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## LAW FOR SURROGACY: NEED OF THE 21<sup>ST</sup> CENTURY

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### ABSTRACT

*This paper focuses on the various issues related to Surrogacy like historical, ethical, economical, legal etc. In India there is no specific law pertaining to it. This paper is an attempt to bring out human angle to a business model. As this business model rotates around the life, ethics and sentiment of many people, besides finance, so it requires special attention from various sectors like government, NGOs, medical practitioners.*

### KEY WORDS

Assisted Reproductive Technique (ART), in-vitro fertilization, medical tourism, surrogacy, outsourcing.

### INTRODUCTION

Last decade of 20<sup>th</sup> century witnessed revolution in sectors like I.T. and BPO, which turned out to be boon for India, as it was being outsourced here because of availability of skills and human resources. Health care also picked up and helped in bringing foreign exchange to the country. In current scenario, when IT and BPO industries are experiencing slowdown in growth, "Medical Tourism" is drawing attention of the world towards India. There has been an increase in flow of foreign tourists and NRIs for the purpose of availing various healthcare facilities of world class standard, in India, at cheaper rates. One of the booming sectors in medical tourism is surrogacy, which is bringing in many couples from West to India in the search of parenthood. Being faced with infertility can pose a serious challenge to our sense of existence in the world.<sup>i</sup> Surrogacy is a controversial combination of biology and international commerce.<sup>ii</sup> It has become half a billion dollar business in India. There is robust growth in surrogacy in India, with the number of surrogate mothers nearly doubling in a year. There is considerable demand for this service. By the Year 2020, it will become a flourishing trade, bringing in lot of foreign currencies. Many countries have imposed ban on commercial surrogacy whereas in certain countries, surrogacy is permitted with certain restrictions. In India, there is no specific law relating to surrogacy, only the guidelines framed by the ICMR (Indian Council of Medical Research) and the Ministry of Health and Family Welfare in 2005. These guidelines have no Constitutional validity and are ambiguous. The much hyped case of baby **Manji Yamada** brought to the forefront the various lacunae in the Indian Legal System and its inability to deal with conflicts arising from it.

### WHAT IS SURROGACY?

Surrogacy occurs when a woman who is not pregnant agrees to bear a child for another/others who will parent the child.

There are two types of surrogacy.

1. **GENETIC/ FULL SURROGACY:** Here, surrogate provides her egg and the intended father provides the sperm and she carries the pregnancy.
2. **GESTATIONAL SURROGACY:** The surrogate carries the pregnancy but genetic material (sperm and egg) are provided by donors - the intended parents if possible, others if not. Gestational surrogacy has been established by many State courts and legislatures as a legitimate means of curing female infertility, while full surrogacy has generally been either prohibited or deemed unenforceable.<sup>iii</sup>

The intending parents approach a clinic which provides the facility of surrogacy. Three contracts are signed, one between the surrogate and the intending parents, second between the intending parents and the service provider i.e. clinic and the third one between the surrogate and the clinic. The clinic makes an arrangement for a healthy surrogate. The couple agrees to bear all the expenses, incurred during the whole procedure. The surrogate commits to leading a healthy lifestyle while bearing the child of the couple and not doing anything which would harm the child in any way. Also, to hand over the child to the couple, at once it is born. And the clinic contract to take care of all the procedures, right from the time of in-vitro fertilization to the handling of the baby to the couple. The clinic also enters into a contract with the surrogate regarding the payment for her services. Once the embryo is properly fixed in the uterus of the surrogate then the couple leaves. The surrogate then lives under the care of the clinic, till the delivery of the new born. The couple returns at the time of delivery, to get the baby.

### NEED OF SURROGACY

Surrogacy has been prevalent in Indian society since time immemorial. Mythological surrogate mothers are well known. Kunti made Pandu a proud father of five children though he had no biological relations with them. Even Devaki could be considered as a surrogate mother of Lord Krishna, as she abandoned him on birth and Yashoda brought him up. It is one of the methods of Assisted Reproduction. Assisted reproduction is the technique(ART), wherein if a couple faces any problem in conceiving in natural way, than they are assisted through various methods like artificial insemination, in-vitro fertilization (egg and sperm are fertilized in test tube under artificial environment and the resulting embryo is planted in the uterus/ womb)<sup>iv</sup> etc.

Surrogacy enables:

- Those couples, who cannot conceive or carry a pregnancy to term, take the services of surrogate, who carry their child in the uterus and then hand it over to the genetic parents, post-delivery; or
- Gay couples to have their own child by in-vitro fertilization (IVF); or
- People who do not want to marry but wish to have their legal heir.

It is even beneficial for surrogates as they are paid somewhere between US\$3000-US\$6000, nearly ten times of their family's annual income. This comes out as fortune in a country where the average per capita income is US\$500.

### INDIA: A HOT DESTINATION

Due to strict rules and high cost, (in India IVF and ART costs somewhere \$10,000-\$20,000 whereas same services in west costs to round about \$80,000) western countries are heading to Asia, particularly India.<sup>v</sup> Dr. Nayana Patel has turned Anand from "milk capital of India" to centre of commercial surrogacy. Surrogacy in India is, roughly, \$500million-a-year business and is growing at fast pace.

India is most preferred destination among Asian countries because of

- Cheap medical facilities as compared to west,
- Availability of advanced health care facilities and English speaking medical practitioners.
- Ready availability of women willing to rent their wombs to childless couples.
- Also Indians have a great commitment in handing over the newborn to the biological parents immediately after birth.

### BABY MANJI: INDIA'S FIRST SURROGATE - MOTHER ORPHAN

A Japanese couple, with the intention to have a child, came to Anand. The wife was unable to donate egg, so the egg of unknown donor was taken and fertilized (in-vitro fertilization) with the sperm of the husband. The resultant embryo was implanted in a surrogate's womb. Just three months before the birth of child, the intended parents got divorced. The ex-wife refused to accept the new born as she had no genetic or emotional bonding with her. After giving birth the surrogate mother too abandoned the baby. Baby Manji Yamada, though had three mothers, on record, yet she became motherless after her birth.

Baby Manji's father was keen on taking her back to Japan but to make the situation worse, a NGO jumped in, debating the issue of nationality of the child and relating it to child trafficking.

After fighting a legal battle for three months, much to the relief of father and grandmother, Supreme Court issued a direction to the Indian Government to grant the baby a travel certificate. On humanitarian ground the Japanese Government issued a one year visa to her, enabling her grandmother to bring her home, to Japan.

Though temporary relief has been provided, yet there are many issues which need to be resolved. This case has thrown open many questions and calls for regulatory laws governing surrogacy in India.

### LEGAL GUIDANCE

There is great growth story lying ahead for already booming surrogacy industry. According to WHO there're 13-19 million infertile couples and out of those, an estimated 8% infertile couples opt for medical intervention. But to reap the profit of this business, India needs to have proper regulatory laws as gestational surrogacy contracts are unenforceable, unlike other business contracts, which enable any of the three parties to rescind the contract leaving the destiny of the child in lurch.

The courts in Germany unanimously took a strong stand against surrogacy and found the contracts to be void (contradiction with public policy).<sup>vi</sup> The situation is same all over the World. Agreements signed by all the three parties have no legal enforceability.

Baby Manji's case has brought to the focus, the loopholes in the ICMR guidelines. The following issues need to be dealt while formulating laws governing surrogacy:-

1. If a child is born handicapped, the parents may back out from accepting it. In such cases, the surrogate mother may have to bear the brunt, for no fault of her, as that is not her genes. And if she also backs out, what will be the right of the child.
2. The pregnancy term is of 9 months and with divorce rate going high every year, (in USA, it is approximately 50%) what will be the fate of the child, if during this duration both parents decide to separate and go their own ways. If both deny accepting the child, what will happen to it, since the mother is only contributing genetically and not carrying the baby, so the psychological bond is missing. It would become more serious in the case where genetic material is not contributed by the intending couples. The new clause has to be added as to who takes care of the baby in the event of a divorce, so that there should not be another Manji.
3. The clinics, that provide ART (Assisted Reproductive Techniques), and the biological parents take good care of surrogate mother in prenatal stage but she needs equal care in postnatal period to regain health and recover from postpartum blues, which nobody bothers for. As she comes from financially weak background (commercial surrogate) she would not spend the money earned, on her, but rather spend on her family and children.
4. Some complications, developed due to pregnancy, may lead to the death of surrogate. In such case there should be a law, compelling the intended parent to take care of her motherless children, born from her marriage.
5. In the ICMR guidelines, there is mention that the age of surrogate mothers should be between 21- 45 years. But that does not prevent any minor from becoming a surrogate.
6. According to the ICMR guidelines, a child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting that the child is theirs. Adoption is a very lengthy and cumbersome process in India and DNA fingerprinting is a costly affair. The only legal recognition of the child's parentage is the birth certificate, where birth mother's name is used. If birth mother refuses to hand over the child, there is very less which doctor or intending parents could do.
7. India has an estimated 2,00,000 IVF clinics, but none has a license. Since money involved is huge, it lures even non-trained medical practitioner to enter in this business. Lack of any licensing authority is leading to opening up of many clinics in India like mushrooms. In the absence of proper quality check on these clinics, the inadequate machineries and the inexperienced doctors pose a great threat on the life of surrogate and the child.<sup>vii</sup>
8. This might give rise to child trafficking.

### CRITICISMS

Though surrogacy is a flourishing trade yet it has attracted much criticism from different areas of society. The surrogate is treated as a means to an end and not as a person; hence it is taken as exploitative and immoral.<sup>viii</sup>

In UK and USA, surrogates are not paid, only altruism is practiced. In Indian society too it is looked down so the commercial surrogates hide the truth from their relatives.

In the words of HEDLEY J. "Surrogacy remains an ethically controversial area and different societies and different nations take radically different stances in their approach to it. Under some legal systems (e g Italy, Germany, Turkey) it is simply prohibited. In others, commercial surrogacy agreements are permitted (e g California, Ukraine, India) and perhaps sometimes even encouraged. The position in the United Kingdom lies between those extremes: whilst commercial surrogacy is unlawful, surrogacy itself is not but no surrogacy agreement is legally enforceable as such. Each sovereign state will have its own preferred approach and its own regulatory system. Those who enter into surrogacy agreements abroad will have to take account both of the law of that state and of the United Kingdom. As this case vividly demonstrates, not only may (and probably will) those laws be different but they may be incompatible to the point of mutual contradiction".<sup>ix</sup>

The contradiction in the laws of two countries reflects the significant conflict of private international law which is raising lots of difficulties. It makes the children born out of surrogacy stateless and parentless, till the time they are adopted under the lengthy and cumbersome procedure. Many commentators have likened the experience of children and birth mothers in surrogacy arrangements to children and relinquishing mothers in adoption, and point to the potential psychological and social harm that may result.<sup>x</sup>

In the era of globalization and widening gap between rich and poor, some people view it as an exploitation of women of third world countries through global inequality. Some feel it is a kind of economic exploitation as foreign women unwilling or unable to pay high western fees happily exploit women of third world countries at a 1/8th of the price it would cost in their country. Also surrogates are poor hence they have unequal bargaining power than the well-off, rich infertile couple.

It will also promote gay marriages and weaken the institution of marriage as people can have legal, biological child without getting married. Current baby-making market conditions have also had a direct impact on the bargaining conditions for men looking to create motherless families. Review of current legal disputes reveals that the cure logic and its manifestation, the gestational/full surrogacy distinction, create complicated and costly bargaining conditions for males seeking to create motherless families. The current legal situation of single and gay men seeking to create families through the baby-making markets exemplifies how complicated bargaining in the shadow of the cure paradigm has become.<sup>xi</sup> The ICMR guidelines allow the gay couples to become parents through this technology. According to Indian law gay marriages are illegal. If the ICMR guidelines take the shape of law then it would be repugnant and inconsistent to the above law, legalizing the gay marriages.<sup>xii</sup>

It will make parenthood as commodity as these services are taken up by affluent Indian couples or NRIs or foreigners. Pregnancy and motherhood demands lot of time and energy. Body of mother goes through lot of physical and psychological change. Today's ambitious, working women might not have the will and time to go for it. But if they want to have their own child, with their increased buying power, they would be inclined to take the services of commercial surrogate, thus not putting at stake their body and career. So surrogacy, which should be the solution to the childless couple, would end up as a commercial commodity as in early sixties, rich Americans, was taking the services of wet nurses to nurse their babies.

Commercial surrogacy lures many poor women to put their health at risk as it gives good financial gains, endangering the future of their own children.

In India six embryos are implanted in a surrogate womb whereas in other countries it is limited to three. This creates the risk of multiple pregnancies and can lead to severe complications and even the surrogate's death.

Since economics is attached to it, many a time's fertility doctor advice for surrogacy option even when it could be done by simple egg donation.

Sometimes without the couple's knowledge, their egg or sperm could be sold to people looking for desirable trait-like fair skinned baby.

## CONCLUSION

While commercial surrogacy is banned in many countries like Spain, Australia, Italy, and China and permitted with restrictions in the US, France and Germany, the Indian Government is yet to formulate any law<sup>xiii</sup>. With the number of IVF (In-vitro fertilization) clinics growing day by day, at present estimated to be 200,000 in number, it is the need of the hour to bring in regulatory laws that promote surrogacy but protect mother and child's right.

The Assisted Reproductive Technologies or ART, (regulation) Bill has been prepared by a 15 member committee including experts from ICMR and the Ministry of Health and Family Welfare. It has been formed after several rounds of discussion with public and affecting parties. It was supposed to be tabled in the winter session (2008) of the Lok Sabha. This bill deals with issues such as the continued scrutiny and licensing of clinics, quality standards and practices at these centers, certification of sperm banks, confidentiality on sperm donation, rights and liabilities of surrogate and parenting couples and above all the nationality and rights of the child. The proposed bill when it becomes law, will give constitutional validity to the guidelines of ICMR and the National Academy of Medical Sciences (NAMS)<sup>xiv</sup>.

After the case of Baby Manji, many changes have been brought in the ICMR guidelines.

The surrogate baby of a separated or divorced couple will remain their "legitimate child" if both parties had consented to assisted reproductive technology (ART) to have the baby. The baby's birth certificate will have the name(s) of the genetic parents/parent. Thus even if one parent has contributed genetically, his/her name would be on the birth certificate of the new born, erasing the need of cumbersome and costly procedure of DNA mapping or adoption. The child does not have a complete knowledge of the complex web of interrelationships which contribute to his or her identity.<sup>xv</sup>

- A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple seeking surrogacy in India, will have to appoint a local guardian who will be legally responsible for the care of the surrogate mother during and after pregnancy until the baby is delivered to the parent/parents or the local guardian.
- No woman shall act as a surrogate for more than three successful live births in her life.
- No woman shall donate oocytes more than six times in her life, with not less than a three month interval between oocyte pick-ups.
- Recently the maximum age of surrogate has been brought down to 35 from 45. Though this would throw out a large chunk of desiring women, wanting to be surrogate yet it would lessen the complications that arise due to pregnancy at higher age, thus saving the lives of many surrogate and child.

In addition to bringing in above changes in ICMR guidelines, to protect the future of the child born out of surrogacy but not accepted by its genetic parents because of divorce or birth of handicapped child or for whatsoever reason, the governing bodies should form a Trust under Central Adoption Resource Authority (CARA) wherein the intending parents would have to deposit money, at the time of entering into the agreement, to insure the future of the child. The multiplied sum would be handed over to the child after attaining the age of maturity, irrespective of being adopted or abandoned.

ART (Regulation) Bill is presently with Ministry Of Law and Justice. Before giving it clearance to be tabled in Parliament, it would be posted on the website (<http://lawmin.nic.in>) of Ministry Of Law and Justice for public feedback

It is high time for Indian Govt. to enact laws regulating surrogacy and related IVF/ART technologies to promote surrogacy and protect all the parties involved.

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