

## REGULATION AND INTERPRETATION OF JUDICIARY ON SURROGATE MOTHERHOOD

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Law has a special role in the regularisation of practice of surrogacy. Surrogacy is a practice that provides the childless with the hope of fulfilling their right to procreate with the aid of third party referred to as a surrogate mother. Widely in the famous case *In Re Baby M*.<sup>1</sup> the addressing of commercial surrogacy enforceability was done for the very first time. The case was concerning a traditional surrogacy contract amid William Stern and Mary Beth whitehead in which Mrs. Whitehead approved to carry a child for the Sterns and conclude her parental rights for \$ 10,000 in return and compensation of all expenses and fees incurring during the entire pregnancy. Following this arrangement, Mrs. Whitehead artificially got inseminated with the sperm of Mr. Stern. The trouble aroused prior to the birth of the baby when Mrs. Whitehead determined that she wanted to have the baby herself and wanted the custody of the child. The Supreme Court of New Jersey acknowledged all contracts involving surrogacy as invalid and unenforceable as breach of some public policies and state laws. The unenforceability of the contract was assumed based on the subsequent laws in particular: those which prohibit the exchange of money in connection with adoptions; those which require “proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted”; and those which permit a woman to revoke her surrender of custody and consent to adoption in private placement adoptions.<sup>2</sup>Therefore, the comparison of the practice of commercial surrogacy was done to baby selling by the court, in conflict that the state laws barring the trade and sale of babies is also applicable to surrogacy agreements on the grounds of public policy.<sup>3</sup>After the verdict of surrogacy contracts being unenforceable and void in New Jersey, the issue regarding the decision of the custody was left to the court. Even though in the Baby M case the surrogate was not given custody in, visitation rights were granted to her. Some European countries and numerous states have approved laws prohibiting paid surrogacy.

<sup>2</sup> Council for Science and Society Staff, *Human Procreation: Ethical Aspects of the New Techniques* (1984)

<sup>3</sup>The Court stated: this is the sale of a child, or, at the very least, the sale of a mother’s right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that promoted the prohibition on the payment of money in connection with adoption exists here.

## ISSUE OF COMPENSATION

Legislatures and courts in general do not favour surrogacy agreements in which the surrogates are compensated. This is particularly true in case where the surrogate mother is genetically linked to the baby as she is believed to have a superior association to the baby when they are genetically linked.<sup>4</sup> States in which surrogacy agreements are acceptable, the commissioning parents might in general make payments for the pregnancy-related expenditure of the surrogate, but might pay directly to the surrogate for the service rendered.

In *R.R. vs. M. H. and another*,<sup>5</sup> The Supreme Court of Massachusetts looked into the adoption laws of Massachusetts, which forbids the pay of money related to adoption other than adoption-concerning expenses. Controversially, a small number of states address recompensing surrogate mothers after determining that surrogates might be paid more than expenses related to pregnancy.

The Supreme Court California allowed the payment to the surrogate mother in *Johnson v. Calvert*.<sup>6</sup> In this case the court found that situations related to surrogacy vary from adoptions “in crucial respects”. In contracts related to surrogacy, the contracting parents pay compensation to the surrogate for “her services in gestating the foetus and undergoing labor, rather than for giving up 'parental' rights to the child”. Under this outlook, recompense to the surrogate is simply for a service and is not associated to her agreement to surrender her parental rights to the baby.

## THE SCENARIO IN INDIA

The world saw the very first successful birth via gestational surrogacy in the year 1984 and in India ten years later it first took place in Chennai. In 1997, an Indian performed as a gestational carrier, and got compensation for the treatment of her paralyzed husband. In India, in January 2004 the matter appeared in news when a Gujarati grandmother delivered her daughter’s twins. Reports say that in India this is certainly not the only happening of surrogacy and there definitely are much more children all over the country who are given birth by surrogates. In India majority of such stay out of sight and unspecified due to social consequences as they are unacceptable to the society.<sup>7</sup> Another cheap and easy option in India is renting wombs fairly lesser cost of medical services, effortless accessibility of surrogate wombs,

<sup>4</sup> Higginson, R., “Reply to Warnock (1986). On the Problem of Surrogate Parenthood: Analyzing the Baby ‘M’ Case” (H. Richardson ed. 1987).

<sup>5</sup> Mass. 501

<sup>6</sup> 5 Cal. 4th 84, (1990)

<sup>7</sup> Ramesh Vinayak, “A Womb for Rent” India Today 82 (June, 1997).

profuse alternative of donors by parallel racial characteristics and deficit of any law to control these practices are drawing both NRIs and foreigners to sperm banks and surrogates to India.

Surrogacy is blooming in India and the number of surrogates is almost doubling-up every year. In the year 2005, 158 surrogacy cases had been reported which went up to 290 in the year 2006. In an assessment that was carried out by Federation of Obstetrics and Gynaecological Societies of India (FOGSI) and the Indian Society for Assisted Reproduction, according to collected data from 116 fertility centres 50-odd cases had been reported.<sup>8</sup> India is observing a surge in cases related to commercial surrogacy owing to two factors: a medical tourism boom fuelled by low medical costs and a status conscious middle class seeking to fulfil its financial needs. The courts are yet to tackle with the legal inferences of surrogacy agreements and, as a whole, the state of the law remains to be insufficient owing to multifaceted moral and ethical queries concerned. The legislature needs to equilibrate individual rights with public policy deliberation with the help of legislation.

#### JUDICIAL RESPONSE TO SURROGACY IN INDIA

There is no law that deals with the complex issue of surrogacy and surrogate motherhood in India. India is even frequently named as 'Surrogacy Hub', but still lacks planned framework for surrogacy and surrogate motherhood.<sup>9</sup> The surrogacy contract, which is based on free consent and a meeting of the minds of the parties concerned towards a particular outcome, has been held to be valid in India and is therefore interpreted in light of the provisions of The Indian Contract Act, 1872.

Presently there is no enactment on surrogacy on the subcontinent and The Indian Contract Act, 1872 exercises jurisdiction over all agreements and contracts. In the well-known case *Baby Manji Yamada vs. Union of India*,<sup>10</sup> a Japanese couple, Dr. Ikufumi Yamada along with his wife, desired to have a child and got into a surrogacy agreement in Anand with an Indian woman, which a city in the state of Gujarat where this procedures were initiated. The couple later went through marital conflict, which resulted in non acceptance of the child by the wife. The surrogate as well deserted the child, but the father still wished to have the custody of the baby. As clear laws were absent regarding surrogacy the fate of the baby hung in balance.<sup>11</sup> Adoption of a girl child cannot be done by a single father Under the Adoptions and Maintenance Act, 1956. He had sent his mother in hid place and an appeal in the Supreme Court

<sup>8</sup>Alifiya Khan, "Surrogacy is soaring in India" Hindustan Times, September 19, 2008.

<sup>9</sup>PriyaPareek, "Surrogacy- Concept of Renting a Womb" Available at: [http://legalservicesindia.com/articleprint.php?art\\_id=921](http://legalservicesindia.com/articleprint.php?art_id=921) (visited on September 19, 2012).

<sup>10</sup> AIR 2009 SC 84

<sup>11</sup>India Born Surrogate Baby to Unite with Dad" The Tribune, November 4, 2008

was filed. The Government appeared to be unable to help in this issue as there were hardly any laws governing the surrogacy effect. It was directed by the Apex Court that the suitable organization to handle this problem is National Commission for Protection of Child Rights.

Therefore in India the debate related to surrogacy had become intense due to this case. In the controversy of this case, a number of shortcomings in the arrangement came to light which included the lack of a legal agreement amid the parties opting for surrogacy, a reality that many could see as a disturbing reminder of the possibility for exploitation of local surrogates. With *Baby Manji* case a Pandora's Box had been opened with a flood of different questions and problems regarding the legality and ethics that surrounded surrogacy.<sup>12</sup>The Supreme Court in legitimizing surrogacy and equating it with an industry has re-opened the debate on. In an effort to legitimize surrogacy and make it equivalent with an industry the debate has been re-opened by the Supreme Court on commercialization of surrogacy and surrogate motherhood in India.<sup>13</sup>Connecting surrogacy with additional types of outsourcing industry and identifying aspects like 'brilliant medical infrastructure, soaring international demand and readily available of poor surrogate women' have elevated the question on use of women and their exploitation, abuse done to their reproductive organs, not having the capacity of making choices and too much strain on women to earn in a patriarchal society.<sup>14</sup>It was observed by Supreme Court that "commercial surrogacy reaching industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms 'wombs for rent', 'outsourced pregnancies' or 'baby farms". It is apparently considered justifiable as no Indian law puts a Bann or prohibits surrogacy completely. However then, as a rejoinder, no law allows surrogacy either.<sup>15</sup>, The varying face of law is now going to usher in a new rent-a-womb law as India is set to be the only country in the world to legalise commercial surrogacy.<sup>16</sup>Justice Mukundakan Sharma and Justice Arijit Pasayat of the Supreme Court held that being the real genetic father of the baby he was handed over the custody of the child. Eventually, an identity certificate with no nationality or a mother listed was issued to Manji Yamada, and a humanitarian visa was granted to her by the authorities of Japanese granted, and as well promised that once paternity was established citizenship would be granted to her. Instructions were given to the government for issuing the passport to Manaji Yamada and she returned along with her grand –mother.

<sup>12</sup>Buchanan, J., "Baby "M" and Surrogate Motherhood: A Resource Guide" (1987)

<sup>13</sup> Rees, N., C. Thaler & K. Hamod "Adoption, Surrogate Mothers, and Other Legal and Medical Remedies for Infertility" (1986)

<sup>14</sup>Revealed: How More and More Britons are Paying Indian Women to Become Surrogate Mothers" The Telegraph, May 26, 2012.

<sup>15</sup> Surrogacy and the Best Interests of the Child, 16 Fam. Law.59 (1986)

<sup>16</sup> Anil Malhotra, "Business of Babies" The Tribune, December 14, 2008.

Most prominently, Surrogacy Agreements were held to be valid by the Supreme Court in India. Even more noticeable thing in the Baby Manji Yamada case is that the standpoint of the court was also very pro-contract not just pro-surrogacy.<sup>17</sup>The agreement was held to be legitimate and so of most significance although what the Court settled had gone against a particular legislation in the country.<sup>18</sup>

In *Jan Balaz vs. Union of India*,<sup>19</sup> the Gujarat High Court bestowed Indian citizenship on two twin babies fathered through paid surrogacy by a German national in Anand district. The court observed that: “we are primarily concerned with the rights of two new born, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance.” The court took in consideration the surrogacy laws Japan, Ukraine, and United States. It was also put forth in the verdict that there is a severe necessity to move forward through the legislation answering all these problems.

On declination of birth certificates, Jan Balaz went to the Gujarat High Court as the surrogate is an Indian therefore, considering that the same treatment will be given to the children and hence would be entitled with the India passports. But , the Indian Government of defied it in result stating that the children being from a surrogate, they cannot be given Indian citizenship, which made the twins stateless as they had neither Indian nor German citizenship. Stating that surrogacy was not recognized as a way of parenthood by the German law, the authorities of Germany also had rejected the visa to the twins. In the end, Susan Lohald and Jan Balaz had to go through an inter-country adoption procedure in India, after which the Government of India arranged exit permits to the German surrogate twins to facilitate their trip back home to Germany. Evidently, courts worldwide incline to constructively interpret accessible existing laws assisting surrogacy. Even India has presented a Surrogacy (Regulation) bill 2016 with the aim of putting an end to the exploitation of poor surrogate mothers for money.

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<sup>17</sup>Organ, Making Motherhood Male: Surrogacy and the Moral Economy of Women, 12 J.L. & Soc. 219 (1985).

<sup>18</sup>Shriya Mishra, “Commercial Surrogacy- Need for Regulation” Available at:<http://www.legalservicesindia.com/article/article/commercial-surrogacy-1188-1.html> (visited o March 6, 2013).

<sup>19</sup> 2010 (2) ALL MR (Journal) 14