

# SURROGACY: A BABY FACTORY

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## INTRODUCTION

Worldwide, approximately 259200 children are born every day. That is almost 3 children each second. The birth of a newborn child is often a very special and fascinating event for all the people involved. Unfortunately some couples, due to certain physiological conditions, cannot give birth to their own offspring. Infertility affects about 1 out of every 6 couples. This includes not just those unable to conceive after 12 months of trying, but also those that cannot carry a pregnancy to term. Since the 1970s, the number of infertile couples has increased (Winston & Bane, 1993). Some might argue that the reason for this is that this number only includes couples who seek clinical assistance for infertility. Over the years the social attitudes towards medical interventions like IVF have changed. As a result infertile couples have become less reluctant to seek help, which is reflected in the percentage of infertile couples registered by the clinics. Others do not fully share this opinion. Medical experts believe that women nowadays postpone childbearing because of career prospects and contraception. Consequently, women are older once they start trying to conceive a baby. Older women are generally less fertile because of age-related biological factors. Due to several reasons, such as the changing sexual practices, the use of intrauterine devices, more and more women suffer from pelvic inflammatory disease, which is a leading cause of female infertility (Winston & Bane). For many infertile men and women, being unable to bear and raise children has severe emotional and psychological consequences. They often feel guilty, and experience a loss of self-worth and confidence. To many infertile people, their condition affects their most fundamental feelings about who they are and what their role in the family is. It influences one's personal identity and the extent of fulfillment. For that reason, infertility is regarded a major health problem. Also, it makes it clear why people who cannot have children the natural way look for other ways in order to become a parent. In the past, couples unable to conceive were expected to turn to adoption to achieve their parenthood

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dreams. Nowadays there are many options for infertile couples, as well as singles and homosexuals who want children. The urge of parenthood leads them to seek alternative solutions including Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF) and Intra-Uterine Injections (IUI).<sup>2</sup> Advances in medical sciences and technology, particularly in assisted reproductive techniques, with techniques like donor insemination and embryo transfer methods have revolutionized the reproductive environment and have led to an increasing popularity of surrogacy. With the introduction of financial agreements in exchange for the surrogate child, the child becomes a saleable commodity. As a result, complications arise and questions must be raised regarding the rights of the surrogate mother, the child and the commissioning parents. Surrogacy is a method of reproduction whereby a woman agrees to become pregnant and deliver a child for a contracted party.<sup>3</sup> The word surrogate' means substitute. Surrogacy arrangements do not only take place within the family, but also within the community, the state, the country and presently even the world. When it comes to surrogacy, there are two types currently used: "traditional" and "gestational".

However, the incorporation of the state of reality in the Bill as it is, could also be the direct effect of the only decision of the Apex Court relating to surrogacy, *Baby Manji Yamada vs. Union of India and Another* rather than the recommendations of the Law Commission.<sup>4</sup>

“Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party.” At the time of this decision, surrogacy was carried out exclusively by infertility clinics and was performed under the guidelines established by the Indian Council of Bio-medical Research in the year 2006 whereby surrogacy contracts were held to be valid. There, however, was no framework for the monitoring of the practices of neither these clinics nor a mechanism to regulate or reprimand any violation of the guidelines. *Baby Manji* can also be credited to be the precursor to the 228th Report of the Law Commission and the Bill as the commercial surrogacy industry received huge media coverage highlighting the absence of a

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<sup>2</sup> Assisted Human Reproduction Act, 6(1), 12(1)c, 12(2), 12(3)

<sup>3</sup> Sama: Resource Group for Women and Health, Letter to Union Minister for Health And Family Welfare, (2008), Available at <http://bit.ly/Me7ox0>. (Last accessed on 27/07/2016)

<sup>4</sup> *Baby Manji Yamada vs. Union of India and Another*, AIR 2009 SC 84; (2008)13SCC518.

regulatory mechanism to a major extent. One more case relating to surrogacy is being deliberated upon and is pending final disposal before the Apex Court.

## **SAME SEX COUPLES**

In 2008, the Sama Resource Group for Women issued a letter of concern to the Minister, voicing concerns over an initial draft of the bill. They pointed out that there is confusion regarding who is specifically responsible for compensating a surrogate, where and when medical screening of the surrogates should take place; and indicated the complete dearth of concern over health of the offspring. The ultimate draft of the bill addressed some of these concerns, but not to the full satisfaction of commentators. With respect to the maternal surrogacy industry, two prominent features of the bill present themselves.<sup>5</sup> First is the seeming disqualification of same-sex clientele from seeking commercial ART services, most notably lesbian couples. As per the first point above, by limiting surrogacy only to those physically incapable of maintaining a pregnancy, so-called “socially infertile” women are disqualified. While this does not necessarily exclude gay men, who, it can be argued, are physically incapable of childbirth, point. While steps are underway to decriminalize homosexual unions, there remains opposition to this development at the highest levels of government. This interpretation is contradicted by Dr Samrit Sekhar, who insists that the phraseology of the bill is meant not to deny the reproductive access to homosexual individuals, but rather to protect the rights of ART-produced offspring in a system that might not acknowledge the legality of same-sex adoptive parents. If this were truly the intent of the bill, however, one hopes that its phraseology would not be so misleading.<sup>6</sup>

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<sup>5</sup> Sama: Resource Group for Women and Health, Letter to Union Minister for Health and Family Welfare, (2008), Available at <http://bit.ly/Me7ox0>

<sup>6</sup> Mumbai Mirror, Homosexuality: Govt. Opposes HC Verdict in Apex Court, (2012), Available at <http://bit.ly/I4VUQz>.

## RIGHTS OF THE SURROGATE

In an earlier paper, we identified several ethical pitfalls associated with the Indian maternal surrogacy model. The two most glaring were: (a) the insufficiency of the medical informed consent model to take into consideration the social risks posed by maternal surrogacy; and (b) the lack of independent advocacy, for the purposes of contract negotiation and medical decision-making, on the part of the surrogate. In its current form, the bill fails to address either of these concerns, thus allowing for the sustained, profound vulnerability of the surrogate and her family. Specifically, we argued that it is ethically incumbent upon the clinic to express the social and emotional risks posed to surrogate, such as the risk of her community's disapproval and the possibility of domestic tension with her husband. Indeed, the bill fails to mention any of the physical risks, such as those involved in egg retrieval, common in the ART process. The commercial nature of the exchange represents a subtle motivator for the under-expression of such risks, such that they reduce the chances of an otherwise eligible surrogate from participating. Independent advocacy is required to remove the conflict of interest inherent in the clinic's role as representative to both the paying client (putative parent of the produced offspring) and the surrogate. It is, after all, the commissioning parents (clients) and the clinician (provider) who decide which procedures the surrogate will undergo. We argued that formal provision must be made for guaranteed separate legal representation for the surrogate, such that her rights are not superseded by those of the paying client. *International Review of Social Sciences and Humanities*, Vol. 4, No. 1 (2012), 169-173 171 Failure to address these concerns gives the new draft of the bill a sense of favoring the needs of the client over the surrogate. Sama recapitulates this sentiment by observing that payment to the surrogate is now required in five installments instead of three, with the bulk of payment (75%) to be made after delivery of the child, allowing for greater financial risk on the part of the surrogate.<sup>7</sup> This is in dire contrast to the 2008 version of the bill, which held that 75% of payment was to be made before the birth of the child. The shifting of recompense from pre- to post-birth is also indicative of the industry's undervaluing of the role of the surrogate. While these women are the bedrock upon which the maternal surrogacy side of the ART industry is built, they are nevertheless only deemed valuable if they successfully

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<sup>7</sup> National Guidelines for Accreditation, supervision and regulation of ART clinics in India. Available at [www.icmr.nic.in/art/art\\_clinics.html](http://www.icmr.nic.in/art/art_clinics.html) (Last accessed on 27/07/2016)

produce children. This is also reflected in the omission of codification of her counseling needs (in the event of medical misadventure or of such common occurrences as post-partum depression) or of her family's compensation in the event of her death.<sup>8</sup>

## **RIGHTS OF THE CHILD**

The 2010 version of the bill differs from its 2008 incarnation in its focus on the rights of the child. The industrial nature of the sector views children as a business product, the client as a customer, and the surrogate as a manufacturer. A ubiquitous criticism is that common respect for human dignity is missing in this equation. In the wake of a handful of high profile cases that almost led to child abandonment, there was clearly a need to institute measures for ensuring a good home for ART children. In response, the bill's current draft properly provides for clarity on the citizen and disposition of the child.

## **PRESENT INDIAN SCENARIO**

The Indian scenario in this field is quite bleak. Delhi artificial insemination (Human) Act 1995 is the only statutory act prevailing in India. There is no internal regulatory body like VLA in U.K, moreover Indian Infertility specialist have rather opposed the steps towards regulation of practice in this field.

### **1. Litigation against doctors – doctors can face few litigations like-**

- a) **Not taking proper informed consent:** After duly counseling the couple and / or oocytes / semen donor and informed and written consent should be taken from both the spouses as well as donor. They should be explained various risk factors including risks involve in ovarian hyper stimulation, anesthetic procedures, invasive procedures like laparoscopy,

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<sup>8</sup> National Guidelines of ART clinics in India – ICMR; chapter- 1 and 3 - 2007

aspiration of ovum etc. in simple language using the words that they can understand well. They should be explained the possibility of multiple pregnancies, ectopic gestation, increased rate of spontaneous abortion, premature birth, higher prenatal and infant mortality as well as growth related problems.

- b) **Following the birth of a defective child:** To avoid this, the donor's chromosomes must be thoroughly screened for possible genetic defect, and should also inform all the likely possibilities at the time of taking informed consent.

**2. Legitimacy** - The child born by ART is considered legitimate with all the rights of parentage, support and inheritance, provided he is born during lawful wedlock and with consent of both the spouses. Sperm or oocyte donors shall have no parental rights or duties in relation to the child. A child can be given status of legitimacy also by adoption. In a case, on the wife's petition for divorce and custody of the child, a question was raised before the court: whether the child, who is born to her consequent to AID, consented to by husband, is legitimate and belongs to mother only? Court held that a child so conceived was not a child born in wedlock and therefore illegitimate. As such it was the child of mother alone and the husband had no rights or interest in the child, not even that of visitation. The husband is not the actual father of the child and, therefore the child is illegitimate.

**3. Inheritance of property** – Since the child is illegitimate if born out of AID, it cannot inherit the property of his father. Any attempt to conceal this fact by registering the husband, as the father amounts to perjury.

**4. Consummation of marriage** – Conception of the wife by AI (AIH or AID) does not amount to consummation of marriage, if there is no successful sexual act due to the impotency of husband. The decree of nullity may still be granted in favor of the wife on the ground of impotency of the husband or his willful refusal to consummate the marriage. However, such a decree could be excluded on the grounds of approbation. However in this situation the child will be illegitimate.

**5. Rights of an unmarried woman to AID:** There is no legal bar on an unmarried woman going for AID. A child born to a single woman through AID would be deemed to be legitimate. However, AID should normally be performed only on a married woman and that too, with the written consent of her husband, as a two-parent family would be always better for the child than a single parent one, and the child's interests must outweigh all other interests.

**6. Ground for divorce and judicial separation** – Mere AI is not a ground for nullity of marriage and divorce since sterility is not a ground, however if AI is due to impotence of husband, it becomes the ground. AID without husband's consent can be a ground for divorce and judicial separation.<sup>9</sup>

**7. Maintenance and custody of child** – Under Hindu Adoption and Maintenance Act 1956 the maintenance of the dependents is the responsibility of the parents, whether legitimate or illegitimate, till the son remains minor and daughter is unmarried.<sup>10</sup>

**8. Insemination after the death of the husband** – This is seen when semen of the husband is cryo-preserved by various methods and the woman is inseminated after death of the husband. Such **Posthumous child** is said to be legitimate because the semen is of husband, although the complexity arises since conception is not during the continuance of marriage.

**9. Relation between AIH / AID child with subsequent Natural / Adopted child of same family** - If the child is born of natural course sometimes after the birth of the child through AI, the status will remain same for AI child but the natural child born will remain legitimate.

**10. Charge of Adultery** - AID does not amount to adultery, even if it was done without the consent of husband. For adultery to be committed both parties should be physically present and engage in sexual act and sexual union involving some degree of penetration of the female organ by the male organ should take place. AI is not equivalent to sexual intercourse.

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<sup>9</sup> The Delhi artificial insemination (Human) Act 1995.

<sup>10</sup>The Hindu marriage Act – 1955

Under section 497 of IPC 1860, sexual intercourse with a person who is or whom he knows or has reason to believe to be wife of another person without the consent or connivance of that man. For the charge of adultery two things must be proved, sexual intercourse took place with another person's wife and no consent or connivance from another man was granted.<sup>11</sup>

**11. Incestuous relationship** – There is high risk of such relationship between naturally born child and child born out of AID of same parent.

## CONCLUSION

In India, surrogacy is purely a contractual understanding between the parties so care has to be taken while drafting agreement so that it does not violate any of the laws like, e.g., points to be taken into consideration why does the intended parents opt for surrogacy, particulars of the surrogate, type of surrogacy, mentioning about paternity in the agreement, the creation of registry for biological father of children in an adoption cases, rules set forth on how and when genetic testing can be done to determine paternity, compensation clause, unexpected mishappening to the surrogate mother, child's custody, regarding the jurisdiction for the disputes arising out of agreement. Indian government has drafted legislation in 2008 and finally framed an ART regulation draft bill 2010. The bill is still pending and not presented in the parliament. The proposed law needs proper discussion and debate in the context of legal, social and medical aspects. We conclude that the government must seriously consider enacting a law to regulate surrogacy in India in order to protect and guide couples seeking such options. Without a foolproof legal framework implementation couples will invariably be misled and the surrogates exploited. Medical innovation and technology make it possible to destabilize the linear categories of biology and kinship. In this context, where there can be multiple definitions, it depends on who has the power to establish the legitimacy of one particular definition. In this context, where the idea of 'natural' biology and parenthood is being seriously challenged, and where the deployment of meanings that are being actively assigned to relationships is also being challenged, whose interests are being served by a particular deployment, particularly as seen in

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<sup>11</sup> Indian Penal Code - 1860

the case of commercial surrogacy? There are particular power configurations in a surrogacy arrangement that make this possible. The objective is to reveal these power configurations and to identify those who are marginalized by them.

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