

## **Progressive Legal & Judicial Developments on Single Parent surrogacy in India & around the world <sup>1</sup>–**

Around the world there is gradual rise of single parent families through / using modern reproductive technologies.

### **Introduction**

The issue of “Single parent surrogacy” gained significance with the Hindi film celebrity commissioning single parent surrogacy, Tusshar Kapoor (39) commissioned a surrogate baby boy named Lakshya in Mumbai born on June 2016. <sup>2</sup> This is reported as the first ever single parent surrogacy in India. There is proposed legislation - the Surrogacy (Regulations) Bill 2016 which was approved by the cabinet on August 24<sup>th</sup> 2016 . The Bill imposes a blanket ban on single parent surrogacy in India.

However this is not the first case of such single parent surrogacy in India. Toban Morrison , (31) from Canada had a male surrogate male child named Orion on July 26, 2011 in Mumbai, India through donated sperm , anonymous egg donor, an Indian surrogate mother<sup>3</sup>. Similarly some of the famous single parent celeb surrogacy cases in the west may be mentioned here,

### International celebs – single parent surrogacy

- Ricky Martin Single father surrogacy -Latin American singer (36 yr) commissioned surrogacy by availing the gestational services of an anonymous surrogate mother, egg donor resulting in birth of surrogate male twins namely Matteo and Valentino in the year 2008<sup>4</sup>. This is one of the first globally famous case of single parent surrogacy.
- Lucy Liu- single mother surrogacy - American Actress had a surrogate male child named Rockwell, in August 2015<sup>5</sup>.

### Legal Grounds for commissioning single parent surrogacy –

- I. Single parent surrogacy facet of Reproductive freedom & Right to life personal liberty–

Every individual has right to life including right to health, right to access medical technology, right to family formation , right to privacy which are core constituents of right to life, personal liberty of individual guaranteed under article 21 of Indian constitution<sup>6</sup>. It may be noted that these right are also recognised as international human rights guaranteed under series of

<sup>1</sup> Sonali Kusum, Ph.D Research Scholar NLSIU Bangalore.

<sup>2</sup> Shobhita Dutt, Tusshar Kapoor Is Now A Proud Single Father Of A Baby Boy Through Surrogacy! indiatimes, June 27, 2016 available at <http://www.indiatimes.com/entertainment/celebs/tusshar-kapoor-is-now-a-proud-single-father-of-a-baby-boy-through-surrogacy-257421.html> ( Last visited October 11, 2016).

<sup>3</sup> Cynthia Vukets Staff Reporter, Single man wanted a child, hired a surrogate, had a baby, the star, health & wellness, Aug 12 2011 available at [http://www.thestar.com/life/health\\_wellness/2011/08/12/single\\_man\\_wanted\\_a\\_child\\_hired\\_a\\_surrogate\\_had\\_a\\_baby.html](http://www.thestar.com/life/health_wellness/2011/08/12/single_man_wanted_a_child_hired_a_surrogate_had_a_baby.html)( Last visited October 11, 2016).

<sup>4</sup>Fox News, Associated Press, Ricky Martin Father of Twin Boys Via Surrogate Mother, August 20, 2008 available at <http://www.foxnews.com/story/2008/08/20/ricky-martin-father-twin-boys-via-surrogate-mother.html>( Last visited October 11, 2016).

<sup>5</sup> Isabelle Khoo, Celebrity Surrogate: Famous Parents Who Are Thankful For Their Surrogates Huffington Post Canada , 01/29/2016, available at [http://www.huffingtonpost.ca/2016/01/29/celebrity-surrogate\\_n\\_9116120.html](http://www.huffingtonpost.ca/2016/01/29/celebrity-surrogate_n_9116120.html) ( Last visited October 11, 2016).

<sup>6</sup> V.N Shukla, Constitution of India 131 (M.P.Singh ed., 2008).

international human right conventions as Universal Declaration of Human Rights 1948 (UDHR)<sup>7</sup>, International Covenant on Economic, Social and Cultural Rights 1966, (ICCPR)<sup>8</sup>, International Covenant on Economic, Social and Cultural Rights 1996 (ICESCR)<sup>9</sup>. Besides, the reproductive rights, freedoms including reproductive or procreative freedom or decision making on choice or means of conception, stages or means of conception others related rights are specifically recognised as human rights under International Convention namely the International Conference on Population and Development (ICPD) Cairo 1994.<sup>10</sup>

All individuals are entitled to this most fundamental right equally and without any discriminatory riders as nationality, marital status, sexual orientation, gender others selection, under article 14 of Indian constitution as well as under international human right conventions. Accordingly right to access to ART including surrogacy as a medico technological procreative means of conception emanating from right to access health services, technology and also a representing a procreative choice or decision making, facet of right to privacy, right to family formation, personal liberty guaranteed under Indian constitution, international conventions.

Thus the right to single parenting through surrogacy finds its legal foundation under series of international human rights conventions and under Indian constitution under article 21, This is also upheld by the supreme court in a host of cases *Kharak Singh v state of Bihar* (1963) *Govind v. State of M.P.*, (1975), *B. K. Parthasarthi v. Government of Andhra Pradesh* (2000) as a facet of right to privacy as which upheld “the right of reproductive autonomy” of an individual as a facet of “right to life, privacy”, personal liberty, health, family formation.

## II.-Single parent surrogacy for Medical necessity –

A New Zealand man seeking to commission surrogacy for medical reason as asexual condition makes a case for single parent surrogacy. A New Zealand man is diagnosed with asexual genetic disorder necessitating surrogacy as the only option to have child genetically related to them<sup>11</sup>. Jesse Greenslade 26-year-old male national of New Zealand is detected with a rare genetic disorder neurofibromatosis (NF), hyperprolactinemia leading to growth of tumors rendering him incapable of sexual relationship thus asexual. Under such condition IVF, Embryo transfer, Gamete donors is the only and the last avenue to have genetically related

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<sup>7</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at <http://www.refworld.org/docid/3ae6b3712c.html> ( Last visited October 11, 2016).

<sup>8</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <http://www.refworld.org/docid/3ae6b3aa0.html> ( Last visited October 11, 2016).

<sup>9</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at <http://www.refworld.org/docid/3ae6b36c0.html> ( Last visited October 11, 2016).

<sup>10</sup> International Conference on Population and Development, Cairo, 5-13 September 1994, United Nations Distr. General A/CONF.171/13, 18 October 1994, available at <http://www.un.org/popin/icpd/conference/offeng/poa.html> ( Last visited October 11, 2016).

<sup>11</sup> JOSIE STEENHART, Asexual 'Kiwi guy' wants to be a father, using Facebook to search for a surrogate, stuff,

July 6 2016, available at <http://www.stuff.co.nz/life-style/parenting/pregnancy/conception/81783461/asexual-kiwi-guy-wants-to-be-a-father-using-facebook-to-search-for-a-surrogate>( Last visited October 11, 2016).

child. Presently, Greenslade is seeking egg donor as well as surrogate by posting on social media on the same in order to attain parenthood.

### Legal instruments on Single Parent Surrogacy in India –

The Assisted Reproductive Technologies Bill 2010<sup>12</sup> states that “*assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples*”. But taking a differing approach from these two instruments, the recently proposed ART Bill 2014<sup>13</sup> provides that “the option of surrogacy shall be available to only Indian heterosexually married infertile couple” only. The Home Ministry Guidelines (Foreign Division) Foreign Nationals Intending to visit India for Commissioning Surrogacy & Conditions to be fulfilled for Grant of VISA, 2012<sup>14</sup>, restricts the choice of availing surrogacy only to such foreign heterosexual couples who are married for a minimum period of two years , thereby it excludes foreigners single , same sex couples , partners to commission surrogacy in India. The most recent Surrogacy ( Regulations ) Bill 2016 permits only “heterosexually married Indian couples who have sustained their marriage for above years and above ” to commission surrogacy.

### Indian judicial position on Single parent surrogacy-

In the landmark case of *Baby Manji Vs Union of India*<sup>15</sup>, The Supreme Court acknowledges the fact that “for certain individuals under typical medical situation “surrogacy is the only available option for parents who wish to have a child that is biologically related to them.” The Supreme Court of India mentioned “commissioning single male or a male, homosexual” as stakeholders who may commission surrogacy and the court referred to both “medical reasons and non-medical reasons” for commissioning surrogacy for having a biologically related child to them. Thus it may be implied that the apex court implies that the “intended parent may be a single individual”, “homosexual” who may equally be allowed or permitted to commission surrogacy in India”<sup>16</sup>. However the apex court considering the absence of law, directed the legislature to enact a regulatory statute on the same.

On the other side in India, It is pertinent to observe the changing legal provisions permitting single parenting through adoption under respective legal instrument following amendment, progressive judicial developments.

The Central Adoption Resource Agency (CARA) Guidelines governing adoption of children, 2015 under Juveniles Justice Act<sup>17</sup> permits single female to adopt a child of any gender,

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<sup>12</sup> The Assisted Reproductive Technologies (Regulation) Bill - 2010 (Draft), Ministry of Health & Family Welfare Govt. Of India, New Delhi & Indian Council of Medical Research New Delhi, available at <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> ( Last visited October 11, 2016).

<sup>13</sup> Government of India, Ministry of Health and Family Welfare, ( Department of Health Research) ART Bill 2014, 30th September 2015, available at [http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202014.pdf](http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf) ( Last visited October 11, 2016).

<sup>14</sup> General Instructions for Registration by the Foreigners, B. - Surrogacy Cases , Ministry of Home Affairs available at [http://mha.nic.in/pdfs/ForeigD-FRRO\\_version223.6.11.pdf](http://mha.nic.in/pdfs/ForeigD-FRRO_version223.6.11.pdf) ( Last visited October 11, 2016).

<sup>15</sup> WP(C) No. 369 of 2008. (2008) 13 SCC 518.,

<sup>16</sup>WP(C) No. 369 of 2008. (2008) 13 SCC 518., Para 11.

<sup>17</sup> JJ Law 2015, CARA Guidelines , Ministry of Women and Child Development Notification New Delhi, Guidelines Governing Adoption of Children, 2015, the 17th july, 2015, Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) available at [http://cara.nic.in/InnerContent.aspx?Id=163#Guidelines – 2015](http://cara.nic.in/InnerContent.aspx?Id=163#Guidelines-2015) ( Last visited October 11, 2016).

whereas single male person is allowed to adopt only male child and not adopt a girl child. Secondly the age limit for single parent adoption has been lowered from 30 to 25 at present. The women and child development Ministry has proposed for amendment of existing Passport Rules to give relaxation in mandatory requirement of listing the father's name in passport application and allow for mentioning of mothers name alone as sufficient for the same. The Ministries supported such change in law stating that there is a numerical rise in single parent families over the recent past for various reasons including breakdown of marriage, self-choice among other therefore such favourable or requisite changes are necessary.

Progressive judicial decisions - The court through its judicial-pronouncements has granted the legal documentation, identity cards passport, birth certificate to bear the name of single parent or a single mothers in series of cases. The Gujarat High Court in *Rashi Yogesh Sadariya vs Director & others* on 15 October, 2015, held that the “petitioner being a single parent and biological natural guardian has right to put her (sur name) name after the name of her minor daughter in the birth certificate following by mutual consent divorce from her husband”.

In a recent judicial pronouncement of this year 2016, the Delhi High Court in *Shalu Nigam & Anr vs The Regional Passport Officer & others*, 2016, the Court while adjudicating petition filed by a divorced single woman for issuance of her daughter's passport without mentioning of her father's name in the application. The court held that “mother's name alone is sufficient in certain cases where she is a single parent in passport and that the name of one's biological father is not necessary in all cases”. The Delhi HC held that a single woman can be a natural guardian and also a parent. Thus through this ruling the court gave legal recognition to single parent families, further the court held that the single parent families are on the rise for various reasons and the court enumerated such case of single parent families as “like unwed mothers, sex workers, surrogate mothers, rape survivors, children abandoned by father and also children born through IVF (in vitro fertilisation) technology”.

It is pertinent to note in this case the court identifies surrogacy, IVF as one of the reason for rise in single parent family while granting legal recognition to single parent families yet single parent surrogacy is not permitted under the proposed statute.

#### Foreign legal & judicial development on Single Parent Surrogacy-

Around the world leading with select legal jurisdictions, laws and regulations on surrogacy is changing to allow single parent surrogacy. Some of these jurisdictions may be mentioned here,

a. Russia- Single intended parent are allowed their right to parenthood through surrogacy in Russia after a recent judicial hearing by the Babushkinsky District Court, Moscow which held that “single intended parents regardless of their sex or sexual orientation can attain fatherhood using gestational surrogacy, they can be registered as father of his new born “surrogate” child without naming surrogate mother on the birth certificate thereby<sup>18</sup>.

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<sup>18</sup> Surrogacy In Russia and abroad, No wife needed: Single Men Can Become Dads through Surrogacy, Moscow Court Says, August 04th, 2010 . available at <http://www.surrogacy.ru/eng/news/news4.php> ( Last visited October 11, 2016).

b. Israel - The issue of single parent surrogacy is proposed to be legalized in Israel following petition before the Israel High Court of Justice. Israel's surrogacy law namely Embryo Carrying Agreements Law 1996 is challenged as discriminatory as this law permits only a man and woman in a relationship to commission surrogacy or to have a child through a surrogate in Israel. The Israel High Court of Justice, issued notice to the state for amending the existing law to allow *single women or women without* a male partner, single male individual, same sex partners to commission surrogacy, thus paving way for legalization of single parent surrogacy<sup>19</sup>.

c. UK - *Baby Z case 2016*<sup>20</sup> - UK has also ushered for legal permit to issue of parental order to single parent thus granting legal recognition to single parent surrogacy in UK. A singleton British national commissioned surrogacy in USA resulting in birth of surrogate child Z. Initially the high court refused to issue parental order and thereby denied vesting of legal parentage under parental order for the single parent despite the single parent being the biological father, the surrogate child was declared as the ward of court. The President of the High Court family division England's top family judge, differing from the higher court held that UK law unfairly discriminates against single parents with children born through surrogacy and is incompatible with their human rights under Article 14 right to non discrimination, right to family, privacy under Article 8 of the European Convention on Human Rights. As the UK Human Fertilisation and Embryology (HEFA) Act 2008 allows only couple including two people in a marriage, civil union or partnership to make application for parental order, thereby excludes single parent on the sole ground of their celibate status thus discriminates against them. Following this landmark judicial precedent the Secretary of State for Health, UK proposed that the law on surrogacy is sought to be amended accordingly.

#### Single parent surrogacy permitted in other nations –

Presently many such nations which have no binding legislation on surrogacy is becoming a familiar ground for single parent surrogacy as Cambodia, which has emerged as the hub of overseas surrogacy owing to nil laws, regulations on the same, the country is reported to have provided for single parent, same sex surrogacy as well.

#### Issues & Considerations in Single parent surrogacy -

In the light of single parent surrogacy, there are many inter connected and incidental issues, if single parent surrogacy is allowed applying the same rationale same sex individuals, live in partners, transgender or ever married women including divorcee, widow should also be allowed to commission surrogacy, In similar vein, the issue of *permission and prohibition* to avail or commission surrogacy based on the individual's marital, celibate status as determining criteria to commission surrogacy is also questioned!

It is also important to incorporate some of the suggestive safeguards in case where single parent surrogacy is permitted in order to safeguard the greater interest of stakeholders as surrogate children. It is also appropriate to lay down the necessary eligibility requirements, or

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<sup>19</sup> Asaf Weiss Israel Must Remove the Discrimination Inherent in Its Surrogacy Law

available at <http://www.haaretz.com/opinion/.premium-1.653667> Apr 27, 2015

available at <http://www.haaretz.com/opinion/.premium-1.653667><http://www.haaretz.com/israel-news/.premium-1.729199> ( Last visited October 11, 2016).

<sup>20</sup> Single father wins surrogacy human rights ruling, 23 May 2016, By Antony Blackburn-Starza, Appeared in BioNews 852 available at [http://www.bionews.org.uk/page\\_651129.asp](http://www.bionews.org.uk/page_651129.asp) ( Last visited October 11, 2016).

preconditions to commission surrogacy as well as to check and control unethical, illicit practices under the guise of surrogacy including the stipulation on the minimum and maximum age limitation, particularly the upper age limit on the attainment of which or beyond which a couple or individual may not commission surrogacy as well as the permissibility on the *number of attempts* for the same couple, individual to commission surrogacy in their life time needs to be specified. An important prerequisite is the strict screening of couple including medical necessity, age, socio economic educational, family background check as done in case of adoption may be required in case of surrogacy. These issues require consideration and resolve.

#### Ending Remarks-

At the outset, the trend of single parent is increasing, with favourable government legislative policy changes or amendments, landmark judicial developments around the world. Therefore, the enactment of a statutory law on surrogacy providing for single parent surrogacy is legit in tandem with established international conventions. Last but not the least , one of the most recent positive development with regard to legalizing single parent surrogacy is initiated by the world renowned World Health Organization (WHO) which has proposed amendments to the current definition of “infertility” “to include 'singles' seek to give every person who desires a family the right to have a child regardless of whether they have health challenges that cause infertility or just do not have or want a partner to sire a child with”<sup>21</sup>. As per this change in the definition, single persons gay , same sex individuals would be termed as disabled owing to absence of female partner to have child with.

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<sup>21</sup> Graham Kajilwa, Why single men could get babies through surrogacy standard media, October 25th 2016, available at <http://www.standardmedia.co.ke/health/article/2000220933/why-single-men-could-get-babies-through-surrogacy> ( Last visited October 11, 2016).