

“Comparative Study on Surrogacy Laws around the World”

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ABSTRACT

Scientifically speaking, a surrogacy arrangement or surrogacy agreement is the carrying of a pregnancy for intended parents, but the picture didn't intend to end here. Undoubtedly, Surrogacy is a wonderful scientific breakthrough concept that helps couples to start a family that they could not make on their own. The paper is intended to understand the Ethical, Legal & Socio-Economic Issues that are involved in “Surrogacy” and the basic idea behind their applicability. It aims to present a comparative study of Surrogacy across the world and their practical application in the respective fields. The paper also attempts to provide the history of Surrogacy in India. The paper aims to ponder over the legal issues relating to surrogacy law by doing analyses of different countries, more particularly of India. The famous cases on “Surrogacy in India” such as “Manji's” and “Balaz v. India” will be discussed in the paper. The current legal framework and provisions related to “Assisted Reproductive Technology (Regulation) Bill and Rules– 2013” and the guidelines of “The Indian Council for Medical Research” will be discussed in the paper. In fact the countries covered for the comparative study provides a different dynamic angle of Surrogacy laws. This article lays a foundation for thinking about various Surrogacy laws of different countries including India, US, Australia, UK, Canada etc. The author's tries to maintain a balance between legal and philosophical aspects of the topic. The research work is exhaustive in nature and legal standards discussed herein are to secure the rule of law. At the end, the paper proposes suggestions and recommendations for the better enforcement of Surrogacy laws worldwide especially for the betterment of populace at large.

Key Words: Surrogacy, India, Scientific, Application, Laws.

Introduction

The genesis of surrogacy can be traced long back in Indian history. Etymologically speaking, the whole process of surrogacy goes back thousands of years. Dating back to the century, when for the first time the case being written about in the Bible and the story of Abraham and his wife Sarah who was infertile. Nature has bestowed the ultimate capacity to propagate a life within women and every woman has the capacity to cherish the experience of motherhood. But, unfortunately there are some women in this world who cannot give birth due to certain physiological conditions.

Legally speaking, “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 surrogate¹. On the other hand it is a practice whereby a woman will become pregnant with the intention of giving the child to someone else upon birth. It is widely believed that if the concept is deeply examined, it is also not untouched from the lacunas of this materialistic world.²

The desire for motherhood leads them to search for alternative solutions, and surrogacy presents itself as the most viable alternative. Surrogacy is a method of assisted reproduction. The word surrogate originates from Latin word surrogates (*substitution*) which means to act in the place of. Further the very word surrogate means “*substitute*”³.

The Historical Background

Scientifically speaking, a surrogacy arrangement or surrogacy agreement is the carrying of a pregnancy for intended parents, but the picture didn't intend to end here. Undoubtedly, Surrogacy is a wonderful scientific breakthrough concept that helps couples to start a family that they could not make on their own.

¹Section 2 (t) Assisted Reproductive Technology (Regulation) Bill and Rules – 2008.

² CRITICAL APPRAISAL OF LEGAL SPECTRUM REGULATING SURROGACY CONTRACT: A COMPARATIVE STUDY WITH SPECIAL REFERENCE TO INDIA at <file:///C:/Users/paras/Desktop/RU/Article-SURROGACY-CONTRACT-MONIKA-BANODE.pdf>.

³Surrogacy from a feminist perspective by Malini Karkal, published in Indian Journal of Medical Science (IJME), available at <http://www. Issuesinmedicalethics.org/054mi15.html?> (Oct. - Dec. 1997 – 5(4)) Also in Nelson Hilde Lindeman, Nelson James Linde mann: Cutting motherhood in two: some suspicions concerning surrogacy. In: Holmes Helen Bequeath, Purdy Laura (Eds.): Feminist perspectives in medical ethics. New York: Hypatia Inc., 1992 3The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India (2010) 4.

Tracing the way back history of India we come across the phenomenon cases such as the case of *Kauravas*. At that time also the concept of surrogacy might be in existence so that a lady (*Gandhari*) was able to become mother of hundred sons which is not possible for normal human being to procure hundred children in one life⁴. Looking at the UK scenario, *Louise Brown* was the first child to be born through IVF (In Vitro Fertilization) technique. Just after two months of this India's first IVF baby was born in Kolkata. Since the concept of legal surrogacy is of recent origin it is unavoidable that different countries will have different stand point on the subject or on the topic. In India after the legalization of surrogacy the concept has developed at an immense rate and now it has become a reproductive tourism destination. Even the Law Commission of India described it as "*Pot of Gold*"⁵.

If methodology is to be believed, this is the best techniques of surrogate motherhood may not be new after all. It explains the one hundred children's of *Dhritarashtra* and *Gandhari* in Mahabharata⁶. The term surrogacy is used when woman carries Pregnancy and gives birth to a baby for another woman. This woman may be the child's genetic mother, or she may carry the pregnancy to deliver after having an embryo, to which she has no genetic relationship, transferred to her uterus⁷. This procedure is legal in several countries including in India where due to high international demand and ready availability of poor surrogates it is reaching industry proportions.

Classification of Surrogacy: Types Defined

Therefore, on the note of defining surrogacy it may be very well noted here that surrogacy is of three broad types:⁸

Traditional Surrogacy- It involves the artificial insemination of the surrogate mother by using the sperm of the intended father.

Gestational Surrogacy- This sort of surrogacy involves the creation of an embryo in a Petri dish and its implementation into the womb of the surrogate mother who carries it to the term.

Donor Surrogacy- In donor surrogacy there is no genetic relationship between the child and the

⁴ Anu, Pawan Kumar et al., Surrogacy and Women's Right to Health in India: Issues and Perspective, Indian Journal of Public Health, (Volume 57, Issue 2, April-June, 2011).

⁵ 228th Law commission report (August 2009).

⁶ State Conference on "*Secure Women for Secure State*" (25th & 26th August 2012) 35.

⁷ *Ibid.*

⁸ Surrogacy & its Legal Aspect available at < <http://Legalsutra.Org/1561/surrogacy-And-Its-Legal-aspect>> accessed on 13/09/2016.

intended parents as the surrogate is inseminated with the sperm, not of the intended father but of an outside donor.

Ethical, Legal and Socio-Economic Issues Involved In Surrogacy

Issues arise when there is a need of change in the conceptualization of any topic. The theory of Surrogacy is surrounded by many questions pertaining to its legality, social need, ethics and much more. The fact cannot be avoided that Surrogacy is an option for those people who are in search to fulfill their desirable needs. On one hand the poor surrogate mother gets the needed money and on other hand an infertile couple gets their desired biologically baby. In this way, the whole process of Surrogacy helps the country to earn foreign currency. But the reality is different. Because of lack of proper legislation and laws in the country, both intended parents and surrogate mothers are exploited. The profit is going in the pockets of middlemen and commercial agencies who are taking benefit of our weak legislation.

The poor illiterate women of rural background are exploited for such deals either by their spouse or middlemen for making money. It cannot be avoided that if the women's are using for such deals, they are having no right on decision regarding their own body and life.

In India there is no provision of psychological screening or legal counseling, which is mandatory in USA. There are a 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.⁹

Henceforth, there is a strict need for separate Surrogacy Laws in our country to protect the rights of surrogate mother and protect them from exploitations.

Comparative Study of Surrogacy Laws across the World: A Practical Approach

Every country in the world has a different standpoint on surrogacy. The Indian society and legal system differs from the rest of the world. The concept of surrogacy is not a new phenomenon in India. Way back in 1978, the concept of surrogacy was known to the Indian culture when the World's second and India's first IVF (in vitro fertilization) baby *kanupriya* was born in Kolkata on 3rd, Oct, 1978 just two months after the birth of the World's first IVF boy, *Louise Brown* in

Great Britain on 25th July 1978¹⁰.

Commercial surrogacy has been banned in several countries such as United Kingdom¹¹, Finland, Canada¹², France¹³, Hungary, Iceland, Italy, Pakistan, and Serbia. However, in India, it has been legal since 2002¹⁴ and by 2012 turned into a booming industry worth \$2.5 billion¹⁵. India has probably recorded the biggest growth in Assisted Reproductive Technology (ART) centres and the number of ART cycles being performed in our country has steadily risen over the last decade¹⁶. Factors such as illiteracy, gender inequality, and poverty have led to this sudden upsurge.

United States

Historically speaking, in the United States surrogacy is governed at the state level. In the aftermath of the infamous Baby M case¹⁷ in the late 1980s in which a "traditional surrogate" decided to renege on her surrogacy contract and fight to keep the genetically related baby she has carried a number of state legislatures passed laws prohibiting surrogacy to ensure that a similar scenario would never be repeated. Due to the implication of having federal set up, United States has varied laws on surrogacy, but overall they seem to have promoted a laissez faire approach towards legislatively regulating surrogacy arrangements.

This part deals with characteristics of the legislations relating to ART (Assisted Reproductive Technology) and surrogacy in United States. Unlike the UK, there is no uniform national position on surrogacy in the US¹⁸. In USA, surrogacy is governed by disparate state laws which fall into four broad categories of legal policy 1) **prohibition** 2) **inaction** 3) **status regulation** and 4) **Contractual ordering**¹⁹. The USA's Law on Surrogacy is very complicated as different

⁹The Associated Press (2007-12-30) "India's surrogate mother business raises questions of global ethics" [Last accessed on 2016 Sept 13]. Available from: <<http://www.nydailynews.com/news/world/india-surrogate-motherbusiness-raises-questions-global-ethics-article-1.276982>>.

¹⁰ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, 35 Journal of Women in Culture and Society 2013.

¹¹ European Centre for Law and Justice, Surrogacy Motherhood: A Violation of Human Rights, (Report Presented at the Council of Europe, Strasbourg, April 26, 2012).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Surrogacy Arrangement Act, 1985.

¹⁵ Assisted Human Reproduction Act, S.C. 2004, c.2

¹⁶ French Civil Code, 1804.

¹⁷ 537 A.2d 1227, 109 N.J. 396 (N.J. 1988).

¹⁸ Rachel Cook and Shelley Day Sclater "Surrogate Motherhood- International Perspective" (2003) 2.

¹⁹ For a detailed description of several models of state policy in the surrogacy context, see US Congress, Office of Technology Assessment, Infertility: Medical and Social choices (1988).

states have different laws. The law of surrogate motherhood in the United States varies from state to state. In some states, surrogacy is banned and in some it can be enforced. Since USA is a federal country, liberty is given to states to legislate on surrogacy. The US Supreme Court could base central legislations on the commerce clause, substantive due process or as the right to surrogacy being a subset of the right to procreations²⁰.

Moreover in US, there is no overwhelming Act on surrogacy, apart from an *American Bar Association Model Act Governing Assisted Reproductive Technology, 2008*²¹, which promoted the case for uniform law²².

Some states have enacted comprehensive statutes that recognize and regulate surrogacy, authorizing court approved surrogacy contracts that contain mandatory terms and create preordained statute relationship²³.

United Kingdom

Human Fertilization and Embryology Act, 1990

The Human Fertilization and Embryology, (HEF, Act 1990) applies to all of the United Kingdom and is the Act which regulates parental orders. Other aspects of Surrogacy are regulated by the *Surrogacy Arrangements Act 1998*. There are no international agreements or Conventions which regulates how surrogacy should be managed between countries so anyone considering entering into an inter country surrogacy arrangements must remember that if they reside in the UK, they are subject to UK law and the definitions which underlie it. In England and Wales as such is not illegal. Neither the intended parents nor the surrogate commit an offence. However, it is illegal on the part of the person who does it for commercial purpose²⁴. Surrogacy is legal in the UK, although the law does not recognize it as a binding agreement on either of the parties

²⁰ *Ibid.*

²¹ American Bar Association, American Bar Association, Model Act Governing, Assisted Reproductive technology, 2008 A.B.A. sec Fam L Committee report & Generic Tech, Available at <[Http://www.abnet.org/family/committees/ Artmodelact.pdf](http://www.abnet.org/family/committees/artmodelact.pdf)> accessed on 13/09/2016.

²² Aruna Nigam et al., Surrogacy: An Indian Perspective, Tropical Clinics of Obstetrics and Gynecology, available at: <http://www.tcog.in/articles/1/1/surrogacy-an-indian-perspective.html#10>, Published on Oct. 7, 2013.

²³ These states include Florida, New Hampshire and Virginia, (See eg, Fla. State Anna 742.16, 1996).

²⁴ S.2 of Surrogacy Arrangements Act 1985(1) No person shall on a commercial basis do any of the following acts in the United kingdom, that is- A) Initiate or take part in any negotiations with a view to the making of a surrogacy arrangements and no person shall in the UK knowingly cause another to any of the act of surrogacy on a commercial basis.

involved during the period preceding and immediately after the birth of the child²⁵. In fact UK couples who are planning a child through surrogacy are looking abroad to countries where surrogacy is legal.

The *Surrogacy Arrangements Act 1985*, which was hastily drafted following concerns raised by the "Baby Cotton Case" (box), prohibits commercial (but not voluntary) surrogacy agencies and outlaws advertising for or about surrogacy.²⁶ Only the commissioning couples and the host surrogate may initiate, negotiate, or compile information to make a surrogacy arrangement. The act does not prohibit payments to surrogate mothers. It has been supplemented by clauses relating surrogacy in the *Human Fertilization and Embryology Act 1990*, which restricted "licensable activity" to premises licensed by the Human Fertilization and Embryology Authority.²⁷ These activities include the creation or use of an embryo outside the body and the use of donated eggs, sperm, or embryos.

India

Commercial surrogacy is legal in India. Surrogacy in India is unregulated as they yet do not have legislations controlling surrogacy although the *Indian Council of Medical Research (ICMR)* has set "National Guidelines"²⁸ to regulate surrogacy, these are simply guidelines. This means that surrogate mothers need to sign a "contract" with the childless couple. Moreover there are no stipulations as to what will happen if this "contract" is violated. Whether these contracts are enforceable is debatable.

In India, under sec 23 of the *Indian Contract Act, 1872* a surrogate agreement may be declared void on the considerations being immoral or against public policy.²⁹ Not only this but also the concept of surrogacy being amalgamated in Indian society as a commercial vehicle and surrogate tourism for the foreign couples. The cost is substantially less than they would spend in developed countries like the USA and the UK. There is no paper work involved, the couples don't have to

²⁵Legal Issues & Surrogacy Laws available at <<http://www.britishsurrogacycentre.com/legalissues/>> accessed on 13/09/2016.

²⁶British Medical Association Annual Representative Meeting Report (1987. BMJ 1985;295(suppl))

²⁷British Medical Association Surrogate motherhood Report of the board of science and education (London: BMA Publications, 1987).

²⁸National Guidelines for Accreditation, Supervision and Regulations of ART clinics in India (2005, ICMR, New Delhi).

²⁹Sec 23 what considerations and objects are lawful.

go through the lawyers, and it's a clean issue, there is no litigation³⁰. The legal perspective on surrogacy has to be essentially coloured by moral & ethical overtones on which the public policy considerations are grounded. Since the courts need to fight with such issue, it is important to delineate the major ethical issues involved³¹.

The Draft Assisted Reproductive Technology Regulation Bill and Rules (2013) intends to regulate an "industry" in India that has been expanding by leaps and bounds, mainly on account of a growing demand by foreign couples in search of relatively cheap surrogacy arrangements.

This commentary argues that there has been next to no public debate on the ethical, social and medical questions around infertility and surrogacy in our context, and makes a beginning in this direction.

Indian Council of Medical Research Guidelines, 2005

The Indian Council for Medical Research has given Guidelines in the year 2005 regulating Assisted Reproductive Technology procedures. In the absence of any law to govern surrogacy, the Indian Council of Medical Research Guidelines, 2005 for accreditation, supervision and regulation of ART clinics in India are often violated. Exploitation, extortion and ethical abuses in surrogacy trafficking are widespread and surrogate mothers are misused with impunity.

Cases Relating to Surrogacy in India

The India surrogacy journey can be said to have actually begun in 2002, when the Supreme Court, the apex Court of the Country, acknowledged commercial surrogacy in India as a legal, even though India's first surrogate baby was delivered on June 23rd, 1994.³²

Subsequently, by virtue of *Baby Manji Yamada V/s Union of India*³³ in this case Baby Manji was born to a surrogate mother through in vitro fertilization using a Japanese man's sperm and an egg from an unknown donor at Anand. In less than a month, 'Baby Manji' has already seen fierce legal battles in two constitutional courts, Rajasthan High Court and now in Supreme Court, where an NGO has raised questions on legal propriety of surrogacy and the child's nationality. Anxious for the outcome are her Japanese father and grandmother. Therefore the writ of Habeas

³⁰ India's surrogate mother industry, By Poonam Taneja, BBC, News (2010).

³¹ Sharma Raghav, "An International, Moral & Legal Perspective: The Call For Legalization of Surrogacy In India" (2011, NLU- Law Journal 2000) 1.

³² Indian Surrogacy Journey (Smith, 2011) available at <<http://Www.surrogacyclinics.com/tag/CommercialSurrogacy-In-India>> accessed on 13/09/2016.

³³ JT 2008 (11) SCC 150.

Corpus has been filed claiming that money making racket is perpetuated in the name of the surrogacy.

Therefore, Apex Court held that commercial surrogacy is permitted in India and consequently that has increased the international confidence in going in for surrogacy in India.

Very recently, in the case of *Jan Balaz V/s Union of India*³⁴ the Gujarat High Court has come to a decision that the child born in India to a surrogate mother, an Indian national whose biological father is a foreign national, would get citizenship in India by birth. Emotional and legal relationship of the surrogate child with biological parents, moral and ethical issues is vital importance. The crux of this case is that the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand districts.

Conclusion and Specific Recommendations

The growing demand for surrogacy in India has raised various issues which include rights of surrogate mother, rights of infertile parents, enforcement of surrogacy contract etc. Surrogacy is not a simple arrangement; it is extremely complex. The relationship can be stressful, overwhelming and intense, patience and perseverance are must.

With the advancement in the technology and medical sciences, to avoid the intricate complications arising to surrogate mother should not be neglected. Legitimacy of the child is another important aspect that needs to be dealt. These problem need to be examined closely before enacting the legislations. Moreover, in the absence of any comprehensive law in the area it may give rise many immoral practices, legal complexities etc.

The 228th Law Commission Report of India also recommends for the need for legislations in India to regulate the assisted reproductive technology clinics as well as the rights and obligations of the parties to surrogacy. So many emotional and psychological issues are involved in the surrogate arrangement. The failure to acknowledge labor is blind folly for those who wish for equity in women's social situation."³⁵ Even at last we can say that the good step was taken by Union Home Ministry in the year 2013 to regulate surrogacy in India and this would definitely enhance the mindset of people for surrogacy.

³⁴ AIR 2010 Gujarat 21.

³⁵ Christian L. Kieran, "Surrogacy: A Last Resort Alternative for Infertile Women or A Commodification of Women's Bodies & Children", (1997, London Women's Law Journal) 11.

Specific Recommendations

- Paramount consideration should be given to the welfare of the child.
- Commercial surrogacy should not be legalized fully, only right to enjoy parenthood should be there.
- The Artificial Reproductive Technology clinics and practice should be regulated by the proper legislations.
- Most importantly, the rights and obligations of the biological parents, surrogate mother should be determined by the statute not by the contract. Such a socially sensitive issue should not be regulated by contractual relations.
- There is need to re draft the ART Bill in compliance with public policy.