

The Surrogacy Law Conundrum

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The Surrogacy Law Conundrum

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India has emerged as an international centre of 'surrogacy industry'. Thousands of infertile couples from India and abroad are flocking to the Assisted Reproductive Technology (ART) clinics to have a child of their own.¹ Surrogacy raises complex ethical, moral and legal questions. Surrogacy must be legal in India for it to have developed into an industry. It is claimed that commercial surrogacy is legal in India. What does it mean and how has it come to be? A way to explore this complex subject is with the Baby M Case², a judgement of the Supreme Court of New Jersey, given almost 30 years back, in the early years of ART. The judgement has been a guiding light in all jurisdictions on the subject of surrogacy.

William Stern and Elizabeth met as doctoral students and eventually got married. When it came to raising a family, the couple realised that Elizabeth suffered from a disease which would make pregnancy fatal for her. William was a lone holocaust survivor in his family and was eager to continue the bloodline. The couple started looking for a surrogate to bear William's child. Through a fertility clinic, they found a surrogate in Mrs. Whitehead. Having had her own children, she was sympathetic to infertile couples and wanted to give them the 'gift of life'. Married to a waste collector, with two children, she also needed money. With the facilitation of the fertility clinic, William entered in a 'surrogacy contract' with Mrs. Whitehead where she would conceive with his sperm through artificial insemination. After birth, she would deliver the

¹ Editorials (2015): "Naturally Unjust", *Economic and Political Weekly*, October 31, 2015, Vol L, No. 44.

² In re Baby M, the Supreme Court of New Jersey, decided on February 3, 1988, 109 N.J. 396 (1988).

child to William and Elizabeth and terminate her maternal rights. She was to be paid \$ 10,000.

Mrs. Whitehead, while carrying the child, got attached to it. A baby girl was born whom she named Sara. She realised she could not part with the baby. Nevertheless, she gave her to the Sterns. Later in the evening, she became unbearably sad and visited the Sterns. Fearing that she might commit suicide, the Sterns gave her the child on the promise that she would return her in a week. A week later, it became apparent that Mrs. Whitehead would not return the child. William filed a case for the enforcement of the surrogacy contract. The trial court found the contract to be valid and ordered the child be handed over to William. On this, Mrs. Whitehead fled to Florida with Sara, changing hotels and motels to avoid apprehension and surrender of the child. Eventually, they were found and Sara was given to William. Mrs. Whitehead challenged the validity of the surrogacy contract before the Supreme Court of New Jersey.

The court found surrogacy on its own 'no offense to our present laws.' This is also the current state of the law in India. A law is made in a given context, with certain horizons. As new activities emerge, these are judged by the law made in an earlier context. In this sense, all activities are judged by a law made with another context in view. Law is forever caught in the text and the context.³ A new activity may or may not have been contemplated by the legislature. What is important, however, is the text of the law. A new activity may not have been contemplated by the law and yet qualify as prohibited within the text of the law. At other times, an act may be un contemplated and also beyond the text of the law. Such acts are legal because these are not illegal within the text of the law. The legislature then may take note of the gap and legislate on it. The Supreme Court of India, referring to ART, in *Baby Manji Yamada v. Union of India*⁴ has noted that the 'medical procedure is legal in several countries

³ Pathak, Akhileshwar and Pandey, Vikash Pandey (1995): "Sociology of Law in India: Postscripts and Prospects", *Economic and Political Weekly*, August 5-12, 1995 Vol. XXX, No. 31 and 32.

⁴ *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84.

including in India.' What this means is that the existing law is silent on a women conceiving through ART. The technology has been beyond the contemplation and text of the law.

The Supreme Court of New Jersey, in the Baby M case, found surrogacy in itself not prohibited. However, it held the surrogacy contract void and not binding on the parties. This was on two grounds. A contract which is in violation of the law or circumvents the law is void. Within the adoption laws of the state, paying or accepting money in connection with adoption was prohibited. The contract was so structured as to bring out that money was paid for the services of bearing a child and giving the child to William, its natural and biological father. The end result of the contract, however, was a mother giving away her child and maternity rights for a sum of money. The substance of the contract was adoption. The court noted:

It strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money.

The court concluded:

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 prompted the prohibition on the payment of money in connection with adoptions exists here.

A contract opposed to public policy is void. It was a policy of the state that, to the extent possible, a child should be raised by both the parents. If a dispute were to arise on the custody of the child, it was to be decided by what was in the best interest of the child. The contract was completely opposite to it. The court noted that it guaranteed the permanent separation of the child from one of its natural parents. Tellingly, the court noted:

This is not simply some theoretical ideal that in practice has no meaning. The impact of failure to follow that policy is nowhere better shown than in the results of this surrogacy contract. A child, instead of starting off its life with as much peace and security as possible, finds itself immediately in a tug-of-war between contending mother and father.

There was total disregard of the best interests of the child. There was no scope in the contract to decide who would be the best for the custody of the child, Sterns or Mrs. Whitehead. The contract was not interested in the effect on the child on not living with her natural mother. The court found the contract opposed to public policy. It concluded:

It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.

Evolutionary biology brings out that, unlike all other species, human infants have a long gestation and can survive only with intensive parenting. Thus, love and care for children and the urge to nurture life is an integral part of human nature.⁵ Steven Pinker, an eminent evolutionary psychologist, to support the argument that parent-child love is a part of human nature and not a cultural artefact, dares one to ask a person the tabooed question- How much would you sell your child for?⁶ Human biology has made parental bond and duty sacrosanct, beyond even imagination of its contamination with money. Parental bonds and rights cannot be traded. Laws in all jurisdictions would embody this universal value.

Surrogacy is new to India but adoption has been there for long. The adoption laws are well settled. Adoption happens according to the personal law of the adopting parents. The courts, interpreted the Hindu law to say that there could be no place for money in adoption. In *Eshan Kishar Acharjee v. Harish Chandr Chowdhry*⁷, the Bombay High Court declared a contract, where the adopting parents were to give an annual allowance to the natural parents, invalid. It noted: “A contract to give a son in adoption, in consideration of an

⁵ Pinker, Steven (1997): “How Mind Works”, Penguin Books, London: p 440-451.

⁶ Pinker, Steven (2012): Taboos, Political Correctness, and Dissent, television interview accessed on Nov 25, 2015 through <https://www.youtube.com/watch?v=B0W9sSqeJnA>.

⁷ *Eshan Kishar Acharjee v. Harish Chandr Chowdhry* 1874 (13) BLR App 42.

annual allowance to the natural parents is void under S. 23 of the Indian Contract Act, 1872.”

Thereafter, in case after case, the courts held a contract, whether between the adopting and natural parents or with a third party, where money was to transact, void. However, in the cases where adoption was already done, and it was in the best interest of the child, the court did not declare the adoption invalid. It held the adoption collateral to the contract and recognised it as valid.⁸ The Hindu Adoption and Maintenance Act, 1956, codified and reformed the Hindu law on adoption. Section 17 of the Act makes it an offence to pay or receive money for adoption. There has been no corresponding law for a non-Hindu to adopt a child. It is only an amendment to the Juvenile Justice Act, 2000 in 2006 which has made it possible for a non-Hindu to adopt. The Act, however, applies to only children who are abandoned. Under both the Acts, an adoption happens only through a court process and order.

Adoption is transferring of parental rights. Guardianship is another aspect of parent-child relationship. Guardianship of minors is governed by the Guardians and Wards Act, 1890 and The Hindu Minority and Guardianship Act, 1956. An early and landmark case on guardianship involved a dispute over the guardianship of our great philosopher and spiritual leader, J Krisnamurti. Annie Besant, the founder of the Theosophical Society of India, knew the family as Krisnamurti's father was employed as a clerk in the society. She recognised the potential of his sons, Krisnamurti and Nityanand, and offered to take over their guardianship to educate them in England. The father consented to the arrangement through a signed letter. After Annie Besant had settled the boys in England, the father demanded the boys be returned to him in India. The dispute over the guardianship of the boys came before the highest court, the Privy Council. The Privy Council noted:⁹

⁸ Murugappa Chetti v. Nagappa Chetti, (1906) 16 MLJ 22; Subbaraju v. Indukuri Narayanaraju, (1926) 51 MLJ 366; and Thuri Kothanda Rama Reddiar v. Thesu Reddiar Alias Veerasami, (1914) 27 MLJ.

⁹ Annie Besant, Mrs. v. G. Narayaniah, AIR 1914 Privy Council 41.

The father is the natural guardian of his children ... but this guardianship is in the nature of a sacred trust, and he cannot therefore ... substitute another person to be guardian in his place.

Therefore, despite the agreement between the parties, the guardianship never got transferred to Annie Besant. A guardian, however, may need to entrust the custody of the child to another person. This can be for education, health or travel. Parental role is so sacred that even these entrustments are not binding. The Privy Council noted:

He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands.

Guardianship is for the benefit of the child. The custody can be revoked if it is in the interest of the child. It was in the interest of the brothers to continue their education in England. Following this, the Privy Council did not change the arrangement.

Sanctity of parental bonds and wellbeing of child are universal values. Thus, in a Baby M like case in India, where the surrogate is the genetic mother, the surrogacy contract could be void and not binding on the parties. Since the Baby M case, however, in vitro fertilisation, has become common. 'In vitro' means in glass. An egg drawn from a woman is fertilised with sperm in a petri dish to develop an embryo. The embryo is then placed in a woman, leading to pregnancy. The technique, 'test tube baby', was first developed in 1978. In the subsequent decades, it has moved from experimentation to the clinics. The attraction of the technique is the commissioning parents can get their own genetic off-spring, the surrogate being only the carrier of the embryo to its term.

The law does not know this arrangement. It knows only one mother. Who then is the mother, the surrogate or the one who has contributed the genetic material? For a geneticist, exploring the genetic make-up of the child, the surrogate mother is of no relevance. For a doctor attending to the delivery of the child, the genetic mother is of no relevance. Law has its own discourse

within which it has to judge one as the legal mother. The Indian Council of Medical Research has issued guidelines for the accreditation of ART clinics.¹⁰ Chapter 3 of the report deals with legal issues. The guidelines, however, does not have statutory authority. It is only for the voluntary accreditation of the clinics. Further, the council does not have the legislative authority to create or change parental rights.

The Gujarat High Court has had to answer this difficult question in *Jan Balaz v. Anand Municipality*. The court, recognising that there is no law on the subject, reasoned that merely by proving the genetic material, 'a woman will not become a natural mother.' The court held that it is the surrogate mother, who carries the child in her womb and deserves to be the natural and legal mother. The case was on nationality of twins born of surrogacy. With the surrogate as the legal mother, the twins, born of an Indian citizen, were also Indian citizens. This gave them the right to get Indian passports. The passport authorities had refused passports on the ground that the twins were not Indian citizens.

The government of India has challenged the decision and the case is pending before the Supreme Court. It is important to settle the question as to who the legal mother and father are in the case of surrogacy. It impacts the question of nationality, parental rights, guardianship and inheritance. But this is only the legal discourse. It needs no emphasis that surrogacy raises extremely complex and contentious ethical, social and gender questions. The Supreme Court of India has asked the Central Government to legislate on the subject.¹¹ The Baby M case was prophetic. Recognising the potential of in vitro fertilisation, it had ended with noting that the society and legislature needed to resolve different aspects of the emergent technology.

¹⁰ Indian Council of Medical Research, (2005): "National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India", New Delhi.

¹¹ PTI (2015): "Supreme Court asks Centre to bring commercial surrogacy within ambit of law", accessed on Nov 25, 2015 through: <http://indianexpress.com/article/india/india-news-india/supreme-court-asks-centre-to-bring-commercial-surrogacy-within-ambit-of-law/>