

## Surrogacy in India: Problems and law

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### Abstract

India is emerging as a leader in international surrogacy and a destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost.<sup>1</sup> Commercial surrogacy is legal in India, as recognized by the Supreme Court of India in 2002. The desire to procreate is a very fundamental attribute of the human race. Sadly though, many are denied the joy of parenthood due to several reasons, biological or otherwise. With the development in reproductive sciences, and technologies the barriers to parenthood are no longer as formidable as they once were. Thus has accelerated the need for Assisted Reproductive Technologies (ART) like surrogacy. This paper has made an attempt to analyze the concept of surrogacy, the legal issues and dispute arising out of the surrogacy and some of the provisions of the newly drafted Assisted Reproductive Technologies (ART) Bill 2014.

**Keywords:** surrogacy, Assisted Reproductive Technology, Law of Contract, ICMR, Draft Bill 2014 and Manji Yamada

### Introduction

Surrogacy or Surrogate means substitute. The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". In medical terminology, Surrogacy is an arrangement where a woman agrees to become pregnant and deliver a child for another couple or person. She may be the child's genetic mother (the more traditional form of surrogacy), or she may carry the pregnancy to delivery after having been implanted with an embryo with another female's genetics.

A standard definition offered by the American Law Reports<sup>2</sup> as "a contractual undertaking whereby the natural surrogate mother, for a fee, agree to conceive a child through artificial insemination with the sperm of the natural father, to bear or deliver the child to the natural father and to terminate all his parental rights subsequent to the child's birth."

### Types of Surrogacy

There are 2 types of surrogacy. One is called traditional surrogacy (also known as the Straight method) and another is gestational surrogacy (also known as the Host method). Arrangement of surrogacy may be either altruistic surrogacy or commercial Surrogacy

#### 1. Traditional surrogacy

The surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra cervical insemination) which is performed at a fertility clinic.

#### 2. Gestational surrogacy

The surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother

or father to raise, or to a parent who is themselves unrelated to the child (e. g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

### The surrogacy arrangement may be either altruistic or commercial.

#### 1. Altruistic surrogacy:

The surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

#### 2. Commercial Surrogacy

A gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved.

### Legal significance of Surrogacy

The legal aspects surrounding surrogacy are very complex and mostly unsettled. There is a default legal assumption in most countries that the woman giving birth to a child is that child's legal mother. In some jurisdictions the possibility of surrogacy has been allowed and the intended parents may be recognized as the legal parents from birth. 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.

Commercial Surrogacy is illegal or banned in Canada, Hungary, Hong Kong, New South Wales, New York, South Australia, Western Australia, Tasmania, Victoria, Saudi Arabia, some parts of USA, UK but it is valid or legal in India and in some States of Australia.

Each state has its own legal approach to surrogacy and surrogacy contracts. Some states make surrogacy contracts

enforceable while others criminalize all forms of commercial surrogacy.

### Legislation in India

There is no specific Act or Laws on Surrogacy in India. It is regulated by Indian Council of Medical Research Guidelines, 2005 and Draft the Assisted Reproductive Technology (Regulation) Bill 2014 which is yet to be passed in the Parliament.

### Law commission report

The Law Commission of India has submitted the 228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy”<sup>3</sup>

### ICMR Guidelines for Surrogacy<sup>4</sup>.

1. Surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term.
2. Advertisements regarding surrogacy should not be made by the ART clinic.
3. Responsibility of finding a surrogate mother should rest with the couple, or a semen bank.
4. Surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate.
5. ART clinic must not be a party to any commercial element in donor programmes or in gestational surrogacy.
6. All the expenses of the surrogate mother during the period of pregnancy and post-natal care relating post to pregnancy should be borne by the couple seeking surrogacy.
7. A third-party donor and a surrogate mother must relinquish in third writing all parental rights concerning the offspring.
8. A child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance.
9. Children born through the use of donor gametes shall not have any right whatsoever to know the identity (such as name, address, parentage, etc.) of their genetic parent(s).
10. ART used for married woman with the consent of the husband does not amount to adultery on part of the wife or the donor. However without the husband’s consent it can be a ground for divorce or judicial separation.
11. Conception of the wife through AIH (Artificial Insemination with husband sperm) does not necessarily amount to consummation of marriage & a decree of nullity may still be granted in favour of the wife on the ground of impotency of the husband or his willful refusal to consummate the marriage.
12. Sec.112 of The Indian Evidence Act, 1872, says that a child born within 280 days after dissolution of marriage (by death or divorce) is a legitimate child since that is considered to be the gestation period, But a child born to a woman artificially inseminated with the stored sperms of her deceased husband must be considered to be a legitimate child notwithstanding the existing law of presumptions under Evidence Act.

### The Proposed Assisted Reproductive Technology (Regulation) Bill 2014

The proposed legislation aims at proper regulation and supervision of Assisted Reproductive Technology (ART) clinic and banks in the Country and for prevention of misuse of this technology including surrogacy, and for safe and ethical practical of ART services.

### Some of the Provisions of the Draft Legislation

- Section 3 provides Establishment of National Board for Assisted Reproductive Technology, with a head office to be located in New Delhi, at the Department of Health Research in the Ministry of Health and Family Welfare
- The National Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable with prior approval of the Central Government, and to contract, and shall, by the said name, sue or be sued<sup>5</sup>.
- Section36 provides that all ART clinics and banks would be required to be registered at a state-level registration authority and on a National Registry established by the draft legislation. The draft also sets out the general duties of assisted reproductive technology clinics and banks.
- The couple commissioning a surrogacy through the use of ART would be required to enter into a surrogacy agreement with the surrogate, “which shall be binding on the parties<sup>6</sup>.”
- The surrogate must relinquish all parental rights over the child or children<sup>7</sup>.
- The surrogate mother is also required to be an “ever married Indian woman with minimum twenty three years of age and maximum thirty five years of age<sup>8</sup>.”
- Section60(11)(a) provides that surrogacy for foreigners in India shall not be allowed but surrogacy shall be permissible to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and a foreigner married to an Indian citizen.
- The commissioning couple is “legally bound to accept the custody of the child or children irrespective of any abnormality that the child or children may have<sup>9</sup>.”
- Even these couples, when seeking to commission surrogacy, would be subject to certain conditions, including that they “be married and the marriage should have been sustained at least for two years” and that they submit “a certificate conveying that the woman is unable to conceive their own child and the certificate shall be attested by the appropriate government authority of that country<sup>10</sup>.”
- Currently, reports state that it might be tabled in the fourth coming session of Parliament<sup>11</sup>.

### Judicial Trend.

Judiciary has recognized the reproductive right of humans as a basic right<sup>12</sup>. AP HC upheld the right of reproductive autonomy of an individual as a facet of right to privacy. Agreed with the decision of US Supreme Court in Jack T. Skinner v State of Oklahoma<sup>13</sup>. right to reproduce one of the basic civil rights of man

If reproductive right gets Constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection. Immigration issues with respect to infants born to surrogates in India first arose with the immigration of twins born at Dr. Patel's Akanksha Fertility Clinic in Anand in 2004.

In *Baby Manji Yamada v Union of India*<sup>14</sup>. Supreme Court held that commercial surrogacy is valid in India and the production/custody of a child given birth by surrogate to the intended parents.

In *Jan Balaz v Anand Municipality*<sup>15</sup>, the Supreme Court held that children have the right to surrogate mother's citizenship.

In *Rama Pandey v Union of India & Others*<sup>16</sup>. Delhi High Court held that in surrogacy arrangement, the commissioning mother is continues to remain the legal mother of the child, both during and after the pregnancy. The basis for reaching such a conclusion is that, surrogacy, is recognized as a lawful agreement in the eyes of law in this country as referred in *Baby Manji Yamada* case<sup>17</sup>.

In *Hema Vijay Menon v State Of Maharashtra*<sup>18</sup>, the Court held that here cannot be any distinction whatsoever between an adoptive mother that adopts a child and a mother that begets a child through a surrogate mother, after implanting an embryo in the womb of the surrogate mother. The case of the mother, who begets a child through surrogacy procedure, would stand on a better footing than the case of an adoptive mother. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the government can provide maternity leave to an adoptive mother, it is difficult to digest the refusal on the part of the Government to provide maternity leave to a mother who begets a child through the surrogacy procedure. The action of the respondent is clearly arbitrary, discriminatory and violative of the provisions of Articles 14 and 21 of the Constitution of India and grant the leave accordingly.

### Problems

The entire arena of surrogacy is still not free from uncertainty and confusion. The proposed ART legislation has debarred the foreigners other than OCIs, PIOs and NRI married couples. The most important contradiction and inconsistency seems to be that arising from the Guidelines Governing the Adoption of Children, 2011, for inter-country adoptions, which now have statutory sanction by virtue of them having being enacted under the Juvenile Justice (Care and Protection of Children) Act, 2000. The Juvenile Justice Act clearly provides that a court may allow a child to be given in adoption to an individual, irrespective of his or her marital status<sup>19</sup>.

Moreover, the Guardian and Wards Act, 1890 and The Hindu Minority and Guardianship Act, 1956 permit a guardianship to be declared or appointed where the Court is satisfied that it is for the welfare of a minor. Barring single parents to adopt is not statutory but can be a restraint in a particular case upon examination by a competent court. Therefore, debarring single persons and foreign nationals from being parents will amount to rewriting laws in existence which has been enacted by Parliament.

In *Shabnam Hashmi vs. Union of India*<sup>20</sup>, on 19<sup>th</sup> February 2014 the Supreme Court 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. Latest verdict of the Supreme Court has recognized transgender as the third gender and they would be entitled to rights of adoption, succession, inheritance and other privileges under law.

### Conclusion

It has been accepted techno medical revolution of ART is considered a boon for the infertile and childless couples. The Indian laws governing surrogacy arrangements are unclear and coupled with uncertainty about law. Thus it is the need of the hour that India enacts suitable legislations and finds solutions to the million dollar question of how to regulate Surrogacy. The more pragmatic approach would be to make a law hedged with safeguards, checks and balances.

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