

# MEDICAL TOURISM, SURROGACY & THE LEGAL OVERTONES - THE INDIAN TALE

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## Abstract

With the onset of globalisation, there has been a decline in fertility levels. This has led to what is known as 'reproductive tourism'. Of the many options, surrogacy has caught the public-eye and so much so that visa regulations have been changed in line with the growing practice. With no legal regulation and easy availability of surrogate mothers at one-third the global cost, the practice proliferates in an unfettered manner in India. The rapid growth of the industry also poses various challenges to various familial notions and makes settled concepts like 'motherhood' look rather hazy. The paper therefore endeavours to bring to light the socio-legal implications of commercial surrogacy and suggest the way forward.

## I Introduction

IN THE wake of globalisation, India's health care sector has grown and developed remarkably.<sup>1</sup> Statistics reveal that the fertility levels<sup>2</sup> in India have declined across all age groups.<sup>3</sup> However, this is not just true to India. The trend is witnessed all over the globe with the exception of some regions in Africa where the fertility levels continue to remain high.<sup>4</sup> With overall 9% prevalence of infertility<sup>5</sup> globally, it is about 56% of

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1 See generally John Connell, "Medical Tourism: Sea, sun, sand and ... surgery" 27 *Tourism Management* 1093-1100(2006).

2 It refers to births per woman.

3 Central Statistics Office, Ministry of Statistics and Programme Implementation, Government of India, *India Country Report 2013 – Statistical Appraisal*, SAARC Development Goals 11, 60 (Aug. 2013), available at: [http://mospi.nic.in/mospi\\_new/upload/SAARC\\_Development\\_Goals\\_%20India\\_Country\\_Report\\_29aug13.pdf](http://mospi.nic.in/mospi_new/upload/SAARC_Development_Goals_%20India_Country_Report_29aug13.pdf) (last visited on Feb. 21, 2014). The report exhibits the dipping age-specific fertility levels (ASFR). The ASFR for the women in the age-group 15-19 years was 51.1 in 2000 which has come down to 30.7 in 2011. Likewise, ASFR for the women in the age-group 20-24 years was 218.7 in 2000 which has come down to 196.7 in 2011. See also Diksha Munjal & Yashita Munjal, "The 'Wanted' Child- Identifying the Gaps and Challenges in Commercial Surrogacy in India" 6 *Asian Bioethics Review* 66 (2014).

4 United Nations Statistics Division, *The World's Women 2010 – Trends and Statistics* 8-10, available at: [http://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010\\_Report\\_by%20chapterBW/Population\\_BW.pdf](http://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010_Report_by%20chapterBW/Population_BW.pdf) (last visited on Feb. 21, 2014).

5 See Jonathan Herring, *Medical Law & Ethics* 343 (3rd edn. 2010). A couple is said to be infertile when they have failed to conceive after twelve months of unprotected sexual intercourse or have suffered three or more miscarriages or still births. World Health Organisation, International Committee for Monitoring Assisted Reproductive Technology (ICMART) and

such couples who seek medical attention.<sup>6</sup> The estimated figures are similar for the developed and the developing nations.<sup>7</sup>

Of the couples who are childless, it is only those who are involuntarily childless<sup>8</sup> who would seek help to have a child as a part of their family. Different avenues stand as a potential choice for these childless couples. These include adopting a child, being a guardian to a child, alternate medicine and medical help.<sup>9</sup> Studies have shown that the most frequently mentioned motive of seeking medical help has been the desire to have a child.<sup>10</sup> Of the many options, it has been found that medical intervention is the one that most couples quickly resort to.<sup>11</sup>

In the advanced technological era, there are many alternatives available for the couple who crave to have a child. Despite the fact that adoption and other options of the like nature exist to counteract the issue of childlessness, there is noted a great desire among couples to have a child of their *own*.<sup>12</sup> That is to say that the infertile couples want a child genetically related to them. It is this yearning and aspiration of the infertile couples for a genetically related child that has fuelled the growth of assisted reproductive techniques, and more particularly, surrogacy. Assisted reproductive technologies present a range of different techniques. These include AIH,<sup>13</sup> AID,<sup>14</sup>

the World Health Organization (WHO) revised glossary of ART terminology, 92 *Fertility And Sterility* 1520, 1522 (2009). Infertility is “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse”.

6 Jacky Boivin, Laura Bunting, John A. Collins and Karl G. Nygren, “International Estimates of Infertility Prevalence and Treatment-seeking: Potential Need and Demand for Infertility Medical Care” 22 *Human Reproduction* 1506 (2007).

7 *Ibid.*

8 Munjal & Munjal, *supra* note 3; see generally Lita Linzer Schwartz, *Alternatives To Infertility* 1-16 (1st edn. 1991). She provides a continuum along which she places different types of couples on the basis of them having a child.

9 Frank van Balen, Jacqueline Verdumen and Evert Ketting, “Choices and Motivations of Infertile Couples” 31 *Patient Education And Counseling* 19(1997).

10 *Ibid.* See also Frank van Balen and T. C. M. Trimbos-Kemper, “Involuntarily Childless Couples: Their Desire to have Children and Their Motives” 16 *Journal Of Psychosomatic Obstetrics & Gynecology* 137(1995).

11 Balen *et al.*, *supra* note 9. It is noted that of the 131 infertile couples investigated, over 80% chose the option of medical help.

12 Centre for Social Research, “Surrogate Motherhood – Ethical or Commercial”. Available at: [http://www.womenleadership.in/Csr/Surrogacy\\_Report.pdf](http://www.womenleadership.in/Csr/Surrogacy_Report.pdf) (last visited on Feb. 25, 2014).

13 Artificial insemination by the husband.

14 Artificial insemination by donor.

IVF/ET,<sup>15</sup> GIFT,<sup>16</sup> cryopreservation,<sup>17</sup> oocyte donation,<sup>18</sup> IVM,<sup>19</sup> ICSI/SUZI<sup>20</sup> and surrogacy. One or more of these techniques may be used in a clinical case to achieve pregnancy. Amongst the aforesaid techniques, surrogacy stands at a different level and resultantly, invites controversy.

Surrogacy is an arrangement made between a woman and an infertile couple before the woman begins carrying a child with the view of handing over the child to the couple when it is born. The Indian Council of Medical Research (ICMR) defines surrogacy as "...an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate."<sup>21</sup> Surrogacy can be classified on two basis, namely: (i) financial considerations and, (ii) contribution of gametes. From the fiscal standpoint, surrogacy may either be altruistic or commercial in nature.<sup>22</sup> The use of gametes of the surrogate mother orients and attributes the surrogacy to be either a traditional or a gestational one. That is to say, when the gametes of the surrogate mother are put to use along with that of the male partner of the commissioning couple, it is known as traditional surrogacy. However, when the gametes of another female, other than the surrogate mother are used, such as that of the female partner of the commissioning couple or a donor and the consequential embryo is simply implanted in the surrogate mother, it is known as gestational surrogacy. However, in accordance with the aforementioned ICMR guidelines, only gestational surrogacy is allowed in India.<sup>23</sup>

Of all the assisted reproductive techniques available, it is surrogacy that has caught the public eye and brought India on the world-map in terms of reproductive tourism.

## II Medical tourism and a surrogacy hub

### Medical tourism

In the yester years, people from the less-developed countries used to visit the developed nations seeking medical attention due to lack of medical and technical

15 In-vitro fertilization/embryo transfer.

16 Gamete intra-fallopian transfer.

17 It is a method in which the gametes or the resultant embryos are frozen.

18 Also known as egg donation.

19 In-vitro maturation.

20 Intra-cytoplasmic sperm injection/ sub-zonal insemination.

21 Indian Council of Medical Research, (2005) *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* (hereinafter referred to as ICMR guidelines) para 1.2.33. Available at: [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm). (last visited on Feb. 25, 2014).

22 Commercial surrogacy has been expressly recognised in India post the decision of the Supreme Court of India in *Baby Manji* case. See *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84.

23 *Supra* note 21.

know-how and infrastructural aspects.<sup>24</sup> However, the trend has now reversed. Living in a world and era where everything seems to be globalised – from trade to communication – there has been observed a flow of people moving from one jurisdiction to another for the treatment that is not available or legal in their own country.<sup>25</sup> For instance, Canadians visit the United States of America for treatments which are not within the Canadian health care structure,<sup>26</sup> the Americans are going to places like Mexico for routine check-ups,<sup>27</sup> Japanese sniff out medical services in Thailand,<sup>28</sup> and the British, among others, travel to India for a range of health services.<sup>29</sup>

India has emerged as a hub of medical tourism.<sup>30</sup> This is so much so that even the Ministry of Tourism, Government of India boasts of it on its website.<sup>31</sup> The Confederation of Indian Industry (CII) reported that “healthcare has emerged as one of the largest service sectors with estimated revenue of around \$ 30 billion constituting 5% of GDP”.<sup>32</sup> It also noted that it was medical tourism that was the key driving force behind such figures and estimates.<sup>33</sup> Reasons that have been instrumental in putting India centre stage in healthcare sector include cost advantage, lesser language barrier in terms of usage of English language, no waiting period for treatment, seasoned and accomplished medical staff including the doctors and nurses and advanced medical know-how, among others.<sup>34</sup>

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- 24 Marc Piazzolo & Nurten Albayrak Zanca, “Medical Tourism - A Case Study for the USA and India, Germany and Hungary” 8 *Acta Polytechnica Hungarica* 137 (2011).
- 25 Shaun D. Pattinson, *Medical Law And Ethics* 238, 242 (1<sup>st</sup> edn. 2006).
- 26 Leigh Turner, “Medical Tourism” 53 *Canadian Family Physician* 1639 (2007).
- 27 Annette B. Ramírez de Arellano, “Patients Without Borders: The Emergence of Medical Tourism” 37 *International Journal Of Health Services* 193(2007).
- 28 Connell, *supra* note 1 at 1096.
- 29 Ganapati Mudur, “Hospitals in India Woo Foreign Patients” 328 *British Medical Journal* 1338 (2004).
- 30 See generally, PTI, “Medical Tourism Booms in India” *The Economic Times* Feb. 7, 2006. *Available at:* [http://articles.economictimes.indiatimes.com/2006-02-07/news/27443329\\_1\\_medical-tourism-cost-advantage-number-of-overseas-patients](http://articles.economictimes.indiatimes.com/2006-02-07/news/27443329_1_medical-tourism-cost-advantage-number-of-overseas-patients) (last visited on Mar. 3, 2014).
- 31 Ministry of Tourism, Government of India, “Medical Tourism”. *Available at:* <http://www.tourism.gov.in/TourismDivision/AboutContent.aspx?Name=Tourism%20Infrastructure%20Development&CID=18&INO=13> (last visited on Mar. 3, 2014).
- 32 CII, “Sector - Healthcare”. *Available at:* <http://www.cii.in/Sectors.aspx?enc=prvePUj2bdMtgTmvPwvisYH+5EnGjyGXO9hLEcVtUNu2yMtqEr4D408mSsgIyM/> (last visited on Mar. 3, 2014).
- 33 *Ibid.* See also PTI, “Revenue of Healthcare Players to Grow 10-15% in FY’15” *The Economic Times* Feb. 2, 2014. *Available at:* [http://articles.economictimes.indiatimes.com/2014-02-02/news/46923741\\_1\\_india-ratings-research-healthcare-players-medical-tourism](http://articles.economictimes.indiatimes.com/2014-02-02/news/46923741_1_india-ratings-research-healthcare-players-medical-tourism) (last visited on Mar. 3, 2014).
- 34 Ministry of Tourism, *supra* note 31; PTI, “Weak Rupee Spurs Medical Tourism In India: ASSOCHAM Study” *The Economic Times* Sep. 13, 2013. *Available at:* [http://articles.economictimes.indiatimes.com/2013-09-13/news/42041894\\_1 ASSOCHAM-study-](http://articles.economictimes.indiatimes.com/2013-09-13/news/42041894_1 ASSOCHAM-study-)

## Reproductive tourism & legal status of surrogacy

Though medical tourism has brought in a number of clients to India for different purposes, it is the sub-set of reproductive tourism<sup>35</sup> that has come into the limelight. Even though the infertile couples would find such help in their own respective countries, some still choose to travel to other nations such as India. The reasons for reproductive tourism are no different than those of medical tourism as a whole.

NRI, PIOs and foreigners flock to India for assisted reproductive remedial measures. Commercial surrogacy has secured a major chunk of the cross-border reproductive care services in India. Whilst other reasons as mentioned previously prevail, one can safely infer that the ambiguity of law on surrogacy in the country plays a considerable role in attracting the patient-population.

To be able to decipher the enforceability of surrogacy agreements in the Indian context, one can resort to the Constitution of India and the Indian Contract Act, 1872. Additionally, the non-binding ICMR guidelines<sup>36</sup> and the Assisted Reproductive Technology (Regulation) Bill, 2010<sup>37</sup> may be analysed.<sup>38</sup>

The Constitution of India under part III guarantees certain fundamental rights. It is article 21 of the Constitution of India that has been held to be the cornerstone and heart of fundamental rights.<sup>39</sup> Following the landmark judgment of the Supreme Court of India in *Maneka Gandhi v Union of India*<sup>40</sup> the courts went all out to widen the scope of the instant article and thus, it acts as the wellspring of countless rights today.

medical-tourism-weak-rupee (last visited on Mar. 3, 2014); PTI, “India Becomes West’s Favourite Destination For Cheaper Cosmetic Surgery“ *The Economic Times* Oct. 31, 2013. Available at: [http://articles.economictimes.indiatimes.com/2013-10-31/news/43561305\\_1\\_plastic-surgeons-plastic-surgery-countries](http://articles.economictimes.indiatimes.com/2013-10-31/news/43561305_1_plastic-surgeons-plastic-surgery-countries) (last visited on Mar. 3, 2014).

35 Some find the term to be incorrect and offer the use of the term ‘reproductive exile’ instead. See generally Marcia C. Inhorn & Pasquale Patrizio, “Rethinking reproductive “tourism” as reproductive “exile” 92 *Fertility And Sterility* 904 (2009); Sharon Bassan & Merle A. Michaelsen, “Honeymoon, Medical Treatment or Big Business? An Analysis of the Meanings of the term ‘Reproductive Tourism’ in German and Israeli Public Media Discourses” 8 *Philosophy, Ethics, And Humanities In Medicine* 9 (2013). It was recommended that an unloaded term such as ‘cross-border reproductive care’ be used instead of ‘reproductive tourism’ as the patients feel offended by the latter as it does not reflect their reality, in particular the stress and exertion involved.

36 *Supra* note 21.

37 Hereinafter referred to as the ‘ART’ bill.

38 The ICMR guidelines and the ART bill are not binding in nature. This is because they do not fulfil the criteria of being what a law is under art. 13 of the Constitution of India, 1950. See generally M.P. Jain, *Indian Constitutional Law* 845 (5th Ed. 2008).

39 *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178.

40 AIR 1978 SC 596.

Article 21 guarantees to every person right to life and personal liberty. The term 'life' has been unreservedly expanding since the landmark decision. In the present scenario, the provision encompasses within itself a number of rights such as right to live with dignity,<sup>41</sup> right to quality of life,<sup>42</sup> right to shelter,<sup>43</sup> right to medical aid,<sup>44</sup> right to livelihood,<sup>45</sup> right to clean environment,<sup>46</sup> right to clean air and water,<sup>47</sup> etc. It however, does not include the right to die.<sup>48</sup>

Among the plethora of rights guaranteed under article 21 of the Constitution, right to privacy holds the key to the enforceability of surrogacy agreements. The issue of right to privacy was first brought before the courts in the case of *Kharak Singh v. State of Uttar Pradesh*.<sup>49</sup> The court in its dissenting opinion held that the right to privacy is an essential ingredient of the right to personal liberty. Further, in the case of *R. Rajagopal v. State of Tamil Nadu*,<sup>50</sup> the court went on to hold that right to privacy is implicit in article 21.

The right to procreation is recognised to be implicit in the right to privacy. The legendary American case of *Roe v. Wade*<sup>51</sup> has been alluded to by the Supreme Court of India in a number of decisions dealing with the subject matter. In the instant case, the US Supreme Court held that a citizen has the "right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters".<sup>52</sup> *Skinner v. Oklahoma*<sup>53</sup> is yet another case that has been widely cited by the Indian judiciary. The American court in the instant case held that the right to reproduce is one of the basic civil rights of man.<sup>54</sup> The Andhra Pradesh High Court in *B.K. Parasarathi's* case<sup>55</sup> held that "the right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the state into such a

41 *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746.

42 *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

43 *Chameli Singh v. State of Uttar Pradesh*, AIR 1996 SC 1051.

44 *Parmanand Katara v. Union of India*, AIR 1989 SC 2039.

45 *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

46 *M.C. Mehta v. Union of India*, AIR 1988 SC 1037.

47 *Subhas Kumar v. State of Bihar*, AIR 1991 SC 420.

48 *Gian Kaur v. State of Punjab*, AIR 1996 SC 946.

49 AIR 1963 SC 1295.

50 AIR 1995 SC 264.

51 410 U.S. 113.

52 *Ibid.*

53 316 U.S. 535 (1941).

54 *Ibid.*

55 *B. K. Partbasarathi v. State of Andhra Pradesh*, AIR 2000 AP 156.

decision making process of the individual is scrutinised by the constitutional courts both in this country and in America with great care.”<sup>56</sup> Likewise, in *Kasturu Lal Lakshmi Reddy v. State of J&K*<sup>57</sup> the Supreme Court of India underpinning the analogous notion held that the right to life and personal liberty as enshrined in article 21 must be interpreted in a broad manner so as to include within its ambit all the varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases. The courts have nevertheless acknowledged that such right to procreate can be subject to reasonable restrictions.<sup>58</sup>

Surrogacy, though an assisted one, is a method of procreation. In light of the above, surrogacy agreements must be afforded the same level of constitutional protection. The American courts have granted constitutional protection to the surrogacy agreements and held that the parties to the surrogacy agreements have a constitutional right to reproductive privacy.<sup>59</sup> The Indian courts too have kept pace with the concern. The courts way back in the year 2000 held that “the personal decision of the individual about the birth and babies called ‘the right of reproductive autonomy’ is a facet of a ‘right of privacy.’”<sup>60</sup> The state cannot intervene in matters of private ordering and matters as intimate as procreation. With the right to privacy and reproductive autonomy in place, the individuals must be afforded protection on how to exercise this right. In other words, the state cannot interfere in matters of mode of procreation, *i.e.*, whether the individuals procreate naturally or through the use of assisted reproductive techniques. Article 21 of the Constitution can be stretched to house the use of assisted reproductive techniques by the individuals under the auspices of the rights to reproductive privacy and reproductive autonomy.

Surrogacy being one of the various methods of assisted reproductive techniques thus stands sheltered under the umbrella provision of article 21 of the Constitution of India.

The Indian Contract Act, 1872 codifies the legal principles that govern the agreements which are enforceable in the court of law in India. It provides the basis of validity of any agreement which evolves in to a contract on the fulfilment of certain pre-requisites. Section 10 of the Indian Contract Act provides the parameters of a

56 *Ibid.*

57 AIR 1980 SC 1992; *Javed v. State of Haryana*, AIR 2003 SC 357.

58 See generally *Mukesh Kumar Ajmera v. State of Rajasthan*, 1997 (1) WLN 682; *Elkapalli Latchaiah v. Government of Andhra Pradesh*, 2001 (5) ALT 410.

59 *In Re Baby M* 537 A. 2d 1227 (N.J. 1988); *Surrogate parenting Associates, Inc. v. Armstrong* 704 S.W.2d 209 (Ky. 1986).

60 *Parthasarathi supra* note 55.

valid contract. According to section 10 of the aforesaid Act, the following conditions must be fulfilled in order to give rise to a valid contract, *viz.*, (a) there must be an agreement which must have resulted out of a proposal by one party<sup>61</sup> and the acceptance of it by the other,<sup>62</sup> (b) the parties to such agreement must be competent to contract,<sup>63</sup> (c) there should be a lawful consideration,<sup>64</sup> (d) their object should be lawful,<sup>65</sup> (e) the parties must enter into the agreement with their free consent<sup>66</sup> and (f) the agreement must not have been expressly declared to be void.<sup>67</sup>

In India, the practice of surrogacy is backed by written agreements between the parties. These agreements are an expression of the proposal and acceptance between the parties. This document of concurrence also cites the amount of payment made to the surrogate mother<sup>68</sup> and hence, meets the requirement of consideration.

As noted above, any contract to perform an illegal act is void. With respect to surrogacy, the aim is to ward off and forbid the ‘selling’ of a baby. In *Surrogate Parenting Associates, Inc. v. Armstrong*,<sup>69</sup> the Supreme Court of Kentucky observed that, “the essential consideration is to assist a person or couple who want a baby but are unable to conceive one in the customary manner to achieve a biologically related offspring”<sup>70</sup> and thus drew the contrast between the practice of surrogacy and baby-selling. Such a remark underpins the argument that the practice has a lawful object in place.

Free consent of the parties is a pre-requisite to the validity of the contract and therefore, the parties to the surrogacy agreement must enter into the arrangement in

61 Indian Contract Act, 1872 s. 2(a).

62 *Id.*, s. 2(b).

63 *Id.*, s.11.

64 *Id.*, s. 2(d).

65 *Id.*, s. 23.

66 *Id.*, s.14. It provides, “Consent is said to be free when it is not caused by - (1) coercion, as defined in section 15, or (2) undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of section 20, 21, and 22. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake”. S. 15 goes on to defines ‘coercion’. S. 16 defines ‘undue influence’. S.17 defines ‘fraud’. S.18 defines ‘misrepresentation’. S. 20 provides for ‘mistake as to matter of fact’ while S. 21 provides for ‘mistake as to law’.

67 There are some agreements which have been expressly declared to be void under the Indian Contract Act. These are as follows: (i) Agreements which do not have a lawful consideration or object (ss. 23, 24), (ii) agreement without consideration (s. 25), (iii) agreement to do an impossible act (s. 56), (iv) agreement in restraint of marriage (s. 26), (v) agreement in restraint of trade (s. 27), (vi) agreement in restraint of legal proceedings (s. 28), (vii) agreement which is ambiguous and uncertain (s. 29), (viii) agreement by way of wager (s. 30).

68 ICMR guidelines, *supra* note 21, para 3.10.3.

69 *Supra* note 59.

70 *Ibid.*



exercise of their free will. With respect to the free consent of the surrogate mother, it is however, immaterial whether or not the surrogate mother is driven by altruistic motives.

Against the given backdrop, one may infer that surrogacy agreements are not only entitled to constitutional protection but are also valid under the domestic contract law.

Furthermore, in early 2000s the ICMR framed and brought out the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India<sup>71</sup> which were later updated in 2005. The ICMR guidelines, irrespective of how far-reaching they may seem, are purely persuasive in nature and are not binding.<sup>72</sup> These guidelines have been taken to another level of being the blueprint of the draft of The Assisted Reproductive Technology (Regulation) Bill, 2010. The ART bill attempts to iron out a number of issues which were unaddressed by the ICMR guidelines on the subject. Nonetheless, being a draft bill, it too lacks the force of law.

The ICMR guidelines as well as the ART bill endeavour to put into order various points in question. These include who can act as a surrogate mother, who can be the commissioning couples, what health and age requirements must be fulfilled before the potential surrogate mother is said to be fit to act as a surrogate mother, how the agreement may be entered into and what all issues must the agreement expressly address in its content *etc.*<sup>73</sup>

While the ART bill and the ICMR guidelines try to fill the voids, there exist many issues that arise from the practice which need to be focussed on and plugged. These include issues of contractual remedies, determination of parentage of the child born and the child's citizenship, among others.

### III Challenges Posed

Whenever a surrogacy arrangement in a developing country like India is talked of, it *per se* brings forth a number of issues. Demographics of the population at large influence the decision making abilities of the parties. Additionally, a legal vacuum on various aspects of the subject area adds to the complexity of the already unstable state of affairs.

As aforementioned, a surrogacy agreement brings together two parties, *viz.* the commissioning couple and the surrogate mother. They would, most typically, have a written agreement between them detailing payments to be made, custody of the child

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71 ICMR guidelines, *supra* note 21.

72 See art. 13, Constitution of India.

73 See ICMR guidelines, *supra* note 21, ch. 3 ; ART bill, ch. V, VII.

*etc.* Simply put, the agreements determine the rights and liabilities of the respective parties. In order to be able to understand the type of challenges that the parties could face, it is vital to identify what possible situations may crop up:

- (i) The surrogacy agreement has been signed by the parties. During the course of the pregnancy however, the commissioning couple which is genetically related to the child, splits and the respective partners separate. The surrogate mother refuses to take custody of the child born.
- (ii) On account of medical reasons, the commissioning couple has to put to use a donor-oocyte instead of the oocyte of the commissioning mother. The parties have put the agreement in writing and signed it. The surrogate however, during the course of pregnancy develops an emotional attachment with the child and on birth refuses to hand over the child to the commissioning couple.
- (iii) The commissioning couple, genetically related to the child, agree upon and sign the surrogacy agreement with the surrogate mother. However, during the course of pregnancy, the commissioning parents pass away and the surrogate mother refuses to keep the child.
- (iv) The commissioning couple and the surrogate mother agree and sign the surrogacy agreement. The commissioning couple is genetically related to the child. However, during child-birth, due to medical complications, the child is born but the surrogate mother passes away.
- (v) Similar to situation (iv) with the exception that not only does the surrogate mother die but also the child is still-born.
- (vi) Similar to situation (iv) with the exception that the surrogate mother who is alive gives birth to a child that is still-born or born with birth-defects.
- (vii) The commissioning couple which is genetically related to the child signs a surrogacy agreement with a surrogate mother. The sum of money, which is agreed to be paid to the surrogate, is however, not paid in full. The surrogate mother nevertheless gives birth to a healthy baby.
- (viii) The commissioning couple being genetically related to the surrogate mother signs an agreement with the surrogate mother with respect to the arrangement. However, the commissioning parents default in making the full payment and the surrogate refuses to hand over the child on birth.
- (ix) The surrogate mother enters into the agreement with the commissioning parents who are genetically related to the child. However, prior to the birth of the child, the surrogate mother demands a greater sum of money that was agreed to and that only on the fulfilment of such condition would she hand over the child.

The probable cases highlight the presence of a sort of broad spectrum along which the incidents may occur. The situations are laden with a number of legal issues which would make their presence felt only when disputes between contracting parties come forth.

### **Contractual remedies**

Surrogacy arrangements may be legally protected under the law. However, it is unclear as to what remedy – damages<sup>74</sup> or specific performance<sup>75</sup> – may be available in the event of a breach by either of the party.

Specific performance of the contract may be suitable only under certain circumstances. If the instance is one which is on the lines of situation (i), the court may be willing to order specific performance of the contract as the child was born as a result of the intention of the commissioning couple. Also, in a case where there has been a default in paying the agreed sum of money as a recompense to the surrogate mother, the court grant specific performance on part of the defaulting party, as in situation (vii).

However, if there is a requirement of relinquishing rights over the child that is sought, the court may be wary of granting a relief of specific performance given the fact that under the prevailing domestic law it is the birth mother who is considered to be the mother of the child. Thus, in the event that a situation like situation (ii) erupts, the court may not permit the specific performance of the contract.

Damages, which are sought as yet another remedy under the contractual law, may be a tough call for the courts to take. This is due to the sensitive nature of the practice and how it may take a step further from commercialisation to actually baby selling. For instance in situation (vi), if the child is born with some abnormality or birth defect, and in case the parents file a suit for damages, it would take the practice into the realm of trading of babies. However, by all means, Indian courts would be cautious, and vigilant to not allow mushrooming of any such system.<sup>76</sup>

### **Parentage**

Surrogacy generates debate on an area that one would think is settled by nature itself – determination of parentage. It was paternity that was always in the dock. However, with surrogacy even the once irrefutable maternity comes into question.

74 *Supra* note 61, s. 73.

75 The Specific Relief Act, 1963 ss. 10, 14, 16, 20.

76 It is however interesting to note that the Supreme Court of India has referred to the practice reaching “industry proportions”. *Baby Manji Yamada v. Union of India*, *supra* note 22.

In any surrogacy arrangement, there would always be a commissioning mother who may or may not be genetically related to the child and the other would be the surrogate mother. There could be an additional mother in case there is an anonymous donor involved. In the event that there may be three different ‘mothers’ who may be contending for the child, it would be a difficult task for the courts to ascertain who should be the legal mother.

In order to determine the maternity, the court can potentially lay emphasis on any of the following aspects – the gestation and birth, the genetics, the intention of having a child or the best interests of the child. These parameters cannot be said to be mutually exclusive as they may overlap under different facts and circumstances of the respective cases. For instance, as in the abovementioned situation (i), the couple splits during the term of pregnancy and the surrogate mother too doesn’t wish to keep the child. In such a scenario, the court, if it resorts to the genetic and the intention parameters, it may order either of the commissioning parents to take custody of the child. Thus, in these circumstances the commissioning mother may be held to be the legal mother of the child. Even though not explicit, a reflection of such an approach however can be traced in the *Baby Manji* case.<sup>77</sup>

On the other hand, if the court follows the best interests of the child concept, it would look into the suitability of the different mothers and on identifying where the child would be best taken care of it would determine who the legal mother should be.

The state of affairs could also be such that the relationship between the genetically related commissioning couple and the surrogate mother turn sour and the surrogate mother refuses to hand over the child. If and when the parties approach the court for custody, in case the court is inclined towards gestational primacy, it would, in all likelihood, grant the custody of the child to the surrogate mother and hold her as the legal mother of the child.

It is noteworthy that till surrogacy arrived, such a complex situation was unfathomable. One can decipher this from the interpretation of the term ‘mother’ by the courts<sup>78</sup>. In *Bai Daya v. Natba Govindlal*,<sup>79</sup> the Bombay High Court held that the “expression ‘mother’ and ‘parents’ should be read in their natural sense”. That is to say, it referred only to the birth mother of the child. In *Kirtikant D. Vadodaria v. State of Gujarat*,<sup>80</sup> the Supreme Court of India held that a mother is “a woman who has given birth to a child or a female parent”.<sup>81</sup> It went on to observe that “mother means

77 *Baby Manji Yamada ibid.*

78 The courts’ interpretations need to be relied upon as the Indian law, under no statute, defines who a mother is.

79 ILR (1885) 9 Bom. 279.

80 (1996) 4 SCC 479.

81 *Ibid.*

only the natural mother who has given birth to the child, not the one who is the wife of one's father by another marriage".<sup>82</sup> Hence, according to the court, the expression mother does not even include in its ambit a step-mother.

However, at this juncture, section 112 of the Indian Evidence Act, 1872<sup>83</sup> comes into the picture which is the prevalent law. If any case with respect to the determination of parentage is filed at present, the court would necessarily look to this provision. In light of the provision of this section, it would be the surrogate mother and her husband who would be the legal parents of the child born and not the commissioning couple. This is because it is the surrogate mother who would be giving birth to the child and that too during the continuance of a valid marriage. It must be borne in mind, as aforementioned, that it is the birth mother who is held to be the legal mother in the present day of the law. While the interests of the surrogate mother are secured by the provision, such a situation would undermine the intention and the amount of effort, time and money that the much-desirous commissioning couple would put in to having the child. The legal position on parentage is quite hazy and hence fraught with conflicting interests that need to be handled dextrously with sensitivity.

## Citizenship

India draws to her shores a large population of foreigners besides the NRIs for surrogacy. The commissioning parents of the child born of surrogacy, especially foreigners, face problems with respect to his/her citizenship. It is the conflict of laws complicates situations.

The Citizenship Act, 1955 provides that citizenship in India can be acquired by birth,<sup>84</sup> descent,<sup>85</sup> registration,<sup>86</sup> naturalisation,<sup>87</sup> and incorporation of territory.<sup>88</sup> The issue first arose in the *Baby Manji* case.<sup>89</sup> A Japanese couple, Mr. & Mrs. Yamada, hired

82 *Ibid.*

83 Indian Evidence Act, 1872. S.112 Birth during marriage, conclusive proof of legitimacy - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

84 Citizenship Act, 1955 s.3.

85 *Id.s.* 4.

86 *Id.s.* 5.

87 *Id.s.* 6.

88 *Id.s.* 7.

89 *Baby Manji Yamada, supra* note 22.

the services of an Indian surrogate mother to bear a child for them who would be genetically related to Mr. Yamada and an Indian oocyte donor. However, after the birth of Baby Manji Yamada, the commissioning couple got divorced and the commissioning mother made no claim to the baby.

A birth certificate was issued by the Anand Municipal Office bearing only the name of the commissioning father. He was informed by the Japanese authorities that the baby could be permitted to enter Japan only if he adopts Baby Manji in compliance to the Indian as well as the Japanese laws and secure an Indian passport. Whilst Mr. Yamada was trying to arrange for the same, a public interest litigation was filed by an NGO in the High Court of Rajasthan in an attempt to put a stop to the transfer of Baby Manji to Japan and to question the legality of surrogacy in India. The NGO contended that in the absence of any law on the subject, the practice was illegal and that hence, no one could assert a right over Baby Manji. While the high court directed that the baby be produced within four weeks, Mr. Yamada's mother filed a writ petition in the Supreme Court. The apex court allowed for temporary custody of the baby with the grandmother and disposed off the case holding that it were the commissions established under The Commissions for Protection of Child Rights Act, 2005 that were competent to look into the alleged grievances of the NGO. It expressly held that commercial surrogacy was legal in India.

As a consequence of the holding of the court, Baby Manji was issued an identity certificate by the Jaipur passport office. Following that the Japan Embassy granted Baby Manji a Japanese visa and thus, the grandmother was able to take her to Japan.

What is noteworthy here is the fact that the baby was issued a certificate of identity which is granted by Government of India to stateless persons residing in India.<sup>90</sup> The validity period for such a certificate is ten years.

Yet another instance of such a nature came up in *Jan Balaz v. Anand Municipality Corporation*.<sup>91</sup> In that case a German couple hired an Indian surrogate mother for her gestational services in Anand, Gujarat. The surrogate gave birth to twins in 2008 who were genetically related only to the commissioning father.<sup>92</sup> Initially, the birth certificate named the commissioning couple as the parents of the child on the birth certificate. Be that is it may, the German authorities refused to recognise the parentage and nationality of the twins born to the couple as surrogacy was illegal in Germany. The commissioning parents then resorted to the Indian authorities to grant the children Indian passports. In the meanwhile, the birth certificates issued by the competent

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90 Consular, Passport & Visa Division, Ministry of External Affairs, Government of India, *Available at*: <http://passportindia.gov.in/AppOnlineProject/online/faqIdentityCertificate> (last visited on Mar 8, 2014)

91 AIR 2010 Guj 21.

92 An anonymous oocyte donor was involved.

authority were recalled on account of typographical error of date of birth for necessary correction. In addition to this rectification, the name of the mother on the birth certificate was changed from the commissioning mother's name to that of the surrogate. Balaz nevertheless, continued to be named as the father on the document. Indian passport authorities issued passports on the ground of the children having an 'Indian' mother.

On the issue of citizenship the court held that on the basis of the Indian Evidence Act, 1872 "no presumption can be drawn that child born out of a surrogate mother, is legitimate child of commissioning parents, so as to have a legal right to parental support, inheritance and other privileges of a child born to a couple through their sexual intercourse". The court observed that the babies born to surrogate mothers in India would be Indian citizens<sup>93</sup> and therefore entitled to get passports. Following this, the German Embassy issued visas to the children on the condition that the commissioning parents would duly adopt the children under the German law on arrival.

As a step to curb such issues from cropping up wherein the commissioning couple's place of domicile doesn't recognise surrogacy and the issue of determination of citizenship of the children born come up, the Ministry of Home Affairs, Government of India brought about a change in visa regulations. In 2013,<sup>94</sup> the government made its stand clear on the visa regulations for foreign nationals coming to India for surrogacy. In its order it said that a tourist visa, which is most commonly and frequently used by foreign nationals, is an inappropriate one. It pronounced that no such relaxation would be given and all such couples must obtain the medical visa for such purposes which may be grant on the fulfilment of a number of conditions. Among others are the conditions that the couple must have been married for at least 2 years and letter from the embassy of the their respective country must be enclosed with the visa application stating clearly that "(a) the country recognizes surrogacy and (b) the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning surrogate".<sup>95</sup>

Even though some measures have been taken by the government, a level of uncertainty nevertheless remains.

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93 The court held the children to be Indian citizens under the provision of s. 3 of the Citizenship Act, 1955.

94 With effect from Nov. 1, 2013.

95 Ministry of Home Affairs, Government of India, Type of visa for foreign nationals intending to visit India for Commissioning Surrogacy and conditions for grant visa for the purpose, *available at*: <http://mha1.nic.in/pdfs/CS-GrntVISA-291112.pdf> (last visited on Mar. 9, 2014).

#### **IV Conclusion**

The thriving practice of surrogacy and the legal challenges it carries with it fortifies the well known saying, 'all that glitters is not gold'. There are a lot of success stories but not all. It cannot even be estimated how many issues with respect to surrogate mothers' stand come up given the social milieu they belong to. Their own socio-economic conditions act as a barrier to their bargaining capacity and hence what come to light are only concerns that the commissioning couples face.

The government does recognise that the subject area is laden with many legal and ethical issues. The Law Commission in its 228<sup>th</sup> Report<sup>96</sup> even recognises these difficulties. However, what is required is a legislation that is drafted keeping in mind the interests of all stakeholders involved and that too, very soon!

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96 Law Commission of India, Government of India, *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy*, Available at: <http://lawcommissionofindia.nic.in/reports/report228.pdf> (last visited on Mar. 9, 2014).