



## Surrogacy: The Socio-Legal Issues

### KEYWORDS

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**ABSTRACT** *The contributions of science and technology have created hope to many infertile couples to have a child of their own through the means of Artificial Reproductive Technique (ART). At the same time, it raises many socio-legal issues especially the rights and obligations of parties to a surrogacy. Now a day, India has been considered as International Surrogacy Centre which has triggered many socio-legal problems because of the absence of any definite legislation in India. To regulate surrogacy and to provide protections to the surrogate mother, a specific legislation should come out*

The god has created human being in such a manner that baffles understanding and cannot be explained. The development of science and technology have rule out the natural reproduction of child by means of sexual relation. But any reproductive technique that replaces the conjugal act is violation of the dignity of procreation when human procreation is disconnected from sexual relation, the spouses can quickly become objects for sex. It becomes difficult to recognize dignity in each other, especially the pre born child<sup>1</sup>. This enormous contribution of science and technology is undoubtedly considered as gift to the society which raises hope to many infertile couples to have a child of their own. Taking advantage of the advanced medical facilities, they seek alternative solutions like Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF) and, Intra-Uterine Injections (IUI), in the hope of having a child of their own. But the fact is that it is not ethical rather controversial. The legal aspects surrounding surrogacy are complex, diverse and mostly unsettled. India is not lagging behind in the field of Assisted Reproductive Technology (ART). The concept of surrogacy can be traced back in India from 1978 when India's first and the world's second IVF (In Vitro Fertilization) baby Kanupriya alias Durga was born in Kolkata on Oct. 3, 1978. But the laws related to surrogacy are still in the inchoate stage.

According to the Artificial Reproductive Technique (ART) Guidelines, *surrogacy is an "arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a "surrogate mother" is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)"*<sup>2</sup>.

International Surrogacy involves bilateral issues, where the laws of both the nations have to be at par/uniformity else the concerns and interests of parties involved will remain unresolved and thus, giving due regard to the concerns and in order to prevent the commercialization of the Human Reproductive system, exploitation of women and the commodification of Children, the Law Commission of In-

dia in its 228<sup>th</sup>(2009) Report on "NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY" has given following observations: -

- 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.
- 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.
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- 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.
- 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.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.
- Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The above Report of the Law commission even support surrogacy in India but has emphasized the proper way of operating surrogacy in Indian conditions. So law must address to save women from exploitation through surrogacy which is another perturbing factor. The Law Commission has strongly recommended against Commercial Surrogacy and expects a strong legislation with respect to Assisted Reproductive Technology to regulate the surrogacy business.

In most of the countries, the legal aspects surrounding surrogacy are complex, diverse and mostly unsettled. The woman giving birth to a child is considered as the Child's legal mother. However, in very few countries, the Intended Parents 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. India is one country amongst the few, which recognize the Intended/ Commissioning Parent/s as the legal parents. Many states now issue pre-birth orders through the courts placing the name(s) of the intended parent(s) on the birth certificate from the start. In others the possibility of surrogacy is either not recognized (all contracts specifying different legal parents are void), or is prohibited.<sup>3</sup> The positions of some countries are given below.

In all the states of **Australia**, the surrogate mother is regarded / 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, although the Northern Territory has no legislation governing surrogacy at all and there are seems no near future plans to introduce laws on surrogacy into the NT Legislative Assembly. 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. In **Canada**, Commercial Surrogacy is prohibited under the Assisted Human Reproduction Act, 2004. Altruistic surrogacy remains legal. In **France**, since 1994 any surrogacy arrangement whether it is commercial or altruistic is illegal, unlawful and prohibited by the law. Commercial surrogacy is illegal in **Hungary, Belgium** and the **Netherlands**. **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. India is the preferred destination because of its low costs. Then Intended Parents also turn to US surrogates where an added bonus is an automatic US citizenship for the newborn. 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. In **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. How this came about is one of those occasions when an ordinary person can change the law. In **United States**, 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. At this point, the laws surrounding surrogacy are well defined in the State of Pennsylvania, and surrogacy is beginning to become common in the state of Delaware.<sup>4</sup>

India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with going through the procedure in the UK. Many people globally are now choosing India a destination for Surrogacy. There are many reasons like: Surrogacy Treatment is Economical in India; Best Of IVF Doctor; Easy to find Surrogate Mother In India; and Legal Aspect of Surrogacy as la ware in favour of surrogacy treatment. Surrogacy in India is relatively low cost and the legal environment is favorable. In 2008, the Supreme Court of India in the Manji's case<sup>5</sup> (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has prepared the ART BILL, subsequently amended in 2008, 2010 and the new draft Assisted Reproductive Technology Bill, 2013 for Accreditation, Supervision and Regulation of ART Clinics in India which is still pending. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that in India that India is an International Surrogacy destination.

The Indian Legal system vastly differs from the rest of the world. Since surrogacy is considered to be a question of public policy for many countries, surrogacy is not sanctioned and may not be even permitted outside the borders. However, Surrogacy Laws in India have been much in favour of International Surrogacy Arrangements.

**Reasons to opt for surrogacy by the commissioning parents:** Various studies indicate that there are various reasons to opt for surrogacy by the commissioning parents.<sup>6</sup>

- Repeated miscarriage and/or ectopic pregnancies
- Failure of infertility treatment
- Dysfunctional reproductive organs
- Complications in previous pregnancy or repeated abortion which resulted risk to mother.
- To be relaxed from social stigma.(Barren or infertile)
- Influence/advice from the relatives/friends to opt for surrogacy because the commissioning parent failed to give birth their child in natural way and it is because of successor problems.

**Socio-legal issues:** Surrogacy arrangement in India is based upon contract between surrogate mother and commissioning parents. By this various socio-legal issues emerge out of surrogacy arrangement and those may be post-contractual problems, surrogate health relevancy issues and Social and psychological concept, Claiming paternity issue, Citizenship and immigration issues, Adoption, Birth certificate, DNA testing etc. Once the contract is made, the surrogate mother is bound by the obligations. If any problems afterwards arise, the commissioning parents are exempted from liability in the pretext of terms and conditions mentioned in the contract. By this the surrogates are exploited. Most of the times the concerned clinic acts as mediator and decides how much the surrogate mother should receive as compensation from the total amount that is paid to the clinic by the commissioning parents. It is also not known to the surrogate mother how much amount the clinic has received from the commissioning parents, thereby the bargaining power of the surrogate is restricted. There are some factors like; illiteracy, poverty, and emergency need of money etc which has limited the bargaining power of the surrogate mother.

Health problems are the major issue for which the surrogate mothers are being exploited. Reason thus, as soon as compensation is paid, the commissioning parents do not take care of the surrogate for any other complications like lapse of pregnancy and post medical care.

After birth complications of surrogates in India are more with the child that grew in mother's womb. In India, surrogates are implanted with up to five embryos in order to increase the chances of pregnancy whereas, in the US, surrogates are given no more than two embryos for their safety. Using such a large number of embryos increases health risks for babies and the mother. Chances of post-partum depression, Pregnancy, birth and the post-partum period includes complications such as pre-eclampsia and eclampsia, urinary tract infections, stress incontinence, hemorrhoids, gestational diabetes, life-threatening hemorrhage and pulmonary embolism. There is a greater risk to the mother of pregnancy induced hypertension, stroke and placental abruption. When hormones or drugs the surrogate is instructed to take, all drugs have side-effects. Many women undergoing Artificial insemination also take fertility treatments, increasing the likelihood of an adverse reaction and risk involved with the procedure. So, Issues such as premature delivery, genetic malformation and infections which lead to increased hospitalization of newborn are important issues to be considered in surrogacy contract. Many women undergoing Artificial insemination also take fertility treatments, increasing the likelihood of an adverse reaction and risks involved with the procedure. (?)<sup>(9)</sup>(?)

Citizenship and immigration issues are major issues which need to be addressed. Foreign nationals intending to visit India for the purpose of Commissioning Surrogacy are required to hold Medical Visa. In such cases, the surrogate mother is generally an Indian national. It has been noticed that some foreign nationals visit India for commissioning of surrogacy on Tourist visa which is not the appropriate type of visa for the purpose. So, the Ministry of Home Affairs has decided that foreign nationals intending to visit India for the purpose of Commissioning Surrogacy shall be issued Medical Visa subject to the fulfillment of following conditions:

The foreign man and woman are duly married and the marriage should have sustained at least for two years.

A letter from the Embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed with the visa application stating clearly that (a) the country recognizes surrogacy and (b) the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning surrogacy.

The couple will furnish an undertaking that they would take care of the child/children born through surrogacy.

The treatment should be done only at one of the registered Assisted Reproductive Technology (ART) clinics recognized by ICMR. (The list of such clinics will be shared with MEA from time to time).

The couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother.

If any of the above conditions are not fulfilled, the visa application shall be rejected.

The foreign couple would be required to take exit permission from the FRRO/FRO before leaving India for their return journey. Before granting "exit", the FRRO/FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact the child/children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement. A copy of the birth certificate (s) of the surrogate child/children will be retained by the FRRO/FRO along with photocopies of the passport and visa of the foreign parents.<sup>10</sup>

Surrogate motherhood as an arrangement, in which a woman takes no ownership of the childborn, has raised moral, ethical social and legal questions about both woman and the "Commissioned baby." According to legal experts "...if surrogacy becomes an avenue by which women in richer countries choose poorer women in our country to bear their babies, then it is economic exploitation, a kind of biological colonization."<sup>11</sup>

**Role of Judiciary:** In absence of any definite legislation, the role of judiciary is some extent satisfactory in case of surrogacy. The Supreme Court judgment in *Baby Manji Yamada vs Union Of India*<sup>12</sup> took due notice that in cases of "commercial surrogacy," an intended parent may be a single male. Court said in a judgment that surrogacy as a medical procedure "is legal in several countries including in India", without elaborating on what makes surrogacy legal. 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 this case the commissioning parents divorced during the pregnancy and the commissioning mother refused to accept the baby. The court finally granted custody to the baby's grandmother. In *Jan Balaz vs. Anand Municipality and 6 ors*,<sup>1</sup> the decision of the Gujarat 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 importance, is still undecided.

*P.Geetha vs The Kerala Livestock Development* on 18 June, 2014, Kerala High<sup>13</sup>. The petitioner and her husband, being childless for more than two decades, had a baby through gestational surrogacy and took custody of the baby on the very day of birth in terms of the surrogacy agreement. The petitioner, being an executive in the first respondent Board, has applied for maternity leave. The authority refused the leave application. The court has declared that a female employee on her getting a child through surrogacy, instead of adoption, be granted leave of the kind and admissible.

The short question that arises before the Madras High Court in *K. Kalaiselvi vs. Chennai Port Trust*<sup>14</sup> on March, 2013 for consideration in this writ petition is whether a woman employee working in the Chennai Port Trust is entitled to avail maternity leave even in case where she gets the child through arrangement by Surrogate parents? The court does not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K.Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3- of the Madras Port Trust (Leave) Regulations, 1987A of the Leave Regulations. The purpose of the said rule is for proper bonding between the child

and parents. Even in the case of adoption, the adoptive mother does not give birth to the child, but yet the necessity of bonding of the mother with the adoptive child has been recognised by the Central Government. Therefore, the petitioner is entitled for leave in terms of Rule 3-A. However, this court is inclined to interpret Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 also to include a person who obtain child through surrogate arrangement.

The above analysis there is no law for surrogacy in India which is, at the moment, governed by the ICMR guidelines. Also the judicial approach towards surrogacy is somehow manageable that the commercial surrogacy is legal in India. The new draft bill is still pending before the legislature which needs to be enacted to regulate surrogacy in India. The Law Commission of India in its 228th report on Assisted Reproductive Technology procedures has emphasized that the steps should be taken to control surrogacy arrangements.

**Conclusion:** The social-legal issues relating to surrogacy in India could not be addressed in right manner because of the absence of any definite law. The commercial surrogacy is legal in India whereas at present there is no law to regulate surrogacy. The government of India must enact a law to regulate surrogacy considering all aspects in such a manner by which surrogates can be protected and will not be exploited.

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