

**SOCIO - LEGAL ASPECTS OF SURROGACY IN INDIA<sup>1</sup>**Y.F. Jayakumar<sup>2</sup>**I. Introduction**

The case of *Baby Manji Yamada v. Union of India*<sup>3</sup> that came before the Supreme Court of India has attracted world-wide attention and has thrown up complex legal issues concerning surrogacy. The commissioned parents of baby Manji, Dr. Yuki Yamada (mother) and Dr. (Mr.) Ikufumi Yamada (father) came to India in 2007 and had chosen a surrogate mother in the town of Anand in the State of Gujarat and a surrogacy agreement was entered into between commissioned parents on one side and the surrogate mother on the other side. It is reported that the sperm of Dr. Ikufumi Yamada and a donor egg were utilised for the fertilization process. The embryo was implanted in the surrogate mother in a hospital at Anand and thereafter the commissioned parents of baby Manji left India. Subsequently, it is reported that matrimonial discord developed between the commissioned parents and they separated. Baby Manji was born on 25<sup>th</sup> July, 2008 in the hospital at Anand. But both Dr. Yuki Yamada and the surrogate mother refused to take custody of the baby. Dr. Ikufumi Yamada was keen to take custody of the baby and came to India along with his mother Emiko Yamada and consequently the child was kept in their custody. But the Japanese embassy in New Delhi refused to issue a passport to Manji saying that since Manji was born in India, she became an Indian citizen and therefore needed an Indian passport and a no-objection certificate to leave the country. Under Indian laws, an infant's passport has to be linked to the mother's and this became difficult since Yuki and the surrogate mother refused to take custody of the baby.

On 3<sup>rd</sup> August, 2008 the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat and she was being provided with much needed care including breast-feeding by a woman. Dr. Ifukumi Yamada had to return to Japan due to expiration of his visa. The Municipality at Anand issued a Birth Certificate indicating the name of the genetic father, Dr. Ikufumi Yamada.

A Writ Petition was filed in the High Court of Rajasthan by SATYA

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  - 3 2008(3) LS 194 (SC); *Supreme* 2008(7) P 287; *JT* 2008(11) P 150; *AIR* (SCW) 2008 P 6964.

an NGO requesting the court to issue a Writ of Habeas Corpus to produce the child before the Rajasthan High Court. The contention of SATYA was that there is no law governing surrogacy in India and in the name of surrogacy lot of irregularities were being committed. Further, it was contended that surrogacy is being misused and turned into a money making racket. Therefore, it was prayed that the Union of India should enact stringent laws relating to surrogacy. Accordingly, a direction was given by the Rajasthan High Court to the Rajasthan Police that the baby be produced before it within four weeks and sent show-cause notices to the Federal and State Governments. Emiko Yamada then moved the Supreme Court of India on August 13, 2008 petitioning it to intervene.

The Supreme Court granted custody of baby Manji to its grandmother, i.e. Emiko Yamada, and issued notice to the Union of India and sought the response from the Indian Council for Medical Research (ICMR), since Yamada's Counsel contended that National Guidelines for Accreditation Supervision and Regulation of ART Clinics in India, 2005 considered the baby as a legitimate child of the biological father. The court also issued a notice to SATYA and impleaded it as the third party.

The Supreme Court observed that "surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but handover to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them"<sup>4</sup>. The case was disposed of with a direction that if any person has grievance, it can be ventilated before the Commission constituted under the Commissions for Protection of Children Rights Act, 2005<sup>5</sup>. Subsequently, the Commission was approached by the grandmother of the child for permission to take baby Manji to Japan on November 1, 2008.

Baby Manji had been unable to leave India after her birth because she held neither an Indian nor a Japanese passport. The issue was resolved after the Japanese Government issued a one-year visa to her on humanitarian grounds. The Japanese Government had issued the visa after the Indian Government had granted the baby a travel certificate in line with a Supreme

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4 Ibid, Para 5

5 The Act, 2005 under Chapter III conferred number of powers and functions to the Commission to safe guard the interest of the child particularly distress, marginalized, children conflict with law, Juveniles, children without family, children affected terrorism, communal violence, riots natural disasters, domestic violence, HIV/Aids, Trafficking, Maltreatment and Pornography and Prostitution etc.

Court direction. Baby Manji finally left India and reached Japan accompanied by her grandmother Emkio Yamada ending months of uncertainty over her fate. According to the Japanese authorities, it is possible for the baby to become a naturalized Japanese citizen once a parent-child relationship was established, either by the man recognizing his paternity or through his adoption of her.

In Manji's case, though the Supreme Court could not pass any directions or guidelines regarding surrogacy, the Court did recognize the concept of surrogacy. In fact, the court emphasised the importance and the need of the institution of surrogacy in the interest of childless parents. The author strongly holds the opinion that surrogacy in the absence of appropriate laws and regulations has become a free playing field in India for unscrupulous intermediaries, who lure and exploit uneducated and poor women into surrogate motherhood. It is pertinent to note that National Guidelines for Accreditation Supervision and Regulation of ART Clinics in India, 2005 are not sufficient to address the various problems of the surrogate child, therefore an endeavour has to be made to explore the various socio-legal aspects of surrogacy in India, basing on the principle that "Welfare of the child is the Suprema Lex."

## II. Concept of Surrogacy

The dictionary meaning of the word "surrogate" is "deputy or substitute". "Surrogate mother" is virtually a "substitute mother". Some women are unable to conceive and carry a child for various reasons such as, the failure of the embryo to implant, repeated miscarriages, hysterectomy, pelvic disorder, high blood pressure, heart and liver diseases<sup>6</sup>. In such cases, the alternative is either to go for adoption or ART<sup>7</sup>.

In surrogacy a woman bears through her womb the genetic or biological child of another woman, who is unable to conceive successfully, bear for the full term and deliver the child. This is an arrangement between the two women, i.e. the childless woman and the surrogate. The surrogate voluntarily rents out her womb to carry the child for other woman with an intention of the helping the childless couple with a specific understanding to hand over the child after the delivery. The surrogate may be within the family members, relative, friend or any stranger. There are various motivated factors and reasons for surrogacy like self-fulfillment, a desire to help others, a liking to become pregnant and also for commercial purposes.

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6 Pratibha Ganesh Chavan, "Psychological and Legal aspects of Surrogate Motherhood" *AIR 2008 Journal* 103 at 104.

7 Assisted Reproductive Technology (ART) is a method in which pregnancy is caused by artificial or partially artificial means. The most commonly used ART procedures are Intrauterine Insemination (IUI), In Vitro Fertilization (IVF), Zygote Intrafallopian Transfer (GIFT), Tubal Embryo Transfer (TET), Zygote Intrafallopian Transfer (ZIFT) and Gestational Surrogacy.

Normally, the term “surrogate mother” refers to a woman who agrees to bear a child for a sterile couple. Firstly, in the case of a couple, where the wife is sterile, the child may be sought by the couple from a baby-bearer woman either by natural insemination or by artificial insemination of the latter with the sperm of the male of the couple. The woman so impregnated gives the child to the couple after it is delivered. Such a surrogate mother is described as “half surrogate mother”<sup>8</sup>. The “half surrogate mother”, who subjects herself to natural insemination or “coitus procreation”<sup>9</sup>, may be described as natural law endowed half surrogate mother; and the “half surrogate mother”, who subjects herself to artificial insemination or “non-coitus procreation” may be called the medical science endowed half surrogate. Secondly, in the case of a couple, where both the husband and the wife are impotent but not sterile, a child may be sought by the couple from a baby-bearer woman by impregnating the latter through artificial device with both sperm and ova of the couple. The mother in this case, who hands over the child to the couple, is described as “whole surrogate mother”<sup>10</sup>. Thirdly, in the case of a couple, where both husband and wife are sterile, they have to seek the help of a sperm donor. A baby-bearer woman may be artificially inseminated with donor semen and after giving birth, she may give the child to the couple as per their agreement. This is the third type of surrogate mother, who may be described as surrogate mother by artificial insemination by donor (A.I.D) or AID surrogate mother.

Thus, the modern advancement in medical science has brought three major types of surrogate mothers. They are (1) “half surrogate mother, (2) “whole surrogate mother” and (3) AID surrogate mother. The basic common factor among the three types of surrogate mothers is artificial insemination. Contemporary medical technology has made extraordinary

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8 Justice Harswarup: Surrogate Motherhood: A new Women Rights Problem: World Congress on Law and Medicine, New Delhi, 1985, P 426.

9 Surrogate Motherhood is not a new concept. In ancient time it was practiced in somewhat a rudimentary form. In Primitive society certain kinds of sons, like (i) *Kshetraja* or the son begotten on the wife by another, (ii) *Gudaja* or the son born to the wife by secret intercourse with another, (iii) *Nishada* or the son by a *Sudra* Woman, (iv) *Parasava* or the son by a *Sudra* Woman and (v) *Parasava* or the son by a concubine, who were recognized as lawfully belonging to a Hindu, actually conveyed the idea of surrogacy; and the other kinds of sons like (i) *Kritrima* or the sons made and (ii) *Krita* or the son bought, who were also recognized as lawfully belonging to a Hindus, conveyed the then existing concept of surrogate motherhood {See N.R. Raghavachary’s Hindu Law, Principles and Precepts, 8<sup>th</sup> Edn. 1987, p.93} Practice of this concept could also be discerned in the Biblical story relating to Abraham. It is said that when Abraham and his wife Sarah failed to beget a child for a long time, he, with the consent of his wife, begot a son by their servant maid Hagar.

10 *Supra note 6* at p 425

advances in reproductive technology responding to the desire of men to have children. It is pertinent to note that there is a proximate relationship between science, law and society. Science cannot tell us how to live our lives. It is silent on ethical and moral issues. But the society as a whole must frame and enforce moral and legal principles to regulate the human conduct. "The dilemmas and puzzles of recent development in health, law and ethics present novel challenges to the organs of democracy which they find it difficult to solve<sup>11</sup>. Lawyers do not know the implications of the emerging science and scientists are not fully posted with the discipline that human rights impose on governance. So it requires interdisciplinary discussions and debates to have an integrated look at the problem. There lies a great responsibility on legal scientists to structure the compromises which man will make in adopting the new technologies<sup>12</sup>.

## II. Strange Instances of Surrogacy

India's first gestational surrogacy took place in 1994 in Chennai<sup>13</sup>. In 1997, a woman from Chandigarh, India agreed to carry a child for 50,000 rupees in order to obtain medical treatment for her paralyzed husband<sup>14</sup>. In 1999, an Indian newspaper carried the story of a villager in Gujarat who served as a surrogate for a German couple<sup>15</sup>. In India, it is estimated that the number of births through surrogacy doubled between 2003-2006<sup>16</sup> and estimates range from 100-290 each year<sup>17</sup> to as many as 3,000 in the last decade<sup>18</sup>.

11 Michael Kirby J., "Health, Law and Ethics", 5 JLM. 31 (1997)

12 Kshitij Kumar Singh, "Human Genome and Human Rights": An Overview 50 *JILI* (2008) p. 80

13 Geeta Padmanabhan, 'Hope in the Test Tube', *The Hindu*, Jan 19, 2006, available at <http://www.thehindu.com/thehindu/mp2006/01/19/stories/2006100900540200.htm>.

14 Sandhya Srinivasan, Surrogacy Comes out of the Closet, *Sunday Times of India*, July 6, 1997, at 1.

15 Jyotsna Agnihotri Gupta, towards Transnational Feminisms: Some reflections and Concerns in Relation to Globalization of Reproductive Technologies, 13 *EUR. J Women's stud.* 23, 30 (2006).

16 Sudha Ramachandran, India's New Outsourcing Business – Wombs, *Asia Times* online, June 16, 2006, <http://www.atimes.com/atimes/southasia/hf16df03.html>.

17 Kritivas Mukherjee, Rent-a-womb in India Fuels Surrogate Motherhood Debate, *Reuters*, Feb. 12, 2007, available at [www.reuters.com/article/latestCrisis/idUSDEL298735](http://www.reuters.com/article/latestCrisis/idUSDEL298735) (though noting that the number of failed attempts is likely much higher); Alifiya Khan, Surrogacy is Soaring in India, *HINDUSTAN TIMES*, Sept. 18, 2008, <http://www.hindustantimes.com/storyPage/StoryPage.aspx?id=93bca0a7-e50-4c06-9552-dbebb0669833>.

18 Neeta Lal, A Labour of Love, *KHALEEJ TIMES*, Feb. 29, 2008, available at <http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/weekend/2008/February/weekendFebruary116.xml&section=weekend&col=> (reporting that Dr. Anoop Gupta, Medical Director, Delhi IVF and Fertility Research Centre, New Delhi claims he has delivered over 3,000 surrogate children since he opened his clinic in 1995).

Perhaps for the first time in India as many as 18 women from the district of Anand in Gujarat State in India) belonging to lower middle income group have come forward to be surrogate mothers for NRIs. “The amount paid to surrogate mothers ranges between Rs. 1-2 lakhs and in one exceptional case Rs.2.50 lakhs was paid by keen parents. It was noticed that a surrogate mother encouraged her three daughters and daughter-in-law also to become surrogate mothers as this would also enhance their living standards. The practice which has been established in Anand District is not only immoral but unethical for Indian standards of womanhood. The said acts will also amount to sale of children, renting a womb, making woman a machine for reproduction, commercialising surrogacy, involvement of agents for arranging surrogacy etc.

A Japanese woman in her 50s gave birth to a child she had carried for her daughter who was unable to conceive as she had her womb removed due to cancer. Japanese media said it was the first time in Japan that a woman has acted as a surrogate mother for the child of her daughter effectively delivering her grandchild<sup>19</sup>.

A woman aged 43 gave birth to her own grandchild after “lending out” her womb to her daughter and son-in-law<sup>20</sup>. This type of situation can create confusion about social roles and familial relations. In India, the status of the mother-in-law is very pious and highly respectable. Even in the present Indian society, the mother-in-law’s position remains the same.

A large number of baby farms have sprung up in Sri Lanka. The *Sunday Herald* in Australia reported this fact. According to them, some of the baby farms there were stocked with twenty or more pregnant women whose children were taken away to privately operated children’s homes where the freelance baby brokers struck deals with would-be adoptive parents. Several women from Colombo slums later claimed that there were more European customers ready to pay for them. The trade involved hotel operators, doctors, lawyers and corrupt officials who brought in foreign couples and sold babies to them and arranged for legal adoptions<sup>21</sup>.

The legal order of any country is not mere laws enacted by the State, but includes doctrines, principles, standards, values, morals, ethics and public policy etc. Article 12 of the European Convention<sup>22</sup> and Article 23(2) of

19 <http://www.ndtv.com/xtra/en/2006/10/16/a46906html>

20 <http://news.bbc.co.uk/1/hi/health/3441939.stm>

21 c.f. V.C Bindu Mol, “Some thoughts on Legal aspects of Assisted Reproduction in India”. *The Academy Law Review* (2005) Vol. 1 & 2 p180

22 The European Convention for the Production of Human Rights and Fundamental Freedoms.

International Covenants<sup>23</sup> guarantees the right of men and women of marriageable age to marry and to found family which includes wife and children. Right to found a family is an equal and inalienable right under the Universal Declaration of Human Rights<sup>24</sup>. The Indian Constitution under Article 21 provides that “no person shall be deprived of his life or personal liberty except according to procedure established by law”. The Supreme Court of India held that the right to life includes ‘right to privacy’. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters<sup>25</sup>. The Federal Supreme Court of USA recognised the Right to Privacy as a familiar fundamental right which includes right to marriage, found family, abortion, child rearing, procreation and education etc<sup>26</sup>.

### III. Surrogacy and Socio-Legal Challenges

➤ Surrogacy is the most socially complicated and controversial ART. It is not a simple arrangement; it is extremely complex. The situation can be stressful, overwhelming and intense. Patience and perseverance is a must. Both, the surrogate and the infertile couple should engage a legal counsel before entering into and signing a contract of surrogacy. It is in their best interest to know how the law addresses certain aspects of surrogacy. Disclosure of the surrogate relationship should be limited so as to avoid unwarranted scrutiny<sup>27</sup>. Surrogacy changes the natural method of conception by creating life in the laboratory. Surrogacy arrangements have different implications on different societies having distinct culture, social values, religious and social set up etc. But human rights issues relating to surrogacy arrangements have universal character. These issues can be addressed by effectuating the basic human rights through legislation. The human rights instruments should be translated in tune with the current pace of assisted reproductive technologies<sup>28</sup>.

➤ Surrogacy is changing the traditional role of parenthood. If the mother undertakes surrogacy for her daughter / mother-in-law takes for daughter in law rocking the relationship between the child and its parents, it is socially questionable. Marital status is not a pre-condition for getting child through surrogacy.

➤ The first known case in India is that of a single man, Mr. Amit Benerjee, a Chartered Accountant of Kolkata, who had a biological child by a surrogate mother. Mr. Amit Benerjee, a divorcee, was keen to have a child.

23 International Covenants on Civil and Political Rights 1966.

24 See., Article 16 of Universal Declaration of Human Rights 1948.

25 *R. Rajagopal v. State of Tamil Nadu* (1994) 6 SCC 632.

26 *Eisenstadt v. Baird* 405 U.S. 438, 453 – 54 (1972).

27 *Supra note 4* at p 107.

28 *Supra note 10* at p 77.

Therefore, Mr. Benerjee took the help of two women, one who donated the egg and the other who carried the foetus, which was fertilised in a laboratory with the sperm provided by Benerjee. Finally, Mr. Benerjee became a father, when the surrogate mother delivered the child, named Arjun Benerjee, at Ghosh Dastidar Fertility Research Institute at Kolkata on 2<sup>nd</sup> October, 2005<sup>29</sup>. Further, sometimes handing over a child to the commissioned parents for prescribed fees amounts to renting the womb or baby-selling.

➤ There is a religious and doctrinal objection to the very concept of surrogacy through ART. In India, the Hindu religion is silent on surrogacy and it does not say anything in allowing or disallowing surrogacy or ART procedures, because some of the incidents are traced in the history of India. Islam is totally against procreation by surrogacy (No historical incidents are traced). The Catholic or Anglican Church, does not accept surrogacy or ART procedure of procreation of surrogate children. Their religious leaders argue that the surrogacy is contrary to unity of marriage and dignity of creation of person.

➤ The child's right to know the parenthood is affected. In *Sutton v Diane*<sup>30</sup> Minor J sued his mother, Diane J, to find out the identity of his biological father. Minor J was born in 1989 to Ms. and Mr. J. His parents were divorced in 1995. Although both Minor J and Mr. J had assumed that Mr. J was the biological father, DNA tests after the divorce indicated that there was no biological connection between the two. Minor J sued his mother in 2006, seeking to require her to reveal the identity of his biological father. Both the trial and appellate courts refused to allow the case to proceed because of the marital presumption: the strong assumption that a child born into marriage is the legal child of the husband and wife<sup>31</sup>.

➤ Surrogate mother may develop emotional attachment of the child and may refuse to hand over the child. The Municipal Law of the country may not permit the child to cross its territory. There is a possibility of misuse of children for terrorism, prostitution, unethical genetical engineering research, besides health risk to the surrogate mother. If the child born is physically and mentally challenged, the foreign parents may avoid to receive the child. If the commissioned parents take divorce during the time of pregnancy, the question of custody of the child is also an issue. In case the foreign parents do not come back to take the child, the question of responsibility of the child shall

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29 The Time of India, 3-10-2005 and Deccan Chronicle 3-10-2005.

30 Mich. App. Lexis 754 (2007).

31 Murray Davis (2007), "Child should have Right to Know Genetic Information", Detroit Free Press (March 6), 9; Christina Stolarz (2006), "Teen Fighting to Find Real Dad", Detroit News (November 20), IB. See Naomi Cahn, "Necessary Subjects: The Need for a Mandatory National Donor Gamete Registry". *IJHL* (2008) P 8 at P 15.



arise.

➤ The possibility of engaging surrogacy in developing countries increases in view of the availability of the surrogate mothers at low cost. The commercialisation of surrogacy raises fear of black market and baby selling, breeding farms, turning impoverished women into baby producers and the possibility of selective breeding for a price. Indeed, surrogacy degrades pregnancy to a service and a baby to a product<sup>32</sup>.

➤ The Indian Constitution is a social document. The Preamble of the Constitution emphasises the dignity of the individual. Article 23(1) says that traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. Art.39 (e) and (f) state that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Therefore, baby bearing contracts on economic necessities definitely attract the constitutional provisions.

➤ The Contractual aspects of Surrogacy: Whether a surrogacy arrangement by which a woman undertakes to bear a child for a childless couple and agrees to relinquish all parental rights at the birth of the child for a payment or other consideration is void for its contravention of statutory enactments, since the contract involves bartering of human lives and also whether it infringes the public policy are problems of that baffle the law enforcing machineries<sup>33</sup>. According to Indian Contract Act, 1872, for a valid contract both the consideration and object must be lawful<sup>34</sup> and every agreement of which the object or consideration is unlawful is forbidden by law, or if it contravenes the provisions of any law or the court regards it immoral, or opposed to public policy<sup>35</sup>.

#### IV. State Apprehension about Art

The increasing demand for ART has resulted in mushrooming of infertility clinics in India. The Assisted Reproductive Technology in India is being provided by private sector only. Many of these technologies require

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32 Vinita Kacher, "The Legal Waters of Surrogate Motherhood will continue to be Murky as there are no Laws or Guidelines in India as yet", *All L.j.99 (2002)*.

33 Kusum Jain, "Surrogate Motherhood; Some Legal and Moral Problems in Bio-ethics" 25 *JILI* (1983) p 546 at 557.

34 Section 10.

35 Section 23.

enormous technical expertise and infrastructure. However, the success rate is below 30% under the best of circumstances. Moreover, it taxes the couple's endurance physically, emotionally and monetarily. Many of these clinics do not have adequate trained manpower and infrastructure facilities to deliver these highly sophisticated technologies and even services provided by some of these clinics are highly questionable. In some cases, the infertile couple are being cheated by providing relatively simple procedures and charged for complicated and expensive procedures. The procedures, wherein Round Sperm aid Nuclear Injection and Pre-implantation Genetics Diagnosis in gender selections of the embryo are used, have not been universally accepted. These issues are of great concern to the society<sup>36</sup>. Such malpractices are not unique to India but are a global phenomenon. Many countries have taken steps to prevent such aberrant occurrences. Austria, Australia, Brazil, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Israel, Italy, Japan, Korea, Mexico, the Netherlands, Norway, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan and Turkey have legislations for the practice of ART. Scientific societies in Finland, Poland, Portugal and the USA have drawn up guidelines for the practices of ART. Argentina, Egypt and the UK have both guidelines and legislation. Guidelines and/or legislation in these countries have been shown to improve the process of patient care and procedure outcomes<sup>37</sup>.

#### **V. National Guidelines for Accreditation, Supervision and Regulation of Art Clinics in INDIA – 2005**

To regulate and supervise the ART clinics, the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) have come out with National guidelines for Accreditation, Supervision and Regulation of ART Clinics in India. These Guidelines have been evolved after detailed discussion and debate by experts, practitioners of ART and public. The Guidelines in respect of surrogacy are mentioned as:

- Clinics involved in IVF AIH AID ART AND SURROGACY should be registered supervised and regulated by the States Accreditation Authority. Any information about Clients, Donors must be kept confidential.
- No treatment should be given without the written consent of the couple.
- The ART clinic must not be a party to any commercial element in donor Programmes or in gestational surrogacy.
- A surrogate mother carrying a child biologically unrelated to her

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<sup>36</sup> National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005 issued by the Ministry of Health and Family Welfare, Government of India, New Delhi 2005 p ix.

<sup>37</sup> Ibid XII.

must register as a patient in her own name.

➤ While registering, surrogate mother must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc.

➤ Surrogate mother must not use/register in the name of the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death (in whose name will the hospital certify this death?).

➤ The birth certificate shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother.

➤ All the expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy should be borne by the couple seeking surrogacy.

➤ The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value 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 relinquish in writing all parental rights concerning the offspring and vice versa.

➤ No ART procedure 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 of the Supreme Court in the case of *X – v. - Hospital Z* (1998) 8 SCC p 269 or any other relevant judgment of the Supreme Court<sup>38</sup>, or law of the country, whichever is the latest.

➤ Gametes produced by a person under the age of 21 shall not be used. The accepted age for a sperm donor shall be between 21 and 45 years

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<sup>38</sup> 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 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.

and for the donor woman between 18 and 35 years.

- Surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible / undesirable to carry a baby to term.

- Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect.

- Advertisements regarding surrogacy should not be made by ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, should rest with the couple, or a semen bank.

- A surrogate mother should not be over 45 years of age. Before accepting a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure (and put on record) 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. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.

- A prospective surrogate mother must be tested for HIV and shown to be seronegative for this virus before embryo to transfer. She must also provide a written certificate that (a) she has not had a drug intravenously administered into her through a shared syringe, (b) she has not undergone blood transfusion; and (c) she and her husband (d) to the best of her/his knowledge) has had no extramarital relationship in the last six months. (This is to ensure that the person would not come up with symptoms of HIV infection during the period of surrogacy.) The prospective surrogate mother must also declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank.

- No woman may act as a surrogate more than thrice in her lifetime.

## **VI. National Guidelines 2005 and Child Protection**

- A child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple through sexual intercourse.

- Children born through the use of donor gametes and their "adopted" parents shall have a right to available medical or genetic information about the genetic parents that may be relevant to the child's health.

➤ Children born 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 thus born will, however, be provided all other information<sup>39</sup> about the donor as and when desired by the child, when the child becomes an adult. While the couple will not be obliged to be provided the above “other” information to the child on their own, no deliberate attempt will be made by the couple or others concerned to hide this information from the child as and when asked for by the child.

In the case of a divorce during the gestation period, if the offspring is of a donor programme – be it sperm or ova – the law of the land as pertaining to a normal conception would apply.

## VII. The Draft Bill 2008

The Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 were released by the Government of India for public opinion. Draft Bill was prepared by Medical experts from ICMR and the Ministry of Health<sup>40</sup>. The Salient features of the Draft Bill comprising of:

- 1 The commissioning parties and the surrogate mother must enter into a surrogacy agreement which will be legally enforceable
- 2 Surrogates must have all expenses, including insurance expenses, incurred during pregnancy and through delivery of the child paid for by the commissioning parties.
- 3 The surrogate mother may also receive monetary compensation for agreeing to act as a surrogate
- 4 The surrogate must relinquish parental rights over the child
- 5 A woman serving as a surrogate must be in between the ages of 21 and 45 and may not serve as a surrogate for more than three live births
- 6 Commissioning parties must approach registered semen banks

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<sup>39</sup> To make the couple aware, if relevant, that a child born through ART has a right to seek information (including a copy of DNA fingerprint, if available) about his genetic parent/surrogate mother on reaching 18 years, excepting information on the name and address i.e, the individual’s personal identity of the gamete donor or the surrogate mother. The couple is not obliged to provide that information to which the child has a right, on their own to the child when he/she reaches the age of 18, but no attempt should be made by the couple to hide this information from the child if an occasion arise when this issue becomes important for the child. (3.4.8)

<sup>40</sup> See Usha Rengachary Smerdon, “The Baby Market Crossing Bodies, Crossing Borders, International Surrogacy between the United States and India”, 39 *Cumb.L.Rev.* 15

or advertise to arrange surrogate mothers; clinics are prohibited from arranging surrogates

- 7 The birth certificate for the child will bear the names of the child's parents
- 8 The commissioning parties are legally bound to accept the child regardless of any abnormality the child may have
- 9 Foreign and non-resident Indian commissioning parties must appoint a local guardian who will assume legal responsibility in caring for the surrogate
- 10 Foreign and non-resident Indian commissioning parties must provide the ART clinic with documentation that they would be able to take the child born through surrogacy outside the country
- 11 The child born of surrogacy is considered the legitimate child of the commissioning parties, even in the event of divorce
- 12 A child born of surrogacy would have the right to obtain non-identifying information about the surrogate upon attaining age 18

### **VIII. Conclusion and Suggestions**

The study reveals that, the Surrogate mother in fact voluntarily renders service to carry the child for the other woman with specific intention of helping the childless parents to fulfill their desire of parenthood, lineage and self fulfillment. In surrogacy, there are number of issues related to technological, medical, physical, moral, ethical, emotional, biological, and socio-legal etc., are involved. These aspects need a scientific investigation in an interdisciplinary approach. Though, artificial insemination or non-coital procreation is against the order of the nature, but it is a boon to the childless parents to satisfy their desire of parentage with the help of technology. The irony is that, certain unfair practices are accompanying surrogacy resulting in its misuse. In fact, it is a matter of Human Rights issue, where the interest of women and children is involved. The increasing demand for ART resulted in mushrooming of infertility clinics in India. The National Guidelines as well as the Draft Bill on ART are not in a position to solve the real socio-legal problems of surrogacy. It is submitted that,

➤ The National Guidelines on ART could not give any legal effect to enforce surrogacy agreements, since these guide lines are only recommendatory but not mandatory.

➤ There is no Scientific Data available with the Government of India pertaining to the number of ART clinics offering surrogacy to the clients both within and outside the country and facilities are available in these clinics to hold artificial reproductive technology.

- The courts in India cannot enforce surrogacy agreements since these are not enforceable by the provisions of the Indian Contract Act, 1872.
- National Guidelines are not specific and clear in respect of parentage, citizenship, custody and rights of succession of the surrogate child.
- National Guidelines are silent on certain legal issues, where the surrogate child suffers from cross-border custody disputes and immigration issues. Further, the Commissioned Parents might become subject to criminal consequences for attempting to take the child out of the country without conforming to the legal procedures.
- National Guidelines and the Draft Bill have completely ignored the welfare of the child after handing over the child to the Commissioned Parents.

### **Corrective Measures**

- There is an urgent need of national and international debate on inter-country surrogacy issues with an integrated and inter-disciplinary outlook.
- IVF, AIH, AID, ART and surrogacy clinics should be under strict supervision and control of the special machinery appointed by the State Accreditation Authority. Such machinery should be given all powers to regulate surrogacy agreements on par with Central Adoptive Resource Agency (CARA).
- Every application for surrogacy must be routed through the respective Governments, to which the Commissioned Parents belong.
- There may be cases, where a single parent, male or female, has a moral justification to go for surrogacy. A spouse who has lost his/her married partner may like to have a child through surrogacy to perpetuate the memory of the dead spouse. However, single parent surrogacy requires strict monitoring, keeping in view the best interests of the child.
- Surrogacy by AID should be banned because in this case, both the commissioned parents are sterile; therefore they have to take the help of Semen Donor and Surrogate Mother. This is a clear case, in which neither of the commissioned parents has any biological and emotional cord with the surrogate child. For such couple, the only option is, to go in for adoption.
- The Indian Draft Bill on ART 2008 needs reconsideration before it becomes the law of the land.

In conclusion, it is submitted that, the very concept of surrogacy and its wide spread prevalence in many parts of the world, poses a challenge to inventive creativity of socio-legal policy makers. Certain amount of commercialization is inevitable in the nature of the things because of the anxiety

of rich commissioned parents to have children, the readiness of the poor and needy surrogate mothers to rent their womb for monetary consideration and the role of predominantly private commercialized fertility clinics. However, while it is impossible to resist the waves of technological changes, ushered in by the concept of surrogacy, the society should adapt itself to the changes and manage the change in terms of the prevailing social values. A line of demarcation between commercial and non-commercial aspects of surrogacy should be drawn by the law-makers of the respective countries by drawing inputs from the social values prevailing in those countries. Every care should be taken to eliminate the role of touts and brokers in surrogacy cases. Fertility clinics should also come under the Government scanner to have a check in respect of specific methods, used for fertilization, medication, pre-natal and post-natal care.