



GOVERNMENT OF INDIA

**LAW
COMMISSION
OF
INDIA**

**NEED FOR LEGISLATION TO REGULATE ASSISTED
REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS
RIGHTS AND OBLIGATIONS OF PARTIES TO A
SURROGACY**

Report No. 228

AUGUST 2009



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**Submitted to the Union Minister of Law and Justice,
Ministry of Law and Justice, Government of India by
Dr. Justice AR. Lakshmanan, Chairman, Law
Commission of India, on the 5th day of August, 2009.**

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D.O. No. 6(3)/157/2009-LC (LS)

5 August, 2009

Dear Dr Veerappa Moily ji,

Subject: Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy

I am forwarding herewith the 228th Report of the Law Commission of India on the above subject.

2. The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978 about two months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly.

3. The growth in the ART methods is recognition of the fact that infertility as a medical condition is a huge impediment in the overall well-being 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. Some authors put it as follows: *The parents construct the child biologically, while the child constructs the parents socially*. 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.

4. The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit

of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.

5. The subject was *suo motu* taken up for study. Most important points in regard to the rights and obligations of the parties to a surrogacy and rights of the surrogate child the proposed legislation should include have been given in this Report.

With warm regards,

Yours sincerely,

(Dr AR. Lakshmanan)

Dr M. Veerappa Moily,
Union Minister of Law and Justice,
Government of India,
Shastri Bhawan,
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I. INTRODUCTION

1.1 The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978 about two

months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly.

1.2 The growth in the ART methods is recognition of the fact that infertility as a medical condition is a huge impediment in the overall well-being 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. Some authors put it as follows: *The parents construct the child biologically, while the child constructs the parents socially*. 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.

Surrogacy - meaning

1.3 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. According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. The New Encyclopaedia Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual

way. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.

1.4 The Black' Law Dictionary categorizes surrogacy into two classes: 'gestational surrogacy' and 'traditional surrogacy'. They are defined as follows:

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

Traditional surrogacy. A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.

1.5 'Gestational surrogacy' is total in the sense that an embryo created by the process of IVF is implanted into the surrogate mother. 'Traditional surrogacy' may be called partial or genetically contracted motherhood because the surrogate mother is impregnated with the sperm of the intended father making her both the genetic and the gestational mother; the child shares make-up of the commissioning father and the surrogate mother.

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

India – a reproductive tourism destination

1.7 In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that. The usual fee is around \$25,000 to \$30,000 in India which is around 1/3rd of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice. ART industry is now a 25,000 crore rupee pot of gold. Anand, a small town in Gujarat, has acquired a distinct reputation as a place for outsourcing commercial surrogacy. It seems that wombs in India are on rent which translates into babies for foreigners and dollars for Indian surrogate mothers.

Legal and moral issues

1.8 The moral issues associated with surrogacy are pretty obvious, yet of an eye-opening nature. This includes the criticism that surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes, psychological considerations may come in the way of a successful surrogacy arrangement.

1.9 As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article 16.1 of the *Universal*

Declaration of Human Rights 1948 says, *inter alia*, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family”. The Judiciary in India too has recognized the reproductive right of humans as a basic right. For instance, in *B. K. Parthasarthi v. Government of Andhra Pradesh*¹, the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as a facet of his “right to privacy” and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*², which characterised the right to reproduce as “one of the basic civil rights of man”. Even in *Javed v. State of Haryana*³, though the Supreme Court upheld the two living children norm to debar a person from contesting a *Panchayati Raj* election it refrained from stating that the right to procreation is not a basic human right.

1.10 Now, if reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection. However, jurisdictions in various countries have held different views regarding the legalization of surrogacy. In England, surrogacy arrangements are legal and the Surrogacy Arrangements Act 1985 prohibits advertising and other aspects of commercial surrogacy. In the US also, commercial surrogacy seems prohibited in many states. In the famous *Baby M case*⁴, the New Jersey Supreme Court, though allowed custody to commissioning parents in the “best interest of the child”, came to the conclusion that surrogacy contract is against public policy. It must

¹ AIR 2000 A. P. 156

² 316 US 535

³ (2003) 8 SCC 369

⁴ 537 A.2d 1227

be noted that in the US, surrogacy laws are different in different states.

1.11 If the 1988 *Baby M case* in the US forced many to put on legal thinking caps, then that year also saw Australia battling with societal eruptions over the *Kirkman sisters' case* in Victoria. Linda Kirkman agreed to gestate the genetic child of her older sister Maggie. The baby girl, called Alice, was handed over to Maggie and her husband at birth. This sparked much community and legal debate and soon Australian states attempted to settle the legal complications in surrogacy. Now in Australia, commercial surrogacy is illegal, contracts in relation to surrogacy arrangement unenforceable and any payment for soliciting a surrogacy arrangement is illegal.

Motherhood – an enigma

1.12 How surrogacy can lead to an array of legal complexities regarding motherhood was shown by *Jaycee B. v. Superior Court*⁵. A child was born to a surrogate mother using sperm and eggs from anonymous donors because the infertile couple was unable to create their own embryo using the in vitro fertilization techniques. The couple chose to use anonymous donors rather than asking the surrogate to use her own eggs because of the *Baby M case* in New Jersey in which the surrogate had eventually refused to hand over the baby saying that she was its biological mother and her right to raise the child pre-empted the commissioning parents'. The child thus had five people who could lay claim to parenthood – a genetic mother, a commissioning mother, a surrogate mother, a genetic father and a

⁵ 42 Cal.App.4Th 718 (1996)

commissioning father. One month prior to the birth of the baby Jaycee the intended parents John and Luanne separated and John sought to rescind his obligations under the surrogacy contract so as to avoid having to pay child-support for Jaycee. Luanne sought both custody and support from her ex-husband. The court battle continued and for three years Jaycee did not have a legal parent. A Californian court granted temporary custody of the baby Jaycee to Luanne and ordered John to pay for child-support.

1.13 Different countries have taken different stands to address this issue. In UK, the surrogate mother is the legal mother, *vide* section 27(1) of the Human Fertilisation and Embryology Act 1990. Section 30 of the said Act at the same time provides that if the surrogate mother consents to the child to be treated as the child of the commissioning parents the court may make a parental order to that effect. This section also prohibits giving or taking of money or other benefit (other than expenses reasonably incurred) in consideration of the making of the order or handing over of the child.

1.14 In India, according to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics, evolved in 2005 by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS), the surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents. The US position as per the Gestational Surrogacy Act 2004 is pretty similar to that of India.

Indian Baby M case

1.15 *Baby Manji Yamada v. Union of India*⁶ concerned production/custody of a child Manji Yamada given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement with her entered into by Dr Yuki Yamada and Dr Ikufumi Yamada of Japan. The sperm had come from Dr Ikufumi Yamada, but egg from a donor, not from Dr Yuki Yamada. There were matrimonial discords between the commissioning parents. The genetic father Dr Ikufumi Yamada desired to take custody of the child, but he had to return to Japan due to expiration of his visa. The Municipality at Anand issued a birth certificate indicating the name of the genetic father. The child was born on 25.07 2008 and moved on 03.08.2008 to Arya Hospital in Jaipur following a law and order situation in Gujarat. The baby was provided with much needed care including being breastfed by a woman.

1.16 The grandmother of the baby Manji, Ms Emiko Yamada flew from Japan to take care of the child and filed a petition in the Supreme Court under article 32 of the Constitution. The Court relegated her to the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act 2005. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother.

Israeli gay couple's case

⁶ JT 2008 (11) SC 150

1.17 Thereafter was in the news the Israeli gay couple's case⁷. The gay couple Yonathan and Omer could not in Israel adopt or have a surrogate mother. They came to Mumbai. Yonathan donated his sperm. They selected a surrogate. Baby Evyatar was born. The gay couple took son Evyatar to Israel. Israeli government had required them to do a DNA test to prove their paternity before the baby's passport and other documents were prepared.

II. THE DRAFT ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL AND RULES 2008

2.1 The legal issues related with surrogacy, as we have seen, are very complex and need to be addressed by a comprehensive legislation. After

⁷ The Times of India, Mumbai, 18.11.2008

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 and Rules 2008. The draft Bill contains 50 clauses under nine chapters.

2.2 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. The Bill provides that single persons may also go for surrogacy arrangements.

2.3 The Bill provides that a foreigner or foreign couple not resident in India or a non-resident Indian individual or couple, seeking surrogacy in India, shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after pregnancy till the child is delivered to the foreigner or foreign couple or the local guardian. It is further provided that the commissioning parents or parent shall be legally bound to accept the custody of the child irrespective of any abnormality that the child may have, and the refusal to do so shall constitute an offence. A surrogate mother shall relinquish all parental rights over the child. The birth certificate in respect of a baby born through surrogacy shall bear the name(s) of genetic parents/parent of the baby.

2.4 The Bill also provides that a child born to a married couple or a single person through the use of ART shall be presumed to be the

legitimate child of the couple or the single person, as the case may be. If the commissioning couple separates or gets divorced after going for surrogacy but before the child is born, then also the child shall be considered to be the legitimate child of the couple.

2.5 The Bill further provides that a couple or an individual shall not have the service of more than one surrogate at any given time. A couple shall also not have simultaneous transfer of embryos in the woman and in a surrogate.

2.6 Chapter I of the Bill contains definitions. Chapter II provides for constitution of a National Advisory Board for ART and State Boards for ART for laying down policies, regulations and guidelines, and Registration Authorities for registering ART clinics. Chapter III lays down procedure for registration of ART clinics. Chapter IV prescribes duties of ART clinics. One of the duties is to make couples or individuals, as the case may be, aware of the rights of a child born through the use of ART. The duties also include the obligation not to offer to provide a couple with a child of a pre-determined sex. Chapter V provides for sourcing, storage, handling and record-keeping for gametes, embryos and surrogates. Chapter VI regulates research on embryos. Chapter VII discusses rights and duties of patients, donors, surrogates and children. Chapter VIII deals with offences and penalties therefor. Chapter IX is titled 'Miscellaneous' and includes power to search and seize records etc. and the power to make rules and regulations. This legislation is intended to be in addition to, and not in derogation of, other

relevant laws in force.

III. SEMINAR ON ‘SURROGACY – BANE OR BOON’

3.1 A seminar on “Surrogacy – Bane or Boon” was held at the India International Centre on 13.02.2009. The discussion focused on the aforesaid draft Bill and Rules. Certain lacunae were noted in the Bill.

3.2 The Bill neither creates, nor designates or authorizes any court or quasi-judicial forum for adjudication of disputes arising out of surrogacy, ART and surrogacy agreements. Disputes may, *inter alia*, relate to parentage, nationality, issuance of passport, grant of visa. There is already a conflict on adoption and guardianship as non-Hindus cannot adopt in India. Such disputes need to be resolved before a child is removed from India to a foreign country.

3.3 A suggestion at the above Seminar emerged that if a specialized court called “Surrogacy Court” is created, it could comprehensively look at all the above problems for adjudicating disputes.

3.4 The points highlighted in the discussion at the Seminar included:

- (i) what would be the remedy available to biological parents to obtain exclusive legal custody of surrogate children,
- (ii) how can the rights of the surrogate mother be waived completely,
- (iii) how can the rights of the ovum or sperm donor be restricted,
- (iv) how can the genetic constitution of the surrogate baby be established and recorded with authenticity,
- (v) whether a single or a gay parent can be considered to be the custodial parent of a surrogate child,

- (vi) what would be the status of divorced biological parents in respect of the custody of a surrogate child, and
- (vii) would a biological parent/s be considered the legal parent of the surrogate child?

3.5 The answers discussed at the Seminar were:

- a) Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To determine the legality of surrogacy agreements, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would be within the domain of section 9 of the Code of Civil Procedure (CPC). Alternatively, the biological parent/s can also move an application under the Guardians and Wards Act 1890 for seeking an order of appointment or a declaration as the guardian of the surrogate child.
- b) In the absence of any law to govern surrogacy, the 2005 Guidelines⁸ apply. But, being non-statutory, they are not enforceable or justiciable in a court of law. Under paragraph 3.10.1 of the Guidelines a child born through surrogacy must be adopted by the genetic

⁸ *Supra* paragraph 1.14

(biological) parents. However, this may not be possible in case of those parents who cannot adopt in India.

- c) Under Section 10 of the Contract Act, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is an enforceable contract. Thereafter, under section 9, CPC, it can be the subject of a civil suit before a civil court for adjudication of all disputes relating to the surrogacy agreement and for a declaration/injunction as to the relief prayed for.

- d) As of today, it may be stated that a single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement. Japanese baby Manji Yamada's case and the Israel gay couple's case who fathered the child in India are clear examples to establish that this is possible. Under paragraph 3.16.1 of the Guidelines dealing with legitimacy of children born through ART (which was the basis of the claim in the Japanese baby's case in the Supreme Court), this claim can be made. However, only in a

petition for guardianship under the Guardians and Wards Act and/or in a suit for declaration in a civil court, the exclusive custodial rights can be adjudicated by a court of competent jurisdiction upon appreciation of evidence and considering all claims made in this regard.

- e) Essentially, this is a question which will require determination in accordance with the surrogacy agreement between the parties. There would apparently be no bar to either of the divorced parents claiming custody of a surrogate child if the other parent does not claim the same. However, if the custody is contested, it may require adjudication by a court of competent jurisdiction.

- f) In answer to this question it can be stated that the biological parents would be considered to be the legal parents of the child by virtue of the surrogacy agreement executed between them and the surrogate mother. Under paragraph 3.16.1 of the Guidelines dealing with legitimacy of the child born through ART, it is stated that “a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance”. Even in the 2008 draft Bill and

Rules, a child born to a married couple, an unmarried couple, a single parent or a single man or woman, shall be the legitimate child of the couple, man or woman, as the case may be.

- g) However, the moot question which may arise for determination is as to whether a judicial verdict determining rights of parties in a surrogacy arrangement is essential in respect of a foreign biological parent who wishes to take the surrogate child to his/her country of origin or permanent residence. It can be said that either a declaration from a civil court and/or a guardianship order ought to be a must to conclusively establish the rights of all parties and to prevent any future discrepancies arising in respect of any claims thereto.

IV. CONCLUSION AND RECOMMENDATION

4.1 Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of

positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.

4.2 The draft Bill prepared by the ICMR is full of lacunae, nay, it is incomplete. However, it is a beacon to move forward in the direction of preparing legislation to regulate not only ART clinics but rights and obligations of all the parties to a surrogacy including rights of the surrogate child. Most important points in regard to the rights and obligations of the parties to a surrogacy and rights of the surrogate child the proposed legislation should include may be stated as under:

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

- [2] A surrogacy arrangement should provide for financial support for 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.
- [3] A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- [4] 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.
- [5] 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.
- [6] The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- [7] Right to privacy of donor as well as surrogate mother should be protected.
- [8] Sex-selective surrogacy should be prohibited.

[9] Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

4.3 We recommend accordingly.

(Dr Justice AR. Lakshmanan)

Chairman

(Prof. Dr Tahir Mahmood)

Member

(Dr Brahm A. Agrawal)

Member-Secretary