

# INTRICACIES OF INDIAN SURROGACY SCENARIO – A REVIEW

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## Abstract

The desire to procreate is a very fundamental attribute of the human race. Sadly though, many are denied the joy of parenthood due to several reasons. Surrogacy is just another way of creating life in the womb. In this method, three persons are involved in the creative process, the biological mother and the father and the woman who makes her womb available for gestation. Among the many applications of the new reproductive technologies, including artificial insemination by donor, in-vitro fertilisation (IVF), embryo transfer and embryo freezing, surrogate motherhood has such far reaching consequences that it raises a multitude of ethical, social and legal questions, which have been hotly debated in courts and legislatures. Surrogacy continues to be a complicated tangle of legal, social, ethical and technical issues and it has re-defined the very meaning and understanding of motherhood and fatherhood. This analysis reviews the medico legal and ethical issues of surrogacy, interpretations of surrogate motherhood and the Assisted reproductive technologies (Regulation) bill – 2010.

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## Introduction

The word 'surrogate' has its origin in Latin '*surrogatus*', past participle of '*surrogare*', meaning a substitute, that is, a person appointed to act in the place of another. Thus a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other woman.<sup>1</sup>

“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 and hand

over the child to the person or persons for whom she is acting as a surrogate.<sup>2</sup>

The Black' Law Dictionary categorizes surrogacy into two classes: Gestational surrogacy and Traditional surrogacy. They are defined as follows:

*Gestational (Total) surrogacy:* A pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the foetus and gives birth to the child.

*Traditional (Partial) surrogacy:* A pregnancy in which a woman (the surrogate mother) provides her own egg, which is fertilized by artificial insemination, and carries the foetus and gives birth to a child for another person.

Surrogacy is commercial or altruistic depending on whether the surrogate receives financial reward for her pregnancy on the relinquishment of the child, or not.

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The world's second and India's first IVF baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978. The growth in the ART methods is recognition of the fact that infertility as a medical condition is a huge impediment in the overall wellbeing of couples and cannot be overlooked especially in a patriarchal society like India. A woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. The problem however arises when the parents are unable to construct the child through the conventional biological means. Infertility is seen as a major problem as kinship and family ties are dependent on progeny. Herein surrogacy comes as a supreme saviour.<sup>1</sup>

The prevailing historical view was that any act of surrogacy diminished women and was degrading to all females. One of the central challenges confronting surrogacy is whether it is morally or ethically just, and whether in view of such concerns, the courts must assess the enforceability of surrogacy contracts. As such, the courts when looking at matters of public policy take account of the 'common good' and the changing perceptions of society as the validity of such contracts is evaluated.<sup>3</sup>

### **Ethical Issues**

1. Because of the gradual emotional attachment and evolving attitude towards the fetus during the gestation, it is not possible for a pregnant woman to give a truly informed consent (to undergo the surrogate pregnancy and relinquish the baby) until after the birth has occurred.
2. In India, where dowry deaths are so common, the women may be coerced for surrogacy by the unscrupulous/greedy husbands and in-laws in order to make some extra bucks.
3. Only rich people will be able to benefit from this arrangement. They may exploit the lower middle class women who may be lured to supplement their income by accepting the surrogacy arrangement.
4. The technique may be misused by the lesbians, homosexuals and singles desirous of having children. It may not be in the best interest of the child because in any eventuality the child will be without a mother or a father which is not a desirable situation. Even the status of parent (lesbian, homosexual) may not be a healthy credential for the child.<sup>4</sup>
5. To what extent is it right for society to permit women to make contracts about the use of their bodies? To what extent is it a woman's human right to make contracts regarding the use of her body? Should the state be able to force a woman to carry out "specific performance" of her contract if that requires her to give birth to an embryo she would like to abort, or to abort an embryo she would like to carry to term?
6. What does motherhood mean? What is the relationship between genetic motherhood, gestational motherhood, and social motherhood? Is it possible to socially or legally conceive of multiple modes of motherhood and/or the recognition of multiple mothers?
7. Should a child born via surrogacy have the right to know the identity of any/all of the people involved in that child's conception and delivery?<sup>5</sup>

8. There is every possibility of misuse of children born out of surrogacy for terrorism, prostitution or unethical genetic engineering research as the foreigners who pay for the child would not have any emotional bonding with the kid.<sup>6</sup>
9. Repugnant to human dignity - It is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child. These words of the Warnock Committee reporting to the British Government in 1984 remain unanswerable even today.<sup>7</sup>
10. Is there a change in motives for creating children: children are not conceived for their own sakes, but for another's benefit? Can anyone predict the emotions associated with relinquishing a child? Should the surrogate be paid? What happens when no one wants a handicapped newborn? Should the couple and surrogate remain unknown to each other? Should the child be told? What kinds of records should be kept, and should the child have access to them?<sup>8</sup>
4. Are surrogacy contracts enforceable? Are they illegal? Is payment of a fee in violation of baby-selling statutes, i.e., is it payment for services rendered or for the child? Is the contract counter to public policy? What happens if the surrogate decides to keep the child? What would be appropriate damages for breaches of the contract? Would they be monetary, or would they require specific performance? Who is the legal mother? How can the husband of the infertile woman establish his paternity rights? Would prohibition of surrogate arrangements violate constitutional rights to privacy or rights to procreate?<sup>8</sup>
5. Section 112 of Indian Evidence Act and Gestational surrogacy: If a *Mr. and Mrs. Y* for instance contracted a *Mrs. Z* for delivering their baby, according to this section the child would be presumed to be a legitimate child of *Mr. Z* i.e. *Mrs. Z's* husband who may have nothing whatsoever to do with the transaction! What is worse is that according to the present interpretation, it will be deemed to be his child simply if and because he had an opportunity to have sexual intercourse with his own wife. He will have no defense.<sup>9</sup>
6. How can the rights of the surrogate mother be waived completely? How can

cardinal principle of jurisprudence “One cannot enforce one's right by infringing any right of others”, but in the instant case the single person while procuring baby by surrogacy shall be infringing the right of baby itself to come in this world with both parents.<sup>7</sup>

### Legal Issues

1. Cases where multiple embryos survive after transplantation, doctors are using a technique called fetal reduction, amounting to feticide.
2. What is the legal position of postmortem insemination, genetic testing of donor sperms and ova for any disorders and of the unused frozen embryos?<sup>4</sup>
3. No single person has any right to obtain baby by surrogacy. Because as per the
6. How can the rights of the surrogate mother be waived completely? How can

the rights of the ovum or sperm donor be restricted? What would be the status of divorced biological parents in respect of the custody of a surrogate child, and would a biological parent/s be considered the legal parent of the surrogate child?

### **Interpretation of surrogate motherhood – Is it an Ambiguous relationship?**

The prenatal separation of biological and moral relationships places the surrogate in a highly ambiguous relationship with the fetus. As a *woman* who has a right to bodily integrity, she has a right to an abortion, but as a *surrogate*, she would have no right to determine the destiny of the fetus. Indeed, through entering the contract she has given the fetus a right to inhabit her body, which she cannot withdraw without the couple's consent. Although surrogacy contracts usually make it clear that the stipulation regarding abortion is unenforceable, the surrogate's having (or not having) an abortion against the couple's wishes would still constitute breach of contract. And if the pregnant woman engages in behaviour that is potentially harmful to the child, it would not involve a neglect of parental responsibilities (since she has none), but would constitute a violation of the legal agreement with the intending parents. (One can only wonder what the appropriate penalty for such a breach would be.)

The attempt to separate biological and moral relationships ignores the fact that the surrogate has, by virtue of her being the gestational mother, certain moral responsibilities to the fetus, and that these can only be affirmed by any legal contract she may enter into. In other words, her obligation is directly to the fetus, not indirectly through an agreement with the intending parents. Surrogacy is not analogous to

child-caring services because, once she has conceived, the surrogate finds herself in a (for all practical purposes) irreplaceable, intimate relationship with someone who is totally dependent on her for its wellbeing. Unless she has an abortion or miscarriage, this link cannot be severed nor can these duties be relinquished before birth, simply because there is no one else who could take over responsibility for the welfare of the developing fetus. In this regard the difference between gestational and genetic surrogacy is irrelevant. The surrogate's obligations during pregnancy stem from her proximity to the fetus and are not contingent upon an agreement with the commissioning couple. The surrogate cannot choose not to be morally responsible for the fetus while it remains in her womb. In this sense, biology certainly is destiny.<sup>10</sup>

### **Assisted Reproductive Technologies (Regulation) Bill 2010**

The legal issues related with surrogacy, as we have seen, are very complex and need to be addressed by a comprehensive legislation. After a long wait for so many years, the Indian Council of Medical Research (ICMR) has come out with a draft Assisted Reproductive Technology (Regulation) Bill 2010. The draft Bill contains 50 clauses under nine chapters. The Bill acknowledges surrogacy agreements and their legal enforceability. This will ensure that surrogacy agreements are treated on par with other contracts and the principles of the Indian Contract Act 1872 and other laws will be applicable to these kinds of agreements.

### **Salient features of Assisted Reproductive Technologies (Regulation) bill 2010**

1. ART banks shall obtain semen from males between twenty one years of age

- and forty five years of age, both inclusive, and arrange to obtain oocytes from females between twenty one years of age and thirty five years of age, both inclusive.
2. No woman shall donate oocytes more than six times in her life, with not less than a three-month interval between the oocyte pick-ups.
  3. A donor shall relinquish all parental rights over the child which may be conceived from his or her gamete.
  4. Both the couple or individual seeking surrogacy through the use of ART, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.
  5. A surrogate mother shall relinquish all parental rights over the child.
  6. No woman less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother.
  7. No woman shall act as a surrogate for more than five successful live births in her life, including her own children.
  8. The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of individual / individuals who commissioned the surrogacy, as parents.
  9. A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy.
  10. Foreigners or Non-resident Indians coming to India to rent a womb will have to submit documentation confirming that their country of residence recognizes surrogacy as legal and that it will give citizenship to the child born through the surrogacy agreement from an Indian mother. (This perhaps, is in view of the two-year legal battle of the surrogate sons, Nikolas and Leonard, born to the German couple Jan Balaz and Susan Lohlad. The two kids, born to an Indian surrogate mother in January 2008, were rendered stateless with neither German nor Indian citizenship. Subsequently, the Supreme Court got them exit permits in May 2010.)
  11. A child born to married or unmarried couple through the use of ART, with the consent of both the parties, shall be the legitimate child of both parties.
  12. In the case of a single woman/man, the child will be the legitimate child of that woman/man.
  13. In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the ART treatment but before the child is born, the child shall be the legitimate child of the couple.
  14. All records, charts, forms, reports, consent letters and all other documents required to be maintained under this Act and the rules shall be preserved for a period of ten years. Provided that, if any criminal or other proceedings are instituted against any facility using ART, the records and all other documents of such facility shall be preserved till the final disposal of such proceedings.<sup>2</sup>

## Conclusion

There are three types of mother, the genetic mother (who donates the eggs and contributes to half the genetic code), the gestational mother (who carries the foetus in her womb) and the social mother (who provides for the care and upbringing of the child). Each is important for the care and well-being of the child. Recognition of surrogacy and its important role in modern society is welcome. Surrogacy is now optimistically viewed as being an acceptable method of procreation in circumstances where it would otherwise not be possible. Women may interpret their pregnancies and their relationship with the foetus in different ways. A surrogate mother should not deny her moral responsibility for the foetus's welfare. Acknowledging the possibility of multiple parenthood has the implication that the intending parents cannot insist on modelling their family directly along the lines of nuclear family. Having reinterpreted parenthood, we should also be prepared to reinterpret the family. The draft assisted ART (regulation) bill, 2010 is a beacon to move forward in the direction of preparing legislation to regulate not only ART clinics, but rights and obligations of all parties to a surrogacy, including rights of the surrogate child. Everything would be in black and white and legal redressal for any failures will be possible. Legal provisions existing under various laws in India which when interpreted leads to lot of confusion and does not hold good regarding the legal implications of surrogacy. May we all hope that the Indian parliament will soon realize the importance of enacting a comprehensive law dealing with intricacies of surrogacy, because “LAW MUST BE STABLE. BUT NOT STAND STILL”.

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