

Concept of Surrogacy and Legal Issues of Surrogacy in India

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Abstract – A Surrogacy is the medical term used for the process when another women carries and gives birth to a baby for the couple who want to have a child and is really appropriate to opt in these cases where the medical conditions of the spouse makes it impossible or dangerous to get pregnant and to give birth. Before the scientific technological development of practice of 'surrogacy' an adoption was in practice for those couples who cannot have their own naturally born child due to infertility or any other complex medical reasons. But after the origin and development of practice of 'surrogacy' an adoption is an underutilized option that can not only give happiness to a childless couple but also provide a future for an orphan child. There are many pros and cons legality and legalizing surrogacy debatable in India. The debate of legal issues was began when in 2008, a Japanese doctor couple commissioned a baby in a small town in Gujarat. The surrogate mother brought forth a solid baby young lady. By then the couple had isolated and the baby was both parentless and stateless, got between the legal frameworks of two nations. The youngster is currently in her grandmother's guardianship in Japan however has gotten citizenship, as surrogacy isn't legal in Japan. Another kind of legal issues rose in year 2012, when an Australian couple who had twins by surrogacy, subjectively dismissed one and brought home at other. Such episodes are cited here to feature the all out negligence for the privileges of the surrogate mother and kid and have brought about various open intrigue prosecutions in the Supreme Court to control commercial surrogacy. The 228th Report of the Law Commission of India likewise suggested denying commercial surrogacy and permitting moral charitable surrogacy to poor resident by ordering a reasonable enactment. The surrogacy (Regulation) Bill, 2019 proposes to control surrogacy in India by allowing it as a possibility for couples who can't normally have youngsters, have an absence of other helped conceptive innovation choices, are quick to have a natural kid, and can locate a surrogate mother among their family members. In India Article 21 of the constitution of India, judgments of the Supreme court, Judicial Activism Reproductive Bill, 2010 and other legal provisions cannot prevent the practice of commercialize surrogacy. This kind of practice will definitely mar the future of the new born baby and the surrogate mother's health which is humiliating and inhuman too. The utmost step which is at present required to stop this mal practice is to make people aware of their social responsibilities and about the guidelines of surrogacy legal provisions, arrangements or agreements so that the rights of surrogate mother as well as of child can be protected. To attain a mother would still considered as a gift to a woman but few are taking advantages of this at the cost of violation of rules of nature.

Keywords: Surrogacy, Surrogate Mother, In Vitro Fertilization (IVF), Pros and Cons of Legality and Legalizing Surrogacy in India, Legislation and legality of surrogacy, Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMC), ART (Regulation) Bill, 2014 Regulatory Laws on Surrogacy.

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INTRODUCTION

A surrogacy is the medical term used for the process when another women carries and gives birth to a baby for the couple who want to have a child and is really appropriate to opt in these cases where the medical conditions of the spouse makes it impossible or dangerous to get pregnant and to give birth. There are certain specific medical conditions which make surrogacy necessary like absence or malformation of

the womb, recumbent pregnancy loss and repeated In Vitro Fertilization (IVF) implantation failures. Before the scientific technological development of practice of 'surrogacy' an adoption was in practice for those couples who cannot have their own naturally born child due to infertility or any other complex medical reasons. But after the origin and development of practice of 'surrogacy' an adoption is an under utilised option that can not only give happiness to a childless couple but also provide a

future for an orphan child. In the past few decades it has been observed that the practice of commercial surrogacy has grown tremendously all over the world and in India at very high rate as it has been estimated last year i.e. in 2015 that this practice has over \$2 billion industry. It was likewise discovered that before November 2015 when the government forced a boycott, foreigners accounted for 80% percent or a greater amount of surrogacy births in the nation. In India government has taken an appreciable step for imposing a ban as before this the foreigners accounted for 80% percent or more of surrogacy births in the country. Before India the Russia, Ukraine and government of some US states had likewise banned or bar the act of commercial surrogacy to secure the conceptive strength of the surrogate mother just as the eventual fate of the new conceived youngster.

Meaning of Surrogacy & Surrogate Mother

A surrogacy is a sort of arrangement or agreement for conveying of a training for planned parent who may look for a surrogacy arrangement when either pregnancy is medicinally inconceivable or pregnancy hazard present an unsuitable peril to the mother's wellbeing or is an equivalent sex couple's money related pay could conceivably be engaged with these arrangements. In other words surrogacy might be fitting if the couple have a lot of ailment that makes it difficult to get pregnant and to conceive an offspring and surrogacy is the procedure when another ladies conveys and brings forth a baby for the couple who need to have a kid. Though the practice of surrogacy is not regulated and legalised in many countries so it is recommended to the couple that they should seek legal advice before proceeding with this option as the types of medical conditions that might make surrogacy necessary for a couple perceived in current may incorporate the nonattendance or mutation of the belly, repetitive pregnancy misfortune and rehased In Vitro Fertilization (IVF) implantation disappointments. The literal meaning of 'surrogacy' is 'substitute' and the word 'surrogacy' has been originated from Latin word '*surrogatus*' which is past participle of '*surrogare*' and that too mean 'substitute' or in other words a person appointed to act in the place of another woman. Generally the term 'surrogacy' is defined as the practice which is motivated by the desire of intended parents for a genetically related child and the difficulty in finding a suitable child through complex adoption procedure. However, the principal reason is a lot of proper reason to select surrogacy. A 'surrogate mother' is a woman who bears a youngster for the benefit of another woman, either from her own egg or from the implantation in her belly of a prepared egg from other woman.

Definition of the term 'Surrogacy'

1. The New Encyclopedia Britannica defines 'surrogate motherhood' as the practice in

which woman bears a child for a couple unable to produce children in the usual way.

2. According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person.
3. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.[1]
4. The guidelines issued by Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMC) defines surrogacy as "an arrangement in which a woman agree to carry a pregnancy that is genetically unrelated to her and her husband with the goal to convey it to term and handover the child to the genetic guardians for whom she is going about as a surrogate.[2]

The practice surrogacy may be positively seen as a ray of hope for the few infertile couples who are unable to procreate and have genetically related offspring's but simultaneously it is a point of disappointment for those who are eagerly waiting to be adopted by some one and really needs a care and natural parenting to groom and grow as a human child.

Types of Surrogacy

There are almost five or six different types of surrogacy but there are two main types of surrogacy i.e. gestational surrogacy which is otherwise called host or full surrogacy and traditional surrogacy which is otherwise called halfway, genetic or straight surrogacy. In gestational surrogacy, the pregnancy results from the exchange of an incipient organism made by In Vitro Fertilizer (IVF), in a way so the resulting child is genetically inconsequential to the surrogate. At some point the gestational surrogates are likewise alluded to as gestational conveys. In traditional surrogacy, the surrogate is impregnated normally or misleadingly, however the resulting child is genetically identified with the surrogate. In the United States, gestational surrogacy is more typical than traditional surrogacy and is viewed as less legally unpredictable.[3] Other than these two there are few more types of surrogacy in practice like non-commercial surrogacy in which the payment of money is just to re-compensate the surrogate for the pain under taken by her and it includes medical and other expenses, commercial surrogacy provides opportunity to earn profit by making surrogacy a business in which a huge amount of money as income is paid to the surrogate for the service offered by her and donor surrogacy means

a surrogacy where 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 however of an outside donor.

Pros and Cons of Legality and Legalizing Surrogacy in India

All over the world there are many surrogacy centers at places where surrogacy is legal and there couples may enlist the help of a third agency to oversee the process of finding a surrogate, entering into a contract with her and recommend fertility centers for insemination, by and large through IVF (In Vitro Fertility). These offices would help and ensure that surrogates are screened with psych assessments and other clinical test to guarantee sound conveyances. They additionally as a rule encourage every single legal issue concerning the two gatherings (intended parents and surrogate). Some of the leading surrogacy centers in the U.S. include circle surrogacy, growing generation and conceive abilities etc. Similarly in India too there are many such centers are operated by the team of professionals to earn profit. And the major reason of growth of such commercial practice in India is poverty whereas the reason of enduring suffering & pain due to legal complexities of surrogacy is lack of awareness and lack of knowledge of rights available to surrogate mother just as child or her. The debate of legal issues was began when in 2008, a Japanese doctor couple appointed a baby in a humble community in Gujarat. The surrogate mother brought forth a healthy baby girl. By then the couple had isolated and the baby was both parentless and stateless, got between the legal frameworks of two nations. The child is now in her grand mother's custody in Japan but has not obtained citizenship, as surrogacy is not legal in Japan. Another kind of legal issue rose in year 2012, when an Australian couple who had twins by surrogacy, self-assertively dismissed one and brought home at other. A single mother of two from Chennai decided to become a surrogate mother in the hope that the payment would help her start a shop near her house. She delivered a healthy child, but her hopes bore little fruit for herself. She got just Rs. 75,000, with an Auto cart driver who filled in as an agent, taking a 50 percent cut. Subsequent to reimbursing the advances, she needed more cash on January 29, 2014, multi year old Yuma Sherpa kicked the bucket in the outcome of a surgery to collect eggs from her baby as a component of the egg gift program of a private facility situated in New Delhi. The act of egg gift is going on in numerous urban areas similarly as a gaining source however it is exceptionally influencing the wellbeing of little youngsters and in some cases it ends up being deadly. Such occurrences are cited here to feature the all out dismissal for the privileges of the surrogate mother and child and have brought about various open intrigue suits in the Supreme

Court to control commercial surrogacy. The 228th Report of the Law Commission of India likewise recommended denying commercial surrogacy and permitting moral philanthropic surrogacy to poor residents by establishing an appropriate enactment. So also as the above talked about it is seen in 2013 that the areas where a woman could legally be paid to help another's child through IVF and undeveloped organism move included India, Georgia, Russia, Thailand, Ukraine and a couple U.S. States.

The Surrogacy (Regulation) Bill, 2019 proposes to manage surrogacy in India by allowing it as a possibility for couples who can't normally have children, have an absence of other helped conceptive innovation alternatives, are quick to have an organic child, and can locate a surrogate mother among their family members. Charitable surrogacy, which implies an arrangement without move of assets as prompting, is right now rehearsed in certain centers in India, however most of surrogacy centers use ladies who are paid for their administrations. The child brought into the world through surrogacy will have all the privileges of a natural child. Indian fruitless couples between the ages of 23-50 years (woman) and 26-55 (man) who have been hitched for a long time and who don't have an enduring child will be qualified for surrogacy. The surrogate mother ought to be a nearby relative of the expecting couple and between the ages of 25-35 years and will go about as a surrogate mother just a single time in the course of her life. Execution will be through the national and State surrogacy sheets. Any foundation discovered endeavor commercial surrogacy relinquishing the child misusing the surrogate mother, selling of bringing in a human undeveloped organism will be culpable with detainment for a term not to be under 10 years and with a fine up to Rs. 10 lakh. Enlisted surrogacy facilities should keep up all records for a base time of 25 years. While infertility is a developing issue in India, there are a wide range of methods of making a family. Reception is an underutilized alternative that can offer bliss to a childless couple as well as give a home and a future for a vagrant child. While the Bill will currently be put before Parliament and the subtleties debated, the fundamental precept of forbidding commercial surrogacy is at its heart, and will remain.

In India Article 21 of the Constitution of India, judgements of the Supreme Court, Judicial Activism, Assisted Reproductive Bill, 2010 and other legal provisions cannot prevent the practice of commercialize surrogacy. This kind of practice will definitely mar the future of the new born baby and the surrogate mother's health which is humiliating and inhuman too. The utmost step which is at present required to stop this mal practice is to make people aware of their social

responsibilities and about the guidelines of surrogacy legal provisions, arrangements or agreements so that the rights of surrogate mother as well as of child can be protected. To attain a mother would still be considered as a God gift to a woman but few are taking advantage of this at the cost of violation of rules of nature.

SURROGACY AND INDIA LAWS

The questions now often posed professionally are as follows:

- (i) How can the genetic constitution of the surrogate baby be established and recorded with authenticity.
- (ii) As to what would be the remedy available to biological parent/s to obtain exclusive legal custody of surrogate children,
- (iii) How can the rights of the ovum or sperm donor be restricted and
- (iv) How can the rights of the surrogate mother be waived off completely,

As of now, in the case of foreigners or non-Hindu couples, single parents or gay parents, they can only claim guardianship of a child under the GWA in respect of children born out of surrogacy arrangements. However, under the new medical visa regulations 2012, foreign single parents, gay couples and unmarried partners cannot come to India for surrogacy arrangements. For married men and women couples with more than two years of marriage, the adoption process can still take place only in the foreign parent's country of nationality or permanent residence as the case may be. This is because the HMGA and HAMA do not allow any adoption proceedings to non-Hindus and thus any foreign non-Hindu parent cannot invoke HAMA/HMGA for adoption proceedings in India. Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To decide the legality of surrogacy agreements, the Indian Contract Act would apply and from there on the enforceability of any such agreement would be inside the area of Section 9 of The Indian Code of Civil Procedure (CPC). On the other hand, the biological parent/s can likewise move an application under the Guardian and Wards Act for looking for a request for arrangement for a presentation to be proclaimed as the Guardian of the surrogate children.

Without any law to administer surrogacy, the 2005 ICMR Guidelines apply. Be that as it may, being non-legal, they are not enforceable or justiciable in a Court of Law. Under para 3.10.1 a child born through surrogacy must be received by the genetic (biological parents). Be that as it may, this may not be conceivable if there should be an occurrence of non-Hindu remote parents who can't embrace in India.

Under area 10 of the Contract Act, all agreements are contracts, in the event that they are made by free assent of gatherings able to contract, are for a legitimate thought, are with a legal article, and are not explicitly proclaimed to be void. Consequently, if any surrogacy agreement fulfills these conditions, it is an enforceable contract. From that point, under segment 9 CPC, it tends to be the subject of a common suit under the watchful eye of a Civil Court to set up every one of/any issues identifying with the surrogacy agreement and for a statement/directive for the reliefs appealed to God for.

- (v) as to whether a solitary or a gay parent can be viewed as the custodial parent of a surrogate child. Already, it might have been expressed that a solitary or a gay parent could be viewed as the custodial parent by goodness of being the genetic or biological father of the surrogate child born out of a surrogacy arrangement. Japanese Baby Manji Yamada's case (JT 2008 (11) SC 150) and the Israel gay couples' case who fathered the child in India are clear guides to build up this was conceivable when the new Medical Visa Regulations 2012 were not in presence. Under para 3.16.1 of the 2005 ICMR Guidelines managing authenticity of children born through ART (which were the premise of the case in the Japanese baby's case in the Supreme Court), this case can be made. Notwithstanding, this was conceivable before the coming into the power of the new 2012 Medical Visa Regulations. Notwithstanding, for wedded couples as of now just in an appeal for guardianship under GWA or potentially in a suit for revelation in a Civil Court, the selective custodial rights can be mediated by a court of skilled endless supply of proof and considering all cases made in such manner.
- (vi) What would be the status of separated from biological parents in regard of the guardianship of a surrogate child? Basically, this is an inquiry which will require assurance as per the surrogacy agreement between the gatherings. There would be evidently no bar to both of the separated from parents asserting authority of a surrogate child if the other parent doesn't guarantee the equivalent. Be that as it may, if the guardianship is challenged, it might require mediation by a court of equipped ward.
- (vii) Would a biological parent/s be viewed as the legal parent of the children. In answer to this inquiry it tends to be expressed that the biological parents would be viewed as the legal parents of the children by

prudence of the surrogacy agreement executed between the gatherings and the surrogate mother. Under Para 3.16.1 of the 2005 ICMR Guidelines managing authenticity of the child born through ART, it is expressed that "a child born through ART will be dared to be the real child of the couple, born inside wedlock, with assent of both the mates, and with all the chaperon privileges of parentage, backing and legacy". Indeed, even in the Assisted Reproductive Technology (Regulation) Bill and Rules, 2010 (ART BILL, 2010) a child born to a wedded couple, an unmarried couple, a solitary parent or a solitary man or woman will be the real child of the couple man or woman by and large.

Nonetheless, the debatable inquiry which may emerge for assurance is concerning whether a legal decision for assurance of privileges of gatherings in a surrogacy arrangement is basic in regard of a remote biological parent who wishes to take the surrogate child to his/her nation of cause or changeless home, it tends to be said that either an assertion from a common court as well as a guardianship request should be an unquestionable requirement to convincingly build up the privileges all things considered and to forestall any future errors emerging in regard of any cases thereto.

POSITION OF LAW UNDER THE ART (REGULATION) BILL, 2014

Under the ART (Regulation) Bill, 2014, Assisted Reproductive Technology, Surrogacy, "gamete", and Surrogacy agreement have been characterized as follows:

"Assisted Reproductive Technology", with its syntactic varieties and related articulations, means all strategies that endeavor to acquire a pregnancy by handling or controlling the sperm or the oocyte outside the human body, and moving the gamete or the undeveloped organism into the reproductive tract of a ladies; **"Surrogacy"**, means an arrangement where a woman consents to a pregnancy, accomplished through assisted reproductive technology, in which neither of the gametes have a place with her or her better half, with the aim to convey it to term and hand over the child to the authorizing couple for whom she is going about as a surrogate; **"Gamete"**, means sperm and oocyte; **"Surrogacy Agreement"**, means a contract between the person(s) profiting of assisted reproductive technology and the surrogate mother; **Chapter 2** of the Bill depicts the constitution of specialists to manage Assisted Reproductive Technology. A 23 Member National Advisory Board comprising of various experts is sought to be created with functions to promote Assisted Reproductive

Technology related issues. State Boards are recommended in States and State Registration authorities are sought to be created for procedural purposes. Proceedings before the National and State Boards are deemed to be Civil Court Proceedings for limited purposes and are sought to be treated as Judicial Proceedings even though the constitution of the National or State Advisory Board have no Judicial Officers, Judges or Designated Courts as constituents. **Chapter 3** Of the Bill talks of procedures for registration and complaints in respect of Assisted Reproductive Technology Clinics. **Chapter 4** talks of the duties of such clinics. **Chapter 5** talks of sourcing, Storage, handling and record keeping for Gametes, Embryos and Surrogates. **Chapter 6** relates to Regulation on Research on Embryos. **Chapter 7** discusses Rights and Duties of Patients, Donors, Surrogates and Children in extensor. The Rights and Duties are well defined and determination of the status of the child is laid out in detail. The duty to take children born through surrogacy outside of India to the country of the parties origin or residence in spelt out. **Chapter 8** talks of Offences and Penalties for contravening the provisions of the Act and **Chapter 10** in the Miscellaneous Section talks of maintenance of records, power to search and seize, power to make regulation and rules. The Act is states to be notwithstanding and not in criticism with some other law for the present in force.

ANOMALIES IN THE ART REGULATION BILL, 2014

- The Bill has neither designated, nor authorized nor created any Court or Judicial Forum to resolve issues which will require adjudication in problems arising out of Surrogacy, ART and Surrogacy Agreements. This is an exceptionally huge lacunae in the Bill. There must be a Designated or a Defined Court, as in the Hindu Marriage Act or the Guardian and Wards Act, which must be vested with the expert in law to choose debates emerging under the proposed law.
- The National and State Advisory Boards are only authorities who will promote ART Technology, Surrogacy Arrangements and related procedures. The proceedings of these Boards have been deemed to be "Judicial Proceedings" before Civil Courts for limited purposes. There is no designated Court, Judicial Officer or Judge appointed, created or nominated for this purpose. Subsequently, how far these Advisory Boards will have the option to play out the "Legal Proceedings" and

which will be "regarded to be a Civil Court", is not yet clear.

- **Chapter 3** talks of objections, **Chapter 4** talks of obligations, **Chapter 5** and **6** talks of more ART related issues. **Chapter 7** talks of obligations. **Chapter 8** talks of offenses and punishments which convey genuine results. However, the inquiry is who will settle these and conclude them to force punishments. Who will decide these "offenses." Unless and until a Court is assigned, made or selected, this will stay uncertain, hesitant and fragmented.
- There are as of now difficult issues of deciding parentage, nationality, issuance of identification award of visas and issues of contested parentage. There is no Forum characterized, assigned or made which will investigate these issues or decide how they must be chosen or managed.
- Baby Manji Yamada's case [JT 2008 (11) SC 150] is an eye opener. From that point, the Israeli gay couple's case is an adherent in the spin-off of issue territories. Government offices, foreign missions and High Commissions of various nations in India are taking a gander at a Resolution on these issues by means of a law really taking shape. Be that as it may, parentage, nationality, identification, visa and related issues stayed dubious in the law in making. There is now a contention on selection and Guardianship as non-Hindus can't receive in India. Along these lines, would it not be smarter to make it obligatory to make a Court for selection/Guardianship purposes before a child is expelled from India to a foreign nation. This won't just give a framework to uniform application to check malpractices yet will likewise convincingly discover privileges of gatherings in case of a contest. Additionally, all Embassies, Foreign Missions and High Commissions will be guided by a legitimate strategy.
- Another anomalous situation has been created by the new Medical Visa Regulations, 2012, which debar foreign single parents, gay couples and unmarried partners from coming to India on tourist visas for commissioning surrogacy arrangements. There are other requirements also stipulated by the Ministry of Home Affairs in their letter of 09 July, 2012 which are not part of the ICMR Guidelines 2005 and the ART Bill, 2010. These inconsistencies need to be reconciled and a uniform policy needs to be underlined by the Government of India with regard to Surrogacy arrangements in India. More particularly, the rights of foreign single

persons, gay couples and unmarried partners for entering into surrogacy arrangements in India must be clearly stipulated as the ICMR Guidelines, 2005 and the ART Bill, 2010, are inconsistent and contradictory to the new medical visa guidelines, 2012. The ART Bill, 2014 mulls over that surrogacy will be accessible to all married fruitless couples in this way, suspending single people from surrogacy. It proposes to forbid surrogacy for foreigners yet makes it admissible for Overseas Citizens of India (OCIs), People of Indian Origin (PIOs), Non-Resident Indian (NRIs) and foreigners married to Indian citizens with two years of marriage who should get a Medical Visa for surrogacy in India.

- In the light of the above thoughts, after the above inconsistencies are suitably resolved it may be necessary to create a procedure for adoption, guardianship, determination of rights etc. to be mandatory through a nominated Court, assigned Court or indicated authority to be mandatorily followed in case of any between nation surrogacy arrangement. In like manner, this Forum, Court, Authority can likewise be the Adjudicating authority to decide disputes choose offenses and decide punishments under the Bill. Without this, the proposed Act isn't important, is uncertain and will just make more vulnerability prompting more disputes and conflicting perspectives.

REWRITING SURROGACY LAWS AND ISSUE AT STAKE

Late meetings of Departments and Ministries of the Government of India on 6 and 7 March, 2014 to talk about and survey unique perspectives on the draft Assisted Reproductive Technology (Regulation) Bill, 2013 (ART Bill 2013), have brought about a proposition to update the draft ART Bill with noteworthy changes and an expressed 2014 adaptation has been made. In any case, its substance are obscure. The most significant proposition is to confine surrogacy in India to "fruitless Indian married couples" just and it would not be permitted to foreigners except if he/she is married to an Indian citizen. Non-occupant Indians (NRIs), Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCIs) will, in any case, be qualified. The motivation behind the article tried to be accomplished is to forestall misuse of Indian ladies who might be enticed to face the challenge notwithstanding monetary hardships.

EXISTING POLICY ON THE SUBJECT

The Indian Council of Medical Research (ICMR) working under the protection of the Ministry of Health and Family Welfare finished the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India in 2005 after broad open debate everywhere throughout the nation from all partners. Under these 2005 guidelines, there was no legal bar to the utilization of Artificial Reproductive Technology (ART) by a solitary or an unmarried woman and the child born would have legal rights on the woman or man concerned. From there on, the draft Assisted Reproductive Technology (Regulation) Bill, 2008 (ART Bill, 2008), the draft Assisted Reproductive Technology (Regulation) Bill, 2010 (ART Bill 2010) and the draft ART Bill 2013, expressed to be modified dependent on the recommendations of the Ministry of Law and Justice, have reliably suggested that ART in India would be accessible to all people including single people and foreign couples. Nonetheless, under the new Medical Visa Regulations, 2012, foreign single parents, gay couples and unmarried partners can't come to India for surrogacy arrangements. The draft Bill 2013, a comprehensive record containing 100 areas tending to different issues identifying with ART is expressed to be currently "Top Secret" being a part of the Cabinet note according to the prerequisite and technique of the handbook of the Cabinet Secretariat on Cabinet Notes. The activity of drafting the 2008, 2010 and 2013 Bills was depended to a 12 Member Specialist drafting Committee other than establishing a National Advisory Committee on ART under the Chairmanship of the Director General, ICMR. The draft Bills and Rules of 2008 and 2010 were widely coursed for general conclusion other than being sent to State Governments, foundations, legal bodies, NGOs and other partners other than medical experts. The 2013 Draft Bill was however not circulated or put in the public domain for discussion, comment or opinion. The revised version of the ART Bill, 2014 has been circulated in public domain for general public / stakeholders inviting suggestions by the Ministry of Health and Family Welfare, Government of India and is appended as Annexure XI with this book.

REPORTED CASES

The only reported Judgment of the Supreme Court in surrogacy matters in Baby Manji Yamada (AIR 2009 SC 84) took due notice that in cases of "commercial surrogacy," an intended parent might be a single male when it had the event to consider the appeal of a Japanese grandmother needing issuance of a movement record for her Japanese separated from child's little girl. In another matter chose by the Gujarat High Court in Jan Balaz (AIR 2010 Guj 21) the matter in advance is as yet pending in the Supreme Court and the choice of the High Court

holding, that children born in Indian to gestational surrogates are Indian citizens qualified for Indian visas, has been remained by the Supreme Court. However, twin German children born to the German couple were permitted to leave India upon directions of the Supreme Court to Central Adoption Resource Agency (CARA) to permit adoption of the children as a special case for them to leave India. The fundamental issue of nationality and citizenship emerging thereto, being of grave significance, is as yet uncertain.

GUIDELINES RESTRICTING SURROGACY

The Ministry of Home Affairs by guidelines of 9 July 2012 limited surrogacy to foreign nationals for example a man and a woman appropriately married for atleast two years who might be required to take a medical visa for surrogacy in India. Starting at now, despite the fact that surrogacy as a subject is in the authoritative concern and area of the Ministry of Health and Family Welfare, in any case, it has been concluded that till the enactment of a law on the ART Regulation Bill, 2014, the Guidelines issued by the Ministry of Home Affairs will win till at that point. Thus, foreign single parent surrogacy is starting at now banished.

NEW PROPOSAL IN CONFLICT

The ART Regulation Bill, 2014 limiting surrogacy to barren Indian married couples just and suspending all foreigners other than OCIs, PIOs and NRI married couples is a turnaround in the perspective. The recommendation banning foreigners from authorizing surrogacy in India is expressed to be dependent upon their being no contention with other Indian laws pertinent to foreigners, for example, those for adoption and other purposes. The most significant logical inconsistency and irregularity is by all accounts the contention emerging with the Guidelines Governing the Adoption of Children, 2011 for between nation adoptions which currently have legal assent by uprightness of them being having enacted under the Juvenile Justice (Care and Protection of Children) Act, 2000 which unmistakably give that a Court may permit a child to be given in adoption to an individual regardless of their conjugal status. In addition, both the Guardian and Wards Act, 1890 and The Hindu Minority and Guardianship Act, 1956 grant a Court that where it is fulfilled that it is for the government assistance of a minor, an individual might be named or announced as a Guardian. The bar of single parents to receive isn't legal yet can be a limitation in a particular case upon assessment by a skillful Court. Consequently, suspending single people and foreign nationals from being parents will add up to re-composing laws in presence which has been enacted by Parliament. On 8 August, 2014, an individual

Member of Parliament had taken the initiative to introduce a private Bill in the Lok Sabha for regulating Surrogacy. Bill No. 61 of 2014 titled The Surrogacy (Regulation) Bill, 2014 was introduced by Dr. Kirit Premjibhai Solanki, an M.P from Gujarat. The fate of this Bill, which is Appendix IX to this book, is unknown.

RECENT DECISIONS

The Supreme Court in *Stephanie Joan Becker v. State*, AIR 2013 SC 3495 allowed a single multi year old woman to adopt a female vagrant child matured 10 years by loosening up the thoroughness of the guidelines of CARA on the totality of the facts of the case that the proposed adoption would be gainful to the child as the specialists were of the view that the adoption procedure would end in fruitful mixing of the child in the US. Moreover, in *Shabnam Hashmi v. Union of India*, 2014 (4) SCC 1, the Supreme Court maintaining the acknowledgment of the option to adopt and to be adopted as a central right has held that each individual, including Muslims, regardless of the religion they purport is qualified for adopt a child. The most recent decision of the Supreme Court in *National Legal Services Authority v. Union of India*, 2014 (5) SCALE 1 2014 perceiving transgenders as the third gender have held "that segregation based on sexual direction or gender character incorporates any separation, prohibition, limitation or inclination, which has the impact of invalidating or transposing correspondence by the law or the equivalent security of laws ensured under our Constitution." Clearly, transgender people having been conceded a legal acknowledgment as third gender would be qualified for privileges of adoption, progression, legacy and other benefits under law. The new articulation is a way of rights.

DESIGNER BABIES: TWO MOTHERS AND A FATHER

Whilst India is still baffled over a ten year yawning period in coming to reality with being the first country to legalise commercial surrogacy, Britain created history with the House of Commons voting in favour of changing the existing English law to legalise the conception of babies by three parents using in vitro fertilization (IVF) technology. As of now under the existing British law, this process is banned since genetically modified embryos cannot be implanted in the womb of a woman. On the House of Lords approving it and upon grant of royal assent, UK will legally permit creation of designer babies with DNA from two woman and one man. The three parent IVF baby born from a genetically modified embryo will have genes from a father, a mother and another female donor. Though hailed in frenzy and euphoria as "historic", the law in the making is fraught with unknown dimensions, unexplored options and prone to commercial possibilities of abusive experimentation, all catapulting to a whirlpool of legal complexities which may perplex mankind to no end.

Embryo selection, choice of traits in babies, cosmetic conception, cloning, and stem cell research for unethical purposes, if not checked, can play havoc with nature. Axiomatically, the use of this positive scientific research potential must be forthwith regulated by an equally forceful corresponding legislation which will restrict procreation of 3 parent babies exclusively and only in established cases which are duly certified by a competent authority as essential to prevent hereditary genetic diseases from being genetically passed on to children.

THREE PERSON BABY PROCESS

The medical treatment of making three babies reportedly involves an IVF technique in which an intervention is made in the fertilization process whereby a small amount of faulty DNA in a woman's egg is replaced with the healthy DNA of another woman donor. Whilst the father remains the same, the baby inherits a mix of genes from two women, a mother and a contributory female. The ideology in conception of three parent IVF babies supposedly being born disease free, stems from blocking inheritance of genetically incurable diseases being passed down generations. The technique known as "mitochondrial donation" is said to be designed to curtail diseases being passed down generations. The technique known as "mitochondrial donation" is said to be designed to curtail diseases passed down the maternal line to remove mitochondria which are stated to act as tiny energy generating batteries inside cells, which, if faulty, can be a source of serious diseases passed on genetically by inheritance. Thus, DNA of two parents is blended with the healthy mitochondria of a female donor to remove the faulty DNA. Undoubtedly, the purpose is laudable, salutary and is a unique breakthrough for specialized medical science seeking a panacea to genetic maladies.

COMMERCIAL SURROGACY IN INDIA

Learning from the Indian experience of commercial surrogacy which involves use of IVF technology for fertilization of natural or donor sperms or eggs, and which embryos are nurtured in a rented surrogate womb to give birth to a child, much can be said about the aftermath as to what happens in stark reality, upon a surrogate baby being born. Without an enabling legislation defining parentage, identifying nationality, defining roles of parties, settling terms of the surrogate mother and providing legislative safeguards to prevent the abuse of such a process, taking over a natural process to create 3 parent designer babies,' is an equally dodgy proposition. Same sex or single parents and unmarried partners in surrogacy arrangements further complicate the matter. Even though, in India. The Transplantation of Human Organs Act, 1994, bans the sale or loaning of organs and any commercialization of the exchange of human organs, leasing of wombs or acquiring

sperms or eggs in the commercial market is wild. To such an extent, the Supreme Court choice in Baby Manji Yamada (AIR 2009 SC 84) saw that "Commercial surrogacy is now and again alluded to by the sincerely charged and possibly hostile terms 'wombs for lease', 'redistributed pregnancies' or 'baby farms.'" Codified law, to this date, to check, regulate, overlook and control surrogacy is still not in existence. The Assisted Reproductive Technology (Regulation) Bill first came in 2008 to legislate on surrogacy. Thereafter in 2010 and 2013, the Bills came again with amendments. Now it is pending before Parliament in a stated 2014 version, which has not been put in public domain. Currently, the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005, made by the Indian Council for Medical Research (ICMR) regulate surrogacy practices in India. However being non statutory and not enforceable, these Guidelines do not provide any legislative answers besides not giving much needed solutions to perplex questions which hound such relationships.

NEED FOR A REGULATORY LAW

Surrogacy is often creating "stateless children" with disputed questions of citizenship, nationality and parentage being recorded on official documentation. Unfortunate surrogate children have also been abandoned without any legal recourse. Besides, there is no mechanism or specialist judicial forum geared to handle complex issues arising from surrogacy. A regulatory environment through an appropriate legislation is much needed to check malpractices and curb the unethical surrogacy trade which haunts the scene in the backdrop of financial transactions changing hands. A much needed question of maintaining anonymity of a surrogate mother or a donor balanced with the right of privacy as also the right of an individual to know his original parents needs to be deliberated upon seriously to look at resolution of future problems. Moreover, a comprehensive consolidated surrogacy legislation having extraterritorial application needs to be put in place for regulating it. A serious look is required to stamp out illegal trading in gametes and embryos. Likewise, mandatory coordination of statutory welfare agencies is much needed to overlook possible loopholes for erring and defaulting parents wishing to abandon surrogate children born with unfortunate congenital defects. As of now, all this is now blissfully missing, while surrogacy thrives as a raging ship in dark, loomy uncharted waters.

INTERNATIONAL PERSPECTIVE

Whilst most countries shun commercial surrogacy, some jurisdictions permit altruistic practices. The British Human Fertilization and Embryology Act, 2008, regulates the surrogacy practices in UK. The Hague Conference on Private International law had

commissioned a study and released a report titled "Parentage / Surrogacy Project" prepared by the Permanent Bureau at the Hague in March 2014. Seventy Six Member States and the European union have decided in March 2015, that an Experts Group should be convened to explore the feasibility of advancing work in this area and that the Group should meet in early 2016 and report to the 2016 Council Meeting of the Hague Conference on Private International Law. In the perspective of the British three parent IVF law in the making, this study ought to continue to provide the much needed mutual international cooperation in this emerging concept of parenthood which has emerged as an offshoot of surrogacy. This silent and subtle occurrence has bloomed a new jurisprudential concept of parentage with allied issues arising from practices of surrogacy and the three parent families concept. This cannot be ignored. Roles and practices in the realm of the family will have to be re-written. The requirement of an international participation is much needed.

INDIAN RESPONSIBILITY

In so far domestic fronts are concerned, an Inter-Ministry dialogue is the call of the day. The ICMR must setup a multi dimensional body to look into and finalize the challenges and issues which arise from commercial surrogacy, a practice now to stay. Making a homogeneous composite law to look at all perspectives for improving the existing situation on the ground may be the true exercise in reality. Equally important will be the role of the Government in harmonizing a composite surrogacy legislation with existing laws governing marriage, adoption and effecting children. An international perspective too must be sought. Be it surrogacy or three parent babies, a regulatory law must be put in place simultaneously to control and counter balance all rights, duties and responsibilities. This facet of thought process must concurrently culminate in an equally forceful controlling legislation to prevent disastrous consequences. Equally, UK too needs to initiate a meaningful dialogue globally before the first designer baby is conceived and set to be born in 2016.

FREEZING POSTERITY – EXPLOITING MOTHERHOOD

While arrangement producers have pondered a draft surrogacy law in Indian Parliament in which surrogacy in India will be confined to fruitless Indian married couples just and exclude foreigners (except if the foreigner is married to an Indian citizen), child bearing has gotten a new global measurement. Oocyte cryopreservation or freezing of freezing of a woman's eggs is expressed to be on choice to broaden fertility and defer motherhood. Silicon Valley technology goliaths

have offered \$20,000 to both full-time and part-time ladies workers to freeze their eggs and \$480 every year to store them so as to empower these ladies to concentrate on their vocations and defer child bearing.

NEW AGE INNOVATION

While the Indian Ministry Finance permits 'Human undeveloped organisms' solidified in fluid nitrogen in cryogenic containers to be imported dependent upon a No Objection Certificate from the Indian Council of Medical Research, the National Gamete Donation Trust in U.K. is presently the newly framed national association for sperm, egg and undeveloped organism donation. It urges ethnic minority foundations to look over an assortment of "socially coordinated donors" and proposes to "change the face" of sperm donation in Britain.

What started as a strategy for freezing female eggs to empower ladies with malignant growth to store eggs before chemotherapy has now become an assistance perquisite. A woman can cooler her eggs to advance her career and ascend the company pecking order by conceding motherhood. In another measurement, after death impregnation and making of infants by assisted and shared current procedures, for example, in-vitro preparation or cryopreservation of gametes and eggs may inspire solid thoughts about existence, parenthood and eternity. Such after death artificial multiplication has offered ascend to legal issues that present obsolete laws can't address. Banking is no longer connected with just cash however with sperms and eggs also.

A volley of contentions has followed the proposals of freezing undeveloped organisms to defer motherhood. These range from the dangers of messing with the request for nature, outlandish obstruction between a woman and motherhood, exposing the woman to wellbeing dangers, costly tedious medical methodology and promising "fertility protection, and conceding child birth plans with guaranteed career movement. Presently actually exhausted experts who lack the capacity to deal with common reproduction and are incidentally dwelling in various universal areas are helpfully utilizing such strategies since they are genuinely apart at the hour of origination. Families are in this manner tried to be planned in solidified edges for couples who are career-disapproved. Innovation has surpassed human connections in this race. Children are structured and arranged like careers, not for bliss however for need.

THE RIGHTS OF THE UNBORN CHILD

While everyone talks of the rights of the father and mother-to-be, no one has taken a gander at the rights of the unborn child. Deferring origination for career progression removes the rights of an unborn child. Be it a frozen undeveloped organism in a

cryogenic container or a frozen sperm or egg in a bank, a human life might be in question. Other than issues of profound quality and morals, there is no emphasis on the 'right to life' of an unborn child. From the point of view of this child, his right to be born can't be frozen once he is intended to be multiplied. For a child to be born and for him to appreciate the organization of his young parents needs assurance. A child born to parents following 20 years of his frozen origination denies him of the youthful friendship of his healthy parents which he would have appreciated, had he not been dispatched to children. This point appears to have been completely disregarded up until now.

Egg, sperm and incipient organism banking which were outsider ideas will presently enter the home, the room and the family and should offer ascent to a new arrangement of laws and rights. The Madras High Court in *Kalaiselvi v. Cheenai Port of Trust*, 2013 SCC Online Mad 811, has held that a woman representative was qualified for profit "child care depart" even in the case where she got a child through an arrangement of surrogacy, and held that "however the solicitor has not experienced any pre-natal stage, be that as it may, from the very beginning, after the conveyance, the candidate is required to be treated as the mother with the new born, and hence without separation, the applicant is qualified for all the advantages that collect to a worker after the convey." The Kerala High Court in *P. Geetha v. The Kerala Livestock Development Board Ltd.*, 2015 SCC Online Ker 71, has likewise been satisfied to hold that the biological mother who has gotten the baby through surrogacy can guarantee the post-conveyance maternity leave to deal with the new born newborn child as she is qualified for all the child explicit legal advantages that a worker could have on post conveyance stage in the wake of bringing forth a child. The court held that "there can't be any separation with respect to the genetic mother in stretching out the legal advantages to the degree they are pertinent." The Delhi High Court in *WP (C) No. 844/2014, Rama Pandey v. Union of India*, chose July 17, 2015 was additionally satisfied to hold that an adoptive parent is the same as an authorizing guardian who looks to acquire a child through a surrogacy arrangement. Appropriately, the Delhi High Court has been satisfied to coordinate that a female representative who is the appointing mother in a surrogacy arrangement would be qualified for apply for maternity leave both at the pre-natal and post-natal stages. Issues may likewise emerge if, in the wake of freezing the eggs, the child isn't considered in view of medical inconveniences or ineffective recovery of eggs. There is no law which guarantees and ensures a woman who has frozen her eggs the birth of a healthy child. By offering cash for freezing and saving eggs and bartering ceaselessly the delights of a characteristic procedure for optimizing careers, these corporate associations are conveying exploitative signs. In

light of a legitimate concern for nature, euphoric child rearing, and the mental government assistance of an unborn child, it might be important to enact a law that gives motivators and advantages to surrogates or parents who consider normally. Giving leave to fertility medicines, maternity leave for non-permanent mothers, time for child care and adoption advantages might be achievable. Work spots could give extraordinary rooms or play rooms in crèches for children of working mothers. Giving yearly vacations or periods, for example, bites the dust non, which don't influence career possibilities of working ladies, can additionally advance convenient parenthood without trading off proficient rights. Except if and until a reasonable authoritative strategy is enacted, usage of female labor may turn into an instrument in the hands of career launchers who murder keep in profound freeze parental delights.

CONCLUSION

The sum and substance therefore, is not to shut the door to surrogacy which is an accepted societal practice in India having grown slowly over the past almost two decades. Medical technology, progression of science allowing free fare of frozen incipient organisms and other logical techniques have offered hopes to childless persons. The more even minded and practical methodology is make a law supported with protections, balanced governance. The proper and attractive technique is make a mechanism to pass judgment on the appropriateness of proposed surrogate parents as opposed to suspend all single and foreign persons completely. This would likewise maintain a strategic distance from any contention with existing laws of adoption wherein foreign persons including single parents are permitted to adopt through an exacting and thorough mechanism gave via CARA and directed by Indian Courts. Just attempting to close out surrogacy for foreign nationals and single persons may not be the perfect method to get rid of the hopes of persons wishing to be a parent. Regardless of whether Indians or foreign nationals, law regards persons as individual parents when so required. A prohibitive significance to "individual" can't qualify or change the definition by confining it to an Indian national. The commended perspective on the Apex court in extending the skylines to forestall segregation on grounds of sex or gender character is a new manner of thinking dependent on global pledges of human rights. We can't presently allow our intuition to be retrograde basically in view of the issues which accompany surrogacy. Managers can't usurp law making capacities to be a law unto them. This is the capacity of the Parliament. Mandarins can't dominate. The more adept methodology is discovers answers for handle and control these issues. The mechanisms in law which can be made in India just like the case on account of bury nation adoptions is the best referred to model. The

approach is to restrict the entry and not shut the door altogether. Let us be wider in adopting the new concept of surrogacy and must try to resolve the issues related to surrogacy individually by the changing the mind set of others socially and by contributing to make others aware of legal aspects of it to ensure safe and secure life of surrogate mothers and children.

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