

## **ETHNIC AND LEGAL ISSUES OF SURROGACY IN INDIA**

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### **Abstract**

India has developed itself in to a country with world class medical facilities, with prices far lower than most developed countries. Medical tourism accepted as a crucial form of tourism in India, however, the proliferation of the industry has exposed a few darker spots as well. One such issue is the thriving institution of fertility tourism in India, popularly called commercial surrogacy. In a developing country like India where still poverty is a major concern the poorer husbands are driven to direct their wife for surrogacy as an income generating option. Chasing dreams of financial independence, thousands of poor Indian women have found work as surrogate mothers helping to turn this country in to a favoured destination for foreign couples who can't become pregnant on their own.

Since the inception of commercial surrogacy, many legal and ethical issues have sparked unpleasant legal questions surrounding commercial surrogacy involving foreigners. Due to lack of proper Legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middle men and commercial agencies. There is no transparency in the whole system and the chance of getting involved in legal problems is there due to unpredictable regulation. In some cases, cross boarder surrogacy leads to problems in citizenship, Nationality, motherhood, parentage and rights of a child. A comprehensive legislation dealing with all these issues is very imminent to meet the present situation created by the reproductive science and technology which have no clear answers in the existing legal system in the country. This research paper aims to explain the legal issues around the surrogacy system in India.

## **Introduction:**

A Jewish proverb states that God could not be everywhere so he made mothers. Nature has bestowed women with one of the most aesthetic capacity of procreating a life within her. A pious expression of a mother is given to a female when she gives birth to a child. The birth of a child is regarded as the most beautiful thing that happened to a parent. In India, we believe that motherhood is sacred, not something that can be traded to anyone with money<sup>1</sup>. Currently many women are found who suffer from the problem of infertility. Over a couple of centuries, the desire to beget a child for an infertile couple was being satisfied by adoption. But modern sciences have provided new opportunities or options we can say to overcome adoption, that's Surrogacy which has resulted as a boon for these childless couples who want their own child.

Surrogacy has been present in society over several hundreds of years. Indian mythology itself is replete with instances of 'miraculous births' which at the helm of it may be classified as surrogacy in the modern context. The concept of surrogacy has been throughout ancient times as well. However, the concept and context of surrogacy has undergone a sea of change. Commercial surrogacy and the ethics of assisted reproductive technologies passionately debated issues in the legal sphere. Chasing dreams of financial independence, thousands of poor Indian women have found work as surrogate mothers, helping to turn this country a favoured destination for Foreign Couples who can't become pregnant on their own. In a developing country like India where still poverty is a major concern the poorer husbands are driven to direct their wife for surrogacy as an income generating option.

The ever-rising prevalence of infertility world over has led to advancement of Assisted Reproductive Techniques (ART). Here in surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person. India is emerging as a leader in International surrogacy and sought-after destination in surrogacy related fertility tourism. Surrogacy in India relatively low cost and the legal environment is favourable. A surrogacy agreement is held to be legal in India by the application of the Indian Contract Act, 1872<sup>2</sup>. Commercial surrogacy is legal in India<sup>3</sup>. Surrogacy in India is legitimate because no Indian law

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<sup>1</sup> Jayashree wad, A Lawyer who has filed a petition in Supreme Court to abolish Commercial Surrogacy

<sup>2</sup> Under Section 10 of the Contract Act, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is an enforceable contract

<sup>3</sup> <http://surrogacylawsinindia.com/legality.php?id=%207> and menu id = 71 accessed on 8<sup>th</sup> June, 2017.

prohibits surrogacy. The contract must clearly state that the child /children born out of surrogacy shall be the legal children of the intended parents and that the surrogate shall have no rights over the child/children. The said contract can then become the basis of legal action against the surrogate mother also the law pertaining to surrogacy i.e. ICMR Guidelines also support the intended parents only as the legal parents. To determine the legality of surrogacy agreements, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would be within the domain of Section 9 of the Code of Civil Procedure, 1908 (CPC)<sup>4</sup>. Alternatively, the biological parent/s can also move an application under the Guardians and Wards Act 1890 for seeking an order of appointment or a declaration as the guardian of the surrogate child<sup>5</sup>.

In any surrogacy, except altruistic<sup>6</sup>, a contract has to be made between the intending parents and the surrogate mother. This is necessary to protect the interests of both the parties. When the surrogate mother is compensated, it becomes obvious that she has to hand over the child to the intending parents after the birth of the child. Provision also prohibits that the intending couples cannot change their mind at a whim or fancy and causes problem for the surrogate mother. The contract makes sure that the intending parents are not left in lurch in case where the surrogate mother terminates the pregnancy and walks away with the money.

The world's second and India's first IVF (in vitro fertilisation) baby, Kanupriya alias 'Durga' was born in Kolkata on October 3, 1978 about two months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly. In 1984 the world saw the first successful birth through gestational surrogacy and after ten years in India. The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias 'Durga' was born in Kolkata on October 3, 1978 about two months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly. In 1984 the world saw the first successful birth through

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<sup>4</sup> It can be the subject of a civil suit before a civil court for adjudication of all disputes relating to the surrogacy agreement and for a declaration/injunction as to the relief prayed for.

<sup>5</sup> P. Saxena, "Surrogacy: Ethical and Legal Issues" Indian Journal of Community Medicine 212 (2012)

<sup>6</sup> Altruistic surrogacy refers only to those arrangements in which the surrogate does not receive compensation for her services beyond reimbursement for medical costs and other reasonable pregnancy related expenses

gestational surrogacy and after ten years in India it was first happened in Chennai. In 1997, an Indian acted as a gestational carrier, and receives payment for his paralysis husband treatment<sup>7</sup>.

**Moral and Legal Issues:**

At a glance surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long desired biologically related baby and the country earns currency, but the real scenes reveals the bitter truth. Though the ethical issues started at an early stage, the legal complications with regard to commercial surrogacy came only in the year 2008. Due to lack of proper Legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middle men and commercial agencies. There is no transparency in the whole system and the chance of getting involved in legal problems is there due to unpredictable regulation. The moral issues connected with surrogacy are pretty understandable, yet of an eye-opening nature. This includes the criticism that surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes, psychological considerations may come in the way of a successful surrogacy arrangement. The worst part is that in case of unfavourable outcome of pregnancy, they are unlikely to be paid, and there is no provision of insurance or post pregnancy medical and psychiatric support for them.

The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing

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<sup>7</sup> Ramesh Vinayak, "A Womb for Rent" India Today 82 (June, 1997).

altruistic surrogacy arrangements and prohibit commercial ones<sup>8</sup>. In some cases, cross boarder surrogacy leads to problems in citizenship, Nationality, motherhood, parentage and rights of a child. A comprehensive legislation dealing with all these issues is very imminent to meet the present situation created by the reproductive science and technology which have no clear answers in the existing legal system in the country.

The legal complications with regards to commercial surrogacy came to the force for the first time in 2008 when a Japanese couple Dr. Ikufumi Yamada and his wife, wished to have a baby and entered into a surrogacy contract with an Indian woman in Anand a city in the State of Gujarat to serve as a surrogate<sup>9</sup>. But before the woman could deliver the child, the couple went through matrimonial discord and the couple got divorced. Thus, the child was born legally parentless as well as without citizenship. The genetic father wanted the child's custody, but Indian law barred single men from it, and Japanese law didn't recognize surrogacy. In this landmark case, the Supreme Court held that commercial surrogacy was permissible in India and the baby was ultimately granted a visa. Though the child was finally handed over to her grandmother, it opened questions about a practice that had continued unabated for a number of years. The culmination of these questions resulted in India's draft Surrogacy (Regulation) Bill that was approved by the Cabinet in August 2016.

**Objectives behind the Surrogacy (Regulation) Bill:**

The draft bill provides for surrogacy as an option to parents who have been married for five years can't naturally have children, lack access to other reproductive technologies, want biological children and can find a willing participant among their relatives.

The second major issue relates to the question of disallowing commercial surrogacy and restricting foreigners from availing themselves of surrogacy in India. Meanwhile, the banning of commercial surrogacy can perhaps open up doors for adoption as well.

The draft bill makes it mandatory for all surrogacy clinics to register with the government. Violators will face jail term of five years and a fine of Rupees ten lakh. The bill also seeks to clarify the legal position of such child and ensures such a child born of surrogacy will have all legal rights as a citizen. It would also restrict overseas Indians, foreigners,

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<sup>8</sup> Govt. of India, 228 Law Commission Report accessed through <http://lawcommissionofindia.nic.in/reports/report228.pdf> on 13th June,2017

<sup>9</sup> Baby Manji Yamada V. Union of India (2008)13 SCC518

unmarried couples, homosexuals, and live-in couples from entering into a surrogacy arrangement. The surrogate mother has to be a married woman who has borne a child and is neither a non-resident Indian (NRI) nor a foreigner. Couples who already have biological or adopted children cannot commission a surrogate child<sup>10</sup>.

The draft Surrogacy (Regulation) Bill seeks to comprehensively address the issues of surrogacy in India. While there are provisions that will definitely evolve with time, the heart of the bill is undoubtedly banning commercial surrogacy. This is indeed a step in the right direction.

### **Indian Council of Medical Research Guidelines:**

The first attempt to regulate surrogacy made by the Indian Council of Medical Research (ICMR) in the year 2005 and this ICMR issued guidelines for regulating Assisted Reproductive Technique (ART) clinics. As per the Indian Council of Medical Research Guidelines, the surrogate mother should not be biologically connected to the child<sup>11</sup>.

The Indian Law recognizes the Intended mother only as the legal mother in surrogacy arrangements. The intended parents only would be the legal parents of the child with all the attendance rights, parental responsibility etc<sup>12</sup>. Also, Guideline 3.5.4 states that the surrogate mother shall not be the legal mother and the birth certificate shall be in the name of the genetic parents. 3.5.5 Provides that the surrogate mother shall relinquish in writing all the parental rights over the child. India is very soon going to enact its legislation on the field of Assisted Reproductive Technology.

Another major legal issue when it comes to international surrogacy is the citizenship that is to be granted to the baby arising out of such an agreement. In *Jan Balaz V. Anand Municipality*<sup>13</sup> question raised before the court whether a child born in India to a surrogate mother, an Indian national, whose biological father is a foreign national, would get citizenship

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<sup>10</sup> Malavika Ravi , A Critical Analysis Of The Surrogacy Regulation Bill 2016, 31 August 2016, viewed at <http://feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/> accessed on 9<sup>th</sup> June, 2017

<sup>11</sup> Indian Council of Medical Research Guideline 1.2.33

<sup>12</sup> *Ibid*, Guidelines 3.10.1 and 3.16.1

<sup>13</sup> AIR 2010, Guj 21



in India, by birth, is a momentous question which has no precedent in this country and this question was debated.

In the above case, Petitioner is a German national and is a biological father of two babies given birth by a surrogate mother by name Marthaben Immanuel Khristi, a citizen of India. Petitioner's wife Susanne Anna Lohle is a German national. Due to biological reasons, the wife of the petitioner was not in a position to conceive a child. Desiring to have a child of their own, they opted for In Vitro Fertilization (IVF). Assisted Reproductive Technology Infertility Clinic at Anand came to their help. Petitioner and his wife had entered into a surrogacy agreement with the surrogate mother. She had also agreed to hand over the child to the petitioner and his wife on delivery. Further surrogate mother had also agreed that she would not take any responsibility about the well-being of the child and the biological parents would have legal obligation to accept their child and that surrogate mother would deliver and the child would have all inheritance facts of a child of biological parents as per the prevailing law. Twin children were born out of the surrogacy agreement in question. The couples were from Germany, working in the United Kingdom and the children required Indian passports to travel. Their citizenship was being debated in court, leading the passport authorities to withhold the passports. Germany, the home state of the couple did not recognize surrogacy. The Court denied the passports but granted an exit permit to the children. The German authorities decided to give the couple an opportunity to adopt the children thereafter. By the time such a decision was rendered, the twins were already two years old. This case brought forward the glaring need for legislation in the surrogacy industry.

While considering this matter Supreme Court held that "at the outset point out that lot of legal, moral and ethical issues arise for our consideration in this case, which have no precedents in this country. We are primarily concerned with the rights of two new born innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova are also of vital importance. Surrogate mother is not the genetic mother or biologically related to the baby. So many ethical and legal questions have come up for consideration in this case for which there is no clear answers, so far, at least, in this country. True, babies conceived through surrogacy, encounter a lot of legal complications on parentage issues, this case reveals. Legitimacy of the babies is therefore a live issue. Further, a host of

scientific materials are made available to us to explain what traditional surrogacy, gestational surrogacy is, altruistic surrogacy, commercial surrogacy etc. and also the response of various countries with regard to the surrogacy, especially commercial surrogacy. Legislature will have to address a lot of emotional, legal and ethical issues. Question as to whether surrogacy can be seen as a ray of hope to otherwise a childless couple, so as to build up a family of their own, necessary for human happiness and social stability also calls for attention”<sup>14</sup>.

**Recommendations of the Law Commission of India<sup>15</sup>:**

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.

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<sup>14</sup> Jan Balaz V. Anand Municipality, AIR 2010 Gujarat 21, Para 9

<sup>15</sup> 228 Law Commission of India Report



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 and Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only<sup>16</sup>.

There is a strong and proximate correlation between the availability of advanced medical technology meant for detecting genetic physical or mental abnormalities in unborn child and /or for detecting threats to mother or foetus, and the decline in the Child Sex Ratio. Modern pre-conception and pre-natal diagnostic techniques/tests/procedures also have the potential to fix sex of the foetus at pre-conception stage or detect the sex of foetus in pre-natal period. The patriarchal social structure, easy availability and affordability of sex-determination technologies and gross violation of medical ethics have spawned the practice of sex selection to even the remotest and most under-developed regions of India<sup>17</sup>. They may also force the surrogate mother to undergo an abortion after detecting the sex of the child with the help of ultrasound scanning, after four months of pregnancy if it happens to be a female child.

**Conclusion:**

Courts and legislatures generally disfavour surrogacy contracts where the surrogate mother is compensated. This is especially true when the surrogate is genetically related to the child because she is deemed to have a greater connection to the child when they are genetically related. There are number of moral and ethical issues regarding surrogacy which has become more of a commercial racket, and there is an urgent need for framing and implementation of Laws for the parents and the surrogate mother. Altruistic and not commercial surrogacy should be promoted. May, we all hope that the Indian Parliament will soon realize the importance of enacting comprehensive law dealing with all the intricacies of surrogacy.

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<sup>16</sup> On 5<sup>th</sup> of August, 2009 the Law Commission of India submitted the 228<sup>th</sup> 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.

<sup>17</sup> Dr. Meeta Mohin, “Scanning For Death: A Medico-Legal Study of the Practice of Sex-Selection in India” Cri L J 276 Jour (2012).