CHAPTER-4

LEGAL ASPECTS

4.1 Surrogacy Bill India

Figure-4.1

A law to regulate India’s multi-billion dollar assisted reproduction industry has been in the works for some time. The draft Assisted Reproductive Technologies Regulation Bill-2010 will be presented to Parliament, and even many inside the ART industry are eager to see it come to fruition. The first-of-its-kind Bill to control and monitor cases of surrogacy in the country has been drafted by the Ministry of Health and Family Welfare, along with the Indian Council for Medical Research (ICMR) and has been sent to the law ministry for approval.

India has become a major destination for foreign couples to hire surrogates to bear their children. This has been made possible by the legalization of commercial surrogacy in India in 2002. It has also been facilitated by the lack of stringent laws on surrogacy India and its low cost in the country. While surrogacy in the US may cost around $50,000 to $100,000, it costs only around $ 25,000 in India. Besides, India offers advanced medical care facilities and the added advantage is that most doctors speak English and can communicate well with foreign couples. In fact, commercial surrogacy in India is all set to become a $2.3 billion-worth industry. Couples, including

306
gay and lesbian couples, from all over the world, have benefited from the surrogacy options available in the country.

India may have been a booming centre of ‘reproductive tourism’ for several years, but it took the complicated case of Japanese baby Manji — born to an Indian surrogate mother — to bring into relief the fact that the law hasn’t managed to catch up with the burgeoning baby industry. But this is set to change now, with India set to be the only country in the world to legalise commercial surrogacy. The proposed rent-a-womb law, if passed in the parliamentary session, will clearly be one of the friendliest laws on surrogacy in the world. India’s booming, and much publicized, surrogacy industry may soon feel the effects of significant regulatory developments.

The 35-page bill seeks to regulate India’s heavily market-driven fertility industry, and introduces a number of policies ranging from clinic regulation to restrictions on ART access. Some points that are worth noticeable in Indian Surrogacy Bill, which the bill formally includes, are:

1) Surrogacy shall not be available to “patients for whom it would normally be possible to carry a baby to term.”
2) Surrogacy contracts shall be legally enforceable.
3) Married women need their husband’s consent in order to become a surrogate.
4) Surrogates shall not undergo embryo transfer more than three times for the same couple.
5) Egg donor identities shall remain strictly confidential.
6) There shall be a detailed accreditation process for fertility clinics and gamete donor banks.
7) The Department of Health Research shall establish and manage a “national ART registry.”
8) The only “couples” eligible for ART shall be those “having a sexual relationship that is legal in India.” (This would apparently exclude gay couples.)
9) Foreigners seeking surrogacy services must provide written proof that their home country “permits surrogacy, and the child born through
surrogacy in India, will be permitted entry in the country.” (This would apparently exclude people from Canada and a number of European countries that specifically prohibit commercial surrogacy, and could exclude people from countries that don’t explicitly permit it.)

10) The bill also calls for the formation of both national and state advisory boards composed of Health Department workers, industry representatives, scientists, and other civil society members. These boards are charged with operational zing and enforcing the many guidelines enumerated in the bill.

11) The ICMR’s ART Bill, 2010, has put in place several important provisions. It says a woman acting as a surrogate mother in India cannot be less than 21 years or over 35 years. Also, she cannot give more than five live births, including her own children.

12) The Bill mandates the appointment of a local guardian in case of surrogacy arrangements where the intended couple is staying outside India. This local guardian will be legally obliged to take delivery of the child born of the surrogacy arrangement if the intended couple does not do so.

It is yet unclear to what extent the 2010 bill’s language, and more importantly, its interpretation, implementation and enforcement if passed will address these and other social justice and health concerns. The implications for reproductive tourism are undoubtedly huge, and will certainly be shaped by the forthcoming responses from international commercial ART/surrogacy agencies, rights groups, and other civil society voices.

The finalized bill’s implications for certain groups, especially LGBT communities and foreigners seeking surrogacy in India, are turning heads already. Depending on how its rules on surrogacy are interpreted and enforced, the legislation would disqualify gay couples, both foreign and domestic, as well as individuals or couples from countries such as the UK, Canada and Germany where the practice of commercial surrogacy is illegal. Such steps in India, the commercial epicentre of what has turned into a global business, would drastically affect the global politics of reproduction “for hire.”
4.2 The Future of Indian Laws on Surrogacy India and Gay Couples.

Indian laws on surrogacy are not clear. However, as the government plans to pass the Assisted Reproductive Technology (ART) bill, this uncertainty will change. The ART bill will regulate In-Vitro Fertilization (IVF) and exclude gay couples from hiring surrogates in India. This is because the government of India has not legalized gay relationships, although it has been decriminalized by the Delhi High Court. Further, surrogacy for gay couples will be an option only after the country legalizes gay relationships. The bill also provides for prohibiting IVF clinics from conducting surrogacy transactions. Instead, it plans to set up special ART banks that will track reproductive donors and surrogate mothers.

The bill’s stipulations about who is eligible to use assisted reproductive services are also problematic. It states that ARTs will be available to all married or unmarried couples as well as single people, but defines “couple” as two persons “having a sexual relationship that is legal in India,” where homosexuality has been decriminalized but not legalized. “Married” and “unmarried” couples are also defined as those in marriages or relationships that are legal in the country where they are citizens. Accordingly the ambiguous language makes it unclear whether assisted reproductive technologies would be available for gay couples, and particularly for Indian gay couples.

As the world’s media seems intent on declaring that forthcoming legislation in India will effectively ban gay couples from becoming parents through surrogacy, the question arises as to exactly what foundation these
Drafts of the Assisted Reproductive Technology (Regulation) Bill 2010, which has been in process since 2008 and includes recommendations dating as far back as 2005, have thus far not explicitly stated one way or another whether gay couples will be eligible under the proposed rules.

Thus from these concepts we can only draw the conclusion that a gay couple may fall short of the requirements of being a “couple” for the purposes of this Bill, but may be acknowledged as being married, or unmarried depending on their legal status in their home country. In fact it would seem that in adding these more specific references to types of relationships or relationship status that are legal in countries other than India, that there is an increased possibility for gay couples to be eligible for surrogacy under the terms of what may become the new laws that govern this area of medicine.

The Bill therefore makes no specific stipulations about gay couples entering into a surrogacy agreement, apart from their being generally eligible as one of the defined groups from Section 32 (1). Furthermore, both individuals who make up the “commissioning” couple must be party to the legally binding contract that will be drawn up.

Unless specific changes are made during the passing of this Bill, it is difficult to see how the current content will preclude or prejudice gay couples.

The ART bill also provides that foreign couples obtain a document from their embassy stating that the surrogate child will be granted the countries citizenship. This document is a must-have for securing a surrogacy agreement with any ART clinic. The clause, however, may hinder the prospects for couples coming from countries that do not recognize surrogacy.

Regardless of how the bill moves forward, there is an ongoing boon in the Art industry and commercial surrogacy in India. Becoming a proud parent with the help of Third Party Reproduction involves a considerable financial and emotional investment.

The surrogacy treatment cost is very economical in India as compared to the cost involved in European countries. The best medical facility and the use of latest technology in the treatment aided by renowned team of doctors and the well trained clinic staff has made India the favourable spot among the foreigners for surrogacy journey.

Rotunda offers surrogacy to people of all nationalities. We are an LGBT friendly clinic and offer surrogacy services to same sex couples. We also offer surrogacy to single parents. We believe in one simple principle, to provide our clients with the highest standard of care in the surrogacy and egg donation industry at an affordable price.

4.3 Government to introduce landmark bill on Surrogacy in Cabinet

New Delhi: Women in India cannot act as surrogates for more than three successful births, including of their own children, and it would be mandatory for surrogate mothers to have a minimum two-year interval between two deliveries to ensure they remain healthy. These landmark provisions are part of the proposed draft Assisted Reproductive Technologies (ART) Bill which the government plans to bring to the Cabinet before introducing in Parliament for passage. Any contravention of provisions of this bill would attract severe penalties.

The bill, a first in India's history, seeks to monitor the unregulated sector of ART clinics, which offer infertility solutions to couples at huge costs, besides preventing commercial surrogacy and safeguarding the rights of surrogate mothers and children born out of surrogacy arrangements.

An estimated 15 per cent couples worldwide are infertile, making ART services critical. The draft ART Bill seeks to fill these gaps and addresses "ethical, legal issues related to gamete donation, surrogacy and nationality of the child born out of ART." Top sources in the Health Ministry said the bill had been sent for comments to ministries and replies were expected by August 5, after which the final draft bill will be prepared.
The bill addresses ethical and legal issues related to child birth through Assisted Reproductive Technologies. The bill is significant as currently there is no supervisory body in the country under which ART clinics offering services, including surrogacy to infertile couples, can be placed and there is no system to monitor these services and ensure that surrogate mothers are not exploited. According to draft bill provisions, no woman less than 21 years of age and over 35 years can act as a surrogate mother.

The bill also, for the first time, states conditions for foreign couples seeking to hire surrogates in India. "Several issues such as ethical, moral, monetary and safety, have been raised in this area by various sectors of the society as there is no law to regulate the issues of surrogacy in India," a Health ministry note states. The Bill comes at a time when surrogacy has become a preferred mode of having children, with film stars like Aamir Khan and Shahrukh Khan opting for the method. Under the new draft law, surrogacy is defined as "an arrangement in which a woman agrees to a pregnancy achieved through ART in which neither of the gametes (the egg or the sperm) belong to her or her husband, with the intention of carrying the pregnancy to term and hand over the child to the persons for whom she is acting as a surrogate." As per the bill, all expenses of the surrogate mother would have to borne by the infertile couple, including her insurance. A surrogate, before being hired, has to be medically tested for sexually transmitted diseases and AIDS to ensure she does not pass on the infection to the child. To streamline financial commitments between the infertile couple and the surrogate mother, the draft bill says a surrogate mother has the right to terminate her pregnancy at any
time but if she does so without medical reasons, she will have to reimburse the cost to the infertile couple which has hired her. If, however, the pregnancy has been terminated for medical reasons, no reimbursement would be needed. Also by law, a surrogate mother would have to relinquish all parental rights over the child born out of the arrangement.

The draft bill adds that a surrogate cannot undergo embryo transfer for more than three times for the same couple. This provision aims to prevent commercialisation of the service. The bill states conditions for foreign couples seeking to hire surrogates in India. As per the draft, they would have to first give a certificate from their foreign ministry stating that the child born out of a surrogacy arrangement would be permitted entry in their country of origin and would be considered the biological child of the couple.

"A foreign couple seeking a surrogate service in India will have to appoint a local guardian to care for the surrogate mother till the child is delivered to the hiring couple. Foreign couple will use at least one gamete of their own in the creation of the embryo. "In case the foreign couple fails to take delivery of the child, the local guardian would be obliged to take the said delivery and he would be free to hand over the child in adoption," the draft law states. Once the bill is passed by Parliament, all states and UTs would have to constitute state boards and registration authority to regulate ART clinics and banks in their areas. Every state board will have the power of a civil court to adjudicate matters under the law and even impose penalties.

A National Advisory Board for ART will be established under the Health Ministry to recommend modification of rules to the ART techniques and Indian Council of Medical Research will maintain a national registry of ART clinics and banks in India which will act as a central database through which all information related to services offered by clinics will be maintained.

• Commercial surrogacy has been legal in India since 2002.
• India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with going through the procedure in the UK.
• Surrogacy in India is relatively low cost and the legal environment is favorable. In 2008, the Supreme Court of India in the Manji’s case (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that in India that India is an International Surrogacy destination.
• International Surrogacy involves bilateral issues, where the laws of both the nations have to be at par/uniformity else the concerns and interests of parties involved will remain unresolved and thus, giving due regard to the concerns and in order to prevent the commercialization of the Human Reproductive system, exploitation of women and the commodification of Children, the law commission has submitted its report with the relevant suggestion:
• The Law Commission of India has submitted the 228th Report on “NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY.” The following observations had been made by the Law Commission: -
(a) Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

(b) A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

(c) A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

(d) One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

(e) Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

(f) The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
(g) Right to privacy of donor as well as surrogate mother should be protected.

(h) Sex-selective surrogacy should be prohibited.

(I) Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only. The Report has come largely in support of the Surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions. Exploitation of the women through surrogacy is another worrying factor, which the law has to address. The Law Commission has strongly recommended against Commercial Surrogacy. However, this is a great step forward to the present situation. We can expect a legislation to come by early 2011 with the passing of the Assisted Reproductive Technology Bill aiming to regulate the surrogacy business.³