Surrogacy in India and Socio-Legal Challenges

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ABSTRACT

At a glance, surrogacy appears like a pretty alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long-wanted biologically related baby and the country receives foreign currency, but the real picture exposes the unpleasant truth. Due to want of appropriate legislation, both surrogate mothers and projected parents are somehow exploited and the revenue is made by middlemen and commercial agencies. There is no transparency in the entire system, and the chance of getting tangled in legal problems is there due to irregular guidelines governing surrogacy in India.

Keywords
Surrogacy, infertile, commercial, altruistic.

1. INTRODUCTION

The plain meaning of the word “surrogate” is “deputy or substitute”. “Surrogate mother” is fundamentally a “substitute mother”, in which she carries a pregnancy for another couple. It is done through contract between the “surrogate mother” and “projected parents”.

Few women are incapable to conceive and bring a child for several reasons such as, the failure of the embryo to implant, repetitive miscarriages, pelvic disorder, hysterectomy, high blood pressure, liver and heart diseases. In such cases, the only way is to go either for adoption or ART.

Generally, the term “surrogate mother” speaks of a woman who decides to bear a child for a sterile couple. Firstly, in the instance of a couple, where the wife is sterile, the child may be sought by the couple from a baby-bearer woman by insemination (natural or artificial) of the latter with the sperm of the male couple. After the delivery of the child the impregnated woman gives the child to the infertile couple. This type of surrogate mother is known as “half surrogate mother”. The “half surrogate mother”, who subjects herself to natural insemination may be described as natural law endowed half surrogate mother; and the “half surrogate mother”, who subjects herself to artificial insemination may be called the medical science endowed half surrogate mother. Secondly, in the instance of a couple, where both the husband and the wife are impotent but not sterile, the said couple may seek a child by impregnating baby-bearer woman through artificial devise with both sperm and ova of the couple. The baby-bearer mother in this case is known as “whole surrogate mother”. Thirdly, in the instance of a couple, where both husband and wife are impotent and sterile, they will have to seek the support of a sperm donor. A baby-bearer woman shall be artificially inseminated with donor semen and after giving birth to a child, as per their agreement she will have to hand over the child to the couple. The baby-bearer mother in this case is known as “AID surrogate mother”.

Thus, the recent development in medical science has brought three major forms of surrogate mothers. They are (a) half surrogate mother, (b) whole surrogate mother and (c) AID surrogate mother. The elementary shared factor among all the three forms of surrogate mothers is artificial insemination.

2. SURROGACY IN INDIA

2.1 Manji Yamada Case

Baby Manji is the leading case relating to the development of surrogacy laws in India. This case has

1 “Projected Parents” here refers to the infertile couple who are unable to have their own biological child.
3 Assisted Reproductive Technology (ART) is a method in which pregnancy is caused by artificial or partially artificial means. The most commonly used ART procedures are Intrauterine Insemination (IUI), In Vitro Fertilization (IVF), Zygote Intrafallopian Transfer (ZIFT), Tubal Embryo Transfer (TET), Zygote Intrafallopian Transfer (ZIFT) and Gestational Surrogacy.
5 Ibid, at p. 425.
attracted world-wide attention and has exposed multifaceted legal issues concerning surrogacy. Mr. Ikufumi Yamada (husband) and Miss Yuki Yamada (wife) were infertile couple who cannot conceive child. They came to India in the year of 2007 and had chosen a baby-bearer woman from Gujarat to act as surrogate mother. A surrogacy agreement was also entered into between commissioned parents and the surrogate mother. It is reported that the sperm of husband Mr. Ikufumi Yamada and a donor egg were used for the fertilization process. The embryo was implanted in the surrogate mother and thereafter the commissioned parents of baby Manji left India for Japan. Subsequently, it was found that the commissioned parents separated due to some matrimonial problems. The custody of Baby Manji, who born on 25th July, 2008 was refused by both Miss. Yuki Yamada and the surrogate mother. Mr. Ikufumi Yamada was interested in the custody of the baby Manji. He came to India along with his mother Emiko Yamada and consequently the child was kept in their custody. But, while carrying the baby Manji to Japan, the Japanese embassy refused to issue a passport to Manji saying that due to her birth in India, she became an Indian citizen and thus an Indian passport and a no-objection certificate is needed to leave the country. Whereas, under Indian laws, an infant child’s passport has to be linked to the mother’s and this was not possible as both the Yuki and the surrogate mother refused to take custody of the baby. On 3rd August, 2008 the Manji was moved to a hospital in Jaipur due to law and order situation in Gujarat. Proper care and protection was provided to her with much needed care including breastfeeding by a woman. Mr. Yamada had to return to Japan due to expiration of his visa. Birth Certificate was also issued indicating the name of the genetic father, Mr. Ikufumi Yamada.

An NGO named SATYa filed a writ petition to issue a Writ of Habeas Corpus and to produce the child before the Rajasthan High Court. The contention of the NGO was that in the name of the surrogacy lot of irregularities are being committed. As there is no law regulating surrogacy in India it is being generally misused and turned into money making racket. Therefore, it was prayed that the Government of India should enact appropriate laws relating to surrogacy and prohibit the exploitation of surrogate mother and the infertile couple. Consequently, the Rajasthan High Court issued direction to the Rajasthan Police demanding the baby to be produced before it within four weeks and sent show-cause notices to the Federal and State Governments. On August 13, 2008 Emiko Yamada, the mother of Mr. Ikufumi Yamada moved before the Supreme Court of India praying it to intervene and maintain justice.

The Supreme Court on the basis of the petition filed by Emiko Yamada granted the custody of baby Manji to her and issued notice to the Government of India. It also sought the response from the Indian Council for Medical Research (ICMR), since Yamada’s lawyer contended that National Guidelines for Accreditation Supervision and Regulation of ART Clinics in India, 2005 directed the baby as a legitimate child of the biological father. The court also issued a notice to SATYA and made it as the third party.

The Supreme Court of India observed that “surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but handover to a contracted party. She may be the child’s genetic mother or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them”. The case was disposed of with a direction that the victim may produce his/her before the Commission constituted under the Commissions for Protection of Children Rights Act, 2005. Consequently, Emiko Yamada approached before the Commission demanding for permission to take baby Manji to Japan. As already discussed earlier, baby Manji was not allowed to leave India and go to Japan, because she held neither an Indian nor a Japanese passport. However, this issue was resolved after the Japanese Government, on humanitarian grounds, issued a one-year visa to her. Baby Manji finally went Japan with her Grandmother Emiko Yamada ending months of ambiguity over her fate. According to the Japanese authorities, it is possible for baby Manji to become a citizen of Japan once a parent-child relationship was established, either by Mr. Yamada recognizing his paternity or through adoption.

In Manji’s case, though the Supreme Court of India could not pass any appropriate guidelines regarding surrogacy in India, the Court did recognize the concept of surrogacy. In fact, the court underlined the significance and the requisite of the institution of surrogacy in the interest of childless parents.

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8 Ibid, Para 5

9 2008(3) LS 194 (SC); Supreme 2008(7) P 287; JT 2008(11) P 150; AIR (SCW) 2008 P 6964, Para 5

10 The Act, 2005 under Chapter III conferred number of powers and functions to the Commission to safe guard the interest of the child particularly distress, marginalized, children conflict with law, Juveniles, children without family, children affected terrorism, communal violence, riots natural disasters, domestic violence, HIV/ Aids, Trafficking, Maltreatment and Pornography and Prostitution etc.
2.2 Present Position

India is evolving as a frontrunner in international surrogacy and a sought-after destination in surrogacy-related fertility tourism. Indian surrogates have been progressively more famous with fertile couples in developed nations because of the comparatively low cost. At the same time, Indian clinics are becoming more competitive both in the pricing, hiring and retention of Indian females as surrogates. Clinic charges in India are about one third of the total price charged in the developed nation like United Kingdom. Though, in 2008, the Supreme Court of India in the Manji's case has permitted the commercial surrogacy in India with a direction to the Union Government to pass an appropriate Law governing Surrogacy in India, no such law has been enacted. At present the Surrogacy Contract is guided by the Indian Contract Act, 1872 and the guidelines of the Assisted Reproductive Technique (ART) Clinics. Giving due regard to the apex court directions, the Legislature has drafted ART BILL, 2008 which is still pending and looking present scenario of Indian Parliament it is not possible to say when we should the said bill to become law.

International Surrogacy encompasses bilateral issues, where the laws of both the nations have to be at par with each other else the concerns and interests of parties involved will remain unresolved. Thus, giving due regard to the interest of both the parties and in order to avoid the commercialization of the human reproductive system, abuse of women and the commodification of Children, the Law Commission of India has submitted its 228th report on “Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy” with the following relevant suggestions:

a) Surrogacy arrangement will continue to be administered by contract between parties, which

will encompass all the terms wanting consent of surrogate mother to bear child, medical techniques of artificial insemination, contract of her husband and other family members for the same, indemnification of all reasonable expenses for carrying child, agreement to hand over the child born to the commissioning parent(s), etc.

b) The surrogacy arrangement mentioned in the contract should not be for commercial purposes.

c) The surrogacy agreement should include financial support for surrogate child in the occasion of death of the commissioning couple before delivery of the child, or divorce between the commissioning parents and subsequent willingness of none to take custody of the child.

d) A surrogacy agreement must take care of life insurance cover for surrogate mother.

e) One of the commissioning parents should be a donor as well, in order to bring the bond of love and affection with the child and also to avoid the chances of various kinds of child-abuse, which have been noticed in cases of adoptions. In case the commissioning parent is single, he/she should be a donor in order to have a surrogate child. Otherwise, adoption is the only way to have a child.

f) Surrogacy law itself should recognize a surrogate child to be the legitimate child of the intended parent(s) without there being any need for any declaration of guardian or adoption.

g) The birth certificate of the child should contain the name(s) of the intended parent(s) only. It is required in order to avoid any future ambiguity.

h) Right to privacy of donor as well as surrogate mother should be essentially maintained.

i) Sex-selective surrogacy should be strictly restricted.

j) All the cases of abortions of surrogate child should be administered by the Medical Termination of Pregnancy Act 1971.

The Report has come largely in support of legalizing Surrogacy in India, emphasizing on proper way of operating surrogacy in India. Exploitation of the women through surrogacy is one of the major worrying factors, which the law will have to address. The Law Commission has strongly recommended law against Commercialization of Surrogacy. However, this is a great step forwarded to the present situation, but not enough to control the irregularities. We can strongly expect an appropriate legislation to come in the coming year or next, aiming to control the surrogacy business in India.

3. POSITION OF SURROGACY IN OTHER WORLD

The legal issues surrounding surrogacy are complex, diverse and mostly unsettled. In most of the countries
throughout the world, the woman giving birth to a child is considered as the Child's legal mother.\textsuperscript{15} However, there are few countries\textsuperscript{16} where the intended parents are recognized as the legal parents from birth by the virtue of the fact that the Surrogate has contracted to give the birth of the Child for the intended parents. India is one country amongst the few, which recognize the intended parent(s) as the legal parents. Many countries now issue pre-birth orders through the courts placing the name(s) of the intended parent(s) on the birth certificate of the child. Positions of surrogacy in different countries are as follows:

A. **Australia**: Australia is one of the many countries where the surrogate mother is considered by the law to be the legal mother of the child and the agreement giving custody to others is void and unenforceable in the courts of Law. Commercial surrogacy is an act of crime in Australia. Usually couples who want surrogacy child in Australia must adopt the child rather than being recognized as birth parents, especially if the surrogate mother is married. However, the Altruistic surrogacy remains legal.\textsuperscript{17}

B. **Canada**: Like Australia, commercial surrogacy is also prohibited in Canada under the Assisted Human Reproduction Act, 2004 and the altruistic surrogacy remains legal. In the province of Quebec, agreements that contain surrogacy are unenforceable.\textsuperscript{18}

C. **France**: Since 1994, all forms of surrogacy agreements whether commercial or altruistic are prohibited and illegal.\textsuperscript{19}

D. **Hungary**: Like all other countries, commercial surrogacy is prohibited in Hungary.\textsuperscript{20}

E. **Israel**: Israel the first country in the world to legalize surrogacy. Israel implemented a form of state-controlled surrogacy in which each and every surrogacy agreement must be directly approved by the state. In March 1996, the Israeli government legitimated gestational surrogacy under the "Embryo Carrying Agreements Law." However this surrogacy agreement is not permitted to everyone.

It is permitted only to Israeli citizens who are of same religion. Surrogates must not be married. She must be single, widowed or divorced. Only infertile heterosexual couples are allowed to hire surrogates. Looking into the several restrictions on surrogacy agreements under Israeli law, the Israeli intended parents have turned to International Surrogacy. India is the preferred country because of its liberalized law and low costs. Another country for intended parents is US, where an added bonus is an automatic US citizenship for the newborn.\textsuperscript{21}

F. **Japan**: Japan does not have any law to regulate surrogacy. A panel of Health, Labor and Welfare Ministry and the Japan Society of Obstetrics and Gynecology has opposed surrogacy on the grounds that people should not be used as a means of reproduction.\textsuperscript{22} In March 2008, the Science Council of Japan also opposed surrogacy and demanded that doctors, agents and their clients should be punished for commercial surrogacy arrangements.\textsuperscript{23}

G. **Netherlands and Belgium**: Commercial surrogacy is strictly prohibited and illegal in Belgium and the Netherlands.\textsuperscript{24}

H. **United Kingdom**: Commercial surrogacy arrangements are illegal in the United Kingdom under the Surrogacy Arrangements Act 1985.\textsuperscript{25} Since, the surrogacy arrangements are not legally enforceable so a surrogate mother maintains the legal right of determination for the surrogate child, unless a parental order or adoption order is made by the court.\textsuperscript{26}

I. **United States**: Surrogacy and its related issues fall under the state jurisdiction and it varies greatly from state to state. Some states in U.S. have written law while other depends on precedent for dealing surrogacy issues. Some states have legalized surrogacy and surrogacy agreements while other has prohibited it. Some have legalized only altruistic surrogacy while other has permitted even

\textsuperscript{15} Such as Australia, Canada, France, Hungary etc.

\textsuperscript{16} Such as India, Israel etc.


\textsuperscript{18} See, Sec. 6(1), 12(1)c, 12(2) and 12(3) of the Assisted Human Reproduction Act, 2004.

\textsuperscript{19} See, French Civil Code, 1804

\textsuperscript{20} Supra Note 12, last accessed on December 27, 2015

\textsuperscript{21} Teman, Elly, ‘Birthing a Mother: The Surrogate Body and the Pregnant Self, University of California Press, Berkeley, 2010

\textsuperscript{22} http://www.japantimes.co.jp/opinion/2014/06/15/editorials/plan-surrogate-births/#.VpJqnU9TJYN, last accessed on January 10, 2016.

\textsuperscript{23} Ibid.


\textsuperscript{26} Ibid, at p. 11.
commercial surrogacy and facilitate straightforward ways for the intended parents to be recognized as the child’s legal parents. Some relatively surrogacy friendly states offer support only for married heterosexual couples, while some does not consider whether the intended parents are married or not. Some surrogacy friendly states in U.S. are Illinois, California, Maryland, Arkansas and New Hampshire.

4. CONCLUSION

It seems sarcastic that people are engaging in the practice of surrogacy when approximately twelve million Indian children are orphans and without any parent. Adoption of a child in India is a complex and a lengthy procedure and childless couples who want to give a home to orphans are left with no option than surrogacy. Even after 69 years of Independence we don’t have a friendly adoption law applicable to all its citizens, irrespective of their religion or the country they live. There is a strong need to modify and make the adoption procedure simple for all. This will bring down the rates of surrogacy. Only Altruistic surrogacy must be legalized and the commercial surrogacy should be strictly prohibited and marked as crime. Laws should be drafted and enacted to cover the grey areas and to protect the rights of vulnerable women and children.

REFERENCES


