

Surrogacy: Removing the Cross National Borders

Sub-Theme: Comparative study on surrogacy laws around the world

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Abstract: 'Little Souls find their way to You, whether from Your womb or Someone else' -Sheryl Crow

Though surrogacy is not a new reproductive practice but its acceptance and the prevalent phenomenal are varied in different culture and nation states. The idea of this article would be to analysis various social, economic, legal structures of various nation states and compare them to one and another to visualize the legal checks and balances and also see that there is a *formal reporting mechanism* which reports non-legal international surrogacy in order to prevent exploitation. In some countries commercial surrogacy is allowed and in others non-commercial surrogacy. In order to declare surrogacy as a commercial or non-commercial, one needs to look deeply into the rights and duties related to any kind of surrogacy which we will do in the article. It is the need of the hour to research on the different laws on surrogacy in the world and come up with a unifying law which unites all the discrepancies of the internal laws and brings together contrasting mindsets in order to make it useful for the intending parents as well as for the benefit of the surrogate mother. In the course of this article the countries we are going to focus on U.K., U.S.A. and India and compare their legislations to see that out of the three which is the country which practices surrogacy the most and which is the country where the lacuna of information and knowledge exist the most. The discussion of ethics of surrogacy in the comparative perspective makes one point clear that there have been arguments and counter-arguments between the west and the east to judge the moral worth of any kind of surrogacy and howsoever hard we try the debate on surrogacy will keep continuing unless and until there is a blanket prohibition law. By the end of the article the overall analysis will show that despite all the religious and social critics the benefits of surrogacy are no less without denying the fact of risk in surrogacy. The Hague Conference on Private International Law which happened in 2011 issued a mandate under which the Permanent Bureau was to gather information on the practical means in the area, comparative developments in internal and private international law and the prospect of achieving some kind of consensus on a global approach to address multiple facets of international cross border surrogacy. In the end we should focus on making the laws in such a manner that the ambiguity of the practice of surrogacy is removed and the ultimate beneficiaries should be the three main stakeholders and not the middleman.

Keywords: International surrogacy, Commercial surrogacy, India, U.S.A. and U.K.

I. INTRODUCTION

While surrogacy is not a new reproductive practice, it is commonly accepted that it is an increasingly prevalent phenomenon. Recent reports have documented a rise in the practice of surrogacy, to include arrangements that cross national borders.¹ Precise statistics relating to surrogacy are, however, hard to estimate. First, traditional surrogacy² does not necessarily require medical intervention and can thus be arranged on an informal basis between the parties concerned.

Second, although gestational surrogacy does require medical intervention, officially reported statistics do not necessarily record the surrogacy arrangement but often only the IVF procedure.³ Third, in many countries there is simply no legal provision, regulation or licensing regime for either fertility treatment and/or surrogacy, to include commercial surrogacy in countries where such is not otherwise legally prohibited. This means that there are no formal reporting mechanisms, which can lead to a rather ad hoc collection of statistics by individual organisations, if indeed they are available at all. Finally, in countries where surrogacy is legally prohibited, those involved could potentially face criminal prosecution, thus exacerbating the difficulties of collecting relevant and accurate data.

Despite these problems, we can still point to a number of factors which signal a rise in the practice of surrogacy. First, a

¹ Hague Conference on Private International Law (2012) A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, pp. 6-8.

² A surrogacy arrangement where a surrogate mother's eggs are used and she is the genetic mother of the child. The pregnancy comes about either through an insemination procedure with the sperm of the intended father or donated sperm or through sexual intercourse with the intended father or another man.

³ E.G. Human Fertilisation and Embryology Authority (2012) Fertility Treatment in 2011: Trends and Figures. Available at: <http://www.hfea.gov.uk/104.html>.

simple internet search reveals a plethora of agencies and clinics that very explicitly seek to facilitate surrogacy arrangements. Sometimes these are voluntary organisations, which seek to match willing surrogate mothers and hopeful parents on a non-commercial basis;⁴ while others operate on a commercial basis either as part of a fertility clinic or in partnership with fertility clinics.⁵

The first scenario is where a country either prohibits surrogacy, or makes no express provision for it. When a child is born following a surrogacy arrangement, the general rules of attributing legal parenthood apply and often a child ends up being cared for by someone with whom they have no legal connection.⁶ This can create a number of difficulties, not least in relation to acquiring and exercising parental responsibility, maintenance provision and inheritance law. Formal adoption – if permitted in the circumstances – must take place, or the courts must rely – if available – on other less permanent family law measures in order to secure some legal certainty for the child and the parent(s).⁷

The second, and arguably more complicated scenario, involves formal recognition following a cross-border surrogacy. Here, the intended parent(s) travel/s to another country where surrogacy arrangements are more readily facilitated and/or available at less expense, either because the fertility treatment (i.e. IVF for a gestational surrogacy) is cheaper or because the fee paid to the surrogate mother is lower. While similar difficulties apply in relation to legal parenthood, the situation can be further exacerbated when the rules on legal parenthood in the two countries are mismatched. For example, under Ukrainian,⁸ Russian⁹ and Californian¹⁰

law the intended mother can be automatically regarded as the legal mother, while for most Member States legal motherhood is attributed on the basis of parturition, irrespective of where the birth took place.¹¹ Similar difficulties can arise in relation to legal fatherhood, as well as the recognition of two parents of the same sex. This can potentially leave a child not only legally parentless, but also stateless and without citizenship given that their birth registration documentation is not recognised beyond the country of birth. This scenario is particularly problematic when the child needs not just civil status travel documentation (i.e. a passport), but also a visa to gain entry into the home country of the intended parent(s). While some Member States have worked towards accommodating the difficult consequences of such scenarios, whether through judicial deliberations and/or through the publication of pre-emptive governmental advice,¹² others have refused to do so, again on the basis of public policy.¹³

In many jurisdictions of the United States, commercial surrogacy is prohibited or even criminalized. Likewise, Great Britain does not allow commercial surrogacy.¹⁴

There are a plethora of views regarding the issue of "surrogate birth" in various countries. It is rather a tumultuous point of law as there are only a handful of nations recognising it and there is also a lack of uniformity in the principles being followed in these nations with respect to the phenomenon of surrogate birth.¹⁵

UNITED STATES as of March 1990, most jurisdictions in United States did not have any specific rules concerning surrogacy. The issue of surrogate motherhood came to national attention during the 1980s, with the Baby M case.¹⁶ The Baby M decision inspired state legislatures around the United States to pass laws regarding surrogate motherhood. Most of those laws prohibit or strictly limit surrogacy arrangements.

In general, though, at the beginning of the twenty-first century, United States' most common response to surrogate motherhood remains a lack of legislation. Among those states that have implemented specific laws, the dominant policy response is similar to that found on the international level, namely policies that ban and/or do not recognise surrogacy contracts. This contradicts the common assumption that the United States, unlike most other nations, uncritically embraces

⁴ E.G. The UK organisation Childlessness Overcome Through Surrogacy (COTS): <http://www.surrogacy.org.uk/>.

⁵ E.G. Surrogacy Cyprus: <http://www.cyprus-surrogacy.com/index.html>.

⁶ Jackson, E (2006) 'What is a Parent?' in Diduck A and K O'Donovan (eds) *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish) pp 59-74 and S. Dermout, H. van de Wiel, P. Heintz, K. Jansen and W

⁷ E.G. the English courts may grant a non-parent a 'residence order' under the Children Act 1989 if they satisfy certain requirements. A residence order will automatically confer parental responsibility, but not legal parenthood. In a number of recent cases in Australia, 'parental responsibility orders' have been granted to intending parents to attribute them with the ability to make day-to-day decisions concerning the child. However, legal parenthood has not been conferred in these cases: *Dudley and Chedi* [2011] FamCA 502; *Hubert and Juntas* [2011] FamCA 504; *Findlay and Punyawong* [2011] FamCA 503; and *Johnson and Anor & Chompunut* [2011] FamCA 505. See further Millbank J (2011) "The New surrogacy Parentage Laws in Australia: Cautious Regulation or '25 brick walls'?", 35(2) *Melbourne University Law Review* 1-44.

⁸ Family Code of Ukraine, article 123(2).

⁹ Family Code of Russia, articles 51-52.

¹⁰ *Matter of Baby M* (1988) 537 A.2d 1227; as reinforced by *Johnson v Calvert* [1993] 5 Cal 4th 84 and *Buzzanca v. Buzzanca* [1998] 72 Cal. Rptr.2d 280.

¹¹ E.G. as per the UK's Human Fertilisation and Embryology Act, s 33(3).

¹² E.G. Belgium, Ireland and UK.

¹³ E.G. France. However, as this Report indicates, the executive branch of the French Government have seemingly been prepared to give ex poste recognition of foreign birth certificates in order to "smooth over" some of these difficulties and the precarious position of children born following cross-border surrogacy agreements.

¹⁴ Surrogacy Arrangements Act, 1985 (Eng.); Human Fertilization and Embryology Act, 1990 (Eng.).

¹⁵ Reetu and Basabodutta, "Surrogate Birth" AIR 2009 Jour 109
¹⁶ 109 N.J. 396, 537 A.2d 1227(1988)

new reproductive practices such as surrogate motherhood. At the same time, the range of state level legislation institutionalised thus far signals a diverse political response to surrogate motherhood.

Tracing the way back history of India we come across the phenomenon cases such as the case of Kauravas. At that time also the concept of surrogacy might be in existence so that a lady (Gandhari) was able to become mother of hundred sons which is not possible for normal human being to procure hundred children in one life. Commercial surrogacy in India is legal in India since 2002.¹⁷ The availability of medical infrastructure and potential surrogates, combined with international demand, has fuelled the growth of the industry.¹⁸ Surrogate mothers receive medical, nutritional and overall health care through surrogacy agreements. 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. India is a flattering destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has prospered on the surrogate practice.

However, this notion looks pleasing only on paper. In most of the cases involving surrogacy, the surrogate mother is ill-treated as she is remunerated relatively less for her services in India. 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.¹⁹ In most cases she is deceived by the agent or the other parties involved. All these lacunae arise from the fact that India does not have any laws with respect to the same. Therefore, these practices though legal and not regulated in any manner. This creates problems not only for the mother but also for the who find themselves in the midst of many immigration, citizenship and other difficulties.

In the year 2005 ICMR (Indian Council for medical research) drafted and enacted a set of guidelines that must be followed by any and all individuals or organizations associated with the field of assisted reproductive techniques or surrogacy.²⁰ It was now when specific rules and protocols were laid down which were to be followed in the process of surrogacy and gestational surrogacy was given the recommended modality to be followed in a commercial sense in India. There were comprehensive provisions for the authorization and recognition of ART clinics in the country as well as state and district level forums were constituted to scan and supervise these clinics. Thereafter the Assisted Reproductive Techniques Bill was proposed but not yet enacted in the

country²¹. The bill was based on the guidelines that were mentioned in the notification by the ICMR (Indian Council for medical research), however as was the case in the ICMR guidelines so is with the proposed bill. There were many issues that were confronted and appropriately slackened yet there is range for further improvement still. Another legislation that holds interest is the "The Delhi artificial insemination (Human) Bill 1995." Which though potent only in the state was initially constructed to control the headway of various ART clinics in the state. It has also now been replaced with the ICMR guidelines. The contract between the wilful parents and the surrogate is considered a legally binding agreement as per the Indian Contracts Act, and the surrogate renounces all right to the child.

However, the scene is different in the UK, where the mother can claim right to the baby up to 2 years after delivery, and it is the discretion of the court to allow this.²² Under UK law, when a baby is born, the woman who gives birth is the legal mother – whether or not she is biologically related to the child – and if she's married, her partner is the legal other parent. After a surrogate mother has given birth, the intended parents must make an application to the family court to become the baby's legal parents. In the eyes of the law, any written agreements between the intended parents and the surrogate are not enforceable.

"In the UK, it's all done on trust and you have to fix out the legal issues after the baby's been born, which in our view is all far too late," says Gamble. "We're keen to see a law which pulls all of that legal exercise forward so there's a contract and the right people are recognised as the legal parents immediately from birth."

An 'order' is currently being outlined by the Council of Europe to smother the rights and legal status of children and parental responsibility. This will include allocations relating to legal parentage in the circumstances of medically assisted reproduction. The European Union is currently considering the possibility of facilitating the creation of simple status documents within in the EU for the identification of legal parentage between EU member states. Research papers have advocated that the work should expand to surrogacy arrangements; it may well be that the status documents provide a mechanism for the effective recognition of the rights of parents involved in surrogacy arrangements.

The Hague Conference on 10th March 2011 has pinpoint the fundamental standards that would need to be covered by all-inclusive international and multinational agreement:

- (i) To make decisions in the matter of legal parentage uniform rules must be followed with respect to the jurisdiction of courts or other authorities;
- (ii) There must be consistent rules applicable on the laws governing the surrogacy arrangement;
- (iii) Rules must provide correspondence to the acceptance and enforcement of parental decisions relating to the legal parentage;

¹⁷ The Associated Press (2007-12-30). "India's surrogate mother business raises questions of global ethics". Daily News.

¹⁸ <http://news.bbc.co.uk/2/hi/business/7935768.stm>

¹⁹ KANIKA SATYAN; *Adoption v. Surrogacy - An Indian Comparative Legal Analysis*; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625608

²⁰ National guidelines for the accreditation supervision and regulation of ART clinics in India. http://www.icmr.nic.in/art/art_clinics.htm [Last accessed on 2016 sept 03]

²¹ ART Regulation draft bill 2010. Available from: <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> [Last accessed on 2016 sept 02].

²² Surrogacy Arrangements Act 1985. Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament.

(iv) There must be uniform rules on the applicability of laws which assist in the establishment of legal parentage by way of operation of law or by agreement;

(iv) there must be uniformity in rules which recognise the principles concerning the establishment of parentage by voluntary acknowledgment (i.e. birth certificates).

II. CONCLUSION

In maintaining with the tradition of justice for all, the civil society and the legislators should form a legislation that is enacted with a priority on averting the exploitation and equivocation in the practice of surrogacy. There are a growing number of infertile couples and individuals who desperately wish a child who they can raise from birth as their own. It is the duty of the legislature to pass laws to protect the citizens and ensure that all of the benefits of reproductive technology are available to every member of our society.²³ Through pronouncement or direction, all parties to a surrogacy contract can be protected. Preventive measures can be entrenched to help safeguard lasting arrangements because informed parties agreeing to the contract and the best interests of the intended child are protected.

Proclaiming surrogate contracts illegal or contradicting to public policy is not productive and leaves the door open to illegal arrangements with no opportunity for valid implementation through our legal system.

The exposure of India as a fulcrum for Assisted reproductive technologies has proven serviceable for many childless couples, however we must ensure that the medical fraternity along with the surrogates and intended parents must be carefully looked after so as to avoid any problems to the family unit and especially to the children born out of surrogacy. The laws enacted must be built in such a way that the eventual beneficiaries of the plan must be the child, surrogate and intended parents and not the middlemen. Foreign individuals craving for having surrogate children in India should be allowed only after proper documentation and verifications are done through the specific agencies and embassies.

Lastly a commendatory and strict law must be enacted after due discussion and arguments which should involve all parties or organizations consisting such as doctors, social activists and surrogacy clinics. As the enterprise set out above indicates, surrogacy is now firmly on the international schedule. The time has come to amalgamate the various efforts to deal the issues surrounding international surrogacy into a multi-lateral convention, presuming that a substructure for the growing number of international surrogacy arrangements being entered into.

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