

Surrogacy: Socio Legal Perspectives in Relation to Surrogated Motherhood in India

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Introduction

Surrogacy is a method or agreement whereby a woman agrees to carry a pregnancy for another person or persons, who will become the newborn child's parent after birth.

The word surrogate means “substitute”. That means a surrogate mother is the substitute for the genetic-biological mother. In common language, a surrogate mother is the person who is hired to bear a child, which she hands over to her employer at birth. In other words Surrogacy is a method of reproduction whereby a woman agrees to become pregnant and deliver a child for a contracted party. The word surrogate’ means substitute’. Surrogacy arrangements do not only take place within the family, but also within the community, the state, the country and presently even the world.

Society is named for the group of individuals. Life exists because of the power of procreation. It is acknowledged that since the Indus Valley civilization, Mother Goddess, who is a symbol of fertility, has been worshipped. Having children has always been important since time immemorial and the continuity of the family unit has been of major significance in Indian society. The inability to reproduce is considered as a social stigma and Indian mythology is full of stories about what couples have done in the past to overcome their fertility problems. Nature has bestowed the beautiful capacity to procreate a life within women and every woman cherishes the experience of motherhood. The desire for motherhood leads them to search for alternative solutions, and surrogacy presents itself as the most viable alternative. The concept of surrogacy has turned a normal biological function of a woman’s body into a commercial contract. Surrogate services are advertised. Surrogates are recruited, and operating agencies make huge profits. Surrogate Mother’s have been called “Baby Factories,” conjuring up images of poor, illiterate women packed into bunks and forced by their husbands to bear Surrogate children for Westerners.

Historical Background

According to the Bhagwad Gita, even Lord Krishna is understood to have been born

Without a sexual union. Kansa, the wicked king of Mathura, had imprisoned his sister Devaki and her husband Vasudeva because oracles had informed him that her child would be his killer. Every time she delivered a child, he smashed his head on the floor. He killed six children. When the seventh child was conceived, the gods intervened. They summoned the goddess Yogamaya and sent her to transfer the fetus from the womb of Devaki to the womb of Rohini (Vasudeva’s other wife who lived with her sister Yashoda across the river Yamuna, in the village of cowherds at Gokul), when Vishnu heard Vasudeva’s prayers beseeching Kansa not to kill all his sons being born. Thus, the child was conceived by divine ‘mental transmission’ in one womb was incubated in and delivered through another womb. This all may be considered as traditional prevalence of surrogacy in India.

India is emerging as a leader in International Surrogacy and a sought after destination in Surrogacy-related fertility tourism. Surrogacy in India is a hot topic right now. With adoption becoming legally more difficult, and greater awareness of Surrogacy as an option, many couples and even individuals that cannot otherwise bear children are increasingly turning to Surrogacy as a possibility to fulfill

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their parenthood dreams.¹ The commercialization of surrogacy has raised fears of a black market and of baby selling and breeding farms; turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product. The giving of birth to a baby relates to the body of a woman which is a matter of her dignity. Surrogacy, though being advantageous to the couple who have no kids, but is, inconsistent with human dignity as another woman uses her uterus for financial profit and treats her womb as an incubator for someone else's child.

Slowly but steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners'.² Cheap medical facilities, advanced reproductive technological know-how, coupled with poor socio-economic conditions, and a lack of regulatory laws in India, in this regard combined to make India an attractive option. Worldwide, approximately 259,200 children are born every day. That is almost 3 children each second. The birth of a newborn child is often a very special and fascinating event for all the people involved. Infertility affects about 1 out of every 6 couples. This includes not just those unable to conceive after 12 months of trying, but also those that cannot carry a pregnancy to term. For many infertile men and women, being unable to bear and raise children has severe emotional and psychological

<http://childbirthsolutions.com/articles/traditional-versus-gestational-surrogacy/>

http://www.suite101.com/article.cfm/surrogacy_new/64753 consequences.

They often feel guilty, and experience a loss of self-worth and confidence. There are varied causes of infertility amongst men and women; as a result this makes every case an entity in itself. Treatment to each couple cannot be generalized it varies and so also the success rate which declines with advancing woman's age. To many infertile people, their condition affects their most fundamental feelings about who they are and what their role in the family is. It influences one's personal identity and the extent of fulfillment. For that reason, infertility is regarded a major health problem.

In general, couples first investigate Surrogacy in their home country. Some couples find that either the cost, or their country's legal environment, makes it very difficult to pursue Surrogacy and then start investigating options for Surrogacy abroad. The most common overseas option is Surrogacy in India, although there are other options.³ The Intended parents are interested in the low costs of International Surrogacy, and many are considering a Surrogate pregnancy in India. 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.

Traditional surrogacy was previously the only way to conceive a child via a surrogate mother. Since artificial insemination is easy, not painful, and importantly, significantly less expensive than IVF, traditional surrogacy continues to be used by many people. Gestational surrogacy on the other hand is a more complex and more expensive process. Nevertheless, the reason that an increasing number of intended parents settle on gestational surrogacy is because that procedure can offer one thing that traditional surrogacy cannot: the chance to raise a child that is genetically completely their own.

In 1984 the world saw the first successful birth through gestational surrogacy. Ten years later, in Chennai, this happened for the first time in India.⁴ Three years after that, in 1997, an Indian acted as a gestational carrier, and got paid for it, in order to obtain medical treatment for her paralyzed husband. India is rapidly becoming the most popular country for fertility tourists', which is due to a number of interrelated factors. In 2002, the Confederation of Indian Industry (CII) published a study on the potential India has to develop a medical tourism sector. This

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[http://www.suite101.com/article.cfm/surrogacy_new/64753 \](http://www.suite101.com/article.cfm/surrogacy_new/64753)

<http://www.princeton.edu/~lawjourn/Fall97/II1ferraro.html>

was picked up on by the then Finance Minister of India who wanted India to become a global health destination. Legislation on Reproductive Technologies provides the means for preventing their misuse. However, the implementation of the Acts related to Reproductive Technologies raises several legal, ethical, moral and social issues. Human experience has shown that mere legislation against undesirable practices generally does not prevent them; such practices being pushed to the back-alleys. Legislation must be armed and strengthened by measures aimed at bringing about a sea change in societal perceptions of the female child and women in general. ⁵The practice of Surrogacy in India has widely increased in last decade.

And looking into the augmenting rate the Indian Government has taken few steps to regulate the industry. But they are insufficient to curb the immoral practices which are growing in guise of Surrogacy. Now let's us study the Legislative Developments on Surrogacy in India in detail till Date. While commercial surrogacy is also developing in other countries, another contributing factor to the rise in popularity of surrogacy in India is that the patients find it easy to communicate with the English-speaking doctors.

Legislation and Jurisdiction in India In 2006, the Indian Council of Medical Research (ICMR) published guidelines for accreditation, supervision and regulation of ART clinics in India. Below are the main points from these guidelines:

- DNA tests are compulsory to determine that the intended parents are indeed the genetic parents. If this is not the case the child must be adopted instead.
- Surrogacy should normally only be an option for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term.
- The payments received by the surrogate mothers should be documented and cover all genuine expenses associated with the pregnancy.
- The responsibility of finding a surrogate mother should rest with the couple, or a semen bank, not the clinic.
- A surrogate mother should not be over 45 years of age. The ART clinic should ensure

[And rewkimbrell.org/andrewkimbrell/doc/surrogacy.pdf](http://rewkimbrell.org/andrewkimbrell/doc/surrogacy.pdf)

www.sagepub.com/gabbidonstudy/articles/Baker.pdf

possible surrogate woman satisfies all the testable criteria to go through a successful full-term pregnancy.

- No woman may act as a surrogate more than three times in her lifetime.
- The surrogate mother must declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank.
- A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple.

A new bill is in the works to regulate the practice of surrogacy aiming to avoid some of the pitfalls of the ICMR guidelines discussed above. In the previous chapter were given extracts from the draft ART bill particularly concerning the surrogacy arrangement, rights of the surrogate mother, the child, etc. The bill empowers a National Advisory Board to act as the regulatory body laying down policies and

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regulations. It also seeks to set up State Advisory Boards that are, in addition to advising state governments, charged with monitoring the implementation of the provisions of the Act, particularly with respect to the functioning of the ART clinics, semen banks and research organizations.

The Artificial Reproductive Technology (Regulation) Bill defines surrogacy as 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.

As surrogate motherhood in technical terms has been defined in many ways, before proceeding to the analysis of data collected from the three areas of study in Gujarat, it is important to outline exactly what the term ‘surrogate mother’ means and how it has been defined in different contexts. Surrogate mother, as defined by the Collins English dictionary is, “a woman who bears a child on behalf of a couple unable to have a child, either by artificial insemination from the man or implantation of an embryo from the woman

www.mcsolicitors.ie/.../Commission_on_Assisted_Human_Reproduction_2005.pdf .
<http://humrep.oxfordjournals.org/contentessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&ocid=6+Minn.+J.+Global+Trade+329&srctype=smi&srcid=3B15&key=d54b229d8ce15b1d0d6dd916888d1503>.

The Oxford dictionary defines surrogate mother as, “a woman who bears a child on behalf of another woman, either from her own egg fertilized by the other woman's partner or from the implantation in her womb of a fertilized egg from the other woman. Taking into consideration the prevalence of Surrogacy in India and its related challenges as well as controversies, the

Government of India formed a committee of experts to make draft for the Surrogacy and ART in India. This Expert committee submitted a copy of the proposed Assisted Reproductive Technology (ART) Regulation Bill, 2008 to the Government. The committee tried to cover the important and necessary dimensions of Surrogacy. This bill was pending with the government and was not presented in the Parliament. Irrespective of no legislation for the regulation of Surrogacy, the process was completed in a crystal clear and ethical manner; keeping into consideration the guidelines by ICMR. Looking into the growing cases of Surrogacy finally this bill was revised. The Ministry of Health and Family Welfare, Government of India drafted the revised bill “The Assisted Reproductive Technologies (Regulation) Bill, 2010”. The ART Regulation Bill, 2010 defines the surrogate mother as, a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple/individual that had asked for surrogacy. Surrogacy in India continues to grow by the day; the proposed law to regulate it continues to remain in incipient stages. The present guidelines are a consequence of those originally framed by the Indian Council of Medical Research (ICMR). However; these do not have any legal sanctity and are not binding.

The draft Bill 2013 is an exhaustive document containing 100 sections addressing various issues relating to ART. The draft Bills and Rules of 2008 and 2010 were extensively circulated for public opinion, besides being sent to State Governments, institutions, statutory bodies, NGOs, medical professionals and other stakeholders, but the 2013 Bill was not circulated or placed in the public

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domain. Women's health activists asked the Centre not to rush into finalizing the 'Assisted Reproductive Technologies (Regulation) Bill, 2013' and, instead, hold wider deliberations with women's rights organizations, queer rights, human rights and legal rights organizations across the country.

Various NGO's and Women groups reviewed the Draft Bill. The Sama Resource Group for Women and Health, while appreciating the initiative of the Union Ministry of Health and Family Welfare (MoHFW) for making efforts to regulate the booming Assisted Reproductive Technologies (ART) industry, including Commercial Surrogacy, in the country, said though the Bill acknowledges the importance and significance of ethical practices in the context of ART services, in the present form, it is inadequate in protecting and safeguarding the rights and health of women going for IVF techniques, recruited as Surrogates and children born through Commercial Surrogacy.

The Judiciary in India has recognized the Reproductive Right of humans as a basic right and if reproductive right gets constitutional protection, Surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection. Therefore, indirectly Judiciary has supported Surrogacy through its innovative Judgments. Supreme Court despite its constitutional limitation has come up with flying colors as a Champion of Justice in the true sense of the word. The Judicial activism has touched almost every aspect of life in India to do positive justice and in the process has gone beyond, what is prescribed by law or written in black and white. Only thing the Judiciary must keep in mind is that while going overboard to do justice to common man must not overstep the limitations prescribed by sacrosanct i.e. The Constitution. Judicial Activism is an inscriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc., others have criticized the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State negating the constitutional spirit etc.

Judicial Trends

The landmark Surrogacy case of Baby Manji in India is a case in the point. Before Baby Manji, Indian Courts had not faced a case relating to Surrogacy, in spite of the rising nature of Surrogacy contracts in India. The Baby Manji case was significant for two main reasons. First, the Indian law on Surrogacy had been silent until that point, but the Supreme Court held in Baby Manji Yamada Petitioner vs Union of India & Anr that Commercial Surrogacy was legal in India. Second, it opened the floodgates of debate regarding the burgeoning Surrogacy contracts in India.

In B.K. Parthasarathi v. Government of Andhra Pradesh, the Andhra Pradesh High Court upheld "The Right of Reproductive Autonomy" of an individual as a facet of his "Right to Privacy" and agreed with the decision of the US Supreme Court in Jack T. Skinner v. State of Oklahoma¹²⁷, which characterized the "Right to Reproduce as one of the basic Civil Rights of Man".

In Shabnam Hashmi vs. Union of India, 2014, the 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.

Gujarat is the paradise for infertile couples. It has become the hub of Surrogacy in India. The low-cost technology, skilled doctors, scant bureaucracy and a plentiful supply of Surrogates have made Gujarat a preferred destination for fertility tourism, attracting nationals from Britain, the United States, Australia and Japan, to name a few. The Akanksha clinic in Anand is the best-known at home and abroad, giving the small town in Gujarat state the reputation as India's "Surrogacy Capital".

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Conclusion and Recommendation:

First of all, there are some ethical issues arising from the surrogacy arrangements. It seems not to be ethical for someone to create a human life with the intention of relinquishing it. This appears to be the primary concern for surrogate arrangements since the surrogate mother is providing germinal material only upon the assurance that someone else will take responsibility for the child she helps to create. The surrogate mother provides her ovum with the clear understanding that she has to avoid responsibility for the life she creates and she has to dissociate herself from the child in exchange of some other benefit such as money. In such a way, at the deepest level surrogate arrangements cannot be viewed as ethical, because they involve a change in motive for giving birth for the sake of some other benefits (money). On the other hand, using a surrogacy service when the biological mother cannot bear the child is no more morally objectionable than employing others to help educate, train, or otherwise care for a child. .

The child can be harmed if the commissioning couple is not fit parents. After all, a desire to spend substantial money to fulfill a dream to rear children cannot be a guarantee of good parenting .Relationship between the surrogate mother and the commissioning parents, in most of the cases, remain harmonious, but from a distance. According to the surrogate mothers, the level of involvement for the commissioning parents with the entire pregnancy experience of the surrogate mother remains restricted to the initial stage of getting introduced to the former and making sure that surrogate mother delivers and relinquishes the baby as per decided. Recommendation

- There is a need of right-based legal framework for the surrogate mothers, as far as the ICMR guidelines are not enough.
- There should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child.
- A clearly defined law needs to be drafted immediately which will pronounce in detail the Indian government's stand on surrogacy; so that discrete activity leading to exploitation of the surrogate mother can be stopped.
- There should be an interpreter (other than doctor) for the communication linkage between the surrogate and intended parents in order to convey the message from surrogate mother time to time.
- There should be a substantial regulation designed to protect the interests of the child.
- Health Insurance for both the surrogate mother and the child is essential to ensure a healthy life.
- Although it is not a crime to bear a child for another, and then relinquish it for adoption, it is not regulated by law and may raise a number of confusions.
- Legal recognition of termination and transfer of parenting rights.
- It is crucially important to maintain and monitor the anonymity of the surrogate mothers.
- The surrogate mother should not undergo more than 3 trials and it has to be monitored.

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