



## CHALLENGES CHANGING PERSPECTIVE OF ETHICS AND MORALITY IN 21ST CENTURY: SURROGACY AND CHILD RIGHTS \*

### Introduction

Surrogacy is the process in which a woman gestates a foetus, gives birth to a child and then relinquishes her parental rights to another couple. This third party relation is not a novel concept but can be traced through the history in various forms.<sup>1</sup> The word “surrogate”, is rooted in Latin “*Subrogare*” (to substitute), which means “appointed to act in the place of.” According to the Artificial Reproductive Technique (ART) Guidelines, surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a “surrogate mother” is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)”.<sup>2</sup>

### Historical Existence

The oldest recorded occurrence of surrogacy was seen during the biblical times; where Sarah “commissions” her maid Hagar to bear Abraham’s child. Ishmael was the first child born of surrogacy. This was in 1910 BC. (Gen. 16:1-15). The second and third known surrogacy births occurred in Sumer-Mesopotamia in the mid 18<sup>th</sup> century in Jacob’s family (Abraham’s grandson).<sup>3</sup> The Code of Hammurabi (1780 BC) was the first legal document that regulated and

\* Ms. Roselin Sara Alex, 1st year Student, BA LL.B Hons. , DSNLU, Vizag.

<sup>1</sup> Charlene Elena Carolyn Peabody Zil “The Effects of Compensation on the Supply of Surrogate Mothers” ,Economics 191A, Senior Essay Seminar , Spring 2006 Vincent Crawford

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

<sup>3</sup> Genesis 30:1-8; see also Angie Godwin McEwen, Note, So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy, 32 VAND. J. TRANSNAT’L L. 271, 274-75 (1999); Christine L. Kerian, Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children, 12 WIS. WOMEN’S L.J. 113, 116-17 (1997).

controlled surrogacy which primarily used to advocate produce male offspring. There are two types of surrogacy: traditional surrogacy and gestational surrogacy. Traditional surrogacy has been practiced since ancient times and occurs when the surrogate's oocytes are used. Gestational surrogacy was introduced only after the first in vitro child was born. In this practice, there is no genetic link between the surrogate and the baby she carries.<sup>4</sup> In Debora Spar's historical account of surrogacy, she finds trends in Vietnam and Greece, where until recently; infertile women "adopted" the later-born children of families with many children.<sup>5</sup> In colonial America, children were sent to other childless families to learn trades or provide extra help to the family.

In ancient Indian period, there were 13 kinds of sons including Aurasa (Legitimate), Dattaka (Adopted) and Kshetraja (Surrogated). According to ancient texts, the process of getting Kshetraja son is called Niyoga. Niyoga is a technical term indicating the procreation of a child on the wife of another person. The term Niyoga in ancient Indian law is applied to a practice especially in case of the widow of the man, who died sonless. The widow of the sonless man was permitted to raise son for her late husband from the younger brother of her husband. In modern society, the concept of Niyoga is termed as 'Donating a Womb' i.e. Surrogacy.<sup>6</sup> In the Bhagvata Purana, Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devaki's womb transferred to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kansa the child was born dead.<sup>7</sup> The Assisted Reproductive Technologies [ART] industry is a thriving industry in India and has become a preferred destination for 'persons', foreign as well as domestic, opting for ART treatment as well as "the destination"<sup>8</sup> on the lookout for surrogates. This controversial matter range emerged from the altruistic to mutually beneficial to coercive.

### **Best Interest of Child in Surrogacy**

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<sup>4</sup> K. Svitnev "Legal control of surrogacy – International Perspectives"

<sup>5</sup> Spar, Debora L. "For Love and Money: The Political Economy of Commercial Surrogacy." *Review of International Political Economy*, Volume 12, Issue 2. May 2005. 287–309

<sup>6</sup> "Surrogacy - Blessing of Motherhood or Curse to Motherhood" Dr. Sonia Dutt Sharma Volume : 1 Issue : 11 November 2012, Indian Journal of Research, PARIPEX

<sup>7</sup> VERONICA IONS, INDIAN MYTHOLOGY 58-59 (1983); Raghav Sharma, An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India 11 (July 2, 2007) (working paper, on file with Nat'l Law Univ., Jodhpur), available at <http://ssrn.com/abstract=997923>; see also Gail Hinich Sutherland, Bija (seed) and Ksetra (field): Male Surrogacy or Niyoga in the Mahabharata, 24 CONTRIBUTIONS TO INDIAN SOC. 1 (1990) (discussing the practice of "niyoga", a practice employed by childless men to ensure the birth of sons, either through "wife lending" or having a brother sire a son in his dead brother's name with the dead brother's widow).

<sup>8</sup> N B Sarojini, Unravelling the fertility industry: ARTs in the Indian Context, International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies, January 22-24, 2010, New Delhi, A Report, Sama-Resource Group for Women and Health, New Delhi, page 46

The United Nation Convention on the Rights of the Child and the European Convention on Human Rights confirm a child's right to parentage, a right to know their parentage and a right to non-discrimination through their status acquired at birth by virtue of their parentage. The determination of who has legal parentage for a child has far reaching consequences, which will affect the child not only in childhood but also into adulthood. Parentage determines nationality, rights of citizenship, rights of abode, who is responsible for a child's care and who is responsible to provide for a child.<sup>9</sup>

The recent decision of SC in *Baby Manji Yamada vs. Union of India*<sup>10</sup>, legitimizing surrogacy and equating it with an industry has re-opened the commercialization of surrogate motherhood in India.

The pitiful case of Baby Gammy, Baby M and other such instances poses the question on the rights of child. In surrogacy, the rights of the child are rarely considered. Early handover of the child

hampers breastfeeding. Transferring the duties of parenthood from the birthing mother to a contracting couple is denying the child its claim to both the mother and the father. It could affect the psychosocial well-being of children who are born as a result of a surrogate motherhood arrangement.<sup>11</sup> In *Jan Balaz v Union of India*, the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district.<sup>12</sup> The court observed: "We are primarily concerned with the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance."

### **Debate on Surrogacy**

The society invokes a debate on the question of ethics and morality on commercial surrogacy and the rights of surrogate mothers and child rights. On one hand where childless couples are blessed with bundles of happiness; the surrogates rent their bodies and the emotional detachment from the baby affects them psychologically. Also it is termed as 'selling babies'. Much of the literature on the moral acceptability of surrogacy focuses on the promise or agreement to hand over the baby, for example: Does commercial surrogacy amount to Commodification of children? Is it

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<sup>9</sup>"The Hague Convention on Surrogacy: Should we agree to disagree?" Anne-Marie Hutchinson OBE, Partner and Head of International Children Department Solicitor (England & Wales) Dawson Cornwell, London United Kingdom

<sup>10</sup> [2008] INSC 1656 (29 September 2008).

<sup>11</sup> A Report on "Surrogate Motherhood- Ethical or Commercial" by Centre for Social Research (CSR)

<sup>12</sup> HC confers Indian citizenship on twins fathered through surrogacy; Express News Service; Nov 12, 2009; Ahmedabad; Indian Express Newspaper

possible to make an autonomous decision about relinquishing a child before becoming pregnant? Can the surrogate be forced to relinquish the child? What should happen if the intended parents refuse to adopt the baby?<sup>13</sup> The surrogacy arrangement has turned into an industry with immense inflow of currency. The transnational surrogacy arrangements are very prevalent. India is slowly emerging as the most destined place for surrogacy contracts due cheap medical facilities, advanced reproductive technological know-how, coupled with poor socio-economic conditions, and a lack of regulatory laws.

The opinion expressed by the American College of Obstetricians and Gynecologists: “To allow a woman to contract away the right to control her own health would be to institute contractual slavery.”<sup>14</sup> Whereas, it is often said that in the surrogacy arrangement “the barren gets a baby, the broke gets a bonus”. The surrogate mothers often really utilize the money they earn. And the debate goes on.

### **SURROGACY: CAUSES AND PROBLEMS FACED**

We live in a society where infertility is considered as a divine punishment. The Indian culture generally attaches a large stigma to infertility and childlessness, especially to the woman, even when the source of infertility is the male.<sup>15</sup> In a patriarchal society, fertility defines womanhood, and womanhood, in turn, is defined by a woman’s capacity to be a mother.<sup>16</sup> Indian couples seeking infertility treatment tend to favour assisted reproduction, including gamete donation, over adoption because the whole process may be done in secret.<sup>17</sup> Even if the infertile couple cannot easily hide the use of a surrogate, the couple still may prefer surrogacy instead of adoption in order

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<sup>13</sup> Ruth Walker And Liezl Van Zyl “Surrogate Motherhood And Abortion For Fetal Abnormality” *Bioethics* ISSN 0269-9702 (print); 1467-8519 (online)

<sup>14</sup> Ethical Issues in Surrogate Motherhood. ACOG Committee Opinion No. 88. *Int J Gynecol Obstet* 1992; 31: 139–144. See also K. Drabiak-Syed. Waiving Informed Consent to Prenatal Screening and Diagnosis? Problems with Paradoxical Negotiation in Surrogacy Contracts. *J Law Med Ethics* 2011; 559–564.

<sup>15</sup> Anjali Widge, *Sociocultural Attitudes Towards Infertility and Assisted Reproduction in India*, in CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION: REPORT OF A MEETING ON MEDICAL, ETHICAL AND SOCIAL ASPECTS OF ASSISTED REPRODUCTION 60, 63 (2001) [hereinafter Widge, *Sociocultural Attitudes*]; see also ushpa M. Bhargava, *The Social, Moral, Ethical, Legal and Political Implications of Today’s Biological Technologies: An Indian Point of View*, 1 BIOTECHNOLOGY J. 34, 41 (2006) (“Traditionally, if a couple is infertile in India, the family places the blame on the woman even though we know today that in about half the diagnosable cases a male factor is the cause of infertility.”); Anjali Widge, *Seeking Conception: Experiences of Urban Indian Women with In Vitro Fertilization*, 59 SOCIAL & CULTURAL ISSUES IN FERTILITY 3, 226 (2005) [hereinafter Widge, *Seeking Conception*] (finding through a study of 22 childless women seeking IVF that infertility is deeply feared, women’s status and security are affected, and they experience stigmatization and isolation).

<sup>16</sup> Widge, *Seeking Conception*, *supra* note 16 at 226.

<sup>17</sup> See Aditya Bharadwaj, *Why Adoption is Not an Option in India: the Visibility of Infertility, the Secrecy of Donor Insemination, and Other Cultural Complexities*, 56 SOC. SCI. & MED. 1867 (2003) (“Secrecy is born out of a need to obfuscate a public and visible violation of a culturally priced ideal that views intimate connection between the married body and the progeny.”).

to maintain a genetic tie with the child.<sup>18</sup> Therefore, the contracting parents indulge in surrogacy arrangement to save themselves from the curse of society.

There are various problematic areas which need to be addressed in such arrangements:

### **1. Social and economic inequality**

In most of the cases, the purchasers arrive from western countries and surrogates from the third world or developing countries. The rich prey on the poor women's vulnerable economic condition in their quest for a child. Becoming a surrogate mother is a way for women in socially vulnerable positions to sell what fundamental human rights should protect them from being forced to sell – their own bodies.

A study on surrogate mothers in Anand, India revealed that 50 % were illiterate and that many cannot themselves read the contract that they are signing to engage in this bodily commerce.

Signing the contract means signing off the right to one's own body. They are dependent on someone else to ensure that they understand the terms of the commitment and their rights during the process of the pregnancy. These women often come from poor backgrounds and their conditions of living do not allow them a fair array of choices when it comes to making a living or to make a choice that does not compromise their bodily integrity.

### **2. Medical consequences and Ethical concerns**

The after effects of pregnancy are totally unpredictable. A pregnancy is never risk free. Every pregnancy is unique, just like every woman and child is unique. Children born by surrogacy mothers in India are more often delivered by a caesarean since the children are too big for the mother. This entails further risks of complications, both in the present situation and in future pregnancies. Not only is the treated body reified through medical observation and manipulation, it also may serve as a site of experimentation for new

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<sup>18</sup> TULSI PATEL, *SEX-SELECTIVE ABORTION IN INDIA: GENDER, SOCIETY, AND NEW REPRODUCTIVE TECHNOLOGIES* 258 (2007) (“In the case of donated gamete surrogacy, the interested parties collude in recrafting the biosocial bond to mark their offspring as biologically related even when it is not. Such a transgression can be tacitly reconfigured into a legitimate kinship unit.”). Many people favour surrogacy over adoption in Western countries as well. *See, e.g.,* Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 187 (1994) (“In addition, the fervent wish to raise one's genetic child, as a link to immortality or an expression of one's self, is a major reason why many people choose surrogacy over adoption.”); B.R. Sharma, *Forensic Considerations of Surrogacy – an Overview*, 13 J. CLINICAL FORENSIC MED. 80, 81 (2006) (noting that adoption does not provide a genetic link to the child, an important consideration for some prospective parents).

techniques and treatments<sup>19</sup>, thus creating significant risks and disadvantages for the women involved.

According to some authors, such as Catherine Waldby (2008)<sup>20</sup>, due to its reproductive capacity, a woman's body also becomes a commodity with added value, a "bio value", which has the potential to be made available, transferable and open to commercialization, in what has become a very lucrative market<sup>21</sup>. More specifically, ova donation and surrogacy, even when altruistic<sup>22</sup>, place these women in the "reproductive bio economy", which is based on reproductive "labour" and "tissues"<sup>23</sup>.

### **3. Harm to Children born of Surrogacy and also to surrogate's children**

Splitting the role of mother between different women in this way (egg donor, commissioning woman, and birth mother), and the role of father (sperm donor and the commissioning man) also violates the child's right to know his or her origin and identity, as guaranteed in Articles 7 and 8 of the Convention on the Rights of the Child. Moreover, such concurring claims can give rise to litigation. Surrogacy compromises the dignity of the child by making the child the object of contract a commodity. It further compromises the dignity of the mother, even if her participation is voluntary, by merely treating her as a 'womb for hire'.<sup>24</sup> Even the surrogates' children have to compromise their care and affection during the surrogate pregnancy period; which is injustice to them.

When contracting parents pay a huge sum of money, the expectations rise. The demand for good-looking child with high academic potential turns children into commodities. The women who want to give eggs or become surrogate mother have to go through a very inquisitive process. The first step is a never ending questionnaire covering all aspects of the applicant's life: physical

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<sup>19</sup> Ehrenreich, B. and D. English. 1978. *For Her Own Good: One Hundred Years of the Experts' Advice to Women*, New York, Doubleday. ; Klein, R. and R. Rowland. 1989. "Hormone Cocktails: Women as Test-Sites for Fertility Drugs", *Women's Studies International Forum*, vol. 12, pp. 333-348.

<sup>20</sup> Waldby, C. 2008. "Oocyte Markets: Women's Reproductive Work in Embryonic Stem

Cell Research", *New Genetics and Society*, vol. 27, no 1, pp. 19-31.

<sup>21</sup> Almeling, R. 2011. *Sex Cells: The Medical Market for Eggs and Sperm*. Berkeley, University of California Press.

<sup>22</sup> Konrad, M. 2005. *Nameless Relations: Anonymity, Malenesia and Reproductive Gift Exchange between British Ova Donors and Recipients*. New York, Berghan.

<sup>23</sup> Pavone, V. and F. Arias. 2012. "Beyond the Genetization Thesis: The Political Economy of PGD/PGS in Spain", *Science, Technology & Human Values*, vol. 37, no 3, pp. 235-261.

<sup>24</sup> "The Ethical Case Against Surrogate Motherhood: What We Can Learn From The Law Of Other European Countries" A Paper By the Iona Institute

appearance (colour of skin, hair and eyes, quality of hair, height, weight etc.), medical background of the applicant and her family, including the age and cause of death of her grand-parents, education, occupation, career goals, education and occupation of the parents and siblings, religion, musical abilities, sexual life and personal questions of all kinds. They also have to send several photos. The clinic or agency certify that no woman with medical problems or a criminal record is selected in their database, and parents are able to choose the one who is more likely to produce a 'perfect' baby with all the optional extras<sup>25</sup>. Many clinics also offer pre-implantation genetic diagnosis, not only to avoid genetic diseases but also to enable commissioning parents to choose the sex of the baby.

#### **4. Surrogacy in terms of Morality and Human Dignity**

It is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child. These words of the Warnock committee reporting to the British Government in 1984 remain unanswerable even today. It is a decision where the 'right' and the 'wrong' are very individual things. Whatever the intentions, it's inevitable. Consequence would be the creation of a market specializing in the sale and purchases of babies or as the court of Appeal in England put it in 1985 in "a kind of baby forming operation of a wholly distasteful and lamentable kind."<sup>26</sup>

Whereas, people's views on the moral legitimacy of surrogacy in general are changing.<sup>27</sup> From a state of "moral panic"<sup>28</sup>, a more permissive attitude appears to be furthered by several general trends and developments. Most noticeable, much of the worries that concerned the early writers in the debate over surrogacy – concerns often framed in terms of harm – appear to have been left unfulfilled. As many of the predicted but undesired consequences of a fairly widespread practice of surrogacy have seemingly failed to materialize, the harm argument seems no longer fashionable.<sup>29</sup>

#### **5. Ambiguity in the Rights of Contracting parents and Surrogate on Abortion**

In commercial surrogacy, the parties enter a contractual agreement which states the rights and responsibilities of the parties. The surrogate typically agrees to undergo a specified list of medical

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<sup>25</sup> Id ; e.g. <http://mother-surrogate.com/anketa.html> ; <http://www.affordablesurrogacy.com/33.html>;

e.g. <http://www.lasvegasfertility.net/index.html> ; [http://www.fertility-docs.com/fertility\\_gender.phtml](http://www.fertility-docs.com/fertility_gender.phtml)

<sup>26</sup> Supra Note 7

<sup>27</sup> Brazier, Margaret, Alasdair Campbell, and Susan Golombok. 1998. *Surrogacy. Review for health ministers of current arrangements for payments and regulation: Report of the review team*. Stationery Office, UK.

<sup>28</sup> Scott, Elizabeth. 2009. Surrogacy and the politics of commodification. *Law and Contemporary Problems* 72: 109-146.

<sup>29</sup> Marcus Johansson Agnafors, The harm argument against surrogacy revisited: two versions not to forget, 2014, *Medicine, Health care and Philosophy*, (17), 3, 357-363.

tests and procedures, such as routine ultrasound scans and blood tests, as well as more invasive procedures such as amniocentesis and abortion in the event of a serious foetal abnormality if that is what the intended parents want. It upholds the surrogate's legal right to abortion and excludes surrogates with a conscientious objection to abortion.<sup>30</sup> The right to decide whether to abort a pregnancy is normally thought to reside with the pregnant woman: it is, after all, her body and her baby. However, in the context of surrogacy the pregnant woman does not intend to raise the child. In a morally relevant sense it is not her baby. There is a lot of ambiguity in the right to abortion.

## 6. Citizenship of the Baby born of surrogacy.

The issue of citizenship status of infants born to surrogates in one country for commissioning parties in another has cropped up in some countries.<sup>31</sup> Cross-border citizenship issues have also been faced. Immigration issues with respect to infants born to surrogates in India first arose with the immigration of twins born at Dr. Patel's Akanksha Fertility Clinic in Anand in 2004.<sup>32</sup>

## LEGALITY OF SURROGACY AND NEED FOR LEGISLATION

Free markets are wonderful institutions in their place. But they are objectionable when allowed to govern spheres of life that should not be co modified. In a world in which market norms have been lauded as cure-alls for every social ill, the time has come to draw some limits to their authority.<sup>33</sup>

For legality of surrogacy around the world, there is a plethora of views regarding the issue of surrogate birth in various countries. It is rather a tumultuous point of law as there are only a handful of nations recognising it and there is also a lack of uniformity in the principles being followed in these nations with respect to the phenomenon of surrogate birth. The United Kingdom was the first country ever to enact surrogacy legislation. It passed the Surrogacy Arrangements Act in 1985 whose main aim was to abolish commercial surrogacy. Under the

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<sup>30</sup> Supra Note 14

<sup>31</sup> Recently, Japan's Supreme Court rejected a Japanese couple's bid to register the birth of their twins, who had been born to a surrogate mother in the United States. See *Japanese Couple Not Allowed to Register Twins Born to U.S.-based Surrogate Mother as Their Own*, PRAVDA, March 23, 2007, <http://english.pravda.ru/society/88588-twins-0>. The Supreme Court cited Japanese Law that presumes the woman who gives birth to a child is its mother. The couple would have to legally adopt the children and then apply for their citizenship through immigration authorities. *Id.* The couple decided to raise the twins as U.S. nationals. See *Twin boys born via surrogacy to be raised as Americans*, YAHOO! ASIAN NEWS, Apr. 11, 2007, <http://asia.news.yahoo.com/070411/kyodo/d8oebkoo0.html>.

<sup>32</sup> Sarah Pook, *Twins Born to Their Granny Win Entry to UK*, DAILY TELEGRAPH, July 27, 2004, at 9, available at [http://www.telegraphindia.com/1040728/asp/nation/story\\_3551289.asp](http://www.telegraphindia.com/1040728/asp/nation/story_3551289.asp).

<sup>33</sup> Anderson Elizabeth S. "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales" *Health Care Analysis* 8: 19–26, 2000. © 2000 Kluwer Academic Publishers.



Human Fertilisation and Embryology Act, 2000, the commissioning parents are given the status of legal parents provided he or she is genetically related to either of the commissioning parents.<sup>34</sup>

Lord Patrick Devlin in his article *"Morals and the Criminal Law"* wrote: "No act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption or exploitation; It is not the duty of law to concern itself with immorality as such; it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive and injurious."

A shocking case of surrogacy was recently unearthed in the Bombay International Airport, where a foreigner couple came for surrogacy arrangements in India in order to get an organ transplant to their sick child in their country. This revelation further highlights the need for studies on surrogacy to provide a foundation for the formulation of laws and regulations in surrogacy arrangements. Therefore, there is a clear need to protect the interests of both the surrogate mothers and the children produced out of such arrangements. There are issues regarding the child's nationality and citizenship.

To address the controversial issues and to regulate surrogacy arrangements, Government of India introduced and implemented of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines have been issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India.<sup>35</sup> However, till now there is no legal provision dealing directly with surrogacy laws to protect the rights and interests of the surrogate mother, the child, or the commissioning parents. Nonetheless, Assisted Reproductive Technique (ART) Regulation Bill, 2010 lays down few guidelines too.<sup>36</sup>

According to senior advocate Kirti Gupta, "At present, it is not difficult to have a baby through surrogacy in India because there is no law to control or regulate it. The technique is cheap, when compared to other countries, and surrogate mothers here charge comparatively less for the services."<sup>37</sup>

Therefore, the risks and the disadvantages involved in the surrogacy arrangements often prove detrimental to the interests of the surrogate mother, and the child. At times the commissioning parents also face legal hassles, which was demonstrated in the case of a Japanese couple and the

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<sup>34</sup> Id

<sup>35</sup> National Guidelines for Assisted Reproductive Technology: Ethical issues in Surrogacy'- Paper presented by Dr. R.S. Sharma, DDG (SG), Division of RHN, Indian Council of Medical research, New Delhi at the meeting-cum-workshop organized by the Ministry of Women and Child Development, Govt. of India on 25th June 2008 at India Islamic Centre, New Delhi.

<sup>36</sup> ART (Regulation) Bill 2010, n. 2, Chapter V, pg. 20-35

<sup>37</sup> Id

child born to them, which brought out many issues related to surrogacy arrangements.<sup>38</sup> Surrogacy cases have been predicted to overtake traditional adoption cases,<sup>39</sup> it then seems appropriate that if there is adoption specific legislation that there should also be surrogacy specific legislation.

It is better to have a well-drafted legislation to govern surrogacy. The Indian Council of Medical Research developed draft Assisted Reproductive Technology (Regulation) Bill in 2008 with the help of a Drafting Committee of ICMR. The draft Assisted Reproductive Technology (Regulation) Bill-2008 was again subjected to extensive public debate not only throughout the country but globally by placing the draft Bill on the websites of the Ministry of Health & Family Welfare, Government of India and of the ICMR. Based on the comments received from various stakeholders including the comments from other countries and as per the recommendations of the Drafting Committee, the draft Assisted Reproductive Technology (Regulation) Bill was revised and finalized. The finalized version of draft Assisted Reproductive Technology (Regulation) Bill-2010<sup>40</sup> was sent to the Ministry of Health & Family Welfare, and has now been revised by the Ministry of Law & Justice as Assisted Reproductive Technology (Regulation) Bill - 2013. The Assisted Reproductive Technology (Regulation) Bill-2014 has now become a part of the Cabinet Note.

## CONCLUSION

***“I am free, no matter what rules surround me. If I find them tolerable, I tolerate them; if I find them too obnoxious, I break them. I am free because I know that I alone am morally responsible for everything I do.”***

**— Robert A. Heinlein**

There is no right or wrong. It's all in the mind. Weighing the concept of surrogacy in the ethical and moral perspective might lead us nowhere. Akiro Kurusawa, Roshoman, says; “The search for the correct viewpoint which is superior to all other viewpoints is an error in itself.”

Surrogacy is increasingly practiced with emerging and conflicting laws among parents based in different legal jurisdictions. In Janice G. Raymond's view, it is more accurate to call surrogacy

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<sup>38</sup> Hindustan Times, dated 7th August 2008, Nation Page, pg. 13, column 2.

<sup>39</sup> Dinah Kennedy *International Adoption and Surrogacy in New Zealand in New Zealand Law Society International Adoption and Surrogacy : Family Formation in The 21st Century* (New Zealand Law Society, Continuing Legal Education, New Zealand Law Society, Wellington 2014).

<sup>40</sup> Sharma RS, Bhargava PM. New Delhi: Ministry of Health and Family Welfare, Government of India; Indian Council of Medical Research; [accessed on October 10, 2014]. Draft The assisted Reproductive Technologies (Regulation) Bill - 2010. Available from: <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1pdf> .

“reproductive trafficking” “because it creates a national and international traffic in women in which women become moveable property, objects of reproductive exchange, and brokered by go-betweens mainly serving the buyer.”<sup>41</sup> Oprah Winfrey declared in front of eight million viewers in 2007 that Indian surrogacy was a case of “women helping women.” The contrasting views leave us in ambiguous state of affairs.

The infertile couple are blessed with bundles of joy but the surrogate who gets emotionally attached to the child suffers psychologically, physically and mentally. Every coin has two sides: one side the immeasurable happiness of the infertile couple to hold the new life in their arms for which they have yearned for long; on the other hand the life giver and carrier of the baby who leaves her own home and children to facilitate the other. There are lot of emotions involved in the surrogacy arrangement. It is essential that the parties of the arrangement respect each other's emotions and dignity. To govern it properly, many observers have called for legislation to be enacted not only to effectively implement the Guidelines but also to address the issue of exploitation of surrogates.<sup>42</sup> Jyotsna Agnihotri asks, “Should we view these cases as examples of women's agency, self determination, and solidarity of ‘global sisterhood’ between the fertile/infertile, first world/third worlds, rich/poor and support them? If only things were that simple!”<sup>43</sup> Such “win-win” type declarations presume that the commissioner and commissioned are on equal footing. But it “is debatable whether women are choosing freely to become surrogates, or that their will is socially and economically constructed.”

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<sup>41</sup> Janice G. Raymond, *Reproduction, Population, Technology and Rights*, 2 WOMEN IN ACTION (1998), available

at <http://www.isiswomen.org/wia/wia298/rep00001.html> (noting that infertility is a concept with no scientific consensus and that the definition conflates inability to conceive with difficulty in conceiving quickly, which routes a large number of women into unnecessary, experimental, and costly medical treatment)

<sup>42</sup> Ritesh G. Menezes & Prashanth K. Adiga, Letter to the Editor, *Surrogacy in India*, 14 J. FORENSIC & LEGAL MED. 307 (2006); Anil Malhotra & Ranjit Malhotra, *No Child's Play: Problems Faced by NRIs to Adopt Children*, ECONOMIC TIMES, March 6, 2008, [http://economictimes.indiatimes.com/The\\_Global\\_Indian\\_Takeover/No\\_childs\\_play\\_Problems\\_faced\\_by\\_NRIs\\_to\\_adopt\\_children/articleshow/2841488.cms](http://economictimes.indiatimes.com/The_Global_Indian_Takeover/No_childs_play_Problems_faced_by_NRIs_to_adopt_children/articleshow/2841488.cms) (“A law governing surrogate motherhood, hiring of wombs in India and sperm banks needs to be enacted immediately. The abuse of this process for exploiting women and misusing children born in surrogacy for commercial considerations, must be stopped forthwith.”); Pankaj Sattawan & Partha Pratim Medhi, Resolving Disputes Arising Out of Surrogacy 1, 5 (May 4, 2007) (working paper), available at <http://ssrn.com/abstract=998512> (“Steps should be taken to regulate and minimize the negative effects of surrogacy. This will protect those who are affected by the use of such technologies.”); Raghav Sharma, *supra* note 6, at 10 (“Surrogacy, if not regulated, will prove to be an avenue of exploitation and subjugation of women.”).

<sup>43</sup> Jyotsna Agnihotri Gupta, *Women's Bodies: The Site for the Ongoing Conquest by Reproductive Technologies*, 4 ISSUES IN REPROD. & GENETIC ENG'G 93 (1991) (discussing the history of reproductive abuses in India including coercive sterilization and hormonal and injectible contraceptive trials)

When the “choices” can be so dire, it is possible that Indian women may be pressured by their families, brokers, and personal circumstances to lend their bodies for cash.

With respect to the abolition vs. regulation debate, Janice Raymond wrote:

*“Basically, the regulatory approach leaves the technologies intact while making them less haphazard. It restricts the more egregious abuses of these technologies by legislating the conditions and the contexts in which they can be used and by watch dogging the ways in which these technologies are used. Regulation functions as quality control rather than as critical challenge. Regulation is a perceived rational response advocating restriction rather than absolution, and within the dominant medical and commercial ecology of reproductive technologies and contracts, scientists, lawyers and entrepreneurs have made a plea for this kind of legislation. It gives the surrogate brokers, for example, a stable marketing environment and makes the process of surrogacy more convenient for the client and broker.”<sup>44</sup>*

The Assisted Reproductive Technology (ART) Bill will make renting a womb by Indian and foreign couples looking for surrogate mother is expected to become hassle free, and the motherhood by subrogation would be ethical and noble.<sup>45</sup>

Let us look forward for a happy co-existence of rights and duties associated in the purview of ethical and moral aspect of surrogacy arrangement.

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<sup>44</sup> Supra N 42

<sup>45</sup> Smerdon U. R (2008)“Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India”