

Surrogacy and ART: A Socio- Legal Analysis

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Abstract:

To become a mother is an eternal feeling, and to become a parents is considered as a matter of pride in the society. Parents consider their progeny as the supporter of their family when they get old. Despite of having an utmost desire to have offspring, sometimes some couples do not get that blessing to get a child of their own. In this respect science is not sitting idle. The scientist continuously putting the effort to bring the smile on the face of the issueless couples. Surrogacy is a mechanism by which a host mother is ready to conceive and bear the baby of others or intended parents in her womb by way of artificial insemination. Surrogacy is a way to ignore infertility, where a third party (woman) is involved who is the surrogate mother. Again there is another process where the intending couple can have their child without the participation of another that is 'ART'. ART is a treatment which can be availed by the commissioning couple themselves and no third person is involved. And in surrogacy womb is given for lease.¹

However all the countries throughout the world, is not able to frame a uniform international law, which can remove all the obstacles in the path of borderless surrogacy.

India is considered as a preferable destination for the foreigners to come for surrogacy. The numbers of host mother is increasing at galloping rate and able to attract foreigners in numbers, which helps to accumulate foreign currency because of medical tourism. In India we do not have sufficient laws which will facilitate to deal with the matters of surrogacy. However two bills are pending before the House of Parliament relating to Surrogacy and Assisted Reproductive Technology, to be passed².

Though surrogacy is a wonderful contribution of science, but it is not free from errors as it involves the involvement of human beings.

In this paper the researcher is trying to analyse need of legislations relating to ART and Surrogacy in India to facilitate the service of surrogacy.

Key Words: *Assisted Reproductive Technology, Surrogacy, and Rights of the child.*

Introduction:

For a couple blessed with a baby is an indispensable wish. Everyone has the impulse to drag on their family line after him by possessing a child. Failure of such desire create disturbance in the family.

Under the old Hindu law, it was opined that the foremost object of marriage is obtainment of child³. It was a myth that an issueless person cannot get a place in heaven, so he must have a child and mostly a 'putra'⁴. By giving birth to a male child through a legally wedded wife, every Hindu is discharged of the debt to his father which is technically known as 'Pitirin'. However in absence of one's own biological child, adoption of a child from other's family was an admissible alternative to clear the path to the heaven. Despite of it many of the couples prefer to have their own biological child. Surrogacy and ART, brings that urge in reality so increasing more urge to have one's own biological child than to take in adoption.

In the last few years, Assisted Reproductive Technology has grown rapidly and India has witnessed rapid growth in registered ART centres' and number of ART cycles performed every year. The rate of surrogacy is growing considerably in many ways which needs urgent framing of legal tools which will ease the process of surrogacy and can attract more and more foreigners to India and can bring smile on the face of many. Assisted reproductive technology is a boon of science by which a woman gets pregnant by artificial insemination

done by specialised medical practitioners in health care institutions, instead of natural course. There are various types to be a surrogated mother. Some of them are as follows:

Gestational Surrogacy⁵: In gestational surrogacy the surrogated mother carries and delivers a child for another couple or for an individual. In this process an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or the anonymous donor. The fertilized embryo is then implanted in the womb of the surrogate mother who gets ready to carry the baby until delivery of the same. Genetically, therefore the child is related to the woman who donated the egg and the intended father or the sperm donor, but not with the surrogate. And accordingly she cannot claim any right over the child, the child belongs to the Commissioning couple or individual.

Traditional Surrogacy: In such surrogacy, a lease is signed by the surrogate mother and the intended parents or individual, where a surrogate mother is artificially inseminated, either by the intended father or an anonymous donor, and carries the baby until the expiry of the lease. In such case both the surrogate mother, who provides the egg and the intended father or the anonymous donor is genetically related with the baby.

Commercial Surrogacy: If a woman agrees in return of payment, to become pregnant and bear a child for the benefit of another person, who intends to be the parent of the kid's, is known as commercial surrogacy. In such surrogacy the surrogate mother will not have any legal right over the child after birth of it.

Altruistic Surrogacy: As the name says that selfless concern for the well being of others, accordingly in altruistic surrogacy the surrogate mother does not receive any financial gain for bearing the child in her womb and she relinquish all kinds of rights over the child after delivery of it. However the intended individual or parents bears all the medical expenses for procuring the child by the surrogate mother.

In our country, Dr. Nayna Patel, the director of Akansha Infertility Clinic in Anand, Gujrat, have made the effort to put Anand on the map, when in 2003, she arrange the surrogacy of a local woman, who wanted to 'lend' her womb to her U.K. based daughter, the woman gave birth to test-tube twins, her own genetic grandchildren and the event made headlines worldwide⁶.

International Laws relating to Surrogacy and ART: There are no existing international laws to deal with Surrogacy and ART. States have their own laws at their interior level. In 2020, Australia has embraced the Assisted Reproductive Treatment (Amendment) Act, 2020 to amend the ART Act, 2008 and to remove the requirement for police checks and child protection order checks before a woman (and if applicable, her partner) can start assisted reproductive treatments⁷.

In May, 2020 Ireland amended the Child and Family Relationship Act, 2015. The amendments under this Act is relating to ART and includes, the possibility for same-sex female partners to establish legal parentage from birth and the prohibition of anonymous gamete donation, besides many others matters⁸.

The State of New Year, USA in 2020 passed an Act namely Child- Parent Security Act. The prime object of this Act is to regulate the establishment of legal parentage in particular in the context of children conceived via ART⁹.

In France, the Parliament is considering a Bill that would extend the access to fertility treatments, including gamete donations, to single women and female same-sex couples. The bill would also put an end to anonymity in gamete donations so that children through ART can have access to non- identifying information about their donors¹⁰.

The Philippines is considering a Bill which will remove the distinction between 'legitimate' and 'illegitimate' children. The bill also seeks to add clarity for children born as a result of ART or as a result of an altruistic surrogacy arrangement by deeming such children as being born within the wedlock of the intending parents¹¹.

The parliament of Switzerland too, is considering a Bill that would extend access to fertility treatments to single women and female same-sex couples. By seeing the international legislative progress and momentum towards surrogacy has made it incumbent to proceed to work on ART¹².

Surrogacy in India: India is a favoured destination for surrogacy by the foreign couples due to its low cost and flexible laws. In our country we don't have complete watertight legal provisions for regulating surrogacy system effectively. In India the law relating to surrogacy is in its nascent stage. It mostly depends on the guidelines of surrogacy presently in use for Assisted Reproductive Technology clinics in India laid down by the Indian Council of Medical Research.

However, Assisted Reproductive Technology (Regulation) Bill, 2020 was introduced in Lok Sabha on September 14, 2020¹³. The bill seeks to provide for the regulation of Assisted Reproductive Technology services in the country. The main purpose of the Bill is to regulate and supervise the ART clinics, ART banks, misuse of it and safe and ethical practice of ART. The Bill further keen to protect the affected women and children from exploitation. The provisions of the Bill make Pre Implantation Genetic Testing mandatory for the benefit of the child from the ART.

Some features of the Bill are mentioned as¹⁴-

1. As per the Bill the ART will include all techniques
2. The main beneficiary of this Bill will be Indian Married Couple (man and woman), Indian single woman and foreigners. Single woman as divorced, widowed and unmarried are allowed to avail ART services. This bill allows single unmarried woman to avail ART services keeping in view the permissible adoption laws in India.
3. This Bill has set the age limit for the beneficiaries, such as to a woman above the legal age of marriage and below the age of fifty years and to a man above the legal age of marriage and below the age of fifty five years.
4. The Bill aims to prohibit commercialization of ART services, but the ART banks are allowed to obtain semen from male
5. Sex- selection will not be permitted under the bill.
6. ART clinics and ART banks shall ensure that commissioning couple and donors of gametes are eligible to avail ART procedure.
7. The child through the ART shall be deemed as a natural child of the commissioning couple and accordingly is entitled for all kinds of rights and privileges enjoyed by the natural child.
8. Penalty for abandoning or exploiting the child or children, selling of embryo or gamete, exploiting the commissioning woman and couple, is imprisonment for a term which shall not be less than eight years but may extend to twelve years and with fine which shall not be less than ten lakh rupees but may extend to twenty lakh rupees.

In its 102th report on Surrogacy the Departmental Related Standing Committee on Health and Family Welfare¹⁵, has observed as,

The Committee strongly believes that with the rapid advancement of science and technology in all spheres of life, there is an urgent need to regulate the use of modern techniques especially w.r.t. Assisted Reproduction and use of ART for surrogacy. Hence, the committee feels that along with surrogacy regulation, there is urgent need to regulate the ART clinics across the country. It is a fact that surrogacy procedure cannot be conducted without assisted reproduction techniques and therefore, mere enactment of surrogacy Bill would not serve the purpose of controlling commercialization of the surrogacy facilities across the country in the absence of regulation of assisted reproductive clinics and banks where surrogacy is being conducted as ART Clinics and Surrogacy Clinics are not separate. The Committee, therefore

strongly recommends that the ART Bill should be brought forth before the Surrogacy (Regulation), Bill, 2016.

Moreover, the Select Committee on the Surrogacy (Regulation) Bill, 2019 has recommended that the ART should be brought before the Surrogacy (Regulation) Bill, 2019 so that all the technical and medical issue could be addressed adequately in the Surrogacy (Regulation) Bill, 2019.

And accordingly the Assisted Reproductive Technology (Regulation) Bill, 2020 was introduced in Lok Sabha on September 14, 2020 and was referred to the Department related Parliamentary Standing Committee on Health and Family Welfare, Rajya Sabha, Rajya Sabha by Chairman Rajya Sabha in consultation with the Speaker, Lok Sabha on October 3rd, 2020 for examination and Report. On further recommendation of the committee, the Hon'ble Chairman, Rajya Sabha has extended the time of Report by 1st April, 2021.

According to the background note received from the Department of Health Research, the proposed Bill seeks to have the following legislative impact:

1. Registration of all ART clinics and Banks
2. Control of unethical Assisted Reproductive Technology practices including gamete donation
3. Improve the quality of Assisted Reproductive Technology services
4. Decrease the cost of Assisted Reproduction Treatment
5. Conduct research on new emerging areas of Assisted Reproduction and develop low cost ART for the economically weaker section of the society
6. Develop Policies and guidelines from time to time on Assisted Reproduction
7. Infertile couples will be more sure of the ethical practice in India
8. Medical Tourism will have more assurances of ethical practices in India.

Differences of both the Bills:

In case of Surrogacy Regulation Bill the Appropriate authority is the implementing authority. On the other hand Registration Authority is the implementing Authority of the ART Bill.

Again the services under surrogacy will be provided on the basis of medically necessitated conditions, whereas on the basis of infertility ART services will be provided. The terms of penalties also varies for both the Bills. The definitions will be specific to each of the Bill.

In Surrogacy Regulation Bill the age of intending couple is in case of female is between 23 to 50 years and in case of male between 26 years to 55 years on the day of application for such treatment and should be married for 5 years. On the other hand under the ART Bill the age of the commissioning couple is between 19 to 50 years in case of female and between 22 to 55 years in case of male on the day of application for such treatment and should be married for 1 year.

Observations and Conclusion:

With the passing and implementation of both the legislative instrument there will be a great impact on the surrogacy practice. It would make the registration of all the clinics and would control the unethical Assisted Reproductive Technology. Moreover the Bills will improve the service quality under ART. Such legislative tools will help to facilitate the necessary policies to smooth functioning of ART. Above all the ethical practice of ART will be controlled and needy couple would be benefitted with it.

Awareness of surrogated mother is a matter of great concern. The educationally and economically poor women of rural areas are often compelled in such deals by their husband or broker for earning money easily. Such women are lacking of having any right on the decision regarding their own body and life. In our country there is absence of legal

counselling, which is mandatory in USA. Hence proper arrangement should be made to aware them and made them literate on the process of surrogacy as well as the ART.

Though commercial surrogacy is not allowed, but in the name of altruistic surrogacy commercial surrogacy is in rampant. Commercial surrogacy is done in most of the cases to reduce the poverty, where either the husband or the broker involves in the process. They may intent to embezzle the amount of compensation given to the surrogate mother. So the host mother deprived of her legitimate dues. So surrogacy is a very sensitive issue, careful and proper handling of it through ART will definitely work for greater interest of the society.

Notes and References:

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