

Surrogacy in India: Legal and Ethical Issues

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I. Introduction

In the age of globalisation, from computer support and hotel reservations to laboratory results and radiographic interpretations, it seems everything can be outsourced. One would not think so with parenthood, especially motherhood, a fundamental activity that humans have historically preserved as personal and private. However, in this modern era, the advent and accessibility of assisted reproductive technologies and the ease with which they have traversed global borders, has fundamentally altered the meaning of childbearing and parenting. The child now is not only procreated through conception from sexual intercourse, gestation, or adoption, but also with the help of complex reproductive technologies.² Surrogate parenting is an arrangement in which one or more persons, typically a married infertile couple (the intended rearing parents), contract with a woman to gestate a child for them and then to relinquish it to them after birth. Surrogate parenting is also sometimes referred to as contract pregnancy.³

II. Conceptual Dimensions

Mythological surrogate mothers are well known in India. Yashoda played mother to Krishna though Devki and Vasudeva were the biological parents. Likewise, in India mythology Gandhari made Dhritarashtra the proud father of 100 children though he had no biological relation with them.⁴

In this modern era, glamour now promotes surrogacy. British pop star Elton John and his Canadian film-maker partner David Furnish became parents of a baby boy born to a surrogate mother in California while over own Indian film star Amir Khan and Kiran Rao obtained a child through surrogacy aided by in-vitro fertilization.⁵

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² Sayantani DasGupta & Shamita DasGupta, *Globalisation and Transnational Surrogacy in India: Outsourcing Life*, Lexington Books, (2014), p. xiii.

³ For details see: <http://www.iep.utm.edu/surr-par/>, (Accessed on 28.01.215).

⁴ Anil Malhotra & Ranjit Malhotra, *Surrogacy in India - A Law in the Making*, Universal Law Publishing Co. Pvt. Ltd., (2013), p. 29.

⁵ *Id.* at 8.

Surrogacy has become an essential component of the flourishing larger fertility industry. Not surprisingly, commercial surrogacy has assumed industrial proportions and India has emerged as the global destination for not only ART procedures, but also surrogate arrangements. In the absence of any kind of regulatory and monitoring mechanism of ARTs in India, it is difficult to arrive at the exact magnitude in regard to the existing surrogacy business. Currently, there are no international and national estimates regarding the number of children born through surrogacy procedures. However, sharp rise in the number of surrogacy arrangements are significant indicators of the spread of the commercial surrogacy industry.⁶

III. Types of Surrogacy

Surrogacy is often portrayed by the fertility industry as a win-win situation for the intended parents (IPs) as well as the surrogate, with the clinics and providers being the nucleus of the arrangements. The transaction is seen as equitable: the commissioning couple gets the child they desperately want and the surrogate receives the amount of money that might not be otherwise possible for her or her family to obtain.⁷ The surrogacy procedures are very complicated and need expertise. The assisted child conception in surrogacy clinics can be done in any one of the following procedures:

- **Gestational Surrogacy**

A surrogate is implanted with an embryo created by IVF, using the egg and sperm of the intended parents. The resulting child is genetically related to the intended parents, and genetically unrelated to the surrogate.⁸

- **Gestational Surrogacy and Egg Donation**

A surrogate is implanted with an embryo created by IVF, using intended father's sperm and a donor egg. The resulting child is genetically related to intended father and genetically unrelated to the surrogate.⁹

- **Gestational Surrogacy and Donor Sperm**

A surrogate is implanted with an embryo created by IVF, using intended mother's egg and donor sperm. The resulting child is genetically related to intended mother and genetically unrelated to the surrogate.¹⁰

⁶ *Supra* note 1 at 2.

⁷ *Id.* at 3.

⁸ For details see: <http://en.wikipedia.org/wiki/Surrogacy>, (Accessed on 29.01.215)

⁹ *Ibid.*

¹⁰ *Ibid.*

- **Gestational Surrogacy and Donor Embryo**

A donor embryo is implanted in a surrogate; such embryos may be available when others undergoing IVF have embryos left over, which they opt to donate to others. The resulting child is genetically unrelated to the intended parent(s) and genetically unrelated to the surrogate.¹¹

- **Traditional Surrogacy**

This involves naturally or artificially inseminating a surrogate with intended father's sperm via IVF or home insemination. With this method, the resulting child is genetically related to intended father and genetically related to the surrogate.¹²

IV. Indian Council of Medical Research Guidelines

The Indian Council of Medical Research has given guidelines in the year 2005 regulating Assisted Reproductive Technology procedures. The Law Commission of India submitted the 228th report on Assisted Reproductive Technology¹³ procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements.¹⁴ The following observations had been made by the Law Commission of India:

- Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.¹⁵

¹¹ *Ibid.*

¹² *Ibid.*

¹³ On 5th of August, 2009 the Law Commission of India submitted the 228th Law Commission Report titled “Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy” to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India. The report expressed the view of the Law Commission on the Indian Counsel for Medical Research Guidelines 2005 on Surrogacy, the draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008 and the Seminar on “Surrogacy – Bane or Boon”. The report had also made recommendations to be kept in mind while legislating on surrogacy.

¹⁴ For details see: http://en.wikipedia.org/wiki/Commercial_surrogacy_in_India, (Accessed on 28.01.215)

¹⁵ *Ibid.*

- A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.¹⁶
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.¹⁷
- One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.¹⁸
- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.¹⁹
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.²⁰
- Right to privacy of donor as well as surrogate mother should be protected.²¹
- Sex-selective surrogacy should be prohibited.²²

V. The Assisted Reproductive Technology (Regulation) Bill, 2013

To regulate the mushrooming business of commercial surrogacy cases in India and the challenges that the surrogacy will face in the future, the Government of India decided to come up with a legislation which will govern the surrogacy in India. The Assisted Reproductive Technology (Regulation) Bill, 2013 is an amended version of the draft Bills of 2008 and 2010, which themselves were based on the guidelines, framed by the Indian

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

Council of Medical Research (ICMR) in 2005.²³ The said bill is still pending with the government and has not yet been presented in the parliament. The proposed draft has taken into consideration various aspects of surrogacy. Some of the features of the proposed Bill are as under:

- Constitution of an authority at National level and State level to register and regulate the IVF clinics and ART clinics.²⁴
- Registration and accreditation of ART clinics.²⁵
- Creation of a forum to file complaints for grievances against clinics and ART clinics.²⁶
- Imposing duties and responsibilities on the clinics and ART clinics.²⁷
- Regulations for sourcing, storage, handling, record keeping of Gametes, Embryos and other human reproductive materials.²⁸
- Placing rights and duties on patients, donors, surrogates and children.²⁹
- Imposing stringent penalties for breach of the duties and regulations.³⁰

VI. The Critical Evaluation of the ART Bill, 2013

It is not wrong to say, if we call India as 'surrogate motherhood capital' of the world. India has become a favourite destination for the childless couples to get their child procreated by way of assisted reproductive techniques on cheap prices. In order to regulate the booming commercial surrogacy in India the Assisted Reproductive Technology (Regulation) Bill, 2013 is a welcome step in this direction. However, pending bill before the parliament is not free from loopholes.

First and foremost it lacks setting the standards for medical practice and completely ignores the regulation of the third party agents who play pivotal role in arranging surrogates such as surrogacy agents, tourism operators and surrogacy home operators. The present draft defines “Couple” as a relationship between a male person and female person who live together

²³ For details see: <http://indianexpress.com/article/india/india-others/art-bill-on-ivf-may-come-up-in-winter-session/>, (Accessed on 29.01.2015).

²⁴ Assisted Reproductive Technology (Regulation) Bill, 2013, Sections 3-12.

²⁵ *Id.* Section 13.

²⁶ *Id.* Section 16.

²⁷ *Id.* Sections 20-25.

²⁸ *Id.* Sections 26-29.

²⁹ *Id.* Sections 32-36.

³⁰ *Id.* Sections 37-42.

in a shared household through a relationship in the nature of marriage. Therefore, the Bill has confined itself to provision of ARTs within a hetero normative framework. It is also clear that as per the definition gay couple(s) cannot access ARTs in India, once the Bill is implemented. The current clause in the Draft Bill is discriminatory, baseless, and a violation of rights to equality, freedom, and reproduction. The Draft Bill should clearly list the various health risks and adverse outcomes of these technologies. The present draft does mention that ART procedure carry health risks both to the mother and child, there is no listing of the risks and adverse outcomes of these technologies for children.³¹

VII. International Perspective

The legal aspects surrounding surrogacy are complex, diverse and mostly unsettled. In most of the countries, the woman giving birth to a child is considered as the child's legal mother. However, in very few countries, the Intended Parents (IP's) are recognized as the legal parents from birth by the virtue of the fact that the surrogate has contracted to give the birth of the child for the commissioned parents.³² The position of surrogacy laws in various countries may be summarised as under:

VII.I. Australia

In all the states of Australia, the surrogate mother is considered by the law to be the legal mother of the child and any surrogacy agreement giving custody to others is void and unenforceable in the courts of Law. In addition in all states and the Australian Capital Territory arranging commercial surrogacy is a criminal offence. Usually couples who make surrogacy arrangements in Australia must adopt the child rather than being recognized as birth parents, particularly if the surrogate mother is married. After the announcement, Victoria changed their legislation since January 1st, 2010, under the Assisted Reproductive Treatment Act, 2008, to make altruistic surrogacy within the state legal, however commercial surrogacy is still illegal.³³

VII.II. Canada

Altruistic surrogacy remains legal in Canada. However, commercial surrogacy is prohibited under the Assisted Human Reproduction Act, 2004.³⁴

³¹ Arti Dhar, Gaps in Surrogacy Bill, *The Hindu*, October 27, 2013.

³² For details see: http://www.surrogacylawsindia.com/legality.php?id=%207&menu_id=71, (Accessed on 30. 01.2015)

³³ *Ibid.*

³⁴ *Ibid.*

VII.III. France

In France, since 1994 any surrogacy arrangement whether it is commercial or altruistic is illegal, unlawful and prohibited by the law.³⁵

VII.IV. Israel

Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state. In March 1996, the Israeli government legalized gestational surrogacy under the "Embryo Carrying Agreements Law." Surrogacy arrangements are permitted only to Israeli citizens who share the same religion. Surrogates must be single, widowed or divorced and only infertile heterosexual couples are allowed to hire surrogates. Due to the numerous restrictions on surrogacy under Israeli law, the Israeli intended parents have turned to international surrogacy.³⁶

VII.IV. Japan

In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements.³⁷

VII.V. United Kingdom

Surrogacy arrangements have been legal in the United Kingdom since 2009. Whilst it is illegal in the UK to pay more than expenses for a surrogacy, the relationship can be recognized under Section 30 of the Human Fertilization and Embryology Act, 1990 under which a court may make parental orders similar to adoption orders.³⁸

VII.VI. United States of America

Many states have their own state laws written regarding the legality of surrogate parenting. It is most common for surrogates to reside in Florida and California due to the surrogacy-accommodating laws in these states. With the accommodating laws of the State of California and the long overseas deployments of husbands, wives have found surrogacy to be a means to supplement military incomes and to provide a needed service. It is illegal to hire a surrogate in New York, and even embryonic transfers may not be done in New York.³⁹

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

VIII. Legal Issues involved in Surrogacy

As of 2013, locations where a woman could legally be paid to carry another's child through IVF and embryo transfer included India, Georgia, Russia, Thailand, Ukraine and a few U.S. states.⁴⁰ The legal aspects of surrogacy in any particular jurisdiction tend to hinge on a few central questions:

- Are surrogacy agreements enforceable, void or prohibited? Does it make a difference whether the surrogate mother is paid (commercial) or simply reimbursed for expenses (altruistic)?⁴¹
- What, if any, difference does it make whether the surrogacy is traditional or gestational?⁴²
- Is there an alternative to post-birth adoption for the recognition of the intended parents as the legal parents, either before or after the birth?⁴³

Ethical Issues involved in Surrogacy

Ethical issues that have been raised with regards to surrogacy procedures include:

- To what extent should society be concerned about exploitation, commodification, and/or coercion when women are paid to be pregnant and deliver babies, especially in cases where there are large wealth and power differentials between intended parents and surrogates?⁴⁴
- To what extent is it right for society to permit women to make contracts about the use of their bodies?⁴⁵
 - To what extent is it a woman's human right to make contracts regarding the use of her body?
 - Is contracting for surrogacy more like contracting for employment/labor, or more like contracting for prostitution, or more like contracting for slavery?
 - Which, if any, of these kinds of contracts should be enforceable?
 - Should the state be able to force a woman to carry out "specific performance" of her contract if that requires her to give birth to

⁴⁰ *Supra* note 7.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

an embryo she would like to abort, or to abort an embryo she would like to carry to term?

- What does motherhood mean?⁴⁶
 - What is the relationship between genetic motherhood, gestational motherhood, and social motherhood?
 - Is it possible to socially or legally conceive of multiple modes of motherhood and/or the recognition of multiple mothers?
- Should a child born via surrogacy have the right to know the identity of any/all of the people involved in that child's conception and delivery?⁴⁷

Judiciary on Surrogacy

The Hon'ble Supreme Court of India in *Baby Manji Yamada v. Union of India*⁴⁸ took due notice that in cases of “commercial surrogacy,” an intended parent may be a single male. The Court had the occasion to consider the petition of a Japanese grandmother wanting issuance of a travel document for her Japanese divorced son’s daughter. In another case decided by the Gujarat High Court in *Jan Balaz v. Union of India*⁴⁹, the decision of the High Court holding that babies born in India to gestational surrogates are Indian citizens and are entitled to Indian passports has been stayed by the Supreme Court. However, the twin German children in the case were permitted to leave India upon the directions of the Apex Court.

The main issue of nationality and citizenship, being of grave concern, is still hanging in air. According to the guidelines issued by the Ministry of Home Affairs in July 9, 2012, surrogacy is restricted to foreign nationals; i.e. a man and a woman married for at least two years would be required to take a medical visa for surrogacy in India. As of now, even though surrogacy is an administrative concern and in the domain of the Ministry of Health, it has been decided that till the enactment of a law on the ART Bill, 2013, the guidelines issued by the MHA will prevail till then. Hence, foreign single parent surrogacy is barren. Restricting surrogacy to infertile Indian married couples only, and debarring all foreigners other than OCIs, PIOs and NRI married couples, is a turnaround in the thought process.⁵⁰

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ AIR 2009 SC 84.

⁴⁹ AIR 2010 Guj 21.

⁵⁰ Anil Malhotra, Ending Discrimination in Surrogacy Laws, *The Hindu*, May 3, 2014.

Very recently Supreme Court in *Stephanie Joan Becker v. State*⁵¹ permitted a single 53-year-old lady to adopt a female orphan child aged 10 by relaxing the rigour of the guidelines of the Central Adoption Resource Authority (CARA). It said the proposed adoption would be beneficial to the child as experts were of the view that the adoption process would end in successful blending of the child in the U.S. Likewise, the court in *Shabnam Hashmi v. Union of India*⁵², upheld the recognition of the right to adopt and to be adopted as a fundamental right. It held that every person, irrespective of the religion he/she professes, is entitled to adopt. The latest verdict of the Supreme Court recognising transgenders as the third gender says “discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution.” Clearly, legal recognition means that they would be entitled to rights of adoption, succession, inheritance and other privileges under law.⁵³

Conclusion

To sum up, it is pertinent to discuss in detail the various dimensions of the surrogacy arrangements before the parliament passes a pending bill on Assisted Reproductive Techniques. The Government of India should constitute a body of experts with the joint assistance of the Ministry of Home Affairs (MHA) and the Ministry of Health and Family Welfare besides involving legal experts to stream line the thought process in carving out a policy decision of the Government of India by taking a uniform and unanimous decision on various aspects of commercial surrogacy.⁵⁴ The ban on the mushrooming growth of the surrogacy procedures in our country is not a solution to the issue. The conception of child by way of assisted reproductive techniques is a hope of infertile couples. However, commercial surrogacy needs to be regulated in a holistic approach by enacting a law with proper checks and balances.

⁵¹ (2013) 12 SCC 786.

⁵² (2014) 4 SCC 1.

⁵³ *Supra* note 49.

⁵⁴ *Supra* note 3 at 109.