

# The Hindu Adoptions And Maintenance Act, 1956 and Surrogacy

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"Wanted healthy, good looking lady below 30 years to deliver baby through Artificial Insemination for a highly respectable couple complete medical care and security assured. Reward Rs. 50,000/- and other expenses. write to..." This piece is taken from the classified advertisement's column of a Women's Magazine in India.<sup>1</sup> It is herein opportune for us to think of the repercussions of such a device in India. The object of this study is to examine whether the existing legislations on adoption in India are adequate to protect the interests of the child as well as the parties involved. At this juncture, a brief description of Artificial Insemination (AI) and surrogate motherhood would be appropriate.

## Artificial Insemination (AI)

Artificial Insemination means depositing semen in the vagina of a woman through artificial means for bringing about pregnancy where the woman is otherwise healthy, but is unable to reproduce.<sup>2</sup> There are two types of AI:

1. Artificial Insemination Homologous (AIH) where semen is from the husband of the woman; and
2. Artificial Insemination Heterologous or Donor (AID) where the semen is from some other unrelated donor. (Here the donor is unknown to the couple).

## Surrogate Motherhood

Here, a woman is hired to mother a child. Once the child is born it is handed over to the couple. The woman who is hired, is inseminated with husband's sperm. So a surrogate parenting arrangement is an agreement in which a surrogate agrees, for a fee, to be impregnated through AI to carry the child to term and after birth to deliver the new born baby to the biological father and to surrender all

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<sup>1</sup> Womens' Era Jan. (Second) 1991. Vol. 18, Issue No. 411.

<sup>2</sup> Modi, *Modi's Text Book of Medical Jurisprudence and Toxicology*, 21 st. Edn., 1988, N. M. Tripathi, Bombay, p. 349.

parental rights she would otherwise have. It is then contemplated that the wife of the biological father will adopt the child.<sup>3</sup>

A woman can be artificially inseminated in two ways in surrogacy. By using:

1. The husband's sperm and the surrogate mother's egg, or
2. The husband's sperm and the adoptive mother's egg.

In the first case, the surrogate mother will be both genetic and gestational mother while in the second case, she is only a gestational mother.

### Why Surrogacy?

The concept of surrogacy is gaining momentum in Western Countries. Why do people resort to such methods? The reasons include the inability of the wife to carry the foetus to term, medical or eugenic problems like genetic defects, fear of labour and child birth or it can even be for the sake of convenience. Generally, surrogacy is preferred to adoption, for in the case of adoption the child is regarded an "outsider" whereas in surrogacy the child is at least genetically the child of the father. Moreover, adoption involves a long wait and a cumbersome procedure. There are always chances of emotional conflict between the child and the adoptive parents if the child comes to know that they are not his biological parents.

However, the possibilities of complications in surrogate motherhood cannot be ruled out. Sometimes, the surrogate mother refuses to hand over the child due to emotional attachment or in situations where the couple refuse to accept the child. In some cases, the child will be a cripple or will be born with some deformities and hence both the parties may refuse to have the child or meanwhile the couple will have their own child. The other problems are the liability of the couple if the surrogate suffers some injury or dies during pregnancy or child birth and the liability of the surrogate if she undergoes an abortion.<sup>4</sup> Likewise, there are profuse complications in this area. In spite of all these, there are surrogate parenting centres which make arrangements for surrogate mothers to the needy couple.

What relevance does the concept carry in the Indian context? The Vedas have mentioned about 13 types of sons.<sup>5</sup> Even today, the concept of sonship has ineffable significance. In India, the main purpose of having a son, it is believed is to salvate the soul of the father when he dies. The other purpose are inheritance and continuation of the lineage.

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<sup>3</sup> Brophy, A Surrogate Mother Contract to Bear a Child, 20 J. Fam. L. 263 (1982); Cf. *Columbia Human Rights Law Review*, Vol. 20, No. 1 Fall: 1988.

<sup>4</sup> Kusum, Legal Implications of Medical Advancement in *New Horizons of Law*, Dept. of Law, Cochin University of Science and Technology.

<sup>5</sup> The vedas have mentioned about 13 types of son namely Avrasa, Putrika Putra, Paunnarbhava, Nishada, Kamina, Godhaja, Sahodaja, Kshetraja, Dattaka, Krithrima, Krithrika, Apavidha and Swayam Dutta.

## Surrogacy, in India, in the Light of Hindu Adoptions and Maintenance Act, 1956

Unlike Western Countries, there is no secular law regarding adoption in India. This deprives a large section of the population of their right to adopt. The only legislation regulating adoption in India is the Hindu Adoptions and Maintenance Act, 1956, which is applicable to Hindus only. Let us examine some sections which will directly affect the surrogate agreements.

Section 5 of the Act stipulates that all adoptions should be made in compliance with the provisions of this Act and if any adoption is made in contravention of these provisions, it shall be void. Section 7 says that a Hindu male can adopt provided he is a major and is of sound mind. The section adds that if he has a wife living he should obtain her consent. Section 8 provides the right of adoption to an unmarried Hindu woman provided she is a major and is of sound mind. However, if she is married she can adopt only if her husband is incapable of giving consent, or is dead or has ceased to be a Hindu. So in a family, only the husband can adopt except under certain circumstances.

Section 9 says that consent of the natural mother should be taken before giving the child in adoption. This section has its own significance because once when the adoption takes place all the rights of the natural parents on the child are cut off for ever. Section 17 of the Act prohibits certain payments involved in the process of adoption. This section penalises such payments by prescribing an imprisonment of six months or with fine or with both.

At this juncture, the point that agitates one's mind is whether this adoption statute can absorb surrogacy. Primarily, there is no secular law regarding adoption. So the needy couple will have to be Hindu or they will have to convert themselves to Hindus. Though there is informal adoption in other religions, if some legal complications arise they will not have access to the courts. In surrogacy, the wife of the biological father adopts the child. This is in contravention of the Act which stipulates that in a family the wife cannot adopt except under certain circumstances as seen before. The next controversial point is Section 9 of the Act which states that the consent of the natural mother is a must. Here, the natural mother is the surrogate mother. This consent should be informed consent or in other words she should be informed of all the complications involved in the process. Students in Medical science and Psychiatry have shown that in the later stages of pregnancy the mother will develop an emotional bond with the foetus.<sup>6</sup> So later she may refuse to hand over the baby to the natural father. In such a case, can the surrogate be compelled to give up the child for enforcing the agreement? Can it be argued that the consent from the surrogate be taken only after child birth?

The consideration involved in a surrogate agreement is a fee paid to the surrogate mother and the legal and medical expenses. The Hindu Adoption and

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<sup>6</sup> Helsh and Levin, How love begins between parent and child in selected readings on mother infant bonding 29 (1979); Columbia Human Rights Law Review Vol. 20, No. 1 Fall, 1988.

Maintenance Act prohibits any consideration involved in adoption. Section 5 of the Act provides that any adoption made in contravention of the provisions of the Act shall be void. Therefore, if a consideration is involved in adoption, it shall be void. From this one can infer that the surrogacy contract itself is void in India. Section 23 of the Indian contract Act, 1872 reads as; "What considerations and objects are lawful and what not —

The consideration or object of an agreement is lawful, unless it is forbidden by law; is of such a nature that if permitted it would defeat the provisions of any law; or is fraudulent; or involves injury to the person or property of another; or the court regards it as immoral or as opposed to public policy.

In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. Since the very agreement defeats Section 23 of Indian Contract Act, 1872 the concept cannot take roots in India.<sup>7</sup> All these circumstances need a careful consideration since the practice has crept.

## Conclusion

Practices like eugenics and surrogacy are gaining acceptance in the West, and these trends are being reflected in the Indian scenario. Surrogacy has already entered India and if this finds favour amongst the majority, the consequences and the chances of such practices being motivated more by profit than other considerations cannot be ruled out. This will devalue human life and dignity by treating babies as commodities.

Further, if the trend is towards surrogacy, the impact on adoption will be that thousands of children will fail to find homes. As a result, it will become incumbent on the Government to increase the number of destitute homes and orphanages, thus incurring unwarranted expenditure and depriving many children of the chance to start a new life. Thus surrogacy has a multiplier effect on other areas as well. As a matter of public policy, it follows that care should be taken while enacting much needed legislation on this practice in order to protect the interests of the child as well as the parties.

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<sup>7</sup> In most of the surrogacy cases in the West, the fees paid to the surrogate is found to be more than the sum total of the fees and legal and medical expenses. This gives rise to an argument that the surrogate agreement is against public policy in the sense that the surrogate child is being sold by the surrogate mother to the couple.