

SURROGACY IN INDIA

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Abstract

Nature has given the beautiful capacity to procreate a life within women and every woman cherishes the experience of being a mother. Unfortunately, some women due to certain medical, genetic conditions are not able to give birth to children. The desire for motherhood leads them to search for alternatives, and surrogacy procedure is seen as the most viable alternative in this regard.

With the availability of cheap medical facilities, advanced reproductive technological know-how, India is emerging as a popular destination for surrogacy arrangements. Also poor socio-economic conditions and a lack of regulatory laws governing surrogacy procedures in India, contribute to this cause

This paper talks about types of surrogacy and surrogacy arrangements. This paper also discusses rights of surrogate mothers and children and the legislation regarding surrogacy in India. A number of cases have also been analysed in this paper including Baby Manji and Balaz case. The Assisted Reproductive Technology Bill, 2010 has also laid down various guidelines regarding the surrogacy procedure. The bill also empowers a National Advisory Board to act as the regulatory and has been bestowed with the power of laying down policies and regulations. It seeks to set up State Advisory Boards in various states that in addition to providing assistance to state governments, are charged with the duty of monitoring the implementation of the provisions covered under the ambit of the Act, especially with respect to the working of the semen banks, artificial fertilization clinics etc.

Key Words: surrogacy, surrogate mothers, ART Bill, Baby Manji

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INTRODUCTION

Surrogacy term is derived from the Latin word '*subrogare*', which means 'to substitute'.¹ In the past two decades, there has been enormous advancement in reproductive techniques. Although the newer technologies, i.e. donor insemination, in vitro fertilization (IVF) and embryo transfers have given hopes to childless couples, but the emergence of surrogacy procedures have changed the concept of parenthood and brought in various controversial social, medico-legal, legal and ethical issues. Surrogacy is a method of assisted reproduction wherein a woman carries a pregnancy and gives birth to a child, acting as a substitute for another woman.

Surrogacy is a complex and challenging topic that is plagued with controversies for the past several decades. There are many legal, social and ethical aspects of a pregnancy involving a surrogate mother. Some infamous cases have been there, which have garnered public attention and have given rise to endless debates in favour of as well as against the procedure. History was created by India when it became the first country to legalize commercial surrogacy in 2002. Internationally, India has become the preferred destination for couples desiring pregnancy through surrogacy although it is difficult to estimate the prevalence of surrogacy in India. Today surrogacy is a business which leaves behind the traditional values and ethics. In this article we have tried to discuss the problems faced and issues with the rules and regulation under the Indian context.

EARLIER CONCEPT OF CHILD

In the early societies also the desire for a male child was very natural and this was very boldly declared in some of the holy books like the VEDAS, and also by our ancient writers like YAJNAVALKYA and MANU, and to beget a son various methods were popular and practiced which our ancient laws permit.

AURASA was said to be a legitimate child begotten by man with his own lawfully wedded wife. Other sons were, **KSHETRAJA** (Son by another man appointed by husband), **GUDHAJA** (Son by another unknown man, brought forth by wife secretly i.e. unknown adultery), **KANINA** (Son secretly born by unmarried damsel in her father's house), **PUTRIKA PUTRA** (Son of an appointed daughter who was given in the marriage to bridegroom), **SAHODHAJA** (Son begotten when a man marries, either knowingly or unknowingly with a pregnant maiden), **POUNARBHAVA** (Son begotten by a man on a twice married woman).

SONS BY ADOPTION were **DATTAK** (Son of same caste given as a gift to a man), **KRITA** (Son sold by its parent to a man), **KRTRIMA** (Orphan son being adopted), **SVAYAMDATTA** (Abandoned son being adopted) and **APDVIDDHA** (Deserted son being adopted).

¹ Gibbs R. Surrogacy: Medical, ethical and legal issues to be considered. Jan 2008 http://www.northeastsexpct.nhs.uk/public_29_01_2008/surrogacy-policy.pdf

Today this classification has become a history and rather in our modern society the law has made three distinctions viz - *legitimate son or daughter, illegitimate son or daughter, adopted son or daughter*. As under section 112 of Indian Evidence Act 1872, legally legitimate means child born during continuance of valid marriage between the parents or within 280 days of its dissolution, the mother remaining unmarried. Under Section 11, 12 of Hindu Marriage Act offspring of a void or voidable marriage shall be deemed to be legitimate of their parents notwithstanding the decree of nullity. *First therapeutic insemination* was performed by Dr. John hunter in London in 1770 in the patient, whose husband was suffering from the disease of *hypospadias*.²

Today surrogacy is one of the most debated topics of discussion globally. Although generally believed to have been in vogue for at least hundred years, the first formal arrangement of surrogate mother was recognized in 1976 in USA. However, it was in 1980, with the first surrogate mother case of Baby M coming up for trial that stirred up a debate on the controversial issues associated with surrogacy. To understand the controversies of surrogacy it is necessary to understand the indications and various types of surrogacy.

TYPES OF SURROGACY³

- **Natural/Traditional/Partial Surrogacy:** In this form of surrogacy, the embryo is genetically related to the surrogate, being conceived with her own ovum. Sperm can be obtained from commissioning father, wherein he also becomes the biological father of the child. Alternatively, the sperm may be obtained from an anonymous donor, i.e. where the two females are ‘commissioning couple,’ or the child is commissioned by a single woman. The pregnancy may be conceived by sexual intercourse or intrauterine insemination (IUI) or IVF.
- **Gestational/Full Surrogacy:** In this form of surrogacy the surrogate acts only as a ‘carrier’ of the embryo; it is not related to her genetically. The pregnancy is conceived by IVF and the fertilized embryo is implanted in the uterus of the surrogate. The embryo can be the result of fertilization of gametes of the commissioning couple, or may be as a result of anonymous donor insemination.
- **Commercial Surrogacy:** The process wherein an individual or couple pays a fee to a woman (*subrogate*) in exchange for her carrying and delivering a baby. After birth, the child is given over to the individual/couple, either privately or through a legal adoption process. Couples facing fertility problems, same-sex couples, and single people who desire to be parents are the ones who seek surrogate mothers. In the present days surrogacy contracts usually involve insemination which is artificial in form (*Invitro fertilization*) ,which is much medically advanced and safer form of insemination.

² a congenital condition in males in which the opening of the urethra is on the underside of the penis

³ Saxena P, Mishra A, Malik S. Surrogacy: ethical and legal issues. Indian J Community Med. 2012;37:211-13

- **Altruistic Surrogacy:** Under this type of surrogacy arrangement a surrogate does not stand to achieve any financial benefit for carrying a pregnancy. The pregnancy-related expenditure is borne by the intended parents such as medical expenses, maternity expenses, etc.

SURROGACY ARRANGEMENTS

A surrogate mother is a woman who is or will try to become pregnant with a child, with the intention that she surrenders the child to another person or persons after the birth. The commissioning couple or individual assume the parenting rights to the child, in accordance with an agreement.

There are several options for impregnation of the surrogate mother including impregnation with the commissioning couple's sperm and ova, the commissioning couple's sperm or ova fertilized with donor ova or sperm, the surrogate mothers ova and commissioning parents sperm, and the surrogate mothers ova fertilized with donor sperm. Partial surrogacy is where the child is the genetic child of the surrogate mother and full surrogacy is where there is no genetic connection between the child and the surrogate mother.⁴

There are two types of surrogacy arrangements. *Altruistic or non-commercial surrogacy* is where the surrogate mother is paid only for the medical expenses associated with the pregnancy and may receive no reimbursement at all. Such agreements tend to be between parties who are known to one another, often family members, without the intervention of an intermediary. *Commercial surrogacy* is the other type of arrangement. This involves payment to the surrogate mother over and above necessary medical expenses in return for her making her body available to host a baby.

All forms of surrogacy are prohibited in some American States where surrogacy became the subject of fierce debate in the mid-1980s when a surrogate mother refused to hand over the child created as the result of a surrogacy arrangement to her genetic father.⁵ The American approach to surrogacy is not uniform. Certain states permit commercial surrogacy, some permit only altruistic surrogacy some will not enforce commercial or altruistic surrogacy contracts, and in some the act of entering into a surrogacy contract is deemed to be criminal.

Whilst commercial surrogacy is uniformly against the law, non-commercial surrogacy arrangements are legal in some states of Australia⁶. Non-commercial surrogacy is available to married couples in the United Kingdom where reasonable expenses can be paid to the

⁴ The New Zealand Law Commission, *New Issues in Legal Parenthood, A Discussion Paper; Preliminary Paper 54*, March 2004, published by the New Zealand Law Commission, Wellington New Zealand p.36

⁵ *Re Baby M* (1987) 525 A 2d 1128

⁶ In Australia surrogacy arrangements are regulated on a state by state basis with a resultant capacity for forum shopping. In the Northern Territory there is no regulation of surrogacy, although altruistic surrogacy is available Victoria, ACT, Tasmania and South Australia and there is no prohibition on the child of a transnational commercial surrogacy arrangement being brought to these states. New South Wales, Queensland and Tasmania do not permit transnational commercial surrogacy.

surrogate mother, though it is illegal to advertise for a surrogate mother.⁷ India encourages commercial surrogacy, which it legalised in 2001.⁸

CHILD OF A SURROGACY ARRANGEMENT

There have been years of discourse on adoption, the human rights involved and an acceptance of what is and is not appropriate and reasonable. Adoption from a human rights perspective invests the responsibility in States, and subsequently in foster and adoptive parents and other guardians deemed suitable, to protect and provide for children whose parents are dead, or unable or unwilling to look after them.

CARA

Foreign prospective adoptive parents considering adoption of a child from India are required by law to use an adoption agency. The adoption agency must be recognised by the Indian Central Adoption Resource Agency (CARA) and is subject to both the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption 1993 and the UN Convention on the Rights of the Child 1989. A child is only legally free for inter-country adoption where the child is either an orphan or the child's parents have given consent to the child being adopted, and an agency has first attempted to place the child with a family in India.⁹

By contrast our understanding of surrogacy and human rights is less certain. One fundamental reason for this may be that adoption prioritises the welfare of the child and recognises the right of a child to a family. The rights of the child are not prioritised in surrogacy as a child only comes into existence as a result of surrogacy arrangements. Instead the rights of the commissioning parents are prioritised and the interests of the child in prospect are unrepresented. The legal analogy selected is natural birth, not adoption irrespective of the genetic relationship between the child and the commissioning party/ies.

RIGHTS OF SURROGATE MOTHERS AND CHILDREN BORN VIA SURROGACY

The moral issues surrounding surrogacy have implications for human rights law. With the lack of regulation currently found in states such as India, surrogate mothers risk being exploited. Their lack of legal or medical knowledge and the fact they are being offered sums of money that to them seem huge, make it difficult for surrogates to have equal bargaining power against the comparatively wealthy and powerful clinics and commissioning parents they contract with. While those parties have an incentive towards ensuring that the surrogate conceives and bears a healthy pregnancy for nine months, they do not necessarily have any need to protect the longer-term physical and mental health of the surrogate mother.

Pregnancy and childbirth can be risky and can result in serious medical consequences or even

⁷ *Surrogacy Arrangements Act 1985* ss 2 & 3 as at

<http://www.england-legislation.hmso.gov.uk/RevisedStatutes/Acts/ukpga/1985/cukpga_19850049_en_1>

⁸ Australian Embassy, India. <http://www.india.embassy.gov.au/ndli/vm_surrogacy.html>

⁹ Central Adoption Resource Agency <<http://www.adoptionindia.nic.in/carahome.html>>

death. Furthermore, the mental elements of bearing a child for someone else cannot be taken lightly. In the documentary *Google Baby*,¹⁰ a surrogate is filmed crying after giving birth to the baby and other surrogates mention that giving up a baby was the hardest thing they have had to do. While some surrogates may not experience intense emotional attachment to the baby they are giving up, some have argued that informed consent for surrogacy is difficult to attain when a woman does not know how she will feel upon the end of her pregnancy and that women are not fully counselled through this process.

Other surrogates have reported feeling as though their body belongs to someone else. Before and during the surrogacy process a woman may have little medical and reproductive autonomy. For these reasons, both courts involved in the *Balaz* case,¹¹ expressed concern about the possible exploitation of Indian women through surrogacy. Some commentators have gone as far as to call international commercial surrogacy “reproductive trafficking” because “it creates a national and international traffic in women in which women become moveable property, objects of the reproductive exchange and brokered by go-betweens mainly serving the buyer.”

For children born through surrogacy, it is often assumed that so long as their commissioning parents can gain custody of the child and provide the child with citizenship, there are no issues in relation to the child’s welfare. However, even when not genetically related to a surrogate mother, a biological (although not genetic) relationship exists between a foetus and its gestating mother. The nine months spent in the womb may create the beginnings of an attachment bond and be a factor in a child’s identity. As has been recognized by the United Nations Convention on the Rights of the Child, a child has a right to know and understand its history and identity. This is particularly relevant to children born of surrogacy given many of these children have anonymous donors as one or both genetic parents. This lack of medical and personal history will represent a loss to most children, which may be heightened in cases where the genetic donor shares a different ethnic background to the family in which the child is raised.

Children born via surrogacy may feel commodified by the way in which they were brought in to the world. One nearly eighteen year old boy born via surrogacy wrote “How do you think we feel about being created specifically to be given away? ... I don’t care why my parents or my mother did this. It looks to me like I was bought and sold.”

Given the commercial nature of international surrogacy and the high value society places on bearing children and motherhood, the ethical implications of surrogacy arrangements remain highly controversial. Analysing these ethical considerations through a feminist paradigm is a useful method for examining many of these moral dilemmas, particularly as many of the issues raised relate to the harms to and freedom of the surrogate mothers.

Two contrasting positions on the subject can be delineated from feminist theory, which reflect the divides within feminism itself. The first approach derives from the gender-

¹⁰ Zippi Brand Frank *Google Baby* (HBO Documentary Films, Israel, 2009).

¹¹ *Jan Balaz v. Anand Municipality*

neutral/anti-differentiation school of feminism and rejects the notion that woman should receive different treatment to men. This can be aligned to the pro-surrogacy feminist argument that reproductive autonomy and the right to enter into contracts are paternalistically curtailed by anti-surrogacy laws, and female freedom is thereby restricted. The opposing view, based on the anti-subordination approach that accepts power differentials within society and the redistribution of power to promote gender equality, supports anti-surrogacy laws in order to prevent the harms it sees commercial surrogacy as causing to the women involved.¹²

LEGISLATION REGARDING SURROGACY IN INDIA

In India efforts have been made to regulate reproductive technology, with the booming international surrogacy market in mind. The Indian Council of Medical Research has issued guidelines to regulate clinics providing assisted reproductive technology services.¹³ However, these guidelines are not legally binding, do not include clarification on many major issues, and are often violated.¹⁴

In 2010 more concerted efforts were made to regulate surrogacy in India. A 12-member committee, consisting of experts from the Ministry of Health and Family Welfare, the Indian Council of Medical Research, as well as other medical specialists, drafted the Assisted Reproductive Technology (Regulation) Rules 2010. These Rules, which are yet to be passed into law, are extremely comprehensive. They would allow foreigners to commission a surrogacy only when they have provided proof of registration of the intended surrogacy arrangement with their embassy. The Rules also stipulate that a child born of surrogacy will have the commissioning parents named on his or her birth certificate, and sets out a number of rules designed to protect the appropriate selection, medical welfare and fair payment of surrogate mothers.

Key features of the Rules are:¹⁵

- The commissioning parents and surrogate mother must enter into a surrogacy agreement, which will be legally enforceable;
- The surrogate must relinquish parental rights over the child;
- A surrogate must be between 21 and 45 and may not be a surrogate for more than three live births;
- The birth certificate will bear the commissioning parents' names as the legal parents;
- The commissioning parents are legally bound to accept the child;

¹² Catherine London, above n **Error! Bookmark not defined.**, at 403-404.

¹³ National Guidelines for Accreditation, Supervision, Regulation of ART Clinics in India, 2005.

¹⁴ Anil Malhotra and Ranjit Malhotra

¹⁵ As discussed in Usha Rengachary Smerdon

- Foreign commissioning couples must be able to provide documentation that they will be able to take the child to another country.

CONFLICT OF LAWS: NATIONALITY, PARENTAGE AND THE ILLEGALITY OF SURROGACY

Children created via surrogacy are often born with an uncertain status as to their parentage and nationality. Conflicting laws between jurisdictions on parentage, citizenship and surrogacy mean that a child can end up with no legal parents or nationality.

Parenthood usually has three components – an intention or willingness to have a child, genetic consanguinity and, in the case of motherhood, gestating and giving birth to a child. Surrogacy can divide these components between two to three different ‘mothers’ and one or two different ‘fathers’. Determining who the legal mother and father are in such situations is frequently a difficult task and different jurisdictions have taken different approaches to this task. Because a child’s citizenship is usually based on parentage and place of birth, this can be equally complicated and a jurisdiction’s interpretation of parenthood will usually have implications for a child’s nationality.

Matters are made worse by the fact that commissioning parents usually come from countries that ban either surrogacy or commercial surrogacy. Consequently, the laws relating to parentage and citizenship are often interpreted in such a way as to exclude commissioning parents from becoming legal parents of a child born overseas via surrogacy. Adoption would seem an obvious solution to this problem, but adoption laws often stipulate many stringent requirements that exclude commissioning parents from adopting their child (for example, payment or knowledge of the birth mother is often prohibited in international adoption).

Commissioning parents are frequently unaware of these legal problems. This may be due to the intending parents’ desire for a child overwhelming their better judgment. This is often fuelled by the practice of agencies facilitating international surrogacy to encourage couples to ignore laws implemented in their own countries and downplay the risk of this to their parental rights to the child that results.¹⁶ For example, one United States based surrogacy website completely minimises the legal and immigration issues associated with international surrogacy. The website states:¹⁷

“Since surrogacy became legal in the United States, more than 30,000 births have resulted from surrogate mothers. The United States is the preferred country for intended parents from all over the world who are looking for international surrogates. Conceive Abilities is conveniently located in Illinois, one of the most surrogacy-friendly states in America. The Illinois Gestational Surrogacy Act provides additional flexibility, stating that intended parents do not need to be Illinois residents and that a birth certificate will be issued with the names of

¹⁶ Usha Rengachary Smerdon “Crossing Bodies, Crossing Borders: International Surrogacy Agreements between the United States and India” 39 Cumberland Law Review 15 at 30.

¹⁷ Conceive Abilities “International Surrogacy” (26 February 2013) <www.conceiveabilities.com/>.

the intended parents - avoiding the need for complicated court proceedings. Laws in other American states do not provide the same protection for surrogacy.”

The situation has reached the point that in 2010 a letter was sent to a number of Mumbai IVF clinics from the consul generals of Belgium, France, Italy, the Netherlands, Poland, Spain and the Czech Republic.¹⁸ This directive stressed that clinics needed to direct potential parents seeking surrogacy towards their embassies for approval before initiating the surrogacy process.

A number of cases have arisen as a result of commissioning parents being unable to establish their legal parenthood and their child's national identity. Few of the cases are described below.

CASE LAWS

*The Baby Manji Case*¹⁹

In 2008 a baby was born to an Indian surrogate mother and commissioning parents from Japan. The Japanese couple had used the husband's (Mr Yamada's) sperm and an Indian donated egg to create the embryo. Shortly before Manji's birth, Mr and Mrs Yamada divorced and Mrs Yamada made no claim to the baby.

Following the directions of the chief registrar of the Anand Municipal Office, a birth certificate was applied for and issued with only Mr Yamada's name on it. Japanese authorities told Mr Yamada that he would only be able to bring Manji to Japan by adopting Manji pursuant to both Japanese and Indian laws and obtain an Indian passport.

While Mr Yamada attempted to obtain the relevant documents to adopt Manji, an NGO called Satya filed a petition in the Rajasthan High Court seeking to prevent Manji from being taken out of India. Satya challenged the legality of commercial surrogacy and accused the clinic where Manji was born of illegal trade in infants. It alleged that the absence of surrogacy law in India meant that no one could claim to be the parent of Manji, including Mr Yamada.

The Rajasthan High Court required Manji to be brought to them within four weeks. In response Mr Yamada's mother filed a writ of petition on Manji's behalf with the Supreme Court of India. The Supreme Court granted her temporary custody of Manji and disposed of the proceedings involving Satya by ruling that the Commission organised under the Protection of Children Act 2005 and not the Rajasthan High Court was the appropriate forum for Satya's complaints. The Supreme Court then said that commercial surrogacy was legal in India.

¹⁸ “Bar Our Nationals, European Countries Tell Surrogacy Clinics” *The Times of India* (online ed, India, 14 July 2010).

¹⁹ *Baby Manji Yamada v. Union of India and Anr*, (2008) 13 SCC 518.

After this judgment was issued, the Jaipur passport office gave special dispensation and issued Manji with a 'certificate of identity'. The Japanese Embassy in New Delhi granted Manji a one-year Japanese visa on humanitarian grounds and Manji's grandmother was able to take her to Japan.

*The Balaz Case*²⁰

A German couple, Mr and Mrs Balaz, commissioned a surrogate pregnancy in India using Mr Balaz's sperm and a donated egg. As a result, Nikolas and Leonard were born in India in 2008 but had to remain there for two years due to their statelessness.

The twins were originally registered and issued with Indian birth certificates naming the Balaz's as their parents. A legal battle ensued when the German authorities refused to recognize the birth certifications as establishing the parentage or German nationality of the twins due to surrogacy being illegal in Germany.

The Balaz's turned to judicial procedures to seek Indian passports for the twins. A lower court refused to recognize the children as Indian because they lacked an Indian 'parent'. The authority that had issued the birth certificates then recalled them and replaced Mrs Balaz with the Indian gestational surrogate as the children's 'mother', while Mr Balaz remained identified as the 'father'. Passport authorities then allowed the application for two Indian passports.

However, the Indian Ministry of External Affairs ordered the Balaz's to surrender the passports while the matter went before the High Court of Gujarat. The Court recognized the nationality of the children as Indian because they were born on Indian soil to an 'Indian mother', meaning gestational mothers were now recognised as legal mothers, despite birth certification practices undertaken in most surrogacy clinics to the contrary. Nevertheless, the Indian passport authority refused to reissue the twins' passports.

India's Highest Court, the Apex Court, finally considered the matter in December 2009. It urged Indian authorities to consider non-judicial avenues and suggested adoption as a possible solution. Adoption was not possible because of certain requirements in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and in Indian law that had not been met, such as the children needing to have been orphaned or abandoned and no contact being allowed between the birth mother and intended adoptive parents. The Apex Court asked the Central Adoption Agency to reconsider its jurisdiction. Before this took place, Germany issued the children with visas and the Balaz twins were able to leave India with the agreement that the Balazs would formally adopt the twins in Germany under German law.

*The Goldberg Twins Case*²¹

²⁰ *Jan Balaz v. Anand Municipality* LPA 2151/2009, 17 November 2009 (High Court of Gujarat, India). See also Yasmine Ergas "The Trans-Nationalization of Everyday Life: Cross-border Reproductive Surrogacy, Human Rights and the Re-visioning of International Law" (12 March 2012) Institute for the Study of Human Rights: Columbia College < <http://hrcolumbia.org/>>.

Mr Goldberg and Mr Angel, a gay couple from Israel, arranged a surrogacy in India using a donated egg and Mr Goldberg's sperm. Israel allows surrogacy but does not allow gay couples to be parents under surrogacy arrangements.

When Goldberg and Angel's surrogacy resulted in the birth of twin boys, they found themselves stranded in India after the Jerusalem Family Court refused to allow a paternity test to initiate the process for gaining Israeli citizenship for the twins.

The issue was debated in the Israeli Parliament and, with the support of Prime Minister Benjamin Netanyahu, the case was appealed to the Jerusalem District Court where it was accepted that it would be in the best interests of the children to allow the paternity test to go ahead. The DNA test confirmed that Mr Goldberg was the boys' biological father and so they were able to gain Israeli passports and travel to Israel after spending the first three months of their lives in India.

*The Canadian Twins Case*²²

In 2005, a Canadian couple commissioned a surrogate pregnancy in India using the husband's sperm and a donated egg. Twins, a boy and a girl, were born in 2006 and the couple applied for proof of Canadian citizenship at the Canadian High Commission in New Delhi. Surrogate children are usually granted Canadian citizenship so long as the child has a genetic link to one Canadian parent.

DNA tests confirmed the couple's baby girl was the genetic daughter of the commissioning father; however the baby boy was not, suggesting a mix up at the clinic. There were no policies in place for the Canadian authorities to deal with such a situation so the family had to stay in India until 2011, when a citizen card was issued to the female twin and travel papers to the male. From Canada, the couple was able to file an application on humanitarian and compassionate grounds for their non-biological son to gain Canadian citizenship.

CONCLUSION

Surrogacy is a complex and challenging subject that has been plagued with controversies for the past several decades. At one end of the spectrum we have the pain of infertility and craving for parenthood, at the other end we have commoditization of the reproductive capacity and exploitation of women and children. However, it needs to be reiterated that, viewed in a correct perspective, surrogacy is a reproductive treatment which can provide many an instance of happiness, fulfilment and satisfaction to an infertile couple.

Commercial surrogacy may seem to many Indian women, and their families, their best option for alleviating poverty. This is not a compelling argument for regulating commercial surrogacy but rather for addressing the poverty, limited opportunities and education of women in India that create the environment that renders surrogacy an attractive option.

²¹ Anil Malhotra and Ranjit Malhotra, above n **Error! Bookmark not defined.**, at 33.

²² Raveena Aulakh "After Six Years and Fertility Mix-up, Surrogate Twin Can Come Home" *The Star* (online ed, Canada, 5 May 2011).

Most human rights dilemmas involve an intersection of competing rights and needs: the right of a child to know his or her parents and other members of his or her family, the right of the surrogate mother to be able to feed, clothe and house her own family, the need of infertile people to found a family. Whilst there are competing rights to be considered in regulating surrogacy arrangements including the child's right to be protected and to know about the circumstances of his or her birth, the arranged parents interest in being able to have a child and to be recognized by law as parents of that child, and the birth mothers right to be protected from exploitation, the welfare of the child should be paramount in any balancing of these competing rights.