

## **SURROGACY AND THE COMMERCIALISATION OF THE WOMB**

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### **Introduction**

Not every couple in this world is blessed with the capacity to bear a child. This might be due to certain physiological conditions that a woman cannot give birth to her offspring. Therefore, they look for viable alternative solutions. The system of surrogacy has given hope to many infertile couples, who long to have a child of their own. Surrogate pregnancy is thought to be a fairly new concept; studies have shown that it has been around since the Babylonian times. There are several references to the idea of surrogacy throughout the Bible, especially the Old Testament. But many personal laws do not allow for surrogacy to propagate as a practice. In the Indian context, the surrogacy journey, though was made legal in 2002. Personal laws hold varying views on surrogacy. Surrogacy has led to the commercialisation of the womb of a woman. The researcher under the project has discussed surrogacy in the context of personal laws in India, with regards to how surrogacy has led to the commercialisation of the womb and the legislative approaches towards it.

### **Aim and Objectives**

The researcher aims at arriving at a conclusion in regards to the stand of personal laws in regards to surrogacy. Surrogacy has been booming in India which has made it into a commercial entity. For this, there have been judicial and legislative approaches such as the formulation of the Artificial Reproductive Technology (ART) Bill, 2010. As such, the researcher aims at analysing the Bill.

Objectives :

- To understand the concept of surrogacy
- To analyse the legal and moral intricacies relating to surrogacy
- To understand the implications of the Personal Laws on surrogacy

### **Scope and Limitations**

The scope of the project work has been limited to understanding the stand of the personal laws in relation to surrogacy. The researcher has limited the project work to an analysis of the commercialisation of surrogacy in the Indian scenario.

**Review of Existing Literature**

The researcher has used the following articles and books while working on the project topic :

- Renuka Deshmukh, et al., “Medicolegal Aspects of Surrogacy in India”, Journal of Ayurveda and Holistic Medicine, Vol.III, Issue II
- Vijender Kumar, (Doctrine of Relation Back Under Hindu law: A case law study”, Andhra University Law Journal, Vol.4 2001
- R. Latha, “The Hindu Adoption And Maintenance Act, 1956 and Surrogacy”, Student Advocate, Vol.3
- N.S.Soundara Pandian, “Surrogate Mothering-Legal Implication In Personal Laws In India”, national seminar on personal laws, Pondicherry, 10-11 March, 2002

-Monika Banode, “Critical Appraisal Of Legal Spectrum Regulating Surrogacy Contract: A Comparative Study With Special Reference To India”, South Asian Journal of Multidisciplinary Studies, Vol. 2, Issue 2

- Prof Kusum, FAMILY LAW I, 4<sup>th</sup> edition, LexisNexis, 2015

The above articles and books have helped the researcher understand the concept of surrogacy. The various implications and intricacies in regards to the personal laws and surrogacy have been dealt with in the above articles.

**Research Questions**

- What is the concept of surrogacy?
- What is the status of surrogacy in personal laws of the country?
- What are the legal implications of surrogacy?
- Is surrogacy ethical and moral?

**Research Methods Used**

The research methodology adopted is a doctrinal method of research. The researcher has also utilised explanatory and analytical methods of research in order to explain and analyse the implications of Surrogacy in India. Secondary sources of data have been used as the researcher has used books from the library and various articles from journals available in the library as well as online sources.

**Surrogacy: Origin and Concept**

Not every couple in this world is blessed with the capacity to bear a child. This might be due to certain physiological conditions that a woman cannot give birth to her

offspring. Therefore, they look for viable alternative solutions. Surrogacy is one such option. Advances in assisted reproductive techniques such as donor insemination and embryo transfer method has brought about major differences to the solution of such problems. The system of surrogacy has given hope to many infertile couples, who long to have a child of their own.<sup>1</sup> The word surrogate means substitute. This means that a surrogate mother acts in place of the genetic biological mother. According to the Artificial Reproductive Technique (ART) guidelines, surrogacy is an “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 caring for it to term and handing over the child to the person or persons for whom she is acting as a surrogate.”<sup>2</sup> Similarly, 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 (egg) for another woman implanted to her to carry the pregnancy to full term and deliver the child to its biological parents”.<sup>3</sup>

Surrogate pregnancy is thought to be a fairly new concept; studies have shown that it has been around since the Babylonian times. There are several references to the idea of surrogacy throughout the Bible, especially the Old Testament. Chapter 16 of the *Book of Genesis*, tells the story of Sarah, the wife of Abraham.<sup>4</sup> Sarah was infertile and could bear children. Therefore, she asked her servant Hagar, to bear a child of Abraham. Another such instance of surrogacy in the Bible is the Mosaic Law that allowed levirate marriages, whereby a man was supposed to marry his brother's widow and bring up his children on his behalf.<sup>5</sup> Similarly, studies also show that in the Pre-Historic times, it was so much imbibed in some cultures that if anybody refused to abide by it, they would be thrown out of their families.

Surrogacy was favoured by the American Indian society as a way to carry on the family name and bloodline.<sup>6</sup> In the 1900s, if an American Indian woman was found to be

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<sup>1</sup> Centre for Social Research (CSR), “Surrogate Motherhood-Ethical or Commercial”, <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>

<sup>2</sup> Sec 2 (zq) Assisted Reproductive Technologies (Regulation) Bill, 2014, p.6

<sup>3</sup> Sec 2 (zr) ) Assisted Reproductive Technologies (Regulation) Bill, 2014, p.7

<sup>4</sup> “History of Surrogacy – When and Where Did it All Begin!”, <http://www.surrogatemothers.org/history-of-surrogacy-when-and-where-it-all-begin>

<sup>5</sup> “Walking Down the Path of Surrogacy from the Ancient Times to Now”, <http://www.surrogatemothers.org/walking-down-the-path-of-surrogacy-from-the-ancient-times-to-now>

<sup>6</sup> “History of Surrogacy – When and Where Did it All Begin!”, <http://www.surrogatemothers.org/history-of-surrogacy-when-and-where-it-all-begin>

infertile, her husband would be advised by the Tribe Chief would advise them to consult them the witch doctor who would prescribe them herbal remedies and when that did not work, the husband would then take another woman and impregnate her. The child born would live with the biological mother and have no relation with the infertile wife. Surrogacy also finds mention in the European history. In Spain, the king would take in several surrogates until a son was born to him. The child born would live with the king and the queen.<sup>7</sup> Many developments in the field of medicine and legal proceedings, the alternative to infertility issues saw the rise and adoption of surrogacy world-wide. In 1930, two US-based pharmaceutical companies by the name of Schering-Kahlbaum and Parke-Davis, started mass production and marketing of estrogens. This was followed by Harvard medical School professor, John Rock, who fertilised human ova outside the uterus in 1944.<sup>8</sup> Then came the world's first commercial sperm bank in New York in 1971. In 1985, in America, a woman carried out the first successful gestational surrogate pregnancy. In 1986, Melissa Stern, known by the name of "Baby M" was born as the first surrogate child. However, the surrogate mother refused to give up the custody of the child which led to the intending couple, William and Elizabeth Stern, filing a lawsuit against her.

In the Indian context, the surrogacy journey, though was made legal in 2002, began a long time back. It has been mentioned in the epics like Mahabharata, wherein Rohini bore a child for Vasudev and Devaki.<sup>9</sup> In the modern context, surrogacy in India began in 2002, when commercial surrogacy was recognised as legal by the Supreme Court of India. With this, India became the first country in the world to legalise commercial surrogacy. However, as India emerged as a country that fostered surrogacy, the nuances related to it and India being called the 'surrogacy hub', the apex court recently in October 2015, has suggested a ban on commercial surrogacy in a judgement delivered by a bench of Justices Ranjan Gogoi and N V Ramana.<sup>10</sup>

Surrogacy can be opted for by women without uterus or who had undergone hysterectomy i.e. surgical removal of uterus. It can be an also option for women with

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<sup>7</sup> "History of Surrogacy – When and Where Did it All Begin!", <http://www.surrogatemothers.org/history-of-surrogacy-when-and-where-it-all-begin>

<sup>8</sup> <https://en.wikipedia.org/wiki/Surrogacy>

<sup>9</sup> Renuka Deshmukh, et al., "Medicolegal Aspects of Surrogacy in India", Journal of Ayurveda and Holistic Medicine, Vol.III, Issue II, p.26

<sup>10</sup> Amit Anand Choudhury, "SC suggests ban on commercial surrogacy", TIMES OF INDIA, Tamil Nadu, Thursday, October 15, 2015

some uterine diseases or chronic ill health.<sup>11</sup> Once the surrogate is selected she has to undergo a full medical and laboratory evaluation which include a careful screening of medical and family history, blood test for different diseases and evaluation of the uterus among others.<sup>12</sup>

### **Types of Surrogacy**

**Gestational surrogacy-** In this type of surrogacy, a surrogate is implanted with an embryo that is created by using in-vitro fertilisation techniques. The resulting child is not genetically related to the surrogate mother. There are several subtypes of gestational surrogacy such as gestational surrogacy with embryo from both intended parents, gestational surrogacy with egg donation, gestational surrogacy with donor sperm and gestational surrogacy with donor embryo.

**Traditional surrogacy-** In this type of surrogacy a surrogate is naturally or artificially inseminated with the intended father's sperm via different techniques such as IUI, IVF etc. In this method the resulting child is genetically related to both the intended father and the surrogate mother. In many jurisdictions, the intending parents will need to go through an adoption process in order to have legal rights in respect to the resulting child.

**Donor Surrogacy**<sup>13</sup> – In this type of surrogacy, the sperm is not of the intended father but of a sperm donor. The child born is not genetically related to either of the intending parents but only to the surrogate mother.

Depending on whether there exists any kind of financial transaction between the surrogate and the intending parents, it can be further divided into two types : Commercial surrogacy and Altruistic surrogacy.

**Commercial Surrogacy** - 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 higher income infertile couples who can afford the cost involved or people who save or borrow in order to complete their dream of being parents. This

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<sup>11</sup> Global Doctor Options, "Surrogacy", <http://www.globaldoctoroptions.com/surrogacy-cost/476>

<sup>12</sup> *ibid*

<sup>13</sup> Monika Banode, "Critical Appraisal Of Legal Spectrum Regulating Surrogacy Contract: A Comparative Study With Special Reference To India", South Asian Journal of Multidisciplinary Studies, Vol. 2, Issue 2

procedure is legal in several countries including India. Commercial surrogacy is also known as ‘wombs for rent’, outsourced pregnancies’ or ‘baby farms’.<sup>14</sup>

**Altruistic Surrogacy** - Altruistic surrogacy 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, accommodation, diet and other related expenses).<sup>15</sup>

### **Surrogacy and its Implications under Hindu Law**

Hindu mythology offers various instances of surrogacy. In the Bhagvata Purana, Vishnu heard Vasudev’s prayers requesting Kansa not to kill his sons. It is said that Vishnu heard these prayers and had an embryo from Devaki’s womb transferred to the womb of Rohini, another wife of Vasudev.<sup>16</sup> The Vedas have mentioned about thirteen types of sons which include Aurasa, Putrika Putra, Paunnarbhava, Nishada, Kamina, Godhaja, Sahodaja, Kshetraja, Dattaka, Krithrima, Krithrika, Apaviddha and Swayam Dutta.<sup>17</sup> The concept of Sonship is given utmost importance. A study of the Rigveda shows that reveals that preference should be given to Aurasa sons that is the son born within the wed lock.<sup>18</sup> As in India, the main purpose of having a son, is believed to salvate the soul of the father when he dies,<sup>19</sup> it is important to have a son. According to *Apastamba*, “an Aurasa son is one be gotten by a man who approaches in the proper season a woman of equal caste who has not belonged to another man, and who has been married legally (who is to be called a *Sastravihita*), and one who have a right to the occupation of their caste and to inherit the estate of the parents.”<sup>20</sup> *Baudhayana* also defines Aurasa son similarly. He says that “*From the several limbs (of my body) art thou produced, from my heart are thou born; thou are self called the son; mayest thou*

<sup>14</sup> “The Parents construct the Child biologically, while the Child constructs the Parents socially”, [http://www.surrogacylawsindia.com/index\\_inner.php](http://www.surrogacylawsindia.com/index_inner.php)

<sup>15</sup> *ibid*

<sup>16</sup> Usha Rangachary Smerdon, “Crossing Bodies, Crossing Borders : International Surrogacy between the United States and India”, 39 Cumberland Law Review, Vol.15

<sup>17</sup> R. Latha, “The Hindu Adoption And Maintenance Act, 1956 and Surrogacy”, Student Advocate, Vol.3, 1991, p.61

<sup>18</sup> Vijender Kumar, (Doctrine of Relation Back Under Hindu law: A case law study”, Andhra University Law Journal, Vol.4 2001, p.73

<sup>19</sup> R. Latha, “The Hindu Adoption And Maintenance Act, 1956 and Surrogacy”, Student Advocate, Vol.3, 1991, p.61

<sup>20</sup> Vijender Kumar, (Doctrine of Relation Back Under Hindu law: A case law study”, Andhra University Law Journal, Vol.4 2001, p.74

*live a hundred autumns.*"<sup>21</sup> The definition of the Aurasa son was judicially examined in the case of *Pedda Amani v. Zamindar of Marungpuri*.<sup>22</sup> The doctrine that procreation in a lawful wedlock is necessary to constitute legitimacy is in accordance with the general spirit of the Hindu law.<sup>23</sup> Therefore under Hindu law the Aurasa son is to be given the first rank as the son of his own body.<sup>24</sup> As such, a surrogate's child would be an illegitimate child.

The only way out for the surrogate child to become the natural and legitimate child of the intended parents is adoption. The legislation that regulates adoption in India is the Hindu Adoption and Maintenance Act, 1956. Section 7 of the said Act says that a Hindu male can adopt provided he is a major and is of sound mind. The Section also adds that if he has a wife living he should obtain her consent.<sup>25</sup> Section 9 says that consent of the natural mother should be taken before taking the child for adoption.<sup>26</sup> Again Section 17 of the Act prohibits certain payment involved in the process of adoption.<sup>27</sup> Although under the old Hindu law, the adopted son is to take the inheritance after the Aurasa son and the appointed daughter's son, under the Section 20 of the Act it has been mentioned that "An adopted child shall be deemed to be the child of the his or her adopted father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family from his or her birth shall be deemed to be severed by those created in the adoptive family."<sup>28</sup> Thus, under the Hindu law, adoption of the surrogate child is to be valid only when the adoptive parents and the child to be adopted are Hindus. Otherwise, the adoption becomes invalid, so the needy couple have to be Hindus or will have to convert into Hindus. In *Kumar Sursen v. State of Bihar*<sup>29</sup>, the court declined to give the status of an adopted child in view that the child was a Muslim child even though he was brought up by Hindu parents from a tender age.<sup>30</sup> In surrogacy, the wife of the biological father adopts the child. But this contravenes the Act which stipulates that in a family the wife cannot

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<sup>21</sup> Ibid p.74

<sup>22</sup> 1 IA 282, 293

<sup>23</sup> Vijender Kumar, (Doctrine of Relation Back Under Hindu law: A case law study", Andhra University Law Journal, Vol.4 2001, p.75

<sup>24</sup> Ibid

<sup>25</sup> Section 7, The Hindu Adoption and Maintenance Act 1956

<sup>26</sup> Section 9, The Hindu Adoption and Maintenance Act 1956

<sup>27</sup> Section 17, The Hindu Adoption and Maintenance Act 1956

<sup>28</sup> Section 12, The Hindu Adoption and Maintenance Act 1956

<sup>29</sup> AIR 2008 Pat 24 : 2008 (1) PLJR 92

<sup>30</sup> Prof Kusum, FAMILY LAW I, 4<sup>th</sup> edition, LexisNexis, 2015, p.360



adopt except certain circumstances that is, she can adopt only if her husband is incapable of giving consent, or is dead or has ceased to be a Hindu.<sup>31</sup> Again, under Section 9 of the Act, the consent of the natural mother is mandatory for the child to be adopted. In the case of surrogacy, the natural mother is the surrogate mother. The consent should be informed consent which means that she has to know all the complications that are involved in the process. But, studies in medical science and psychology have shown that there develops an emotional bond between the mother and the foetus. So, in such cases, the mother might not want to give the child into custody of the intending parents.<sup>32</sup> The consideration in surrogacy agreements is the amount that is to be paid. But again, this is contrary to Section 17 of the Act, which prohibits payments in case of adoption. Thus, the adoption of the surrogate child would become invalid as it contravenes the provisions of the Act, as per Section 5. Therefore, here lies the lacuna. Where on one hand, commercial surrogacy is legitimate in India, the adoption of the surrogate child becomes invalid as it involves a financial transaction between the child and the adoptive parents.

Under the Hindu Marriage Act, 1955 the right to matrimonial remedy is to be exercised as soon as the impotency of the other party comes to light. But if the party without seeking the remedy gives consent for the surrogate mothering arrangements with the knowledge that the other spouse suffers from impotency, it is understood that the party has waived the right to seek matrimonial remedy. Thereafter the spouse is estopped from seeking such remedy on consideration of the surrogate child welfare. It is desirable that consummation of marriage may be presumed between the intended parents who resort to such an arrangement. The presumption may operate from the moment the surrogate mother is conceived through artificial insemination or IVF.<sup>33</sup>

Under the Hindu Minority and Guardianship Act, 1956 the custody of a child upto the age of five years should ordinarily be with the mother.<sup>34</sup> The Indian courts in deciding the custody of a surrogate child use the principle of 'Paramount Welfare of the Child'. Although in the case of matrimonial litigation, this principle is widely used, it is not very clear whether the

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<sup>31</sup> Section 8, The Hindu Adoption and Maintenance Act 1956

<sup>32</sup> R. Latha, "The Hindu Adoption And Maintenance Act, 1956 and Surrogacy", Student Advocate, Vol.3, 1991, p.62

<sup>33</sup> N.S.Soundara Pandian, "Surrogate Mothering-Legal Implication In Personal Laws In India", national seminar on personal laws, Pondicherry, 10-11 March, 2002, p.7

<sup>34</sup> Section 6(a), Hindu Minority and Guardianship act, 1956



court would extend the same principle in dispute relating to the custody of the child between the surrogate mother and the intended parents. The law as it stands now is in favour of the surrogate mother as she cannot be denied the title of natural mother. The object and intentions of the parties to the surrogate mothering arrangements and the paramount welfare of the child act as the guiding principle to award the custody of the child.<sup>35</sup> The Madras High Court in *D. Rajaiah v. Dhanapal*<sup>36</sup> case, held that the welfare of the minor children is not be measured only in terms of money and physical comforts, but is to be used in the widest sense possible. The Court held that along with the physical well being of the child, the moral and ethical well being was equally important. Similarly, in the case of *Sarita Sharma v. Sushil Sharma*<sup>37</sup>, the Supreme Court held that the welfare of the child is of paramount importance.

Like in all other personal laws, inheritance in Hindu law, is also related to the legitimacy of the child born within the wedlock. As such, the surrogate child would not have any inheritance rights, unless adopted. The surrogate child, if has any genetic linkage with either of the intended parents, would be able to inherit the property of the intended parents. But, the surrogate child will be the legal heir of the surrogate mother and her husband, provided her husband consents to such surrogate mothering arrangement.

Therefore, in certain circumstances, such provisions would seem to be unjust for couples who cannot bear children due to physical anomalies.

### **Surrogacy and Muslim Law**

Surrogacy as a practice where the woman gives birth to a child, to be raised by another woman, raises pertinent issues in the Muslim Law and varying opinion among the authorities.

According to Muslim scholars, the question of surrogacy in Islam, is one of *fiqh* and have based their findings on the legal analogies and considerations. For one group of scholars, surrogate motherhood especially the gestational type of surrogacy, is not allowed in Muslim law, because it is akin to *zina* (adultery).<sup>38</sup> This is because the woman carries the child of a man who is not her husband. The status of surrogacy in Muslim Law is *Haram* and is forbidden. Scholars have

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<sup>35</sup> *ibid*

<sup>36</sup> AIR 1986 Mad. 451

<sup>37</sup> (1991) 1 SCC 759

<sup>38</sup> Shaykh Mohammed Amin, "The Islamic Ruling on Surrogate Motherhood", <http://www.ilmgate.org/the-islamic-ruling-on-surrogate-motherhood/>

pronounced a *fatwa* (Islamic verdict) regarding surrogacy. They regard it to be illegal and immoral because surrogacy involves the introduction of the sperm of another man into a woman, who is not his wife. In support of these scholars, there is the *ayah* (verse) in the *Surah-al-Mujadalah*, where the Quran says : "...their mothers are only those who conceived them and gave birth to them"<sup>39</sup>

Under the Muslim law, formation of embryo outside the human body, will be permissible only under strict conditions. This means that although they allow the IVF techniques to a certain extent, they do not in way allow surrogacy. Islam does not support surrogacy due to the fact that many bad things may arise from this procedure. Unmarried women could be tempted into 'leasing' their wombs for monetary benefits, which would undermine the institution of marriage and family life. It would not only up heave the very notion of family relations, but married woman could be tempted to escape themselves from the agony of childbirth by hiring or using other woman. Islam abominates such action.<sup>40</sup> Furthermore, this group can argue that the harms of confusion and dispute far outweigh the benefit of offering someone a child. The child will be a source of perpetual stress for all parties involved which will invariably cause harm to the child also. "Harm is to be avoided before benefit is derived" is a well established maxim in Islamic law. Surrogacy requires exposing and looking at the private parts of the surrogate mother in order to implant the fertilization between the sperm from the husband and the eggs from his wife. This procedure may need to repeat multiple times. This is another reason why surrogacy is forbidden in Islamic law. They did believe what Allah has explicitly mentioned in the Quran – which is a primary source of theology and law – that ultimately, it is only Allah's will that decides who does and does not have children. They followed the lead of their own Prophet (upon him blessings and peace) in that he did not have any male child who survived him. When Mariyah (his concubine) gave birth to his son Ibrahim, Allah took him away in his infancy. The Prophet (upon him blessings and peace) although naturally shaken by the loss, submitted to Allah's will and left it at that. Their Prophet (upon him blessings and peace) did not even ask Allah to grant him a son as other prophets did. He submitted to Allah's will as he knew that he had sought children from his wives and no one –except his first wife, Khadijah, bore children for him.

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<sup>39</sup> Ibid

<sup>40</sup>Uztaz Maulana Utsabah, "Status of Surrogate Mother in Islamic Perspective", <http://taakbs.blogspot.in/2013/06/status-of-surrogate-mother-in-islamic.html>

Among Muslims, there is another group who believe that reproductive technology is generally permissible. They are the Shiite Muslims. They allow surrogacy. Shiite scholars argue that in context Quran 58:2 means simply that in an adulterous sexual relationship, the child belongs to the mistress bearing the child, not the wayward father. Accordingly, it is permitted for a surrogate to carry another woman's fertilized egg, so long as it came from a married couple. Moreover, a number of Shiite scholars conclude that it is lawful for a surrogate's own ova to be fertilized by the husband's sperm, although most allow this only if the husband and the surrogate enter into a temporary polygamous marriage.<sup>41</sup> They base their claim on secondary considerations and not on any primary principle. This group claims Islamic law recognizes the preservation of the human species as one of its primary objectives (*maqasid*). It follows that allowing married couples to pursue conceiving children is also part of this primary objective. Therefore, if a married couple is not able to conceive children themselves, they should be allowed to use means that override their inability to do so. Therefore, based on this, they claim that surrogacy can be allowed, on the principle of *maslaha* (public interest). The fact that the surrogate mother is not carrying her own child can be overridden by saying that she is merely renting her womb as an incubator and she is not actually engaged in any act of *zina*. Besides, there is no fear of confusing the lineage of the child as the biological parents are already confirmed. For them, this could be made analogous to hiring a woman to breast feed someone else's child which is an acceptable practice. Moreover, they believe that there are many cures that are sought to in the haram way by people who have money. It is clear that if a couple feels compelled to resort to gestational surrogacy, after they have exhausted all other forms of medicinal means for facilitating conception, it can be allowed.

### Surrogacy And The Parsi Law

Initially, the Parsi people did not believe in the concept of surrogacy. However, with a significant decline in their population, the Parsi community has come to terms with the artificial reproductive techniques. As such, in order to arrest their dwindling population, they have decided to accept surrogacy as an alternative means to childbirth. Dr Shernaz Cama, a project to preserve the Parsi Zoroastrian heritage through 'Jiyo Parsi' scheme, confirmed that some Parsi women have accepted to resort to surrogacy.<sup>42</sup> After much deliberations among the religious leaders, surrogacy has been

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<sup>41</sup> Marcia Inhorn, Soraya Tremayne, "Islam and Assisted Reproductive Technologies : Sunni and Shia Perspectives", <http://people.opposingviews.com/islam-surrogacy-9541.html>

<sup>42</sup> Yagnesh Mehta, "Parsis to adopt Surrogacy to arrest dwindling numbers", THE TIMES OF INDIA, December 28, 2015, <http://timesofindia.indiatimes.com/city/surat/Parsis-to-adopt-surrogacy-to-boost-dwindling-numbers/articleshow/50349544.cms>

accepted. However, the orthodox community members are debating whether the scriptures allow for the renting of a non-Parsi womb.

The government is also extending its support to the Parsi community. For this, the 'Jiyo Parsi' scheme has been initiated. Under this, central government has offered funding of Rs 10 crores for a span of four years for Parsi couples to undergo infertility treatment like Invitro Fertilisation (IVF) and Artificial Insemination (AI). Moreover, the government has also offered to fund surrogacy costs of up to Rs 5 lakh per couple.<sup>43</sup> But, there exists contrasting views regarding this among the religious leaders. According to one religious scholar, surrogacy is a fairly new idea and is not contained in their religious scriptures. Therefore, it can be allowed, provided the sperm and the egg belong to the Parsi couple. On the other hand, another religious head believes that their religious scriptures mandate the nurturing of the foetus in the mother's womb, by the mother. The nourishment of the foetus is to be from the mother and therefore, the womb matters a lot<sup>44</sup>, and as such, irrespective of whether the egg or the sperm comes from a Parsi couple, surrogacy cannot be recognised. In the case of *Jamshed v. Zerina*,<sup>45</sup> the custody of the child should be decided by the court in the best interest of the child. The welfare of the child should be of paramount consideration under Section 39 of the Parsi Marriage and Divorce Act, 1936.

### **The Church's Stand On Surrogacy**

There have been references to surrogacy in the Bible. The *Book of Genesis* in Chapter 16, contains references to surrogacy. The story of Sarah and Abraham is explained here wherein, Sarah was not able to bear children and therefore, asked her servant Hagar, to reproduce Abraham's child. However, the Church holds different views in regards to surrogacy. The birth of a child is believed to be an act of God. But, the church does not support surrogacy. The Church believes in the natural conception of a child. Surrogacy is seen to be a departure from the norms of the Church.<sup>46</sup>

In the Church's opinion, surrogacy is akin to adultery. Therefore, it goes against the word of God. However, there are grey areas when it comes to the Church's view on surrogacy i.e. in regards to the concept of surrogacy in Christianity. The dissenting view of the Church has also gone on to influence the ban on surrogacy in many states of the US.

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<sup>43</sup> Jyoti Shelar, "Parsis Consider Surrogacy to Boost Population", MUMBAI MIRROR, February 12, 2015, <http://www.mumbaimirror.com/mumbai/others/Parsis-consider-surrogacy-to-boost-population/articleshow/46205332.cms>

<sup>44</sup> Ibid

<sup>45</sup> AIR 1974 Cal. 111

<sup>46</sup> "The Church's Response to Surrogacy", <http://www.surrogatemothers.org/the-churchs-response-to-surrogacy>

### Commercialisation Of The Womb Through Surrogacy

The roots of surrogacy can be traced long back in the Indian History. After the birth of the first testube baby Kanupriya in Kolkata on October 3<sup>rd</sup> 1978, the field of assisted reproductive technology advanced rapidly. Initially it began with the objective of enabling married couples who could not have children to procreate and establish a family. But today surrogacy has become a business in India, making it impossible to talk about surrogacy without referring to India. Anand in Gujarat has become the surrogacy capital the world where woman offer their wombs to childless couples of different parts of the world such as UK, US, Japan, etc. So far 177 couples have become parent through hiring surrogates in Anand which has a 300 member community of surrogates.<sup>47</sup> The surrogates in India are paid a minimum of rupees three lack and are also given a monthly maintenance of rupees 3000-5000 during the pregnancy. In 2010, there were around 1500 births through surrogacy in India.

The concept of surrogacy, with the introduction of financial arrangements in the process, has successfully turned a normal biological function of a woman's body into a commercial contract. Surrogate services are advertised, they are recruited and the operating agencies make huge profits out of it. The commercialisation of surrogacy has raised fears of a black market and of baby selling; turning impoverished woman into baby producers as most of the surrogate mothers come from weak economical backgrounds. According to one surrogacy report slowly and steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners.<sup>48</sup> This is because, cheap medical facilities, advanced reproductive technological know-how, along with poor social economic conditions and a lack of regulator laws in regards to surrogacy in India makes it a feasible option. Women who agree to become surrogates usually come from lower class to lower middle class background and are often in need of money. For many such women the amount offered to them for their womb may serve as the economic life blood for their families.

The demand for gestational surrogacy in India is booming. With the fertility clinics offering "five-star medical facilities", "high rate of success" and "extensive choices" for infertile couples, the unscrupulous practices being followed by IVF clinics, seem to suggest that commercial surrogacy in the country is almost in a state of lawlessness. According to a survey conducted by a Delhi-based NGO Sama Resource Group for Woman and Health, there are around 3000

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<sup>47</sup> Radha Sharma, "Anand: A Womb Too Let", THE TIMES OF INDIA, May 15, 2010

<sup>48</sup> "Surrogate motherhood- Ethical Commercial", Centre for Social Research, p.4

fertility clinics in India. In Delhi, only 39 out of the 300 clinics are registered. The amount generated by surrogacy in India in 2012, was estimated to be \$2 billion.<sup>49</sup> After the surrogate mother would be impregnated with one of the couple's embryos, others would be told that the embryo transfer for their surrogate mother had failed. The clients would then be told that they needed to pay up for another IVF cycle. Many clinics are also known to have "faked complications" in the surrogate mothers' pregnancies to make the commissioning parents cough up more money.<sup>50</sup> In 2012, the Home Ministry banned the entry of gay couples and single individuals from abroad into surrogate agreements. Today, Indian surrogate mothers are shifted from Kathmandu in Nepal as it is easier to get visas for the babies. Moreover, the clinics are known to put the health of the mothers at great risks. Many clinics are known to indulge in multiple embryo-transfers, sometimes up to nine (as opposed to three, according to the ICMR guidelines).<sup>51</sup> The living conditions of the surrogate mothers are of big concern. They are forced to live in cramped and stuffed rooms, with 10-15 surrogates living in one room. There also exist discrepancies in payments being made to the surrogate mothers, and those that the commissioning parents believe is being paid. This has led to an increase in the number of fertility firms with more demands, even from remote areas of the country. The commercialisation of surrogacy has reached such an extent that the Supreme Court of India had to suggest a ban on it in India.

## Judicial Trends In Surrogacy

### Case Laws

**Baby Manji Yamada v. Union of India**<sup>52</sup> In this case Baby Manji was born to a surrogate mother through in vitro fertilization using a Japanese man's sperm and an egg from an unknown donor at Anand. In less than a month, 'Baby Manji' has already seen fierce legal battles in two constitutional courts, Rajasthan High Court and now in Supreme Court, where an NGO has raised questions on legal propriety of surrogacy and the child's nationality. Anxious for the outcome are her Japanese father and grandmother. Therefore the writ of Habeas Corpus has been filed claiming that money making racket is perpetuated in the name of the surrogacy. Therefore,

<sup>49</sup> Namita Kohli, "Outsourcing motherhood : India's reproductive Dystopia", HINDUSTAN TIMES, July 26, 2015, <http://www.hindustantimes.com/india/outsourcing-motherhood-india-s-reproductive-dystopia/story-iCG1IuJJYMV994Gus2LZuK.html>

<sup>50</sup> Namita Kohli, "Outsourcing motherhood : India's reproductive Dystopia", HINDUSTAN TIMES, July 26, 2015, <http://www.hindustantimes.com/india/outsourcing-motherhood-india-s-reproductive-dystopia/story-iCG1IuJJYMV994Gus2LZuK.html>

<sup>51</sup> Ibid

<sup>52</sup> 2008 (11)SCC 150

Apex Court held that commercial surrogacy is permitted in India and consequently that has increased the international confidence in going in for surrogacy in India.

**Jan Balaz v. Union of India<sup>53</sup>** : In this case, the Gujarat High Court has come to a decision that the child born in India to a surrogate mother, an Indian national whose biological father is a foreign national, would get citizenship in India by birth. Emotional and legal relationship of the surrogate child with biological parents, moral and ethical issues is vital importance. The crux of this case is that the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand districts. The Division bench of the HC comprising Justice K.S Radhakrishnan and A.S. Dave, in this landmark judgement observed that a comprehensive legislations defining the rights of the child born out of surrogacy agreement, rights and responsibilities of a surrogate mother, egg donor, commissioning parties, legal validity of the agreement, the parent child relationship, responsibilities of the Infertility clinic was also required.<sup>54</sup> Upholding the citizenship rights of the boys, the Court said: “we, in the present legal framework, have no other go but to hold that the babies born in India to gestational surrogate are citizens of this country and therefore entitled to get the passport and therefore direct the passport authorities to release the passport withdraw from forth with.”

**P Geetha Nagar v. Kerela Live stock Development Board<sup>55</sup>**: In this case, the kerala High court scrutinised whether surrogacy is legal in India. The court held that ‘even in the absence of statutory frame work, surrogacy in India is not illegal, thus the country becoming a favourite destination for international destitute of children. Before referring to the specifics, it is appropriate to appreciate the essential terminology employed in this field.<sup>56</sup>

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<sup>53</sup> AIR 2010 Gujarat 21

<sup>54</sup> Monika Banode, “Critical Appraisal Of Legal Spectrum Regulating Surrogacy Contract: A Comparative Study With Special Reference To India”, South Asian Journal of Multidisciplinary Studies, Vol. 2, Issue 2

<sup>55</sup> WP(C).No. 20680 of 2014 (H)

<sup>56</sup> Monika Banode, “Critical Appraisal Of Legal Spectrum Regulating Surrogacy Contract: A Comparative Study With Special Reference To India”, South Asian Journal of Multidisciplinary Studies, Vol. 2, Issue 2



**Assisted Reproductive Technology (Regulation) Bill, 2010**

The Draft Assisted Reproductive Technology Regulation Bill and Rules (2010) intends to regulate an "industry" in India that has been expanding by leaps and bounds, mainly on account of a growing demand by foreign couples in search of relatively cheap surrogacy arrangements. The bill empowers a National Advisory Board to act as the regulatory body laying down policies and regulations. It also seeks to set up State Advisory Boards that are, in addition to advising state governments, charged with monitoring the implementation of the provisions of the Act, particularly with respect to the functioning of the ART clinics, semen banks and research organizations.

The bill lays down conditions that the surrogate mothers have to meet along with certain duties of the clinics. The bill allows unmarried couples and individuals to engage in surrogacy. However, the bill states that conception by surrogacy is not allowed when the intended parent(s) is able to conceive the natural way. NRIs and foreign couples are required to assign a local resident who is in charge of the surrogate's welfare until the act of relinquishment. For the same group, it is also mandatory to be able to document their ability to take the newborn back to their home country with them.

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**Conclusion**

The roots of surrogacy can be traced long back in the Indian History. The concept of surrogacy, with the introduction of financial arrangements in the process, has successfully turned a normal biological function of a woman's body into a commercial contract. Personal laws hold different views in regards to surrogacy. In Hindu law, the only way out for the surrogate child to become the natural and legitimate child of the intended parents is adoption. According to Muslim scholars, the question of surrogacy in Islam, is one of *fiqh* and have based their findings on the legal analogies and considerations. For one group of scholars, surrogate motherhood especially the gestational type of surrogacy, is not allowed in Muslim

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<sup>57</sup> "Surrogate motherhood- Ethical Commercial", Centre for Social Research, p.4

law, because it is akin to *zina* (adultery). Some Muslim scholars, claim that surrogacy can be allowed. Initially, the Parsi people did not believe in the concept of surrogacy. However, with a significant decline in their population, the Parsi community has come to terms with the artificial reproductive techniques. The Church believes in the natural conception of a child. Surrogacy is seen to be a departure from the norms of the Church.

However, the commercialisation of surrogacy has raised fears of a black market and of baby selling; turning impoverished woman into baby producers as most of the surrogate mothers come from weak economical backgrounds. According to one surrogacy report slowly and steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners. Therefore, personal laws need to be amended in order to facilitate childless couples to have children. However, the central laws regulating surrogacy in India must be made stringent and the ART Bill should be passed immediately for the better future of the surrogates as well as the child born out of such arrangements.