

## SURROGACY IN INDIA & ITS CORRESPONDENCE WITH HUMAN RIGHTS

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### Abstract

*In India, the concept of surrogacy means “womb for rent” which aids those who cannot otherwise have children, making it possible for them to procreate genetically through the process of artificial insemination.*

*This Article additionally converses, the extent to which the proposed legislation, the Assisted Reproductive Technologies (Regulation) Bill and rules (2009), adequately deals with interest of women engaged in surrogacy (surrogate), intended parents and child, keeping in view that their human rights are not being infringed.*

*However, it is not unknown that the surrogates are EXPOSED TO greater menace and trouble as compared with those allied with pregnancy and childbirth. The menstrual cycles of a gestational surrogate must be precisely matched to that of the egg donor, SO that the fertilized egg in the womb operates receptively during THE IMPLANTATION. SURROGATES ARE then ingested large doses of hormones, which have unknown long term effects associated. Further it has been noted that, after UNDERGOING SUCH IMMENSE PAIN, THE surrogates are mostly exploited due to illiteracy and poverty. The bill proposed in the parliament of India must be more vigilant in regulating laws relating to surrogacy, in the manner which is appropriate and just and does not act in contravention to any human right. The emphasis of the author (s) in this article is vis-à-vis the conception of surrogacy and its correlation with human right*

**Keywords:** Surrogacy, Gestational, Traditional, Insemination, Embryo Implantation, Anonymous Donor, Human Rights & Laws.

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## INTRODUCTION

The word surrogate is derived from the Latin word ‘subrögare’ which in literal term means ‘to substitute’. Surrogate pregnancy is the trend which is referred in the form of assisted conception. In general, it is characterized as the practice whereby one woman (the surrogate mother), carries a child for another person or persons i.e. for the commissioning couple as the aftereffect of an agreement prior to conception, that is the child should be handed over to that person after birth. According to, the **Surrogacy (Regulation) Bill** which was proposed in **2009**, ‘surrogacy’ means an arrangement in which a woman agrees to a pregnancy, achieved through Assisted Reproductive Technology (**ART**), in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.<sup>1</sup>

This observable fact derived in 1978 depicts a girl named Kanupriya alias Durga as a baby born through IVF (In Vitro Fertilization) technology in Kolkata, just about 67 days subsequent to the first IVF baby born in the United Kingdom.<sup>2</sup> The concept of surrogacy in India is not new. It is a practice that has been predominant from an elongated duration of time. Generally, two known methodologies can be pulled out in the greater part of the nations are traditional surrogacy and gestational surrogacy. Traditional surrogacy is a practice whereby a surrogate mother is artificially inseminated, either by the intended father or a anonymous donor, and carries the baby to term. The child is thereby genetically related to both the surrogate mother, who provides the egg, and the intended father or anonymous donor.<sup>3</sup> Wherein, in gestational surrogacy, an egg is detached from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then transferred to a surrogate who carries the baby to term. In this case, genetically the child is related to the woman who is the donor of the egg and the intended father or sperm donor, but the surrogate cannot be so associated.<sup>4</sup>

Consequently, there is a difficulty which is allied as regards to the paternity rights over the child, as there is involvement of multiple parents i.e. the surrogate mother, intended father,

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<sup>1</sup> Assisted Reproductive Technology Bill, 2008 (pending)

<sup>2</sup> *It’ official: Kanupriya’s India’s first test tube girl, dna*, Available at <http://www.dnaindia.com/india/report-it-s-official-kanupriya-s-india-s-first-test-tube-girl-210> , last seen on 14/08/2015

<sup>3</sup> Admin, *Commercial surrogacy in India*, Civil Satta Blog, available at <http://civilsatta.in/blog/commercial-surrogacy-in-india/> , last seen on 14/08/2015

<sup>4</sup> Ibid

intended mother & donor. In actual fact surrogacy is not merely a biological verity but is interrelated to legal facets and socially construed aspects in conjunction with liabilities, rights and duties.

The hindrance which arises due to surrogacy is not unknown. Many fundamental issues can be raised at this point, such as, whether surrogacy agreements enforceable, void or prohibited? Who is the person liable when parenthood is in question? In the event of separation between intended parents, in that case what happens to the child? What if the commissioning couple transforms their mind set or passes away before the contracted surrogacy term? Law differs extensively from one jurisdiction to another in response to the above mentioned questions.

### **WHY SURROGACY IS DIFFERENT**

The essential need for surrogacy is that it lends a hand to the sterile couple to have a baby of their own. It is favored over adoption in light of the fact that in most surrogacy agreements, the child will be genetically identified with either or both the parents. Surrogacy is an agreement which is contracted between the surrogate mother and the intended couple describing the details along with the compensation to be paid to the surrogate. A Surrogate mother in this way creates a superior life for herself. For infertile women or for single guardian, surrogacy gives the most ideal approach to have a child. There are various social, moral, restorative and emotional subject matters that join the surrogacy arrangements which influence both sides. Additionally, surrogacy is extravagant as many expenses add up to it, apart from medicinal costs like counseling and legal expenses. It is likewise conceivable that at the time of giving over the child the surrogate may encounter grief and mental issues for she has carried the baby for so long and conveyed it. This may place the intended parents in possibly troublesome position and lawfully may get entangled.

Traditional surrogacy is more disputable than gestational surrogacy in extensive part as the biological relationship between the child and the surrogate frequently convolutes the certainties of the case, if paternity or the validity of the surrogacy contracts are challenged. Thus, most nations deny agreements regarding traditional surrogacy. So far as India is concerned, gestational surrogacy has a higher achievement rate than traditional surrogacy. Also, numerous countries that allow surrogacy agreements forbid payment of medicinal and legal costs caused as a consequence of the surrogacy agreement. Surrogates' ovulatory cycle

is suppressed by injecting estrogen which builds her uterine lining. Subsequent to such transfer, daily injections of progesterone are administered until her body understands that it is pregnant and can sustain the pregnancy on its own. The side effects of these medications can include hot flashes, mood swings, headaches, bloating, vaginal spotting, uterine cramping, breast fullness, light headedness and vaginal irritation.<sup>5</sup> Surrogacy is not as simple as adopting a child, it is a prudent method of procreation of child where there is an implication of artificial insemination.

## COMMERCIALIZATION OF SURROGACY IN INDIA

India today is seen as blooming in the surrogacy industry. A new stream of medical tourism is seen to enter into medical arena with surrogacy as a part of it. The basic reason for growing outsourcing services is that India provides satisfyingly efficient workers at relatively lesser cost. India not only provides a number of successful IVF clinics with excellent technology and services, there are many women willing to provide surrogate services. According to some estimates, Indian surrogacy market is already a whopping \$445 million a year.<sup>6</sup> No wonder India is already gaining fame as the cradle of the world, poised to become the surrogacy outsourcing capital. Not only foreigners visit India for gaining cheaper medical services, foreign couples suffering from infertility are gaining interest in India because of the same reason. Surrogacy costs about \$12,000 in India, including surrogate mother's fees and all medical expenses. In the U.S., the same procedure can cost up to \$70,000.<sup>7</sup> A surrogate mother can gain some \$6000 for her services. Now \$6000 is not a small amount, it is equivalent to almost Rs30, 000.<sup>8</sup> Some people may argue that foreigners are exploiting poor Indian women using them as surrogates, but same argument one can put forth for every outsourcing job Indians provide. India provides fairly advanced medical system and services and English speaking doctors, but above that, Indian surrogate market is yet not suffering

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<sup>5</sup> Anne R Dana., *The State Of Surrogacy Laws: Determining Legal Parentage of Gay Fathers*, 18:353 Duke Journal of Gender Law & Policy 353, 362 (2011) , available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1192&context=djglp> , last seen on 14/08/2015

<sup>6</sup> Anu, Pawan Kumar, Deep Inder, Nandini Sharma, *Surrogacy and woman's right to health in India: Issues and prespective*, 57 India Journal Of Public Health 65, 72 (2013) , available at <http://www.ijph.in/article.asp?issn=0019557X;year=2013;volume=57;issue=2;spage=65;epage=70;aulast=A nu%2C#ft22> , last seen on 14/08/2014

<sup>7</sup> *Womb for Rent: Surrogate mother in India*, Web MD, available at <http://www.webmd.com/infertility-and-reproduction/features/womb-rent-surrogate-mothers-india> , last seen on 14/08/2015

<sup>8</sup> Brooke Lea Foster, *The Hunt For Golden Eggs: Young Woman Donation Eggs* , *Washingtonian* (01/07/2007), available at <http://www.washingtonian.com/articles/health/the-hunt-for-golden-eggs-young-women-donating-eggs> , last seen on 14/08/2015

with the legal-red-taping, ill-defined surrogacy laws and governmental interference, making things easy and economically viable. Surrogacy is not a new conception for Indian nationals. From a long time, infertile or sterile couples used to hold services of other woman in the form of mistress or second-wife, for procreation of a child.

## **INITIATIVES TAKEN BY THE GOVERNMENT**

To address such issues and to regulate surrogacy arrangements, the Government of India has taken certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines have been issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India.

However, till now there is no legal provision dealing directly with surrogacy laws to protect the rights and interests of the surrogate mother, the child and the commissioning parents. Nonetheless, Assisted Reproductive Technique (ART) Regulation Bill, 2010 lays down few guidelines.

## **SURROGACY LAWS**

Since 2002 the Supreme Court of India legalised the commercial surrogacy. *Surrogacies together with the exceptional medical skill in India have made India a hotspot for Surrogacy requirements.*

In order to make surrogacy process more vigilant and strictly supervised, Indian Parliament is in the process of finalizing Surrogacy Bill. Besides to this Indian Council of Medical Research turned out with a draft for the ART (Assisted Reproductive Technique) Guidelines, which makes the stand for the Surrogacy arrangements and IVF clinics in India.

A child conceived through surrogacy does not get the citizenship of India by virtue of nativity in India. In fact the child has the same citizenship as that of his parents. For example: A couple from USA come to India to have a baby through surrogacy. Once the baby is born, the couple needs to get in touch with their countries consulates/ high commissioner in India and local visa authorities in USA and make requisite arrangements for the visa/ passport and citizenship of the child as being a citizen of United States of America. As per Indian laws, the

birth certificate of a bay born through surrogacy contains the name of the intended parents itself, nowhere is the name of the surrogate mother mentioned.<sup>9</sup>

The Indian Council for Medical Research prescribed rules to manage Assisted Reproductive Technology systems. The Law Commission of India presented the 228th report on Assisted Reproductive Technology techniques examining the significance and requirement for surrogacy, furthermore the tramps taken to control surrogacy arrangements. The following observations had been made by the Law Commission:<sup>10</sup>

- Surrogacy arrangement will continue to be governed by a contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear the 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 the 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.

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<sup>9</sup> *Legal Aspect of Surrogacy*, Surrogate India End To End Solution for Surrogacy, available at <http://www.surrogateindia.co.in/surrogacy/legal-aspect> , last seen on 14/08/2015

<sup>10</sup> *What does the Law says on surrogacy?*, The New Indian Express, available at <http://www.newindianexpress.com/cities/bengaluru/article599047.ece> , last seen on 14/08/2015

- 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.

After understanding the laws, can we answer to the question whether surrogacy is void, voidable or enforceable in India? This question is highly debatable and the answer varies according to the jurisdictions. Though in India, the essential feature of an agreement is meeting of mind that is the party to an agreement must have consensus ad idem at the point of entering into an agreement. Therefore, the parties must pay attention in making of perfect agreement (document), which authenticates the birth of a baby born, so it should be made with such prudence that the agreement is able to meet the worst twirl of a situation. Indeed such agreements are connoted as enforceable and not void and voidable.

## **SURROGACY IN RELATION WITH HUMAN RIGHTS**

### *Reproductive Rights*

Reproductive rights are increasingly recognized in international human rights law. To the extent surrogacy enables those otherwise unable to “achieve their reproductive goals and have children by choice,” If the government disfavors surrogacy and its practice then it would be considered erroneous as it would be a violation of reproductive right.

On December 18<sup>th</sup>, 1979, **Convention on the Elimination of all forms of Discrimination against Women (CEDAW)** was signed by various nations which assure the rights of pregnant women. India was one amongst its signatories. Article 11.2 sets out the measures to be taken by states to “prevent discrimination on the grounds of marriage or maternity and to ensure women’s effective right to work.” These measures include the prohibition of dismissal



for pregnancy or maternity leave, maternity leave with pay or “comparable social benefits,” and the “necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment of childcare facilities.”<sup>11</sup> Article 12 requires the state to “ensure access to healthcare services, including those related to family planning” and, more specifically, to “ensure to women appropriate services in connection with pregnancy, confinement in the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation.”<sup>12</sup> Article 14 reiterates the right to family planning services for rural women in particular.<sup>13</sup> Finally, Article 16 requires states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”<sup>14</sup> In addition to these specific guarantees, Article 5 more broadly demands recognition of maternity as “a social function,” rather than a commercial function.<sup>15</sup> To the extent CEDAW though focuses on the health of the pregnant woman but it is not inconsistent with gestational surrogacy. Rather, it safeguards the human rights by protecting the health of the surrogate.

### *Child Rights*

Surrogacy is associated with certain specific rights allocated to the child Under **CRC (Convention on the rights of the child)**. Firstly, the child’s rights are to be “valued and guaranteed” exclusive from discrimination of any sort. According to, UNICEF, UN Convention on the Rights of the Child, there were provisions which originally dealt with protection of illegitimate child’s rights, it later on underwent an expansive application which was inclusive of children born through surrogacy.

Article 7 of CRC is quite complicated here, as Article 7.1 states that “the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents.”<sup>16</sup> There are two difficulties with this provision, both grounded in its presumptive

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<sup>11</sup> *Convention on Elimination of All Forms of Discriminations Against Woman*, UN Entity for Gender Equality and the Empowerment of Woman, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, last seen on 14/08/2015

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> *Convention on the Rights of the Child*, United Nations Human Rights, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, last seen on 14/08/2015



incorporation of national law. If that law provides that a mother is the person giving birth, the child's status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation.<sup>17</sup> Such setback can be set right by restructuring domestic laws or as proposed in the pending Indian Surrogacy Regulation Bill, which recommends that, the intending parents are required to prove, before entering into a surrogacy arrangement, that the resulting child will be granted citizenship of that of the intended parents, also, they will be legally recognized as the child's parents in that nation.

*This Bill further proposes that:*

- A child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother.<sup>18</sup>
- The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent or parents or surrogate mother when required, and to the extent necessary, for the welfare of the child.<sup>19</sup>
- Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother, provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother.<sup>20</sup>

### *Surrogates Rights*

In a lifetime a surrogate women can only give birth to five successful babies including her own children. The baby so born has the liability linked with the person(s), availing the facility of a surrogate mother. In case if the intended parents reject to accept the child or in case of separation of the commissioning couple, it will be considered as a serious offence according to the bill.

Wherein the embryo transfer fails, the surrogate will be paid monetarily as per the conditions of the agreement. Confidentiality is the right allocated to the surrogate mother and if she

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<sup>17</sup> Ibid.

<sup>18</sup> Supra 1

<sup>19</sup> Supra 1

<sup>20</sup> Supra 1

intends to hide her identity from the commissioning couple, she is permitted to do so. It is the main concern of the ART clinic to keep confidentiality. In India it is obligatory to appoint a local guardian who will take care of surrogate mother during and after the pregnancy. These are the rights accessible by the surrogate mother.

## **CONCLUSION**

This Article has described surrogacy in India has got several snags, which need to be statures out and treated in a coherent way. The genuine apprehension should be drawn to recognize the omitted priorities of the proposed bill and must be reviewed from the perspective of surrogate mother. To safeguard the human rights of the surrogate mother, numerous provisions are enacted. Even then, there are persistent problems existing in relation to find a way out. The Government has to juggle around with and make such regulations which will look after the rights of the surrogate as well as the intended parents of the child who entered into a contract with the surrogate in order to achieve their dreams.