

SURROGACY AND PARENTAL ISSUES

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I. INTRODUCTION

Surrogacy is a ray of hope to those couples, who are unable to bear their child. To be a mother is the best gift of God for a woman. Every society across the world has given primary importance to the institution of family as the most basic and fundamental unit of social relationship. When two individuals come together and enter into a matrimonial bond a new family is deemed complete with the birth of children. All traditional societies are pro-natal societies¹ and consider children as a necessity for continuation of the family lineage and consequently a source of happiness for parents. Such beliefs in the traditional societies create a pressure on married couples to bear a child. In such a situation the inability to have a child causes matrimonial breakdown and exposes the couples to social ridicule.² The inability to have children, in medical term, is known as 'infertility.'³ The infertility is a global problem. According to WHO Report the incidence of infertility across the globe, including India is around 10-15 percent.⁴ A family also demands an heir for its continuation and succession purpose. It is only possible when couples have their own child. Previous to the advancement of science of reproduction and surrogacy, the infertile couples have the only option that is adoption. But the act of adoption is not acceptable to all personal laws for example Muslim personal law does not recognize the adoption. After the advancement of science and technology, surrogacy has become a popular method for getting a child who desires so. This option is also a kind of boon for new trends of couples LG BT (lesbian, gay, bisexual, transsexual). Surrogacy has evolved by the medical science as a method of '*proxy womb*.'

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¹ Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275.

² Imrana Qadeer, *Social and Ethical basis of Legislation on Surrogacy: Need for Debate*, VI: 1 INDIAN JOURNAL OF MEDICAL ETHICS 2009.

³ Assisted Reproductive Technology (Regulation) Bill 2008, Section 2(q) "Infertility" means the inability to conceive after at least one year of unprotected coitus."

⁴ ANNUAL REPORT 2008-2009 Ministry of Health and Family Welfare, Government of India available at <http://mohfw.nic.in>.

India is witnessing a spurt in cases of surrogacy due to two factors: a medical tourism boom fuelled by low medical costs and a status conscious middle class seeking to fulfill its financial needs.⁵

In 2006, 290 surrogacy cases were reported compared to 158 in 2005. There were 50-odd cases, according to data collected from 116 fertility centers in a survey conducted by Federation of Obstetrics and Gynecological Societies of India (FOGSI) and, Indian Society for Assisted Reproduction.⁶ It becomes more complicated when the traditional form of surrogacy has been opted by the intended parents; by which the surrogate mother becomes the both genetic and biological mother of the child.

The process of surrogacy has been entangled with multi facet medico, social and legal complicacies, throughout the world, from the *Baby M. case (U.S.)*⁷ to recent controversy in India in *Baby Manji case*.⁸ Conceptually, fundamentally and practically, there are various issues related to surrogacy.

II. SURROGACY: IT'S MEANING AND DEFINITIONS

The word, surrogate, has its origin in Latin, *surrogatus*, which refers '*surrogare*', means '*a substitute*,' that is, a person '*appointed to act in place of another*'. Thus a surrogate mother is a woman, who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from another.⁹

Traditionally, surrogate motherhood referred to, 'an arrangement between a married couple who is unable to have a child because of the wife's infertility, and a fertile woman who agrees to conceive the husband's child through artificial insemination, carry it to term, then surrender all parental rights in the child'.¹⁰

⁵ Monica Chawala, *Surrogacy: A Need for New Law*, 45:4 CIVIL & MILITARY LAW JOURNAL 193.

⁶ Alifiya Khan, *Surrogacy is soaring in India*, HINDUSTAN TIMES, 19th September 2008.

⁷ 537 A.2d 1227, 396 (N.J. 02/03/1998).

⁸ AIR 2009 SC 84.

⁹ TWO HUNDRED TWENTY EIGHTH REPORT OF LAW COMMISSION OF INDIA, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*, p.9.

¹⁰ Kusum Jain, *Surrogate Motherhood; Some Legal and Moral Problems in Bio-Ethics*, 25 JILI 1546(1983).

According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. The New Encyclopedia Britannica defines surrogate motherhood as the practice in which a woman bears a child for a couple unable to produce children in the usual way. 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. According to Concise Law Dictionary, the role of a woman (a surrogate mother) who is commissioned to bear a child by a married couple unable to have children themselves.

The Assisted Reproductive techniques Bill 2008 defines surrogacy under section-2(t) as 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 to her husband, with the intention to carry it to term and hand over the child to the person or persons for whom she is acting as a surrogate.

In this respect surrogacy is a method where- 'a woman who bears a child for another person, often for payment whether through artificial insemination or carrying until birth another women's surgically implanted fertilized egg.'

In India the concept of surrogacy has been imbibed in the mythology itself. The concept of surrogate mothers is well known from ancient period. Dhritarastra was the proud father of hundred children, though he had no biological relation with Gandhari. At that time, the underlying idea behind surrogacy is a noble one as it is based on the altruistic principle of doing well to others i.e. one woman helping another woman. The religious texts of Hinduism and Christianity highlight the practice of surrogacy in ancient era. The Old Testament cites the example of Abraham's infertile wife, Sarah, commissioning her maid Hagar to bear a child by Abraham.¹¹

The Bhagavata Purana narrates the story how by the blessings of Vishnu the embryo from Devaki's womb was transferred to the Rohini; another wife of Vasudev, so that the life of one of their sons is protected.

¹¹ Genesis 16.

Rohini secretly gave birth to Balrama and raised him, while Devaki and Vasudev informed Kansa about the death of their son.

There is an increasing acceptance of surrogacy arrangement in certain jurisdiction around the world. The growth of infertility in modern society and the declining numbers of children for adoption had increased the need for a reproductive technology options to be made available.

III. TYPES OF SURROGACY

There are various categories of surrogacy. Different authors have categorized this act in different forms. Some are as given below:

(a) *Traditional Surrogacy*

This is also known as the straight method of surrogacy. In “traditional surrogacy” the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishment of the child to be raised by others; by the biological father and possibly his female spouse or partner, either male or female. The child may be conceived via artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra-cervical insemination) which is performed at a fertility clinic.¹²

In this respect when a surrogate mother is pregnant with child but the child is conceived with intention of handing it over to others or the biological father and his partner is called “traditional surrogacy”.¹³ Traditional surrogacy is an Assisted Reproduction method when the surrogate mother agrees to donate her eggs. The child that is conceived using IVF (in-vitro fertilization) or IUI (intra uterus insemination) is biologically related to the surrogate mother. It involves legal risk to intended parental rights because in this form of surrogacy, “traditional surrogate” carries her own biological child and may experience emotional attachment to the child.

The infamous “*Baby M*” case involved traditional surrogacy. The surrogate mother carried a biological child and later refused to relinquish her parental rights to the biological father. She fled from New York to Florida trying to escape the Judge’s Order. *Baby M. case* attracted a lot

¹² AIR 2009 SC 84.

¹³ Suzane Griffiths & Logan Martin, *Assisted Reproduction and Colorado Law: Unanswered Questions and Future Challenges*, 35 Colo Law 39 (2006).

of publicity and caused the changes of New York and New Jersey laws on surrogacy.¹⁴

(b) *Gestational surrogacy*

This is also known as '*the Host method of surrogacy*'. In the gestational surrogacy the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is unrelated to the child (e.g. because the child was conceived using egg donation, germ donation is the result of a donated embryo). The surrogate mother may be called the gestational carrier.¹⁵ Gestational Surrogacy always involves using IVF (in-vitro fertilization). In the USA, high costs of IVF and lack of medical coverage for Assisted Reproduction prevent many families to seek surrogacy as family building options. At the same time, the USA remains the country where gestational surrogacy arrangements are not illegal in most of its states.

It is the most prevalent form of surrogacy, wherein the surrogate mother becomes pregnant via embryo transfer with a child of which she is not the biological mother and as per the agreement she is required to hand over the baby and relinquish all her rights to the commissioning parents.

Gestational surrogacy, with or without monetary incentive, is the most popular form of surrogacy as it enables the birth of child having the genes of the commissioning parents.¹⁶ In such kind of surrogacy the surrogate mother is genetically unrelated to the child, hence has less legal claim on the child.¹⁷ But the procedure of gestational surrogacy is highly complicated one and is accompanied with high risks and low success rates.¹⁸ However the desire to have ones own children encourages couples to undertake the risks and complications of surrogacy.¹⁹ In the gestational

¹⁴ *Baby M*, 537 A.2D, 1227, 109 N.J. 396 (N.J. 02/1998).

¹⁵ *Baby Manji Yamada v. Union of India & Another*, AIR 2009 SC 86.

¹⁶ *Supra* n.2.

¹⁷ Kevin Tuininga, *The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law*, 41 CREIGHTON L. REV. 185.

¹⁸ The IVF take home baby rate in India is documented to be around 25 percent and it varies with age. Available at [http:// icmr. nic. in /bujunjulyoo. pdf](http://icmr.nic.in/bujunjulyoo.pdf).

¹⁹ Pankaj Desai, *Why is Commercial Surrogacy a Contentious Issue?* [http://www. expresshealthcaregmt. Com/200703/stretery05. shtml](http://www.expresshealthcaregmt.Com/200703/stretery05.shtml).

surrogacy embryo transfer takes place. The embryo is created from the gametes of the commissioning parents or from the gametes of the sperm or egg donor.²⁰

During the course of surrogacy the commissioning parents generally bears the cost of medical care of the surrogate mother including her living costs, maternity clothes, transportation cost, loss of earning and other reasonable expenditure.

(c) *Altruistic surrogacy*

It is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).²¹ Thus when the surrogate mother agrees to carry on the pregnancy on behalf of the commissioning parents without demanding any consideration for the service rendered it is deemed to be an 'altruistic surrogacy'.

(d) *Commercial Surrogacy*

In commercial surrogacy, there is consideration in lieu of the act. Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dreams of being parents. This medical procedure is legal in India where due to excellent medical infrastructure, high internal demand and ready availability of poor surrogates it is reaching industry proportion.²²

IV. JUDICIAL APPROACH TOWARDS SURROGACY

In surrogate birth, there are three important entities – the intended mother, the biological mother and the genetic mother. The intending mother in this respect is the mother who wants the child, the biological mother is the one who gives birth to the child or provides her womb and the genetic

²⁰ Jim Hopkins, *Egg Donor Business Booms on Campuses*, USATODAY, Mar. 15, 2006, <http://www.usatoday.com/money/industries/health/2006-03-15-egg-donors-usat-x.htm>.

²¹ *Supra* n. 15.

²² *Ibid*.

mother is the one whose ovum is used. There may be an overlap between the three in certain cases. If the ovum of the intending mother is used, she herself is the genetic mother but if the biological mother uses her own ovum then she becomes the genetic mother. This is where the moral and legal question arise- that is out of three who should be the legal mother- the intended mother who wants the child and for whom the child is brought forth: the biological mother who carries the child for the gestation period; or the genetic mother who can be proved to be the mother through DNA tests.²³

The phenomenon of surrogate birth may involve other legal complexities such as legality of surrogate contract, legitimacy of the child, right of surrogate mother over the child and the parenthood rights. In India, as there is no legislation regarding surrogate birth the position becomes even more complex. Even socially, the concept of surrogate birth is not accepted on a large scale.²⁴

The moral issues, which are associated with surrogacy, are pretty obvious. This includes the critical aspect, which leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes, psychological problems also encountered in the act of surrogate agreements.

In recent years the arguments against commercial surrogacy has been heightened because medical practitioners in the countries like India using their technical expertise and easy availability of poor women have opened up new surrogacy market for childless couples across the world.²⁵ Women with limited economic means in India have readily accepted this method of earning quick money and fulfilling the needs of their family.²⁶

To resolve this issue various countries have laid various legal angles. In UK, the surrogate mother is the legal mother (section 27(1) of the Human Fertilization and Embryology Act 1990). Section 30 of the said Act at the same time provides that if the surrogate mother consents to the child to be

²³ Reetu and Basabodutta, *Surrogate Birth*, AIR July 2009, Journal Section, 109.

²⁴ *Ibid.*

²⁵ *Supra* n. 16.

²⁶ Orphen.com.wombs for Rent: Journey to Parenthood, available at <http://www.orphen.com/slideshow/world/globalissues/slideshow>.

²⁷ *Supra* n. 9, p. 14.

treated as the child of the commissioning parents the court may make a parental order to that effect. This section also prohibits giving or taking of money or other benefit (other than expenses reasonably incurred) in consideration of the making of the order or handing over of the child.²⁷

In India, according to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics, evolved in 2005 by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS), the surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents. The US position as per the Gestational Surrogacy Act 2004 is pretty similar to that of India.

*US BABY M. CASE*²⁸

In 1984, a couple from New Jersey in US – William Stern and Elizabeth Stern contracted to pay Mary Beth Whitehead \$10,000 to bear a child using artificial insemination of William Stern's sperm. The baby was born, but Whitehead decided to keep the child and refused the money. On this issue in the landmark case of *Baby M.*²⁹, New Jersey Supreme Court decided and defined the custody rights in the case of surrogate motherhood. The natural father was awarded custody of Baby M but the rights of adoptive mother were denied. The surrogate mother who conceived the child via artificial insemination was granted visitation rights. The New Jersey Supreme Court decision prohibited further surrogacy arrangements in the State unless, "the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights." Seventeen other states have since adopted similar guidelines.³⁰

*CALIFORNIA'S BUZZANCA CASE*³¹

In 1998 a California court ruling has fostered the favorable legal scenario for the surrogacy and egg donation agreements. The question before the court in the case of *In re Marriage of Buzzanca*³², was whether

²⁸ 537 A.2d 1227, 109 N.J. 396 (N.J. 396 N. J. 02/03/1998).

²⁹ *Supra* n. 15

³⁰ *Ibid.*

³¹ 61 Cal. App. 4th 1410 (1998).

³² *Ibid.*

a married couple, who used both anonymously donated sperm and egg and used a surrogate mother to carry the child, were the parents of the child born six days after the husband filed for divorce. The contention of the intended father was that since he was not the biological father of the child, therefore he was not the child's father and could not be forced to adopt. The court decided that 'both intended parents were the legal parents of the child.

*CALIFORNIA'S JOHNSON v. CALVERT CASE*³³

The California court, in the case of *Johnson v. Calvert*³⁴, held that the gestational surrogate had no parental rights to a child born to her, as a gestational surrogacy contract was legal and enforceable. The court reasoned that the one who intended to, "*to bring about the birth of a child that she intended to raise as her own-is the natural mother under California law.*

JAPAN'S JUDICIAL POSITION

In Japan, the latest position is that the mother who gives birth to the child is the legal mother and the intended parents need to adopt the child to gain the legal status of the parents. This was upheld by the Ministry of Justice in a 2003 Supreme Court decision by reiterating the stand laid down in a 1962 decision by Supreme Court of Japan.³⁵

BRISBANE STATE'S, IN RE EVELYN CASE

In Brisbane state, the Brisbane Family court decided the case of *Re Evelyn*, involving the dispute of parenthood rights of the child born out of surrogate contract. The court decided the surrogate contract to be invalid and the genetic parents to be the legal parents i.e. the surrogate mother and the intended father. And for the custodial rights it opined that the best interest of the child needs to be the prime consideration.

AUSTRALIAN KIRKMAN SISTERS'S CASE

In Australia *the case of Kirkman sisters* raised the societal eruption in Victoria. Linda Kirkman has entered into an agreement to

³³ (1993)5 Cal.4th 84.

³⁴ *Ibid.*

³⁵ *Supra* n. 23.

gestate the genetic child of her older sister Maggie. The baby girl, called Alice, was handed over to Maggie and her husband at birth. This sparked much community and legal debates and soon Australian states attempted to settle the legal complications in surrogacy. Now in Australia commercial surrogacy is illegal, contracts in relation to surrogacy arrangements unenforceable and any payment for soliciting a surrogacy is illegal.³⁶

*JAYCEE B. v. SUPERIOR COURT*³⁷

How surrogacy can lead to an array of legal complexities regarding motherhood was shown by *Jaycee B. v. Superior Court*.³⁸ A child was born to a surrogate mother using sperm and eggs from anonymous donors because the infertile couple was unable to create their own embryo using the in vitro fertilization techniques. The couple chose to use anonymous donors rather than asking the surrogate to use her own eggs because of the *Baby M case*³⁹ in New Jersey in which the surrogate had eventually refused to hand over the baby saying that she was its biological mother and her right to raise the child pre-empted the commissioning parents'. The child thus had five people who could lay claim to parenthood – a genetic mother, a commissioning mother, a surrogate mother, a genetic father and a commissioning father. One month prior to the birth of the baby Jaycee the intended parents John and Luanne separated and John sought to rescind his obligations under the surrogacy contract so as to avoid having to pay child-support for Jaycee. Luanne sought both custody and support from her ex-husband. The court battle continued and for three years Jaycee did not have a legal parent. A Californian court granted temporary custody of the baby Jaycee to Luanne and ordered John to pay for child-support.

Indian *Baby M case*⁴⁰ concerned custody of a child Manji Yamada given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement with her entered into by Dr Yuki Yamada and Dr Ikufumi Yamada of Japan. The sperm had come from Dr Ikufumi Yamada, but egg from a donor, not from Dr Yuki Yamada. There were matrimonial discords between the commissioning parents. The genetic father *Dr Ikufumi Yamada* desired to

³⁶ *Supra* n. 9, p. 13.

³⁷ 42 Cal. App. 4th 718 (1996).

³⁸ *Ibid.*

³⁹ *Supra* n. 28.

⁴⁰ JT 2008, (11) SC 150.

take custody of the child, but he had to return to Japan due to expiration of his visa. The Municipality at Anand issued a birth certificate indicating the name of the genetic father. The child was born on 25.07 2008 and moved on 03.08.2008 to Arya Hospital in Jaipur following a law and order situation in Gujarat. The baby was provided with much needed care including being breastfed by a woman.

The grandmother of the baby Manji, Ms Emiko Yamada flew from Japan to take care of the child and filed a petition in the Supreme Court under Article 32 the Constitution of India. The Court relegated her to the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act 2005. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother.⁴¹

In *Israeli Gay couples case*⁴² a gay couple of Yonathan and Omer from Israel have come to Mumbai for a surrogate child, because in Israel they could not adopt a child or have a surrogate mother for the same. Yonathan donated his sperm. They selected a surrogate. Baby Evyatar was born. The gay couple took son Evyatar to Israel. Israeli government had required them to do a DNA test to prove their paternity before the baby's passport and other documents were prepared.⁴³

A German couple Jan Balaz and Susan Lohle had surrogate twins in Anand Gujarat, in April 2008. Since Germany does not recognize surrogacy, Balaz moved in Gujarat High Court, which ruled that the children be given Indian citizenship. Later on the couple moved to UK but UK refused to give visas to those twins whose citizenship is undecided. Government opposed the order of High Court, which then asks for the identity papers so that twins can travel. The Supreme Court says, "Surrogacy must be examined in detail". A Bench comprising Justices G S Singhvi and A K Ganguly vented its anguish and said;

Should we treat children born out of surrogacy as commodities?
Statelessness cannot be clamped upon the children. There must
be some mechanism to get citizenship of some country. Children

⁴¹ *Supra* n. 9, p. 15.

⁴² THE TIMES OF INDIA, 18 November 2008.

⁴³ *Ibid.*

should be allowed to leave the country after an assurance of their citizenship has been given.⁴⁴

Thus the judiciary has tried to settle all the issues related to the legal complexities and social acceptance of the surrogacy. Supreme Court of India has also criticized the term 'industry', used in place of surrogacy by the Law Commission.

V. LEGAL ISSUES ATTACHED WITH THE SURROGACY AND PARENTAL ISSUES IN INDIA

There are the following legal mazes that have knotted with the surrogate arrangements

Firstly, whether surrogacy agreement between two parties is valid under section 25 of Indian contract Act 1872 or void under section 23 of the same Act.

Secondly, who will become the genetic and biological mother of the concerned child? This has changed the definition of the mother and there is the need to redefine the term mother in the context of the surrogate mother. This issue may get more complicated in regard to other familial relationships between siblings, property rights, inheritance etc.⁴⁵

Thirdly, the legitimization of surrogate child is also a matter of great controversy under the legal parameter. Indian law recognizes relationship by blood and adoption or marriage. Children are said to be related to each other by full, half and uterine blood. The status of children in a family is established by reference to the marital status of their parents. They are legitimate when they are born out of wedlock, otherwise they are illegitimate. Surrogacy challenges both the principles. For the legal problems, paternity is a question based on generic aspects. Use of the husband's sperm for inseminating the wife either in vitro or in utero fertilization does not pose any problem to the question of paternity of the offspring. However the use of donated sperm in AID inevitably creates conflict with social reality and genetic truth. In the absence of statutory intervention, the child is illegitimate, his rights being those enforceable against

⁴⁴ THE TIMES OF INDIA, 6th December, p. 11.

⁴⁵ Shri Mahaveer Chand Bhadari Memorial Lecture, *The Advance of Science and the Need to Evolve Compatible Legal System* by MGK Menon, (1995) 5SCC(Jour) 18 available at <http://www.ebc-india.com/lawyer/articles/96v5a4htm>

his genetic father i.e. the anonymous donor, and his social father is a legal stranger to him. This state of affairs creates problems in his inheritance rights.⁴⁶

In India, legitimacy issues are governed by section 112 of the Evidence Act, where under the child would be legitimate child of the woman and her husband, and the artificiality of the process (in its sexual aspect) would make no difference. This presumption is also rebuttable on the ground of access. Of course, if the marriage was not consummated in the usual sense, it would be a valid ground for a decree of nullity.⁴⁷

VI. A CRITICAL APPRIASAL OF THE ASSISTED REPRODUCTION TECHNOLOGY (REGULATION) BILL 2008 AND RECOMMENDATIONS OF LAW COMMISSION OF INDIA

Surrogacy regulation may well be one of Hilbert's unsolvable problems. Only this is not mathematics and there are already many versions of the 'solution' in existence.⁴⁸ A detailed assessment of the Bill will definitely bring to light many more areas of contradictions. These are just a few examples. It seems that the bill has been proposed in a lot of haste, it assumes certain social trends have been accepted in India and strengthens certain traditionally held notions which have been systematically critiqued by feminists in India. Thus if at all we need a legal regulation, it needs to be much more well thought out, with more dialogue between the stakeholders. This still seems to be the brain child of Indian Council for Medical Research.

1. 'surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

⁴⁶ *Supra* n. 23, p. 111.

⁴⁷ *Ibid.*

⁴⁸ <http://www.thehindu.com/opinion/open-page/article532007.ece?service=mobile>

2. Surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple, an individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
4. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
7. Right to privacy of donor as well as surrogate mother should be protected.
8. Sex-selective surrogacy should be prohibited.
9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The Report has come largely in support of the surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions.

VII. AMENDMENT IN THE DRAFT BILL, 2010

Surrogacy is entangled with the multifaceted legal, moral and social complications. To elucidate these complication there are already many versions of the 'solution' in existence⁴⁹. So far, there have been a set of draft guidelines (2002), the finalized guidelines (2005), the draft Bill 2008, the draft Bill 2010 and a Law Commission report (2009) — all with a

⁴⁹ Aastha Sharma, *Surrogacy: law's labour los?* Available at <http://www.thehindu.com/opinion/open-page/article532007.ece?service=mobile>

mix of contradicting, progressive, regressive, rights protecting and profit-protecting clauses. The draft Assisted Reproductive Technologies (Regulation) Bill and Rules 2010, the latest version, has not been made public yet, and only glimpses of some of its clauses can be caught through recent news reports.⁵⁰

- (i) The draft Bill 2008 was widely criticized by health and rights experts and civil society organizations mainly on the ground that it promoted and facilitated profit making by private doctors and compromised on the health and rights of the surrogates and the children born.
- (ii) The clause clearly demonstrating the pro-profit orientation of the 2008 Bill was the provision facilitating easy access to foreign couples to hire Indian surrogates, including appointing a local guardian for the surrogate. But the modified, new version of the Bill has made an amendment to this clause. It has been currently conveyed through the Bill that it will be mandatory for all foreign couples coming to India for surrogacy to submit documents from their home country certifying that they permit surrogacy in their country and that the child born will be granted citizenship. This is a revolutionary change and will, in some way at least, ensure that children born through surrogacy are not caught in legal conflicts and declared 'stateless.'
- (iii) The other remarkable change in 2010 Bill is that unless gay and lesbian relationships are legalized in India, gay couples from other countries too would not be allowed to access these technologies. Recently, there has been a rise in the number of gay couples from various parts of the world to have a child through surrogacy in the Indian clinics. While the Delhi High Court⁵¹ in July 2009 did decriminalize gay sex, gay relationships are yet to be legalized. There were a host of other objectionable clauses in the 2008 Bill, like allotting the task of sourcing gametes and surrogates to semen banks, allowing women to donate eggs six times with a gap of three months each, the absence of the basic rights to the surrogate, etc. What the 2010 Bill has to say about these and the rest of the clauses is yet to be seen, and cannot be known till it is made

⁵⁰ *Ibid.*

⁵¹ *Naz Foundation v. Govt. of NCT*, WP(C) No. 7455/2001 decided on July 2, 2009 by Delhi High Court.

public. Whether the 2010 Bill is trying to find a middle path between the 2008 Bill, the Law Commission report and the comments and feedback from civil society is hard to say. In any case, while the policymakers keep drafting, changing, redrafting and reversing rules on paper, the surrogacy market continues to proliferate.⁵²

VIII. CONCLUSIONS AND SUGGESTIONS

Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.

In the year 1992 a public multi professional commission headed by Justice Aloni was setup to consider all the aspect of reproductive technologies in Israel and after their recommendations the surrogate motherhood agreement (approval of agreement and status of new born) law was passed in the year 1996. According to this law the entire act of surrogacy is deemed to be legal if the surrogacy agreement is approved by the committee which has made under this act comprising the seven members. In the same manner, in India the surrogacy agreement has to be regulated by a strong legislation. The proposed ART Bill 2008 and further the 2010 Amendment Bill thereof is a welcoming step towards the right direction to regularize and legalize the act of surrogacy and its annexure attempt to redefine the parental rights; but still is inadequate to deal with the complexity of the surrogacy. For this purpose personal laws should also be amended, to tackle with complex parental issues in surrogacy. This is the only solution to cope with the emerging dangers of revolutionized technology.

⁵² *Ibid.*