

Indian Surrogates: Whether Laws provide room for it ?

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Abstract: Indian Laws are not made to accommodate Surrogacy arrangements, so with the validity of surrogacy arrangements certain legal complications arise. Present Paper deals with the legal validity of Surrogacy arrangements in India in light of legal complications arising out of it in present legal framework.

Keywords: Surrogacy Laws, Surrogacy Bill, Legal Complications.

INTRODUCTION:

Recently, Cabinet approved the Surrogacy (Regulations) Bill 2016, that imposed various restrictions on Surrogacy and banned Commercial surrogacy, which has been legal in India since 2002. India is emerging as popular surrogacy destination now a days. So far the Indian perspective is concerned; it has left no doubt that Indian surrogates have been increasingly popular among the infertile couples globally. In fact Indian ART clinics are providing world class facilities with affordable prices. They are also professionally dealing with the hiring and retention of Surrogates, resulting into providing best surrogacy services for lesser amount. In this Situation author tried to analyse the concept of surrogacy with probable complications. It is basically a pre-legislative analysis.

The Surrogacy is subjected to a lot of controversy. It is due to various social, legal and ethical problems associated with it. Concept of ‘motherhood and family’ has been severely affected. ‘mother child bonding’ is another area of psychological problems associated with it. Certainly maternal health also can’t be overlooked and another objection regarding commodification of the surrogate body specifically can’t be ruled-out. Due to the lack of proper legislation, it has become an unconventional family formation technique as emergence of artificial insemination has not only separated procreation from intimacy but also allowed anonymity, simply allowing the purchase of genetic material. It has a lot of issues may harm to the society, to women and children in general.

Most of the countries do not permit the surrogacy as a mean of procreation. Legalisation of surrogacy in India is also subjected to controversies. The main issue associated with it is actual psychological and physical harm to women. It is associated with several ethical hazards to both the surrogate mother and the child. The concept of surrogacy has turned a reproductive capacity of a woman into the subject matter of a commercial contract. The commercialization of surrogacy may lead to baby selling and even black marketing. It may convert the ART clinics into breeding farms and impoverished women into baby producers. So, the pregnancy becomes a service and resultant baby becomes a product, a ‘saleable commodity’. Parentage of the child has split into pieces among Surrogate, Commissioning mother and egg donor. Surprisingly, India fails to make any legislation to regulate this growing industry and to safeguard the interests of the surrogate mother, the child, or the commissioning parents.

While considering the baby as product in surrogacy, his rights are rarely considered. His natural requirement of breastfeeding hampers due to early handover. Transferring the parenthood from the birthing mother to commissioning couple adversely affect the natural right of the child of having both the mother and the father. The psycho-social well-being of the baby born out of the surrogacy arrangement is also at stake.

It has been observed that most women enter into surrogacy arrangements only for the money, which is life-changing for them. It is also substantial amount to maintain their family. But the major drawback associated with it that it exploits women economically, emotionally and physically.

LEGAL ISSUES:

There are certain legal issues may arise out of the process of Artificial Insemination including matrimonial relations, Legitimacy of child, Child’s right to know Vs. Donor’s right of privacy, Rights of child in various personal Laws and property laws and many more.

In India, where no legislation enacted and at the same time judicial consideration of issues is also required to settle the issues. Though, some issues have been considered by the judiciary in various countries, so as to enable us to analyze the legal principles laid down in those matters, which may consider as settled issues.

At this juncture I find it appropriate to examine the legal complication may arise of using surrogacy arrangements in the present legal frame work and in light of matters decided and verdict given by various Courts. Though in India surrogacy requires consideration of court and except two cases no example of court's intervention are available, so the present analysis is largely based on the consideration by the courts of various countries and even the issues considered by the courts in India in other aspects may applicable to complications arises from the surrogacy arrangements.

DOES IT AMOUNT TO ADULTERY:

Whether, marriage may nullify on the ground of non-consummation of marriage in case of Artificial Insemination by Wife.....? The general opinion is that this does not amount to non-consummation leading to nullity of marriage.

Whether, Artificial insemination by wife in absence of Husband's consent amounts to adultery...? Canadian Supreme Court replied it affirmative and held in Orford Vs. Orford¹ that recourse to Artificial Insemination without consent of husband amounted to the adultery. This verdict of Canadian Supreme Court was not supported by the Courts in other Countries. In Maclennon Vs. Maclennon² the Scottish trial Court held that it does not amounted to adultery. Now a day it nowhere considered as adultery³. British Legislature clarified it by the act of 1990.

As far as India is concerned, according to definition of adultery provided under section 497 of I.P.C. sexual Intercourse is pre-condition to constitute the offence of adultery, so in absence of actual physical contact no question of Adultery arises in India in case of Artificial Insemination⁴.

LEGITIMACY OF CHILD IN ARTIFICIAL INSEMINATION:

The most important issue arises from the Artificial insemination is the legitimacy of the child.

The Hindu Law and the Mohammedan Law raise similar presumptions as stated in the section 112 of Evidence Act 1872⁵, regarding legitimacy, but while English Law give importance to the time of birth, The Hindu Law and the Mohammedan Law give importance to the time of conception.

Section 16 of Hindu Marriage Act 1955 specifically provides that a child of a null and void marriage under section 11 of the Act or annulled under section 12 shall be legitimate.⁶ Section provides:-

“Legitimacy of children of void and voidable marriages:-

1. *Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate...*
2. *Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it has been dissolved instead of being annulled, shall be deemed to bet their legitimate child Notwithstanding the decree of nullity.*

¹ (1921) 49 Ontario LR 15 as referred to in G.W. Bartholomew "Legal Implications of Artificial Insemination", 21 Mod L Rey 236 at 238-239 <http://onlinelibrary.wiley.com/doi/10239/full> [last accessed 18.1.2014]

² www.plakaservisi.com/alt/58-SLT-12, also referred in *ibid* at page 236

³ Sandeep Kulshrestha, Assisted Reproduction Technology : An Overview, *Shri Ji Socio-Legal Journal* (3)2012, 74 at 76

⁴ Section 497 of Indian Penal Code 1860

⁵ Section 112 Indian Evidence Act 1872

⁶ Section 11 and 12 Hindu Marriage Act 1955

3. *Nothing contained in subsection 1 or sub-section 2 shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any right in or to the property of any person other than the parents, in any case where, but for passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents”*

It clearly appears from the language of the section that the child will have all rights over the property of his parents but it is clearly mentioned that he will have no right over the property of Hindu Undivided family and he will have no right over the property of others by virtue of being heirs of agnet or cognet categories.

Under Muslim Law the Putative father is not recognized for any purpose. Under Islamic law, child born out of lawful wedlock may consider the legitimate and law doesn't provide any other method to legitimize the child. However Islamic Law accept the concept of “acknowledgement of paternity” to save the children from being bastardised. As far as maternity is concerned Quran Shareef states 3 stages to ascertain maternity i.e. conception, delivery and feeding. In this concept, child through surrogacy has not a valid child of a mother through surrogacy arrangement.

For the legal purposes, paternity is a question based on genetic factor. Use of the husband's sperms for inseminating the wife either *in vitro* or *in utero* does not pose any problem to the question of paternity of the offspring. However, the use of donated sperms changes the whole scenario.

The main problem with section 112 of the evidence Act is that sexual intercourse considered as absolute essential for the conception of a child. In non access clause of this section it is specifically mentioned that if a man could not possibly have had sexual intercourse it cannot be his child. Section 112 read as follows:-

“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.”⁷

Indian Courts have been considered it as it provided in the Act. Hon'ble Apex Court held in Goutam Kundu v. State of W.B. :-

“24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. “Access” and “non-access” mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual “cohabitation”⁸”.

In this Judgement Hon'ble Supreme Court denied the necessity of cohabitation and held that mere access serves the purpose of the section.

Similar view was taken by the Hon'ble Apex Court in Kamti Devi v. Poshi Ram and denied the prayer for DNA test to ascertain the paternity and held that it is irrebutable presumption. Hon'ble Court held :-

“10.The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of

⁷ Section 112 of Evidence Act 1872

⁸ Goutam Kundu v. State of W.B., (1993) 3 SCC 418

which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception.....⁹ .”

The concept was further strengthened and Hon’ble Apex Court held in Banarsi Dass v. Teeku Dutta, that:-

13. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.¹⁰

In this manner Court held that presumption under section 112 of the evidence Act is ir-rebuttable and even if DNA test reveals that child does not the child of claimed father, even though, the presumption under section 112 will remain ir-rebuttable. Hence, Court denied to permit DNA test to ascertain the paternity and considered only non access as the tool of denial of paternity as provided under non access clause of section 112. Later on, the view was diluted up to some extent and held that:-

“22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of “eminent need” whether it is not possible for the court to reach the truth without use of such test¹¹.”

But recently Hon’ble Apex Court has considered the presumption under section 112 of the Evidence Act as rebuttable presumption if the evidence is sufficient. In Nandlal Wasudev Badwick Vs. Lata Nandlal Badwick Hon’ble Apex Court held:-

“20. As regards the authority of this Court in the case of Kamti Devi (Supra), this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non- access of the husband with the wife, this Court held that the result of DNA test “is not enough to escape from the conclusiveness of Section 112 of the Act”. The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, this Court was confronted with a situation in which DNA test report, in fact, was available and was in conflict with the presumption

⁹ Kamti Devi v. Poshi Ram, (2001) 5 SCC 311

¹⁰ Banarsi Dass v. Teeku Dutta, (2005) 4 SCC 449

¹¹ Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633

of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the respondents¹².”

In this case court differentiated its previous Judgment in Banarsi Dass v. Teeku Dutta¹³ regarding the rebuttability of the presumption under section 112 and held that presumption cannot be over-ride conclusive evidence.

Now the question left that in case of donated sperm, the DNA of the child will match with the donor, who never had access to the mother of the child in question.

When a widow Conceive by using her dead Husband's preserved sperms to get pregnant after his death, but the complication is that section 112 requires “continuance of a valid marriage” so, in this case the child will unfortunately born after the, death of her husband, so with the help of section 112 of Evidence Act, the child can easily be proved to be illegitimate¹⁴.

On applying section 112 of Evidence Act to surrogacy, when a gestational surrogate gives birth to a child and her husband shall be considered the father by virtue of section 112 of the Evidence Act, whereas he has no connection with the child.

So, in light of the above discussion it is crystal clear that any kind of conclusive presumption has no scope to ascertain paternity or legitimacy of a child when conclusive evidence can easily be obtained with the aid of technology developed in recent past. Further looking into is apparent conflict between duty of the court to reach the truth and right of a person not to submit himself forcibly to medical examination, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed.

Presumption of legitimacy of the child was also considered in various countries in reference to an AI child and a Newyork Court in Strad Vs. Strad refused the plea of husband on the ground that after giving consent of Artificial Insemination to his wife, he potentially adopted or semi adopted the child and child was entitled to same rights as those required by a foster parent, who formally adopted the child¹⁵.

In Doomboss Vs. Doomboss, the court found that in the absence of consent of the husband for Artificial Insemination, child do conceived is not a child born in wedlock and therefore considered as Illegitimate.

This issue was resolved in Britain by legislative intervention. British Parliament passed legislation called **Human Fertilisation and Embryology Act 1990**. Section 28 of the Act provides:-

“If a child born as a result of Artificial Insemination or embryo transfer to a woman who was at the time of artificial insemination or embryo transfer, married, then her husband will be treated as father of the child.”¹⁶”

A number of Countries including Germany, Newzealand, Nigeria, Several states in Australia and USA have resolved this controversy through legislative intervention and have enacted their respective Laws clarifying the legitimacy of child born out of Artificial Insemination or embryo transfer.

In India concept of legitimacy is mainly based on presumption, being the principle of Evidence. Since the language of the Act is quite clear, left very limited scope for judicial intervention, though, the trend shows that court is constructing the issue liberally.

¹² Nandlal Wasudev Badwick Vs. Lata Nandlal Badwick, 2014 (2) SCC 576

¹³ Supra Note 16

¹⁴ Caesar Roy, Supra at P. 390

¹⁵ Sandeep Kulshrestha, Supra note 6 at Page 77

¹⁶ Human Fertilisation and Embryology Act 1990

Another problem arose when US gay couple rented a womb in Hyderabad. One of them donated his sperm, fused with the egg of an Indian Donor, such child may legitimate in United States, but in India the same shall be considered in light of section 377 of Indian Penal Code. Section 377 of Indian Penal Code provides:-

“377. Unnatural offences.-- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”¹⁷

From the bare perusal of this provision it clearly appears that the homosexuality is an offence in India and thus, Gay marriage is not a recognized marriage form in India. In this situation a child born out by any procedure would not be considered as legitimate child of such couple.

Humble researcher met an Australian Gay father at Hyderabad stayed there to have his child and asked the same question, he simply replied that i nowhere mentioned in the records that we are gay couple. My legal advisor suggested me to register myself as single parent that I did.

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 law complicates situations.

The citizenship act, 1955 provides that citizenship in India can be acquired by birth¹⁸, descent,¹⁹ registration,²⁰ naturalization,²¹ and incorporation of territory.²² The issue of citizenship of the child born through surrogacy arrangement of the intended parent's country does not recognizes it, was first arose in the Baby Manji's case.

Baby Manji case ²³

A Japanese Couple engaged an Indian Surrogate, but before the birth of the child they filed for divorce. The commissioning father wanted to take care of the child, but Indian laws prohibits single men to adopt. In absence of the claim for her custody by her birthing mother and Commissioning mother, the child was not permitted to go to Japan. Eventually, the baby was permitted to leave for Japan after the Japanese government issued a one-year visa to her on humanitarian grounds. However her grandmother was directed to accompany her, as her temporary custodian of the baby.

JAN BALAZ CASE²⁴

In *Jan Balaz v Union of India*, the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district. The court observed:

"We are primarily concerned with the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital

¹⁷ Section 377 of Indian Penal Code 1860

¹⁸ Citizenship Act, 1955, s. 3

¹⁹ *Ibid*, s 4

²⁰ *Ibid*, s 5

²¹ *Ibid*, s 6

²² *Ibid*, s 7

²³ *Baby Manji Yamada Vs Union Of India and Anr*, AIR 2009 SC 84

²⁴ *Jan Balaz v Anand Municipality*, LPA 2151/2009, 17 [2009]

importance." The court considered the surrogacy laws of countries like Ukraine, Japan, and the United States.

Because India does not offer dual citizenship, the children will have to convert to Overseas Citizenship of India if they also hold non-Indian citizenship.

Balaz, the petitioner, submitted before the Supreme Court that he shall be submitting his passports before the Indian Consulate in Berlin. He also agreed that a NGO in Germany shall respond back to India on the status of the children and their welfare. The Union of India responded that India shall make all attempts to have the children sent to Germany. German authorities have also agreed to reconsider the case if approached by the Indian.

In May 2010, the Balaz twins were provided the exit and entry documents that allowed them to leave India for Germany. The parents agreed to adopt them in Germany according to German rules.

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 the babies born to surrogate mothers in India would be Indian Citizen²⁵ and therefore entitled to get Passport. 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 2013,²⁶ the Government made its stand clear on the VISA regulations for foreign nationals coming to India for surrogacy. In its order it is said that a tourist VISA, which is most commonly and frequently used by foreign nationals, is an inappropriate one. It pronounced that so 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 condition that the couple must have been married for at least two years and letter from the embassy of the their respective country must be enclosed with the visa application stating clearly that "(a) the country recognises 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."²⁷

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

ANONYMITY OF DONOR:

The technique involves artificial insemination of other women with the sperm of the barren woman's husband. After surrogate birth the baby is handed over to its Biological father and his wife. It is now also possible to remove a matured healthy ovum from the wife and fertilized it with the Husband's sperm *in-vitro* in the specialized laboratory and re-implants this fertilized ovum (Embryo) in the hired womb of another woman. The child born out of this arrangement may search for his surrogate Mother or donor father or mother, so an important aspect of artificial insemination is the identity of donor or surrogates. Whether Surrogates or donor have the right of privacy...?

Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

²⁵ As per section 3 of Citizenship Act 1955

²⁶ <http://mha1.nic.in/pdfs/CS-GrntVISA-29112.pdf> (last visited on march 27, 2014)

²⁷ *Ibid*

Article 17 of the International Covenant of Civil and Political Rights (to which India is a party) refers to privacy and states that:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

The European Convention on Human Rights, which came into effect on Sept. 3, 1953, also states in Art.8:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."

Anonymity of donor is also an important aspect to be considered with whether it should be secret or a child has right to know his origin is a question of debate.

Sweden is the First Country provides right to a child to trace his origin. Austria also allows a child on maturity to access to information about the origin but Switzerland, France, Canada, Norway and Denmark do not allows offspring any information. In U.S. there is no legislation, it either Federal or State level, that either provided or enforces anonymous Gmate donation. The matter is regulated by non legal binding professional guidelines which recommended the anonymity or identity.

In U.K. The Human *The Human Fertilisation and Embryology Act 1990* provides limited access to knowledge of origin to get information to an AID child limited to as to whether the person of woman whom he is going to marry is related

Right to privacy found place in the Constitution only through the Judicial intervention only. In *Kharak Singh v. State of UP*²⁸, the majority referred to *Munn v. Illinois*²⁹ and held that though Indian Constitution did not refer to the right to privacy expressly, still it can be traced from the right to 'life' in Art. 21. Subba Rao J while concurring that the fundamental right to privacy was part of the right to liberty in Art. 21, referred to *Wolf v. Colorado*: (1948) 338 US 25 and found it as the part of the right to freedom of speech and expression in Art. 19(1)(a), and also of the right to movement in Art. 19(1)(d). So, all seven Judges held that the 'right to privacy' was part of the right to 'life' in Art.21.

The question of privacy as a fundamental right presented itself once again to the Supreme Court a few years later in the case of *Govind v. State of Madhya Pradesh* (AIR 1975 SC 1378). The petitioner in this case had challenged, as unconstitutional, certain police regulations on the grounds that the regulations violated his fundamental right to privacy. Although the issues were similar to the *Kharak Singh* case, the 3 judges hearing this particular case were more inclined to grant the right to privacy the status of a fundamental right. Justice Mathew stated:

"Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. 'Liberty against government' a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy."

²⁸ *Kharak Singh v. State of UP*, 1964(1) SCR 332

²⁹ *Munn v. Illinois* (1876) 94 US 113 downloaded from u-s-history.com/pages/h855.html on 15/3/2014

A two-judges Bench in *R. Rajagopal v. State of Tamil Nadu*³⁰ held the right of privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "It is the right to be let alone". Every citizen has right to safeguard the privacy of his own. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. The right to privacy has since been widely accepted as implied in our Constitution, in some other cases, namely, *PUCL v. Union of India*, (1997) 1 SCC 301; *Mr. X v. Hospital 'Z'*, (1998) 8 SCC 296; *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399; *Sharda v. Dharmpal*, (2003) 4 SCC 4931 etc.

In *Mr. X v. Hospital 'Z'* Hon'ble Apex Court held that:-

"25. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

26. Right of Privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, Doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the Right of Privacy which may sometimes lead to the clash of person's "right to be let alone" with another person's right to be informed.

27. Disclosure of even true private facts has the tendency to disturb a person's tranquility. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the Right of Privacy is an essential component of right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

28. Having regard to the fact that the appellant was found to be HIV(+), its disclosure would not be violative of either the rule of confidentiality or the appellant's Right of Privacy as Ms. Akali with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if marriage had taken place and consummated.³¹"

From the above discussion it is quite clear that right to privacy though protected by the Constitution of India, but it is not absolute right and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

Now another question arises i.e. right of privacy vis-a-vis right to know, but it is also clarified by Hon'ble Apex Court that right of Privacy will prevail over right to know though for the its disclosure would not be violative of either the rule of confidentiality or the appellant's Right of Privacy in exceptional cases as discussed above.

Even though in India, system of prohibited degree is provided in section 3(g) of Hindu marriage Act 1955 and as per section 5 (iv) of the Act the precondition of a valid Hindu Marriage is:-

“.....

iv. The Parties are not within the degrees of prohibited relationship unless the customs or uses governing each of them permits of a marriage between the two,

v. The Parties are not Sapindas of each other unless the customs or uses governing each of them permits of a marriage between the two,”

³⁰ *R. Rajagopal v. State of Tamil Nadu* (1994) 6 SCC 632

³¹ *Mr. X v. Hospital Z* (1998) 8 SCC 296

Unfortunately, there is no law to regulate such identity of or genetic information and to about any critical circumstances a law like Sweden or at least like U.K.

LEGAL VALIDITY OF SURROGACY AGREEMENTS:

In the case of surrogacy, there may be questions about enforcing a contract with the surrogate mother, e.g. whether such contracts may be valid in view of the provisions of public policy, particularly under Section 23 of the Indian Contract Act, 1872; whether the child to be handed over can be considered a saleable commodity for consideration. A party may refuse to have its contract acted upon, or the child is not according to the specifications agreed upon in ordinary law of contract, the finished goods can be rejected and damages can be claimed in such situations.³²

Whether surrogacy contracts are the same as other contracts? It raises a very serious issue of morality and gives rise to the question of whether insemination amounts to adultery and whether a surrogacy agreement is a case of exploitation of the helplessness of poor women who are selected as surrogate mothers. Surrogacy also raises complex questions of succession by a child born of a surrogate mother, as under Section 26 of the Special Marriage Act, 1954 and Section 16 of the Hindu Marriage Act, 1955, children of voidable and void marriages cannot inherit the coparcenary properties of any relative, they can only claim share in self acquired property of the parents. (Vide: **Smt. PEK v. Kalliani Amma & Ors. v. K. Devi & Ors.** AIR 1996 SC 1963; and **Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.** AIR 2010 SC 2685).³³

The right to procreation is recognized to be implicit in the right to privacy. The legendary American Case of *Roe Vs. Wade*³⁴ has been allowed by the Supreme Court of India in a number of cases dealing with the subject matter. In the instant case, the U.S. Supreme Court held that a citizen has the right to be safeguarded the privacy of his born. His family, Marriage, Procreation, Motherhood, child bearing and education among other matters³⁵ *Skinner Vs. Oklahoma*³⁶ is yet another case that had 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 right of man.³⁷ The Andhra Pradesh High Court in *V.K. Parthasarathi's case*³⁸ 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 decision making process of the individual is scrutinized by the Constitutional Court both in this Country and in America with great care³⁹. Likewise, in *Kasturalal Lakshmi Reddy Vs. State of J&K*⁴⁰ the Supreme Court of India underpinning the analogous notion held that the right to life and personal liberty as enshrined Art. 21 must be interpreted in a broad manner so as to include emit all the barriers of rights which go to makeup 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 the right to procreate can be subject to reasonable restrictions⁴¹.

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 agreement have a Constitutional right to reproductive privacy⁴². The Indian Courts too have kept pace with the concern. The Courts a 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 fact of a right of privacy.⁴³ The State cannot intervene in matters of private ordering and matters as intimate as re-procreation. With the right to privacy and reproductive autonomy in place, the individuals must be afforded protection on who to exercise this right. In other words, the state cannot interfere

³² *Dr. Justice B.S. Chauhan, Supra Note 9 at page 9*

³³ *Ibid*

³⁴ *Supra note 38*

³⁵ *Ibid*

³⁶ 316 U.S. 535 (1941) <https://supreme.justicia.com/.../us/316/535/...> [downloaded on 25/3/2014]

³⁷ *Ibid*

³⁸ *V.K. Parthasarathi Vs. State of Andhra Pradesh AIR 2009 A.P 156*

³⁹ *Ibid*

⁴⁰ AIR 1998 SC 1992, affirmed in *Javed Vs. State of Haryana AIR 2003 SC, 357*

⁴¹ *Diksha Munjal-Shankar, Medical Tourism, Surrogacy & the legal Overtones- The Indian tales, 56JILI (2014) 62, at page 68*

⁴² *In Re Beby M. 537 A. 2D 1227 NJ 1988 <http://bit.ly/ML2cp> [last accessed 18.1.2014]*

⁴³ *Parthasarthy Supra Note 34*

in matter of mode of procreation, i.e. whether the individuals procreate naturally or through the use of Assisted Reproductive Technology. Art.21 of the Constitution can be stretched to house the use of Assisted Reproductive Technology by the individual 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 Art. 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 into a contract on the fulfillment of certain prerequisites. Section 10 of the Indian Contract Act provides the parameters of a 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 personal by one party⁴⁴ and the acceptance of it by the other⁴⁵,
- b. The parties to such agreement must be competent to contract⁴⁶,
- c. There should be a lawfull consideration⁴⁷,
- d. There object should be lawful,⁴⁸
- e. The Parties must enter into the agreement with their free consent,⁴⁹
- f. The Agreement must not have been expressly declared to be void⁵⁰

In India, the parties of surrogacy are backed by written agreement between the parties. These agreements are an expression of the personal and acceptance between the parties. This document of concurrence also cites the amount made to the surrogate mother⁵¹ 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 associated inc. Vs. Armstrong⁵² 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 achieve a biologically related offspring*”⁵³ 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 prerequisite of the validity of the contract and therefore, the parties of the surrogacy agreement must enter into the arrangement in 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 agreement are not only entitled to Constitutional protection but are also valid under the domestic contract law.

Questions may also arise regarding the validity of such contracts with or without the consent of the husband as under the Contract Act, only a major i.e. who is 18 years of age as per the provisions of Indian Majority Act, 1875, is competent to enter into a contract. In India, in spite of several statutory provisions the marriage of the children is solemnized before attaining the majority. There is no provision declaring a child born by a girl before she attains majority as illegitimate or illegal. Therefore, the question may arise as to whether the minor girl, or parents, or husband on her behalf can enter into a contract of surrogacy or artificial insemination.⁵⁴

⁴⁴ India Contract Act 1872 section 2(a)

⁴⁵ Ibid section 2(b)

⁴⁶ Ibid, section 11

⁴⁷ Ibid, section 2(d)

⁴⁸ Ibid, section 23

⁴⁹ Ibid, section 14

⁵⁰ Ibid, section 24-30

⁵¹ ICMR National guidelines for Accreditation supervision and regulation of ART clinics in India downloaded from www.icmr.com/guidelines

⁵² Supra Note 38

⁵³ Ibid

⁵⁴ Dr. Justice B.S. Chauhan, Supra Note 9 at page12

In **Suchita Srivastava v. Chandigarh Admn.**⁵⁵ the Supreme Court held :

“There is no doubt that a woman’s right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman’s entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a “compelling State interest” in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.”

Furthermore, in early 2000s the ICMR formed and brought out the National Guidelines for Accreditation, Supervision and Regulation Of ART Clinics In India⁵⁶ 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 binding⁵⁷. These guidelines have been taken to another level of being the blue print of the draft of the Assisted Reproductive Technology (Regulation) Bill, 2010. The ART Bill attempts to iron out a number of issue which were undressed 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 includes who can act as a surrogate mother, who can be the commissioning couple, 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 addressed in its content etc.⁵⁸

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 focused on and plugged. These include issues of contractual remedies, determination of parentage of the child born and the child’s citizenship, among others.⁵⁹

Diksha Munjal-Shankar discussed various possible situations in her article “Medical Tourism, Surrogacy & the legal Overtones- The Indian tales”, which is reproduce in her own words as under:-

“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 etc. Simply put, the agreements determined 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. Dering the course of the pregnancy however, the commissioning couple which is genetically related to the child, splits and the respective parents separates. 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 pregnancy develops and emotional attachment with the child and on birth refuses to hand-over the child to the commissioning couple.

⁵⁵ (2009) 9 SCC 1

⁵⁶ ICMR Guidelines, *Supra* Note 38

⁵⁷ Art. 13, Constitution of India

⁵⁸ ICMR guidelines, Ch. 3; ART bill ch. V, VII

⁵⁹ Diksha Munjal-Shankar, *Supra* Note 37, at page 70

- iii. The commissioning couple, genetically related to the child, agrees upon and signs 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 give birth to a child that is still-born or born with birth-defect.
- vii. The commissioning couple, genetically related to the child, agrees upon and signs the surrogacy agreement with the 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, genetically related to the child, agrees upon and signs the surrogacy agreement with the surrogate mother with respect to the agreement. 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 fulfillment of such condition would she had-over the child.

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

CONTRACTUAL REMEDIES

Surrogacy agreements may be legally protected under the law. However, it is unclear as to what remedy – damage or specific performance – 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 vary of granting a relief of specific performance given the fact that under the prevailing domestic law it is 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 not as yet another remedy under the contractual law, may be tough call for the courts to take. This is due to sensitive nature of the practice and how it may take a step further from commercialization to actually baby-selling. For instance in situation (vi), if the child is born with some abnormality or birth defect, and in case 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 system⁶⁰.

COURT’S RESPONSE TO SURROGACY CASES:

Besides, Commercial surrogacy potentially creates several ethical conundrums related to parentage, nationality and situations such as miscarriage or multiple births. Commercial surrogacy is fraught with ethical questions such as what happens to the surrogacy contract in case of a miscarriage, what if the baby is born with serious disabilities and is unwanted, what the nationality of the child is, or what happens if the contracting couple

⁶⁰ *Diksha Munjal-Shankar, Supra Note 37 at page 72*

changes their mind about wanting a baby, or if the surrogate dies during childbirth. The Baby Manji case has now prompted the Indian Medical Association to debate the ethical aspects of commercial surrogacy. Commercial surrogacy in India is regulated by the Indian Council of Medical Research (ICMR) guidelines. This situation is widely accepted as inadequate, and the ICMR has drafted the Assisted Reproductive Technology (ART) (regulation) Bill, 2008 – and further amended bill in 2010 after incorporating suggestions from various sections of the society, which is itself proving controversial.

Surrogacy (traditional and gestational), like other forms of assisted procreation, is socially significant in that, parenthood emerges as fragmented³⁷ across persons who contribute biogenetically, socially and financially to the making of a child. As Almeling (2011) among others suggests, women can separate maternity into several parts: one woman can provide the egg, another can carry the embryo and a third can raise the child – all three can lay claim to motherhood. The fact that kinship connections with offspring are forged through means other than 'blood' has particularly destabilised notions of a kinship based in 'biology'.

In the case of surrogacy in particular, the anxieties to do with biological connectedness seem to resolve in the shift away from 'traditional' surrogacy arrangements (where the eggs of the surrogate are used) to the more popular practice of gestational surrogacy (where the surrogate gestates the fertilized embryo but does not contribute any of her own reproductive material).

Gestational surrogacy is preferred by commissioning parents as well as surrogates in the USA, for instance, as it removes the surrogate as a contender for having any 'real' (i.e., genetic) ties with the baby she gestates⁶¹.

REPRODUCTIVE TOURISM AND PROTECTION OF CHILDREN:

Certainly children are the assets of mankind beyond borders, thus their well being is the paramount concern of all laws pertaining to children. Recent hyper growth in reproductive tourism to the third world countries have ample scope of trafficking of children. Though, it may be a hyper-sensitive approach, but certainly well-being of the children born in India is the prime concern of law. To protect the interest of children going out of the country in maintain the track record of such children is necessary.

India participated in the United Nations (UN) General Assembly Summit in 1990, which adopted a Declaration on Survival, Protection and Development of Children and has also acceded to the Convention on the Rights of the Child (CRC) on the 11th December, 1992; and whereas CRC is an international treaty that makes it incumbent upon the signatory States to take all necessary steps to protect children's rights enumerated in the Convention;

In order to ensure protection of rights of children one of the initiatives that the Government has taken for Children is the adoption of National Charter for Children, 2003;

The UN General Assembly Special Session on Children held in May, 2002 adopted an Outcome Document titled "A World Fit for Children" containing the goals, objectives, strategies and activities to be undertaken by the member countries for the current decade;

United Nations Convention on the Rights of Child ratified by Government of India on 11th December, 1992, and the National Charter for Children, 2003 adopted by Government of India described number of rights of child under various categories viz.

1. Survival, Life and Liberty;
2. Promoting High Standards of Health and Nutrition;
3. Assuring Basic Minimum Needs and Security;
4. Play and Leisure;

⁶¹ *Maya Unnithan Supra*

5. Early Childhood Care for Survival, Growth and Development;
6. Free and Compulsory Primary Education;
7. Protection from Economic Exploitation and All Forms of Abuse;
8. Protection of the Girl Child;
9. Empowering Adolescents;
10. Equality, Freedom of Expression, Freedom to Seek and Receive information, Freedom of Association and Peaceful Assembly;
11. Strengthening Family;
12. Responsibilities of Both Parents;
13. Protection of Children with Disabilities;
14. Care, Protection, Welfare of Children of Marginalized and Disadvantaged Communities;
15. Ensuring Child Friendly Procedures.

In furtherance of National Charter for Children, 2003 adopted by Government of India, **The Commissions For Protection of Child Rights Act, 2005** has been enacted for the constitution of a National Commission and State Commissions for protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto. Section 13 which appears in Chapter III of the Act is of considerable importance empowers commission to Examine and review any law for the safeguards provided by or under for the protection of child rights and recommend measures for their effective implementation; Present to the Central Government, reports upon the working of those safeguards; Inquire into violation of child rights and recommend initiation of proceedings in such cases; Examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures; look into the matters relating to children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures; study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children; Undertake and promote research in the field of child rights; spread child rights literacy among various sections of the society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminars and other available means; inspect or cause to be inspected any juvenile custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organisation Where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary; inquire into complaints and take suo motu notice of matters relating to -Deprivation and violation of child rights; Non-implementation of laws providing for protection and development of children; non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities; and Such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions. The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force."

Commission under section 14(1) of the Act has also been conferred all the powers of a Civil Court while inquiring into any matter referred to in clause (j) of sub-section (1) of section 13. Steps which the Commission may take after inquiry are described in section 15 which reads as under:-

For the purpose of providing speedy trial of offences against children or of violation of child rights, State Government has been empowered to specify a Court of Session with the concurrence of the Chief Justice of the High Court and for appointment of Special Public Prosecutor.

It is most unfortunate that after passing so many years to the enactment of the Act, the Governments are not sincere of its implementation. Recently Hon'ble Apex Court in the Re. Exploitation of Children in Orphanages in the State of Tamil Nadu Vs. Union of India & Ors.⁶² Observed:-

“It has been brought to our notice that inspite of the emphatic directions that have been issued by this court on 3rd January, 2013 directing all the States and the Union Territories to implement the protective provisions contained in the Protection of Rights of Children from Sexual Offences Act, 2012, the Right of Children to Free and Compulsory Education Act, 2009 and the Commission for Protection of Child Rights Act, 2005, many States and Union Territories have not complied with the same. By order dated 3rd January, 2013, we had also directed the States to file an affidavit indicating the time frame within which the State Commission for the protection of children would be established. By a subsequent order dated 7th February, 2013, further directions were issued to all the States and the Union Territories to comply with the obligations under the aforesaid three Acts, with regard to the establishment of protection institutions/implementation institutions, together with necessary Rules and Regulations. The aforesaid order was to be complied with within a period of three months from the date of receipt of the certified copy of the order. Sadly, we have to notice that in spite of the concern shown not only by this Court but also by the learned counsel appearing for the parties, little or no progress has been made in this regard. Although the affidavits have been filed indicating that the State Commissions have been established yet we find that such establishment is only on paper. In many States, Chairman of the Commission has not been appointed and in some other States even Members have not been appointed. This apart, necessary rules and regulations have also not been framed. This, in our opinion, would be sufficient justification for this Court to take a serious view and initiate appropriate proceedings for contempt of court against the defaulting States and the Union Territories.”

National and State Commissions constituted under the Act of 2005 may play key role for protection of children from such risk. Specifically, when no effective DATA base of ART Clinics could be prepared at any level, no record of child born out of ART procedure/Surrogacy arrangement is available with any authority, and even it is not clear that which authority owe the responsibility to keep such record, record of such children may be kept by these Commissions and the commission may also enquire into the genuineness of these matters, with the powers already wasted.

It is clearly appears from the above discussion that the welfare of the children is paramount consideration in Indian Laws and Indian Laws provide adequate measures for the protection of children, but certain Indian Laws requires to be amended to carp with this new situation arises of this development in technology.

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