



## ORIGINAL RESEARCH PAPER

Law

### STUDY ON SURROGACY AND ITS SOCIAL, ETHICAL AND LEGAL ASPECTS: AN INDIA PERSPECTIVE

**KEY WORDS:** Surrogacy, Social Aspect, Ethical Aspects and Legal Aspects

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#### ABSTRACT

Infertility is generally known as a social stigma in India. It is hypothesized that the agony and trauma of infertility is best felt and described by the infertile couples themselves. Though, infertility does not claim the life of an individual but it inflicts devastating influence on life of an individual for not fulfilling the biological role of parenthood for no fault of his or her own. It is also known that in general, Indian society has got a very stable family structure, strong desire for children and particularly for son to carry forth the lineage or *Vansh*.

#### INTRODUCTION

On examining the thousands of years old records of Indian Vedic literature and based on the discoveries of today's science dealing with molecules, genes and DNA it appears that the motherhood is an instinct driven physiological phenomena. Instinct of motherhood is the most powerful desire that exists in all the living creatures that include all animals and humans. According to ancient Indian philosophy the biological purpose of life is to propagate once own traits (genes) and all living creatures are here on a transition phase to pass their own traits (genes) to the next generation. Propagation is the ultimate purpose of any species, therefore, birth of an offspring is always dependent on the factors that lead to high chances of survival of the offspring. For example, birds migrate thousands of kilometers to find out suitable place where environment can support the high chances of survival of their offsprings. In the Canadian Inuit Community which is 300 miles north of Arctic Circle, the seasonality was reported till 1970. But due to modernization and decline of traditional life-style the seasonality in this community has not been reported in the later years.

With the enormous advances in the field of medicine, the infertility can now be treated using the new medical technologies collectively called as Assisted Reproductive Technology (ART) such as *in vitro* fertilization (IVF) or intracytoplasmic sperm injection (ICSI), etc. The birth of the world's first child, Louise Brown on July 25, 1978, through the technique of *in vitro* fertilization was a path-breaking step in control of infertility; and is considered as one of the most important medical advances of the last century. In October 1978, Dr Subhash Mukherjee, Kolkata (India) announced the birth of country's first test tube baby. Dr Mukherjee and his team used the cryopreserved embryo.

#### SURROGACY: MEANING

In Latin "*Surrogatus*" means a substitute i.e. a person appointed to act in the place of another. As per the Black's Law Dictionary surrogacy means the process of carrying and delivering a child for another person. The New Encyclopedia Britannica defines surrogacy as a practice in which a woman bears a child for a couple unable to produce children in the usual way.

According to Warnock Report (1984) HF&E, surrogacy is the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.

There are two types of surrogacy practices prevailing in India: (i) Traditional/Natural/Partial surrogacy; and (ii) Gestational surrogacy. Like in other countries, in India also, the following two types of surrogacy arrangements are being practiced:

**Altruistic surrogacy:** Where the surrogate mother receives

no financial rewards for her pregnancy or the relinquishment of the child to the genetic parents except necessary medical expenses.

**Commercial surrogacy:** Where the surrogate mother is paid over and above the necessary medical expenses.

Surrogacy is the union of science, society, services and person that make it a reality. Surrogacy leads to a win-win situation for both the infertile couple and the surrogate mother. The infertile couple is able to fulfil their most important desire and the surrogate mother receives the suitable reward.

To give a womb for rent means to nurture the fertilized egg of another couple in your womb and give birth to the child with a specific intention, the intention here being either money, or service, or because of altruistic reasons.

#### Bhadaraka has described the following misconceptions regarding a surrogate mother:

1. She is not the genetic mother of the child whom she nurtures and gives birth to.
2. She is not the wife of the father of the child to whom she gives birth.
3. This is a scientific idea, a scientific process. There is no need for any physical contact.
4. She is not an asocial woman.
5. This is not an illegal practice.
6. She is not forced into this. She herself decides whether she wants to become a surrogate mother or not.
7. She has no claim or rights over the child that is born.
8. "This is my child", "this child is my inheritance" - she cannot articulate such thoughts, because of social, scientific and legal restrictions.
9. She is not a woman who sells children.
10. She is not responsible for the child (once the child is born).
11. Surrogacy is a mutually beneficial concept of providing services.

#### SOCIAL, ETHICAL AND LEGAL ASPECTS

It is necessary to mention here that the couple's insistence does not agree with what science believes. It does not matter as to which religion the surrogate belongs, as the child is genetically of the couple. Religion is interpreted according to the conditions, education, time and the circumstances.

Surrogacy is a social act of highest level of service which is scientific and brims with goodwill. A person's opinion based on a lack of information should not harm others. Like medicine is prescribed for treatment of a disorder, in the same way surrogacy is also a method of treatment. Bhadaraka reported that the majority of the Indian society considered surrogate

mother as an amalgam of religion, culture and science with following noble services: (i) She shows a strong inclination to society by doing something novel, (ii) She abolishes the stigma of infertility from the society, (iii) She fulfils her duty by doing something worthwhile for the society, and (iv) She is an example of a model woman in society. As per the proposed draft Assisted Reproductive Technology (Regulation) Bill the surrogacy and related terms are defined in the following ways: (i) Surrogacy means 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 to carry it to term and hand over the child to the person or persons for whom she is acting as a surrogate; (ii) Surrogate mother means a woman who agrees to have an embryo generated from the sperm of a man who is not her husband and the boycott of another woman, implanted in her to carry the pregnancy to full term and deliver the child to its biological parents; and (iii) Surrogacy agreement means a contract between the persons availing of assisted reproductive technology and the surrogate mother.

### ISSUES RELATED WITH SURROGACY

Surrogacy, by ART, should be considered only for those infertile women for whom it would be physically or medically impossible/ undesirable to carry a baby to the term. Surrogate mother should sign an agreement with the commissioning couple which shall have legal bindings on both the parties. Before signing the agreement, the written consent of her spouse shall be required. A woman seeking or agreeing to act as a surrogate shall be medically tested for diseases such as sexually transmitted diseases or otherwise, as may be necessary, and all other communicable diseases which may endanger the health of the child or children, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months. The commissioning parent(s) shall ensure that the surrogate and the child or children she delivers are appropriately insured until the time the child is handed over to the commissioning parent(s) or any other person as per the agreement and till the surrogate is free of all health complications arising out of surrogacy. Surrogate mother must register as a patient in her own name in the hospital after signing the appropriate agreement. While registering, the surrogate mother must mention that she is a surrogate mother and should provide all the necessary information about the commissioning parents. Surrogate mother should not use or register in the name of the commissioning couple for whom she is acting as surrogate as this would pose legal issues, particularly in the untoward event of maternal death. The birth certificate shall be in the name of the commissioning parents. The ART clinic should also provide a certificate to the commissioning parents giving the name and address of the surrogate mother. All the expenses of surrogate mother during the period of pregnancy and postnatal care relating to pregnancy should be borne by the commissioning couple. The surrogate mother would also be entitled a monetary compensation from the commissioning couple for agreeing to act as a surrogate. The exact value of the compensation should be decided by discussion between the commissioning couple. and the prospective surrogate mother or an appropriate formula may be developed by the Government to calculate the minimum compensation to be paid to the surrogate mother. A surrogate mother should never donate her own boycott to the commissioning couple. Surrogate mother as well as the donor shall relinquish all parental rights related with the off springs in writing.

### BACKGROUND OF PROPOSED DRAFT ART (REGULATION) BILL

After the birth of the first scientifically well documented test tube baby in 1986 in India. There was mushrooming of IVF clinics in the country. The services offered by some of these IVF clinics were questionable. The reason for this was a lack of ART guidelines as well as legislation on ART in the country, no

accreditation, supervisory and regulatory body and no control of Government. Therefore, the Indian Council of Medical Research (ICMR) developed draft National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2002. The draft document was then subjected to extensive public debate throughout the country (in seven cities; New Delhi, Jodhpur, Mumbai, Bangalore, Chennai, Hyderabad & Kolkata) where more than four thousand people participated. Therefore, the Indian Council of Medical Research developed draft Assisted Reproductive Technology (Regulation) Bill in 2008 with the help of a Drafting Committee of ICMR. The draft Assisted Reproductive Technology (Regulation) Bill-2008 was again subjected to extensive public debate not only throughout the country but globally by placing the draft Bill on the websites of the Ministry of Health & Family Welfare, Government of India and of the ICMR.

### CONCLUSION

The draft Assisted Reproductive Technology (Regulation) Bill proposes to establish National Board, State Boards and National Registry of Assisted Reproductive Technology (ART) in India for accreditation and supervision of ART clinics and ART Banks, ensuring that services provided by these are ethical and that the medical, social and legal rights of all those concerned including surrogate mother are protected with maximum benefit to all the stakeholders within a recognized framework of ethics and good medical practices.

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