

## **SURROGACY 'RENT-A-WOMB': AN INDIAN LEGAL PERSPECTIVE**

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*"We never know the love of a parent till we become parents ourselves."*

*-Henry Ward Beecher*

PROCREATION of children is one of the main objects of marriage. It is a natural desire of every human being to leave behind his descendants for the continuity of lineage. Matrimonial happiness depends not only on satisfying biological need of sexual urge, but also on begetting of a child. Attainment of parenthood gives social recognition of the parties to the marriage. A situation of childlessness arises if a married couple is unable to procreate children due to infertility. This results in depression and insecurity amongst the parents and affects them not only psychologically and socially, but also their lineage is discontinued. Therefore, adoption was the only alternative. Due to the advancement of medical science over the last thirty years, modern reproductive techniques like artificial insemination and in vitro fertilization are being resorted to. It is estimated that 15 percent of couples around the world are infertile. The magnitude of the infertility problem has enormous social implications. In instances, wherein the wife is unable to conceive, surrogacy is available as an alternative due to advancement in medical science. Surrogacy has been found to be a more suitable alternative than adoption for such couples, as the child which is born has a genetic connection with the parents.

The roots of surrogacy in India can be traced back to 3 October, 1978, as on this date, Kanupriya alias Durga was born in Kolkata using the In Vitro Fertilization (IVF) technique, few months

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after the world's first IVF boy, Louise Joy Brown, was born in Great Britain on July 25, 1978<sup>1</sup>. Since then the field of Assisted Reproductive Technology (ART) has developed rapidly. Following the Supreme Court's decision in 2008<sup>2</sup>, India has emerged as a leader in international surrogacy due to the legalization of commercial surrogacy. Today, India is the most favoured destination for surrogate mothering. The factors, which have attracted foreign couples to prefer India as a destination for surrogacy are, simpler procedures, lesser costs involved, poverty, illiteracy, lack of regulations of ART clinics, possibility of allegiance of any law on the subject, and judicial approval regularizing commercial surrogacy. Thus, '*rent-a-womb*' has become a thriving industry, unbridled by law<sup>3</sup>. Fertility clinics in India are becoming more competitive, and charging patients a huge sum of money for a complete package including fertilization, the surrogate's fee and the delivery of baby at a hospital.<sup>4</sup> The Law Commission Report points out that in India itself the fertility tourism contributes to a 25,000 crore industry.<sup>5</sup> The total cost of a surrogacy arrangement in India is roughly in the range of Rs 4-12 lakhs, depending on the IVF clinic and is thus, around one-third of what it costs in the US or any other western country, where it is legal.<sup>6</sup> According to a recent report, the '*industry reproductive outsourcing*' referring particularly to commercial gestational surrogacy in India is estimated to be worth over Rs. 2000 crores.<sup>7</sup> Anand Town in Gujarat, is a hub for surrogate mothers<sup>8</sup>, along with Indore, Pune, Mumbai, Delhi, Kolkata and Trivandrum.

At the moment, the concept of surrogacy has been engaging the attention of not only ethicists, psychologists, sociologists and medical scientists but jurists as well. This method has given rise to innumerable legal issues especially in the domain of personal laws. The spectacular breakthrough in the reproductive technologies has brought forth enormous jurisprudential questions of morality, legal regulation, in the family and child's rights domain. This paper attempts to understand the development in reproductive technologies and examines the proposed

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<sup>1</sup> Report of the Law Commission of India, 228 (2009) P 9

<sup>2</sup> *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84

<sup>3</sup> Aarti Dhar, "*Rent-a-Womb, a thriving industry unbridled by law*", The Hindu, July 15, 2012, Chennai Edition, p.9

<sup>4</sup> Shilpa Kannan, "*Regulators eye India's surrogacy sector*", India Business Report, BBC World, 23 Mars, 2009

<sup>5</sup> Report of the Law Commission of India, 228 (2009) P 9

<sup>6</sup> Kohli, Namita, "*Moms on the Market*", The Hindustan Times, 13, March 2011

<sup>7</sup> *Supra* n.6

<sup>8</sup> Rekha P, Pahuja, "*Problems of Surrogacy - A Critical Study*", Nyaga Deep, Vol.XII, Issue 2, April 2011

ART Bill, 2010 in the backdrop of various constitutional and contractual provisions and suggests legal reforms to regulate surrogacy arrangements in India.

## MEANING OF SURROGACY

Surrogacy is a reproductive technique that tries to achieve pregnancy by means other than by intercourse. Surrogacy is a form of assisted reproduction and a “Surrogate Mother” is a woman who bears a child on behalf of other parents.<sup>9</sup> It is derived from a Latin word ‘*Surrogare*’ which means a substitute i.e. appointed to act in place of. According to Black’s Law Dictionary, Surrogacy means “*the process of carrying and delivering a child for another person*”.<sup>10</sup>

Surrogacy is an arrangement or agreement by which a surrogate woman agrees to be impregnated by non-coital means, using either the intended father’s sperm or intended mother’s egg or both, with the intention that the intended parents are to become the parent of the resulting child after the child’s birth.<sup>11</sup> Surrogacy is essentially a contract of service by which a woman agrees to carry a baby in accordance to the terms of the contract. It basically involves three promises:

- i. The surrogate who offers her services carries the baby according to the terms of the Contract, either in the capacity of the gestational mother or genetic mother.
- ii. The surrogate and her husband agree to relinquish all parental rights at the birth of the child and;
- iii. The intended parents agree to remunerate the surrogate for her service.

## TYPES OF SURROGACY

### On the basis of genetic co-relation:

#### (A) Traditional

#### (B) Gestational

#### (A) Traditional Surrogacy or Straight Surrogacy

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<sup>9</sup> Supra Note. 10.

<sup>10</sup> Report of the Law Commission of India, No.228, p.9.

<sup>11</sup> IOWA Law Review 1987, 73, Iowa L. Rev. 943 (1987), [www.viowa.edu/skflaw/surrog.html](http://www.viowa.edu/skflaw/surrog.html)

In traditional surrogacy the surrogate is pregnant with her own biological child, but this child was conceived with the aim to surrender the child to be raised by others such as the biological father and perhaps his spouse or partner and hence the child that results is genetically related to the Surrogate mother. The child may be conceived via sexual intercourse, home artificial insemination or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination), which is performed at a fertility clinic. Sperm from the male partner of the commissioning couple may be used, or instead, sperm from a sperm donor can be used.<sup>12</sup> In traditional surrogacy, the surrogate's egg is used to create the embryo of the child she is going to carry. The following people may consider traditional surrogacy-

- Single men
- Same-sex male couples
- Intended mothers who cannot produce healthy eggs
- Single women using sperm donation
- Commissioning couple are both females via sperm donation

#### **(a) Home Artificial Insemination**

Undergoing insemination at home is a popular practice. By the use of home insemination kit, the insemination can be easily performed in the comfort of the recipient's home, for instance, in their bedroom. Pregnancy accomplishment rate is high when insemination is carried out at home as opposed to in a fertility clinic. This could be explained by the fact that the sperm used is fresh and not frozen. Kit comprises of digital thermometers, fertility tests, ovulation tests and pregnancy tests, and number of syringes, semen containers and urine containers to ease the process. These kits come with everything that is needed for home insemination, as well as everything that is required to prepare well enough to be successful. This method is less expensive and hence cost effective.<sup>13</sup>

#### **(b) Intrauterine Insemination (IUI)**

IUI is a kind of fertility treatment in which high quality sperm are separated from sperm that's sluggish or non-moving. This sperm is subsequently injected directly into the womb and can

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<sup>12</sup> [http://www.surrogacylawsindia.com/index\\_inner.php](http://www.surrogacylawsindia.com/index_inner.php)

<sup>13</sup> <https://www.coparents.com/insemination/home-insemination-guide.php>

either be performed with the partner's sperm or donor sperm (known as donor insemination- using this approach, the child is genetically linked to the sperm donor and the Surrogate Mother.)

It may be used in the treatment of:

- People who require donated sperm but have no female fertility problems, including [single women](#) and [same sex couples](#).
- Couples with unexplained infertility who are having private treatment.
- Couples who are not capable (or would find it very complex) to have vaginal intercourse, for example because of a physical disability or psychosexual problem.
- Those who have a condition which means they need specific help to get pregnant (for example, men who are HIV positive and have had sperm washing to reduce the risk of passing on the disease to their partner and potential child)

In IUI, the highest quality sperm are selected and injected into the uterus where they are left to fertilize the eggs naturally. IUI works finest for people who don't have stern fertility problems.<sup>14</sup>

### **(c) Intracervical Insemination (ICI)**

Intracervical Insemination (ICI) is one of the oldest and most common artificial insemination procedures, dating back as far as the 1880s. Alike Intrauterine Insemination (IUI), it involves introduction of sperm directly into the woman's reproductive tract to improve the chances of pregnancy. The main difference is that the ICI procedure places the sperm sample near the cervix, rather than the uterus as in IUI. From the cervix, the sperm moves up to the uterus and into the fallopian tubes to fertilize the egg.<sup>15</sup> During ICI procedures, fresh, untreated or raw semen must be allowed to liquefy<sup>16</sup> before it is sucked into the syringe.<sup>17</sup> ICI costs less than IUI, which is why it is one of the most general artificial insemination techniques performed.

This method is generally used when-

- Couples often choose ICI when the male partner is having difficulty ejaculating during sexual intercourse, as the procedure allows the sperm to be placed inside the woman artificially.

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<sup>14</sup> <https://www.hfea.gov.uk/treatments/explore-all-treatments/intrauterine-insemination-iui/>

<sup>15</sup> <https://www.docshop.com/education/fertility/treatments/ici>

<sup>16</sup> The liquefaction is the process of sperm becoming liquid once ejaculated. The semen gel liquefies to enable the sperm cells to swim more freely through the cervical mucus and towards the egg.

<sup>17</sup> <http://human-fertility.com/intrauterine-and-intracervical-insemination-iui-and-ici/>

**(B) Gestational Surrogacy or Host Surrogacy**

In gestational surrogacy, a surrogate is only a carrier/female host and is not genetically or biologically linked to the child. The Surrogate is implanted with an embryo that is not her own, and becomes pregnant with a child to which she is not the biological mother. Biologically, the carrier has no genetic link to the child. This can be done by one of several ways-

- Mother's egg, father's sperm

Example: if the biological mother was unable to carry for medical reasons

- Donor egg, father's sperm

Example: if there w

- as a question about egg quality of the mother, or there were no ovaries

- Mother's egg, donor sperm

Example: if sperm quality was questioned

- Donor egg, donor sperm

Example: if the "parents" didn't want the Carrier to have any biological link to the child.<sup>18</sup>

- Donor Embryo

Example: If both of the Intended Mother and Intended Father are incompetent, the Surrogate Mother can carry a donated embryo. Using this approach, the child is not genetically related to any of the involved parties.<sup>19</sup>

Host surrogacy occurs when IVF is used, either with the eggs of the intended mother, or with donor eggs. The surrogate therefore does not utilize her own eggs, and is genetically unconnected to the infant.

In essence, there are three stages to 'host' surrogacy:

- I- Egg donation: the female IP, or the egg donor, undergo special procedures to extract a number of eggs
- II- Fertilization: the egg is fertilized with semen in the laboratory
- III- Transfer: the fertilized egg is transferred into the womb of the surrogate mother

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<sup>18</sup> <https://www.canadiansurrogacyoptions.com/types-surrogacy/>

<sup>19</sup> <https://www.findsurrogatemother.com/surrogacy/information/types>

### **In-Virto Fertilization (IVF)**

IVF works by using a mixture of medicines and surgical procedures to facilitate sperm fertilize an egg, and help the fertilized egg implant into uterus. Initially, the medication is given that makes several eggs mature and ready for fertilization. Then the doctor takes the eggs out of the body and mixes them with sperm in a lab, to help the sperm fertilize the eggs. Later several fertilized eggs (embryos) are put directly into the uterus. Pregnancy happens if any of the embryos implant in the lining of the uterus.<sup>20</sup> However, in IVF as in natural conception, not every embryo implants to become a pregnancy, which is why surplus embryos are frozen - so that a subsequent transfer might be tried if the first one fails.<sup>21</sup>

#### **(A) On the basis of compensation to the Surrogate: Compensated and Altruistic**

Another aspect that creates diverse types of surrogacy is the reimbursement that a surrogate is paid to carry the intended parents' child.

#### **1- Compensated Surrogacy**

When a surrogate is offered base fee for carrying the child (beyond reimbursement for pregnancy-connected expenses), this is known as compensated surrogacy. Commercial Surrogacy is a type of surrogacy in which a gestational carrier is remunerated to carry a child to maturity in her womb and is normally resorted to by higher earning childless couples who can pay for the cost involved or people who save or borrow in order to complete their dream of being parents. This practice is legal in quite a few countries as well as India. Commercial surrogacy is also known as 'wombs for rent', outsourced pregnancies' or 'baby farms'.

It is generally used when-

- If the intended parents are not at ease asking an acquaintance or family member to become an uncompensated surrogate, a commercial surrogacy may help remove the feeling of indebtedness that they could never pay back.
- Surrogates may come to feel aggrieved or taken benefit of during the altruistic surrogacy process, so for women who are unconfident, a compensated surrogacy is usually the way to go.

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<sup>20</sup> <https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments/what-ivf>

<sup>21</sup> <https://www.londonwomensclinic.com/fertility-treatments/invitro-fertilisation-ivf.htm>

## 2- Altruistic Surrogacy

If a surrogate does not obtain any supplementary payments, she will complete an altruistic surrogacy. It is a condition wherein the surrogate collects no pecuniary compensation for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, housing, diet and other connected expenses).

Following are the reasons for the use of Altruistic Surrogacy-

- If a surrogate's state forbids compensated surrogacy agreements, she and the intended parents will have to complete their surrogacy altruistically.
- For some intended parents and surrogates who are friends or family members, a compensated surrogacy is uncalled for; a surrogate will want to carry their baby due to the affection between her and the intended parents.
- Since surrogates are not remunerated, an altruistic surrogacy might make simple for intended parents to slash the price of their surrogacy.

### (B) Where it is completed: Domestic and International Surrogacy

Surrogacy is an ART practice that's completed around the world. Though, many countries have severe laws regulating this process, so depending on where you live; you may have the option between two types of surrogacy: domestic and international.

#### 1- Domestic Surrogacy

**It is helpful in the following situations-**

- If any country allows surrogacy and regulates it properly, it's usually cheaper and safer to complete a domestic surrogacy.
- This type of surrogacy allows intended parents and surrogates to meet, establish a relationship and more easily stay in contact during the whole surrogacy process.
- A domestic surrogacy eradicates the legal procedures that take place with bringing a baby born abroad back into their parent's country.



## 2- International Surrogacy

### It is generally helpful-

- If intended parents live in a nation that restricts or does not permits surrogacy, completing an international surrogacy in a surrogacy-friendly country is safer and easier.
- Surrogates who bear a baby for an international intended parent can obtain payment that, due to exchange rates and different standards of living, can drastically change their life situation.

### (C) Who do you work with: Agency and Independent Surrogacy

Usually, there are two methods of surrogacy when it comes to working with an expert: an agency surrogacy and an independent surrogacy.

#### 1- Agency Surrogacy

In an **agency surrogacy**, intended parents and surrogates work with a surrogacy service or agency from the start to the ending of their surrogacy procedure — from the initial screening and matching to mediation of contact to the finalization of compensation and parentage.

Following are the reasons for the use of Agency Surrogacy-

- If intended parents and a surrogate have not found one another yet, they'll typically work with a trusted and reputed surrogacy agency or like service to securely find the ideal match.
- When intended parents and surrogates are not fulfilled for management and taking charge of all the phases of their surrogacy, a surrogacy agency will take the mass of the dependability out of their hands.

#### 2- Independent Surrogacy

In an independent surrogacy, intended parents and surrogates simply work with a surrogacy lawyer and a fertility clinic to complete their surrogacy practice.

Following are the reasons for the use of Independent Surrogacy-

- If intended parents are working with a surrogate they be familiar with (generally a friend or family member), they may feel relaxed without the mediation services offered by a surrogacy agency. They may only need a surrogacy lawyer and fertility clinic to manage the legal and medical facets of the surrogacy.

- For intended parents who are look to save money on their surrogacy, an independent surrogacy may be the cheaper alternative.<sup>22</sup>

## Legal issues on surrogacy

### A. status of a surrogacy contract

One of the fundamental issues that manifest in a surrogacy arrangement is its legality. As mentioned earlier, a Surrogacy arrangement is essentially a contract of service in which a woman carries a baby in accordance to the terms agreed thereof. To examine whether the consideration and object of the contract is lawful, reference is made to **Section 23 of the Indian Contract Act, 1872**. In legal parlance, an agreement is unlawful if it is forbidden by law, immoral or opposed to public policy<sup>23</sup>. In India, at present, there is no prevalent law that forbids the practice of surrogacy. The concept of ‘immorality’ in law is generally confined to sexual immorality only.<sup>24</sup> Surrogacy through AI / IVF, which does not contemplate cohabitation, is not to be construed as immoral. The concept of ‘Public Policy’ is a dynamic concept, changing with the current trends of society, varying from generation to generation. The twin touchstone of public policy is the advancement of public good and prevention of public mischief.<sup>25</sup> A Contract having the tendency to injure public interest or public welfare is one that is opposed to public policy. Surrogacy is an option available to a childless couple for whom adoption is not a legally viable option. For a childless couple, surrogacy, either commercial or non-commercial, is a feasible alternative to adoption. It neither affects public good nor does it result in public mischief. However, the law regarding surrogacy is characterized by confusion and uncertainty. This is further hampered by a complex set of moral and ethical issues that are enumerated as follows;

- i. There is no doubt that a significant number of people who oppose surrogate motherhood, think of it as an unnatural and wrong practice, which should not attract the protection of law.

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<sup>22</sup> <https://surrogate.com/about-surrogacy/types-of-surrogacy/types-of-surrogacy/>

<sup>23</sup> Section 23 of Indian Contract Act. 1872 reads as follows:

“23. What considerations and objects are lawful and what not.- The consideration or object of an agreement is lawful, unless- it is forbidden by law [ ; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

<sup>24</sup> *Gherulal Parakh v. Mahadeodas Maiya*, AIR 1959, SC 781.

<sup>25</sup> *Ratanchand Hirachand v. Askar Nawaz Jung*, AIR 1976, AP 112.

Such agreements are detrimental to the interest of women and children and should not be enforced by law.

- ii. The agreement advanced against a surrogacy agreement is that it leads to commodification of children and the practice has turned into a ‘*baby selling market*’.
- iii. The feminists who oppose the idea of surrogacy believe that there is a threat to the health of the surrogate who is being used as a child making machine, unaware of the risks to her health and also the pain of giving away the child at the time of making the agreement.<sup>26</sup>
- iv. Surrogacy arrangement does not empower women. Instead it provides an opportunity for women to sign away their rights.<sup>27</sup>
- v. The most serious objection raised against surrogacy is that, the body of the surrogate mother is simply used as an incubator by the commissioning couple. The woman is subjected to an invasive procedure for which she has no need and the natural child carrying process is distorted by the fact that the surrogate mother is counseled against bonding, as she is to part with the child after birth<sup>28</sup>.
- vi. Institutionalization of surrogacy would promote unnatural and undesirable means of family formation<sup>29</sup>. The procedure amounts to dehumanization and degradation of women. Surrogacy in many ways is felt to be a form of ultra or bio-prostitution in which more than a mere sexual act is involved and the women’s body is used to incubate a foreign embryo in exchange of money<sup>30</sup>.
- vii. It amounts to commercialization, which becomes a tool in the hands of the wealthy, to tempt and manipulate the weaker sections of the society into selling their organs for money, ignoring their human emotions and physical comforts.<sup>31</sup>

Placing the above mentioned objections, the critics plead that commercial surrogacy should be banned in India. The advancement and increase in awareness of the techniques in medical science, will only resort to surrogacy as an accepted convention among childless couples and thereby, any legislative enactment introduced with an intent to ban and label such practice as

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<sup>26</sup> *Runkles v. Maryland*, 590, A 2d 552 (Md.1991)

<sup>27</sup> Vossmeier M. Celeste Schejbal, “*What Money Cannot Buy: Commercial Surrogacy and The Doctrine of Illegal Contracts*”, 32, STLULJ 1171 (1988).

<sup>28</sup> Elizabeth A. Erickson, “*Contracts to Bear a Child*” 66 California Law Review, 611 (1978).

<sup>29</sup> Waller Louis, “*Surrogate Parenting*”, Report of the National Bio Ethics Consultative Committee, 5-7 (April 1990).

<sup>30</sup> Hari Swarup, “*Surrogate Motherhood: A New Woman Rights Problem*”, World Congress on Law and Medicine, held on 22-25 Feb. 1985 at New Delhi.

<sup>31</sup> *Surrogate motherhood: the ethics of using human beings*, Thomas A. Shannon

immoral, will only portray the lack of conviction in promoting a positive cause. What cannot be stopped *de facto* should be regulated and regularized *de jure* in the interest of all the parties, especially in the interest of the child who in the absence of such regulation might suffer as an innocent victim. In view of the above reasons, surrogacy arrangement does not suffer from any legal infirmity and is neither tainted with any immorality nor is it opposed to public policy. As far as the legality of the concept of surrogacy is concerned, it would be worthwhile to mention that Article 16.1 of the Universal Declaration of Human Rights, 1948 opines, inter alia, that “*Men and women of full age without any limitation due to race, nationality or religion have the right to marry and form a family*”. The Judiciary in India too has recognized the reproductive rights of humans as a basic right<sup>32</sup>. Under Article 21 of the Constitution, Right to life has been widened by surrogacy. The interpretation of the word ‘*Personal Liberty*’ in Article 21 is of the widest amplitude and covers a variety of rights, which go to constitute the personal liberty of man. Right to life does not mean a mere animal existence and includes the right to live with human dignity<sup>33</sup>. Any right to privacy implicit in Article 21 must encompass and protect the personal intimacies of a citizen in relation to his family, marriage, procreation, motherhood and child rearing<sup>34</sup>. Now, if reproductive rights get a constitutional protection, surrogacy, which allows an infertile couple to exercise that right, also gets the same constitutional protection<sup>35</sup>. It can be said that surrogacy might just further the right to procreation and to have a family, which is implicit under Article 21. Unfortunately, law is very slow to react to the rapid advancement of science and changing behavioral patterns of society. This maximal pace is made apparent when it is realized that as of this day no law has been passed. More importantly, this industry has a quasi-legal status in India, since there is no law regulating it, with only some non-binding guidelines, which includes the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India given by the ***Indian Council of Medical Research (ICMR), 2005***. In cases of surrogacy that have gone to courts, the practice has not been rendered illegal, though there are some judicial pronouncements questioning the ethics of its practice.

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<sup>32</sup> *B.K.Pasthsarathi v. Government of Andhra Pradesh* AIR 2000 AP 156

The Court upheld that the right to reproductive autonomy of an individual as a fact of his right to privacy and agreed with the decision of the US Supreme Court in *Jack T. Skinner V State of Oklahoma* ( 316 US 535) which characterized the right to reproduce “as one of the basic civil rights of man.

<sup>33</sup> *Maneka Gandhi v. Union of India*, AIR 1978, SC 597.

<sup>34</sup> *R. Rajagopal v. State of Tamilnadu*, AIR 1955, SC 264.

<sup>35</sup> “*Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy*”, 5<sup>th</sup> August, 2009.

## B. Legitimacy of a surrogate child

A vital issue in personal law manifests in surrogacy arrangement relates to the legitimacy of the surrogate child. Is the surrogate child legitimate? If so, to whom the child belongs? And who is considered the natural mother of the surrogate child? The legitimacy of children is the direct outcome of the concept of marriage. The settled rule is that the children born within the lawful wedlock are legitimate children of the man and his wife. As a corollary to this, children born outside the lawful wedlock are considered illegitimate<sup>36</sup>. Legal presumption as to the maternity of the child is assigned to its birth mother<sup>37</sup>. The ‘*child-mother*’ relationship is conclusively determined at the point of birth regardless of whether the child is conceived through sexual intercourse or AI or IVF. Therefore, the surrogate child is the legitimate child of the intended parents. In the U.K., mother means “*the woman, who is carrying or has carried a child as a result of the placing in her an embryo or sperm and eggs, and no other woman, is to be treated as the mother of the child*”<sup>38</sup>. Legally, the child’s mother is the woman who carries it i.e., the surrogate host, not the mother who provided the ova. Indian courts in this regard follow the English Common Law. Due to this, the surrogate mother is admitted to be the mother of the surrogate child. If the surrogate is a married woman, the legitimacy of a child during subsistence of a valid marriage is almost concluded under Section 112 of the Indian Evidence Act 1872<sup>39</sup> and for all legal purposes, the child would be the legitimate child of the surrogate and her husband, unless he proves to the contrary. It is clear that the intended parents are not to become the legal parents of the surrogate child. The position is still worse if the surrogate mother is unmarried. In both cases, the surrogate child may not become natural and legitimate child of the intended parents. The only way out for the surrogate child to become the natural and legitimate child of the intended parents is adoption. However, in India, the law of adoption is not liberalized to overcome the situation. Under the personal laws of India, the institution of adoption is recognized only by Hindu law and not by Mohammedan or Parsi law. Christians in India are left

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<sup>36</sup> Paras Diwan , *Family Laws in India*, 2001 Edition, p.279.

<sup>37</sup> Black’s Law Dictionary® 4226 (Bryan A. Garner ed., 2009).

<sup>38</sup> Sec.27 (1) the Human Fertilization and Embryology Act, 1990, U.K.

<sup>39</sup> Section 112 reads as follows: “S. 112: *Birth during marriage, conclusive proof of legitimacy.* - *The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.*”

with no legal sanction for a valid adoption<sup>40</sup>. Even under Hindu law, an adoption is valid only when the adoptive parents and the child to be adopted are Hindus<sup>41</sup>. When either the surrogate woman or the intended parents are non-Hindus, adoption is invalid. The issue gets complex when the surrogate woman and her husband refuse to give the child in adoption to the intended parents who are genetically related to the child. Under this circumstance, adoption is not possible even if their personal law paves way for adoption. This position of law may cause a grave injustice to the intended childless parents who desire to have their genetic child through surrogacy. As the proposed ART Bill, which declares that the intended parents are the legitimate parents of the surrogate child, has not been passed yet, it is desirable that the intended parents can apply for a parental order, which will give them full and permanent parental rights once the child is born. At present, family courts may be vested with the jurisdiction to entertain such petition and pass necessary orders notwithstanding the religion of the parties to the surrogacy arrangement. Such arrangement may continue till the ART Bill is passed by the Parliament.

### **C. Surrogacy and consummation of marriage**

A problem may arise when the intended parents seek to avoid the marriage on the ground of non-consummation of marriage, due to impotency of the party either during the pregnancy of the surrogate or after the delivery of the surrogate child. In this situation a question may arise. Can the surrogacy arrangement with the consent of both the spouses approbate the marriage in the absence of consummation of marriage? A marriage is consummated when parties have sexual intercourse after solemnization of marriage<sup>42</sup>. Under all personal laws, incapacity to consummate the marriage entitles the other party to a decree of nullity of marriage<sup>43</sup>. The courts in England have taken the view that even when the wife resorted to AID with the consent of her husband who is psychologically impotent, a marriage cannot be consummated. To have a child by AID is no approbation of marriage<sup>44</sup>. Probably it was in this background, the Royal Commission on Marriage and Divorce 1956 recommended that when parties had resorted to AI, either party should not be allowed to seek a declaration that their marriage is void on the ground of

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<sup>40</sup> E.d. Devadasan, *Christian Law in India*, 1974, p.327.

<sup>41</sup> Sec.7, Sec.8 and Sec.10 of the Hindu Adoption and Maintenance Act, 1956

<sup>42</sup> Paras Diwan, *Family Law*, Edition 2001, p.96

<sup>43</sup> Paras Diwan, *Family Law*, Edition 2001, p.72

<sup>44</sup> *R.E.L. v. E.L.* (1949) Probate Division 211

impotency<sup>45</sup>. Though the recommendation contains merit, it has not been acted upon by the British Parliament so far. In India, under the Hindu Marriage Act, 1955<sup>46</sup>, the Special Marriage Act 1954<sup>47</sup>, the Parsi Marriage Act, 1986<sup>48</sup> and the Dissolution of Muslim Marriage Act 1939<sup>49</sup>, non-consummation of marriage makes the marriage a nullity. However, in Muslim law, consummation of marriage is presumed in the presence of a valid retirement<sup>50</sup>. The proposed ART Bill, 2010 is silent on this issue. Hence, the present position of law seems to be more favourable to the petitioner spouse who seeks to nullify the marriage on the ground of non-consummation of marriage notwithstanding the fact that the surrogacy arrangement is made with the consent of both the spouses. It is submitted that the right to matrimonial remedy is to be exercised as soon as the impotency of the other party comes to light. If the party without seeking the remedy gives consent for the surrogacy arrangement with the knowledge that the other spouse suffers from impotency, it is understood that the party has waived the right to seek matrimonial remedy. Thereafter, the spouse is stopped from seeking such remedy on consideration of the surrogate child's welfare. In the light of the above reason, it is desirable that consummation of marriage may be presumed between the intended parents who resort to surrogacy arrangement with their consent for getting a child. This presumption may operate from the moment the surrogate woman is conceived through AI or in case of IVF by placing of the embryo in the womb of the surrogate woman.

#### **D. Custodial rights over a surrogate child**

Surrogacy may also present a problem on surrogates' refusal to hand over the custody of the child to the intended parents. A surrogate mothers' claim for custody of the child may be strengthened when she is the genetic mother. Even with artificial insemination the surrogate is still the biological mother of the child, irrespective of whether the surrogate mother is related or unrelated to the social family of the child, or whether she has taken money from the child's social parents. There is every possibility that the surrogate mother would feel attached to the child she bears, would refuse to hand over the child to the father and, might state a claim on the

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<sup>45</sup> *Modi's Medical Jurisprudence & Toxicology*, 21<sup>st</sup> Edition, New Delhi, p.471

<sup>46</sup> Section 12 of the Hindu Marriage Act, 1955

<sup>47</sup> Section 24(1) of the Special Marriage Act, 1954

<sup>48</sup> Section 30 of the Parsi Marriage Act

<sup>49</sup> Section 2(v) of the Dissolution of Muslim Marriage Act 1939

<sup>50</sup> A.A.A. Fyzee, *Outlines of Mohammedan Law* pg.108 (4th Ed. 1974).

custody of the child. The judicial approach in foreign countries to this problem is in favour of the intended parents only. In Britain, under magistrate's order surrogate mother Kim Cotton was restrained from removing the baby from the hospital where the baby was born. The High Court eventually awarded the baby to the couple who commissioned it, with Kim Cotton receiving a substantial fee for providing her womb<sup>51</sup>. No surrogate has ever gotten custody of her baby in American Courts. In the U.S.A., the Uniform Parentage Act 1973 has recognized both genetic and birth test as a means of establishing a mother-child relationship. When a gestational surrogate delivers a child, the genetic parents of the child are the natural and legal parents<sup>52</sup>. In India, Hindu law lays down that the custody of a child up to the age of 5 years should ordinarily be with the mother<sup>53</sup>. Under other personal laws, though there is no statutory provision, the Indian Courts have consistently taken this view<sup>54</sup>. The Indian Courts are very often influenced by the principle of '*paramount welfare of the child*' in deciding the custodial right of the father and mother in matrimonial litigations. It is not known whether the courts would extend the principle of '*paramount welfare of the child*' to disputes relating to custody of the child between surrogate and intended parents. The law as it stands now is in favour of the surrogate, as she cannot be denied the title of natural mother. In the light of the above factors, it is desirable that the object and intention of the parties to the surrogacy arrangement and the paramount welfare of the child are the guiding principles to award the custody of the child. Awarding custody to the intended parents is the general rule and the contrary is an exception.

### **E. Inheritance rights of surrogate child**

Last but not the least, the legal issue relating to surrogacy in personal law is the right of the parties to the surrogacy arrangement. This issue may raise several questions.

- i. Is the surrogate child entitled to succeed the property of the surrogate mother dying intestate either at delivery or thereafter?
- ii. Can the surrogate child inherit the property of the surrogate's husband who dies intestate during surrogate's pregnancy?

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<sup>51</sup> H.K. Saharay, *Laws of Marriage and Divorce* 1999 Edition, p.35.

<sup>52</sup> *Belsite v. Clark* 644 N.E. 2d, 760 pl.1994.

<sup>53</sup> Sec.6 of The Hindu Minority and Guardianship Act, 1956.

<sup>54</sup> Paras Diwan, *Family Laws in India*, 2001 Edition, p.230.



- iii. Can the surrogate mother claim inheritance rights against the properties of her surrogate child who dies intestate after some years?
- iv. Is the surrogate child entitled to inherit the properties of both or either of the intended parents died intestate as a child born at the time of their death or as a child begotten in the surrogate's womb at the time of death of intended parents but born after their death?
- v. Can the surrogate child acquire coparcenary interest in the ancestral property of the intended parents or surrogate mother's husband, in case they are Hindus?

All the above questions lead to a common one: Whose legal heir is the surrogate child? The general principle of inheritance is that inheritance is closely linked with legitimacy of heirs. Under all personal laws, legitimacy of a child is entirely based on lawfulness of the marriage between the child's parents. However, the child and the mother are always entitled to inherit their properties mutually, as the question of legitimacy between the child and its mother is not relevant for the purpose of inheritance. As discussed earlier, under the existing laws in India, the surrogate mother and her husband are the natural and the legal parents of the surrogate child. The child is therefore, the legal heir of the surrogate mother and her husband, provided that the surrogate's husband has consented for such surrogacy arrangement. As a result, the answer is affirmative in respect to the first three questions. The surrogate child has no right of inheritance in the properties of the intended parents. A complication may arise when the surrogate mother after delivery, as the natural guardian of the surrogate child, claims the property of the intended father or mother dying intestate during her pregnancy by which time the child could not have been given in adoption. Her claim would fail even when intended parents have any genetic linkage with the child, as the intended parents do not adopt the child. This position may prejudicially affect the interest of the child. The Surrogacy agreement should protect not only the rights of the parties but also the rights of the product i.e., the surrogate child. It is therefore, desirable that the surrogate child is deemed to be the child of the intended parents from the moment the child is begotten for the purpose of testamentary and intestate succession.

### **The Artificial Reproductive Technologies (Regulation) Bill 2010- an Evaluation**

The newly drafted *Artificial Reproductive Technologies (Regulation) Bill, 2010* recognizes new developments in reproductive technology and aims to regulate the practice to ensure that these are no obstacles to anyone who intends to resort to surrogacy. Whatever justification one can

give to the recent bill, there is a dire need for immediate attention to the various issues on surrogacy relating to reproductive freedom and procreative liberty. It is also necessary to examine how public conscience perceives commercial surrogacy. The Bill mainly aims to regulate the already thriving surrogacy industry in India, which the Law Commission referred to as a '*pot of gold*' while noting that the infertility clinics have managed to reach the end of the rainbow.<sup>55</sup> The highlights of the Bill are as follows:

- i. Constitution of authorities to recognize assisted reproductive technology by framing policies and guidelines. These authorities are also to receive any complaints relating to surrogacy. The Bill stipulates the establishment of Advisory Boards at the state and national level. The proceedings before these boards are to be considered as judicial proceedings<sup>56</sup>.
- ii. The assisted reproductive clinics are to be regulated by the Advisory Boards and their registration and accreditation is to be mandatorily sought before the Registration Authority<sup>57</sup>. This entails that these clinics will function under heavy regulation.
- iii. It details the rights of the parties namely, intended parents, surrogates, gamete donors and children<sup>58</sup>.
- iv. It criminalizes advertisements related to pre-natal sex determination<sup>59</sup>.
- v. A draft of the surrogacy agreement has also been given in the schedule in the Draft Rules.
- vi. The Bill confers to unmarried couples and single person's the right to have children<sup>60</sup>.
- vii. It also legalizes commercial surrogacy<sup>61</sup>, although altruistic surrogacy alone was recommended by LCI, single parenthood and live-in relationships<sup>62</sup> and entitles gays and lesbians to start families using surrogate mothers. The Bill proves that apart from all the expenses involved, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate<sup>63</sup>.

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<sup>55</sup> Jwala. D. Thapa, "*The 'Babies M': The Relevance Of Baby Manji Yamada V. Union Of India (UoI) And In The Matter Of Baby "M"*"

<sup>56</sup> Sec.5 to 11, ART Bill 2010

<sup>57</sup> Sec. 12, ART Bill 2010

<sup>58</sup> Sec. 32 to 36, ART Bill 2010

<sup>59</sup> Sec. 37, ART Bill 2010

<sup>60</sup> Sec.2 (g), Sec. 2 (x), Sec.2 (dd), ART Bill 2010

<sup>61</sup> Sec. 2 (aa), ART Bill 2010

<sup>62</sup> Sec. 2 (dd), ART Bill 2010

<sup>63</sup> Sec 34 (3), ART Bill 2010

- viii. The Bill also makes it mandatory for the foreigners to submit the certificates on their country's policy on surrogacy and that the child born to an Indian surrogate mother will enter into the commissioning parents' country<sup>64</sup>.
- ix. The Bill also provides that anyone acting as a surrogate mother should be between 21-35 years old and cannot give birth to more than 5 children including her own<sup>65</sup>.
- x. The surrogate mother is not allowed to take embryo transfer for the same parents over three times<sup>66</sup>.
- xi. To have a married woman as a surrogate mother, her spouse's consent is mandatory<sup>67</sup>.
- xii. Only an Indian citizen can be considered for surrogacy within India and women cannot be sent abroad for surrogacy<sup>68</sup>.
- xiii. The donor's identity has to be kept confidential<sup>69</sup>.
- xiv. A prospective surrogate mother should not engage in any act that may harm the fetus during the pregnancy period or after birth<sup>70</sup>.
- xv. The baby's birth certificate should have the name of those individuals who had commissioned the surrogacy<sup>71</sup>.
- xvi. In case of any congenital abnormalities, the commissioning parents would have to take the child's custody<sup>72</sup>.
- xvii. The Bill also includes a provision that says that foreign couple will have to identify a local guardian to take care of the surrogate mother during her gestation period as well as after delivery, till the baby is handed over to the commissioning parents<sup>73</sup>.

Even though vesting rights on women to make reproductive choices is a step to empowerment, lots of issues remain unsettled. The ART Bill fails to keep a check on the existing misuse of surrogacy arrangements.<sup>74</sup> Depending on his finance, a man can make contractually binding

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<sup>64</sup> Sec 34 (19), ART Bill 2010

<sup>65</sup> Sec 34 (5), ART Bill 2010

<sup>66</sup> Sec 34 (9), ART Bill 2010

<sup>67</sup> Sec 34 (16), ART Bill 2010

<sup>68</sup> Sec 34 (22), ART Bill 2010

<sup>69</sup> Sec 33, ART Bill 2010

<sup>70</sup> Sec 34 (23), ART Bill 2010

<sup>71</sup> Sec 35 (7), ART Bill 2010

<sup>72</sup> Sec 34 (11), ART Bill 2010

<sup>73</sup> Sec 34 (19), ART Bill 2010

<sup>74</sup> Supra n.11

demands on the surrogate's behavior and her quality of service rendered.<sup>75</sup> Thus, the women from poorer sections are treated no lesser than chattel, with this outsourced mode of reproductive services.<sup>76</sup> If commercial surrogacy were to be allowed without any unambiguous regulations, it is likely to create a situation where the womb is rented out to an individual analogous to organ loaning. Custody claims over the child is an area, which requires consideration. The Bill exhibits the strong bias against the claims of the surrogate mother over the child by making it mandatory that she relinquish her rights over the child. It assumes that the genetic lines are stronger than the emotional bonds that the surrogate may develop. The commissioning couple is allowed to abort the fetus if they do not desire it by compensating the surrogate, but the surrogate is not allowed to do so except on expert medical advice. Also it fails to envisage a situation where a person does not want the child after delivery. The Bill does not recognize the rights of the surrogate and fails to adhere to the norms of equality. The Bill contradicts with the national policy, which prescribes two children to ensure stable population and women's health.

### **Conclusions and Suggestions**

India as a developing country along with the western world is actively engaged with genetic engineering that has posed many challenges including medico-legal problems. Medical advancement has revolutionised family building through AI, IVF in surrogate motherhood, which is gradually becoming popular in India. The infertile couples have started resorting to this technique to overcome childlessness. This method is likely to be more in demand with the changing role of women, who now hold important positions in commerce, industry, science and politics and would naturally find it inconvenient to bear a child. With the legal vacuum, these medico-legal issues remain unsettled leading to various complications especially in personal laws. The question relating to legitimacy, custodial right, succession right, religion of the child etc., should be answered in unambiguous terms in the proposed legislation. There is more demand for amendments in the area of personal law, contract law and other fields of civil law. In the absence of any generally accepted moral or religious standards, human rights have been frequently referred to as the major contemporary guidelines for legislators, courts, jurists and other competent authorities. It is therefore, imperative that proposed law must be enacted for

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<sup>75</sup> R.Anleu, "Surrogacy for Money Not Love", 6(1), Gender and Society 30, 48 (1992) at 39

<sup>76</sup> Supra n.11

surrogate motherhood without any further loss of time. In this process, due reconsideration should necessarily be given on all the social, ethical and legal issues inherent in surrogate motherhood by engaging an expert committee representing scientists, medical practitioners, lawyers, legal academicians, sociologists and psychologists, so that procreative liberty and social welfare may be balanced. This endeavor to bring about legislation on surrogacy will be a boon to childless couples, not only solving their problems but also addressing all the legal issues arising out of surrogate motherhood.