

# ● ISSUES RELATING TO SURROGACY: INDIAN PERSPECTIVE



J.P. RAI\*

## Abstract

*The desire for motherhood leads to search for alternatives solutions, and surrogacy presents itself as the most viable alternative. The practice of surrogacy arouses positive as well as negative emotions ranging from mild taste to revulsion. Despite the demand, surrogacy has its share of critics in India due to the moral, ethical and legal issues that swirls around it. The regulation of the system of surrogacy, through an effective legislation, dealing all aspects and issues of surrogacy will be beneficial to all concerned and society as a whole.*

## Key words

*Surrogacy, Surrogate Motherhood, Assisted Reproductive Technology and Regulation.*

## INTRODUCTION

The feeling of motherhood is something incomparable with any other experience. It is considered to be a very important part of the human life. It makes the family life complete. Indeed, it is very difficult to understand the pain and emptiness of the couples who are not blessed with the boon of having a child of their own. Some women, due to various reasons, are unable to give birth to their own offspring. The desire for motherhood leads them to search for alternatives solutions, and surrogacy<sup>1</sup> presents itself as the most viable alternative.<sup>2</sup> Modern technological advancement such as Assisted Reproductive Technology (ART) is an offspring of technological revolution and medical advancement. Advances in assisted reproductive techniques such as In-Vitro Fertilization (IVF)<sup>3</sup> and Intra Uterine Insemination (IUI) methods have revolutionized the reproductive environment, resulting in "Surrogacy", as the most desirable option.

The practice of surrogate motherhood, though not unknown in previous times, came to international attention in the mid seventies of the twentieth century. Because of lower cost, less restrictive laws, lack in regulation of ART clinics and availability of

\* LL.M. (Gold Medalist), Ph.D., Associate Professor, Faculty of Law, Banaras Hindu University, Varanasi (India). Author may be contacted at [jprailawschool@gmail.com](mailto:jprailawschool@gmail.com)

<sup>1</sup> The word surrogate has its origin from a Latin word *surrogatus* meaning a substitute, that is, a person appointed to act in the place of another.

<sup>2</sup> According to the World Health Organization, infertility rate in India is 3%. According to recent National Family Health Survey in India, 3.8% of women between the age of 40 and 44 years have not had children and 3.5% of currently married women are declared barren, moreover it is also estimated that 15% of couples around the world are infertile, available at: <http://libdoc.who.int/HQ/2002/9241590300.pdf>

<sup>3</sup> Available at: <http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization>

surrogate mothers India has become a booming centre<sup>4</sup> of a fertility market with its reproductive tourism industry reported at estimated Rs. 25000 Crores in total.<sup>5</sup> India has become most favored destination for issueless couples from across the globe.<sup>6</sup> The surrogate mothers in India cost about \$ 25,000, roughly a third of the typical price in the United States.<sup>7</sup>

Despite the demand, surrogacy has its share of critics in India due to the moral, ethical and legal issues that swirls around it. This paper makes an attempt to examine various legal, ethical and human rights issues connected with the practice of surrogacy along with Indian perspective to deal with such issues. In this regard, an analysis of the status of surrogacy in various countries; legal status of surrogacy in India and attempt being made by the Indian Parliament to handle the issues connected with surrogacy, its efficacy and contribution made by Indian judiciary in this field has been analyzed to assess the preparation of India to deal with surrogacy issues and to suggest some steps to improve the situation.

## CONCEPTUAL FRAMEWORK

Surrogacy is not of recent origin. Examples can be found in the birth of Lord Hanuman as the fetus from the womb of 'Mohini' was transferred to the womb of 'Anjani' and the birth of Lord Krishna, as the fetus from the womb of Devaki was transferred to the womb of Rohini<sup>8</sup>. The first infertile couple in history is Abraham and Sarah and the first known surrogate mother is Hagar, their maid who bore a child in about 1910 BC (Gen. 16.1-15).<sup>9</sup> Until the 1960, surrogacy was usually carried out by a friend or relative, as a favour to someone in need. In 1976, the first formal surrogacy arrangement was set up in the United States. The birth of the first child, Louise Brown in 1978, through the technique of in vitro fertilization by Robert G Edwards and Patrick Steptoe, was a path breaking step in control of infertility, and within the few decades, surrogacy has become socially acceptable.<sup>10</sup>

Surrogacy can be traditional, gestational and donor surrogacy. Traditional surrogacy involves the artificial insemination of the surrogate mother by using the sperm of the intended father. Gestational surrogacy, on the other hand, involves the creation of an embryo in a Petri dish and its implantation into the womb of the surrogate who carries it to the term. Lastly, in donor surrogacy there is no genetic relationship between the child and the intended parents as the surrogate is inseminated with the sperm, not of the intended father, but of an outside donor. Biological<sup>11</sup> and

<sup>4</sup> In India, it is estimated that the number of births through surrogacy doubled between 2003-2006 and estimates range from 100-290 each year, see Kritivas Mukherjee, "Rent-a-Womb in India Fuels Surrogate Motherhood Debate, REUTERS, available at: [www.reuters.com/article/latestCrisis/idUSDEL298735](http://www.reuters.com/article/latestCrisis/idUSDEL298735)

<sup>5</sup> Anil Malhotra, "Business of Babies", The Tribune, 14th December, 2008

<sup>6</sup> Surrogacy cases have been reported from various regions in India but one area that appears to be over-represented is Anand district in the western state of Gujarat, Available at: <http://www.dailymail.co.uk/news/article-492733/India-takes-outsourcing-new-level-women-rent-wombs-foreigners.html>

<sup>7</sup> "India Nurtures Business of Surrogate Motherhood", The New York Times, 10th March, 2008

<sup>8</sup> Available at: [http://randommiaeducation.blogspot.in/2014\\_05\\_01\\_archive.html](http://randommiaeducation.blogspot.in/2014_05_01_archive.html)

<sup>9</sup> Available at: [http://www.jurconsult.ru/publications/ethical\\_dilemmas/13\\_Legal%20control%20of%20surrogacy%20-%20international%20perspectives.pdf](http://www.jurconsult.ru/publications/ethical_dilemmas/13_Legal%20control%20of%20surrogacy%20-%20international%20perspectives.pdf)

<sup>10</sup> Available at: <http://www.delhi-ivf.com>

<sup>11</sup> From the biological point of view, surrogacy is of two types; first, Full surrogacy/Gestational surrogacy or Host method and second, Half surrogacy/Traditional surrogacy or Straight method.



sociological<sup>12</sup> are the two perspectives of surrogacy.<sup>13</sup> To deal with various legal, ethical and human rights issues, there is an urgent need of changes in municipal laws. This change may not only provide legal status to surrogacy agreements, but also empowers administrators to deal with issues; protects interest of the various persons concerned with the process of surrogacy and makes arrangements for remedy in case of breach of contract.

## **SURROGACY: INTERNATIONAL PERSPECTIVE**

The right to procreate should not depend on gender, family, or sexuality. It is a natural, inalienable right of any person to provide intergenerational continuity and further evolution of *homo sapiens*. One of the main principles of modern bioethics is that the interests and welfare of the individual should have priority over the sole interest of science or society.<sup>14</sup> Refusing to allow childless people to become parents (when they can have children through surrogacy) means refusing to treat them equally and is a classic example of selective discrimination. People who desperately want to become parents are excluded from reproduction and deprived of existing reproductive technologies.

Regulation of surrogacy, in modern times, varies greatly from one country to another, with two main types. In the first one, surrogacy is regulated by legislation. In the second one, it is not mentioned in laws and thus is not regulated. In United Kingdom, it is a criminal offense to advertise that one is willing to enter into a surrogacy arrangement. Based on the recommendations of Warnock Committee,<sup>15</sup> the Surrogacy Arrangements Act, 1985 was brought in to force.<sup>16</sup> Under this Act, surrogacy arrangements are made legal and the Act prohibits advertising and other aspects of commercial surrogacy.<sup>17</sup>

United States of America is a unique country with a mixed legal landscape concerning surrogacy.<sup>18</sup> Seventeen States and Washington, DC, have laws that regulate surrogacy. Ten states have laws allowing surrogacy under certain circumstances. Six of those states limit the compensation for surrogacy arrangements; the other four require account approval. Three states allow the surrogate to change her mind or challenge the contract and the other six require prescreening for the surrogates and the prospective parents. In Australia, the surrogate mother is considered by the law to be the legal mother of the child and any surrogacy agreement giving custody to others is void and unenforceable in the court of law. Usually couples who make surrogacy arrangements must adopt the child rather than being recognized as birth parents, particularly if the surrogate mother is married.<sup>19</sup>

In Russia, liberal legislation makes attraction for reproductive tourists. Costs for ART

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<sup>12</sup> From the sociological perspective, there are two kinds of surrogacy; first, Altruistic surrogacy/Non commercial surrogacy and second Commercial surrogacy.

<sup>13</sup> Available at: <http://lifethroughsurrogacy.com/SurrogacyTypes.html>

<sup>14</sup> The Universal Declaration on Bioethics and Human Rights, 2005, Article 3.2

<sup>15</sup> The Report of the Committee of Inquiry in to Human Fertilization and Embryology, Her Majesty's Stationery Office, 1984

<sup>16</sup> Available at: <http://www.legislation.gov.uk/ukpga/1985/49>

<sup>17</sup> Available at: <http://www.jiarm.com/MAY2014/paper12962.pdf>

<sup>18</sup> Aarons J., "Future Choices: Assisted Reproductive Technologies and the Law", Center for American Progress, 2007, Available at: <http://www.americanprogress.org>

<sup>19</sup> Available at: [http://ivfsurrogacy.in/Surrogacy/Legaleties\\_in\\_your\\_country.php](http://ivfsurrogacy.in/Surrogacy/Legaleties_in_your_country.php)

are also lower in Russia than in the European Union, and foreigners have the same rights for assisted reproduction as Russian citizens. If delivery in a gestational surrogacy program takes place in Russia, commissioning parents may obtain a Russian birth certificate with both their names on it.<sup>20</sup> In France, surrogacy is not mentioned directly in the law per se, but since 1994, according to Article 16 and 17 of the Civil Code, any convention related to procreation or gestation for another person is null and void. Furthermore, in terms of criminal penalty, any person participating in a surrogacy program (whether it consists of artificial insemination or a donor's embryo transfer) commits a crime punishable by a three year imprisonment. In accordance with a law passed in 1989 about adoption intermediaries, the same measures are implemented for those who arrange contacts with a surrogate mother (Articles 13 and 14b). However, neither the surrogate mother nor the clients bear any responsibility.<sup>21</sup>

In Germany<sup>22</sup>, the restrictive law for the protection of embryos strictly prohibits artificial insemination of a woman who is willing to hand the child over to commissioning parents upon birth in accordance with a surrogacy agreement. Criminal sanctions are applied for noncompliance, ranging from heavy fines to imprisonment.<sup>23</sup> In China, surrogacy is a grey area, but a report by the Southern Metropolis Weekly estimated that around 25,000 surrogate children have been born in China. Prospective surrogate mothers are openly recruited via the Internet and are paid 50,000-100,000 Yuan.<sup>24</sup> In Italy, the law<sup>25</sup> on Norms in the Area of Medically Assisted Reproduction completely bans heterogonous (third party) reproduction, including surrogacy. The use of medically assisted procreation techniques is limited to cases of sterility or infertility established and certified through a medical act within officially married heterosexual couples only, banning from the IVF clinic heterosexual couples just living together as well as single women and men who, though fertile, for such or another reason would like to use services of reproduction experts to become parents.

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In Israel, in March 1996, the government legalized gestational surrogacy under the Embryo Carrying Agreements Law. Surrogacy arrangements are permitted only to Israeli citizens who share the same religion.<sup>26</sup> According to the law, the commissioning father must supply the sperm and the ovum must come from either the commissioning mother or from a donor who is not the surrogate.<sup>27</sup> Greece Law

<sup>20</sup> Svitnev K., "Legal Regulation of Assisted Reproduction Treatment in Russia", 20 *Reprod BioMed Online*, 2010, pp.892-894

<sup>21</sup> Available at: [http://www.lider-lab.sssup.it/lider/attachments/011\\_LoFP%20Contract%2015April2010.pdf](http://www.lider-lab.sssup.it/lider/attachments/011_LoFP%20Contract%2015April2010.pdf)

<sup>22</sup> Schreiber H., "The Legal Situation Regarding Assisted Reproduction in Germany", 20 *Reprod BioMed Online*, 2010, pp.892-894

<sup>23</sup> Available at: [http://www.alertnet.org/thenews/newsdesk/HKG3611\\_96.htm](http://www.alertnet.org/thenews/newsdesk/HKG3611_96.htm)

<sup>24</sup> According to the exchange rate of 6.5 Yuan to U.S. Dollar, it is US\$7,657-\$15,314

<sup>25</sup> Available at: [www.jurconsult.ru/.../13\\_Legal%20control%20of%20surrogacy%20-%2](http://www.jurconsult.ru/.../13_Legal%20control%20of%20surrogacy%20-%2)

<sup>26</sup> Siegel-Itzkovich J. "Israel Legalizes Surrogate Motherhood", *BMJ* 312, pp.729-730

<sup>27</sup> Available at: [http://en.wikipedia.org/wiki/Surrogacy\\_laws\\_by\\_country](http://en.wikipedia.org/wiki/Surrogacy_laws_by_country)



allows gestational surrogacy via a court order or ruling issued before the embryo transfer provided there is a written agreement that excludes any financial agreement between the involved parties (the prospective parents and the surrogate mother). If the latter is married, the written consent of her husband is required, and she must also provide a medical attestation of her inability to gestate the child. In addition, both the prospective parent and the surrogate mother must reside in Greece.<sup>28</sup>

## **SURROGACY: INDIAN PERSPECTIVE**

Surrogacy, in India, is regulated only by the ICMR Guidelines, 2006, which was issued on the basis of report of the Law Commission of India.

### ***Report of the Law Commission of India on Surrogacy***

The 228th Report of the Law Commission of India<sup>29</sup> emphasizes the need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy.<sup>30</sup> The report recommended that banning surrogacy completely, on vague moral grounds would be futile. Since surrogacy is a complex concept, the law must be equally comprehensive in defending human liberty and distributing positive entitlements. Legislation should facilitate the correct or ethical use of ART technology for the benefit of childless couples. The situation in which India finds itself necessitates the abandonment of an insular approach to surrogacy, legalization of altruistic surrogacy and a ban on commercial surrogacy. It maintains that surrogacy agreements be governed by a contract concluded between the parties. This agreement will include the consent of surrogate mother, her husband and other family members to bear the child, her willingness to hand over the child immediately after birth. It should include details of the reimbursement of medical expenses and also include life insurance cover for the surrogate mother. Surrogacy agreements in India should be legally binding for all parties, under the existing Indian Contract Act. The right to privacy for both gamete donors and surrogates must be protected.<sup>31</sup> The Report has come largely in support of the Surrogacy in India, but it is lacking the legal hold on many aspects such as strengthening laws regarding commercializing surrogacy. India currently is in heavy need of laws which can regulate and can have a check on this activity.

### ***Indian Council for Medical Research (ICMR) Guidelines***<sup>32</sup>

To address issues relating to surrogate motherhood and to regulate surrogacy arrangements, the Government of India took certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines were issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India.<sup>33</sup> The main drawback of the

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<sup>28</sup> Available at: <http://books.google.co.in/books?isbn=3110240211>

<sup>29</sup> Available at: <http://lawcommissionofindia.nic.in/reports/report228.pdf>

<sup>30</sup> Available at: [www.lawcommissionofindia.com](http://www.lawcommissionofindia.com)

<sup>31</sup> Ibid.

<sup>32</sup> The Indian Council of Medical Research (ICMR) is the apex body in India for the planning, formulation, coordination, implementation and promotion of biomedical research and is one of the oldest medical research bodies in the world. India currently has no laws regulating assisted reproductive technologies. In 2000, the ICMR released a Statement of Specific Principles for Assisted Reproductive Technologies. Available at: [http://www.icmr.nic.in/ethical\\_guidelines.pdf](http://www.icmr.nic.in/ethical_guidelines.pdf)

<sup>33</sup> Available at: [http://www.icmr.nic.in/ethical\\_guidelines.pdf](http://www.icmr.nic.in/ethical_guidelines.pdf)

Guidelines was its non-binding nature. These are merely guidelines and have very little or no legal implications.<sup>34</sup> Guidelines gave a model draft for surrogacy contracts. However, whether a contract of surrogacy will be held as 'legal contract' or not, was not clear. If a child is born handicapped, the parents may back out from accepting it. In such cases, the surrogate mother may have to bear the brunt, for no fault of her, as that is not her genes. And if she also backs out, what will be the rights of the child? Guidelines were silent about it. What will be the fate of the child, if during this duration both parents decide to separate and go their own ways? If both deny accepting the child, what will happen to it? In the ICMR guidelines, it was mentioned that the age of surrogate mothers should be between 21-45 years.<sup>35</sup> But that does not prevent any minor from becoming a surrogate.

## SURROGACY IN INDIA: LEGAL ISSUES

Till now, in India there is no legal provision dealing directly with surrogacy to protect the rights and interests of the surrogate mother, the child, or the commissioning parents. Nonetheless, no Indian law expressly prohibits surrogacy.<sup>36</sup> The surrogacy agreement under Indian Contract Act, 1872 is not enforceable because it is against public policy. By the drafting of the Assisted Reproductive Technology (Regulation) Bill, 2010 the surrogacy treatment is enforceable, but this bill is still pending.<sup>37</sup> In such a situation, several legal issues arise:

- a) Who will be the Legal Mother:** In India, the surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents.<sup>38</sup> *Baby Manji Yamada*<sup>39</sup> was the first case where identity certificate was issued by the Indian government to a surrogate child born in India. The certificate did not mention nationality, mother's name or religion and it was valid only for Japan. This decision is growing public concern in India that there should be a legislation which deals with problem relating to commercial surrogacy. In *Jan Balaz v. Anand Municipality*,<sup>40</sup> Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district.<sup>41</sup> The Assisted Reproductive Technologies (Regulation) Bill, 2010<sup>42</sup> takes care of this issue. This bill deals with the parenthood of child very well but is still to be converted into Act.

<sup>34</sup> The Baby Manji Case has exposed the lacuna that exists in the current legal framework in India regarding surrogacy. In this case, the intending father was debarred from taking the custody of the child as there was no law governing the effect of surrogacy in India.

<sup>35</sup> Available at: [http://www.icmr.nic.in/ethical\\_guidelines.pdf](http://www.icmr.nic.in/ethical_guidelines.pdf)

<sup>36</sup> The concept of surrogacy raises two pertinent questions; firstly, whether surrogacy is legal, and secondly, whether a baby born out of surrogacy is legitimate one. Article 16.1 of the Universal Declaration of the Human Rights, 1948 says, inter alia, that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family". For details see J.P. Rai, "Regulation of Surrogacy in India: Need of the Day", 7(7) Chotanagpur Law Journal, 2013-14, at 105

<sup>37</sup> Available at: [www.legalserviceindia.com](http://www.legalserviceindia.com)

<sup>38</sup> According to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics, evolved in 2005 by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences.

<sup>39</sup> *Baby Manji Yamada v. Union of India* JT 2008 (II) SC 150

<sup>40</sup> 2010 (2) All MH Law Reporter, 14 Gujarat HC

<sup>41</sup> *Ibid.*

<sup>42</sup> The ART (Regulation) Bill, 2010, Clause 35



- b) Nationality of Child Born through Surrogacy:** If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy in India and a child born as a consequence, what shall be the nationality of the child? The Assisted Reproductive Technology (Regulation) Bill, 2010 Clause 35(8) provides that the child even though born in India, shall not be an Indian citizen. The birth certificate of a child born 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.<sup>43</sup>
- c) Custodial Parent of a Surrogate Child, in case of Gay Parents:** In the case of *Baby Manji Yamada*<sup>44</sup>, the court held that the intended parent may be a single male or a male homosexual couples. So in India, gay parents can be considered as a parent of a surrogate child. In Clause 35(4) of the ART (Regulation) Bill, 2010 the expression 'unmarried couples'<sup>45</sup> has been used, recognizing heterosexual relationships.
- d) Custody of Child if Born by Surrogate Mother:** Assuming that most surrogate arrangement are completed without conflict, parental rights should vest with the initiating parents. Problems arise where the surrogate decides to keep the child and refuse to relinquish the child to the couple especially, if she also happens to be the genetic mother. It is argued that section 13(1) of Hindu Minority and Guardianship Act 1956 and Section 17(1) of the Guardians and Wards Act, 1890 makes it clear that in declaring a person as the guardian, the best interests of the minor are to be a paramount consideration. ART (Regulation) Bill, 2010 considering this issue provides that the birth certificate issued in respect of a baby born through surrogacy shall bear the name of individual who commissioned the surrogacy as parents.<sup>46</sup> It shows that the custody of surrogate child shall be with the commissioned parents.
- e) Case of physically and mentally retarded Surrogate Child:** Earlier, there was no law to regulate the situation if surrogate child born physically and mentally retarded. The person or persons who have availed of the services of a surrogate mother should 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 should constitute an offence under this Act. The Bill takes care of this issue.<sup>47</sup>
- f) Status of Divorced Biological Parents in Respect of the Custody of Child:** In *Baby Manji Yamada*<sup>48</sup>, a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. There were matrimonial discord between the biological parents and they refused to accept the child. Then the question arose about the custody of child. Here the Supreme Court did not decide the issue relating to custody of child to the divorced parents. If a commissioning couple opts for divorce after going for surrogacy but before the child is born than still in that case also the child should be considered to as the legitimate child of the couple.<sup>49</sup>

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<sup>43</sup> Id., Clause 35(7)

<sup>44</sup> JT 2008 (II) SC 150

<sup>45</sup> Supra note 42, Clause 35(4)

<sup>46</sup> Id., Clause 35(10)

<sup>47</sup> Id., Clause 35(11)

<sup>48</sup> JT 2008 (II) SC 150

<sup>49</sup> Supra note 42, Clause 35(4)

- g) Confidentiality of Information Regarding Surrogacy:** All the information regarding surrogate mother should be kept confidential.<sup>50</sup> No assisted reproductive technology clinic should provide information on or about surrogate mothers or potential surrogate mothers to any person and any assisted reproductive technology clinic acting in contravention of this provision should be deemed to have committed an offence.<sup>51</sup>
- h) Rights of the Child Born in Surrogacy:** A child, who has attained the age of 18 years, must have the right to ask for any information relating to the donor or surrogate mother except personal identification.<sup>52</sup> Personal identification of the genetic parent or parents or surrogate mother must be released only in case of life threatening medical conditions which require physical testing or samples of the genetic parents or parents or surrogate mother.<sup>53</sup>
- i) Enforceability of Surrogate Agreement:** Traditionally, the contract entered by the surrogate mother is not free contract because surrogate mother enters into contract only for money consideration so it is not free contract.<sup>54</sup> The contract entered by the mother is also against the public policy and immoral.<sup>55</sup> If surrogate mother denies fulfilling the contract, it is not enforceable by court of law.
- Now, the ART (Regulation) Bill, 2010 acknowledges the concept of "surrogacy agreements"<sup>56</sup> and the fact that surrogate mother is entitled for monetary compensation<sup>57</sup> apart from the expenses borne by her for carrying on the pregnancy.<sup>58</sup> Now, this is a step in the right direction because merely turning a blind eye towards these kinds of arrangements won't serve the purpose. Also, the draft Bill states that the surrogate agreements shall be legally enforceable in the court of law.<sup>59</sup> This will ensure that these surrogacy agreements are treated at par with other standard contracts and the principles of the Indian Contract Act, 1872 and any other laws will be applicable over these kinds of agreements. So this will ensure better regulation of these agreements by the authorities and this will also ensure the protection of rights of surrogate mother.
- j) Appointment of Legal Guardian by the Foreign Couples coming to India for Surrogacy:** Ensuring arrangement, for appointment of a legal guardian, will

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<sup>50</sup> Id., Section 34(12)

<sup>51</sup> Id., Sections 34(14) and (15)

<sup>52</sup> Id., Clause 36(1)

<sup>53</sup> Id., Clause 36(3)

<sup>54</sup> The Indian Contract Act, 1872, Section 14

<sup>55</sup> Id., Section 23

<sup>56</sup> In Section 2(cc) of the draft Bill, Surrogacy agreement has been defined as a contract between the persons availing of Assisted Reproductive Technology and the surrogate mother.

<sup>57</sup> Section 34(3) of the Bill states that she is entitled for monetary compensation.

<sup>58</sup> Section 34(2) of the Bill states that all expenses, including those related to insurance, 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.

<sup>59</sup> Section 34(1) of the Bill states as follows:- 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.



ensure that unfortunate incidents such as the *Baby Manaji's* case are not repeated in India again. When a foreign couple comes to India for surrogate agreement to avail the services of the surrogate mother, they should appoint a legal guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy,<sup>60</sup> till the child/children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the ART clinic through proper documentation that the party would be able to take the child/children born through surrogacy, including where the embryo was consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence as the case may be.<sup>61</sup> For the first time, this kind of provision is going to be introduced in India. Certainly, one can say that the authorities have considered the fact that majority of the commercial surrogate agreements involve a foreign party.

- k) Screening of Surrogate Mother:** The surrogate mother should be properly screened so as to ensure the suitability regarding her age<sup>62</sup> and health<sup>63</sup>. This step is to ensure that the surrogate is of minimum age preventing her exploitation. And also by screening her for various infectious diseases, this will ensure that the baby doesn't inherit any one of the disease which is affecting the surrogate mother.
- l) Certificate to the Surrogate Mother by Persons availing Services:** Still further, the surrogate mother should be issued a certificate by the persons who have availed of her services acknowledging the fact that she has acted as a surrogate for them.<sup>64</sup> In a nutshell, after going through these prominent provisions of the ART (Regulation) Bill, 2010 regarding commercial surrogacy agreements and the rights of surrogate mother and child, one can definitely say that for the first time, various issues which were raised from time to time have been acknowledged and discussed in detail in the Bill. But still it remains to be seen that how these provisions are adopted in actuality by the legislature and even more important is the fact that how far these provisions will be enforced in letter and spirit.

## SURROGACY IN INDIA: ETHICAL ISSUES

The practice of surrogacy arouses positive as well as negative emotions ranging from mild taste to revulsion. Some say there is nothing wrong, in principle, with surrogate motherhood as it is a way of helping infertile women to fulfill a fundamental human longing. Those who believe that surrogacy is ethically wrong argue that surrogacy exploits women, particularly those from lower economic classes, thus constituting a new form of 'slavery'. Others contend that it is dehumanizing babies, amounting to a

<sup>60</sup> Section 34(19) of the Bill

<sup>61</sup> Ibid.

<sup>62</sup> Section 34(5) of the Bill states that no woman less than 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.

<sup>63</sup> Section 34(6) of the Bill states that any woman seeking or agreeing to act as a surrogate mother 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 must declare in writing that she has not received a blood transfusion or a blood product in the last six months.

<sup>64</sup> Section 34(17) of the Bill Draft

new variety of 'baby selling' and that surrogacy contracts are "against public policy". Major moral and ethical issues involved with surrogacy, on which the public policy considerations are grounded, are:

- a) **Considering Women as Commodity:** It is said that surrogate arrangements may lead to considering women as a commodity and devaluation of both the gestational and expecting mother.<sup>65</sup> Surrogacy arrangements, even dressed up in altruistic terms, constitute bargain and exchange over the incidents of parenthood and allow society to view a woman's reproductive abilities, not only as a biological source of procreation, but also in a contractual and perhaps commercial nature.<sup>66</sup> No topic related to surrogate motherhood is more contentious than compensation of the surrogate mother by the intended parents. Hence, the requirement of the day is to take care of this issue.
- b) **Baby Selling:** The great majority of assisted reproduction is centered on private health care and, even with in a public health service, there is indirect payment for obstetric expertise. People who express a strong distaste for surrogate motherhood are quick to label it 'baby-selling'<sup>67</sup>. This aspect of surrogacy must be regulated by way of public awareness and suitable provisions, lest the entire purpose of the coming legislation will fail.
- c) **Exploitation of Women:** Some critics of surrogate motherhood opposes it as exploitative of women. This makes it to appear that surrogacy is unethical because of the type of practice it is namely a form of exploitation. It is always going to be poor women who have the babies and rich women who get them. To offer money to a poor, unemployed woman to bear the child of another woman is probably to offer her an undue inducement. It is an offer that may be difficult for a person of little financial means to refuse and would, in that case, be coercive. Exploitation of women in an Exploitation of women in any form should be prevented.

## SURROGACY IN INDIA: HUMAN RIGHTS ISSUES

Assisted reproductive technologies have raised a number of human rights issues, including right to dignity, individual autonomy, right to know, etc. Human dignity is an engine of individual empowerment, reinforcing individual autonomy and the right to self determination.<sup>68</sup> The autonomy of the individual includes the dignity and worth as a human person and the individual rights of freedom of choice. However, the claim to respect for private life into contact with public life or into close connection with other protected interests, the weighing of which requires legal regulation and is of some import to the acceptance or expansion of modern birth technology.<sup>69</sup> The contest between public and private interests or individual and group rights, sometimes creates a lot of confusion in legal field.

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<sup>65</sup> ichelle Pierce-Gealy, "Are You My Mother? Ohio's Crazy-Making Baby-Making Produces a New Definition of Mother," 28 Akron L. Rev, 1995, at 535, available at: <https://www.uakron.edu/dotAsset/726634.pdf>

<sup>66</sup> B. Bartlett, "Re-Expressing Parenthood", 98 YALE L.J, 1988, at 332 &333

<sup>67</sup> JK Mason, et al, Law and Medical Ethics, Butterworths Lexis Nexis, 2002, at 106

<sup>68</sup> Timothy Caulfield & Roger Brownsword, "Human Dignity: A Guide to Policy Making in the Biotechnology Era?" 7 Nature Review/Genetics, 2006, at 72

<sup>69</sup> Bartha Maria Knoppers, "Modern Birth Technology and Human Rights", 33 The American Journal of Comparative Law, 1985 at 24



Artificial insemination is the insertion of sperm into a woman's vagina to cause pregnancy using a method other than sexual intercourse. Where the male genetic material of the husband is introduced artificially into the woman's body, it is known as "Artificial Insemination Homologous" or Artificial Insemination Husband" (AIH). Where the genetic material is obtained from male other than the woman's husband, it is called "Artificial Insemination Donor (AID)". From the human rights point of view AID generates much heated debates.

One of the most problematic human rights aspects relating to Artificial Insemination Donor (AID) is concerned with the anonymity and non-anonymity of gamete donor. In the age of human rights, there remains a great conflict between the child's right to know and parent's rights not to tell the genetic origin.<sup>70</sup> Many societies in the present time have begun to place greater emphasis on the rights of child. Article 7 of the UN Convention on the Rights of Child, 1989 can be seen as being of fundamental importance which provides the right to know one's parents. In the context of donor anonymity, it has been expressed as the child's right to know the identity of gamete donor.

There may be arguments that it is not in the best interest of child to tell about the gamete donation because there is a fear that telling a child how they are conceived would cause severe social and psychological problems. A further reason for not telling the child is that parents should have a right to privacy and if they keep such information confidential that is their prerogative. Balancing of these competing interests is a difficult matter that requires a full debate and consequent, legislative attempt to create a balance between these conflicting interests.

Surrogate arrangements have created a lot of confusion in legal circle, posing new challenges. Questions posed by reproductive technologies challenge the most basic tenets of family law. The bifurcated role of woman in surrogate arrangements is prompting renewed assessment of the meaning of motherhood and the designation of maternal rights.<sup>71</sup> Once the embryo is implanted in the womb of the surrogate the process enters a realm of privacy which entails substantial personal freedom for gestating mother. The inviolability of this personal realm prohibits enforcement of the surrogate contract through specific performances during gestation. Damage remedies against the surrogate mother for non-performance must be severely limited to preserve the fundamental rights of privacy and procreative autonomy. The terms of the contract should save primarily as indications of the parties' intent including a willingness on the part of the surrogate mother to abide by the terms. However, punishing the surrogate mother for inadequate birth is misplaced in the traditional scheme of maternity, which accords pregnant woman the freedom to lead their life without fear of sanction.<sup>72</sup> A surrogate mother is no more a machine and no less a human, should not be held to a higher standard of procreation than a natural mother. The surrogate mother cannot be made to bear the burden of human procreative fallibility<sup>73</sup>. This all poses a great challenge for the policy makers.

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<sup>70</sup> For details see Lucy Frith, "Gamete Donation and Anonymity", 16 Human Reproduction, 2001, at 819, available at: [humrep.oxfordjournals.org/content/16/5/818.long](http://humrep.oxfordjournals.org/content/16/5/818.long)

<sup>71</sup> Andres E. Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies", 96 The Yale Law Journal, 1986, at 186

<sup>72</sup> Id., at 202-03

<sup>73</sup> Ibid.

## CONCLUDING OBSERVATIONS

The improvement and regulation of the system of surrogacy would be beneficial to potential parties and society as a whole. Regulation is superior to either the prohibition or even criminalization of surrogacy, actions which would be of questionable constitutionality<sup>74</sup> and in all likelihood drive surrogacy underground. Carefully drafted legislation can minimize the potentially exploitative aspects of surrogacy and protect the individuals who choose it as a reproductive option. There cannot be a law to arrest the development of science and technology but there can be a law to prevent misuse of the same and channelize its use in proper direction. Science is bound to progress. Medical advancements cannot be prevented for the sake of societal non-acceptance and legal inadequacies. The cause for societal non-acceptance should be sorted out and inadequacies of law should be identified. The moral and ethical issues eternally ebb and flow in the tides of medical and technological advancements and technological advancement and a good law should have ethical foundation and morality is ultimately a concern of subjective analysis. We have ICMR guidelines, but it is ineffective and insufficient to tackle and regulate the challenges emerging out of surrogacy in India.

Because the assisted reproduction practice is regulated primarily by non-enforceable guidelines, arbitrary procedures regulate them. As surrogate arrangements have become normal and routine course, the legislature should pass clear legislation governing surrogacy. People view their procreative rights as sacrosanct: too important to be left to the unpredictable rulings of courts and/or the sometimes arbitrary policies of infertility clinics and assisted reproduction centers. Developing ideal laws to govern surrogate parenting arrangements will be no easy matter. In order to have effective regulation of surrogacy in India, the ART (Regulation) Bill, 2010 should be enacted with provisions expressly authorizing and regulating assisted reproductive technology and commercial surrogacy arrangements with certain limitations.

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<sup>74</sup> Larry Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements", in Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy*, 1990 pp.3-7