



## Surrogacy - Blessing of Motherhood or Curse to Motherhood

\*Dr. Sonia Dutt Sharma

\* Assistant Professor (HOD), School of Law, NIMS University

### ABSTRACT

*There were 13 kinds of sons, in Ancient period in India including Aurasa (Legitimate), Dattaka (Adopted) and Kshetraja (Surrogated). According to ancient texts the process of getting Kshetraja son called Niyoga. Niyoga is a technical term indicating the procreation of a child on the wife of another person. The term Niyoga in ancient Indian law is applied to a practice especially in .case of the widow of the man, who died sonless. The widow of the son less man was permitted to raise a son for her late husband from the younger brother of her husband, i.e. Devare or the kinsman of her husband. Some thinkers have tried to locate the practice of Niyoga in the vedic texts by stretching the meaning of the texts, like Gautama in Gautama Dharma sutras; Manu, Apastamba, vasishtha, Baudhayana, VishnuDharmashastras, Yajnavalkya, Narada, Brihaspati, Rigveda (10,40,2) etc.*

**Keywords :** Procreation, in fertility, Renting Womb, Reproductive Tourism, Incubator, Gestational Surrogacy.

**(1) Introduction:** There were 13 kinds of sons, in Ancient period in India including Aurasa (Legitimate), Dattaka (Adopted) and Kshetraja (Surrogated).

According to ancient texts the process of getting Kshetraja son called Niyoga. Niyoga is a technical term indicating the procreation of a child on the wife of another person. The term Niyoga in ancient Indian law is applied to a practice especially in .case of the widow of the man, who died sonless. The widow of the son less man was permitted to raise a son for her late husband from the younger brother of her husband, i.e. Devare or the kinsman of her husband.

Some thinkers have tried to locate the practice of Niyoga in the vedic texts by stretching the meaning of the texts, like Gautama in Gautama Dharma sutras; Manu, apastamba, vasishtha, Baudhayana, VishnuDharmashastras, Yajnavalkya, Narada, Brihaspati, Rigveda (10,40,2) etc.

In Mahabharata the Kshetraja son is assigned the place next to the Aurasa son and he is known by the name of pranita.<sup>1</sup> Pandu argues with wife Kunti for begetting a son through some shrestha Bramana (qualified Brahrmana) and cites various illustrations for Niyoga and justifies it on the authority of Dharma.<sup>2</sup>

In modern society Niyoga has been converted in "Surrogacy" which is define in term of "Donating a womb...". An analysis of so many cases of surrogate motherhood, shows how a highly sensitive concept of "surrogacy" has suddenly become acceptable now to every one.

Ten to fifteen percent of married couples are unable to have children. Surrogate mothers are not a new solution to the old problem of not being able to reproduce an offspring. Surrogacy has been around a long time and dates back to biblical times. An interesting bible scenario is Sarah, the wife of Abraham. Sarah could not have children in the beginning. she gave her handmaid, Hagar, to her husband Abraham to produce them a child. The method used was copulation. A surrogate mother is a woman who carries a child, usually for an infertile couple.

### **(2)The Technical meaning of Surrogacy:**

Surrogacy is a method of assisted reproduction on the word surrogate originates from Latin word "Surrogatus" (substitution) to act in the place of the term surrogacy is used when a woman carries a pregnancy and gives birth to a baby for another woman.

There are two type of surrogacy:-

1. IVF/Gestational Surrogacy.
2. Traditional / Natural Surrogacy.

**1.1 IVF / Gestational surrogacy** - This is a more common form of surrogacy. In this procedure, a woman carries a pregnancy created by the egg and sperm of the genetic couple. The egg of the wife is fertilized in vitro by the husband's sperms by IVF/ ICSI procedure, and the embryo is transferred into the surrogate's uterus, and the surrogate carries the pregnancy for nine months. The child is not genetically linked to the surrogate.

**1.2 Traditional / Natural surrogacy** - This is where the surrogate is inseminated or IVF/ICSI procedure is performed with sperms from the male partner of an infertile couple. The child that results is genetically related to the surrogate and to the male partner but not to the female partner.

### **(3)Surrogacy: Blessing of Science**

Surrogacy is the only chance for some couples to have a child, which is biologically completely their own (IVF surrogacy) or partly their own (gestational surrogacy),

Only in surrogacy genetic mother can bond with the baby better than in situations like adoption.

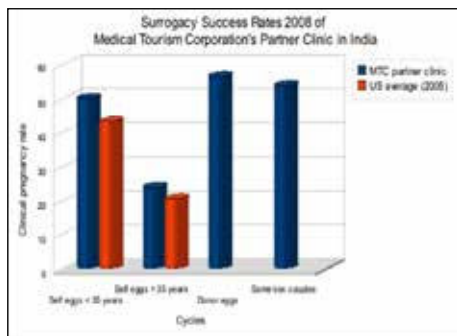
### **(4)Surrogacy: Reproductive Tourism in India. :**

Infertility is a global problem and we have its global solution, third party reproduction or surrogacy in India. Outsourcing surrogacy abroad to India will offers a wide range of option to fulfill the dream of parenthood. The Cheaper availability of surrogates in India attracting allot of interest.

Commercial surrogacy has been legal in Indian since 2002; But India's surrogacy boon began in January 2004 with a grandmother delivering her daughter's twins. The success spawned a virtual cottage industry in Gujrat.

Anand in Gurjat has become the center for surrogacy. The number of successful surrogated deliveries is the highest in the world, as childless couple and destitute woman both find hope. Once a candidate is chosen by a childless couple, they sign a legal contract with her covering the details of payment. The semen and eggs of the couple are them collected, fertilized in the clinic laboratory and then injected into the uterus of the surrogate. Within 15 days, it becomes clear if the

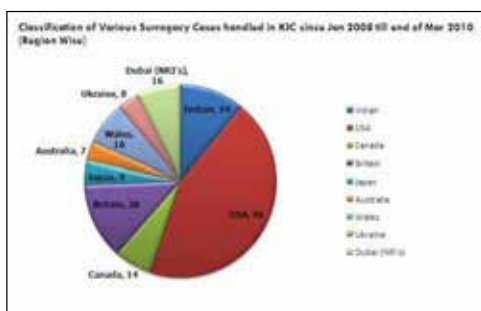
woman will conceive or not, if she doesn't the success rate is 50% the candidate gets a nominal amount from the couple as per the contract On conception she gets about Rs.2.5 lakh, in addition to a monthly amount of Rs. 3,000/-that the couple spend on the pregnancy in order to get a healthy child.



Renting wombs has become an easy and cheap option in India. Relatively low cost of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and the lack of any law to regulate these practices is attracting both foreigners and NRIs to sperm banks and surreptitiously, India has become a booming centre of a fertility market with its "reproductive tourism" industry reportedly estimated at Rs 25,000 crore today. Clinically called ART (Assisted Reproductive Technology). It has been in vogue in India since 1978 and today an estimated 200,000 clinics across the country offer artificial insemination, IVF and Surrogacy. Statistics indicate that Indian surrogacy clinics handled around 1,500 surrogacy births for domestic and overseas couples in 2010. This indicates a jump of 50 percent in two years.

Surrogacy in the UK, THE us and Australia costs more than US \$ 70,000 whereas advertisements on websites in India give varying costs in the range of US \$ 12,000 and offer egg donors and surrogate mothers. It is a free trading market, flourishing and thriving in the business of babies. According to the report of Council for Responsible Genetics (C.R.G.) as of the report in 2008, the gestational surrogacies have the increasing number in just double (738 in 2004 and 1400 in 2008).

Surrogacy services in India have proved to be more successful than their counterparts in U.S.A. and Europe. Surrogacy



services in India are the second most common location for gestational surrogacy since the 2007 figures from the society for Assisted Reproductive Technology revealed 276 successful gestational surrogate pregnancies in the U.S. and 150 successful gestational pregnancies in India' clinics.

Today the organizations who arrange surrogate mother, refuse the term "Rent a womb" they calling it "Donating a womb" instead. There is a powerful emotional angel to it which gets buried when it is described in the language of economics.

Some psychologists handle the psychological aspect of such cases some devout Hindu couples request the surrogate mother to read verses from the Gita in the belief that it will have a positive effect on the development of their child in her womb.

Surrogacy is revolutionary concept of child production it has a wide aspect of motherhood with social-psychological-economical and 'mythological aspects. Surrogacy is legally valid process which is admitted by Indian society as well as international level. This is the new name of "Kshetraja child" or "Niyoga." Today it has been equal lent to Aurasa child.

**(5) Dark side of the Surrogacy**

**(A) Surrogacy is repugnant to human dignity**

One side where surrogacy is the hope a child, for child less couple., on other hand some time it is a burden of 9 months, for a woman and some time it seems like a blank cheque for a poor family. But it is in consistent with human dignity that a woman should use here uterus for financial profit and treat it as an incubator for someone else's child. These words of the Warnock committee reporting to the British Government in 1984 remain unanswerable even today.

Whatever the intentions, its inevitable Consequence would be the creation of a market specializing in the sale and purchases of babies or as the court of Appeal in England put it in 1985 in "a kind of baby forming operation of a wholly distasteful and lamentable kind." So we can say in such position Surrogacy is repugnant to human dignity. There are a lots complex issues involved. It is an emotional roller coaster ride for the couple, the families and friends. It is a decision where the 'right' and the 'wrong' are very individual things.

**(b) Side effect on woman's and child health in surrogacy:**

Pregnancy affects a woman's health and one cannot know all the long-term consequences of repeated pregnancies. Studies have shown that repeated pregnancies can even affect cardiovascular health. Pregnancy can also aggravate existing health conditions and a poor uneducated woman in India may not fully comprehend the risks, either short-term or long-term, if she is aware of here health problem that is.

A baby soaks up nutrition from it's host's body and though the 'mother' might have a better diet during the pregnancy because of the money and care provided by the biological parents, her health may not be that good enough to begin with. In India women are not as healthy as they are in the developed countries due to poorer nutrition levels since childhood.

Some stresses associated with being a surrogate are: insemination (over several months), pain, unpleasant side effects, depression, sleep disturbance, guilt difficulty remaining unattached, intrusive or aloof couples, relinquishing etc. It takes a special person to become a surrogate.

So many time, children born through surrogacy don't receive breast milk, which is protects babies from getting diarrhea, ear infections, leukemia, and respiratory disorder such as asthma, Breast milk contains the protein CD 14 which works to develop B cells, which are immunity cells that are essentials for the production of antibodies in an infant, to build the babies immunity system.

**(c) Commercial Surrogacy: New face of women exploitation:**

The poorer in the country has the more fear of exploitation. If in the long term the mother pays a heavier price, all short-term benefits have no meaning. Now husbands are encouraging their wives to go in for surrogacy, the combination of poverty, illiteracy and the lack of power that women have over their own lives in India are a deadly combination. Indian women are vulnerable, there are so many young girls from orphanages were being 'hired out' for surrogacy and they (the surrogates) themselves never got any money, and even if the mother do get the money, poor women often have little choice.

Western countries often focus on the pain of giving up a baby which the mother has carried for 9 months and there are many court battles fought on this issue.... but in India this is not the issue. Why there are instances of desperately poor women in India selling their own (biological) babies because they can't feed the rest of their family! And this doesn't just happen in India. Poverty has driven parents to sel1 their chil-

dren in other countries too.

Table 3  
Descriptive Statistics for Indicators of Mother-Child Mutuality, Maternal Positivity and Maternal Negativity by Family Type

Variable	Natural conception			Egg donation			Surrogacy		
	Mean	SD	Range	Mean	SD	Range	Mean	SD	Range
Mother-child mutuality									
Mother's responsiveness	5.37	0.68	3-6	4.88	0.87	3-6	5.04	0.71	4-6
Child's responsiveness	4.82	0.92	2-6	4.36	1.08	2-6	4.68	0.73	3-6
Diadic reciprocity	1.80	1.01	0-5	1.44	0.82	0-3	1.87	1.20	0-4
Diadic cooperation	1.58	1.14	0-5	0.98	0.74	0-3	1.04	0.88	0-3
Maternal positivity									
Mother-child interaction	1.46	0.57	0-2	1.19	0.64	0-2	1.28	0.77	0-2
Mother expressed warmth	1.06	0.79	0-2	0.91	0.69	0-2	1.03	0.74	0-2
Mother sensitivity	1.52	0.64	0-2	1.10	0.67	0-2	1.40	0.72	0-2
Maternal negativity									
Mother-rated hostile frequency	1.26	0.76	0-2	1.38	0.75	0-2	1.16	0.69	0-2
Mother-rated hostile level	1.15	0.53	0-2	1.28	0.52	0-2	1.22	0.61	0-2
Mother-rated criticism	1.11	0.66	0-2	1.09	0.64	0-2	1.09	0.64	0-2
Mother-rated aggression	1.11	0.60	0-2	1.28	0.68	0-2	1.00	0.57	0-2

There are other negative aspects of surrogate motherhood. There are some who feel that if surrogate motherhood becomes a legal 'business' then soon educated working women will start hiring wombs to prevent a break in their career! To take an extreme scenario, baby 'factories' could spring up!! A scene from a horror movie, which fortunately will not see the light of day as most countries have realized the downside of surrogacy.

**(d) Lack of legal support to surrogacy in India:**

Hon'ble Justice Balbir Singh Chouhan, a sitting judge of the Hon'ble supreme court of India, remarked: "Surrogacy in India has developed because it is very cheap in the country. Artificial insemination and surrogacy is a serious concern as it raises a question in terms of Law".

A poor country like India badly needs a law and surrogacy and it badly needs to make legal. Payments to surrogate mother. There is no law to deal with the issue of surrogacy precisely in India at present. Due to lack of proper law, women from the poor and weaker sections of the society are getting exploited.

In Baby Manji Yamada's case (2008), the Supreme Court observed that "commercial surrogacy reaching industry proportions is sometimes referred-to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms". It is presumably considered legitimate because no Indian law prohibits surrogacy. But then, as a retort, no law permits surrogacy either. Surely, the proposed law will usher in a new rent-a-womb law as India is set to be the only one to legalize commercial surrogacy.

In the absence of any law to govern surrogacy, the Indian Council of Medical Research guidelines (2005) for accreditation, supervision and regulation of ART clinics in India are often violated. Exploitation extortion and ethical abuses in surrogacy trafficking are rampant and surrogate mothers are misused with impunity.

**(6)Legal Prospectus of Surrogacy in India:**

Surrogacy laws in India are much lenient as compared to other countries. In the U.S. most In the U.S., most of the states have their own state laws regarding the legality of surrogacy, while in Canada Commercial surrogacy was prohibited in 2004. In Australia, commercial surrogacy is a criminal offence.

There is no uniform law in India, to deal with legal pre-requisites for a Commercial surrogacy. For the time being guidelines for accreditation, supervision and regulation of ART (Assisted Reproductive Technology) clinics, formulated by the Indian Council of Medical Research and National Academy of Medical Science which gives a basic platform and the code for conducting surrogacy in India.

The 28th Report of 2009 Law Commission had described



ART industry as "a Rs. 25,000 corer pot of Gold." Wombs in India are on rent which translates into babies in India are on rent for foreigners and dollars for Indian surrogate mothers," the report had stated. The commission had recommended legalizing only altruistic surrogacy arrangements and not commercial ones.

Floated earlier in 2008 and 2010 it envisages a national framework for the regulation and supervision of assisted reproductive technology (ART). The union Health Ministry of India has finalized the (ART) Assisted reproductive technology Regulation Bill 2010. By conferring the right to have children on unmarried couples and single persons, the Bill attempts to achieve several historic feats legalizing commercial surrogacy, single parenthood, live in relationships and entitling gays and lesbians to start families using surrogate mothers at one go.

The code of practice described in the draft guidelines deals with all those areas, which affect the doctors, scientists and patients. Some salient feature of the bill is as follows:

1. The ART Clinic must not be a party to any commercial element in donor programmers or in gestational surrogacy.
2. No ART procedure shall be done without the spouse's consent.
3. Sex selection at any stage i.e. both before and after fertilization or abortion of embryos of any particular sex should not be permitted except to avoid the risk of transmission of a genetic abnormality assessed through genetic testing of biological parents or through pre-implantation genetic diagnosis (PGD).
4. Use of sperm donated by a relative or a known friend of either the wife or the husband should not be permitted. It will be the responsibility of the ART clinic to obtain sperm from appropriate banks.
5. The committee has recommended accepting semen only from Semen Bank and not from the individual. Hence it has also been recommended that Semen Bank should be an independent organization, if set up by an ART clinic it must operate as a separate identity.
6. No relative or a person known to the couple may act as surrogate.
7. Surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/undesirable to carry a baby to term.
8. The genetic (Biological) parents must adopt a child born through surrogacy.
9. After a specific consent, the embryos may be stored for five years and stored embryos may be used either for other couple or for research after taking the consent of the couple to whom the embryos belongs.
10. The sale or transfer of human embryos or any part thereof, or of gametes in any form and in way that is directly or indirectly to any party outside the country must be prohibited.
11. Human cloning for delivering replicas must be banned.
12. Stem cell cloning and research on embryos (less than 15 days old) needs to be encouraged.
13. A child born through ART should be presumed to be the legitimate child to the couple, born within wedlock and all the attendant rights of parentage, support and inheritance.
14. Though there is no legal bar on an unmarried or single going for AID (Artificial insemination with donor), however it is universally recommended that AID should be performed only on married woman and that, too, with the written consent of her husband.
15. There is an urgent need to have infertility treated like any other disease the expense of dealing which by authorized ART clinics should be reimbursable e.g. by the Government or other employer or by the health insurance company, but for one child only.
16. Clause 34(3) of the Bill specifically says that apart from all expenses involved. "The surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate."
17. She will have to relinquish all parental rights over the child

- in favor of commissioning parent/s. only a woman in the age-group of 21-35 can become a surrogate mother but she can not bear more than five children including her own and she will not be allowed to donate oocytes more than six times in her life.
18. In view of the recent controversy involving a German couple's child 'maanji' born to surrogate mother in India, the Bill makes it mandatory for foreigners to submit certificates on their country's policy on surrogacy and that the child born to an Indian surrogate mother will get entry into the commissioning parent's country.
  19. During gestation period, the couple will bear the surrogates expenses and give monetary help to her. The couple may enter into an agreement with the surrogate.
  20. Foreign couple has to nominate a local guardian who will take care of the surrogate during gestation.
  21. ART banks, accredited by the government, will maintain a database of prospective surrogates as well as storing semen and eggs and details of the donor.
  22. State boards will give accreditation to ART banks— private and government. The board will have a registration authority which, in turn, will maintain a list of all In-vitro Fertilization (IVF) centers and monitor their functioning.
  23. The Bill provides gays, singles person having live in relationship the legal right to have surrogate babies. It defines a 'couple' as two persons living together and having a sexual relationship that is legal in the country. After the Delhi High Court verdict on homosexuality, even two gay men can claim to be a couple.
  24. Constitution of an authority at National level and State level to register and regulate the IVF clinics and ART centers.
  25. Creation of a forum to file complaints for grievances against clinics and ART centers. Imposing duties and responsibilities on the clinics and ART centers.
  26. Regulations for sourcing, storage, handling, record keeping of Gametes, Embryos and other human reproductive materials.
  27. Placing rights and duties on Surrogate and IP's.
  28. Imposing stringent penalties for breach of the duties and regulations under the Act.

Law Commission made significant observations relating to surrogacy:-

- (1) surrogacy arrangement will continue to be governed by contract amongst parties, which will contain at the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent (s), etc. But such an arrange-

ment should not be for commercial purpose.

- (2) A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- (3) A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- (4) One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- (5) The birth certificate of the surrogate child should contain the name (s) of the commissioning parent (s) only.
- (6) Right to privacy of donor as well as surrogate mother should be protected.
- (7) Case of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

#### (7)Conclusion

Even though, there was no law or legislating to regulate Surrogacy in India, the entire surrogacy process was carried out in ethical and transparent manner keeping in mind the ICMR.

India's First Fertility Law Firm, Indian Surrogacy Law Centre, ISLC deals with surrogacy related issues and facilitates contractual relationships between the surrogates and intended parents, providing surrogates for intended Parents, providing legal assistance to either of the parties to the surrogacy agreement. ISLC partners with psychologist, lawyers and fertility clinics to ensure that our surrogates and Intended Parent are cared for and supported through out the entire process.

The Bill is very important in various aspects of Surrogacy and it will be safe guards for both, IP's and surrogate mothers.

The Assisted Reproductive Technology (ART) Bill will make renting a womb by Indian and foreign couples looking for surrogate mother is expected to become hassle free, and the motherhood by subrogation would be ethical and noble.

#### REFERENCES

1. Web log of Indian Surrogacy Law centre. | 2. 28th report of law commission of India (Aug.-2009) on - Need for legislation to Regulate Assisted Reproductive Technology clinics as well as rights and obligations of parties to a surrogacy. | 3. Grhari@indian surrogacylaw.com. | 4. Rotunda. The center for Human Reproduction. | 5. Hindustan times news. | 6. DNA. | 7. The Indian Council of Medical Research Guidelines. | 8. Surrogate Alternatives.com. | 9. Law Resources India. | 10. Medical Tourism Corporation. | 11. Decision of the Majhi Yamada, By G.R. Hari, Indian Surrogacy Law Centre, Indian surrogacy law.com | 12. Unicef India Statistics | 13. The Associated Press (2007-12-30), | 14. HC, Confers Indian Citizenship on Twins Fathered through Surrogacy; Express News Service, No. 12, 2009, Ahmadabad, Indian express Newspaper.