

Comparative Review of Surrogacy Laws in India and Abroad

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Abstract: Surrogacy is an arrangement for carrying of a pregnancy by a female for other intended parents. It has been practiced since ancient times but has achieved a scientific outlook since the advent of IVF practices in the modern era. The practice of surrogacy involves many medical and ethical issues as well as requires a legislation which should be strong and specific enough so as to prevent immoral trafficking and prevent exploitation of childless couples as well as surrogate mothers. This paper presents a review between the legal issues in the countries of USA, UK and India, in terms of surrogacy.

Keywords: Surrogacy, Legal Issues, Laws in India, USA, UK

1. Introduction

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) 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. (1)

Surrogacy in its modern avatar has its roots originating from ancient Egypt, where infertile women were allowed to undertake the practice of allowing another woman bear the biological child of her husband in order to avoid divorce. It was a practice though not held commonplace but was still considered an act and not a criminal offence.

In modern times, it was in the year 1978 that in the United Kingdom, the first successful IVF procedure was carried out and resulted in the birth of baby Mary Louise. This heralded a new found hope for childless couples as well as ushering in a new branch of science. This did however also raise a multitude of questions in morality, law and ethics with regards to the field of assisted reproductive techniques. (2)

Though there are either enacted or proposed laws in many countries with reference to surrogacy, there exist a lacuna of information and applications of these laws among the ones who are affected most by it. This was evident in many cases across the world. A case in point would be the enforced ban on surrogacy in China.

There is an amalgamated pool of ethical and legal issues that are hovering around the practice of assisted reproductive techniques and none are more important than in the case of surrogacy. The primary reason here is that in the case of surrogacy, be it gestational or traditional surrogacy, there is

no specific outlined plan for the protection of the mother and the child, in case the contract is not honored by the intended parents.

Most insurance companies are not having plans to cover surrogate mothers specifically and even in places where schemes are available, the premiums are very high and the knowledge is not distributed among the surrogate mothers. (3)

2. Issues in Surrogacy

As mentioned, one of the core issues that need to be delineated is the issue of financial protection of the mother who is acting as the surrogate.

In countries where commercial surrogacy is allowed, such as India, Russia, Georgia, Ukraine, Thailand and a few states of the United States of America, there are legislations which provide for some relief to the surrogate but as was reported in media circles, its more often than not that the intended parents as well as the surrogate are exploited in the name of benefits and it's the middlemen who ultimately reap the monetary benefit. The legislations and guidelines in place are ineffectively enforced in such cases.

Another issue that holds place is the matter of the child born out of surrogacy. It was widely reported in Indian and some foreign media regarding the case of the Israeli couple that had faced hurdles in establishing parentage of their child or of the German couple who faced a long legal battle to get citizenship for their Indian surrogate child.

Mandatory testing in terms of psychological and health criteria is practiced in the United States of America, however Indian laws focus only on the infectious diseases aspect of the matter without due note of the impact of psychological health on the subsequent intended parents as well as the surrogate.

Exploitation of the surrogate is rampant as many women from poor socio-economic strata are both attracted and lured to surrogacy with the promise of easy money. (4) These women are generally left high and dry with the middlemen and ART clinics taking a bulk of the payment and offering no post delivery care, as stipulated in Indian guidelines.(4,5)

3. Indian Scenario and International Scenario

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. (6)

It laid down specific protocols to be followed in the process of surrogacy and also specifically mentioned that gestational surrogacy is the accepted modality to be followed in a commercial sense in India. There were detailed provisions for the accreditation and recognition of ART clinics in the country as well as state and district level forums were constituted to monitor these clinics.

Thereafter the Assisted Reproductive Techniques Bill was proposed but not yet enacted in the country(7). The bill was based on the guidelines that were mentioned in the notification by the ICMR, however as was the case in the ICMR guidelines so is with the proposed bill. There were many issues that were addressed and appropriately moderated yet there is scope for further improvement still.

There was no single point redressal system enacted or proposed to be enacted by the law, through which a surrogate mother or the intended parents can seek to solve their complaints. The proposed law mentioned many factors like age, number of embryo implantations, blood transfusion etc. for the surrogate but was as yet silent on whether a specific demographic criteria must be laid for the intended parents or not. Though the act has not yet made distinction in the caste, creed or otherwise, the authors feel a minimum standard of care must be exercised in making sure that the intended parents are in fact genuine and not criminal elements, are they stable and can support a new member in their family, and finally are the children being treated fairly and without discrimination in their new household. This is a long process and should be done in a method as followed in the western countries where parents of adopted children are subjected to repeated, but un-intrusive verification of their child's welfare. In India this can be achieved by the Integrated Child Development Services (ICDS) scheme started by the Government. (8)

Another legislation that holds interest is the "The Delhi artificial insemination (Human) Bill 1995." Which though effective only in the state was initially formulate to control the blooming of various ART clinics in the state. It has also now been replaced with the ICMR guidelines.

As per the guidelines prevalent, no punitive action is proposed on the malpractice by doctors in the clinics. The issue is left to the ambit of the Medical council of India (MCI) and the respective State Medical Councils (SMC).

The contract between the intended parents and the surrogate is considered a legally binding agreement as per the Indian Contracts Act, and the surrogate relinquishes all right to the child.

In the USA, the picture is similar in a few states where through disputed cases; this matter has been maintained in a status similar to Indian laws where the surrogate relinquishes all rights 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.(9)

However due to the USA following federal system of government, there are no unifications of the laws centrally. The state of California recognizes the act of commercial surrogacy while the state of Washington considers commercial surrogacy unacceptable. In California the traditional surrogacy is allowed but the biological mother is still the legal mother in this case, while in the UK and India traditional surrogacy is not legally acknowledged.

In the state of Utah, in USA, traditional surrogacy is prohibited and it's a matter of rule that at least one intended parent must provide one gamete in a gestational surrogacy. The state of Virginia does not register the intended parents as legal parents on birth of the child but instead requires a legal process to have the name of the parents changed after permission is taken both prior and after surrogacy is done.

In another State of the USA, the state of New York, any and all surrogacy agreements involving compensation of any kind are considered, void and unenforceable, similar to the laws in the UK and contrary to the proposed law in India.

4. Conclusion

In keeping with the tradition of justice for all, the civil society and the legislators should form a legislation that is enacted with a focus on preventing the exploitation and ambiguity in the practice of surrogacy.

The emergence of India as a hub for Assisted reproductive technologies has proven beneficial 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 made in such a manner that the ultimate beneficiaries of the procedure must be the child, surrogate and intended parents and not the middlemen.

Foreign individuals desirous of having surrogate children in India should be allowed only after proper credentials and verifications are done through the specific agencies and embassies.

Lastly a favorable and strict law must be enacted after due discussion and arguments which should involve all parties or organizations involved such as doctors, social activists and surrogacy clinics.

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