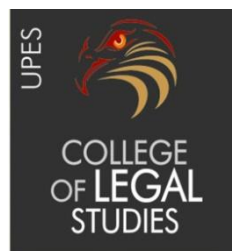


**SURROGACY: LEGAL AND ETHICAL ISSUES**

Daya Shankar Tiwari

Submitted under the guidance of: Prof. Venugopal BS

This dissertation is submitted in partial fulfillment of the degree of B.A., LL.B.  
(Hons.)



College of Legal Studies  
University of Petroleum and Energy Studies  
Dehradun  
2015

## **CERTIFICATE**

This is to certify that the research work entitled “**Surrogacy: Legal and Ethical Issues**” is the work done by Daya Shankar Tiwari under my guidance and supervision for the partial fulfillment of the requirement of B.A., LL.B. (Hons.) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Signature & Name of Supervisor

Designation

Date

## DECLARATION

I declare that the dissertation entitled “**Surrogacy: Legal and Ethical Issues**” is the outcome of my own work conducted under the supervision of Prof. Venu Gopal, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student

Daya Shankar Tiwari

Date:

# INDEX

## Contents

CERTIFICATE .....	I
DECLARATION .....	II
List of Cases:.....	VI
ABBREVIATIONS .....	VIII
ACKNOWLEDGENT .....	IX
CHAPTER I.....	- 1 -
1.1.    Meaning of Surrogacy:.....	- 1 -
1.2.    Types of Surrogacy.....	- 2 -
1.3.    Surrogacy under the Indian Contract, 1872.....	- 5 -
1.4.    Surrogacy In India, In The Light Of Hindu Adoptions And Maintenance Act, 1956.....	6
-	
1.5.    History Of Surrogacy .....	- 7 -
CHAPTER II.....	- 9 -
2.    JUDICIAL RESPONSE TO SURROGACY IN INDIA .....	- 9 -
2.1.    Surrogacy and Right To Life .....	- 14 -
CHAPTER III .....	- 17 -
3.    LEGAL AND ETHICAL DEBATE SURROUNDING SURROGACY .....	- 17 -
3.1.    If Something Is Unethical Should It Be Illegal .....	- 22 -
3.2.    Arguments For Surrogacy .....	- 23 -
3.3.    ARGUMENTS AGAINST SURROGACY.....	- 25 -
CHAPTER IV .....	- 28 -
4.    LEGAL CONTROL OF SURROGACY IN UNITED STATES OF AMERICA .....	28 -
4.1.    Judicial Response .....	- 28 -
4.2.    Right Of Abortion .....	- 30 -
4.3.    Statutory Response .....	- 31 -
4.4.    Legal Theories for Resolving Parenthood Disputes .....	- 32 -
Parenthood by Intent .....	- 33 -
Parenthood by Contract.....	- 34 -

Parenthood by Genes .....	- 34 -
Parenthood by Gestation .....	- 35 -
Best Interests of the Child Test .....	- 36 -
Declaratory Actions to Establish Parenthood .....	- 37 -
Gay and Lesbian Couple .....	- 37 -
4.5.    Constitutional Issues .....	- 38 -
CHAPTER V .....	- 40 -
5.    LEGAL CONTROL OF SURROGACY IN UNITED KINGDOM .....	- 40 -
CHAPTER VI .....	- 46 -
6.    LEGAL CONTROL OF SURROGACY IN INDIA .....	- 46 -
6.1.    Law Commission Of India On Surrogacy .....	- 46 -
6.2.    National Guidelines For Accreditation, Supervision And Regulation Of Art Clinics In India – 2005.....	- 47 -
6.3.    National Guide Lines 2005 And Child Protection.....	- 50 -
6.4.    Analysis of Assisted Reproductive Technology Bill 2010 .....	- 51 -
6.5.    Rights and duties in relation to surrogacy: .....	- 56 -
6.6.    Determination of status of the child:.....	- 59 -
6.7.    Right of the child to information about donors or surrogates: .....	- 60 -
6.8.    Persons who can opt for surrogacy under the Bill.....	- 60 -
6.4.    The surrogate mother and her role under the Bill.....	- 64 -
6.9.    Limitations on the function of the surrogate mother under the Bill: .....	- 66 -
6.10.    Territoriality of surrogacy under the Bill:.....	- 68 -
6.11.    Confidentiality of the surrogacy: .....	- 68 -
6.12.    Health and medical benefits for the surrogate:.....	- 69 -
6.13.    Compensation for the surrogate: .....	- 70 -
6.14.    Right of Child under the Bill .....	- 71 -
6.15.    No Right of Abortion .....	- 72 -
6.16.    Anomalies in the Bill .....	- 73 -
CHAPTER V .....	- 75 -
7.    CONCLUSION AND SUGGESTIONS.....	- 75 -
7.1.    SUGGESTIONS .....	- 76 -

BIBLIOGRAPHY .....	X
1. Legislations.....	X
1.1 India .....	X
1.2 United Kingdom.....	X
2. Journal Articles.....	X
3. Newspaper Articles .....	XII
4. Websites .....	XII

## **List of Cases:**

### **India**

- 1) Baby Manji Yamada V Union of India AIR 2009 SC 84
- 2) Basheshwar Nath v. Commissioner of Income Tax AIR 1959SC149
- 3) B. K. Parthasarathi v. Government of Andhra Pradesh AIR 2000 A. P. 156
- 4) Jan Balaz v Anand Municipality LPA 2151/2009, 17 November 2009 (High Court of Gujarat, India
- 5) Javed v. State of Haryana 2003) 8 SCC 369
- 6) R Rajagopal v. State of Tamil Nadu AIR 1995 SC 264
- 7) Suresh Kumar Kaushal v. Naz Foundation. SLP (C) No. 15436/2009
- 8) Suchita Srivastava v. Chandigarh Admn. (2009) 9 SCC1
- 9) X v. - Hospital Z (1998) 8 SCC p 269

### **United States of America**

- 1) Belsito v. Clark, 644 N.E.2d 760, 762 (Ohio 1994)
- 2) Caliendo v. Mariano, 2007 WL 4711520 (Conn. Super.)
- 3) De Barnardo v. Gregory, 2007 WL 4357736 (Conn. Super.)
- 4) Doe v. Bolton (1973) 410 US 179
- 5) Doe v. Smith (1988) 486 US 1308
- 6) Flynn v. Bimber, 2005 WL 1349640 (Pa.Com.Pl. 2005)
- 7) Goad v. Arel, 2007 WL 4711515 (Conn. Super.)
- 8) In re Baby M 537 A.2d 1227 (February 03, 1988
- 9) In re Marriage of Buzzanca (1998) 61 Cal App 4<sup>th</sup> 1410
- 10) Jaycee B. v. Superior Court 42 Cal.App.4Th 718 (1996)
- 11) Jack T. Skinner v. State of Oklahoma 316 US 535
- 12) Johnson v. Calvert 5 Cal. 4 84 (May 20, 1993)
- 13) K.M. v. E.G., 118 Cal. App. 4th 477 (2004
- 14) Lehr v. Robertson, 463 U.S. 248 (1983).
- 15) Malahoff v. Stiver, 975 F.2d 192 (6th Cir.,1988

- 16) Michael H. v. Gerald D, 491 U.S. 110, 120 (1989)
- 17) Planned Parenthood Southeastern Pennsylvania V. Casey (1992) 120 L.Ed 2d 67
- 18) Planned Parenthood of Central Missouri v. Danforth (1976) 428 US 52;
- 19) Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).
- 20) Roe v. Wade 1973) 410 US 113
- 21) Surrogacy Parenting Associates v. Commonwealth of Kentucky, 704 S.W.2d 209 (February 06, 1986)
- 22) Wray v. Samuel, 2007 WL 4711519 (Conn. Super.);

### **United Kingdom**

- 1) Re: L (A Minor) [2010] EWHC 3146 (Fam).
- 2) Re S (Parental Order) [2009] EWHC 2977(Fam), [2010] 1 FLR 1156.
- 3) Re: IJ (A Child) [2011] EWHC 291 (Fam)
- 4) Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)
- 5) Re G (Children) [2006] UKHL
- 6) D, L (Minors)(Surrogacy [2012] EWHC 2631 (Fam)
- 7) JP v LP, SP and CP [2014] EWHC 595



## **ABBREVIATIONS**

AI – Artificial Insemination

AIR- All India Reporter

AIP- Assisted Insemination by Partner

AID- Assisted Insemination by Donor

ART- Assisted reproductive Technology

DNA- Deoxyribonucleic Acid

ICA- Indian Contract Act

IVF – In-Vitro Fertilization

MTP- Medical Termination of Pregnancy

SC- Supreme Court

SCC- Supreme Court Cases

Sec- Section

## **ACKNOWLEDGEMENT**

*This report would not have been accomplished without the assistance and guidance of University of Petroleum & Energy Studies of which I am the student. It is indeed, the cooperation of college that I have been successful in presenting this report to the reader.*

*I am highly obliged to my mentor Professor Venugopal B S for the time and guidance he has devoted for my report & help me a lot in every prospect.*

*This work would not have been completed without the blessing of my Parents. I am also grateful to my seniors, who have assisted me in formulating the structure of this report. I would also like to thanks all my friends who have provided a great support in carrying out research and completion of this report.*

*At last but not the least I want to express my gratitude to Almighty, without whose blessings, I would not be able to complete this report.*

*Thanking you all!*

***Daya Shankar Tiwari***

*BALLB, Sec A*

*Sem X, College of Legal Studies,*

*University of Petroleum and Energy Studies, Dehradun*

# CHAPTER I

## 1. INTRODUCTION

The desire of infertile couple to have a child of their own has inter alia led to the concept of surrogacy. It has its own welcomes and flip side. It has given rise to many legal and ethical issues. These issues vary from jurisdiction to jurisdiction. In this dissertation an attempt is made to analyze the legal and ethical issues surrounding surrogacy in some foreign jurisdiction and India.

### 1.1. *Meaning of Surrogacy:*

The word surrogate is derived from a Latin word “surrogatus” which means substitute.<sup>1</sup> It implies an arrangement where a woman who is, or is to become, pregnant agrees permanently to surrender the child (ren) born of that pregnancy to another person or couple (the desire parents).

Surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a „surrogate mother“ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the Oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)”<sup>2</sup>

In short it means the process of carrying and delivering a child for another person<sup>3</sup>

---

1 Surrogacy from a feminist perspective<sup>4</sup> by Malini Karkal, published in Indian Journal of Medical Science (IJME), Oct.- Dec. 1997 – 5(4), link; <http://www.Issuesinmedicalethics.org/054mi15.html>. Also in *Nelson Hilde Lindemann, Nelson James Lindemann: Cutting motherhood in two: some suspicions concerning surrogacy. In: Holmes Helen Bequaert, Purdy Laura (Eds.): Feminist perspectives in medical ethics. New York: Hypatia Inc., 1992.*

2 The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4 (aa).

3 See Black’s Law Dictionary, IX Edition

‘Surrogate motherhood’ is the practice in which a woman bears a child for a couple unable to produce children in the usual way.<sup>4</sup>

Surrogacy’ has also been defined in the following manner: a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth.”<sup>5</sup>

## ***1.2. Types of Surrogacy***

As per the Supreme Court judgment of Baby Manji Yamda vs Union of India & other<sup>6</sup>, surrogacy can be categorized in the following types:

- 1) Traditional surrogacy (also known as the Straight method) is an arrangement where the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra cervical insemination) which is performed at a fertility clinic.
- 2) Gestational Surrogacy (also known as host method) is an arrangement where the surrogate becomes pregnant via embryo transfer with a child of which she is not biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, sperm donation or is the result of a donated embryo). The surrogate mother may call the gestational carrier.
- 3) Altruistic surrogacy is an arrangement where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all

---

<sup>4</sup> See *New Encyclopedia Britannica*

<sup>5</sup> American Law Reports, *Validity and Construction of Surrogate Parenting Agreement*, 77 A.L.R. 470. (1989) see also *Warnock Report of the Committee of Inquiry into Human Fertilisation and Embryology\_1984* which defined surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth. It implies a contract between a woman known as surrogate mother who undertakes to conceive and deliver a child on behalf of the intending parents styled as commissioning parents and handover the child after delivery to the latter

<sup>6</sup> AIR2009 SC 84

expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

4) Commercial surrogacy is an arrangement where a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

Opponents of traditional surrogacy point out problem of the genetic link between the surrogate and the baby she carries. Most gestational surrogates consider that they would never be able to hand over a child that they are genetically related to. Other reason to opt for gestational surrogacy is that some people might feel comfortable with their children having half siblings out and about in the world.

Proponents of traditional surrogacy often contend that albeit there is a genetic connection, this connection is not as important as the connection between the appointing parents and their child to be. The individuals who do pick traditional surrogacy most regularly depict their sentiments on the matter as being like egg donation: there is a genetic connection, yet that connection is less critical than the connection between the expected folks and their youngster to be. Some expected folks stress over the legitimate consequences of conventional surrogacy; however in actuality this has never ended up being an issue. Since the surrogate is genetically identified with the child, the proposed mother will commonly need to embrace the child through a stepparent adoption process.

Traditional surrogacy was earlier the only way to conceive a child via a surrogate mother. As artificial insemination is easy, not painful, and importantly less expensive than IVF, traditional surrogacy remains the best method to be used by many people. Moreover, traditional surrogacy has the high success rate when the surrogate mother has proven to be fertile. Further, in general, traditional surrogates do not have to be on any special medication. Keeping track of their menstrual cycle and timing the inseminations around when they naturally ovulate will usually suffice. However, in

order to amplify the chances for twins or to fine-tune the timing of ovulation, several surrogates do take some mild fertility drugs.

Gestational surrogacy on the other hand is a more unpredictable and more expensive procedure. Nevertheless, the reason that an expanding number of intended parents settle on gestational surrogacy is on account of that system can offer one thing that customary surrogacy can't: the opportunity to bring up a child that is genetically totally their own. Surrogates can convey fetuses that have been made from the commissioning mother's eggs and the commissioning father's sperm. The eggs are recovered from the intended mother and fertilized with the sperm, permitted to develop, then transferred, through IVF, into the surrogate's uterus. In a few circumstances the intended parents can't deliver the essential sperm and/or eggs. In that is the situation a donor may also be used.

In spite of the fact that this technique may appear to be shockingly clear, the exchange of the incipient organisms obliges substantial therapeutic intercession and weeks of arrangement. In the United States surrogates generally get day by day infusions for a considerable length of time. Firstly the surrogate own ovulatory cycle must be smothered. This is carried out by taking ant conception medication pills and hormone shots. This strategy will be trailed by estrogen shots to assemble her uterine covering. When she is impregnated the surrogate must take day by day infusions of progesterone until her body understands it is pregnant so it can maintain pregnancy all alone. These solutions frequently have noteworthy symptoms the surrogate must live with. Samples are emotional episodes, cerebral pains, hot flashes and laziness.

As previously outlined, gestational surrogacy is a costly process. Each IVF cycle can simply costs thousands of dollars. Further, there is a higher rate of miscarriage among pregnancies accomplice this way than through traditional means. In the case of a failed transfer there is often a wait of several months before one can attempt another transfer.

The expanded lawful profits of gestational surrogacy and presence of a genetic bond, notwithstanding, are regularly solid offering focuses for the intended parents and surrogates who pick this course. Be that as it may, given the expenses of surrogacy in western nations like the United States and the United Kingdom, proposed parents are advancing more frequently to creating nations, in the same way as India, to discover a surrogate mother. The charge the couples need to pay the surrogate mother – around a quarter of what surrogate in Europe and North-America charge – is by all account not

the only purpose behind them to go to a nation like India. Different reasons are India's modest medicinal offices and progressed regenerative innovative technology. Consequently, India is developing as a famous destination for childless couples to look for help.

Clearly individuals are prepared to travel midway over the world and contract a surrogate to satisfy their craving to impart a genetic attach to their children. Obviously the genetic tie remains an effective and persevering premise of human connection. Authors recognize that through this manifestation of relationship surrogates structure connection ties that bother the holiness of science and qualities inside a framework that may well be the zenith of the commoditization of the genetic tie. They contend that with the passage of money related surrogacy arrangements in return of the surrogate child, the child turns into a saleable item' and surrogacy popularized. Enlisting couples no more need to cross outskirts: the child conceived would convey its parents 'genes and thusly their race, standing and religion.

### ***1.3. Surrogacy under the Indian Contract, 1872***

India at present has no specific legislation for regulating surrogacy. It is governed by the contract entered between the surrogate mother and intended parents. As contemplated in the Indian Contract Act 1872, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object unless they are expressly declared to be void.<sup>7</sup> A surrogacy agreement that meets the above conditions is an enforceable contract and hence, it can be the subject of a civil suit before a civil court for adjudication of all disputes relating to the surrogacy agreement and for a declaration / injunction as to the relief prayed for.<sup>8</sup> It can be inferred from the above provision that the surrogate mother and the commissioning parents must have attained the age of majority according to the law to which they are subject and be of sound mind. The consent of the above mentioned parties must be free that otherwise it vitiates the validity of the contract rendering an option to the party whose consent is not free to rescind the contract. Consideration may be pecuniary or otherwise. Detriment to the surrogate mother in carrying the

---

7 Section 10 Indian Contract Act

8 See section 9 Civil Procedure Code 1908

pregnancy to term or benefit to any individual or commissioning parents being blessed with a child, is a valid consideration.

#### ***1.4. Surrogacy In India, In The Light Of Hindu Adoptions And Maintenance Act, 1956***

Unlike Western Countries, there is no secular law with respect to adoption in India. This denies a substantial section of the number of inhabitants in their right to adoption. The main enactment which deals with adoption in India is the Hindu Adoptions and Maintenance Act, 1956, which is material to Hindus just. There are few provisions in the Act which will have direct impact on the surrogacy contract.

Section 5 of the Act contemplates that all adoption ought to be made in agreeability with the provisions of this Act and if any adoption is made in repudiation of these provisions, it shall be void. Section 7 of the Act stipulates that a Hindu male can adopt a child provided he is a major and is of sound personality. The section includes that on the off chance that he has a wife living he ought to get her assent. Section 8 of the Act gives the privilege of adoption to an unmarried Hindu woman provided she is a major and is of sound personality. However, if she is married she can adopt just in the event that her husband is unequipped for giving assent, or is dead or has ceased to be a Hindu. So in a family, only husband can adopt with the exception of particular conditions.

Section 9 of the Act stipulates that assent of the natural mother ought to be taken before giving the child in adoption. This area has its own essentialness in light of the fact that once when the reception happens all the privileges of the common folks on the kid are cut off forever. Section 17 of the Act forbids certain installments included during the time spent adoption. This segment punishes such installments by recommending a detainment of 6 months or with fine or with both.

At this juncture, the point that shakes one's psyche is whether this reception statute can assimilate surrogacy. Essentially there is no common law with respect to reception. So the destitute couple will must be Hindu or they will need to change over themselves to Hindus. In spite of the fact that there is casual adoption in different religions, if some lawful complexity emerges they won't have admittance to the courts. In surrogacy, the wife of the biological father receives the child. This is in repudiation of the Act which stipulates that in a family the wife can't embrace with the



exception of in specific situations as seen in the recent past. The following disputable point is segment 9 of the Act which expresses that the assent of the common mother is must. Here the regular mother is the surrogate mother. This assent ought to be informed assent or at the end of the day she should be informed of all complexities involved in the process. Students in medicinal science and Psychiatry have demonstrated that in the later phases of pregnancy the mother will build up a passionate security with the hatchling. So later she may decline to handover the infant to regular father. In such case, can the surrogate mother be urged to surrender the child for authorizing the understanding? Will it be contended that the assent from the surrogate mother be taken when labor?

The thought included in a surrogate agreement is an expense paid to the surrogate mother and legitimate and restorative costs. The Hindu Adoption and Maintenance Act preclude any consideration involved in the adoption.

### ***1.5. History of Surrogacy***

The idea of surrogacy is as old as the human progress itself and nothing novel in it. It was seen then not in the sense in which it is seen now. The historical backdrop of surrogacy goes long back to the beginning of time. Anyway the idea of cutting edge surrogacy got its huge begin in the late 1970's. Sterility is not another issue experienced just by modern women. Women in all times leading up to ours have had trouble conceiving, and one way in which they were able to start a family was through the assistance of a surrogate mother. The initially recorded instance of surrogate pregnancy originates from the book of scriptures.

In 1976, attorney Noel Keane (of Baby M Fame) <sup>9</sup> without precedent for the history expedited first legitimate agreement between a set of intended parents and a traditional surrogate mother. The surrogate mother did not get any remuneration for this. Keane went ahead to begin the Sterility Center, orchestrating several surrogate pregnancies consistently. Keane was additionally included in different prominent cases and claims over a percentage of the game plans made. The primary authoritative archive on surrogate pregnancy was recorded in the year 1976. From that minute until 1988, around 600 infants were conceived by means of surrogacy. Somewhere around 1988 and 1992, that number rose altogether, to more than 5,000 births. On July 25,

---

<sup>9</sup> <http://www.law.harvard.edu/students/orgs/jlg/vol301/sanger.pdf>

1978, Louise Joy Brown was the first test-tube (otherwise known as IVF) infant conceived. While this was not a surrogate parenthood plan, this noteworthy occasion prepared towards gestational surrogacy later on.<sup>10</sup>

**Between 1988 and 1992**, number rose significantly, to more than 5,000 births. Recently, in August 2007, 58 years old Ann Stopler gave birth to her twin granddaughters. Her daughter, Caryn Chomsky, was unable to conceive due to cervical cancer. Moreover, in 2008, 56 year old Jaci Dalenberg became the oldest woman ever to give birth to triplets. She acted as a gestational surrogate mother for her daughter Kim, and delivered her own grandchildren. The oldest surrogate mother in Japan gave birth to her own grandchild in 2008 at 61 years old. Her daughter had no uterus, but doctors were still able to use her eggs. Surrogacy is generally frowned upon in Japan, but this unusual case made headlines.

The bases of surrogacy can be followed long back in Indian history. The world's second and India's first IVF (In Vitro Fertilization) child Kanupriya nom de plume Durga was conceived in Kolkata on Oct. 3, 1978. From that point forward the field of Assisted Reproductive Technology (ART) has been produced quickly. Anyhow the laws identified with surrogacy are still in the incipient stage. At present the agreement between the parties in view of the ART Guidelines are the guiding forces. The systematized law is yet to be embraced and actualized. For its different socio-ethical issues, surrogacy has turned into a subject of profound investment amongst the administration of distinctive countries, medico-lawful lights and additionally opens on the loose.

Surrogate parenthood has made some amazing progress ever. From infrequently talked about conventional surrogacy's of hundreds of years past, to relatives going about as surrogate transporters and business surrogacy of today, the street has been long, and numerous wonders and hardships have been confronted along the way. It will be intriguing to witness what will to the historical backdrop of surrogacy in the following 20, 50 or 100 year

---

10 Information on Surrogacy, 2008 History of Surrogacy[online] Available at: <http://www.information-on-surrogacy.com/history-of-surrogacy.html> (Visited on 15 February, 2015)

## CHAPTER II

### 2. JUDICIAL RESPONSE TO SURROGACY IN INDIA

Till date, there is no statute regulating surrogacy arrangements in India. The judicial response is highly encouraging for such an arrangement. Judiciary has given recognition to commercial surrogacy. As far as the validity of the concept of surrogacy is concerned it would be pertinent to mention that Article 16.1 of the Universal Declaration of Human Rights 1948 says, inter alia, that “men and women of full age without any restraint due to race, nationality or religion have the right to marry and found a family”. The Judiciary in India has also recognized the reproductive right of humans as a basic right. For example, in *B. K. Parthasarathi v. Government of Andhra Pradesh*<sup>11</sup>, the Andhra Pradesh High Court held “the right of reproductive autonomy” of an individual as a facet of his “right to privacy” and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*<sup>12</sup>, which reconized the right to reproduce as “one of the basic civil rights of man”. *Even in the case of Javed v. State of Haryana*<sup>13</sup>, though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it abstain from stating that the right to procreation is not a basic human right.

Moreover, in the case of *Suchita Srivastava v. Chandigarh Admn.*,<sup>14</sup> the Supreme Court held that: “There is no doubt that a woman’s right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is essential to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The vital consideration is that a woman’s right to privacy, dignity and bodily integrity should be appreciated. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman’s right to refuse contribution in sexual activity or alternatively the persistence on use of contraceptive methods. Furthermore, women

---

11 AIR 2000 A. P. 156

12 316 US 535

13 (2003) 8 SCC 369

14 (2009) 9 SCC 1

are also free to choose birth control techniques such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's right to carry a pregnancy to its full term, to give birth and to subsequently birth children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the forthcoming child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable limitations that have been placed on the exercise of reproductive choices.

Now, if reproductive right gets constitutional safeguard, surrogacy which allows a sterile couple to exercise that right also gets the same constitutional safeguard. However, jurisdictions in various countries have held different views regarding the justification of surrogacy.

Surrogacy is not new to India. However, before *Baby Manji Yamada v Union of India*<sup>15</sup>, Indian courts had not faced a case pertaining to surrogacy and it was not an oft-discussed topic. While existing, the various facets of surrogacy had not yet been so strongly debated and analyzed against the Indian legal and social realities.

In *Baby Manji Yamada V Union of India*<sup>16</sup>, Supreme Court of India has given recognition to the idea commercial surrogacy. In the instant case, a Japanese couple, Mr. Ikufumi Yamada and his wife Yuki Yamada went into a surrogacy agreement with a lady by name Mrs. Mehta, an occupant of Anand, in the State of Gujarat. An embryo made by utilizing the sperm of Yamada and egg of a donor was embedded into the womb of Mrs. Mehta. As said in the agreement Mrs. Mehta for her services got a house worth Rs. 3,25,000/- whole installment of Rs. 50,000/- and a regularly scheduled installment of Rs. 5,000/- amid pregnancy. There was likewise a proviso in the agreement which expresses that if the couple were to get separated, the husband (Yamada) would be in charge for the upbringing of the child. After the implantation of the emryo, Yamada left to Japan. Only one month prior to infant Manji was conceived, Yamada couple got separated by an announcement of separation. Therefore, Manji was conceived in a private clinic center at Ahmadabad. As

---

15 AIR 2009 SC 84

16 Ibid

Yamada's ex declined to go with him to take care of the child, only he traveled to India. But the Japanese embassy in India refused to grant Manji a Japanese passport because of the reason that the Japanese Civil Code does not perceive surrogacy conceived youngsters and it perceives just a lady who has conceived the kid as the mother. Despite the fact that Manji had a biological father as Yamada, the inquiry was who ought to be her mom. The lady who has conceived her was an Indian lady and she was just a gestational transporter. The egg benefactor was unidentified and she was the natural mother who never planned to be a mother. Mrs. Yamada can't be considered as the proposing mother in light of the extraordinary statement as specified above in the surrogacy agreement. There is no law in India to control surrogacy. The infertility center where the developing life was embedded issued an authentication expressing that Yamada was the genetic father. Anand Municipality declined to issue a conception declaration due to the standard demanding saying of names of both father and mother. The hospital where Manji was conceived was not arranged to hand over the custody to the genetic father. Inevitably the fight in court could witness a ceasefire, when the Japanese Embassy issued an one year visa to the 3 months old infant Manji. Above all the decision is worth mentioning for the reason that commercial surrogacy received judicial recognition. In this respect Supreme Court observed:

"Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to convey a child to development in her womb and is typically turned to by well off fruitless couples who can manage the cost of the expense included or individuals who spare and acquire keeping in mind the end goal to finish their fantasy of being folks. This medicinal technique is lawful in numerous nations incorporating in India where because of superb invigorating framework, high global demand and easy accessibility of poor surrogates it is coming to industry extents. Commercial surrogacy is sometimes referred as 'wombs for rent, outsourced pregnancies' or 'infant ranches.'"

Moreover in the case of *Jan Balaz vs. Union of India*<sup>17</sup> the inquiry which preceded the Gujrat High Court was that whether a child conceived in India to a surrogate

---

17 Jan Balaz v Anand Municipality LPA 2151/2009, 17 November 2009 (High Court of Gujarat, India). See also Yasmine Ergas "The Trans-Nationalization of Everyday Life: Cross-border

mother, an Indian national, whose natural father is an outside national, would get citizenship in India, by conception which has no point of reference at all in this nation.

For this situation A German couple, Mr and Mrs Balaz, commissioned a surrogate pregnancy in India utilizing Mr Balaz's sperm and a gave egg. Thus, Nikolas and Leonard were conceived in India in 2008 however needed to stay there for a long time because of their statelessness.

The twins were initially enrolled and issued with Indian birth certificates naming the Balazs as their guardians. A fight in court followed when the German powers declined to distinguish the conception accreditations as securing the parentage or German nationality of the twins because of surrogacy being illicit in Germany.

The Balazs turned to legal systems to look for Indian international IDs for the twins. A lower court declined to perceive the kids as Indian on the grounds that they did not have an Indian 'guardian'. The power that had issued the conception authentications then reviewed them and supplanted Mrs Balaz with the Indian gestational surrogate as the youngsters' 'mom', while Mr Balaz stayed distinguished as the 'father'. Identification powers then permitted the application for two Indian international IDs. However, the Indian Ministry of External Affairs requested the Balazs to surrender the travel papers while the matter went in the eyes of the High Court of Gujarat. The Court perceived the nationality of the kids as Indian on the grounds that they were conceived on Indian soil to an 'Indian mother', importance gestational moms were presently perceived as lawful moms, in spite of conception confirmation rehearses embraced in most surrogacy centers despite what might be expected. By the by, the Indian visa power declined to reissue the twins' identifications.

The Supreme Court eventually considered the matter in December 2009. It encouraged Indian authorities to consider non-legal avenues and recommended adoption as a conceivable arrangement. Adoption was unrealistic as a result of specific necessities in the Hague Convention on Protection of Children and Co-operation in Respect of Inter nation Adoption and in Indian law that had not been met, for example, the child expecting to have been stranded or relinquished and no contact

---

Reproductive Surrogacy, Human Rights and the Re-visioning of International Law” (12 March 2012) Institute for the Study of Human Right: Columbia College <http://hrcolumbia.org/>

being permitted between the conception mother and expected new parents. It further asked the Central Adoption Agency to reconsider its jurisdiction. Before this took place, Germany issued the children with visas and the Balaz twins were able to leave India with the agreement that the Balazs would formally adopt the twins in Germany under German law.

Thus, in this case the Court has bestowed the Indian citizenship upon two twin babies fathered through compensated surrogacy by a German national in the Anand district of Gujarat.

**In the Canadian Twins Case<sup>18</sup>**, a Canadian couple entered into a surrogacy agreement in India utilizing the spouse's sperm and a donated egg. Twins, a child and a girl, were conceived in 2006 and the couple petitioned verification of Canadian citizenship at the Canadian High Commission in New Delhi. Surrogate kids are generally conceded Canadian citizenship so long as the child has a genetic connection to one Canadian guardian. DNA tests made the couple's infant young lady were the genetic little girl of the dispatching father; however the child kid was not, meaning a mistake at the facility. There were no approaches set up for the Canadian powers to manage such a circumstance so the family needed to stay in India until 2011, when a subject card was issued to the female twin and travel papers to the male. From Canada, the couple had the capacity record an application on compassionate and empathetic reason for their non-natural child to pick up Canadian citizenship.

**In Volden Case<sup>19</sup>** a single Norwegian woman, Ms Volden, approached an Indian fertility center in 2009, which helped her in picking an unidentified Scandinavian sperm contributor and an Indian egg donor. A pregnancy facilitated by an Indian surrogate mother brought about twin children.

India acknowledged Ms Volden as the lawful mother and would not permit the kids to wind up Indian residents. However prevailing voices in Norway, where surrogacy is unlawful, rejected Ms Volden's solicitation for travel reports for the twins after

---

<sup>18</sup> Raveena Aulakh "After Six Years and Fertility Mix-up, Surrogate Twin Can Come Home" The Star (online ed, Canada, 5 May 2011)

<sup>19</sup> See generally Sumitra Deb Roy "Stateless Twins Live in Limbo" The Times of India (online ed, India, 2 February 2011)

compulsory DNA tests secured that she was not naturally identified with them. Norwegian powers would not give the twins citizenship without Norwegian maternity or paternity being built and they have turned down Volden's solicitations to embrace the twins. Starting 2011, Volden is living in India with the stateless twins, attempting to raise cash to seek after further legitimate activity to convey the twins back to Norway.

### **2.1. Surrogacy and Right To Life**

The right to privacy is an important facet of the right to life and personal liberty.<sup>20</sup> It has been acknowledged as an essential corollary of the right to life and personal liberty by the Indian Judiciary.

In *R Rajagopal v. State of Tamil Nadu*<sup>21</sup>, the Supreme Court observed:

The right to privacy is implicit in right to life and personal liberty mentioned under Article 21 among other matters of the Constitution. It is a right to be let alone. A citizen has the right to defense the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.

Viewed in the context of women, the right to privacy becomes even more important because she belongs to the vulnerable sex out of the tow sexes. Her protection and privacy are of most extreme significance to her and as she battles to protect and secure it in every venture in life right from the minute she is aware of the presence of world around her. In like manner, a surrogate mother is a lady who ought to have approach security and rights to shield her protection, yet since she is utilizing her body simply as a creation house, her security is misused. The regular desires concerning security are "out the window" as the aiming couple has pre decided investment, which is contractually accessible to them, in what is happening in the uterus of an outsider to their marriage, the surrogate. She is subjected to intensive restorative tests and screening. There are tests directed on the potential surrogate to see whether she is a suitable applicant, when all is said in done, for pregnancy and in particular terms whether she is a proper contender to manage the offspring of a

---

<sup>20</sup> See Article 21 of the Constitution of India

<sup>21</sup> AIR 1995 SC 264



fruitless couple.<sup>22</sup> She is also questioned about her menstrual cycle, her sexual history and other personal things. Furthermore, the commissioning parents are privy to the communication between the doctor and the surrogate. Mark A Johnson, a renowned American Advocate practicing in this subject observes:

Participants in transnational Indian surrogacy, together with women contracted as gestational bearer their families, commissioning parents, and the child born through Indian surrogacy are all experimental subjects as a result of the shifting social market and legal conditions under which it occurs, further he states the ways by which the construction of the surrogates body itself is experimental, produced through a western medical understanding of the body that constructs uterus as surplus and a genetics- based model of parentage that creates a link between the intended parents and the fetus and a space between the surrogate and the guest fetus.<sup>23</sup>

The right to privacy includes the right to not bring about a child, right to be or not to be a right to use or not to use medical pills and right to indulge in or abstain from sexual intercourse and the list is never ending. However, these rights are deprived of because the provision in the bill provides for a legally enforceable contract under Clause 34(1) and non provision of abortion rights.

Article 21 of the Constitution puts a wellbeing valve against the discretionary activity of the state. Right to life does not mean a mere creature presence, yet it implies personal satisfaction. As needs be it envelops each one of those exercises and capacities which empower an individual to lead a subjective life. Reproduction and family life constitute a fundamental component of personal satisfaction. The vital inquiry is whether right to life of which right to multiply is a crucial segment incorporates generating a kid through surrogacy.

The fruitless couples have the choice of staying childless subjecting themselves to the social alienation. Emphatically on the off chance that they wish to have a youngster the option is reception or supported multiplication by method for surrogacy buries

---

22 Elizabeth S Anderson, "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swale" Last Accessed at [www.personal.umich.edu/~eandersn/surreply.pdf](http://www.personal.umich.edu/~eandersn/surreply.pdf)

23 Available at <http://www.majpc.com/practice-areas/art-assisted-reproductive-treatment>

alia. On the off chance that they choose to take plan of action to surrogacy, the significant inquiry that emerges for thought is whether the privilege to life and individual freedom pondered under Art. 21 include surrogacy. Despite the fact that Art. 21 is adversely worded, it has a constructive substance tossing a constructive commitment on the state to make conditions and offices for the better pleasure in the privilege to life and individual freedom. Individual freedom infers flexibility to settle on a decision between options. It can't be diminished unless there are invalidating limitations. The state might utilize its administrative wand as a part of the nonappearance of invalidating restrictions to forestall the hardship created to its kin by setting down principles and regulations which empower them to practice absolutely their opportunity. Else it brings about willful dissent of flexibility to individuals by the state. It doesn't mean state ought to give monetary aid to the same. It is clear then that there is nothing to anticipate reproduction by method for surrogacy which turns into a vital part of the privilege to life and individual freedom. The Honorable Supreme Court additionally passed the disarray by setting out that surrogacy versus commercial surrogacy is legitimate. In this way it takes after that privilege to life and individual freedom incorporates the privilege to multiply through surrogacy. Yet the debate is about whether business surrogacy ought to be allowed. The Assisted Reproduction Technologies Bill, 2010, which is pending before the parliament has authorized surrogacy versus commercial surrogacy. Anyhow the bill has not yet seen the light of the day.

## CHAPTER III

### 3. LEGAL AND ETHICAL DEBATE SURROUNDING SURROGACY

The entire construction of law does not rest on the ethical premises. But it should be accepted that certain ethical considerations cannot be alienated from the sphere of law. Surrogacy has given rise to very intricate ethical issues of greater dimension. It is inevitable for the courts and legislatures struggle with these issues to lay down a comprehensive and sensitive legal regime with respect to surrogacy. The ethical issues involve in the surrogacy arrangements can be discussed as under:

Commodification contentions are identified with commercial surrogacy. In fact, one of the strongest and most emotive contentions against permitting commercial surrogacy arrangement is that they make a business of kid offering or infant cultivating. As per this contention, the infant or child turns into an item to be purchased and sold, tumbling it to a product. In the event that we apply the above contention to women, then it is guaranteed that a surrogate's regenerative work turns into the item. While commodification and misuse regularly go as one, this is not basically always the case. Therefore, it is pertinent to first give the English meaning of the two terms.

To *commodify* or *commoditize* something is to 'turn it' into or treat it as a mere commodity.<sup>24</sup> The word *commodity* is defined as 'a raw material or primary agricultural product that can be bought and sold, such as copper or coffee' or 'a useful or valuable thing'.<sup>25</sup>

It is also referred as an 'article of trade'.<sup>26</sup> The word *exploit*, has two ordinary meanings. First, to exploit a reserve means to 'make full use of and derive benefit from it. However, exploit can also mean to 'make use of (a situation) in a way

---

24 <<http://oxforddictionaries.com>> accessed on 13/02-2015

25 <<http://oxforddictionaries.com>> accessed 13/02-15. Water is given as an example of a precious commodity

26 The Australian Pocket Oxford Dictionary, first Australian edition (1976).

considered unfair or underhand'<sup>27</sup> or to 'benefit unfairly from the work of (someone), typically by overworking or underpaying them.<sup>28</sup> It is the second meaning of *exploit* which is appropriate where it concerns surrogacy arrangements. Thus, in this context, *exploitation* is 'the action or fact of treating someone unfairly in order to benefit from their work'.<sup>29</sup>

If one accepts the definitions above, it is practically possible to commodify something without exploiting it since the commodification of something is connected to its use as an article of trade. If commodification is also to be regarded as exploitative, it must contain the element of unfair advantage.

### **(A) Commodification of the child**

It is said that the place of surrogacy conceived child are pathetically consigned to property which can be sold and obtained in open markets. The entire natural methodology of pregnancy and proliferation is currently a day's considered as infant cultivating or a child is selling and offering action, wombs for lease or rent a womb. There are various examples where an infant conceived with variations from the norm was tossed by the dispatching folks, in the same way as a thing with an imperfection which gets disposed of by a potential client. In *Malaboff v. Stiver*<sup>30</sup>, a surrogacy child was born suffering from hearing loss, mental retardation and neuro-muscular disorders was rejected by all the parties to the surrogacy contract. The reality which has come to the forefront in the above case has falsified the counter argument of the proponents that parents do not disown their natural children born with deformities.

The proponents validate commercial surrogacy on the ground that whatever monetary considerations paid to the surrogate mother is only compensatory of the pains undertaken by her with a philanthropic motive to enable the barren couples to enjoy the bliss of the existence of a child, which is a unique human being, not a commodity.

---

27 Such as, eg, a company exploiting a legal loophole, <http://oxforddictionaries.com> accessed on 20 February 2015

28 For example, women exploited in the workplace, <http://oxforddictionaries.com> accessed on 20 February 2015.

29 <<http://oxforddictionaries.com>> accessed 15 February 2015. Here, the example given is the exploitation of migrant workers.

30 *Malahoff v. Stiver*, 975 F.2d 192 (6th Cir.,1988)

## **(B) Commodification of Women:**

Surrogacy makes women child breeder machines belittling the mother – child relationship. Rich will abuse the poor women. In India woman is regarded as a wife just on the off chance that she is mother of a child, so her spouse's manliness and sexual intensity is demonstrated and the heredity proceeds. Hitched ladies may be constrained by the in-laws for monetary reasons or it might be a suo-moto choice to see a superior life ahead. The advocates of surrogacy purport that surrogacy implies activity of conceptive right by a woman as a piece of her opportunity to contract. Subsequently it advances the constitutional right of woman to security and reproduction by giving monetary independence to her. Without a doubt surrogacy maintains the sacred right of reproduction of a meaning or appointing lady. Anyway it is a myth that it supplies monetary freedom to the surrogate as surrogacy can't be made lasting wellspring of job.

Surrogacy is further compared with prostitution. The likeness lies in the way that like prostitution commercial surrogacy is embraced for material and monetary thought. The selfless thought process if any is exceeded by the business thought. Then again non – business or charitable surrogacy can't be compared with prostitution. Benevolent surrogacy whether brings about unlawful intercourse particularly if there should arise an occurrence of fractional surrogacy which includes manual sperm injection of sperm of someone else is an easy to refute issue, if sex is seen as exchange of semen from a male to female body without retribution how it is carried out. Further complaint is that the assent of a surrogate is not educated and well found as she is compelled to surrender the privilege upon a youngster even before her bond with the kid develops. There is no space for this contention as she realizes that she is just a gestational bearer and whatever she does is for others and in the event of gestational surrogacy, where she is not in the slightest degree hereditarily identified with the youngster, one is at misfortune to comprehend the above contention.

### **(C) Psychological anguish to the mother and child**

The opponents contended that surrogacy causes mental anguish to the mother and additionally the child. Commercial qualities fundamental surrogacy demolishes the exceptionally natural connection and obligation of family relationship. Detachment mentally influences both the mother and child. The surrogate mother may think that it anguishing to part with the child. As the child is denied of breast bolstering instantly after conception, it will clearly have a grave effect on its wellbeing. Further the kid will be set in a sad circumstance in the matter of think about its introduction to the world. The advocates have dared to quiet the commentators by supporting that the benevolent target invigorating the entire surrogacy course of action exceeds the negative effect emerging there from. Further it is contended that the surrogate mother may alter her opinion along these lines to decline to surrender the child. The current lawful position under English law invigorates this contention that in such a projection the charging folks can't implement the surrogacy contract.

### **(D) Determination of the best interest of the child**

The matter relating to the guardianship of the child is resolved even much before the origination that it is the contractual right of the dispatching folks which puts into obscurity the best enthusiasm of the kid.

The opponents contended that it is the discretion of the courts to choose the issue of authority of the child after it is conceived, figuring the best enthusiasm of the youngster. This perspective has gathered statutory and legal backing under English law that the courts may decline to pass parental request for the dispatching folks to the greatest advantage of the youngster. It might be depended to the surrogate mother who is hereditarily related or the dispatching folks if hereditarily related.

In this manner, the greatest assault against surrogacy is that "making a child without wanting it generally changes the way we take a gander at youngsters -as opposed to review them as one of a kind individual identities to be coveted in their own right, we may come to view them as wares or things of assembling to be fancied on account of

their utility<sup>31</sup> leading to the danger of rejection of handicapped children. However, the proponents are firmly premised on the freedom and economic independence of women<sup>32</sup> and the following booming note is pertinent to be quoted in this regard:

“Woman as mindful, just, social and political being is also woman as economic being. We cannot detach ourselves from our economic existence or ignore the value of our reproductive powers. The failure to recognize the economic value of female reproductive labor is blind folly for those who wish for equity in women's social condition.”<sup>33</sup>

As both positions on these moral issues are helpless against questionability because of just as persuading counter contentions, law needs to strike a sensitive parity, not endeavoring to take sides on the ethical battlefield, yet by formulating a structure in light of different diversions included.

From the contentions above, it appears that even where the surrogacy contract speaks to a commercial exchange, whether the child is a thing may rely on upon how the surrogacy contract is really structured. Whether a surrogacy contract transforms the surrogate into merchandise is additionally open to question. What is clear is that there is no accord about how to name the methodology of surrogate parenthood – especially if one's point is to stay away from the mark of commodification. Whether it can rather be expressed as child offering, leasing a womb or offering a privilege to a child is to some extent a semantic activity. On the off chance that we acknowledge that cash changes hands we truly need to recognize that surrogacy will include commodification – be it of a youngster, an uterus, or a lady. Yet the word commodification some way or another feels hostile in the setting of human administrations, particularly generation, despite the fact that it doesn't need to be. In any case, the length of business surrogacy is included; it is hard to move beyond the contention that surrogacy courses of action commodify something. The inquiry that ought to be in center is whether commodification should in itself be unethical.

---

31 Herbert T. Krimmel, *Surrogate Mother Arrangements from the Perspective of the Child*, 9 *Logos* 97 (1988).

32 See Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 *J. Contemp. Health L. & Pol'y* 21 (1989).

33 Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children*, 12 *Wis. Women's L.J.* 113 (1997)

### ***3.1. If Something Is Unethical Should It Be Illegal***

If surrogacy agreements can be considered as ethically questionable – or even be made known to be ethically defenseless in particular situations – is this satisfactory validation for prohibiting them? Further, even if surrogacy in itself is unethical, does this entail that it should never be permitted?

In an article pertaining to the ethics of post-menopausal motherhood, Daniela Cutas explains the relation between morality and legality.<sup>34</sup> This matter is also highly relevant in the context of commercial and altruistic surrogacy. She writes that:

Most accept that all morality should not become law and that all law need not represent an implementation of morality.

Hence, even if we do show that an act is immoral, we are still bound to show why it is that sort of an immoral deed that should become illegal. Further, we are bound to show that making an act illegal will show the way to better results than not making it illegal.<sup>35</sup>

Applying the above reasoning to medically assisted surrogacy, then, the challenge is to establish, first, whether surrogacy arrangements are immoral. If so, are these arrangements of such a nature that they should also become illegal? If so, why?<sup>36</sup> And finally, what are the potential legal outcomes of the alternatives?<sup>37</sup> That is to say, what is the likely outcome of legally permitting surrogacy arrangements as compared with prohibiting them?

Whether surrogacy will be seen as corrupt, be that as it may, won't just rely on upon the realities of a given circumstance; it will likewise rely on upon one's own moral point of view and one's perspective on surrogacy itself. In surrogacy game plans, the surrogate is obviously utilized as a necessary chore by the expected folks; the end being the generation and conveyance of an infant. There is little uncertainty about this

---

34 Daniela Cutas, 'Postmenopausal motherhood: immoral, illegal? A case study' (2007) 21(8) *Bioethics* 458 p 462

35 Above

36 Where it concerns the current policy that surrogacy is ethically indefensible, the response to this question requires a detailed investigation into why or why not this is the case; a comprehensive public debate which explores as many arguments and options as possible

37 Cutas uses this line of questioning to tackle the problem of postmenopausal motherhood in Cutas 2007 (n 230) p 462.



procedure. It could likewise be contended that the surrogate uses the folks as a necessary chore, or maybe even the infant. Here, the folks (the methods) are so frantic to have a child that the surrogate can extricate cash from them (the end) on the off chance that she delivers and conveys one to them (thusly the infant is likewise the methods). On the off chance that, then again, one is persuaded that we should never regard other individuals just as an unfortunate chore, and that regarding individuals just as a necessary chore is basic to the surrogacy process, surrogacy will dependably be deceptive. Fitting possibility to endure the offspring of a sterile couple<sup>38</sup>.

In the event that one considers Cutas' model, above, if surrogacy is unethical it ought not to so much be discounted – despite the fact that it may well be. There are clear advantages from being forced to legitimize, initially, that something is indecent and along these lines, why this is sufficient motivation to preclude it. A conspicuous focal point is that such a defense and thinking methodology would probably require a state examination and be trailed by open level headed discussion. Coming about open arrangement would in this manner be more prone to be viewed as true blue and thus have a more noteworthy possibility of open acknowledgement, regardless of the fact that not everybody concurred with the result.

### **3.2. Arguments For Surrogacy**

Supporters of surrogacy contend that the surrogacy arrangements are advantageous for all parties involved as the needs of two edgy ladies are met. It is often said that in the surrogacy arrangement „*the barren gets a baby, the broke gets a bonus* “. The surrogate mother regularly uses the cash they gain. Others assert that the privilege to reproduce is an imperative right. For instance, in the United States this right is secured by the Constitution. The couple may practice this right in the most useful route accessible to them given their fruitlessness. On the other hand, this right is not actually spelled out in the constitution. Margaret Jane Radin (1988) contends that if men are to give sperm and get cash for that exchange, then surrogacy ought to additionally be permitted as a comparable to exchange for ladies. This sacred contention can likewise be utilized as a contention against surrogacy. Because of the

---

38 As was reasoned above in the context of whether surrogacy is inherently exploitative

substantive due methodology security right the conception mother has a privilege to friendship of her kids which can't be overridden by contract.

The liberal contention for surrogacy is independence and free decision. The length of one does not hurt others; one has a wide circle for doing what one needs. This identifies with the expected folks and also the surrogate moms. Practice frequently has a tendency to be marginally diverse however, on the grounds that pressure and intimidation influence the degree to which somebody has free decision. A monetary contention, communicated by Posner J, is that productivity will enhance with unhindered commerce. This will happen when there are folks who are avid for youngsters and ladies - restless to be surrogates. Then again, once this exchange of parental rights is restricted, illicit businesses will start to be. Further he states that because of the complicated adoptions regulations in numerous nations, individuals go to different nations to dodge the regulations making a boundless bootleg market. Thus, it is ideal to recognize the presence of such a business sector keeping in mind the end goal to better control it and make it more effective.

Interestingly, there are exceptionally dedicated women's activists on both sides of this issue. As per Radin,<sup>39</sup> women's activists who would like to completely legitimize surrogacy take after the thinking that the world is non-perfect. Ladies and men are not equivalent and for a considerable length of time ladies have been consigned to a different circle at home, far from the commercial center. This has made ladies feeble, on the grounds that the spot of force is the commercial center, which is ruled by men. This force has implied the liberation of men. Ladies need to accomplish this also. They don't need men to let them know what offer and what not to. Whether it is ethically wrong to participate in child offering and surrogacy ought to be chosen by the ladies themselves. Numerous women's activists utilize this thinking as a contention for why surrogacy ought to be lawful. Different women's activists however concur that ladies have been kept out of the business sector for quite a while, yet generally ladies likewise have been seen (in their different circle at home) and treated like infant delivering machines. Permitting child offering and surrogacy would imply that ladies stay being dealt with as mysterious exchangeable raisers and strengthens

---

39 Radin, Margaret Jane, 1988, —Market Inalienability, Harvard Law Review, 100: 1849–1937

the objectification and subordination of ladies. Entering the business in this connection is accordingly a long way from freeing, but instead corrupts.

### **3.3. ARGUMENTS AGAINST SURROGACY**

The act of surrogacy exploits women monetarily, candidly and physically. An imperative variable is that most ladies who get included as surrogates do as such in light of the fact that they are in urgent need of the cash to keep up their crew. Likewise, specialists are frequently included and organize contracts of sketchy legitimacy. Those agreements require the women to experience all the rigors of childbearing, and in the long run they need to dole the youngster out. The surrogate mothers are regularly unconscious of their legitimate rights and because of their monetary circumstance they can't bear the cost of the administrations of lawyers. Once the surrogate mother has marked the agreement, it is unthinkable for them to get away. Kembrell goes much further saying: —the practice of surrogacy speaks to another and novel manifestation of subjugation of women. This a perspective upheld by many authors. Amid times of servitude, slave ladies were frequently utilized as conception or genetic moms and as surrogate moms these days, which had no legitimate rights as moms. In light of the commoditization of the youngsters, and really additionally of themselves, they have the same status as surrogate moms have in contemporary times. Another comparability is that slave moms couldn't talk openly about their pregnancy and the kids they conveyed; a viewpoint that is likewise introduced in surrogacy as a consequence of social shame. Davis is concerned that, given this history, poor ladies may be changed into an exceptional station of contracted pregnancy bearers (1993). She accepts that with the commoditization of work administrations of pregnant surrogate moms, cash is being made, which infers that somebody is being abused. Davis proceeds by saying that surrogacy shows up as a technique generative of life, what is truly produced is by all accounts sexism and benefits.

Other authors contradicted to women on the grounds that he accepts surrogates are physically misused once they have marked contracts consenting to conceive babies for customers. In the event that there is motivation to prematurely end the baby, due

to therapeutic reasons or customer's requests, the surrogate mother must agree. To exacerbate matters, if the pregnancy is in reality prematurely ended, the surrogates frequently get simply a small amount of the first installment (Horsburgh, 1993). The agreement can likewise put obligation on the mother for dangers including pregnancy-actuated maladies, demise and baby blues inconveniences (Kembrell, 1988).

Foster states that many surrogate mothers face emotional issues after having relinquished the child. She reviews a woman who said that she began begging not to go in the process of childbirth so that she and her child could stay together. Nonetheless, different creators can't help contradicting Foster. A study by Jadva, Murray, Lycett, MacCallum and Golombok (2003) demonstrated that surrogate mother don't seem to experience mental issues as an aftereffect of the surrogacy plans. Despite the fact that they do recognize that a few ladies do experience passionate issues in giving over the infant or as a consequence of the responses around them, these sentiments seemed to reduce amid the weeks taking after the conception.

Other authors take an alternate position. Radin <sup>40</sup> raises the issue of surrogacy truth is told being child offering. She states: —if it were alright to consider youngsters property, then it would be alright to purchase and offer them; and in the event that it is not done to purchase and offer them, then perhaps it's not done to consider kids property. A New Hampshire judge led the following in a guardianship case: —At conception the father does not buy the child. He himself own organic hereditarily related kid. He can't buy what is as of now his. Further then again, accepts that regardless of the fact that there is a genetic relationship between the adopters and the youngster this does not so much make it a non-deal. On the off chance that some (surrogate) kids are imagined as business wares in light of the fact that there is a practice of paying cash for giving up parental rights, and then every youngster can be viewed as a product. Truly, we all are products, on the grounds that we used to be youngsters ourselves. On the off chance that kids are seen as interchangeable business wares, it may make the start toward oneself of those youngsters as persons unimaginable. Hence, if imagining youngsters as products has an adverse impact on personhood, it implies that infant offering, and surrogacy thus, isn't right.

---

40 Supra note 38

Others may reason that commissioned adoption, in which somebody pays a lady to consider, gestate, conceive an offspring and consequently give up the parental rights to this individual, is unlawful. The thought is that surrogacy, legitimate in a few nations, is simply dispatched selection under certain unique – a commitment of genetic material – circumstances. As a result: to allow surrogacy would be an unreasonable exemption to the child offering laws if that qualification is in light of genetic relationship does not hold great. On the off chance that enactment is passed which empowers legitimate surrogacy plan, and then the laws against infant offering as a rule ought to likewise.

## CHAPTER IV

### 4. LEGAL CONTROL OF SURROGACY IN UNITED STATES OF AMERICA

Surrogacy has turned into a mysterious legal dilemma and the views on its legalization have been highly divergent. As Indian courts are still to grapple with the issues involved, an overview of the legal position in other jurisdictions is indispensable.

#### 4.1. *Judicial Response*

The judicial response to surrogacy arrangement in United States is best explained in the cases of *In re Baby M*<sup>41</sup>, a highly paternalistic response, and *Johnson v. Calvert*<sup>42</sup>, the libertarian response. In Baby M's case, the couple went into a surrogacy arrangement with the surrogate mother whereby she needed to convey the child to term and hand over the care of the kid consequently for \$10,000 in addition to medicinal costs. After the conception of the child, the surrogate mother renounced the agreement and declined to hand over the kid because of profound fondness with the kid. The New Jersey Supreme Court, during a period when the State had no law to manage the surrogacy agreement, pronounced the surrogacy understandings to be void and unenforceable. The Court declined to develop the security of 'right to protection' and 'right to multiplication' to such understandings expressing that the care, care, camaraderie, and sustaining that take after conception are not parts of the privilege to reproduction. The Court further expressed that agreement was discovered to be against open approach as it neglected the "best interest of child" standard, made the assent of the regular mother automatic because of the cash inspiration and was 'possibly disparaging to ladies' in the court's conclusion.<sup>43</sup> Lastly, the Court held it to

---

41 537 A.2d 1227 (February 03, 1988).

42 5 Cal. 4 84 (May 20, 1993)

43 See Doe v. Attorney General, 487 N.W.2d 484 (June 01, 1992).

against the public policy as the contract was involuntary due to the irrevocable commitment of the mother before she knew the strength of her bond with her child.

In contrast to this, *Johnson v. Calvert*, the Californian Supreme Court granted constitutional protection to surrogacy agreement and accepted it on touchstone of public policy considerations. Further, the Court held that the surrogacy agreements involved free, informed and rational choice by a woman to use her body. The ethical issues which are generally arise of a surrogacy agreement of exploitation and commodifications have to be decided by the legislature. The Court struck a resounding note on 'freedom to contract' and economic independence of the women declaring:

“The argument that a woman cannot deliberately and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prohibited women from attaining equal economic rights and professional status under the law. To revive this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock.”

Moreover, the Court held that the privilege to reproduction does not stretch out to a surrogate mother as she is not practicing her own particular right to settle on procreative decisions; she is just consenting to give an essential administration with no desire that she will case directly over the subsequent child as her own. To secure the characteristic mother the Court propounded the idea of 'expectation test' i.e. the surrogate would not have conceived the child yet for the expectation from the genetic mother and along these lines the surrogate mother just encouraged the demonstration of multiplication by the genetic mother by issuing her willful assent. The genetic folks are the prime movers of the reproduction process.<sup>44</sup>

Jaycee B. v. Superior Court<sup>45</sup>

In the instant case a child was born to a surrogate mother utilizing sperm and eggs from unidentified donors on the grounds that the sterile couple was not able to make their own particular incipient organism utilizing the as a part of vitro preparation procedures. The couple decided to utilize unidentified donors instead of requesting

---

44 *Surrogacy Parenting Associates v. Commonwealth of Kentucky*, 704 S.W.2d 209 (February 06, 1986).

45 42 Cal.App.4Th 718 (1996)

that the surrogate utilize her own particular eggs in view of the Baby M case in New Jersey in which the surrogate had in the end declined to convey the child saying that she was its biological mother and her entitlement to bring up the child appropriated the appointing parents'. The child hence had five individuals who could make a case for parenthood – a genetic mother, a commissioning mother, a surrogate mother, a genetic father and an commissioning father. One month before the conception of the infant Jaycee the planned parents John and Luanne got separated and John looked to cancel his commitments under the surrogacy contract to abstain from needing to pay child support for Jaycee. Luanne looked for both care and backing from her ex. The court fight proceeded with and for a long time Jaycee did not have a lawful guardian. A Californian court allowed interim authority of the infant Jaycee to Luanne and requested John to pay for youngster childhood support.

#### **4.2. *Right of Abortion***

In Roe v. Wade<sup>46</sup> case US Supreme court held the right to terminate a pregnancy as a basic human right. The court establishes that the right is implied in the constitutional right to privacy. This landmark decision was followed in a plethora of cases in the United States.<sup>47</sup> In almost all countries right to abortion has been recognized subject to certain constraints adopted to protect the rights of the unborn. It would be pertinent to examine the abortion laws as prevalent in various countries.

Typically, abortion laws vary from being too strict in certain countries to being too liberal in others. Today, in most countries abortions are allowable for reasons that fall into four categories namely<sup>48</sup> :-

- a) To defend the life or physical or mental well being of the mother;
- b) To avert the completion of a pregnancy that has resulted from rape.;
- c) To avert the birth of a child with serious deformity, mental deficiency or genetic abnormality or.

---

46 1973) 410 US 113

47 Doe v. Bolton (1973) 410 US 179;

Planned Parenthood of Central Missouri v. Danforth (1976) 428 US 52; Doe v. Smith(1988) 486 US 1308

48 AIR 1997 Journal Section, 129



d) To exercise birth control that is to help from having a child for social or economic reasons.

In *Planned Parenthood Southeastern Pennsylvania V. Casey*<sup>49</sup> US Supreme Court held that the constitutional safeguard of the woman's decision to terminate her pregnancy derives from the Due Process Clause as mentioned in the Fourteenth Amendment. It adjudges that no State shall deny any person of life, liberty, or property, without due process of law. Due process as mentioned in the fourteenth amendment is applied to both substantive law and procedural matters.

### **4.3. Statutory Response**

Different states have reacted through enactment to the concept of authorization of surrogacy. In Arizona, New York, North Dakota and Utah, the governing bodies have taken a sweeping methodology, esteeming all surrogacy contracts to be void and unenforceable. Kentucky, Louisiana, Nebraska, and Washington, then again, have taken a less prohibitive methodology, passing enactment that voids just those surrogacy gets that accommodate pay to the surrogate. Interestingly, Florida, New Hampshire, and Virginia have embraced the minority approach by making them legitimate and enforceable yet they restrict business surrogacy, with an exemption of costs brought about as an aftereffect of pregnancy and labor. They likewise permit the surrogate a chance to revoke the agreement. Surrogacy enactment in New Hampshire requires legal preauthorization of all surrogacy contracts subject to three conditions viz. educated assent by parties, culmination of mental guiding and assessment, nonappearance of unconscionable terms in the agreement and introduction towards best interest of child.

In aggregate, then, the law of surrogate parenthood in the United States is in a condition of flux and disarray. States have broadly varying laws, some authorizing surrogacy gets, some banning them altogether, and some permitting them under particular conditions. Numerous states have no laws with respect to surrogacy contracts by any means. No single statutory administration has won across the board

---

49 (1992) 120 L.Ed 2d 67

acknowledgement. Thus, courts are regularly left to choose parenthood debate emerging from these agreements, and have a scope of speculations by which to do as such. It is clear, notwithstanding, that surrogacy will remain a practical decision for barren couples, and even people who wish to have posterity and face physical hindrances to doing as such. It is unfortunate that more state assemblies have not tended to the lawful issues included.

#### ***4.4. Legal Theories for Resolving Parenthood Disputes***

The Baby M case goes about as an impetus for some officials to desire a few administrative regulation of surrogacy, albeit there was a wide range of perspectives concerning what sort of administration was called for, extending from calls to criminalize the practice to urgings to secure such plans. A proposed Uniform law for the United States offered two options, one banning surrogacy, the other regulating it. State laws differ. Some boycott it totally, others direct it, and couples basically perceive the proposed parents. Radhika Rao sorts the changing methodologies into four sorts: denial, inaction, status regulation, and contractual requesting.<sup>50</sup> Some states prohibit surrogacy contracts, whether compensated or not, and impose both civil and criminal penalties on anyone taking a part in such a contract.<sup>51</sup> An example of this is the Arizona statute, which stipulates that a surrogate is "the legal mother of a child born as the result of a surrogate parentage contract and is entitled to custody of that child."<sup>52</sup> Despite the fact that the Arizona Appellate Court lined this statute unconstitutional because it denied the genetic mother equal safeguard, it has not been repealed. Other states ban enforcement of surrogacy contracts, thereby presumably also making the surrogate the legal mother of the child.

The confused state of the law boils down to two questions: will the surrogacy contract be imposed that is, will the surrogate be required to comply with its requirement that she surrender parental rights and may the surrogate receive compensation other than coverage for the expenses associated with the gestation? Following are several different theories courts use when answering these questions.

---

50 Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in *Surrogate Motherhood: International Perspectives* 23 (Rachel Cook et al. eds., 2003).

51 Arizona, District of Columbia, Indiana, Michigan, and North Dakota.

52 Arizona Rev. Stat. Ann. 25-218(D) (2009).

## **Parenthood by Intent**

The case which established the theory of parenthood by intent was of *Johnson v. Calvert*<sup>53</sup>. In this case in order to decide the natural mother the Supreme Court of California reded the '*intention test*' i.e. the surrogate would not have conceive the child but for the intention on the part of the genetic mother and thus the surrogate mother only eased the act of procreation by the genetic mother by giving her voluntary consent. The genetic parents play a significant role in the procreation process.

California keeps on applying the intent test. In 1998, *In re Marriage of Buzzanca*, a California Court of Appeal found that a father who had consented to a surrogacy arrangement was the subsequent youngster's natural father and committed for child support in spite of the way that the couple had separated, the wife had consented to expect obligation regarding the child's care, the surrogacy contract had not been marked at the time of implantation and origination, and the father, not having contributed the sperm, had no genetic relationship to the kid. The Court connected the settled collection of law under the Uniform Parentage Act, which connected to manual sperm injection: when a spouse agrees to his wife's in vitro treatment, he is esteemed the father of the kid, on the grounds that the therapeutic methodology which created the youngster was situated in movement and planned by the putative folks. The spouse's assent makes him "specifically mindful" for the youngster's presence, and he realizes that "such conduct conveys with it the lawful obligations of parenthood and criminal obligation regarding non bolster." This Court supported its choice with the basic law tenet of estoppels, noticing the precept's dislike for conflicting activities like "consenting to a demonstration which brings a kid into presence and afterward pivoting and disavowing any obligation."<sup>54</sup> The Court likewise found that the wife was the child's natural mother.

The Court emphasized that it was not ruling on the public policy aspects of surrogacy contracts in fact, it was obstinate that it was not concerned with the enforceability of the contract at all. Rather, it said, it was determining parenthood with reference to the "consequences of those agreements as acts which caused the birth of a child."

---

53 5 Cal. 4 84 (May 20, 1993)

54 (1998) 61 Cal App 4<sup>th</sup> 1410

Other courts also hold that intent manifested in a surrogacy agreement offers a third way besides procreation and adoption that parenthood can be established. For example, Nevada law permits the surrogacy contracts and states that a "person recognized as an intended parent in a [surrogacy] contract must be treated in law as a natural parent under all circumstances."<sup>55</sup> Similarly, Arkansas law provides that a child born to surrogate mother is supposed to be the child of the biological father and the intended mother as long as the father is married.<sup>56</sup>

The opponents criticize the intent theory, based primarily on the lack of weight it gives to the role of gestation and genetics in determining parenthood, and also because intent is not a decisive factor for establishing legal parenthood in cases of coital conception.<sup>57</sup> Commentators have expressed the concern that if intent is given a foremost role in creating parental obligations, it will make it easier for parents of coitally conceived children to avoid their responsibilities toward their offspring.<sup>58</sup>

### **Parenthood by Contract**

Other courts uphold surrogacy agreements on the contract principles. The Minnesota Court of Appeals, for example, applied traditional contract analysis to a surrogacy contract that the surrogate arrogated, after childbirth, was void.<sup>59</sup> It confirmed the District Court's finding that the parties had entered into a valid agreement that reflected the intentions of the parties, had not been coerced, and did not contravene state public policy.

### **Parenthood by Genes**

Other courts implement surrogacy agreements under the theory that the parents are the ones with a genetic tie to the child. For example, in *J. F. v. D.*, the Ohio Court of Appeals held that a surrogacy contract did not disobey public policy as a "private agreement to forego parental rights" because the surrogate had no parental rights to forego: under Ohio law, "the persons who provide the genes of that child are the natural parents." Similarly, in *Clark v. Belsito* Court held that "the law requires that those who provided the child with its genetics must be designated as the legal and

---

55 Nev. Rev. Stat. 126.045 (2001).

56 Ark. Code Ann. ?9-10-201 (Michie 2002).

57 Note, "Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements," 51 Drake L Rev. 605, 624 (2003)

58 *ibid*

59 *P.G.M. v. J.M.A.*, 2997 WL 4304448 (Minn.App.).

natural parents.<sup>60</sup> There is, however, plethora of cases holding that genes alone do not form parentage when there is a conflicting interest with someone else who has claimed a parent-child relationship.<sup>61</sup> These cases seem in fact to be based on the supposition that genes along with intent create parenthood when the only conflicting interest is one that is purely biological. Another case involving a fertility clinic mix up used the genetic relationship test in a similar manner: in *Perry-Rogers v. Fasano*, two couples began IVF treatments at the same clinic, and the clinic inadvertently implanted both embryos in Ms. Fasano.<sup>62</sup> Ms. Fasano gave birth to two children of different races, and she and her husband emphasized on visitation rights as a condition of relinquishing custody of the non-genetically related child. The Court relied on genetics to determine that Ms. Fasano was a mere gestational transporter for the child to whom she was not related, and therefore that she had no standing to seek visitation. The Court's emphasis on genetics, however, served to carry out the parties' original intentions, and thus can hardly be seen as relying on genetic ties alone.

Criticism of the genetic contribution test arises from the discrepancy of its results for example, if the commissioning couple uses a donor ovum for implantation in the surrogate, may the egg donor make a claim for parenthood?<sup>63</sup> In addition, the genetic test is not consistent with most states' laws denying a legal claim to paternity to sperm donors.

### **Parenthood by Gestation**

State statutes that assert surrogacy contracts void<sup>64</sup> in effect employ the doctrine of motherhood by gestation, refusing to grant a commissioning mother parental rights over the protestation of the gestational mother. This approach implies the ancient common law presumption that the woman who gives birth is the mother, and also identifies the bond established during the nine months of pregnancy. The blemish numerous observers note in this hypothesis is that it meddles with private requesting and the privilege to enter intentionally into contracts, and in addition attacking the intrinsically secured range of protection to settle on choices about multiplication and

---

60 *Belsito v. Clark*, 644 N.E.2d 760, 762 (Ohio 1994).

61 See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983).

62 *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

63 Note, "Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements," 51 *Drake L Rev.* 605, 624 (2003)

64 See e.g., North Dakota and Arizona.

child rising. As an end product to the above choices authorizing surrogacy gets, a few courts have observed that a surrogate needs remaining to seek after care either as the legitimate guardian or as an overseer in loco parentis. The Superior Court of Pennsylvania decided that a surrogate who expelled triplets from the healing center without authorization from the proposed folks was an "outsider" in connection to the child and the kid's organic folks, and hence couldn't make in loco parentis status in resistance of the regular folks' wishes. Nor might she be able to build the status of lawful guardian, without any natural association with the youngster, and subsequently did not have remaining on this premise either.

### **Best Interests of the Child Test**

Very few courts apply the concept of Best Interests of the Child Test in surrogacy matters, but the first case to reach an appellate court in California did in fact apply it.<sup>65</sup> The Court declined to control on the legitimacy of the agreement itself on the grounds that "the state's principal interest for the child's welfare overrides its interest for stopping illicit con conduit." The dispute in *Johnson v. Colvert* made the same point: Justice Kennard contended that this standard of family law ought to be controlling without an administrative determination about the authenticity of such contracts. The *Colvert* larger part held that in a determination of parentage the best advantage standard did not matter in light of the fact that "such a methodology raises the repulsive phantom of represent mental impedance in matters embroiling our most essential thoughts of protection, and befuddles ideas of parentage and authority. Legitimately, the determination of parentage must go before and ought not to be directed by consequent authority choices."<sup>66</sup> Succeeding California cases have followed this holding.<sup>67</sup> A Pennsylvania court, by contrast, used the Best Interests test to make a custody decision be twin the surrogate and the biological father.<sup>68</sup> While it was true that in this case the surrogate had been granted in loco parentis status due to having housed and cared for the children from birth, she had taken the children from the hospital against the biological father's wishes, an action that other courts would have found merely to be unlawful. The Court went on to determine, based on the in

---

65 *In re Adoption of Matthew . M.*, 284 Ca. Rptr. 18 (Cal. Ct. App. 1991).

66 *Johnson . Colvert*, 5 Cal. 4th 84 (1993).

67 See, e.,g., *K.M. v. E.G.*, 118 Cal. App. 4th 477 (2004)

68 *Flynn v. Bimber*, 2005 WL 1349640 (Pa.Com.Pl. 2005).

loco parentis determination, that custody with the surrogate served the children's best interests.

### **Declaratory Actions to Establish Parenthood**

Parties to surrogacy contracts have engaged increasingly over the past few years is to ask a court for a determination of parentage before the child is born to the surrogate. Some courts have accepted these requests and others have not. The cases in which the petition is unimpeded, a court's decision can be based on a multiplicity factors, but is generally favorable. For instance, *In re Roberto* d. the Court of Appeals of Maryland decided that permitting fathers to disclaim parentage as did a Maryland statute regarding sperm donors<sup>69</sup> while denying the right to surrogate mothers dishonored the state's Equal Rights Amendment. Other courts have been equally eager to issue orders amending birth certificates.<sup>70</sup> Some courts granted these orders on the basis of genetics: the Ohio Supreme Court, for instance, granted such an order on the basis that Ohio law deemed the parents of the child to be those who "provide the genetic indentation for the child."<sup>71</sup> Such orders may conflict with state adoption laws, which require a waiting period after the child's birth before the birth mother can surrender parental rights: a court in Massachusetts denied granting such an order, ruling that the couple had to wait the statutorily mandated period after the birth. The Supreme Court, however, reversed, deciding that the probate judge had equitable jurisdiction to enter a pre-birth parentage order, and noting the dangers of delays in establishing legal parenthood: possible delays in medical treatment, problems with inheritance, and custody disputes.<sup>72</sup> Other courts, however, have insisted on the mandatory waiting period.<sup>73</sup>

### **Gay and Lesbian Couple**

Gay and lesbian couples use surrogacy as an approach to have kids with a genetic and gestational attach to no less than one accomplice. Issues emerge if the couple then differentiates, infrequently prompting court determinations of parental rights: by then,

---

69 923 A2d 115 (Md. 2007).

70 See, e.g., *De Barnardo v. Gregory*, 2007 WL 4357736 (Conn. Super.); *Goad v. Arel*, 2007 WL 4711515 (Conn. Super.); *Wray v. Samuel*, 2007 WL 4711519 (Conn. Super.); *Caliendo v. Mariano*, 2007 WL 4711520 (Conn. Super.).

71 *Belsito v. Clark*, 644 N.E. 2d 760, 761 (Ohio 1994).

72 *Culliton v. Beth Isr. Deaconess Med. Ctr.*, 756 N.E. 2d 1133 (Mass. 2001).

73 See, e.g., *A.H. W. v. G. . B.*, 722 A.2d 948 (N. J. Super Ch. Div. 2000).

it is conceivable to see the gestational transporter as a surrogate for the other accomplice. Taking into account the above case law, courts ought to take a gander at the non-hereditarily related accomplice as having built a guardian youngster relationship through aim and activities, yet courts at times treat these cases in an unexpected way, presumably in light of inclination against same sex couples. Case in point, in *Wakeman v. Dixon*, a Florida District Court of Appeals denied a same sex accomplice lawful guardian status of a kid the other had gestated after a sperm gift, notwithstanding the way that the couple had executed co child rearing agreements and the sperm benefactor had surrendered parental rights to both of the ladies as co-folks.<sup>74</sup> The Court contemplated that the non-gestational accomplice was not a guardian, analogizing her position to that of a sperm giver who had no parental rights, and found that conceding her parental status would damage the Florida Constitution's solid security assurances. The case appears to be severely contemplated and badly fitted to the abundant point of reference that inspects expectation and additionally science and genetic qualities to focus parental status, and partiality against same sex couple might sadly represent this outcome. A California case that discovered a same sex partner liable for child support does little to console on this point: in *Elisa v. Superior Court*, a previous same sex partner denied being a legitimate guardian to twins destined to the next accomplice amid the relationship, in spite of an understanding that every lady would bring up the children as her own.<sup>75</sup> The custodial mother filed for state support, and the state brought an action to recover child support from the defendant. The issue of state support seems to have been dispositive in this case, given the strong policy against allowing children to become public charges, and it may not set precedent for determining same sex non-biological parenthood where public monies are not an issue.

#### ***4.5. Constitutional Issues***

The principle Constitutional contention for assurance of surrogacy contracts is that it is part of the privilege to protection under the Fifth Amendment, the penumbra to the Bill of Rights, and the Fourteenth Amendment. Defenders of this line of contention declare that the privilege to security, which has been held to incorporate the privilege

---

74 921 So. 2d 669, 669-70 (Fla. Dis. Ct. of App. 2006).

75 117 P. 3d 660, 663 (Cal. 2005).



to settle on conjugal and procreative decisions, the privilege to bring up one's youngsters as one sees fit, in addition to a variety of other things, likewise envelops the privilege to contract a surrogate mother to imagine a kid. For instance, Lawrence Gostin has contended that surrogacy plans "merit Constitutional security on account of the private connections and procreative proposition of the gatherings, the lady's control over her own particular body, and the privilege of genetic folks to relationship with their child."<sup>76</sup> Moreover, the surrogate has the privilege to decide to experience manual sperm injection, paying little respect to who will be the legitimate guardian to the youngster. The opposite Constitutional contention is that, on account of her protection right, the surrogate can't waive the privilege to the child she conveys, and that these rights trump the privileges of the expected parents if the surrogate ought to alter her opinion at the conception of the youngster. This contention, thusly, is countered with the declaration that the surrogate has decided to waive her Constitutional rights by openly and intentionally going into the agreement. Further, it can be contended, that those with the genetic attach to the child have a privilege to parentage that is better than that of the bearer who has no such tie. A Fourteenth Amendment contention can likewise be made on Equal Protection grounds. State laws don't typically boycott manual sperm injection when the man is sterile; accordingly, banning surrogacy, the cure when the lady is sterile or generally not able to gestate a youngster, separates in light of sex. The counterargument is that incubation is substantively not quite the same as manual sperm injection in that the pod lair it puts on the giving party, and subsequently supports divergent treatment.

---

76 Lawrence Gostin, "Surrogacy from the Perspectives of Economic and Civil Liberties," 17 J. Contemp. Health Law and Poly 429, 434 (2001).

## CHAPTER V

### 5. LEGAL CONTROL OF SURROGACY IN UNITED KINGDOM

The Surrogacy Arrangements Act, 1985, declares instigation and involvement in commercial surrogacy agreements to be a criminal offence. Further, the Human Fertilization and Embryology Act, 1990, declare surrogacy arrangement to be unenforceable by or against any person making it. Under English Law, surrogacy is legal if it involves payment only of expenses rationally incurred by the surrogate mother, which have to be determined by parties. Parties are not bound by the contract. After six weeks of child birth the genetic parents can apply for a Parental Order from the Court under the provisions of law<sup>77</sup>, which gives them full and enduring rights over the child and the surrogate surrenders' her right. Lastly, the transfer can be made only through Parental Responsibility Agreements when the genetic father is registered as father of the child.<sup>78</sup>

*Re: L (A Minor)*<sup>79</sup>

This was one of the first cases in the United Kingdom which discusses the issue of whether international commercial surrogacy would be recognized under British law. A British couple had paid a surrogate mother in Illinois to conceive their baby, which resulted in the birth of Baby L. The couple brought baby L, who had passport of United States, to the United Kingdom after provisional leave to do so was granted. The Court had to decide whether it would identify the couple as L's legal parents, given that payment for surrogacy outside of "reasonable expenses" is illegal in the United Kingdom.<sup>80</sup>

Hedley J granted the custody of child in favour of the commissioning couple, stating that the wellbeing of the child was the paramount consideration and in this case L's interests outweighed any public policy considerations regarding surrogacy

---

77 See Section 30 of Human Fertilization and Embryology Act, 1990

78 See <<http://www.surrogacy.org.uk/Registering-birth.htm>> (accessed on 17 February, 2015).

79 *Re: L (A Minor)* [2010] EWHC 3146 (Fam).

80 See section 54(f) of the Human Fertilization and Embryology Act 2008

arrangements. The policy arguments are described thus by Hedley J in *Re S (Parental Order)*<sup>81</sup>:

(1) To make sure that commercial surrogacy agreements are not used to outwit childcare laws in this country.

(2) The court should be astute, not to be involved in anything that looks like the simply payment for effectively buying children.

(3) The court should be astute to make sure that sums of money which might look modest in themselves are not in fact a substance that they overbear the will of a surrogate.

### *The Ukrainian Case*

Ukrainian case *Re: IJ (A Child)*<sup>82</sup> and *Re: X & Y (Foreign Surrogacy)*<sup>83</sup> included very much alike arrangements of truths and both showed up before Hedley J. For every situation the commissioning British couple had arranged a commercial surrogacy in the Ukraine utilizing sperm from the male partner, and donor egg. Since the surrogate was married, British law would respect the surrogate and her husband as the lawful parents.<sup>84</sup> Ukrainian law perceived the appointing couples as the lawful folks, importance the kids had no privilege to home or citizenship in the Ukraine. The contention between these two arrangements of laws implied that the kids included were lawfully stranded and stateless. English powers ventured in and, in the wake of being furnished with confirmation from a DNA test that the British appointing fathers were hereditarily identified with the youngsters, permitted the kids to enter the UK "outside the guidelines."

Concentrating on the welfare of the kids, Hedley J made a parental order in the favor of commissioning couples in both circumstances and held the necessity in the Human Fertilization and Embryology (Parental Orders) Regulations 2010 for the Home Office to be pulled out of any parental request that would furnish a kid with British citizenship would be shed in instances of worldwide surrogacy.

---

81 *Re S (Parental Order)* [2009] EWHC 2977(Fam), [2010] 1 FLR 1156.

82 *Re: IJ (A Child)* [2011] EWHC 291 (Fam)

83 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

84 As provided under Human Fertilization and Embryology Act 1990.

As Hedley J states:

The intricacy is that it is almost impossible to imagine a set of conditions in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.

Accordingly, in *Re L*<sup>85</sup> (a later surrogacy decision) Hedley J observed that “it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making”. Therefore, in practice, the commercial nature of these international surrogacy arrangements has not been an obstacle to British couples being able to become the legal parents to the children born of surrogates overseas, despite the illegality of commercial arrangements domestically.<sup>86</sup>

*D, L (Minors)(Surrogacy)*<sup>87</sup>

In *D, L (Minors)(Surrogacy)* the court considered the consent of the surrogate mother. The applicants for the parental request were partners who had paid a surrogate mother in India to convey and conceive twin young child. All courses of action were made through a center and a formal court surrogacy agreement was entered into. The couple took immediate care of the kids taking after conception, yet the facility never delivered the obliged assent from the surrogate mother given six weeks after conception and got to be progressively antagonistic to the couple's endeavors to acquire this. Not able to discover the mother they requisitioned a parental request without the mother's agrees, and tried to conjure the exemption in s 54(7) to that prerequisite.

Stressing that assent is an imperative component to granting a parental request as the surrogate is the "natural mother" with an "extremely unique relationship" to the child, the court by and by found that for this situation her assent would not be needed. Endeavors had been made to discover her, she had given assent six weeks after the conception of the kid, and the welfare of the youngster must be of fundamental

---

85 *Re L (A Minor)*

86 See *In the matter of X and Y (Children)* [2011] EWHC 3147 a more recent case which retrospectively allowed the illegal surrogacy payment.

87 *D, L (Minors) (Surrogacy)* and in the *Matter of Human Fertilisation and Embryology Act 2008* [2012] EWHC 2631 (Fam).

significance. As this was the first case permitting the request to be given without assent, the judge cautioned that it would "not be right to use this procurement as a method for maintaining a strategic distance from the need to make all sensible moves to accomplish the lady's assent" however presumed that in these circumstances all sensible steps had been taken by the applicants..<sup>88</sup>

### *The Beasley Case*<sup>89</sup>

In the instant case, a British woman named Helen Beasley consented to be a surrogate mother for a Californian couple, Charles Wheeler and Martha Berman for \$20,000. Beasley got to be pregnant with an embryo made from Wheeler's sperm and a donated egg. One of the statements as specified in the surrogacy agreement stipulated that Beasley would prematurely end any extra embryos on the off chance that she had a various pregnancy. Beasley asserted that she had an oral concurrence with the couple that no premature birth would occur following twelve weeks of growth. Beasley, Wheeler and Berman were educated in the eighth week of Beasley's pregnancy that she was conveying twins; however Wheeler and Berman did not talk about her getting a premature birth until she was 13 weeks pregnant. Beasley felt it was ethically wrong to end a baby at that phase of the pregnancy and was worried about the danger an end would have on the remaining hatchling.

Wheeler and Berman did not acknowledge Beasley's choice and advised her she would need to end one hatchling as asked for or they would decline to acknowledge two children. Since they would not like to partition the children, they told Beasley that both kids would be her obligation and she would not get paid. As had been concurred, Beasley moved incidentally to California, where she would not be viewed as the lawful mother of the twins, which she would have been in the UK. Beasley couldn't bear to bring up two more youngsters and would not have liked to keep the twins. In any case, the way that she would not be the twins' mom implied that she would not have the capacity to put them up for selection, leaving the children with no folks willing to deal with them.

---

<sup>88</sup> *D, L (Minors) (Surrogacy)*,

<sup>89</sup> See generally Catherine London "Advancing a Surrogate Focused Model of Gestational Contracts" 18 *Cardozo J L & Gender* 391

After Wheeler and Berman approached Beasley for \$80 000 in costs for supposedly breaking their agreement, Beasley documented a common claim requesting harms for enthusiastic misery and rupture of agreement. In the meantime, she recorded in the family court for Wheeler and Berman's parental rights to be renounced so that she could put the twins up for adoption. The twins were inevitably embraced by another couple. The Californian court requested Wheeler and Berman to pay Beasley USD 6,500.

**JP v LP, SP and CP<sup>90</sup>**

In the instant case Justice Eleanor KING DBE admonishes of the serious legal and practical difficulties of surrogacy in the UK.

The family which involved in the instant case entered into an informal surrogacy agreement with a friend and problems arose when the parents got separated soon after the child's birth. The parents were not appropriately advised about the legal position of parents before entering into surrogacy arrangements and they were caught out by the following legal complications:

- **Surrogacy agreements are not enforceable under the UK Law.** In the instant case even where there is no genetic link between the surrogate mother and the surrogate child.
- **It is a punishable offence under the UK law for a third party, including a firm of solicitors, to negotiate surrogacy arrangements on a commercial basis** (i.e. for payment). These agreements can be drawn up between the surrogate mother and the intended parents, but they can't be prepared by solicitors or third parties for a fee.
- **Only the surrogate mother, and no other woman, will be the child's legal mother.** This remains the case until and unless the child is adopted or legal parenthood is transferred as a result of a Parental Order<sup>91</sup>.

---

90 [2014] EWHC 595

- To be successful in making an application **for a Parental Order** (transferring legal parenthood to the intended parents), parents must meet the criteria as mentioned in the Act.<sup>92</sup> One of the criteria is of compulsory time limit for the making of the application; it has to be made within 6 months after the birth of child takes place and there is no discretion to extend this time limit. If parents do not make the application in prescribed time limit, their choice for resolving the parentage position are limited, although they can make an application for an **Adoption Order** or a **Residence Order**, in certain cases. A Residence Order is limited in its effect as it will not quench the surrogate mother's parental responsibility for the child.

In the abovementioned case, an intricate and exceptional structure was approved by the Court to resolve the legal difficulties:

- The child was made a Ward of the Court;
- The parents were granted shared residence orders;
- Parental accountability was transferred to the parents jointly; and
- The surrogate mother was forbidden from exercising her parental responsibility without the leave of the Court.

---

91 Without a Parental Order, the surrogate mother will have parental responsibility for the child (all rights and responsibilities arising out of parenthood, including the right to consent to medical treatment for a child, register a child for school and make a passport application for a child.)

92 See Section 54 of the Human Fertilization and Embryology Act 2008

## CHAPTER VI

### 6. LEGAL CONTROL OF SURROGACY IN INDIA

#### 6.1. *Law Commission Of India On Surrogacy*

Law Commission of India focused on the requirement for an enactment to direct the aided regenerative innovation. Sans such enactment, surrogacy agreement keeps on being regulated under the Indian Contract Act. The 228th report of the law commission inter alia gave the following suggestions for regulation of surrogacy<sup>93</sup>

- Surrogacy arrangements ought to keep on being administered by contract amongst parties, which contracts ought to contain all the terms obliging assent of surrogate mother to shoulder the child, agreement of her spouse and other relatives for the same, medicinal systems for manual sperm injection, repayment of all sensible costs for conveying the kid to its full term, readiness to hand over the youngster destined to the appointing folks and so on. On the other hand, such a course of action ought not to be for commercial purposes.
- A surrogacy arrangement ought to accommodate financial support for surrogate child in the occasion of the demise of the authorizing couple or people before conveyance of the child, separate between the planned folks and consequent unwillingness of anyone to take conveyance.
- A surrogacy contract should mandatorily provide for life insurance cover of the mother.
- One of the proposed parents ought to be the donor too, on the grounds that the power of profound devotion and affection with a child principally radiates from the biological relationship. This additionally lessens the possibilities of different sorts of kid ill-use, which have been perceived in instances of receptions. In the event that the proposed guardian is single, he or she ought to be a giver to have the capacity to have a surrogate kid. Something else,

---

93 Need for legislation to regulate assisted reproductive technology clinic as well as rights and obligations of parties to surrogacy:228th Report, Law Commission of India.



adoption is the best approach to have a child which is depended on if organic folks and new parents are distinctive.

- Legislation itself should give recognition to a surrogate child to be the lawful child of the commissioning parents without there being any need for adoption or even declaration of guardianship.
- The birth certificate of the surrogate child should contain the names of the commissioning parents only. Right to privacy of the donor as well as the mother should be protected.
- Sex discriminating surrogacy should be prohibited.

(viii) Cases of abortion should be regulated by the Medical Termination of Pregnancy Act, 1971.

## ***6.2. National Guidelines for Accreditation, Supervision And Regulation Of Art Clinics In India – 2005***

Commercial surrogacy still remaining an unregulated domain, the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) has come out with National guidelines for Accreditation, Supervision and Regulation of ART Clinics in India. These Guidelines have been made after exhaustive discussion and debate by experts, practitioners of ART and public. Following are the guidelines with respect surrogacy arrangements:

- Clinics which deal in IVF AIH AID ART AND SURROGACY essentially be registered supervised and regulated by the States Accreditation Authority. Any information pertaining to Clients, Donors required to be kept confidential.
- No medical service should be given without the written assent of the couple.
- The ART clinic are forbidden to be a party to any commercial element in donor Programmes or in gestational surrogacy.
- A surrogate mother carrying a child biologically unconnected to her must register as a patient in her own name.

- At the time of registration, surrogate mother is required to mention that she is a surrogate mother and provide all the necessary information related to the genetic parents such as names, addresses, etc.
- Surrogate mother is not required to register in the name of the person for whom she is carrying the child, as this would set legal issues, particularly in the untoward event of maternal death.
- The birth certificate is to be made in the name of the genetic parents. However, the clinic must also provide a certificate to the genetic parents giving the name and address of the surrogate mother.
- All the costs of the surrogate mother during the course of pregnancy and postnatal care relating to pregnancy are to be borne by the couple looking for surrogacy.
- The surrogate mother would also be allowed to recover monetary compensation from the couple for agreeing to act as a surrogate; the exact amount of this compensation should be decided by discussion between the couple and the proposed surrogate mother.
- An oocyte donor cannot act as a surrogate mother for the couple to whom the oocyte is being donated.
- A third party donor and a surrogate mother must surrender in writing all parental rights concerning the offspring and vice versa.
- No ART practice shall be done without the spouse's consent. The provision or otherwise of AIH or ART to an HIV- positive woman would be governed by the implications of the decision made by the Supreme Court in the case of X v. - Hospital Z<sup>94</sup> or any other relevant judgment of the Supreme Court<sup>95</sup>, or law of the country, whichever is the latest.

---

94 (1998) 8 SCC p 269

95 The Supreme Court held that although the "right to privacy" is a fundamental right under Art.21 of the Constitution but it is not an absolute right and restrictions can be imposed on it for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. According to the Supreme Court, if a person is suffering from AIDS even prior to marriage, he has no

- A child born through surrogacy must be accepted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.
- Gametes of a person who is below the age of 21 shall not be used. The accepted age for a sperm donor shall be between 21 and 45 years and for the donor woman between 18 and 35 years.
- Surrogacy by assisted conception should generally be considered only for patients for whom it would be physically or medically impossible to carry a baby to term.
- Expenses to surrogate mothers must cover all genuine expenses associated with the pregnancy.<sup>96</sup>
- Advertisements which advertise surrogacy should not be made by the ART clinic. The duty of finding a surrogate mother, through advertisement or otherwise, should rest with the couple, or a semen bank.
- A surrogate mother is required to be below the 45 years of age. Before accommodating a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure that the woman satisfies all the testable criteria to go through a successful full-term pregnancy.
- A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple.<sup>97</sup>
- An imminent surrogate mother must be tested for HIV and indicated to be so negative for this infection just before fetus exchange. She should likewise give a composed authentication that (a) she has not had a medication intravenously

---

right to marry so long as he is not fully cured of the disease. As such, when the patient was found to be HIV(+ve), the disclosure by the Doctor was not violative of either the rule of confidentiality or the patient's right to privacy as the lady with whom the patient was likely to be married was saved by such disclosure or else she too would have been infected with the dreadful disease, if marriage had taken place.

<sup>96</sup> Also, documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect.

<sup>97</sup> In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate

managed into her through an imparted syringe, (b) she has not experienced blood transfusion; and (c) she and her spouse (to the best of her/his insight) has had no extramarital relationship in the most recent six months. (This is to guarantee that the individual would not think of manifestations of HIV disease amid the time of surrogacy.) The forthcoming surrogate mother must likewise announce that she won't utilize sedates intravenously, and not experience blood transfusion with the exception of blood acquired through an ensured blood donation center.

- No woman should act as a surrogate more than thrice in her lifetime.<sup>98</sup>

### **6.3. National Guide Lines 2005 and Child Protection**

A child conceived through ART might be dared to be the authentic offspring of the couple, having been conceived in wedlock and with the assent of both the companions. Accordingly, the child might have a legitimate right to parental bolster, legacy, and all different benefits of a child destined to a few through sexes.

Children conceived through the utilization of donor gametes and their "adopted" parents might have a privilege to accessible therapeutic or genetic data about the genetic folks that may be important to the kid's wellbeing.

Children conceived through the use of donor gametes shall not have any right whatsoever to know the identity (such as name, address, parentage etc. of their genetic parent(s)). A child along these lines conceived will, nonetheless, be given all other data about the contributor as and when wanted by the kid, when the kid turns into a grown-up. While the couple won't be obliged to be given the above "other" data to the child all alone, no planned endeavor will be made by the couple or others concerned to conceal this data from the youngster as and when requested by the child.

On account of a separation amid the gestation period, if the posterity is of a benefactor program – be it sperm or ova – the tradition that must be adhered to as relating to an ordinary origination would apply.

---

98 Hari,G.R.,2009.FEWBASICS FROM ICMR GUIDELINES.[online]Available at : <http://blog.indiansurrogacylaw.com/2009/01/few-basics-from-the-icmrguidelines> (Visited on:15 February 2015)

#### **6.4. Analysis of Assisted Reproductive Technology Bill 2010**

To regulate the surrogacy arrangements, the legislature of India has made different strides which incorporate the presentation and usage of National Guidelines for the Regulation of Assisted Reproductive Technology (ART Bill) Clinics in 2006; furthermore rules have been issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India.<sup>99</sup> The bill has not yet been passed by the Parliament. The proposed law has considered various aspects including interests of intended parents and surrogate mothers. The proposed law needs to be properly discussed in the light of various ethical and moral issues associated with the surrogacy.

The Assisted Reproductive Technologies [ART] industry is a flourishing industry in India and has become a favorite destination for ‘persons’, foreign as well as domestic, opting for ART treatment as well as “the destination”<sup>100</sup> on the lookout for surrogates. Some of the elements bestowing to this have been identified as low costs for high end medical facilities, slack governmental regulations; in fact there is no law for regulating the market of surrogacy,<sup>101</sup> and many women ready to engage her in surrogacy in order to fulfill financial needs.

ART has played a significant role in solving these problems. As treatment of sterility has become more high profile, medical technology has developed new techniques to assist conception over the past thirty years.<sup>102</sup> India herself has received ART,

---

99 National Guidelines for Assisted Reproductive Technology: Ethical issues in Surrogacy<sup>4</sup>- Paper presented by Dr. R.S. Sharma, DDG (SG), Division of RHN, Indian Council of Medical research, New Delhi at the meeting-cum workshop organized by the Ministry of Women and Child Development, Govt. of India on 25th June 2008 at India Islamic Centre, New Delhi.

100 N B Sarojini, Unravelling the fertility industry: ARTs in the Indian Context, International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies, January 22-24, 2010, New Delhi, A Report, Sama-Resource Group for Women and Health, New Delhi, page 46.

101 The Hindu, “Law silent on protecting rights of a surrogate”, 24 March 2012, <http://www.thehindu.com/news/cities/Hyderabad/article3213040.ece>, [last visited 2 March 2015] Also see The Hindu, “Once a taboo, surrogacy gaining acceptance”, 24 March 2012, <http://www.thehindu.com/news/cities/Hyderabad/article3211525.ece> [last visited 2 March 2015]

102 Jean McHale and Marie Fox, Health Care Law: Text and Materials, (Second Edition, 2007, Thomson Sweet and Maxwell), 752

beginning with a lot of skepticism for almost the same number of years with its first test tube baby being born on the 3/10/1978.<sup>103</sup>

Assisted Reproductive technology (ART) has been defined as “all techniques that try to obtain a pregnancy by handling or manipulating the gametes, the sperm or the oocyte outside the human body, and transferring the fertilized embryo into the reproductive tract of the woman”.<sup>104</sup>

This ‘manipulation’ could be through artificial insemination (AI) or implantation of fertilized gametes in a womb under clinical environment. There are variety of methods by which artificial insemination can be done, one where the semen of the husband or partner is used and is usually known by the term “Assisted Insemination by Partner (AIP)” and the other where the sperm comes from a donor the latter as “Artificial Insemination by donor (AID)”<sup>105</sup>

There are various instances when AIP or AID/DI<sup>106</sup> is favored, one over the other. It could be because of the low sperm count or low motility of the partner’s sperm and which could be rectified by raising the density in the lab. It could also be the place where the partner stores the sperm in a sperm bank<sup>107</sup> either because he is presently incapacitated by illness or apprehends such a situation in the future and thus wants his sperm preserved for future artificial reproduction by his spouse or partner. It could

---

103 The baby was named Durga (officially named Kanupriya Agarwal by her parents) and her birth resulted in a lot of medical controversy and tragedy. She was born three months after the world’s first test tube baby; Louise Brown, was born in the UK. However, his claims were repudiated by a committee of experts set up by the Government of West Bengal.

“..In the conservative Calcutta of the 70s, the idea of a test tube baby was science fiction. It just couldn’t have happened. Discredited by the medical fraternity, humiliated, and the purpose of his life taken away, Mukherjee killed himself in 1981..”. Although Kanupriya always knew of the method of her conception, the controversy that ensued and the conservative Marwari background of her parents meant that her parents never came out in the open supporting Dr. Subhas Mukherjee although they kept close relations with his widow and a colleague who worked with him closely in the case. See Mandira Nayar, Kanupriya Agarwal: My Five Parents and I, The week ,3 April 2011, 38.

104 See Section 2(c) , The Assisted Reproductive Technologies (Regulation) Bill, 2011.

105 Section 13(3): “.....the techniques and procedures of assisted reproductive technology practiced at such clinic, such as –

(a) infertility treatment, including Intra-Uterine Insemination (IUI), Artificial Insemination with Husband’s semen (AIH), and Artificial Insemination using Donor Semen (AID), involving the use of donated or collected gametes; “

106 AID is also alternatively known as just “Donor Insemination” (DI). See Mason and Laurie at page 254.

107 The process is known as ‘Cryopreservation.’

also be in a situation where the husband is under intensive care or there is an apprehension of his death and his wife/partner wants his sperm to be preserved.<sup>108</sup>

However, Artificial Insemination need not be a strictly technical process that has to be conducted under lab conditions as impregnation “can be accomplished with nothing more sophisticated than a syringe, turkey-baster or a drinking straw”.<sup>109</sup>

The marriage of surrogacy and ART is a very recent phenomenon as compared to the older practice of surrogacy as is understood in its conventional sense.<sup>110</sup> ‘Traditional’ and ‘gestational’ surrogacy are American terminologies and are also known as ‘partial’ and ‘full/complete’ surrogacy, respectively, in the British context. Mason and Laurie have used the term “womb-leasing” to describe a complete surrogacy.<sup>111</sup> Also, the couple seeking for surrogacy arrangement and also pays for it, with the intention of being the social parents, is called the ‘commissioning couple’ under British law but

---

108 R v. HFEA, Ex p. Blood [1997] 2 W.L.R. 807; [1997] 2 All E. R. 687. Here, the husband was dying from meningitis and unconscious. His sperm was taken via electro-ejaculation and was preserved in a sperm bank at the insistence of his wife who later had two sons as a result of conception from the sperm through ART, after his death.

109 Jean McHale and Marie Fox, *Health Care Law: Text and Materials*, 759 (2007)

110 The concept of surrogacy through copulation could be said to be ancient as is found in the Biblical lore and ancient texts like the Mahabharata and if at all existing in modern society, possibly through private arrangement between the parties.

“The concept of surrogacy dates back to the biblical days of Abraham and Sarah. Due to Sarah's infertility, Hagar, her Egyptian handmaiden, conceived and gave birth to Ishmael, a baby fathered by Abraham.” See Jamie Levitt, “Biology, Technology And Genealogy: A Proposed Uniform Surrogacy Legislation”, 25 *Columbia Journal of Law & Social Problems* 451, 454.

“Similarly, Rachel, the barren wife of Jacob, commissions her maid Bilhah to have a child by convincing Jacob to sleep with her.....

.....Hindu mythology also offers instances of surrogacy and reflects the secrecy that still surrounds surrogacy practice. In the Bhagvata Purana, Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devaki's womb transferred to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kansa the child was born dead.” See Usha Rangachary Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India”, 39 *Cumberland Law Review* 15, 16.

111 See Mason and Laurie at page 283. Also see, Shaun D. Pattinson, *Medical Law and Ethics*, 271 (2006). Traditional Surrogacy has also been alternatively called “Artificial Insemination Surrogacy” while gestational as “In-vitro-fertilization surrogacy” or “Host uterus”. See Christine L. Kerian, *Surrogacy: A last resort alternative for infertile women or commodification of women's bodies and children?*, 12 *Wis. Women's L.J.* 113, 114 (1997).

She uses the term “donor surrogacy” to indicate gestational surrogacy with the fertilisation and implantation of an embryo which is neither genetically related to the commissioning parent nor the surrogate mother. Also, the term “genetic surrogacy” has been used to denote traditional surrogacy by other writers. See Abby Brandel, *Legislating surrogacy: A partial answer to feminist criticism*, 54 *Md. L. Rev.* 488, 491 (1995).

as 'intended parents' or 'contracting parents' in American law.<sup>112</sup> The Bill uses the English terminologies to denote types of surrogacy as well as persons interested to the use ART or a surrogate. Pasayat, J in *Baby Manji* has used the term 'straight method' to signify traditional surrogacy and 'host method' for gestational surrogacy. He has also mentioned a third type known as 'altruistic surrogacy'<sup>113</sup> where money for surrogate services is not a factor and a fourth type, 'commercial surrogacy' which, as the term denotes, implies the one where there is exchange of material benefits, most of the times, money.<sup>114</sup>

Traditional surrogacy is the sort where the surrogate conveying the child is additionally the genetic mother. The improvement of ART has pushed the idea of conventional surrogacy to a fresher level where the strategy for impregnation of the genetic mother has changed from 'through sex' to 'manual sperm injection' to the utilization of cutting edge ART methods like impregnation through the implantation of treated incipient organism in the womb. In this manner, "surrogacy" in today's setting, particularly out of sight of ART leaps forward, incorporates numerous kinds, with the exception of customary surrogacy in its strictest term, which are principally dictated by the mode of impregnation, treatment and implantation of a prepared egg in the placenta.

The expression "modern traditional surrogacy" may be utilized to indicate manual sperm injection by the sperm of the genetic father in the womb of the surrogate who is likewise the genetic mother. It is cutting edge because of the utilization of AI instead of the prerequisite of intercourse in the entirely conventional form and customary because of the utilization of the genetic mother's egg and additionally the womb. A "cutting edge conventional surrogacy" can likewise be philanthropic and in addition

---

112 Peter De Cruz, *Family Law, Sex and Society*, 82 (2010).

The Assistant Reproductive Technologies (Regulation) Bill, 2010 uses the term "commissioning Parents" and hence the author shall use this term throughout the paper. The word parent shall be written as 'parent(s)' to signify a single person as well as a couple as the commissioning parent.

113The third type can be said to be an extension of both the traditional and gestational forms of surrogacy but devoid of any material benefits for the surrogate mother and may have been done out of love and familial bonds with the commissioning parent(s). Paras 5-8, *Baby Manji Yamada v. The Union of India and Anr.*, [(2008) 13 SCC 518.

114 Although commercial surrogacy as defined by him could be present in the definitions of surrogacy in the first two instances given by him, the term which he states as being "...sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms", could exclusively be read in the background of the case where the surrogate mother was sought only for her womb for which she was paid. See para. 9 of the judgment.



entirely business, contingent on the surrogate mother and her association with the genetic father and his wife.<sup>115</sup>

Another strategy where ART comes into utilization is on account of gestational surrogacy where the surrogate mother is embedded with a treated fetus, resultant of the treatment of the ova and sperm of the dispatching couple under manufactured conceptive conditions. Here, the charging mother has the capacity deliver a solid ovum which is surgically expelled from her ovaries and falsely inseminated outside her body. The zygote is then embedded into the womb of the surrogate finishing a methodology known as in-vitro treatment (IVF). The infant could be hereditarily identified with the authorizing folks or stand out of them.

Gestational surrogacy can also happen by the in-vitro fertilization of the surrogate with a zygote which is not genetically linked to either of the commissioning parent(s). Here, the egg and sperm are obtained from donors who are generally anonymous and the fertilized gamete is implanted in the womb of the surrogate.<sup>116</sup>

The bill endows a National Advisory Board to act as the regulatory body laying down policies and regulations for surrogacy. It also provides for the State Advisory Boards that are, in addition to advising state governments, charged with monitoring the implementation of the provisions of the Act, particularly with respect to the functioning of the ART clinics, semen banks and research organizations.

However, till now there is no legal provision dealing directly with surrogacy laws to protect the rights and interests of the surrogate mother, the child, or the commissioning parents. Assistant Reproductive Technique (ART) Regulation Bill,

---

115 In *In re Baby M*, [537 A2d 1227 (NJ 1988)], the case involved the method of “modern-traditional surrogacy” with the parties entering into a surrogacy contract. The surrogate mother was paid a certain amount of money for being a surrogate.

116 Egg donation is the other form of gamete donation where the egg is used for female ‘patients’. For donation of the egg, the donor does however get monetary compensation most of the times and the egg is useful for couples who are unable to rear due to the problems faced by the wife/partner to produce eggs or are incapacitated due to trauma, accidents or drug treatments of severe diseases that renders them infertile. Extra-ovarian fertilization or storage of eggs could be as a result of the inability of the patient to get the eggs fertilized through the normal/natural reproductive processes and or also in cases of women diagnosed with cancer who opt for preservation of eggs for childbearing post treatment. The patient is administered superovulatory drugs to increase production of the eggs by the ovaries. The drugs are administered from days 3 to 7 of her menstrual cycle. The drugs stimulate the ovaries to develop one or more follicles containing eggs. The eggs are ‘extracted’ from the ovaries via laparoscopy and now through the use of ultra sound where the egg is extracted through the vagina(considered less evasive).After the oocytes are removed from the ovaries, they are cultured and incubated to develop into mature eggs. See generally Jean McHale and Marie Fox, *Health Care Law: Text and Materials*, 261-62 ( 2007).

2010<sup>117</sup> which has yet not been passed by the Parliament lays down few guidelines which are discussed as follows:

**6.5. *Rights and duties in relation to surrogacy:***

(1) Both the couple and individual looking for surrogacy through the utilization of assisted reproductive technology, and the surrogate mother, should go into a surrogacy arrangement which might be legitimately enforceable.

(2) All costs, including those identified with life protection if accessible, of the surrogate identified with a pregnancy attained to in assistance of helped conceptive innovation should, amid the time of pregnancy and after conveyance according to medicinal guidance, and till the kid is prepared to be conveyed according to therapeutic counsel, to the natural parent or folks, might be borne by the couple or individual looking for surrogacy.

(3) Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, 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.

(4) A surrogate mother shall surrender all parental rights over the child.

(5) No woman below the age twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act, provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.

(6) Any women looking for or consenting to go about as a surrogate mother should be therapeutically tried for such illnesses, sexually transmitted or generally, as may be recommended, and all other transferrable infections which may jeopardize the soundness of the child, and must announce in composing that she has not got a blood transfusion or a blood item in the most recent six months.

(7) People or couples may get the administration of a surrogate through an ART bank, which may promote to look for surrogacy gave that no such ad might contain any subtle elements identifying with the rank, ethnic character or drop of any of the

---

117 ART (Regulation) Bill 2010

gatherings included in such surrogacy. No supported conceptive innovation center should publicize to look for surrogacy for its customers.

(8) A surrogate mother should, in appreciation of all restorative medications or techniques in connection to the concerned child, register at the clinic or such medicinal office in her own name, obviously pronounce herself to be a surrogate mother, and give the name or names and locations of the individual or persons, as the case may be, for whom she is going about as a surrogate, alongside a duplicate of the declaration specified in condition 17 beneath.

(9) On the off chance that the first fetus move has fizzled in a surrogate mother, she might, in the event that she wishes, choose to acknowledge on commonly concurred monetary terms, at most two more fruitful developing life exchanges for the same couple that had connected with her administrations in the first example.

(10) The birth certificate issued in respect of a baby conceived through surrogacy shall bear the name(s) of individual / individuals who commissioned the surrogacy, as parents.

(11) The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act.

(12) Notwithstanding, all information about the surrogate mother shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction.

(13) A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, looking for surrogacy.

(14) All the information with respect to surrogate mothers should be kept confidential by the ART clinic.

(15) Any assisted reproductive technology clinic acting in breach of sub-section 14 of this section shall be deemed to have committed an offence under this Act.

(16) If the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate.

(17) A surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them.

(18) A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual provided that the relative should belong to the same generation as the women desiring the surrogate.

(19) A foreigner outside couple not inhabitant in India, or a non-occupant Indian individual or couple, looking for surrogacy in India might select a neighborhood gatekeeper who will be lawfully in charge of dealing with the surrogate amid and after the pregnancy according to provision 34.2 of (ART Bill), till the youngster/ kids are conveyed to the outsider or remote couple or the nearby watchman. Further, the gathering looking for the surrogacy must guarantee and secure to the helped conceptive innovation center through fitting documentation (a letter from either the consulate of the Country in India or from the outside service of the Country, unmistakably and unambiguously expressing that (a) the nation licenses surrogacy, and (b) the youngster conceived through surrogacy in India, will be allowed section in the Country as a natural offspring of the charging couple/person) that the gathering would have the capacity to take the kid/ kids conceived through surrogacy, including where the developing life was an outcome of gift of an oocyte or sperm, outside of India to the nation of the party's beginning or living arrangement as the case may be. In the event that the remote party looking for surrogacy neglects to take conveyance of the child destined to the surrogate mother charged by the outside gathering, the nearby gatekeeper should be legitimately obliged to take conveyance of the kid and be allowed to hand the kid over to a reception organization, if the dispatched party or their lawful agent neglects to case the kid inside one months of the conception of the youngster. Amid the move period, the nearby watchman might be in charge of the prosperity of the kid. If there should arise an occurrence of selection or the lawful gatekeeper needing to raise the youngster, the kid will be given Indian citizenship.

(20) A couple or an individual shall not have the practice of more than one surrogate at any given time.

(21) A couple shall not have simultaneous transfer of embryos in the woman and in a surrogate.

(22) Only Indian citizens shall have a right to act as a surrogate, and no ART bank/ART clinics shall receive or send an Indian for surrogacy abroad.

(23) Any woman agreeing to act as a surrogate shall be bound not to employ herself in any act that would harm the fetus during pregnancy and the child after birth, until the time the child is handed over to the designated person(s).

(24) The commissioning parent(s) shall make sure that the surrogate mother and the child she deliver are appropriately insured until the time the child is handed over to the commissioning parent(s) or any other person as per the agreement and till the surrogate mother is free of all health complications arising out of surrogacy.

**6.6. *Determination of status of the child:***

(1) A child born to a wedded couple through the utilization of supported assisted reproductive technology should be ventured to be the authentic offspring of the couple, having been conceived in wedlock and with the assent of both companions, and might have indistinguishable lawful rights as a honest to goodness kid conceived through sex.

(2) A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the lawful child of both parties.

(3) In the case of a single woman the child will be the lawful child of the woman, and in the case of a single man the child will be the legitimate child of the man.

(4) In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the lawful child of the couple.

(5) A child born to a woman artificially inseminated with the stored sperm of her dead husband shall be considered as the lawful child of the couple.

(6) If a donated ovum contains oocyte from another donor ovum, both the donors shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and the donor of both the oocyte and the ovum shall surrender all parental rights in relation to such child.

(7) The birth certificate of a child conceive through the use of assisted reproductive technology shall contain the name or names of the parent or parents, as the case may be, who sought such use.

(8) If a foreigner or a foreign couple looks for sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.

### **6.7. *Right of the child to information about donors or surrogates:***

(1) A child may, on reaching the age of eighteen, ask for any information, excluding personal identification, relating to the donor or surrogate mother.

(2) The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent or parents or surrogate mother when required, and to the extent necessary, for the welfare of the child.

(3) Individual distinguishing proof of the genetic parent or folks or surrogate mother may be discharged just in instances of life debilitating medicinal conditions which oblige physical testing or tests of the genetic parent or folks or surrogate mother, gave that such individual ID won't be discharged without the former educated assent of the genetic parent or folks or surrogate mother.

### **6.8. *Persons who can opt for surrogacy under the Bill***

The Preamble of the Bill demonstrates a presumption that ‘infertility’<sup>118</sup> is the main reason for commissioning couples looking for the help of ART and a surrogacy arrangement and also treats the commissioning couple as ‘patient(s)’.<sup>119</sup> Further reading of section 20(10)<sup>120</sup> of the Bill which bars couples/persons who can have the capability of procreating normally from seeking the help of ART and surrogacy under the Bill; the onus of this decision banks majorly on the incapability of the commissioning mother to carry the baby to term. Hence, the infertile couple as well as medical problems of the female partner leading to miscarriages, bad physical and possibly, psychological and mental condition of the commissioning mother etc. are grounds for rendering a couple as ‘patient(s)’ and thus eligible for holding them able for entering into a surrogacy agreement.

The provisions for selecting an individual or a couple as ‘patient(s)’ are laid down in the Rule 7 which has to be read along with Part 5 of the Schedule I of the draft Assisted Reproductive Technologies (Regulation) Rules, 2010<sup>121</sup> (henceforth to be

---

118 Section 2(u): “infertility”, means the inability to conceive after at least one year of unprotected coitus; or an anatomical / physiological condition that would prevent an individual from having a child.

119 See Section 2(x).

120 See Section 20(10).

121 Part 5 of the Draft Rules deal with Patient Selection which are based on the physical examination of husband, wife, defect in partner(s) etc.

known as the Rules). The Bill with respect to the Rules lays down the various instances of how and the manner in which each of the steps leading to the couples looking ART treatment to surrogacy and delivery of the child is regulated.

The Bill has managed in subtle element with the occasions of who can and can't be a dispatching couple. On the other hand, the Bill particularly bars gay person couples looking for surrogacy arrangements in India in light of the meaning of "couple" in area 2(h) which expresses that a "'Couple' implies two persons living respectively and having a sexual relationship that is legitimate in India."<sup>122</sup>

This provision can be construed as to bar homosexuals from approaching for a surrogate. The ineligibility of homosexuals can also be read in the backdrop of the criminalization of homosexuality in India<sup>123</sup> but which again is subject to the decision of the Supreme Court in the appeal<sup>124</sup> from the judgment of the High Court of Delhi in the *Naz Foundation Case*<sup>125</sup>. However, the Supreme Court in *Baby Manzi* observed that surrogacy is also a method used by a single male or a homosexual partner to start a family.<sup>126</sup> In light of the present status of the law this statement of the Court could be relegated to the status of *Obiter Dicta*.<sup>127</sup>

---

122 The term 'couple' as defined in Section 2(h) has to be read in light of the definition of 'commissioning couple' as defined in section 2(g) where it is the term used to denote the couple seeking the surrogacy agreement.

123 Section 377, Indian Penal Code.

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

124 SLP (C) No. 15436/2009, *Suresh Kumar Kaushal v. Naz Foundation*.

125 *Naz Foundation v. Government of NCT of Delhi and Others* dated 02.07.2010 of the High Court of Delhi in the writ Petition(C ) No. 7455/2001.

126 AIR 2009 SC 84; (2008)13SCC518, Para 11- "Alternatively, the intended parent may be a single male or a homosexual couple."

127 In practice, foreign couples are already opting for surrogacy in India. *See generally*: "Israeli gay case to hit surrogacy biz in India", Available in The Times of India, 11 May.2010;

articles.timesofindia.indiatimes.com/2010-05-11/india/28289465\_1\_1surrogacy-fertility-clinics-surr  
gatemother;

2. "Spanish gay couple's child dream comes true in India", Available in sifynews, 16 February.2011; [www.sify.com/news/spanish-gay.....lcqt4jbighi.html](http://www.sify.com/news/spanish-gay.....lcqt4jbighi.html); last visited 19 February 2011.

3. See the NDTV video "Ahmedabad: Twin hope for gay couple" dated 21 November 2011, where a Spanish gay couple, incidentally the first in Gujarat, to become parents to twins through surrogacy from Ahmedabad. Available on [www.ndtv.com/video/player/news/ahmedabad-win-hope-for-gay-couple/201125](http://www.ndtv.com/video/player/news/ahmedabad-win-hope-for-gay-couple/201125); last visited 21 February 2015.

*See* Marla J. Hollandsworth, *Gay men creating families through surro-gay arrangements: a paradigm for reproductive freedom*, 3 Am. U. J. Gender & L. 183 where she argues that gay couples in the USA do not get the same support as lesbians to become "gay fathers" and writes for a need of legal

The term ‘couple’ as defined in Section 2(h) has to be read with the definition of ‘commissioning couple’ in section 2(g) to denote all persons looking for the surrogacy agreement.<sup>128</sup> While specifically identifying the feature of the commissioning parent(s) on grounds of sexuality and thus barring homosexual commissioning parent(s) under Section 2(h), the Bill is more liberal when it comes to their marital status.

While section 2(v)<sup>129</sup> defines “married couples”, section 2(dd)<sup>130</sup> identifies and defines an “unmarried couple”. The legality of these relationships is not specific to the Indian legal context, compared to the provision of 2(g), but “in the country/countries of which they are citizens.” Thus, these provisions makes it open for homosexual couples to opt for surrogacy in India if they are recognized as married in their country of origin<sup>131</sup> or in those instances where their relationship, even if it cannot be considered a marriage in India, is recognized legally. However, unmarried couples, who are Indian citizens, can be recognized as being a ‘couple’ in the backdrop of recent Supreme Court decisions where live-in-relationships have been legally recognized as "relationships in the nature of marriage".

Thus, the persons opting for surrogacy could be a couple, heterosexual individual or a closet homosexual with a closet partner.<sup>132</sup> However, in light of the above mentioned legal provisions, in India, only one of the partners in the homosexual relationship will have a legal right to the child born out of the surrogacy agreement. This is against the position of the ‘unmarried couples’, (where heterosexuality is an unstated criterion)

---

regulation and recognition of “surro-gay agreements” bringing gays at par with single women, lesbians and heterosexual couples in exercising their right to procreation and raising a family.

3. Also see Law Commission of India Report No.228, 2009, page 14-15.

128 Section 2(g): “Commissioning parents/couples/individuals”, means parents, couples or individuals, respectively, who approach an ART clinics or ART bank for providing a service that the ART Clinic or the ART bank is authorized to provide”.

129 Section 2(v): “married couple”, means two persons whose marriage is legal in the country / countries of which they are citizens.

130 Section 2(dd): “Unmarried couple” means two persons, both of marriageable age, living together with mutual consent but without getting married, in a relationship that is legal in the country/countries of which they are citizens.”

131 Like civil marriages, civil partnerships, consortium, cohabitation etc. in some Common Law countries. See Frances Burton, *Family Law*, 35-41(2003)

132 Section 35(3): In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man.



where both are considered to have a legal right over the child and consent by both to the ART process and surrogacy has to be provided.<sup>133</sup>

Nonetheless, whether the couple is married or unmarried, section 32(2) of the Bill requires that there has to be informed consent of both the parties to the ART.<sup>134</sup>

The Bill has likewise kept these inquiries open because of the shots of such couples, from outside nations, deciding on surrogacy agreement in India, in this manner reinforcing the suspicion that one of the essential expectations for institution of the Bill is to manage the current business surrogacy industry, consigning the modalities to future possibilities and suits.

Thus, under the Bill, in order to be able to enter into valid surrogacy agreements, the following is essential:

1. Either of the commissioning couple *must be infertile* and also, or, the commissioning mother must be *incapable of carrying a baby to full term*;
2. The commissioning couple should either be married heterosexual couples or in an unmarried heterosexual relationship. Individuals can also apply for surrogacy. However, homosexual couples living together and who are Indian citizens, are not recognized as commissioning couples when both apply together.
3. ‘Single’ commissioning persons (male or female) *must prove infertility or prove inability to carry a baby to full term* (in case of single female) by the commissioning mother in case of a single woman or a couple.
4. The status of homosexual commissioning couples who are not citizens of India depends on their legal right to marry under the law of their country. The question whether they, as a couple, will be allowed to go for a surrogacy agreement in India is a matter of future legislative deliberations.

---

133 Section 35(2): A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties.

134 Section 32(2): In case assisted reproductive technology is used by a married or unmarried couple, there must be informed consent from both the parties.

5. A couple or an individual shall not have the service of more than one surrogate at any given time.
6. A couple shall not have simultaneous transfer of embryos in the woman and in a surrogate.

The Draft Rules provide that the commissioning couples are to enter into a surrogacy agreement with the surrogate mother and Form J which is provided in Schedule I serve as an outline of a surrogacy agreement.<sup>135</sup> Under Section 34(1) of the Bill, the agreement is legally enforceable.<sup>136</sup>

#### ***6.4. The surrogate mother and her role under the Bill***

Section 2(a) provides that a surrogate mother is an extension of the ‘ART bank’<sup>137</sup> and the surrogacy contract must involve ART according to the language of Section 2(cc).<sup>138</sup> The ART Clinics have to maintain a record which shall be a confidential record of donors, clients and surrogate mothers and which they are liable to disclose only to the Department of Health Research but with the permission of those to whom the information relates to or in cases of medical emergencies.<sup>139</sup>

Though the wordings of Sections 2 (aa) and (bb) stipulates that the Bill aims to regulate only gestational surrogacy; particularly, commercial gestational surrogacy,<sup>140</sup>

---

135 See the draft Assisted Reproductive Technologies (Regulation) Rules, 2010

136 Section 34(1): Both the couple or individual seeking surrogacy through the use of assisted reproductive technology and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable.

137 Section 2(a)- “ART bank”, means an organisation that is set up to supply sperm /semen, oocytes / oocyte donors and surrogate mothers to assisted reproductive technology clinics or their patients.

138 Section 2(cc). “surrogacy agreement”, means a contract between the person(s) availing of assisted reproductive technology and the surrogate mother.

139 See Section 20(9).

140 Section 2(aa). “surrogacy”, means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.

Section 2(bb). “surrogate mother”, means a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple / individual that had asked for surrogacy

section 34(18) of the Bill shows that it is also open to the inclusion of altruistic surrogacy.

The woman acknowledged as the prospective surrogate mother can only carry a child who is not genetically related to “her or her husband”<sup>141</sup> and the strength of this provision is reiterated by barring her from acting as an oocyte or ovum donor for the couple or individual seeking surrogacy under Section 34(13).<sup>142</sup> The consent of the husband of the surrogate in the surrogacy is very essential<sup>143</sup> and this consent has to be recorded in the Form J.

Also, the “*only-surrogate and not- donor*” clause, positively mandated in section 34(13) also, is not only a reinforcement of the push towards commercial surrogacy but also to avert a situation where the surrogate mother might grow attachment to a child who is genetically related to her partially. This “*Baby Melissa*”<sup>144</sup> like situation is something commissioning parents as well as ART clinics, the doctors as well as surrogate mothers would want to avoid. Most of the times, the commissioning parents would also want a child with certain specifications relating to race and other genetic character in their child which are considered by going through records of the gamete donors without knowing their personal identities.

Thus, the term “another woman”<sup>145</sup> could include a female relative of the commissioning parents for whom she is conceiving the child purely out of altruism. Section 2(aa) stipulates that the surrogacy agreement must involve a woman carrying a child born out of the artificial fertilization of gametes which do not belong to either her or her husband. There is however an exception to this ‘non-genetically related’

---

141 See Section 2(aa).

142 See Section 34(13).

143 See Section 34(16).

144 *In the Matter of Baby M, 217 N.J. Super 313, (1987)*

In one of the first cases relating to surrogacy to have come within the empire of law, a case of breach of contract was filed by the parents of the child who was born through a surrogate. The surrogate refused to give up the child born through AI of her egg by the child’s father. What followed her refusal was a prolonged legal battle and conflicts between her and the commissioning /intended parents. The Court ruled that there was a breach of contract and allowed her visitation rights only. In the meantime, her own marriage to her spouse as well as the security, peace and happiness of her older children were compromised.

145 See Section 2(bb).

clause when a relative of the commissioning parents is involved as a surrogate mother.

Section 34(18)<sup>146</sup> stipulates that a surrogate mother can be a “known person”, an “unknown person” or a person who is a “relative” of the intending parents provided that she is of the same generation as that of the intending mother. This means that the child and the surrogate mother, who is a relative, could be genetically related if either the gametes or one of the gametes is of the commissioning parent(s), although there could be variable amounts of dilution in the degree of the genetic relation on either side of the commissioning parents. Hence, Section 34(13) will not be valid in such a case but only to those when both the gametes are from donors not genetically related to the surrogate mother, even if she be a relative of either of the commissioning parents.

The quandary with the language of the Bill is that it makes space for the commercial gestational surrogate and the terms and conditions under which she is to operate while leaving these aspects open in case of altruistic gestational surrogate under the whims and fancies of the commissioning parents. The Form J also asks for specifications as to whether the surrogate is related or not to the commissioning parents(s). However, it is not apparent from the interpretations of Section 34(18) if the involvement of a relative as a surrogate is subject to the same regulation as that of a commercial surrogate except that Form J shows that she has to sign it in the same terms as a non-relative surrogate.

The Bill also lays down certain duties on the part of the surrogate, her rights and the terms and conditions of the surrogacy which has to be observed by her as a surrogate and vis-à-vis the infertility clinic, ART banks and the commissioning parent(s).

#### **6.9. *Limitations on the function of the surrogate mother under the Bill:***

The surrogate mother has to enter into the surrogacy agreement with the clear intention to conceive the baby to full term and “hand over” or “deliver” the child to

---

146 See Section 34(18).

the “person or persons”/ “couple/individual” for whom she is “acting as a surrogate” or “has asked for the surrogacy”.<sup>147</sup>

“Full term” signifies that the surrogate mother cannot abort the fetus nor do harm to it until it reaches full term and is delivered and handed over.<sup>148</sup> However, the Form J in the draft Rules provide an option to the surrogate mother to terminate the pregnancy at her “will, under the provisions of the MTP Act” and it has the effect of automatically rescinding the contract. It can also be aborted on expert medical advice where she will be considered as not having breached the contract and thus entitled to continuation in the payment of damages as opposed to when she aborts on her free will or under the provisions of the MTP Act. These section do not apply to her in case of fetal reduction which is a selective abortion and the choice to do so is only given to the intending parents and not to the surrogate mother who is the one carrying multiple fetuses.<sup>149</sup>

A surrogate can only enter into a contract with the full information that she as well as her spouse has to relinquish all parental rights over the baby.<sup>150</sup> Thus, in case of non relinquishment, the commissioning parents can initiate an action for breach of the surrogacy contract against her.<sup>151</sup> On the other hand, the commissioning parent(s) has to take the custody of the child no matter what and refusal to do shall constitute an offence under the Act.<sup>152</sup>

After a surrogate is known, the commissioning parent(s) has to issue a certificate to prove her appointment as such.<sup>153</sup> At all levels of medical checkups, pregnancy and delivery of the child, where records have to be maintained, she shall affirm herself as a surrogate and furnish the certificate issued by the commissioning parent(s) to give their details and thus prove her status of a surrogate.<sup>154</sup> When the child is born out of a

---

147 See Sections 2(aa) and (bb); Sections 34(2) and (4)

148 See Section 34(23).

149 Section 2(o): “Foetal reduction”, means reduction in the number of foetuses in the case of multiple pregnancies.

150 See Section 34(4)

151 See Section 34(1)

152 See Section 34(11)

153 See Section 34(17)

154 See Section 34(8)

surrogacy, the birth certificate issued shall state the commissioning parent(s) as the parents.<sup>155</sup>

#### **6.10. Territoriality of surrogacy under the Bill:**

The Bill also provides for the territoriality of its protection of the rights of the surrogate mother by specifying that she “is a citizen of India and is a resident of India”.<sup>156</sup> This is further exemplified by Section 34(22) which provides that the surrogates under this Bill should be Indian citizens and one *cannot go out of the country* to become a surrogate. This section is quite ambiguous when it comes to the words ‘shall receive’. It is not clear if ‘receive’ means receiving of non-Indian citizens by Indian ART bank/ clinics or whether it is supposed to signify that foreign ART banks/ clinics are not supposed to receive Indian nationals/ citizens as surrogates.<sup>157</sup>

#### **6.11. Confidentiality of the surrogacy:**

The surrogate is guaranteed utmost protection and secrecy in terms of her way of life as the surrogate. The surrogacy agreement is a private agreement, to be entered between the surrogate mother and the intended parents, under their own particular terms and conditions and those stipulated under the Bill and the example Form J. A copy must be kept by every intending parent to the surrogacy and additionally the ART center when approached for the barrenness treatment. The ART Banks who "deals with" the surrogates can't give out any data about surrogates in their records when they promote for their surrogacy offices.<sup>158</sup> The ART clinic too is under a

---

155 See Section 34(10).

156 See Section 2(bb)

157 Section 34(22): Only Indian citizens shall have the right to act as a surrogate, and no ART bank/ ART clinics shall receive or send an Indian for surrogacy abroad.

Also, the interpretation of the Bill makes it clear that in cases of altruistic surrogacy, the “known person”, “unknown person” or a person who is a “relative” of foreign commissioning couples also has to be an Indian citizen. This further reinforces the push towards commercialization of surrogacy as a commercial gestational agreement is clearly enforceable under the Bill but is ambiguous about altruistic gestational surrogacy as pointed out above.

158 Section 34(12): Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction. This Section is read with Section 34(7) Individuals or couples may obtain the service of a surrogate through an ART bank, which may advertise to seek surrogacy provided that no such

similar kind of obligation.<sup>159</sup> The confidentiality can only be broken under an order of the Court or for the future when the child would want to know about her.<sup>160</sup>

Form J also puts an obligation on the surrogate mother not to divulge the name of the parties seeking the surrogacy.

### **6.12. Health and medical benefits for the surrogate:**

The surrogate mother, being essential to the surrogacy arrangement, her health and well being is of primary concern to ensure that the whole arrangement becomes a success.

- a) In order to ensure that the surrogate is physically fit to carry the baby to term, the Bill ensures that only women of a certain age are allowed to be surrogates; she has to be between the ages of twenty one and thirty five years. If she is already a mother to her own biological offspring, then she should not have borne more than five successful live births, inclusive of the number of surrogacies.<sup>161</sup>
- b) A surrogate mother is expected to have a clean slate of health and tests are conducted to ensure that she is not a carrier of any forms of sexually transmittable or other diseases. For the same, she has to make an undertaking that she has not received a blood transfusion or any blood products for the “last six months”.

The date from which the six months is to be calculated is not mentioned in the Bill<sup>162</sup> but Form J also mentions this time line. So a presumption can be drawn that this is calculated from the date of signing of the surrogacy

---

advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy. No assisted reproductive technology clinic shall advertise to seek surrogacy for its clients.

159 Section 34 (14): No assisted reproductive technology clinic shall provide information on or about surrogate mothers or potential surrogate mothers to any person.

Section 34 (15): Any assisted reproductive technology clinic acting in contravention of sub- section 14 of this section shall be deemed to have committed an offence under this Act.

160 See Sections 34(7), 34(8), 34(12) and 32(3).

This happened in the case of *Jan Balaz v. Union of India* [From L.P.A. No. 2151 of 2009, High Court of Gujarat] where the Court disclosed the name of the surrogate.

161 See Section 34(5)

162 See Section 34(6)

agreement or alternatively, from the period of her clinical preparation as a surrogate.

- c) The Rules require that a surrogate fill a Form ‘M2’ read with Rule 15.1 where the details of the surrogate mother including the detail of her medical history and other information relating to her health, like detail of the use of contraceptives, substance abuse etc. are required to be given. The various tests to be conducted upon the mother are mentioned along with the time and stages of the fertilization at which these tests are to be conducted.

Thus, any non-disclosure and subsequent finding of health related disorders or other medical requirements can be a ground for breach of the surrogacy agreement. However, such a breach, when a surrogate is already impregnated or in an advanced stage of pregnancy, can make her position as well as that of the unborn child’s insecure and problematic.

- d) A surrogate also cannot be subjected to more than three embryo transfers for the same couple and after each failed attempt, the process has to start anew with regards to the terms and conditions relating to payment.<sup>163</sup>

The most crucial angle to a surrogate’s medical and health coverage is that she is extended to such benefits only till the baby is born, neglecting her requirements after childbirth. The compensation she receives thus is to take care of her in case she develops pregnancy related physical complications, trauma or psychological disorders like postpartum depression etc.<sup>164</sup>

### ***6.13. Compensation for the surrogate:***

The surrogate mother’s role as a ‘womb for rent’ is apparent as the Bill allows “monetary compensation” to be paid to the surrogate mother,<sup>165</sup> apart from expenses relating to insurance and medical expenses, by the commissioning parents.<sup>166</sup>

---

<sup>163</sup> See Section 34(9).

<sup>164</sup> See Section 34(2)

<sup>165</sup>Section 34(3)-Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, 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.



The questions pertaining to the amount of compensation to be paid for the surrogacy is left between the commissioning parent(s) and the surrogate mother. Thus, the exact amount of payment to be received by her depends on the bargaining power of the surrogate as well as the support which she can garner from the ART Bank. But since the Bank merely acts as a “surrogacy facilitator” or a “surrogacy database” for the commissioning parents, the level to which they might rally behind the surrogate both at the time of signing of the agreement or post-birth is questionable.

#### ***6.14. Right of Child under the Bill***

The Bill provides that in case the commissioning parents are foreigners then the child shall not be granted Indian Citizenship<sup>167</sup>. The bill does not provide for any conditions in which the child can be hand over to the surrogate mother. Her relinquishment of rights over the child has been made absolute. This creates a state of flux in as much as the child so born will be deprived of the mother’s milk. It has been acknowledged by leading medical bodies that an infant is to be fed with only his mother’s milk for the first six months.<sup>168</sup>

The significance of breastfeeding is recognized in various conventions<sup>169</sup>. India being a signatory to the aforesaid convention has to ensure compliance with it. The World Health Organization also has, reiterated the need for providing only mother’s milk to a child for the first six months<sup>170</sup>. The importance of breastfeeding of child has been realized in almost all the jurisdictions.<sup>171</sup> In India also, this right is impliedly recognized by various statutes.

---

166 Section 34(2) - All expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.

167 See section 34(19)

168 “Infant and Young Child Feeding: Fact Sheet”, WHO Available at <http://www.who.int/mediacentre/factsheets/fs342/en/> Visited on 15 February 2015

169 See also Article 24(c) and 24 (e) of the Convention on the Rights of Child

170 *ibid*

171 In the United Kingdom, Sex discrimination Act, 1975 protects breastfeeding in public. In US, the same right is protected by Childs Right to Nurse Act

Every woman delivers a child who returns to duty after such delivery shall, in addition to the interval for rest allowed to her, are allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of fifteen months.<sup>172</sup>

It is submitted that a surrogate child is as much entitled to mother's milk as any other child is. Denial of such a right may have severe implications on the growth of the child. Studies have shown that denial of mother's milk to a child can cause a great hurdle in the physical and mental development of the child<sup>173</sup>. In view of such compelling reasons, an attempt should be made to incorporate this right in the bill.

### ***6.15. No Right of Abortion***

In certain countries the right to abortion is very generously granted to women.<sup>174</sup> In India, however, the legislature seems to have taken a middle tactic to abortion. Abortions in India are governed by the Medical Termination of Pregnancy Act, 1971. The Act allows abortion until 12 weeks of pregnancy, only if in the opinion of the registered medical practitioner the childbirth would cause a risk to the life of the woman or of grave injury to her physical or mental health or that there is a substantial risk that the child if born would suffer from such mental and physical abnormalities as to be seriously handicapped.<sup>175</sup> The provision of this right is important in as much as it is a species of reproductive rights and its denial is bound to create problems in the society, not to mention the adverse effects it can have on the woman's health. The significance of this right can be gauged from the following line:<sup>176</sup>

---

Even, a conservative country such as Saudi Arabia does not prohibit breastfeeding in public.

172 Section 11 of the Maternity Benefits Act, 1961

173 Alison Steube, "The Risks of not Breastfeeding for Mothers and Child" Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2812877/> Accessed 15 February 2013

174 Australia, Canada, Cuba, Denmark, South Africa are among such countries that have laws which permit 'abortion on demand'. The abortion can be done without the permission of authorities if asked within a given duration which is usually twelve weeks

175 Section 3(2) (a), Medical Termination of Pregnancy Act, 1971

176 Mria Ladas essay on "*Sexuality and Reproduction as Human Rights, Legal Perspectives*

Reproduction and sexual rights have such strong impact on health, economy, social development, justice and evolution that they cannot be continued to be overlooked. They have as much to do with personal fulfillment, as with survival and the continuation of human race which exists as a result of the reproductive options.

The Assisted Reproductive Technology Bill does not give surrogate mother, right to abortion. Clause 34(23) of the Act forbids the surrogate mother from engaging “*in any act that would harm the fetus during pregnancy and child after birth*”. The section does not provide for the right to effect an abortion irrespective of the effect of such pregnancy on the surrogate. The effect of Clause 34(23) is to deprive the surrogate of the right of abortion, irrespective of the condition she may be in. Accordingly, if a surrogate aborts the child and even though the grounds laid down in Section 4 of the MTP Act are fulfilled she would still be liable under Civil Law to the commissioning parents. It is uncertain whether such a provision can be enacted by the Parliament. The Supreme Court in *Basheshwar Nath v. Commissioner of Income Tax*<sup>177</sup> held that the ‘Doctrine of Waiver’ has no application in India. Thus, a surrogate cannot waive of her fundamental right to life by entering into a surrogacy contract.

The non provision of abortion rights is a grave lacuna in the Bill which requires the urgent attention of the legislatures. The Law Commission suggestion on this point should be adopted and the abortions should be governed by Medical Termination of Pregnancy Act, 1971.

#### ***6.16. Anomalies in the Bill***

The bill is silent on the mechanism to enforce the rights of the child after the child is handed over to the commissioning parents. The bill does not provide for any provision whatsoever by which it can be ensured that the commissioning parents do not violate the rights of the child. It is submitted that in the absence of such a provision there is great possibility of child abuse taking place especially in case the commissioning parents are foreigners. The same concern has been echoed by the 228th Report of the Law Commission, According to the one recommendation of the report ,one of the

---

177 AIR 1959 SC 149

intending parents should also be the donor because the bond of love and affection primarily arises from a biological relationship. Moreover, the bill in the present form leaves scope for child abuse and trafficking. Further, the bill is also silent about the number of times the commissioning parents can enter into such an arrangement. There is a need to lay down a provision like this as it would reduce the possibility of the surrogacy law being abused. Further, as per the bill, commissioning parents may include single persons, same sex parents, live in couple and married couple. As far as the provision of this right to unmarried live in couple or same sex couple is concerned. It poses two grave problems.

First, the bill provides that in such cases the child shall be presumed to be a legitimate child of both the parents; however it is again silent about the custody of the child in case of separation between the couple. In such cases, there is a huge possibility of both the parties abandoning it.

Secondly, homosexuality is not accepted in many countries, hence in those jurisdictions the child may not be considered as a legitimate child of the couple.

Also, Clause 34 makes it illegal for the parents to abandon the child in case the child is born with abnormalities. However, there is no clear enforcement mechanism to prevent the commissioning couple from abandoning the child and going to their country. It would become difficult for the Indian Law Enforcement Agencies to make them liable in case they flee from India. If a situation like this takes place, then it is incumbent upon the local guardian appointed by the commissioning parents to hand over the child to an adoption centre<sup>178</sup>. It is submitted that a provision should be made to allow the surrogate mother to retain the rights over the child in case the commissioning parents fail to take the child from the local guardian in one month.

---

178 Clause 34(19)

## CHAPTER V

### 7. CONCLUSION AND SUGGESTIONS

From the above discussion it can be said that the right to reproduce is a fundamental and an intuitive human right. Surrogacy is the only way to defeat both biological and social infertility. It provides medically sterile couples as well as socially sterile individuals who are unwilling to get married with a chance to have a child of their own. Actually, legalization of surrogacy aims to protect the surrogate's interests as well as those of the intended parents and the baby born after the surrogacy.

It is also submitted that not allowing same sex parents, single parents and live in couple to enter into such agreements may be appropriate when viewed from the context of the social conditions prevalent in India. As highlighted earlier in this paper, it is necessary to provide the right conditions for the growth and development to a child, such conditions can only be provided in case the child is handed over to normal heterosexual couples. There is also need to provide for a post- surrogacy enforcement mechanism in the bill itself, especially when the parents are foreigners.

However, till date there is no law dealing directly with surrogacy laws to protect the rights and interests of the surrogate mother, the child, or the commissioning parents. Therefore, it is the duty of the legislature to come up with a strong legislation which protects the destitute women from such exploitation and such a duty can be discharged only by making a strict law on the same and ensuring implementation and not by allowing a free hand to such agreements.

Moreover, the Bill has been passed with the purpose of regulating an already existing surrogacy industry which is apparent from the language of the Bill. Also there are many anomalies and loopholes in the bill which needs to be corrected.

Lastly, proper safeguards for ensuring the best interests of the child and the rights and obligations of the parties to a surrogacy and rights of the surrogate child can be grafted in the scheme of legislation as pointed out in the later section of the paper.

## **7.1. SUGGESTIONS**

The following suggestions are made based on the findings of this study to plug out the loopholes in the current legal framework:

- There should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child.
- There is a need of right-based legal framework for the surrogate mothers, as far as the ICMR guidelines are not enough.
- A clearly defined law needs to be drafted immediately which will pronounce in detail the Indian government's stand on surrogacy; so that discrete activity leading to exploitation of the surrogate mother can be stopped.
- Although it is not a crime to bear a child for another, and then relinquish it for adoption, it is not regulated by law and may raise a number of confusions
- It has to be regulated whether paying the mother a fee for adoption beyond medical expenses is a crime (like in some countries) or not. In case it is recognized as crime and one pays extra charges then it should prevent the adoption from being approved.
- There should be a substantial regulation designed to protect the interests of the child
- Legal recognition of termination and transfer of parenting rights
- It is crucially important to maintain and monitor the anonymity of the surrogate mothers.
- The surrogate mother should not undergo more than 3 trials and it has to be monitored.
- The surrogate mother should be provided by the copy of the contract as she is a party in the agreement and her interests should be taken into account. It happens that very often decision is taken by the intended parents and clinic, while surrogate mother does not have any say in this matter .
- There should be an interpreter (other than doctor) for the communication linkage between the surrogate and intended parents in order to convey the message from surrogate mother time to time. As far as often doctors speak on

behalf of surrogate mothers, but there is no guarantee that their interests are conveyed without any misinterpretation.

- Typically, after the birth the surrogate mother is left without any medical support, it is recommended that there should be a provision of intensive care and medical check-ups of their reproductive organs during the 3 months after pregnancy
- In case surrogate mother gives birth to twins she should be paid double amount or at least 75% of the price for the second child.
- The commissioning couple should try to establish a relationship of trust with the surrogate, yet such a relationship creates reciprocal rights and duties and might create demands for an undesired relationship after the birth.
- The citizenship right of the surrogate baby is also of crucial importance. The Indian government needs to take a stand in terms of conferring the surrogate baby Indian citizenship as s/he is born in the womb of an Indian (the surrogate mother) and in India.
- The rights of the child should be protected and in case s/he is not taken by the commissioning parents, then the child should be given Indian citizenship.
- Health Insurance for both the surrogate mother and the child is essential to ensure a healthy life.
- There is a need of debate and discussion of the stance that public policy and the law should take toward surrogate mothering. Actually, there exists a range of choices from prohibition and regulation to active encouragement
- The government needs to monitor the surrogacy clinics, which generally charge arbitrary prices for surrogacy arrangements. Regulations would enable the government to ensure that the clinics charge fair prices.
- The contract signed between the commissioning parents and the surrogate mother should mention something about insurance and emergency needs that the surrogate mother may require during the pregnancy; it has to mention something about her future after relinquishing the baby.

# BIBLIOGRAPHY

## *1. Legislations*

### **1.1 India**

- i. The Assisted Reproductive Technologies (Regulation) Bill 2010
- ii. Indian Contract Act, 1872
- iii. Hindu Adoptions and Maintenance Act, 1956
- iv. Medical Termination of Pregnancy Act, 1971

### **1.2 United Kingdom**

- i. Surrogacy Arrangement Act, 1985
- ii. Human Fertilization and Embryology Act, 1990

## *2. Journal Articles*

- i. Adams, An. Marilyn, Examination of Bill Introductions during the 1987 Legislative Sessions Relating to Surrogacy, 1988. Natl Conf State Legis.
- ii. Adair, Patricia, Surrogate Mother's Story, 1987. 140p. Loiry Publishing House
- iii. ALLAN Sonia Commercial Surrogate and Child: Ethical Issues, Regulatory Approaches, and Suggestions for Change
- iv. Bach, Kathleen, Research Guide: Surrogate Motherhood. 1988. 46p
- v. Bala, Dr. Shashi "Commercial Surrogacy: The need for Regulation,"IBR, vol. 3, 2012 p. 209
- vi. Christine L. Kerian , Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children, 12 Wis. Women's L.J. 113 ( 1997)
- vii. Daniela Cutas, 'Postmenopausal motherhood: immoral, illegal? A case study' (2007) 21(8) Bioethics 458 p 462
- viii. Gostin, Lawrence, "Surrogacy From the Perspectives of Economic and Civil Liberties," 17 J. Contemp. Health Law and Poly 429, 434 (2001)



- ix. Jay Kumar F. Dr. Yegudala : Socio – Legal Aspects of Surrogacy in India.
- x. Mukherjee, Sugato Legal and Ethical Issues of Commercial Surrogacy : An Overview
- xi. Pande, Amrita “Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker” (2010) 35 Signs 969
- xii. Radin, Margaret Jane, 1988, —Market Inalienability, Harvard Law Review, 100: 1849–1937.
- xiii. Radin, Margaret Jane, Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things (2001
- xiv. Rao, Radhika, Surrogacy Law in the United States: The Outcome of Ambivalence, in Surrogate Motherhood: International Perspectives 23 (Rachel Cook et al. eds., 2003)
- xv. Richardson, Herbert ed., On the Problem of Surrogate Parenthood: Analyzing the Baby M Case, 1987. 144p. Edwin Mellen Press.
- xvi. Shannon, Thomas A, Surrogate Motherhood: The Ethics of Using Human Beings, 1988. 212p. Crossroad
- xvii. Sharma, Raghav An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India.
- xviii. Smerdon, Usha “Crossing bodies, crossing borders: International surrogacy between the United States and India” (2008-2009) 16 Cumb L Rev 17
- xix. Spivack Carla The Law of Surrogate Motherhood in the United States Author(s): Source: The American Journal of Comparative Law, Vol. 58, Supplement
- xx. Stauch, M., and Wheat, K. with Tingle J., 2006. “Text, Cases & Materials on Medical Law”, 3<sup>rd</sup> Edition, New York: Routledge, p.389
- xxi. Surrogate Motherhood: Ethical or Commercial report by Center for Social Research.
- xxii. Thapa, Jawala D, Analysing the status of the surrogate mother under The Assisted Reproductive Technologies (Regulation) Bill, 2010 NUJS Working Paper Series NUJS/WP/2012/01
- xxiii. Uniikrishnan, C. H., ‘\_Bill to Regulate IVF Clinics to be Tabled Soon’, The Wall Street Journal, September 24, 2008
- xxiv. Venugopal B. S. Law And Surrogacy: A Critical Analysis Of Indian Experience Indian Streams Research Journal, Volume-3, Issue-6, July-2013

### **3. Newspaper Articles**

- i. “Ahmedabad: Twin hope for gay couple” dated 21 November 2011, where a Spanish gay couple, incidentally the first in Gujarat, to became parents to twins through surrogacy from Ahmedabad. Available on; last visited 21 February 2015.
- ii. “Baby Manji gets birth certificate” The Telegraph (online ed, Calcutta, India, 10 August 2008)
- iii. “Born in India, Nowhere to Belong” The Times of India (online ed, India, 18 September 2009)
- iv. Dhanajay Mahapatra “Baby Manji’s Case Throws Up Need for Law on Surrogacy” The Times of India (online ed, India, 25 August 2008)
- v. “Israeli gay case to hit surrogacy biz in India”, Available in The Times of India, 11 May 2010; [articles.timesofindia.indiatimes.com/2010-05-11/india/28289465\\_1\\_1surrogacy-fertility-clinics-surrogatemother](http://articles.timesofindia.indiatimes.com/2010-05-11/india/28289465_1_1surrogacy-fertility-clinics-surrogatemother);
- vi. Kishwar Desai “India’s surrogate mothers are risking their lives. They urgently need protection.” The Guardian (online ed, UK, 5 June 2010)
- vii. “SC directs CARA to consider German couple’s plea for adoption” The Times of India (online ed, India, 17 May 2010)
- viii. The Hindu, “Law silent on protecting rights of a surrogate”, 24 March 2012, [visited 2 March 2015]
- ix. The Hindu, “Once a taboo, surrogacy gaining acceptance”, 24 March 2012, [last visited 2 March 2015]

### **4. Websites**

- i. <http://www.adoptionindia.nic.in>
- ii. [http://www.hfea.gov.uk/docs/Warnock\\_Report\\_of\\_the\\_Committee\\_of\\_Inquiry\\_into\\_Human\\_Fertilisation\\_and\\_Embryology\\_1984.pdf](http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf) accessed on 20 February 2015
- iii. <http://www.information-on-surrogacy.com/history-of-surrogacy.html>  
(Accessed date 15/02/, 2015)

- iv. <http://www.majpc.com/practice-areas/art-assisted-reproductive-treatment>
- v. <http://oxforddictionaries.com>> accessed 13/02-15
- vi. <http://blog.indiansurrogacylaw.com/2009/01/few-basics-from-the-icmrguidelines> (Accessed on:15 February 2015)
- vii. <http://www.surrogacy.org.uk/Registering-birth.htm>> (Accessed on 17/02/2015)
- viii. <http://www.who.int/mediacentre/factsheets/fs342/en/> Accessed 15/02/ 2015
- ix. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2812877/>Accessed on 15/02/2015
- x. <http://www.thehindu.com/news/cities/Hyderabad/article3211525.ece>  
[www.ndtv.com/video/player/news/ahemadabad-win-hope-for-gay-couple/201125](http://www.ndtv.com/video/player/news/ahemadabad-win-hope-for-gay-couple/201125)