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# JUDICIAL PERSPECTIVES TOWARDS SURROGATE MOTHERHOOD AND REPRODUCTIVE AUTONOMY: ISSUES AND CHALLENGES IN INDIA

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**Abstract:**

Advanced methods in the medical field have discovered and changed the method and nature of conception. It is now possible for a human ovum to be fertilized outside the body and without physical intercourse. A child can be born using pregnancy related technology and services. These pregnancy services have created various legal, social, moral and other issues. These include parenting, motherhood and citizenship. The US Supreme Court had ruled in 1986 in the Baby 'M' case on the validity of the surrogacy agreement. The Indian Supreme Court, on the other hand, had the opportunity to intervene on issues related to surrogacy in the Baby Manji case. However, the work of the Supreme Court of India in this regard could be considered weak. It lacks the courage to deal with these issues like the American courts. As a result, the commercial business of surrogacy flourished so much that India became a hub for paid surrogacy. However, it has led to an increase in the incidence of exploitation. Prior to the passage of the ART Bill, issues such as guardianship, legal motherhood, birth registration, citizenship, etc. for a child born through surrogacy were unclear.

These questions were raised after the cases before the Supreme Court of India.

**Introduction:**

The issue of surrogacy is being raised all over the world including India. Most of the issues are legal issues like parenting, Motherhood and citizenship. These questions are very complex and serious due to lack of law. The issue of custody and citizenship of a child born of surrogacy was first raised in the 2008 Baby Manji case, which is the first case that has led to the intervention of the Supreme Court of India.

Currently, the ART Bill and the ICMR Guidelines, 2005 reaffirm the legal status of parenting by separating and limiting the role of surrogate mothers. These guidelines provided legal guardianship on the part of the mother or aspiring father. In other words, such a child is considered a natural child for the purpose of inheritance.<sup>3</sup> The surrogate child will be issued a birth certificate with the name of the aspiring parent and the name of the surrogate mother has been omitted. However, the current provisions are also inadequate and inconsistent with the established principles relating to natural

motherhood in which the natural mother is considered the legal mother under almost all different laws.

**Surrogacy and Reproductive Autonomy: Concepts**

Surrogacy is a type of reproduction of child with the help of a third party in which a woman agrees to conceive for the intended parent. Those who cannot have children for medical reasons or who are gay couples, can choose a child with this technical assistance. There are two types of surrogacy- a) traditional surrogacy and b) pregnancy surrogacy. In traditional surrogacy, they use surrogate mother's eggs for conception. In surrogacy during pregnancy, embryos produced by IVF are transferred from the expectant mother or donor by laying eggs. However, both pregnancy and childbirth carry a mental burden and health risks for the surrogate mother. So the surrogate mother has to formally relinquish her parental rights and adopt the child born to the intended parent.<sup>4</sup> Surrogacy is a process in which a woman agrees to conceive for a couple or another woman, for charity or financial gain. She promises to give up at the birth of the baby, which should be adopted by the woman who will be the legal mother. The expressions such as female carrier, surrogate mother, maternity option, pregnancy contract, representative pregnancy, surrogate motherhood and pregnancy for another etc refer to this practice.<sup>5</sup>

Reproductive autonomy is synonymous with reproductive life and freedom of decision related to the female body. Freedom of decision is expected, free from coercion and violence. It is a woman's right to make decisions

about her sexual and reproductive life. It is recognized under Article 21 of the Constitution of India. Under Article 21, the right to privacy and dignity is part and parcel of the right to life and personal liberty. All reproductive rights are part of the right to privacy. These rights include the right of women, individuals and couples to make decisions about reproduction, health care, family planning, childbirth, full-term pregnancy, child rearing, contraceptive use, legal abortion and termination of pregnancy. Reproductive freedom and the use of fertility are the rights of women. Moreover, the Supreme Court of India has brought reproductive rights and reproductive freedom under the right to privacy.

The Supreme Court on August 24, 2017, K.S. Puttaswamy Vs. The Union of India<sup>6</sup> has unanimously recognized that the right to privacy is a fundamental principle of the right to life and personal liberty and is an integral part of Article 21 of the Indian Constitution. Individual autonomy and reproductive rights are clearly stated to be key components of the right to privacy. Individual autonomy related to reproduction also includes decision making related to reproduction, reproductive selection and reproductive rights. In the case of Suchita Srivastava,<sup>7</sup> the Supreme Court has reiterated the same view. A three-judge bench of the court observed that women have the right to choose reproduction during pregnancy. She can conceive for a full period and raise children. These rights are an integral part of the right to privacy, physical integrity and dignity.

The Bombay High Court has also held a similar view in the case of Gautam Bhatia,<sup>8</sup> which clearly states that a single woman should have the right to control her body, reproduction

and motherhood. In the case of Parthasarathy,<sup>9</sup> the Andhra Pradesh High Court ruled that the decision to reproduce was personal to the man or woman and also included the right to decide not to reproduce.

However, The Supreme Court of India has failed to bring clarity on the issues, though it upheld the prevailing privacy jurisprudence which includes individual decisions relating to the birth of a child as part of reproductive autonomy.<sup>10</sup> In the above cases, the Supreme Court has stated that individual autonomy should be protected as a fundamental right in our Constitution. Moreover, the vital thing is that reproductive liberty and right permits selling of womb as a method of reproduction.<sup>11</sup> In above cases Supreme Court stated that Individual autonomy must be protected as fundamental value like other fundamental rights under our Constitution. Surrogacy is a complex issue which has raised several issues of individual autonomy of single parent, gay, lesbian, these persons also desire to have their own children through surrogacy<sup>12</sup>. On the other hand surrogacy involve commodification of reproductive capacities of women<sup>13</sup> which poses multiple issues such as social, ethical and legal, including exploitation, baby selling, social stigma, abandonment of babies, exploitation of egg donors, definitions of parenthood and custody of children, less payment of money for being surrogate mother, have been reported<sup>14</sup>

#### Legislative Scenario

Many Countries have responded differently to the legality of surrogacy and value in their policies. Some countries, including Canada (AHR Act 2004), Greece (the Medical Assistance Reproduction Act 2005), Israel

(Surrogacy Act 1996), and the Netherlands (provisions in the Criminal Code) only allow philanthropic surrogacy under their laws. South Africa (Children's Act 2005), the UK (Surrogacy Act 1985), and several States in Australia, Georgia (Health Protection Act 1997), Russia (Federal Law on Fundamental Principles on the Protection of Citizens' Health 2011), Ukraine (Family Code of Ukraine) and some U.S. States (Arkansas, California, Illinois and Maryland) and Other counties largely prohibit both types of surrogacy under law or for medical, ethical, social and religious reasons.

In Asia, significant changes or attempts have recently been made to regulate commercial surrogacy. Thailand, which calls itself the "Health Tourism Center of Asia", has attracted significant attention from foreign patients seeking surrogacy who cannot enter their country. Recently, however, international problems have arisen around commercial surrogacy. As a result, Thailand has legally banned commercial surrogacy for foreign tourists, with the Assisted Reproductive Technology Act 2015. In India, commercial surrogacy has been practiced since 2002. The rules of procrastination attracted foreigners for commercial surrogacy, but it created conflict between the surrogate mother and the desired parent. Thus, the Cabinet passed the Surrogacy (Regulation) Bill 2016 to regulate commercial surrogacy.<sup>15</sup>

Against this backdrop, the Government of India has re-proposed the Surrogacy (Regulation) Bill 2020. The Union Cabinet has approved the Surrogacy (Regulation) Bill in 2020. If it becomes law, it is likely to violate the right to privacy. Philanthropic surrogacy is only

for legally married Indian infertile couples, widows and divorced women. The government cannot suppress the will of the people. Therefore, before enacting it into law and implementing it, any such policy or bill should be put for public discussion.

### Judicial Perspectives in India Baby Manji case

In the Baby Manji case,<sup>16</sup> there was a question about the rights of the child born through pregnancy surrogacy. The case reached the apex court when Baby Manji's grandmother, Imiko Yamada, challenged the Rajasthan High Court's decision regarding the custody. The baby's grandmother defended her custody. Satya, a Jaipur-based NGO, had filed a writ petition in the Rajasthan High Court, arguing that the grandmother had no right to take custody of the child that her possession was illegal, and sought to declare it illegal as there was no law relating to surrogacy.

The facts of the case were presented before the Rajasthan High Court in 2007 by a Japanese couple who visited Gujarat in India with the intention of having a child through surrogacy. A well-known surrogacy clinic in Anand provided surrogate mothers for surrogacy contracts. There was a surrogacy agreement between the couple and the surrogate mother. One of the facts was that the Japanese wife could not make ova for surrogacy. Therefore, Dr. Patel arranged for the Ova donor and again the couple made another agreement for the female donor. Concerned doctors fertilized eggs with Japanese male sperm. In this way, he becomes the biological father of the child. After successful conception, the fetus was implanted in the uterus of a surrogate woman. But in the meantime the

Japanese couple had a marital dispute and then they decided to separate and finally they separated and returned to Japan. And here the surrogate women carrying the baby have only a biological father, who finally decided to move on by agreement. And the surrogate baby is ready to accept. After the full term, the surrogate mother gave birth to the child on July 25, 2008 and the custody was handed over to the biological father. He later received a birth certificate from Anand Municipality confirming his name as a biological father. During this period riots broke out in Gujarat due to law and order issues, the baby was shifted to a safe place Jaipur Rajasthan. Where her grandmother had come to India to take care of baby Manji Yamada as the biological father had returned to Japan after the visa issued to him by the concerned government expired. Here, a dispute arose from Satya, an NGO from Jaipur, Rajasthan, ran to the High Court.<sup>17</sup>

Disappointedly Grandma then moved the apex court against the Rajasthan High Court. In this case, the Supreme Court had officially legalized commercial surrogacy and explored its types. The court also weighed in on several favorable factors such as advanced medical infrastructure, high international demand and easy availability of surrogate women in India. The Hon. Court said that the present factors have facilitated the surrogacy process in India. The lack of a legal framework also transforms the surrogate industry into a worldwide trade.<sup>18</sup> In addition, the petitioner has been directed to go before the Juvenile Board as a special body concerned with the rights of the child in case of complaint. The court has empowered the Juvenile Board to resolve complaints related to juvenile delinquency. It

says the Board has the right to address child rights issues related to surrogacy and other matters.<sup>19</sup>

**Citizenship, birth registration Issues in Baby Manji case**

After the birth of the baby Manji Yamada, complications arose over her citizenship and legal motherhood, but the problem was clear with regard to the fact of the father. Genetically, father Yamada was eager to take her baby to Japan. Earlier, he needed a visa or passport from the Japanese embassy, a birth certificate from Anand Municipal Council and an Indian passport from the Passport Authority of India for Baby Manji Yamada to travel to Japan. But the prevailing laws of both the countries did not allow it and created confusion about travel.<sup>20</sup>

The story goes that Mr. Ikufumi Yamada, a genetically active father, tried to secure the aforementioned travel documents to take the baby to Japan. The Japanese government, on the other hand, also denies entry because the Japanese Civil Code does not recognize surrogacy. The Japanese embassy in India also rejected the child's passport application. Japanese law does not recognize the practice of surrogacy and on the ground that the child born for surrogacy is of Indian nationality. The Japanese Civil Code supports the birth mother; the legal mother is the natural mother of the child, so the child born for surrogacy cannot take a Japanese passport. Therefore, the Japanese Embassy in India refused to issue Manji with a Japanese passport or visa because the Japanese Civil Code does not recognize surrogate children and only recognizes women who have given birth as mother.

Further, Mr. Yamada was again disappointed when the Passport Authority of India demanded the child's birth certificate. The birth certificate should confirm the names of the mother and father as per legal provisions. The birth certificate issued by Anand Municipality mentions that Yamada is the biological father of the baby. However, it was also certified by the Aspiration Infertility Clinic. But there was ambiguity and confusion about the name of the mother in front of Anand municipal officials, as Baby Manji has three mothers, one anonymous egg donor, another a surrogate mother and a third mother. Therefore, Anand Nagal Palika was confused due to uncertainty about the mother's name, so instead of issuing the certificate, the case was referred to the National Passport Authority for further advice. The office of the Chief Registrar, Delhi, handed over the office of Anand Municipality to her biological father. This was the baby's first successful move toward Japan.

Now it will be easier for her to get an Indian passport or a Japanese visa before going to Japan. Citizenship issues arose; When the Japanese Foreign Ministry requires Yamada to adopt a child first, he may be granted a Japanese visa. So Yamada was required to adopt a child, but Indian adoption law does not allow single parents to adopt a child, only guardianship is allowed under the law. If he wants to get a passport, he must do so.<sup>21</sup> Only ICMR guidelines are in place but they are not mandatory either. According to the guidelines, a baby born to a surrogate mother will be the biological and legal child of the commissioning parent. The conflict between the legal provisions and the surrogacy process struck again. With a view to resolving the issue of

citizenship and guardianship, the Government of India issued a certificate of identity to Baby Manji Yamada, born by surrogacy. The identity certificate remains valid for one year. It is issued only for the identification of a stateless person and therefore does not contain religion, and therefore does not contain religion, mother's name and nationality. After the intervention of the Supreme Court, the authorities of Jaipur issued the birth certificate.<sup>22</sup> It was again hit by conflicting situations among legal provisions and which is created by surrogacy procedure.<sup>23</sup> With view to resolve question of citizenship and parenting, the Government of India issued identity certificate to the baby Manji Yamada a child born through surrogacy.<sup>24</sup> The identity certificate remains valid for one year, it is issued only for identification of stateless person and therefore it does not contain religion, mother's name, and nationality.<sup>25</sup> The birth certificate was issued by Jaipur authorities after the Supreme Courts intervention.<sup>26</sup> The Surrogacy Bill has also prescribed intended parent would be parent of surrogate child.<sup>27</sup>

## 2. Jan Balaz Case

Similarly, cross-border surrogacy sparked the Jan Balaz case. Almost all issues like citizenship, birth registration were the same. And these questions were put before the bench of Gujarat High Court. Whether a child born by surrogacy is eligible for birth registration under Indian law and secondly he can be considered a citizen of India. In fact, the story was that on January 4, 2008, twins were born to an Indian surrogate mother. The German couple came to India to have a child genetically related to them. He chose Gujarat in India for surrogacy because it was famous for surrogacy, where

surrogate mothers were readily available at low cost; Surrogacy procedures may be available at a much lower cost compared to Western countries. The German couple entered into a surrogacy agreement with the woman to work as a surrogate to carry their child for the entire term. The German man's wife could not have children naturally because she could not produce ova in the natural cycle, so they needed an egg donor. And finally the surrogacy clinic made the egg donor available to them. They made a separate agreement with the egg donor in addition to surrogacy. The aspiration clinic took the husband's sperm and fertilized the egg obtained from the donor, after which the healthy embryo was implanted in the surrogate mother's womb. Such infertility clinics make the surrogate mother fully aware of the terms of the contract that after delivery she must deliver the child to the commissioning couple, after delivery to the parents who commission the twin babies from German according to the contract.

The facts seemed simple and straightforward but the matter turned sour when the biological father of the twins went to the birth registration office in Anand municipality. They registered the birth of the child and accordingly issued them a birth certificate under the Birth and Death Registration Act, specifying the name of the biological father in the certificate and showing the name of the birth mother of the surrogate mother concerned, hence the name of the surrogate mother changed. Surrogates related to the birth mother also appear as surrogates in hospitalized births. After receiving the birth certificate, the German father applied for a passport certificate from the Ahmedabad Regional Passport Authority:

Conclusions

- > The commercial surrogacy leads to exploitation of surrogate mother.
- > There are several ethical and legal questions involved in surrogacy which are complicated.
- > There is no specific law governing issues relating to surrogacy.
- > The fact of surrogacy is misused by dominating people with the help of power and money.

Suggestions

- > There is dire need of surrogacy law to prevent misuse of surrogacy and conflict of legal provisions under various laws. It should be enacted on urgent basis.
- > There has to be clear provisions as to the citizenship of children born through surrogacy procedure.

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