

# Child Rights in Surrogacy

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Not all parents are fortunate enough in having or creating babies only through natural means or only through sexual activities. In many cases there might be fertility problems in either of the parents or in some cases there may even be problems of potency. But there is always the wish to have a child of one's own. Due to all this, the last resort for the parents is to either adopt a child or try having one through artificial scientific methods for e.g. via in vitro fertilization and other means. At times when even this doesn't work out, the parents resort to having children through "surrogacy". A **surrogacy** arrangement or surrogacy agreement is the carrying of a pregnancy for intended parents. There are two main types of surrogacy, **gestational surrogacy** (also known as host or full surrogacy<sup>1</sup>) which was first achieved in April 1986<sup>2</sup> and traditional surrogacy (also known as partial, genetic, or straight surrogacy). In gestational surrogacy, the pregnancy results from the transfer of an embryo created by in vitro fertilization (IVF), in a manner so the resulting child is genetically unrelated to the surrogate. Gestational surrogates are also referred to as gestational carriers. In traditional surrogacy, the surrogate is impregnated naturally or artificially, but the resulting child is genetically related to the surrogate. In the United States, gestational surrogacy is more common than traditional surrogacy and is considered less legally complex.<sup>3</sup> But with all this comes the question of Child Rights for e.g. "who has the rights to the child conceived via surrogacy?"; "Is the surrogate mother the legal guardian of the child?" and so on. In this paper I will try to answer the questions related to child rights during surrogacy and adoption.

## Origins of Surrogacy

Commercialization in the field of surrogacy has made it a billion-dollar industry in a huge portion of the underdeveloped nations and one of these nations is the great democratic nation called India. Surrogacy has undoubtedly, generated a way of earning for a major portion of Below Poverty Line (BPL) families in India and has allowed them to accomplish the essential necessities of life –food, shelter, education, etc. But along with it comes quite many deficiencies which can't be overlooked further as it influences a large number of innocent lives, including the ones which are yet to take their first breath in this world. What started as an act of selfless love by a grandmother for her daughter wherein, she agreed to carry her

<sup>1</sup> Imrie, Susan; Jadva, Vasanti (4 July 2014). "The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements". *Reproductive BioMedicine Online* **29** (4): 424–435. doi:10.1016/j.rbmo.2014.06.004

<sup>2</sup> <http://www.people.com/people/archive/article/0,,20096199,00.html>

<sup>3</sup> "Using a Surrogate Mother: What You Need to Know". *WebMD*. Retrieved October 18, 2015.

daughter's baby in her womb, has undergone a lot of change in the last ten years and taken the form of a business activity which can be termed as 'womb for hire'.

The roots of surrogacy can be traced back to the ancient Babylonian legal code of Hammurabi (18th century BC) which recognized the practice of surrogacy and actually laid down detailed guidelines specifying when it would be permitted and the respective rights of both wife and surrogate mother<sup>4</sup>.

"Vestal virgins were not supposed to have children, yet they could and often did marry, and such a wife would give a husband a surrogate to bear his children."<sup>5</sup> References to Surrogacy can be found in the Bible: for instance, the stories of surrogacy between Abraham, Sarah and Hagar, and of Jacob, Rachel and their servant in the first book of the Old Testament. When Rachel saw that she was not bearing Jacob any children, she became jealous of her sister. So she said to Jacob, "*Give me children, or I'll die!*" Jacob became angry with her and said, "*Am I in the place of God, who has kept you from having children?*" Then she said, "*Here is Bilhah, my servant. Sleep with her so that she can bear children for me and I too can build a family through her.*" So she gave him her servant Bilhah as a wife. Jacob slept with her and she became pregnant and bore him a son. Then Rachel said, "*God has vindicated me; he has listened to my plea and given me a son.*" Because of this she named him Dan."<sup>6</sup> It suggests that surrogacy was accepted in early Jewish society as a legitimate way by which infertile couples had children and created a family.<sup>7</sup>

It is again mentioned in the great Indian epic Mahabharata, that all the hundred sons of the king of Hastinapur, Dhritrashtra were born through IVF process. "Vyasa took the piece of flesh and divided into 100 parts. He then put them into 100 pots and tied their mouths and buried them in the earth for a year."<sup>8</sup>

From this it can be assumed that surrogacy is there from the time immemorial, but it is only recently that it has been commercialized and made into a billion dollar industry. The famous case of Baby Manji Yamada<sup>9</sup>, was the very first reported case of commercial surrogacy and the contract for which was drafted by Late Noel Keane provided the basic idea about the ambiguities present in the field of commercial surrogacy regarding the rights of the surrogate mother, the child who is yet to be born and the parents.

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<sup>4</sup> NBCC, *Surrogacy: Report 1*, pp 3-4.

<sup>5</sup> Hammurabi's Code & Babylonian Law, available at: <http://iws.collin.edu/mbailey/hammurabi's%20code%20overview.htm>, (Visited on October 22, 2015)

<sup>6</sup> Bible Gateway, available at: <https://www.biblegateway.com/passage/?search=Genesis+30%3A1-6&version=NIV>, (Visited on October 22, 2015).

<sup>7</sup> Glenda Emmerson, "Surrogacy: Born For Another", Queensland Parliamentary Library, 8/96, 7 (1996).

<sup>8</sup> Mahabharat Chapter 6 – Birth of Pandavas and Kauravas, available at: <http://www.india-intro.com/religion/mahabharat/67-mahabharat-kunti-gandhari-birth-of-pandavas-kauravas.html> (Visited on October 22, 2015).

<sup>9</sup> 537 A.2d 1227, 109 N.J. 396 (N.J. 1988)

In India, surrogacy heralded with the delivery of its first surrogate baby on 23 June 1994, but it took as many as eight years to draw the world's attention when an Indian woman in 2004 delivered a surrogate child for her daughter in the United Kingdom. Surrogacy as a medical process has matured over the years<sup>10</sup>. In India commercial surrogacy was not legalised till 2002. The pioneer in this field Dr. Nayana Patel had her first surrogacy process successfully conducted in the year 2004 .Since then it has only grown and now it has become a billion-dollar unregulated industry in India. Even after twenty years from its origin in India commercial surrogacy is still considered a taboo by many.

## Present Situation in India

Since the sanctioning of surrogacy in the year 2002, commercial surrogacy has grown to become a booming business industry in India. It has put India on the world guide as the surrogacy capital of the world. It has given a support to the fertility tourism, as a substantial number of couples from across the world are traveling to India with hopes of proceeding with their blood lines. There are numerous variables which assume a key part in giving this sudden support and one of them is that commercial surrogacy has not been legalized in a major portion of the world nations. At present there is neither harmonization of laws across jurisdictions, nor any global conventions managing surrogacy and hence there are crucial contrasts between nations with respect to the regulation, lawfulness and legitimate ramifications of surrogacy.

There is a Table (1.1) given below which shows the current state of laws in the different countries of the world:

**Table (1.1)**

<b>Status</b>	<b>Countries</b>
Legal	India, Ukraine, Georgia and some States of USA like California, Illinois, Arkansas, Maryland, Thailand and New Hampshire
Commercial surrogacy is illegal, but altruistic surrogacy is permitted.	Canada, New Zealand and Australia
Illegal	France, Germany, Italy, Belgium, Netherlands, Saudi Arabia, Finland, Hong Kong, Hungary, Iceland, Japan, Pakistan, Portugal, Serbia, Spain, Switzerland.
Status not clear	Sweden

In India, surrogate mothers actively involved included are by and large from poor family units and in urgent need of money to sustain themselves. This is misused by the mediators or

<sup>10</sup> India Law Offices, available at: [http://www.indialawoffices.com/ilo\\_pdf/publications/Legalizing%20Surrogate%20Baby%20Business%20in%20India.pdf](http://www.indialawoffices.com/ilo_pdf/publications/Legalizing%20Surrogate%20Baby%20Business%20in%20India.pdf) :(Visited on October 22, 2015).

middlemen who guarantee these ladies a superior life in return of their consent to go about as surrogate mothers. Because of the condition of laws identified with surrogacy in India, there is a high rate of these ladies being misused for the consent given by them. The privileges of the surrogate mother and the child conceived from surrogacy are of most extreme significance. Subsequently there is a requirement for a strong legal framework to secure the rights of the surrogate moms and the kids conceived through surrogacy.

The only rules available for surrogacy in India are a set of guidelines prepared by Indian Council for Medical Research (ICMR) in the year 2005, to protect the right of the surrogate mother, the new born and the parents but it has its share of loopholes. The Guidelines prepared by Indian Council for Medical Research (ICMR) are discussed below in Table (1.2).

### **ICMR Guidelines**

All registered ART (Assisted Reproductive Technology) clinics are required to have procedures for acknowledging and investigating complaints, and to have a nominated person to deal properly with such complaints.

Lists down the Minimal Physical Requirements for an ART Clinic and Essential Qualifications of the ART Team.

Rights and duties of the clinic towards its patients. Screening of Patients for ART: Selection Criteria and Possible Complications.

Desirable Practices/Prohibited Scenarios, Requirements for a Sperm Donor and Requirements for an Oocyte Donor

However, these guidelines don't hold any legal validity and lack enforceability. Even though the ICMR Guidelines do exist, yet there is no central or state body to ensure that these regulations are followed strictly when it comes to surrogacy.<sup>11</sup>

Baby Manji Yamada was a child born to an Indian surrogate mother for a Japanese couple who before a month of the kid's introduction to the world, separated and the eventual fate of the baby was left in the dark. The biological father, Ikufumi Yamada needed to take the baby to Japan however the legal system had no such provision for such a case nor did the Japanese government allow him to bring the baby back home. At last, the Supreme Court of India needed to interfere and the baby was permitted to leave the nation with her Grandma. The greatest impact of the Baby Manji Yamada choice has been that it prodded the administration of India to authorize a law regulating surrogacy.

In August 2009, the Law Commission of Indian delivered the Report which stated that:

*“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*

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<sup>11</sup> *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518 at 521.

*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.”<sup>12</sup>*

On the suggestions given by the Law Commission the government made certain amendments to the Assisted Reproductive Technologies (Regulation) Bill, 2010, for the first time attempt to plug the loopholes which prevail in the field of surrogacy. Some important provisions of the Bill are as follows:

To ensure that there is a law to protect the interest of the surrogate mother and the child who is born through surrogacy, the Assisted Reproductive Technology Bill was drafted in 2008 to look into the rights and duties of the surrogate mothers. But the loopholes which were present in the ART Bill were highlighted in the case of Baby Manji Yamada<sup>13</sup>. The ART Bill is further discussed below in:

1. If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.
2. The surrogate mother may receive monetary compensation for carrying the child in addition to healthcare and treatment expenses during pregnancy. [Section 34(3)].
3. The surrogate mother will relinquish all parental rights over the child once the amount is transferred.
4. The prescribed age-limit for a surrogate mother in between 21-35 years and no woman shall act as a surrogate mother for more than five successful live births in her life, including her own children.
5. Both the couple or individual seeking surrogacy and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable.
6. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally
7. Obligated to take delivery of the child and be free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child with Constitution of Authorities to regulate assisted reproductive technologies; establishment of National Advisory Board In one months of the birth of the child.
8. Constitution of Authorities to regulate assisted reproductive technologies; establishment of National Advisory Board.
9. Lays down the complete procedures for registration of clinics and complaints.
10. Duties of an assisted reproductive technology clinic.
11. Rights and duties of patients, donors, surrogates and children.
12. Offences and Penalties for violation of the rules of this Act.

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<sup>12</sup> The Law Commission of India , 228<sup>th</sup> Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy, ( August, 2009)

<sup>13</sup> *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518.

In an interview conducted with Dr.Nayana Patel by one of my colleagues here at JGLS, the following questions were asked and answered on how the commercial surrogacy industry works:

### **The Interview**

**What happens to the surrogacy contract in case of a miscarriage? What if the baby is born with serious disabilities and is unwanted? Or what happens if the contracting couples change their mind about wanting a baby?**

Up to 3 months, you pay 600 USD to surrogate + clinic fees up to 3 months. Up to 6 month you pay 1200 USD to surrogate + clinic fees till 6 months. After 6 months, you have to pay totally to surrogate + clinic fees up to that period of gestation (even if the baby dies) the couple has to accept handicap babies

**How has the commercial surrogacy industry changed after the Baby Manji case?**

Accordingly to ICMR guideline, if couple doesn't come for baby, these is an a agreement with a government run orphanage

**How does Akanksha recruit a surrogate mother?? Will it be possible to have a testimonial of a surrogate mother?**

Screening of surrogate – HB, TC, DC, Platelet count, Random Blood Sugar, Blood group, VDRL, HIV, HBsAg, Hepatitis C, Serum Creatinine, SGPT, Bilirubin, Toxoplasma IgG IgM, APA, TSH, X-ray chest, Pap smear, USG abdomen + pelvic USG, Urine test, ECG and physician check-up, psychological counselling, husband HIV, HBsAg, Hepatitis C.

### **Conclusion**

The main issue with the Assisted Reproductive Technologies (Regulation) Bill, 2010, is that it has too many lacunae which have to be filled by the lawmakers. It is the need of the hour to have to have a comprehensive draft which will cover every single aspect of the commercial surrogacy industry, but it is clear from the survey which was conducted with the youth of the country, that there should also be something done to change the mind-set of the nation. Like Ela Gandhi said “A law alone cannot solve the problems of society, the attitude of the people need to change.” We need to bring about a change in the mind-set of the people. There is an urgent need of awareness about issues around surrogacy and the ways of offsetting the unethical and negative aspects of its commercialization. This is an issue involving both national and trans-national solutions.

This is the primary issue with the Assisted Reproductive Technologies (Regulation) Bill, 2010, which has an excess of lacunae which must be filled by the legislators. It is the need of great importance to have an exhaustive draft which will cover each and every part of the business surrogacy industry, yet it is clear from the review which was led with the adolescent of the nation, that there ought to additionally be something done to change the mind-set of the country. Like Ela Gandhi said "A law alone cannot solve the problems of

society, the attitude of the people need to change." We have to realize an adjustment in the mind-set of the general population. There is a dire need of mindfulness about issues around surrogacy and the methods for balancing the unscrupulous and negative parts of its commercialization. This is an issue including both national and trans-national arrangements.

But slowly the law is indeed changing, for instance in today's Times of India newspaper, a new article has been published which notifies us about a new law that may end rent-a-womb tourism in India for which the link is provided in the footnote.<sup>14</sup>

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<sup>14</sup> <http://www.pressreader.com/india/the-times-of-india-mumbai-edition/20151022/282003261275516/TextView>