

**“SURROGACY AND WOMAN’S RIGHT TO HEALTH IN
INDIA: ISSUES AND PERSPECTIVE”**

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LIST OF ABBREVIATIONS

AI	:	Artificial Insemination.
A.I.R.	:	All India Reporter.
ART	:	Assisted Human Reproductive Technologies.
CEDAW	:	Convention for Elimination of All Forms of Discrimination Against Women.
CSR	:	Centre for Social Research.
D.L.R.	:	Dominion Law Reports.
F.L.R.	:	Family Law Reporter.
I.N.D.L.H.C.	:	In Delhi High Court.
ICCPR	:	International Covenant on Civil and Political Rights.
ICESCR	:	International Covenant on Economics and Cultural Rights.
ICMR	:	Indian Council for Medical Research.
ICPD	:	International Conference on Population and Development.
J. Perinat. Educ.	:	Journal of Perinatal Education
W.L. R.	:	Wales Law Reports
West. Indian Med. J.	:	West Indian Medical Journal.

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- 4) B. K. Parthasarthi v. Government of Andhra Pradesh, 1999
- 5) Baby Manji Yamda v. Union of India & Another, A.I.R. 2009 S.C
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(C)

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- 11) Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981)

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CHAPTER 1

INTRODUCTION

'He is my son'; 'No he is mine'. After hearing both the ladies, the King delivered his judgment. 'Divide the living child into two, and give half to one and half to the other'.

This was the decision given by the wise King Solomon in order to identify who is the real mother of the child, in a case where two women were fighting with each other for claiming rights over a child. On hearing the King's decision, the real mother started crying and requested the King not to cut the child but give it to the other woman. The King however gave the child to the woman who requested him not to cut the child as she was the real mother. Though this is a story to highlight King Solomon's wisdom, such disputes are not rare and in fact, have become a reality in modern times. The scientific developments in the field of human reproduction have made it possible for a child to have two or three mothers or fathers. Today the King is replaced by the Courts. An important question which arises today is whether the courts can decide a dispute over a child in the same manner as King Solomon? King Solomon had only claimants for the child whose fate he was called upon to decide. In present times, several people may raise claims over a child and resolving such disputes is not only a herculean task before the courts but also poses a legal and human rights challenge. Such disputes are emerging due to the increasing use of assisted human reproductive technologies. These technologies have developed as a result of various experiments and research carried out by biologists and medical experts in order to find a solution for childlessness. The problem of childlessness is a matter of great concern due to the fact that it has a severe impact on the life of couples.

OBJECTIVES

The main objectives of this study are as follow:

- ❖ To highlight the need and importance of artificial human reproduction technologies in general and surrogacy arrangements in particular.
- ❖ To identify the legal and human right issues relating to the intended parents, surrogate woman and surrogate child in India.
- ❖ To examine the legality of surrogacy contracts and the various legal and human rights controversies relating to surrogacy contracts.
- ❖ To surrogate modifications in the existing laws if requested and to propose a model law for the regulations of surrogacy practices in India.
- ❖

HYPOTHESIS

In this dissertation the researcher presumes that the surrogacy is a blessing for childless couples in India and to analyse the impact of surrogacy on women's health in India. There is lack of legal framework for surrogated women's right and health in India.

METHODOLOGY

The research method which has been adopted by researcher is doctrinal. The data collected is through various e-data sources and are used for research study. The different type of cases of various countries are analyzed . The landmark cases analyzed. The condition of India is compared with the conditions of foreign countries various thoughts given by the persons on surrogacy are also included under this research.

In this research, the researcher will mainly focus on the positive and negative aspects of the surrogacy and its effect on woman health.

CHAPTER 2

LITERATURE REVIEW

The reviews of various e-sources, e-books have been taken to analyse the topic Surrogacy forgetting the views of various people and their psychologies about it for better understanding of topic which will help to get the results of research.

Nigam (2013) gives conclusion that surrogacy is a reproductive technology and countries like India need clear guidelines from legislature. She also states that commercial surrogacy is best for all when done with a contract and rights of the born baby should be addressed in details .

The Iona Institute (2102) gives summary in their paper that commercial surrogacy is a very good activity and many countries are adopting it. They help the couples who are incapable of producing the child naturally. Many agencies form the databases of the women who are ready to become the surrogates and the commissioning couple can choose from them by their own that are more capable of producing their child. In developing countries like India, the rated of the commercial surrogacy are much less than those of the developed countries like California **Teman** (2001) states in her book that in 1991 the ministers of health and justice made a public committee for legislating the surrogacy in Israel. After that the ban for surrogacy was cancelled in the nation after the petitions of 25 couples who were not capable of producing the child. After that the Israel became the only country in the world to start the practice of surrogacy and helped a lot of couples to enjoy the right of the birth of child.

European Parliament (2013) concluded that the surrogacy agreements must be made in legal sense and all those agreements which prohibited doing the surrogacy or prevented from the point of view of ethics should be made void. It also concluded that it appears to be untenable at a large level in spite of the law enacted in the nation for prohibiting it.

Pilka, Rumpik, Koudelka, Prudil et al (2009) concluded that public has shifted its opinion and recognized that surrogacy is an appropriate measure in the cases of the infertility. It is also expected

that this technique will get strength and supported by the people and will have good & favourable effects on the life of the people.

Temam (2001) states in her book that in 1991 the ministers of health and justice made a public committee for legislating the surrogacy in Israel. After that the ban for surrogacy was cancelled in the nation after the petitions of 25 couples who were not capable of producing the child. After that the Israel became the only country in the world to start the practice of surrogacy and helped a lot of couples to enjoy the right of the birth of child.

Mukherjee, S (2011) concluded that right to reproduce is a fundamental right and also a human right. Surrogacy is the best way to overcome both biological and social infertility. It provides to have the child of our own regardless of the marriage. He also concluded that legalization of gestational surrogacy will protect rights of mother as well as of the commissioning parents who need the child¹.

Yale University (2014) stated that the practice of surrogacy is rapidly increasing day by day. By this technique U.S accounts for more than 2000 babies which are three times as the decade ago. Similar is the case with UK and Australia where it has been doubled in six years and tripled in three years respectively.

By observing all the above stated review of related literatures to the topic Surrogacy, it can be concluded that surrogacy is a reproductive technology which is a fundamental and human right and in which the commercial surrogacy is best and well suited to the entire person because the surrogate get the compensation for what she sacrifices.

The feelings of the surrogate should also be taken care of so that there are no negative impacts on the child which is in the womb of the surrogate. So, proper counseling should be made to her. Many ethics support this and many not but the best way is that of the people living in the western culture which only observes the moral values of the person which help the commissioning parents to enjoy the rights of the child. There should be the legal agreement and should be legalize because in spite of being prohibited it is uncontrollable to stop it completely. The technique has bright future ahead and will have a favourable impact on the lives of the people.

¹ Mukherjee,S. (2011). Legal and Ethical Issues of Commercial Surrogacy: An Overview. Indian Legal Aspect.

CHAPTER 3

SURROGACY

3.1 SURROGACY: MEANING & DEFINITION

It is an arrangement by which a woman agrees to become pregnant by AI or through implantation of embryo and then carry the child for full term and after birth of child relinquishes all her parental right over the child and hand it over to another couple or individual.

These techniques offer the advantage to couples or individuals to beget a genetically related child. However AI and IVF are techniques mainly assisting medically infertile couples to beget a child. But in case where the wife is unable to carry the child for a full term due to any medical or other reasons then surrogacy is the best option for such couples. Surrogacy can be opted not only by medically infertile couples but also by socially infertile couples and individuals .

This is because in surrogacy, the individuals who wish to have a child are required only to contribute genetic material and the process of carrying the foetus to full term in the womb and delivering the child is performed by another woman known as surrogate woman. Thus surrogacy can be used by medically infertile couples in whom AI and IVF are not successful. So also, it can be used by socially infertile couples/individuals who are unable to have a child through AI or IVF or who may wish to beget a child without undergoing the natural procreation process. Therefore, surrogacy is emerging as the attractive and convenient option for begetting a child.

3.2.CHILDLESSNESS-

Every human being has an innate desire to have a natural offspring. The reasons are many, to love and to be loved, for performing the religious rituals at funeral pyre, for carrying the tradition of a family, to preserve a particular community and so on. The significance and need of a child is also emphasized in almost all the religions of the world. Begetting and giving birth to a child is essential not only for fulfilling the personal aspirations of the individuals but also for continuation of the society.

This desire is accomplished by the act of procreation which is a natural process by which the married couple can have their own offspring. Traditional reproduction is an unambiguous three dimensional phenomenon involving natural mother, natural father and natural child sharing amongst them the entire natural biological process, without intervention from any other external agencies except for minimal medical expertise.

A child is seen to be a natural product of the procreative act of its parents. For most couples, the procreation of a child is one of the simplest tasks. Melissa Williams, the renowned Political Scientist, commented that Reproduction of child, after all is the oldest production known to humankind, a process that is programmed into the biological fiber of our beings and defines our very survival.

However, unfortunately a large number of people due to various reasons are unable to fulfill this very biological process fruitfully and beget a child. The major reason for childlessness is infertility which may be either medical or social.

Medical infertility is usually defined as the inability to achieve pregnancy after a year or two of trying to conceive a child through regular sexual intercourse². In the past few decades a new type of infertility termed as social infertility has emerged. It means the inability of individuals to have a child due to the various social circumstances in their life. For example, single individuals, widowed and divorced, may be fertile but are unable to have a child unless and until they marry. Likewise, the homosexual couples cannot have a child due to the fact that for begetting a child a sexual union between man and woman is required . Further, aged individuals³ , disabled as well as those individuals who have undergone voluntary sterilization can also be termed as social infertile.

Childlessness either due to medical or social infertility, can be devastating experience that causes enormous amount of emotional pain. It can have a grave impact on every aspect of an individual's

² Marcia Inhorn, Frank Van Balen, *Infertility Around the Globe: New Thinking on Childlessness, Gender, and Reproductive Technologies*, University of California Press, London, U.S.A. (2002), p.12.

³ See generally, Dr. Nicholas Tonti Filippini, —*Reproductive Technology Outcomes in Australia*:

life affecting his/her self-esteem and relationship with others. It is well-known that in many couples childlessness due to infertility causes serious strain in their interpersonal relationships, and often leads to personal distress and periods of existential crisis. One of the important challenges faced by a childless couple is learning how to manage the childlessness with oneself, with the partner and with the society. Couples often feel frustrated, angry or guilty after such a diagnosis.

Women may feel unfeminine and men may feel powerless and un-masculine. In some cases the inability to have children is one of the main causes for divorce. The treatment for medical infertility also involves stress, because some treatments may be painful, and there may be fear that the treatment will not work.

Further, the side effects of the medications, and the necessity of going through procedures several times, can test a couple's patience and create a strain on their relationship. Thus childlessness has a serious impact on the couples and individuals who wish to beget a child and are unable to do so due to various reasons. The need for a child and the impact of childlessness has been recognized since ancient time.

3.3.INFERTILITY MEANING & DEFINITION

Infertility is a disease of the reproductive system which affects both men and women with almost equal frequency. It is a global phenomenon which affects some percentage of every human population. It is estimated that an average of 10 per cent of the global women population of reproductive age is unable to get pregnant or carry a pregnancy to term.

While there is no universal definition of infertility, a couple is generally considered clinically infertile when pregnancy has not occurred after at least twelve months of regular sexual relationship without the use of contraceptives.

A common definition of infertility is that, a couple has failed to conceive after 12 months of unprotected sexual intercourse or have suffered three or more miscarriages or still births⁴. However, the WHO suggests that there should be two years of unprotected sexual intercourse without conception before an infertility diagnosis is made⁵.

⁴ Emily Jackson, *Regulating Reproduction Law, Technology and Autonomy*, London School of Economics, Hart Publishing, Oxford – Portland Oregon, U.K. (2001), p.162

⁵ Jonathan Herring, *Medical Law and Ethics*, Oxford University Press, U.K. (2006), p.281.

To constitute a problem, such inability to produce a child must have continued over a certain length of time. It has been estimated that 63 per cent of normally fertile women having unprotected sexual intercourse with a fertile partner will conceive within six months, and 80 per cent will conceive by the end of one year ⁶ .

Infertility has been described as the active but frustrated desire for a biologically related child . Thus infertility means the inability to generate a pregnancy among people who wish to bear children. The problem may be short term, long term, or permanent.

The infertility may lie primarily or solely with the male (such as a low sperm count) or with the female (such as failure to ovulate). In some cases, both parties have a fertility problem. In some cases, the cause of the infertility cannot be determined, despite extensive testing. Infertility includes: infecundity - meaning inability to conceive or impregnate; and pregnancy wastage - meaning failure to carry pregnancy to its term because of spontaneous abortion and still-birth. Infertility includes primary infertility, where a couple has never achieved conception, and secondary infertility, where at least one conception has occurred but the couple is currently unable to achieve pregnancy.

Based on the reasons for causing infertility in individuals, infertility can be classified into two broad categories:

i) *Medical Infertility*

It refers the inability/failure of a couple to have a child even after one year or two years of regular sexual intercourse without any contraceptives, due to biological reasons. There are various biological and medical reasons for this type of infertility such as Diabetes Mellitus, Thyroid disorders, Adrenal disease, Kallmann syndrome, Hypopituitarism, etc.

ii) *Social Infertility*

It refers to the inability of individuals to have a child due to various social factors in their life. For example, lesbians, gays, divorced individuals, widowed person and single individuals. It is

⁶ Gillian Douglas, *Law, Fertility and Reproduction*, Sweet and Maxwell, London (1991), p.104.

pertinent to point out here that the individuals belonging to this category may be fertile but because of their situation and way of life and social circumstances they are unable to have a child. For having a child there has to be a sexual relationship between a healthy man and a healthy woman. But in a lesbian relation which involves only same sex relationship in females, naturally they alone cannot have a child. Similar is the case of gays which involves only males.

Likewise, the divorced individuals, widowed persons and single individuals cannot have a child unless they marry. There can be yet another classification termed as forced infertility so as to include those individuals who are fertile but are forced to remain childless due to certain other reasons. For example, people who are disabled may not marry and remain single and thus are deprived of a child or even if married, in certain cases they may not be able to have a child due to their physical disability. The most unfortunate category of people is those who lose their child, in an age, in which they are unable to beget another child. For example, if a couple lose their only child or all their children in an accident or due to some disease, they are deprived of having a child because they may have undergone either tubectomy⁷ or vasectomy⁸ or may be above the child bearing age.

3.4.ORIGIN & DEVELOPMENT OF MODERN SURROGACY

The concept of surrogacy has come into lime light, since the case of Elizabeth Kane in 1980. This technology focuses on fulfilling the desire and dream of individuals to have their own biological child with the help of another individual by using scientific advancements.

This scientific procedure encompasses long standing concerns of human society to have an offspring to continue their legacy, name, family and property. The origin and development of surrogacy can be traced to the ancient cultures, religions, and developments all over the world which have shaped the attitude of the generations towards surrogacy and its human rights implications.

The practice of surrogate motherhood has had a long history and it was accepted in many ancient cultures. For example, the ancient Babylonian Legal *Code of Hammurabi* (18th century BC)

⁷ Tubectomy is a surgical procedure for permanent contraception to prevent future pregnancies in women.

⁸ Vasectomy is a surgical procedure for male sterilization and/or permanent birth control

recognized the practice of surrogacy and actually laid down detailed guidelines specifying when it would be permitted. The *Old Testament* suggests that surrogacy was accepted in early Jewish society as a legitimate way by which infertile couples could have children and create a family of their own.

The National Bioethics Consultative Committee (NBCC) Report described the traditional Torres Strait Islander⁹ surrogacy practice of a woman or couple having a child for another woman or couple. Other societies such as the Kgatla people of Bechuanaland in Southern Africa and some traditional Hawaiian groups undertook similar practices.

In these communities surrogate motherhood is seen as an act of friendship and generosity¹⁰. However, in European cultures, though surrogacy was undoubtedly being practiced in the past, it had never been formally recognized by the society or the law. Thus surrogacy was known in almost all the ancient cultures all over the world. The origin and roots of surrogacy can be traced to the major religions of the world.

The various religious, cultural and mythological writings also provide an interesting insight into the use and practice of surrogacy.

3.4.1.DEVELOPMENT OF MORDEN SURROGACY

The history of modern surrogacy methods can be traced back to 1899. It is to be noted that the various practices, customs and traditions followed by different communities all over the world have had a great impact on the development of surrogacy as a form of Assisted Human Conception.

The practices followed by American Indians can be considered as the beginning point of modern surrogacy methods. If a woman of American Indian tribe was found to be infertile, she would be sent to the medicine man. If even after his treatment, the woman was not able to conceive, the chief of the tribe had the power to grant liberty to her husband to take another woman and to have

⁹ *Torres Strait Islanders* are the indigenous people of the Torres Strait Islands, part of Queensland,Australia.

¹⁰ Glenda Emmerson, —Surrogacy: Born For Another, *Research Bulletin*, No 8/96, Queensland Parliamentary Library, Publications and Resources Section, Brisbane, (September 1996).

a child with that woman. Likewise, in recent European history, especially in Spain, it was common for the kings to take in several women for begetting a male child.

Modern historians may criticize this practice as adultery or polygamy, but it is to be noted that this practice was followed only for begetting a biological child and some similarity can be drawn with modern surrogacy³⁸. It can be seen that in these practices there is no use of technology. The development of science and technology in the medical field gave rise to the modern surrogacy methods, which involves integration of science and technology with natural process of human conception. The successful birth of Louise Brown with the help of in-vitro fertilization in 1978 in England confirmed the thinking of the scientists and medical experts that a woman other than the genetic mother could be used to carry the foetus and deliver it. In 1979, Dr. Richard Levin, gave suggestion to an infertile couple to use a woman as a donor as well as to carry the resulting foetus and deliver the child.

Dr. Richard Levin examined in detail the pros and cons of the issue as well as the various social, ethical, religious and legal issues. As a result, the couple reached an agreement with a woman to act as a donor and surrogate mother. The surrogate mother was artificially inseminated in the early 1980's and she conceived within the first month. She gave birth to a baby boy after nine months and handed over the baby to the couple.

The right of the surrogate mother as a legal guardian was terminated and guardianship was handed over to the biological father through a legal process. The pseudonym of the surrogate woman involved in this case was Elizabeth Kane, who agreed to give birth as a traditional surrogate mother for a financial compensation of \$10,000. This type of surrogacy arrangement is now popularly known as commercial surrogacy. Thus this case is considered to be the world's first case of planned surrogacy. In 1983, a menopausal woman at Monash University in Melbourne, Australia became the first woman to give birth to a baby by using donated eggs. It is to be noted that though this case is not a surrogate pregnancy, it is however a remarkable event which made the practice of gestational surrogacy possible. The year 1986 can be considered as a milestone in the history of surrogacy. In 1986 the world's first gestational surrogate pregnancy took place in USA. In this case the surrogate mother carried the biological child of a woman who had undergone an hysterectomy and therefore was unable to carry a child. The identities of the couple and that of the surrogate mother were not disclosed. However Noel Keane, the lawyer who represented the couple said that surrogate mother was a 23 year old girl and she received \$10,000 for her service. The use

of surrogacy as a procedure for procuring a biological child slowly gained acceptance. Generally, surrogacy practices were carried out in secret. However, the *Baby M Case*¹¹, due to its peculiar nature brought surrogacy within the knowledge of public. In this case Mary Beth Whitehead gave birth to Melissa Stern as a traditional surrogate mother in 1986. However after the birth of the child, Mary Beth changed her mind and instead of handing over the child to the intended parents, she decided to keep the baby herself. As a result there was a two year legal battle with Melissa's biological father, Bill Stern, and intended mother, Betsy Stern, over custody. Finally, the Sterns were successful in getting custody of the child and Mary Beth was given a right of visitation.

This highly publicized case highlights the various conflicting legal and human rights issues involved in surrogacy and the need for a legal frame work for its regulation and control. Along with the further developments in the field of surrogacy, there has been unprecedented increase in instances of application of surrogacy for procuring a biological child.

One such instance is that of Teresa Anderson, a 54 year old woman who gave birth to five boys as a gestational surrogate mother in 2005 for a couple she had met online. In August 2007, 58 year old Ann Stopler gave birth to her twin granddaughters. Her daughter, Caryn Chomsky, was unable to conceive due to cervical cancer.

Another incidence is that of 56 year old Jaci Dalenberg who became the oldest woman ever to give birth to triplets in 2008. She acted as a gestational surrogate mother for her daughter Kim, and delivered her own grandchildren. One of the landmark events in the history of surrogacy is that of a surrogate woman who gave birth to her own grandchild at the age of 61 years. This event took place in Japan in 2008.

In India, the first gestational surrogacy took place in 1994 in Chennai¹². In 1997, the first commercial surrogacy was reported in India. A woman from Chandigarh agreed to carry a child for 50,000 rupees in order to obtain medical treatment for her paralyzed husband. Further in 1999, an Indian newspaper reported the story of a village woman in Gujarat who served as a surrogate for a German couple¹³. It is estimated that, in India, the number of births through surrogacy has

¹¹ *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

¹² See, Geeta Padmanabhan, —Hope in the Test Tubel, *The Hindu*, January 19, 2006

¹³ Jyotsna Agnihotri Gupta, —Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies, 13 *Eur. J. Women's Stud.* 23 (2006), at p.30.

doubled between 2003-2006¹⁴, and estimates range from 100-290 each year to as many as 3,000 in the last decade¹⁵.

3.5.TYPES OF SURROGACY

Surrogacy is considered as a very sensitive and emotional issue which has far reaching impact on all the parties involved in it. Due to the delicate nature of surrogacy, it is vitally important that in order to be a successful procedure, all the parties are comfortable and confident with one another. There are various arrangements which are possible in surrogacy depending upon the suitability and convenience of the parties. This has given rise to various forms of surrogacy. Each surrogacy arrangement is unique, and the parties have the choice to select from several types of surrogacy, the one that is best and convenient to them.

Surrogacy can be classified into different types on the basis of the type of agreement entered into, financial transactions and relationships involved and on the basis of the use of genetic material. One of the basic classifications of surrogacy is based on the nature of the agreement entered into by the parties.

Thus surrogacy can be classified as formal or informal surrogacy. *Formal surrogacy* arrangements are those in which the nature and terms of the agreement between the surrogate and the commissioning couple are clearly specified, and are generally in writing.

These arrangements are otherwise described as ‘contractual surrogacy’. This term denotes the potential legal enforceability of such agreements by a court of law. *Informal surrogacy* arrangements are ‘non-contractual’ and lack the legal requirements of an enforceable contract, in that they are often vague and uncertain. In practice, they are generally difficult to detect and control¹⁶.

¹⁴ Sudha Ramachandran, —India’s New Outsourcing Business – Wombs!, *Asia Times Online*, June 16, 2006, available at <http://www.atimes.com/atimes/south_asia/hf16df03.html> 10.5. 2011.

¹⁵ See for more, Neeta Lal, —A Labour of Lovel, *Khaleej Times*, Feb. 29, 2008, available at <<http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/weekend/2008/Febr>> 10.5.2011.

¹⁶ Faith Merino, *Adoption and Surrogate Pregnancy*, Info base Publishing, U.S.A. (2010), p.20.

Surrogacy can again be classified into two types i.e. *commercial surrogacy* and *altruistic surrogacy* depending upon the financial transactions and relationships involved between the surrogate mother and commissioning parents. *Commercial surrogacy* refers to arrangements which include payment of money or other benefits to the surrogate mother and, in some cases, her agents.

Altruistic surrogacy refers to less formal arrangements between friends and relatives which involve no financial reward for the surrogate mother. However, the distinction between *commercial* and *altruistic* surrogacy can be blurred because *altruistic* surrogacy may still involve payment of medical and ‘out of pocket’ expenses. According to Meggitt, every woman involved in surrogacy is motivated by altruism, although some are paid¹⁷.

Further, it is argued that money alone is insufficient to motivate a woman to become a mother in a surrogacy arrangement, and paid surrogacy just —perverts woman’s altruism. The procedure of surrogacy involves the use of genetic material of the intended father or mother or surrogate mother and hence depending upon such use the surrogacy can be classified into two main types such as Traditional and Gestational Surrogacy.

3.5.1. TRADITIONAL SURROGACY OR PARTIAL SURROGACY

Traditional surrogacy is the most widely used method of surrogate pregnancy, as well as the most historically prevalent. Before the era of assisted reproductive technology and IVF, traditional surrogacy was the only form of surrogacy available.

However this method was used in the ancient cultures and communities without the application of technology. The husband of the infertile woman would have access to another woman and after the birth of the child, the woman would hand over the child to the husband and his wife.

The modern science and technology has made it possible for procuring a biological child with the help of another woman without sexual intercourse. In this process the woman is artificially inseminated with the semen of the husband of the ‘genetic couple’. Because it is her own egg that is being fertilized, the surrogate mother is genetically related to the foetus that she conceives. Therefore, any resulting child is genetically related to the male partner of the ‘commissioning couple’ but not the female partner.

¹⁷ Meggitt, —Lessons to be Learnt in Parallels Between Adoption and Surrogacy, *Policy Issues Forum*, (1991), p. 12, available at <210.8.42.131/documents/explore/Research Publications/.pdf> Visited on 10.5.2011.

Thus it is also known as *partial surrogacy* or *natural surrogacy*, as the surrogate mother contributes genetic material to the resulting child and gives birth to it as her own child. Typically, insemination is performed by a doctor within a clinical setting, although some centers may perform it in the surrogate's homes based on the belief that the surrogate's comfort level should be respected.

During this time, the surrogate mother agrees to refrain from sexual intercourse with any man, including her husband if she is married, from the point of signing the contract until a pregnancy is confirmed and the entire process which can take up to an year. Since the surrogate mother will be the genetic mother of the child conceived, traditional surrogacy presents a unique opportunity for contracting couples to choose the genetic heritage of their child—an opportunity that is not afforded to adoptive parents.

Often, this means contracting couples can specify phenotypic characteristics that they desire in a surrogate mother and can screen for undesirable traits, such as a genetic history of mental illness or disease. Many couples also look for a surrogate that resembles either of them.

When a surrogate is selected, she will be medically evaluated and tested for HIV as well as other venereal diseases. In some cases, the surrogate's husband is also tested for such diseases. When the surrogate has met contractual requirements for physical and mental fitness, she will be inseminated when fertile. Traditional surrogacy or partial surrogacy, though complicated by ethical uncertainty over the relationship between biological relatedness and kinship bonds, remains the most popular form of surrogacy in the world due to its high success rates and its low fees.

3.5.2.GESTATIONAL SURROGACY

Gestational surrogacy is preferred by couples who desire a biological connection to their child, assuming the husband and/or wife have viable gametes. Gestational surrogacy, is defined as the treatment in which the gametes of the genetic couple, commissioning couple or intended parents are used to produce embryos by the process of *in vitro* fertilization (IVF).

These embryos are subsequently transferred to a woman who has agreed to act as a host for these embryos. In this case, the ‘surrogate host’ is therefore genetically unrelated to any child that may be born as a result of this arrangement. Thus it is also known as *total surrogacy* or *full surrogacy* because the foreign genetic material is implanted into a woman who gestates the child for another couple who are the genetic parents.

In most cases, the contracting couple supplies the ova and sperm, which means the child conceived will be biologically related to them. However, in the event that one or both members of the contracting couple do not have viable gametes, the process may require donor eggs or sperm. Thus, in a gestational surrogacy, minimum three adults, in some cases four and in extreme cases five adults may be involved in the conception of a child.

Due to the lower success rates and the number of individuals involved, gestational surrogacy is often more expensive than traditional surrogacy. In an interview, Helena Ragone⁶⁶, a Director of one surrogacy center, referred to gestational surrogacy and IVF procedures as a —rip-off that simply prolongs the couple’s infertility while charging them outrageous sums of money per attempt. According to the U.S. Department of Health and Human Services (HHS), in 2004 the success rate per cycle at the average fertility clinic was 33.7 percent, by using non-frozen, non-donor eggs and embryos.

It is to be noted that there are only two major forms of surrogacy all over the world, i.e. Traditional Surrogacy and Gestational Surrogacy. Both these forms of surrogacy have their own merits and demerits due to the differences in the procedure involved and the expenses incurred. Regarding the acceptability of these two forms of surrogacy there are divergent opinions all over the world. In some countries, such as India, traditional surrogacy is considered highly a taboo, while in others, such as China, traditional surrogacy is the only legal surrogacy arrangement. In certain countries like Israel and Ukraine, both the forms of surrogacy are allowed . Depending upon the type of surrogacy used, the methods of surrogate parenting may also differ.

3.6.ASSISTED HUMAN REPRODUCTIVE TECHNOLOGY

The technological advancements in the field of human reproduction and medical science helped to develop various methods such as Artificial Insemination, In-vitro Fertilization, Surrogacy, etc¹⁸, for assisting a couple to beget a genetically related child. These technologies are collectively known as Assisted Human Reproductive Technologies or Artificial Human Reproductive Technologies¹⁹.

These technologies have helped couples and individuals to overcome obstacles to reproduction arising from infertility, medical complications, and threat of harm to mother or child, personal choice, biological limitations of same-sex couples, death of a partner, and the risk of transmission of genetic diseases to the child .

¹⁸ John A. Robertson, —Assisted Reproductive Technology and the Family, 47 *Hastings Lawjournal*, 911 (1995-1996).

¹⁹ Lars Noah, —Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovationl, 55 *Florida Law Review*, 603 (2003), at p.608.

CHAPTER-4

LEGAL ETHICAL & MORAL ISSUES

4.1.LEGAL ISSUES OF SURROGACY

Surrogacy has proved to be a boon for infertile couples. At the same time the increasing use of this technology has also led to various controversies and conflicting legal issues. These conflicts have at times erupted into a fierce debate over the legality of surrogacy. A discussion on this debate is necessary in order to understand the arguments underlying surrogacy. Further, since the controversy surrounding surrogacy, has been brought to limelight by the leading surrogacy cases all over the world as well as arguments made by legal scholars and commentators, such a discussion is important in determining how surrogacy should be dealt with by the legal systems in different countries in future . Most of the criticisms against surrogacy are based on various ethical, moral, religious and legal grounds.

Admittedly, the influence of ethics, morality and religious practices cannot be ruled out in a legal discussion, as the ethics and morality have played an important role in shaping the societies attitude towards legal issues as well as the foundation of most of the legal systems of the world.

The moral, ethical and religious objections to surrogacy are based on the premise that life is a creation of God and human beings should not attempt to play God by interfering in the natural processes. Another serious objection in this regard is the fact that surrogacy procedure involves repeated trials which use either male or female genetic material or the human embryo. The wastage of human embryo is criticized as similar to murder, because according to some scholars human life begins at fertilization.

The major legal objection to surrogacy strikes at the very root of the procedure of surrogacy which is due to the need and requirement of a woman to act as a surrogate. Various scholars have criticized surrogate motherhood, as it presents intolerable risks to women, including physical risks, psychological risks, and symbolic risks such as objectification and commodification.

Carl Schneider points out that —some surrogate mothers will become sick or even die²⁰. Some commentators assert that the chances that the surrogate will be psychologically harmed by the process are very high, analogizing it to the psychological harms felt by birth mothers giving children up for adoption. Some surrogates do regret their decision to bear a child for another couple, as is evidenced by their decision to try to keep the child²¹.

Further many critics of surrogacy have focused on the notion that these arrangements reduce women to the value of their wombs. Such a warning was given by both the *Royal Commission* and the *Quebec Council for the Status of Women in Canada*, which suggested that reproductive technologies risk fragmenting the reproductive process and alienating women from their own reproductive capacities²².

This is because the procedure of surrogacy separates motherhood as gestational, genetic and intended motherhood. Moreover, once a woman has agreed to be a surrogate mother, she has to follow all the terms and conditions of the contract during the entire process and more importantly she has to relinquish all her rights over the child after its birth. It is claimed that the entire process of reproduction is an inherent part of a women's existence and that transferring a child to someone else upon its birth is unnatural and psychologically damaging.

The symbolic harm posed by surrogacy to society is that surrogacy may be characterized as baby selling, a practice that is totally against a civilized society. Some scholars argue that surrogacy treats children as commodities that can be bought or sold for a price. Others contend that surrogacy should be prohibited for the same reasons that the sale of organs for transplantation is prohibited. It is also argued that agreeing to participate in a surrogacy process is equivalent to prostitution or adultery or slavery. Further it is argued that surrogacy will degrade the inherent human dignity of a woman.

A similar argument has been made that surrogacy should be banned because of the potential physical, psychological, and symbolic risks to the resulting children. It has been asserted that a

²⁰ Carl E. Schneider, —Surrogate Motherhood from the Perspective of Family Law, 13 *Harv. L.J. & Pub. Pol'y*, 125 (1990), at p. 125.

²¹ Scott B. Rae, —Parental Rights and the Definition of Motherhood in Surrogate Motherhood, *S. Cal. Rev. L & Women's Stud.* 219 (1994), at p.242.

²² Rakhi Ruparelia, —Giving Away the 'Gift of Life': Surrogacy and the Canadian Assisted Human Reproduction Act, 23 *Canadian Journal of Family Law*, 11 (2007), at p.26

surrogate, who will be carrying a child, that she will not later rear, will lie about her health or will not take proper care during pregnancy because she will not care about the subsequent condition of the child. In addition to the risks that the surrogate mother herself may present to the child, commentators arguing against surrogacy also allege that the child may be harmed by parents who may not have undergone previous screening with respect to their suitability for parenting²³.

Another major criticism which cannot be ruled out is that a surrogate child may suffer great psychological harm when the child comes to know about its parentage or origin. The critics also point out that the symbolic risk to the child due to surrogacy genetically related to the child²⁴. Thus surrogacy is one of the hotly contested technological advancement in present times having a grave impact over the basic human rights. The various contentious and conflicting issues raised by surrogacy pose a daunting challenge to the courts as well as to the legislatures and policy makers. The manner in which these conflicts will be answered would have a profound effect on the way in which the society would view the relationship between parent and child. It would ultimately have far-reaching consequences on the reality of the relationship between parents and children of the future and the power of the state to regulate that relationship.

4.2.COMMERCIAL SURROGACY

Where the surrogate mother is paid over and above the necessary medical expenses. This usually happens when the surrogate mother is not related to the mother. The concept of commercial surrogacy is not a new practice in India. The application of this practice could be found in ancient and historic times. The Hindu mythology shows instances of surrogacy in the society. In Bhagwat Purana it is told that lord Vishnu heard the prayers of Vasudev for preventing Kansa not to kill her new born son. Lord Vishnu after hearing the prayers of Vasudev transferred the embryo from Deviki's womb to Rohini's womb.

In mahabarat, Ghandhari did not give birth to any of her children instead a semi solid substance was divided by Vyas Maharishi into 10 pieces and planted them in different containers. Trithankar, Mahavira, the key (Dr.Lakshmi T and Rajeshkumar S , 2018.)Figures of the Jain Mythology was

²³ Lori B. Andrews, —Surrogate Motherhood: The Challenge for Feminists, 16 *Law Medicine & Health Care* 72 (1988), pp.80-81.

²⁴ Irma S. Russell, —Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising From Surrogacy Contracts, 27 *Journal of Family Law*, 596 (1988 /1989).

conceived and had been exchanged starting with one ladies' womb then onto the next one's.. Devananda, spouse of a Brahmin named Rishabdeva imagined him. The divine beings, shrewdly, exchanged the fetus to the womb of Trishala.

India's first IVF baby, Kanupriya, nom de plume Durga, was conceived 67 days after the fact on October 3, 1978, through the endeavors of Dr. Subhas Mukherjee and his two associates in Kolkata. The birth of baby Kanupriya (otherwise called Durga), through the novel method was set apart by gigantic debate. As of late the condition of surrogacy in India is that it is a boon to infertile couples and has been a torrent of blended data and perplexity. From one perspective, a lot of VIPs in India are having babies through surrogacy.

By and large, in India does not have any enforceable laws set up with regards to the surrogacy procedure. Surrogacy was made legitimate in India in 2002, and with the law came rules from the India Council of Medical Research.

Though the general presumption with respect to commercial surrogacy is as to the boon to infertile couples, there is additionally no law to guarantee appointing guardians have lawful rights to a youngster; a surrogate mother can keep the infant she brings forth and be well inside her rights. And there is no law that guarantees an infant conceived by means of surrogacy has a nationality. But the concept of commercial surrogacy has faced various challenges which include the case of Baby Manji Vs. Union of India and Balaz Vs. India

4.3.ALTRUSTIC SURROGACY

Where the surrogate mother receives no financial rewards for her pregnancy or the relinquishment of the child to the genetic parents except necessary medical expenses. This usually happens when the surrogate mother is a relative. This is when the surrogate is paid only the necessary pregnancy related expenses and at time nothing at all. Surrogate does not receive compensation for her services beyond reimbursement for medical costs and other reasonable pregnancy related expenses.

This procedure is legal in several countries including India, due to excellent medical infrastructure, high international demand and ready availability of poor surrogates.

4.4.PROBLEM IN ENFORCEABILITY OF SURROGACY

The question whether surrogacy contracts should be enforced is one of the most controversial issues in the contemporary times²⁵. The opponents of surrogacy contracts argue that if surrogacy contracts are made enforceable it would lead to potential exploitation of the surrogate⁷⁵, the commodification of women²⁶ and children²⁷, and promote positive eugenics, etc. The supporters on the other hand argue that, if surrogacy contracts are made unenforceable, it would undermine the woman's ability to contract freely for the use of her body²⁸. Moreover making a surrogacy contract enforceable would not lead to exploitation, slavery, baby selling and commodification as argued by the critics; but it would help to protect the rights and interest of parties to such contracts by providing them an opportunity to enforce the obligations. The courts all over the world have also discussed the issue of legality of surrogacy contracts. For example, the first landmark surrogacy case of *Baby M* raised the question regarding the legality of surrogacy contracts²⁹. Thereafter, this issue has been discussed in a number of cases in various countries. There is however no consensus in the judicial decisions regarding the legality of such contracts. The courts

²⁵ Molly J. Walker Wilson, "Pre-commitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity", 31 *Journal of Legislation*, 329 (2004-2005), at pp.329-330.

²⁶Margaret Jane Radin, "Reflections of Objectification", 65 *South California Law Review*, 341(1991), at p.351.

²⁷ Lori B. Andrews, "Surrogate Motherhood: The Challenge for Feminists", 16 *Law Medicine & Health Care* 72 (1988), at p.76; and Ruth Macklin, "Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis", 16 *Law Medicine and Health Care* 57 (1988), at p.60

²⁸ *In re Baby M*, 537 A.2d 1227, 109 N.J. 396.

²⁹ In this case, in 1987, New Jersey Superior Court Judge Harvey R. Sorkow formally validated the surrogacy contract and awarded custody of Baby M to William Sterns (intended father) under a "best interest of the child analysis". On February 3, 1988, however, the Supreme Court of New Jersey, led by Chief Justice Robert Wilentz, invalidated surrogacy contracts as against public policy but *indicta* affirmed the trial court's use of a "best interest of the child" analysis and remanded the case to family court. On remand, the lower court awarded the custody to Bill and Betsy (intended parents) and Mary Beth (surrogate mother) was given visitation rights. See, <http://en.wikipedia.org/wiki/Baby_M> 10.6.2012.

in certain countries have held such contracts as valid, while in some other countries the courts have held such contracts as invalid. Yet in some other countries the courts have validated only altruistic surrogacy contracts and invalidated all commercial surrogacy contracts. The legislations in different countries have also adopted diverse approaches with respect to the legality of surrogacy contracts. In India, there is no direct legal provision dealing with surrogacy contracts. In the absence of such legal provision, the general laws regulating commercial contracts i.e. The Indian Contract Act, 1872 can be applied to such contracts. According to Indian Contract Act, all contracts which satisfy the essential ingredients of a valid contract are legal and enforceable. As stated above, a surrogacy contract satisfies all the essentials of a valid contract. However various authors have pointed out that though surrogacy contract satisfies all the essentials of valid contract, such contracts are still illegal and should not be enforced. Most of the arguments against surrogacy contracts are based on legal, ethical and moral considerations. Some of the arguments are specifically against commercial surrogacy. Therefore, in order to protect the interest of the parties in a surrogacy contract, it is essential to determine whether such contracts are legal or illegal.

4.5.ETHICAL ISSUES IN GENERAL-

It generates the family pressure on pure women to offer their wombs for a price.

- Majority of the women becoming surrogates are extremely vulnerable due to poverty, lack of financial resources, low educational levels. For them the financial gain is the key factor. This makes their economic exploitation much easier for the agents for commissioning parents.
- The surrogates often face the dilemma that being a surrogate is socially unacceptable, when they frankly accept monetary consideration. So they tell their neighbours that they gave away their child, or the baby died .
- As the surrogacy involves implantation of multiple foetuses, the unwanted foetus is aborted during the course of development. The misuse of PNDT in the process can eliminate the female foetus resulting into imbalance of sex ratio in the country.

- In other cases the commissioning parents have refused to accept the child with the deformity. In many cases, the caesarean section has to be performed. For such surgery the consent of surrogate mother is to be obtained. Her refusal may imperil the life of the child.
- Confusion exists where a surrogate mother fails to take standard care and precaution during pregnancy as a result of which harm is caused to the foetus. The high aspirations of the intending parents are ruined. It also involves the issues of children's right to information about the identity of their parents.

4.6.METHOD OF SURROGATE PARENTING

There are mainly three methods of surrogate parenting. The first method is the artificial insemination method which is the traditional method and includes three steps. In the first step, the surrogate mother is artificially inseminated with the biological father's sperm. In the second step, the surrogate mother carries the foetus in her uterus for nine months and gives birth to the child. Lastly, the surrogate mother terminates all parental rights over the child and gives it to the biological or adopting father for his custody or adoption. This procedure is commonly known as traditional surrogacy³⁰. This method is normally used in cases where the wife is infertile and the husband is fertile. The second method of surrogate parenting is in-vitro fertilization. It involves the following five steps.

Firstly, a fertile couple desiring a child gives an egg and semen to a doctor.

Secondly, the doctor fertilizes the egg with the sperm in that semen through in-vitro fertilization.

³⁰ Katharina Boele-Woelki, *Perspectives for the Unification and Harmonization of Family Law in Europe*, Intersentia, Oxford, U.K. (2003), p.414.

Thirdly, the fertilized egg is implanted in the surrogate mother's uterus.

Fourthly, the surrogate mother carries the foetus in her uterus for nine months and gives birth to the child.

Lastly, the surrogate mother terminates all parental rights over the child and gives it to the couple who donated the egg and semen.

This method is used when the wife has an abnormality in her reproductive organs that prevents her egg from being fertilized by her husband's sperm or when the wife is unable to carry a child to term because she has an abnormality in her uterus. If the wife is able to conceive, but unable to carry the gestating foetus, the embryo transfer methods allow transfer of the naturally fertilized egg from the biological mother's womb to the surrogate mother's womb. This method is known as gestational surrogacy³¹. The third method of surrogate parenting is a modification of the in-vitro fertilization method and known as donor surrogacy, which involves five steps.

The first four steps are identical to that of in-vitro fertilization method. The fifth step, however, differs. Instead of giving the child to the couple who donated the semen and egg, the surrogate mother gives the child to adoptive parents who are not biologically related to the child. There have been no reported incidents of the use of this method, but the method could be utilized in a situation in which both the husband and wife are infertile but wish to have a child with specific traits³². Although the above-mentioned three methods of surrogate parenting involve different medical techniques, and although the biological relationship of the couple receiving custody of the child may vary depending upon the method used, the legal consequences of contracting to perform each method are surprisingly similar. The methods are treated very much the same because most

³¹ Lewis Vaughn, *Bioethics: Principles, Issues, and Cases*, Oxford University Press, U.K. (2012), pp.355-57.

³² Timothy F. Murphy, —Selecting the Traits of Children Prior to Birthl, *Virtual Mentor*, Vol.14, No.2, 158-161 (February 2012).

countries presume that the woman who gives birth to a child is the natural, biological mother of the child.

Thus, depending on the infertility problem involved, either Artificial Insemination or IVF may be used in a surrogacy situation. For surrogacy to be successful, three conditions are to be satisfied. Firstly, the parties to the surrogacy process must be able to arrange for the conception and birth of a child. Secondly, before actually doing so, the parties must reach an agreement defining what their respective rights and duties will be, both before and after the child is born. Thirdly, the parties must have some means by which they can enforce these rights and duties so as to ensure performance.

To begin this process, a married couple identifies and contacts with a woman who is willing to act as a surrogate mother for their child. This may be as simple as convincing a family member, such as the wife's sister, or mother-in-law, husband's sister or a friend to undertake the responsibility. Increasingly, however, it is more common for a couple to hire a lawyer or private agency that specializes in locating and screening a woman who would be willing to serve as a surrogate.

The parties thereafter negotiate on the terms of their relationship. It may be an informal verbal agreement in which the surrogate agrees to serve gratuitously. More often, however a lawyer drafts a written contract in which the couple agrees to pay for the surrogate's medical expenses during pregnancy. Usually, though not always, the couple will also agree to pay the surrogate a fee for carrying the child. For her part, the surrogate generally agrees to be inseminated, to not abort the child, to seek and accept adequate medical care, and most importantly, to terminate her parental rights upon the birth of the child.

If the surrogate woman is successful in conceiving a child and carrying it to term, the contracting husband will, upon birth, acknowledge his legal paternity of the child. The surrogate then relinquishes all her parental rights over the child, after which the couple pays her. The contracting husband, as the legal father, obtains custody of the child, and the wife as stepmother, may initiate an adoption action in order to declare herself as the child's legal mother³³.

³³ Thomas S. Bradley, —Prohibiting Payments to Surrogate Mothers: Lovers Labour Lost and the Constitutional Right of Privacy, 20 *J. Marshall L. Rev.* 715 (1986-1987), at p.718.
88*Supra* n.19 at p.467

In practice, a surrogate mother typically receives a fee or honorarium from the sperm donor for her services. Ordinarily, the donor also pays for all the expenses of the procedure. There can be many variations in the terms of surrogate parenting agreements (the enforceability of which have been discussed in Chapter VI), but they center on a promise that the surrogate-mother will relinquish the child to the biological father or mother immediately after birth, renouncing all rights over the child and/or consenting to adoption. Other common provisions provide for genetic screening, medical and psychiatric evaluation, cooperation with medical directions during pregnancy, submission to amniocentesis if medically appropriate, or abstention from alcohol or other possible teratogens during pregnancy. Some persons or organizations providing surrogate mother intermediary services prefer to use married women who have had at least one healthy child. Such a requirement necessitates additional contractual provisions ensuring that the surrogate's husband will relinquish any rights he may have in the child and that adequate blood testing will be performed to confirm that the sperm donor is the biological father.

Thus there are various methods of surrogate parenting depending upon the type of surrogacy involved. The couples or individuals can select the types of surrogacy as well as method of surrogate parenting depending upon their needs and convenience. It is to be noted that when compared to adoption as well as any other method of ART, the method of surrogacy offers various advantages to the couples or individuals who wish to beget a child.

4.7.SURROGACY AND OTHER FORMS OF ART

Procreation as discussed earlier is a fundamental human drive. The image of happy parents holding a healthy baby pervades the human mind and the society³⁴.

Hence the greatest motivation to use surrogacy is that it will help a couple to have a genetically related child. Thus a surrogacy arrangement is a boon to childless couples as it gives them the greatest gift of life, i.e. a child. It is pertinent to point out here that the impact of childlessness on

³⁴ Michelle Sargent, —Regulating Egg Donation: A Comparative Analysis of Reproductive Technologies in the United States and United Kingdom, *Michigan Journal of Public Affairs*, Vol. 4, 1(2007).

married couples is very grave. Surrogacy thus provides an opportunity to such couples to beget a child and gives them satisfaction and happiness. The major benefits of surrogacy when compared to other forms of ART can be classified as follows:

i) Genetic Link

The most important benefit of surrogacy is that it helps the couple to beget a child genetically related to at least one of the parent. Thus it helps to fulfill the natural instinct and desire to have a biological child. The urge to procreate, usually involves a desire to transmit one's own genetic heritage to the child and to participate in gestation and parturition. Thus it offers greater advantage to childless couples as compared to the traditional option of adoption.

ii) Prevention of Hereditary Diseases

The second major advantage of surrogacy is that by using this method an individual can prevent transmission of hereditary diseases to his biological child. The individuals who have a history of genetic illness or who have given birth to children with genetic diseases can with the help of genetic screening find out whether they might transfer a harmful trait to their offspring. In cases where the individuals are likely to transmit the harmful traits to their offspring, they may prevent such transmission by selecting a surrogate mother and using genetic material from a male donor or female donor as required.

iii) To Overcome Medical Risks

Surrogacy is the only option available to couples who are fertile but unable to beget a child due to risk factors involved in pregnancy. It is to be noted that some pregnancies involve high risks due to medical problems of the mother and could pose serious complications of premature births leading to deformities in the child or sometimes, such pregnancies may cause danger either to the life of the mother or child, or both³⁵. So also in case of women suffering from AIDS, conceiving

³⁵ Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues*, Harvard University Press, U.S.A. (1990), p.31.

a child may be risky and is also dangerous to the future child³⁶. In these circumstances surrogacy is the best option available for the couple to beget a child. Likewise, it is also the best option in case of a woman having a disability such that it is difficult to carry a child or in cases where woman is suffering from allergic reactions .Surrogacy also offers hope to those couples who have crossed their age of natural Conception³⁷ and those who have undergone tubectomy or vasectomy.

iv) To satisfy the desire of Single, Divorced, Lesbians and Gay couples, etc.

Surrogacy arrangements make possible the creation of non-traditional families.

In modern times even single men and women, gays and lesbians couples may wish to beget and raise a child. The process of procreation involves the union of both male and female. But in cases of lesbian and gay couples as well as transgender couples, due to inherent biological reasons, they are unable to procreate naturally. So also single women/men, a divorced individual or in cases where one of the spouses has expired are also deprived of their right to procreate due to their societal conditions. In these situations surrogacy can be very useful to help these individuals to satisfy their natural craving for a child.

v) An option for individuals/couples with modern life style

Surrogacy can be used for begetting a child by those couples and individuals who are fertile and able to carry a child, but are unwilling to do so due to various reasons. The reasons can be their life style, career prospects, and profession³⁸.

(vi) To avoid problems related to infertility treatments

Surrogacy is not a treatment for infertility but it is an arrangement for begetting a child. Hence it can avoid the physical and mental sufferings caused to infertile couples due to the prolonged and sometimes unsuccessful infertility treatments. Thus the method of surrogacy offers new ways for infertile and other individuals/couples to become parents. It facilitates the pursuit of biological

³⁶ Lawrence O. Gostin, —A Civil Liberties Analysis of Surrogacy Arrangements, 16 *L.Med. & Health Care* 7-17 (1988), at p.9.

³⁷ Peter R. Brinsden, —Surrogacy, in Peter R. Brinsden (ed.), *Textbook of In - Vitro Fertilization and Assisted Reproduction*, Taylor & Francis Publication, U. K. (3rd edn. – 2005), p.394.

³⁸ M. Humphrey, *Families with a Difference: Varieties of Surrogate Parenthood*, Routledge, U.S.A.(1988), p.157.

parenthood and in many cases where couples/individuals have opted for surrogacy, it has brought enormous joy into their lives by helping them to beget a child which they never thought that they would have. It might be thought that such a miraculous procedure which creates new life and produces such happiness would be accepted by all without any objections. But it is not so. The practice of surrogacy is criticized and objected on various legal, ethical and social issues that pose severe challenges to the legal systems.

CHAPTER-5

NATIONAL AND INTERNATIONAL PERSPECTIVE OF SURROGACY

5.1.PROCREATION

Procreation is fundamental to the existence and continuation of any species. It is a natural desire and biological instinct of every creature to reproduce and to have an offspring. Among human beings not only the natural and biological instincts play a major role, but there are also strong psychological and social needs to have children. The social concepts of love, family, community and mortality strengthen the biological drive for genetic procreation³⁹. The importance of procreation as a whole derives from the genetic, biological, and social experiences that comprise it. Thus reproduction is a basic instinct that supplies societies with enough members who maintain and perpetuate the social order and who provide services for others. It also satisfies an individual's natural drive for sex and his or her continuity with nature and future generations. Reproduction fulfills cultural norms and individual goals about a good life, and many consider it the most important thing a person does with his or her life⁴⁰.

The beginning of family formation may be either marriage or parenthood or both. The positive element of the right to family planning and right to establish family is related to individuals and couples right to decide to have a child, i.e. it implicitly guarantees a right to procreate. The procreative right has a negative as well as a positive dimension. The narrow procreative right, which is a negative or —first Generation right, is linked to a bundle of fundamental negative rights regarding bodily integrity. The broader procreative right which is positive or —second generation right, is linked to economic and social rights (or entitlements) like rights to reproductive education and actual means to choose family size . Claims of procreative freedom logically extend to every aspect of reproduction ranging from conception, gestation and labor, and childrearing.

³⁹ Chantelle Washenfelder, —Regulating a Revolution: The Extent of Reproductive Rights in Canada,44 *Health Law Review*, Volume 12, No. 2, 44 (2004).

⁴⁰ John A. Robertson, —Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth,69 *Virginia Law Review*, 405 - 414 (1983), at p.405.

5.1.1. Right to Procreation: Meaning and Content

Procreation means a biological process by which women gives birth to a child. The *Webster's Dictionary* defines the term 'procreate' as —to produce (young); beget (offspring). To beget means, —To be the father of, to produce; cause. According to *Black's Law Dictionary* procreation means the generation of children. These definitions are equally vague, and do not explicitly reflect a contemplation of whether, or to what degree, a genetic link is required. According to Bruce L. Wilder, the term procreation includes, —deliberate actions by an individual, which lead to birth of a child, whom that individual intends to raise as his/her child from the time of birth to maturity, and to be legally bound as the child's parent, even when the genetic material was obtained by that individual from a source outside his/her body. The developments in modern medical science, has coined a new definition to procreation, which says, 'procreation is a reproductive process by which a person creates offspring who may or may not have genetic or biological ties to the intended parent or parents'. This expansive definition captures a full range of reproductive activity from coital reproduction to the sale of gametes to in-vitro fertilization and surrogacy arrangements. This definition says something new that the other definitions do not.

Firstly, it identifies procreation as a process. *Secondly*, it makes no pronouncements about how that process is initiated, how many people it may involve, or the body in which the future child is created. *Thirdly*, it announces that this process ends in the creation of offspring, but makes no statement about whether that offspring is in the form of an embryo, foetus or child. *Fourthly*, the definition does not require a genetic or biological link between the offspring and the person who gives birth because that presupposes a certain avenue of child creation and birth, which excludes the multiple ways in which children can be created and brought into the world. Thus this definition serves to recognize human artificial reproductive technologies, in its many forms and in its component parts, as a type of reproduction for which constitutional protection is warranted and include access to sexual and reproductive healthcare and autonomy in sexual and reproductive decision-making. These rights are human rights and are universal, indivisible, and undeniable. These rights are founded upon principles of human dignity and equality, and have been enshrined in international human rights documents. Reproductive rights embrace a bundle of core human rights, including the right to health, the right to be free from discrimination, the right to privacy,

the right not to be subjected to torture or ill-treatment, the right to determine the number and spacing of one's children, and the right to be free from sexual violence.

The *United Nations Programme of Action of the International Conference on Population and Development*, 1995 states that, 'reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents'⁴¹. Reproductive rights also include the right to the highest standards of sexual and reproductive healthcare.

Reproductive rights may include some or all of the following rights such as: the right to legal or safe abortion, the right to control one's reproductive functions, the right to quality reproductive healthcare, and the right to education and access in order to make reproductive choices free from coercion, discrimination, and violence. These rights may also be understood to include education about contraception and sexually transmitted infections, and freedom from coerced sterilization and contraception, protection from gender-based practices such as female genital cutting (FGC) and male genital mutilation (MGM). Though there are numerous references regarding the term 'reproductive rights', it has not yet been defined by any international human rights instruments. However, Art. 23 (1) (b) of the *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 2006⁴² entails the right to reproductive health and education. At the regional level,

Art. 14 of *Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa*, 2003⁴³ expressly articulates women's reproductive rights as human rights.

⁴¹ P.K. Das, *Protection of Women from Domestic Violence*, Universal Law Publishing Co. Pvt. Ltd., New Delhi (4th edn. -2011), p.280.

⁴² The text was adopted by the United Nations General Assembly on 13 December 2006, and opened for signature on 30 March 2007. Following ratification by the 20th party, it came into force on 3 May 2008.

⁴³ Adopted by the African Union on 11 July 2003, available at <<http://www.achpr.org>> 6.5.2010.

Nonetheless, the content and scope of reproductive rights remains controversial. There are two views on this matter. Scholars supporting the narrow view affirm that reproductive rights rest only on the recognition of reproductive choice, and argue that binding reproductive rights are limited to Art. 16 (1) (e) of *Convention on the Elimination of all forms of Discrimination against Women*, 1979⁴⁴ which safeguards the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, as well as to attain the highest standard of sexual and reproductive health.

This relatively restricted view on reproductive rights includes as its core elements: the right to found a family⁴⁴; the right to decide, freely and responsibly, the number and spacing of one's children⁴⁵; the right to access to family planning information and education; and the right to access to family planning methods and services. Supporters of this narrow view do not exclude the possibility of other rights to be related to reproductive freedom or choice, insofar as the violation of that particular right affects reproduction. However, from this perspective, these general human rights are not constitutive *per se* of reproductive rights. Regarding the second and wider view, reproductive rights _embrace certain human rights that are already recognized in national laws, international human rights documents, and other relevant UN consensus documents based on the recognition of reproductive choice in Art. 16 of CEDAW. Scholars and organizations supporting this view identify 12 rights within this group, viz. the right to life, the right to health, the right to personal freedom, security, and integrity, the right to be free of sexual and gender violence, the right to privacy, the right to equality and nondiscrimination, the right to consent to marriage and equality in marriage, the right to employment and social security including the right to legal protection of maternity, the right to work in an environment free of sexual harassment, the right to non-discrimination on the grounds of pregnancy both in and out of the workplace, the right to education and information, the right to be free from practices that harm women and girls, and the right to benefit from scientific progress. Thus in short, right to reproduction means the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest

⁴⁴ CEDAW, Art.16; International Covenant on Civil and Political Rights, 1966 (hereinafter referred to as ICCPR), Art. 32.

⁴⁵ Art. 16 CEDAW, Art. 24 Convention of the Rights of the Child, 1989(hereinafter referred to asCRC), Art. 17 ICCPR, and Art. 12 ICESCR.

standard of sexual and reproductive health. In addition, it also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. The right to use appropriate health care the best opportunities to have healthy children is also included.

5.2. RIGHT TO PROCREATION VIS-À-VIS INTERNATIONAL LAW

Human rights are vital to individual's existence. They are the fundamental and inalienable rights, prerequisite to life as human beings⁴⁶. Human rights are moral, social, and political rights that concern respect and dignity associated with our lives as individuals and has their origin in natural law and in contemporary moral values.

The inclusion of human rights law as part of international law is a relatively recent development. However, it is universally accepted that the way a sovereign treats individuals - both its own citizens and aliens - is a matter of international concern⁴⁷.

The international community has established several instruments detailing the inalienable human rights. The various means to achieve or avoid procreation are viewed as integral to concepts of human dignity, personal identity and community.

The significance of reproductive rights is evident in its entrenchment in international law under four broad health-related categories, viz. (i) the right to found a family (ii) the right to decide the number and spacing of children (iii) the right to family planning information and services and (iv) the right to benefit from scientific advancement. The bundle of human rights provided in international law in various human right documents suggests the existence of a right to procreation and reproductive health.

The *United Nations Charter*, the *Universal Declaration of Human Rights* and other international agreements provide the framework for analyzing reproductive freedom as an international human right. The Charter reaffirms, —the faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to

⁴⁶ Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts*, Cambridge University Press, U.K. (2006).

⁴⁷ Berta E. Hernandez-Truyol, —To Bear or Not to Bear: Reproductive Freedom as an International Human Rightl, *37 Brooklyn Journal of International Law*, 309 (1991), at pp.321 –325.

promote social progress and better standards of life in larger freedom and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to employ international machinery for the promotion of the economic and social advancement of all people. The Charter imposes a solemn duty on United Nations to promote —universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion and it pledges to its member states to ensure these rights and freedoms. This reference to duty of member states is wide enough to cover a duty to ensure reproductive freedom to an individual especially a woman. Inspired by the Charter, the United Nations General Assembly has adopted a code of human rights comprising of both civil and political rights and social, economic and cultural rights in 1948, i.e. *Universal Declaration of Human Rights*. This Declaration is the mine from which other conventions as well as national constitutions protecting the human rights have been and are being quarried.

The Declaration proclaims that the recognition of inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 16 of UDHR states that, —Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. Family is the natural and fundamental group unit of society and is entitled to protection by society and the state. This right lays the foundation for the reproductive rights in UDHR. Article 12 which ensures the right to privacy and non-interference by others to every individual can be interpreted to include the individual's rights to determine the number and spacing of their children⁴⁸. Further, the rights such as right to information, health and education can also be interpreted to give protection to the rights to family-planning information and services. The right to benefit from advancements of science can be considered as the repository for the use of modern scientific technologies for the enjoyment of reproductive rights. Though, the Declaration is a legally non-binding instrument, it has gained considerable authority as a general guide to the content of fundamental rights and freedoms as understood by members of the United Nations. It is treated as important in providing a connecting link between different concepts of human rights in different parts of the world. The impact of

⁴⁸ *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3rd Sess., Supp. No.13, UN Doc A/810 (1948) 71 [UDHR]; Athena Liu, *Artificial Reproduction and Reproductive Rights*, Aldershot, Dartmouth Publishing Company, London (1991), p.27.

UDHR can be seen in various international documents adopted by the UN and its Specialized Agencies as well as Regional Human Rights instruments also.

5.2.1. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHT, 1966

The first binding international human right document is the *International Covenant on Civil and Political Rights*. The state parties to the Covenant have recognized that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic social and cultural right. Thus in keeping view of the obligations under the *Charter of the United Nations* to promote universal respect for and observance of, human rights and fundamental freedoms, the state parties have agreed, —to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Like the UDHR, in ICCPR also there is no express provision regarding the right to reproduction. But the provisions relating to right to family and privacy are considered as the foundation for reproductive rights in ICCPR. Article 23 of the ICCPR provides protection for the right to found a family. The Human Rights Committee, the adjudicative body for the enforcement of ICCPR, states that Art. 23 should be interpreted not only to protect the right to cohabit and procreate, but also as a codification of national obligations to enact non-discriminatory family-planning policies⁴⁹. The Covenant provides that no person shall be subjected to illegal or arbitrary interference into their right to privacy. This right can be interpreted as protecting family autonomy and the right to decide on the number and spacing of children. Further, Article 19(2) can be interpreted as protecting the rights to family planning information under the rubric of the freedoms of expression and information.

The interpretation of Article 23 provided by the Human Rights Committee confirms a positive right to non-discriminatory access to reproductive technologies. Thus, the ICCPR over and above

⁴⁹ Laura Shanner, —The Right to Procreate: When Rights Claims Have Gone Wrong!, 40 *Mc Gill Law Journal*, 823 (1995).

the UDHR provisions highlights the importance of personal autonomy and access to reproductive information.

The Human Rights Committee in *K.L. v. Peru*⁵⁰ held that, refusal to abort pregnancy in a circumstance that threatened a woman's health and had no chance of survival will violate the right to privacy under the Covenant. Forcing her to carry such pregnancy to a term constituted a cruel, inhuman and degrading treatment.

Though there is no specific discussion on reproductive right in this case, indeed this case is an example of using this Covenant for giving effect to civil and political rights in cases where violation of reproductive rights are involved.

5.2.2.CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMAN

This Convention was adopted in 1979 by the General Assembly of the UN. CEDAW addresses specific issues of discrimination affecting women as well as social, political, religious and other practices that amount to or lead to discriminations against women. With regard to women's reproductive rights, Article 12 of CEDAW states as follows:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this Article, State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

The Committee on the Elimination of All Forms of Discrimination against Women has made it very clear in its General Recommendation No. 24/90 that Article 12 must be interpreted broadly. The Committee recommended that policies related to reproductive issues should be undertaken from —the perspective of women's need or, as it has been developed in the literature, adopting a

⁵⁰ *K. L. v. Peru*, Comm. No 1153/2003, paras. 2.1-2.6, UN Doc. CCPR/C/85/D/1153/2003 (Nov. 22,2005).

—women-centered approach. This is the very central notion in the way reproductive rights are approached today.

Under CEDAW, it is the States responsibility to prove that they have done everything they could to ensure —access to the range of services which are related to family planning, in particular, and to sexual and reproductive health in general. On a more broad level, the Committee recognized that women’s health – including reproductive rights – was central to the promotion of women’s well-being. Article 12 offers clear and strong protection of women’s reproductive rights through the recognition of their right to health care.

5.2.3.INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTUAL RIGHT AND INTERNATIONAL CONFERENCE

The state parties to this Covenant undertake to take steps, individually or through international economic and technical assistance and co-operation, to the maximum of its available resources for achieving progressively the full realization of the rights recognized in the present Covenant. The state parties are also required to guarantee that the rights recognized in this Covenant will be exercised without any discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of the individuals in question.

The Covenant recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This right includes the right to treatment for maternal and infant mortality and the promotion of children’s health within the rights to medical treatment for illness. According to Pecker, the right to decide the number and spacing of children and the right to access family-planning services has been found to exist in this right⁵¹. Further, the right to education and personal development mentioned in this Covenant can be interpreted to include one of the element of reproductive right i.e. right to information relating to family planning, access to technologies and other relevant information’s related to reproduction. This Covenant also confers a right to enjoy the benefits of scientific progress and its application to everyone. This right is having a

⁵¹ Corinne A.A. Packer, —The Right to Reproductive Choice, Abo Arkademi University Institute for Human Rights Publication, Finland (1996), p. 38.

significant impact over reproductive rights, because with the help of this right an individual can take recourse to modern scientific technologies for reproduction.

5.2.4.REPRODUCTIVE RIGHT AND INTERNATIONAL CONFERENCES

The reproductive rights were specifically addressed also in various international human rights conferences. The first time during which reproductive rights were recognized internationally as human rights was at the International Human Rights Conference in Teheran held in 1968. At this time, the international community was primarily concerned by the rapid growth of population. It associated, quite exclusively, development and promotion of human rights with birth control in developing countries. As a consequence, when recognizing that —parents have a basic human right to decide freely and responsibly on the number and spacing of their children, the Final Act of the Teheran Conference’s aim was to put pressure on developing countries to control their birth rate by using contraceptive means. It did not recognize an individual right to reproductive autonomy. At the Bucharest World Population Conference held in 1974, there was an important opposition movement from developing countries who denounced population growth control as a device used by the West for hidden economic purposes. Following difficult negotiations, it was finally agreed that population limitation was an important element in development. The right to decide freely and responsibly on the number and spacing of their children was extended to —couples and individuals, a position that is still endorsed today by most of the stakeholders involved in reproductive issues.

The position was endorsed a year later at the 1975 Women’s Conference – that officially launched the women’s rights movement – was much more clearly women oriented.

It used the notion of bodily integrity and control as a reference point to interpret the right to decide on the number and spacing of children. In 1984 in Mexico, circumstances had changed again since the previous conference on world population. The US made a complete U-turn from their population growth control position following the appearance of a powerful ‘right-life’ movement. While contraception, abortion and birth control techniques were suddenly rejected by the US, it also consecrated reproductive rights as individual rights⁵².

⁵² Centre for the Study of Global Ethics, —Background Report on Women’s Reproductive Rights, p.6, available at <info.worldbank.org> 10.3.2011.

The explicit reference to reproductive rights is conspicuously absent in major international human rights instruments, such as the Universal Declaration for Human Rights and the International Covenant on Economic, Social and Cultural Rights. The Convention on the Elimination of Discrimination against Women and other international conferences only provides for fragmented recognition of reproductive rights by singling out issues of family planning and maternal health. Against this background, the pronouncements at subsequent three international conferences in the 1990's have been said to mark milestones in the recognition of reproductive health rights⁵³.

The first of these conferences, viz. the International Conference on Human Rights held in Vienna, Austria, in 1993, while reiterating on the universality, interdependence and interrelatedness of human rights, reaffirmed that the rights of women are an inalienable, integral and indivisible part of human rights. The conference among other things emphasized that human rights entailed a woman's right to self determination and equality, and freedom from violence and exploitation.

The conference also emphasized the need for women to enjoy the highest standard of health throughout their life span. This set the ground for more self-determination oriented pronouncements which were made at the 1994 International Conference on Population and Development and the 1995 Fourth World Conference of Women held in Beijing.

The ICPD conference extended women's reproductive rights from merely serving the goals of population control to the respect for the rights of women as autonomous individuals with the capacity to decide on matters pertaining to their sexuality within their social, economic and political contexts. Remarkably, the Beijing Conference re-emphasized a holistic approach in defining reproductive rights. It underscored the point that issues of reproductive health should not be viewed in isolation from the underlying social, economic and other conditions.

⁵³ Grace Tikambenji Malera, —Women, Reproductive Rights and HIV/AIDS: The Value of the African Charter Protocoll, p.128, available at <<http://www.agenda.org.za/dmdocuments>> 10.3.2011.

5.3. RIGHT TO PROCREATION WITH REFERENCE TO NATIONAL LAWS

The right to reproductive freedom is recognized and protected in virtually every corner of the world. Domestic and international tribunals have increasingly found that the right to privacy includes such a right. For example, in *Annapurna Rana v. Ambika Rajya Laxmi Rana and others*,⁵⁴, the Nepal Supreme Court held that women's right to control over their own body is a part of fundamental right to privacy. Guarantee of fundamental rights to freedom of speech and information are extra advantages in protecting reproductive rights and which can be invoked to protect the right of all persons to access to full information on the benefits, risks and effectiveness of all methods of fertility regulation, in order that any decision they take on such matters are made with full, free and informed consent.

In United States, the Supreme Court recognized the fundamental right to procreate nearly sixty years ago. The Court took the first step towards affording constitutional protection to the right in its 1942 decision, in *Skinner v. Oklahoma*⁵⁵.

In *Skinner*, the Court identified the right to procreate as —one of the basic civil rights of man and invalidated a state statute requiring the sterilization of habitual offenders as an unconstitutional infringement on that right. The Court explained that, because —marriage and procreation are fundamental to the very existence and survival of the race, forced sterilization of criminal offenders violates the Equal Protection Clause of the Fourteenth Amendment. Additionally, the Court required strict scrutiny of governmental attempts to impose involuntary sterilization⁵⁶. In 1965, the Court gave further protection to the right to control one's reproductive choices in *Griswold v. Connecticut*⁵⁷. *Griswold* established the fundamental right to

⁵⁴ *Annapurna Rana v. Ambika Rajya Laxmi Rana and others*, *Nepal Kanoon Patrika (N.K.P.)* 2055 (1998), Vol. 8, p. 476.

⁵⁵ 316 U.S. 535 (1942).

⁵⁶ *Skinner v. Oklahoma*, 316 U.S. 535 (1942), at p.541

⁵⁷ 381 U.S. 479 (1965).

privacy for married couples and stands as the first of a series of contraceptive cases that built upon *Skinner* to firmly establish procreation as a fundamental right.

Further, in *Eisenstadt v. Baird*⁵⁸, the Court noted that, for privacy to have any meaning, it must extend to individuals. Writing for the majority, Justice Brennan stated that —if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. The final case establishing the fundamental right to procreate is *Carey v. Population Services International, Inc*⁵⁹. In *Carey*, the Court followed the reasoning of *Eisenstadt* and expanded the right to contraceptive access and information to minors. The Court stated, —The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices regarding family and procreative autonomy/control.

In United Kingdom, the Human Rights Act, 1998 is the law which provides the legal framework for human rights. This Act incorporates European Convention for the Protection of Human Rights, 1950 into UK. It has adopted three major Articles such as Articles 8, 12 and 14 from ECHR which are the foundation for reproductive rights in European Union¹²². A close analysis of all these provisions in the Act suggest that there is a statutory right to reproduction and the state should not place unreasonable restrictions on people who wish to have children. In Canada, the right to reproduction is protected under the Canadian Charter of Rights and Freedoms. Sections 7 and 15 are wide enough to cover the various reproductive rights which are recognized under the international human rights law.

The interpretations given by Canadian courts to these Sections in various cases established a right to reproduction and procreative autonomy in Canada⁶⁰. This right to procreation that has been recognized and developed at international level as well domestic level finds much support in the Indian Constitution. The Constitution of India described as the conscience of the Nation and the cornerstone of the legal and judicial system came into effect on January 26, 1950.

⁵⁸ 405 U.S. 438 (1972).

⁵⁹ 431 U.S. 678 (1977).

⁶⁰ *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; *Winnipeg Child and Family Services v. G.(D.F.)*, [1997]3 S.C.R. 925; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Korn v. Potter*, (1996), 134 D.L.R. (4th) 437 (B.C.S.C.); *Brooks v. Canada Safeway*, [1989] 1 S.C.R 1219.

The Constitution doesn't provide any explicit provision for 'reproductive rights'. But it has wide scope for the materialization of this type of rights. Many Constitutional provisions can be invoked for this purpose. To begin with, the preamble comprises paramount objectives of the Constitution as to secure social, economic and political justice through protection of basic human rights⁶¹. It can be meant in a way that reproductive rights are also integral parts of the basic human rights and without their protection and promotion the paramount goal of social justice cannot be secured. The Fundamental Rights which are mentioned in Part III of the Constitution form the basis for incorporating a globally recognized reproductive rights framework into the Indian context. The key provisions for these purposes include, right to equality before the law and equal protection of the laws; prohibition of discrimination on the grounds of sex; protection of life and personal liberty - which the Court has interpreted to include the rights to human dignity, health, and privacy; and prohibition of trafficking in human beings. While interpreting these provisions the Courts have repeatedly stated that right to life —does not connote mere animal existence or continued drudgery through life, but rather, implies —a right to live with human dignity and —all that goes along with it, namely, the bare necessities of life.

The Judiciary in India has recognized the reproductive right of individuals as a basic right. In *B. K. Parthasarthi v. Government of Andhra Pradesh*⁶², the Andhra Pradesh High Court upheld —the right of reproductive autonomy of an individual as an aspect of his —right to privacy and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*⁶³, which characterized the right to reproduce as —one of the basic civil rights of man. The argument for the contention that right to procreation is recognized in India is further strengthened due to the fact that, the Indian judiciary has abstained from stating that the right to procreation is not a basic human right. In *Javed v. State of Haryana*⁶⁴, though the Supreme Court upheld the two living

⁶¹ The Constitution of India, 1949, Preamble. It provides that, —We the people of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic, Republic and to secure to all its citizens - justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation.

⁶² 2000 (1) A.L.D. 199 and 1999 (5) A.L.T. 715.

⁶³ 316 U.S. 535 (1942).

⁶⁴ 135 A.I.R. 2003 S.C. 3057.

children norm to debar a person from contesting a Panchayati *Supra* Raj election, it has not negated the contention that there is a right to procreation in India.

Article 21 also guarantees fundamental right to privacy that could be invoked to protect the right of individuals to reproductive health care information, education and services to a degree of privacy, and to confidentiality with regard to personal information given to service providers¹³⁸. Recently, the Supreme Court of India in *Suchita Srivastava & Another v. Chandigarh Administration*⁶⁵ has declared 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 procreation. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. In this case, the Court struck down the decision of the High Court to terminate the pregnancy of a mentally retarded woman against her will.

It can therefore be pointed out that right to procreation is one of the most fundamental and basic human right. However, a large section of individuals in the society are unable to enjoy this right and fulfill their dream for a biological child due to various barriers. The inability to beget a child has a very serious impact on the individuals and needs to be addressed properly.

5.4.SURROGACY AND LEGAL RESPONSE IN INDIA

The popularity of surrogacy as a means for begetting a genetically related child has increased tremendously all over the world. However facilities offered by the countries as well as the legal regulations of surrogacy are not uniform everywhere. In certain countries the cost of surrogacy arrangements is very high while in some countries the legal regulations are very strict and in others surrogacy practices are even banned. Therefore, the couples and individuals who wish to beget a child through surrogacy often search for countries which offer surrogacy at an affordable cost and with minimum legal complications. In this context, India is considered as the most favorable nation by foreigners to beget a child through surrogacy. This is because the cost of surrogacy arrangement in India is very low when compared to other countries.

⁶⁵(2009) 9 S.C.C. 1.

The Law Commission of India in its report points out that the surrogacy costs in India is about \$25000 to \$30000 which is around 1/3rd of the costs in developed countries like United States of America¹³⁸. The Centre for Social Research (CSR)⁶⁶, New Delhi in its study report given in the year 2012¹⁴⁰, identifies that the fees for surrogates in India ranges from \$2,500 to \$7,000 and the total costs for surrogacy arrangements can be anything between \$10,000 and \$35,000. Therefore, it is a lot less than what intended parents pay in the United States, where rates fluctuate between \$59,000 and \$80,000 . Another statistics shows that, a surrogacy arrangement, including IVF, costs about \$11,000 (approximately Rs. 5,00,000) in India, while in the United States of America, surrogacy alone, excluding ART charges, costs \$15,000 (Rs 6,75,000). Likewise in United Kingdom, an IVF cycle costs about £7,000 (Rs. 5, 00,000 approx.) and surrogacy costs about £10,000 (Rs. 7, 00,000 approx.). The cost of gestational surrogacy in Canada is approximately \$29,600 - \$68,500 and the cost of traditional surrogacy is approximately \$19,600 - \$ 68,500¹⁴³. In Russia the minimum cost for surrogacy arrangement is about \$35,000¹⁴⁴. Thus it can be seen that, the cost of surrogacy arrangements in India is very low when compared to other countries. Further, the regulations that deal with surrogacy are also minimal and there are no restrictions with respect to who can be the intended parents. As a result, the unmarried, divorced, aged, gays and lesbians who may be prohibited in their country to use surrogacy can come to India and fulfill their dream of begetting a child. Thus the strongest incentive for foreigners to travel to India is most likely to be the relatively low costs involved in the process coupled with the limited legal regulations.

In addition to the above mentioned reasons, there are many other reasons also due to which the foreign couples or individuals come to India for availing the benefits of surrogacy. Some of the key reasons are that India offers the advantages of well qualified and experienced doctors, world class private health care providers, English speaking doctors and staffs to facilitate such process, and more importantly easy access to surrogate women⁶⁷. Moreover the Indians show a great commitment in handing over the new born to their intended parents immediately after birth and

⁶⁶ Centre for Social Research is a non-profit, non-governmental organization established in the year 1983 in New Delhi. See for more, the official website of CSR <<http://www.csrindia.org>> 10.8.2012.

⁶⁷ Sama - Resource Group for Women and Health, *Unravelling the Fertility Industry: Challenges and Strategies for Movement Building International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies*, SAMA, New Delhi (2010), p.47

till now no dispute is reported regarding refusal of surrogate to hand over the baby to the intended parents. So also when compared to foreign women the Indian women have a more methodical lifestyle and most of them do not indulge in drinking, smoking, use of drugs and narcotics. Further, the cost of living in India is economical⁶⁸ and the foreign couples or individuals who come to India can also enjoy visiting world famous tourist destinations and then go back with the baby once the surrogacy arrangement is over. Lastly, the success rates of surrogacy in India are also considered as very high⁶⁹.

Due to all the above said reasons, India has become a favorable destination for foreign couples who look for a cost-effective surrogacy arrangement and a whole branch of medical tourism has flourished on the surrogacy practice. As a result, the surrogacy business is well-established in India, with an estimated annual turnover of half a billion dollars . The exact figures are not available and hard to verify.

However, according to one estimate, India's reproductive tourism business is estimated to be approximately 400 million US dollars a year . As per the CSR Report, the volume of surrogacy industry is estimated to be around \$500 million and the number of cases of surrogacy is increasing rapidly. Thus the true extent of surrogacy practice in India is not known, but from the above two reports it is clear that, the surrogacy industry is fetching revenue from 400-500 million US dollars a year⁷⁰. The places like Anand, Surat, Jamnagar, Bhopal and Indore have become the major centers for surrogacy practices. A large number of couples are travelling to these places not only from India but also from western countries and from other countries like Sri Lanka, Pakistan, Bangladesh, Thailand and Singapore to fulfill their desire for a child. It is estimated that there are more than 600 fertility clinics established in both rural and urban areas spread over in almost all states of India.

⁶⁸ Apoorv Dwivedi, —Surrogate Mothers and Legal Complexity, available at <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1612712> 20.8.2012.

⁶⁹ George Palattiyil, *et al.*, —Globalization and Cross-Border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work, *International Social Work*, 53 (5) 686 (2010), at p.689.

⁷⁰ For more details on estimates of surrogacy turn-over in India, see, Shyantani Das Gupta & Shamita Das Gupta, —Motherhood Jeopardised: Reproductive Technologies in Indian Communities, in Jane Maree Maher, *The Global Politics of Motherhood: Transformation and Fragmentation*, Routledge, U.S.A. (2010), p.138.

However, the state of Gujarat is particularly popular, especially among westerners. In fact India in general and the state of Gujarat in particular is rapidly becoming the center for Child Process Outsourcing (CPO).

In India, though surrogacy is gaining popularity and is rapidly developing as an industry, the Government has been very slow in responding to the changing situations. In the absence of a legislative action, the Indian Council for Medical Research⁷¹ has come up with certain ethical guidelines for regulating assisted human reproductive technologies in general and it also includes guidelines for surrogacy practices. In 2000, the ICMR adopted *Ethical Guidelines for Biomedical Research on Human Participants*, in which they prescribed certain guidelines to deal with ART in general. So also in the same year, —Statement of Specific Principles for Assisted Reproductive Technologies, 2000 was released by ICMR. Further in 2002, the ICMR submitted a Draft *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics, 2002* to the Ministry of Health and Family Welfare. It is pertinent to point out that, this step of ICMR has been interpreted by many authors as a step of legalization of commercial surrogacy in

India. However, this Draft was not officially adopted by the Government of India in 2002, nor it was a legislative step and hence it cannot be considered as a step of legalization of surrogacy in India. In fact, this draft was later modified and adopted by the ICMR officially in 2005 after consultation with the National Academy of Medical Sciences, practitioners of ART, and the Ministry of Health and Family Welfare.

⁷¹ Hereinafter referred to as ICMR. The Indian Council of Medical Research, New Delhi, is the apex body in India for the formulation, coordination and promotion of biomedical research, and is one of the oldest research bodies in the world. This was established in the year 1911 by the Government of India under the title Indian Research Fund Association (IRFA) with the specific objective of sponsoring and coordinating medical research in the country. After independence, several important changes were made in the organization and the activities of the IRFA. It was re-designated in 1949 as the Indian Council of Medical Research. See for more, the official website of ICMR, available at <http://www.icmr.nic.in/About_Us/About_ICMR.html> 20.8.2012

5.5.SURROGACY IN FOREIGN COUNTRIES LIKE

The debate generated by surrogacy and the various moral, ethical, religious and legal issues raised by it have led to the view that there should be some policy or guidelines for its control and regulation. However there is no consensus of opinion among the countries of the world with respect to the legal measures to be adopted for the control and regulation of surrogacy. Different countries have adopted different guidelines and legislations as per their social, economic, cultural, and religious needs and legal requirements⁷².

As an initial response to the regulation of surrogacy, various countries appointed committees for identifying the multiple issues raised by surrogacy. For example, the Warnock Committee in United Kingdom, the Aloni Commission in Israel , the Ministerial Committee on Assisted Reproductive Technology in New Zealand, and the Law Commission of India have considered the pros and cons of surrogacy. The legal disputes that emerged because of the surrogacy practices in countries all over the world have led to the adoption of laws and regulations for the control and management of surrogacy in various countries.

5.5.1. Israel

Israel is the first country to adopt a specific legislation for regulation of surrogacy. The Surrogate Motherhood Agreements Law, 1996 was enacted in Israel on the basis of the recommendations given by the Aloni Commission⁷³. Thus Israel is a pioneer in regulating and facilitating commercial surrogacy agreements. The Surrogate Motherhood Agreements Law allows only for gestational

⁷² Surrogacy contracts are entirely prohibited in countries such as Austria, Egypt, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, and Switzerland. The countries such as Canada, Denmark, Hong Kong, and Great Britain have national laws banning commercial surrogacy. But the countries like Ukraine and India are providing very favorable conditions for commissioning couples that permit and encourage surrogacy. For a helpful graphic depiction of the States' approach to surrogacy. See, Susan Markens, *Surrogate Motherhood*, University of California, California (2007), pp. 28-29, table 2.

⁷³ Israel Ministry of Justice, *Report of The Public-Professional Commission in The Matter of In Vitro Fertilization*, July, (1994).

surrogate arrangements, thereby implicitly forbidding traditional surrogacy. In addition, according to the Surrogate Motherhood Agreements Law, the sperm must be from the intended father.

Further, the Surrogate Motherhood Agreements Law does not give any legal status to the birth mother upon the child's birth. Legal parenthood is delegated to the intended parents almost immediately. The Surrogate Motherhood Agreements Law states that, the child shall, from its birth, be in the custody of the intended parents, and they shall bear towards it all the responsibilities and obligations of a parent to his child. Delivery of the child by the birth mother into the custody of the intended parents must be in the presence of a Welfare Officer and must be carried out as soon as possible after the birth of the child. Within seven days of the child's birth, the intended parents must apply for a parentage order. The parentage order is given to the intended parents by the court automatically, unless, after having received a report from the Welfare Officer, the court determines that doing so would endanger the child's welfare. The intended parents are the —defaultl parents and, in the absence of extraordinary circumstances, they will be given custody of the child upon its birth and full rights of parentage shortly thereafter.

5.5.2.Canada

In Canada, the Assisted Human Reproduction Act was adopted in 2004.

However, it does not explicitly regulate who may or may not enter into a surrogacy arrangement. It forbids the payment of consideration to a woman to be a surrogate mother. This is consistent with the principle, set out in Section 2(f) that ‘_trade in the reproductive capabilities of women and the exploitation of women for commercial purposes raises health and ethical concerns that justify their prohibition’. In addition, the Act forbids the payment to another person to arrange the services of a surrogate mother. A surrogate mother may be reimbursed for expenditure incurred in relation to her surrogacy if a receipt is provided. She may also be reimbursed for loss of work related income incurred during her pregnancy provided certain conditions are fulfilled. It is an offence to counsel or induce a female believed to be less than 21 years of age to become a surrogate or to perform any medical procedure to assist such a person to become a surrogate.

5.5.3. United Kingdom

In the United Kingdom, the law on surrogacy is found in the Surrogacy Arrangements Act, 1985 119 and the Human Fertilization and Embryology Act, 1990. The Surrogacy Arrangements Act applies to surrogacy arrangements whether or not they are lawful and whether or not they are enforceable⁷⁴. No surrogacy arrangement is enforceable by or against any of the persons making it. The Act defines ‘surrogate mother’ as a woman who carries a child under an arrangement which was made before she became pregnant; and this arrangement is made with a view that the child would be handed over to another person or persons who will (so far as practicable) exercise parental rights. Section 2 (1) deals with the subject of payment. It states that no person shall on a commercial basis initiate or take part in any negotiations with a view to making a surrogacy arrangement. A person does an act on a commercial basis if any payment is, or is to be, received. The prohibition does not, however, apply to the potential surrogate mother or to an intended parent. The Act reinforces this by stating that ‘payment’ does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother. Although the Act does not make explicit what kind of ‘payment’ may be made to a surrogate or prospective surrogate mother, some regulation does occur, since any payment received by her will be assessed when parental or adoption orders are sought. The subject of parentage is dealt with in the HFE Act. Section 27 provides that the woman, who is carrying or has carried a child as a result of placing in her womb an embryo, or sperm and eggs, is to be treated as the mother of the child. If the woman is married and her husband consented to the procedure, and the embryo was not brought about with his sperm, he is treated as the father of the child. If the woman is not married, but she has accessed treatment services jointly with a man and his sperm was not used, the man is treated as the father of the child. Section 30 of the HFE Act creates a procedure by which the commissioning parents will be treated as the parents of the child. A court may make a parental order in their favor. In situations where the Act does not apply (for example, when the commissioning couple are not married, or when neither of them

⁷⁴ The Surrogacy Arrangements Act, 1985 (UK) S. 1(9). that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife under the surrogacy agreement (although the court may authorize such a payment), see, John Seymour and Ms Sonia Magri, *A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review*, Victorian Law Reform Commission, Australia, (2004), pp.44-46.

is genetically related to the child), it appears that the commissioning couple would have to adopt the child under the Adoption and Children Act, 2002 (UK).

5.5.4 New Zealand

New Zealand has passed legislation in this area in 2004, i.e. the Human Assisted Reproductive Technology Act. Prior to 2004 there was no legislation on surrogacy. However there was a ban on surrogacy by the clinics because the ethics committee had refused to approve the practice of IVF surrogacy involving altruistic embryo transfer to a relative or friend. The Ministerial Committee in its 1994 report criticized this decision. This led to the shift in policy of ethics committee and finally ten years later the Parliament enacted the law allowing surrogacy.

Section 14 of the 2004 Act declares negatively that a —surrogacy arrangement is not in itself illegal but then states that it is not enforceable. In this Act, a —surrogacy arrangement is one where —a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy.

This definition is not restricted to surrogacy using assisted means but also includes arrangements that rely on natural intercourse and probably includes the Maori practice of —whangai where there is an understanding that a child will be handed over to another member of the family. This becomes rather more important when the remaining provisions are noted. No one, including the surrogate mother, commissioning couple and an intermediary arranging a surrogacy, may give or receive valuable consideration. The Act expressly stipulates that any reasonable and necessary expenses for professional services, including legal advice, are not caught by the ban on valuable consideration. Thus the Act in New Zealand allows not-for-profit surrogacy only. Whangai and do-it-yourself arrangements that do not involve cash transactions for profit are legal.

Surrogacy through a regular clinic with the usual costs associated with the procedures is also legal. Anyone, including the surrogate mother, who steps outside these boundaries, may have committed an offence⁷⁵.

⁷⁵ Bill Atkin, *Regulation of Assisted Human Reproduction: The Recent New Zealand Model in Comparison with Other Systems*, Victoria University of Wellington, New Zealand, p.18, available at <<http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Atkin.pdf>> 13.6.2011.

5.5.5 United States of America

In United States, there is no federal law on surrogacy. But many states have enacted laws dealing with surrogacy. There are great variations in the approaches adopted by different states. Some state Acts have provisions prohibiting surrogacy contracts or declaring them void or unenforceable . Others have expressly authorized and regulate surrogacy agreements . Altruistic, but not commercial, arrangements may be permitted. Not all states distinguish between traditional and gestational surrogacy. In states where there is no relevant legislation, there may be case law on certain aspects of surrogacy, especially on the question of parentage.

Thus, state laws on surrogacy are hardly uniform. In an effort to provide such uniformity, the American Bar Association has drafted the American Bar Association Model Act Governing Assisted Reproductive Technology⁷⁶. Article 7 of this Act addresses gestational surrogacy, providing various approaches to the conditions for the enforceability of gestational agreements. Meanwhile, Article 8 permits reimbursement of expenses to the surrogate and payment of reasonable compensation.

Further, Article 8 of the Uniform Parentage Act, 2000 addresses gestational agreements, their validation by court hearing of, and parentage issues.

⁷⁶ American Bar Association, *American Bar Association Model Act Governing Assisted Reproductive Technology* (2008), available at <http://www.abanet.org/family/committees/art_modelact.pdf.> 10.5.2011.

CHAPTER-6

LEGAL FRAMEWORK FOR SURROGATED CHILD AND MOTHER

6.1.SURROGACY IN INDIA AND LAWS RELATED TO SURROGACY-

6.1.1. ICMR Guidelines, 2005 and Surrogacy

The ICMR Guidelines, 2005 was adopted with the main objective to provide ethical guidelines for regulating ART clinics in India. However, these guidelines also contain certain provisions for dealing with surrogacy. The guidelines defines surrogacy as an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate. It states that, 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 . ART used for married woman with the consent of the husband does not amount to adultery on part of the wife or the donor. However ART without the husband's consent can be a ground for divorce or judicial separation.

The guidelines state certain conditions to be followed by a surrogate mother such as, a surrogate mother should not be over 45 years of age and no woman may act as a surrogate more than thrice in her lifetime. Before accepting a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full-term pregnancy. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate. However, an oocyte donor cannot act as a surrogate mother for the couple to whom the oocyte is being donated. It further mandates that, a surrogate mother must register as a patient and as a surrogate in her own name and provide all the necessary information about the genetic parents such as names, addresses, etc.

She must not use/register in the name of the person for whom she is carrying the child, in order to avoid any legal issues, particularly in the untoward event of maternal death. There must be informed consent by the surrogate and it must be witnessed by one who is not associated with the clinic.

The guidelines also consider the interests of surrogate mother and state that,—all the expenses of the surrogate mother during the period of pregnancy and post- natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother. Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect.

The guideline also tries to protect the interests of the child and thus prohibits sex selection at any stage after fertilization, or abortion of foetus of any particular sex, 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). The ART clinics are also prohibited from making an offer to provide a couple with a child of the desired sex. Further it mandates that, advertisements regarding surrogacy should not be made by the ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, rests with the couple, or a semen bank. The guidelines also stipulate that, the birth certificate of surrogate child shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother. A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs. In the case of a divorce during the gestation period, if the offspring is of a donor programme – be it sperm or ova – the law of the land as pertaining to a normal conception would apply. Most importantly, the guidelines states that, a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both spouses, and with all the attendant rights of parentage, and inheritance.

The guidelines are a positive step towards the regulation of surrogacy in India and contain provisions for protecting the interests of surrogate woman as well as the child. However, there are many drawbacks in these guidelines. As per the definition of surrogacy provided in these guidelines only gestational surrogacy can be practiced in India. Moreover, the woman can act as a surrogate only for the genetic parents.

Thus the guidelines are unclear about the situation where one of the intended parents was not able to contribute the genetic material. The question arises whether they can take the help of a donor? This question is also relevant, when the gays, lesbians and single individuals want to use surrogacy for begetting a child.

Further, the restriction that only gestational surrogacy can be practiced, would create hardship for the intended parents as they would have to search for egg donor also in case the female partner of intended parents is unable to provide the genetic material. The guidelines also stipulate that, the surrogacy can be availed normally by patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term. So the guidelines are impliedly prohibiting the use of surrogacy by married fertile couples. Further, the gay couples and single men can use surrogacy as it is physically/medically impossible to them to carry a child. However it is unclear regarding the issue whether a lesbian couple/ single woman can have access to surrogacy.

An important drawback of the guidelines is that, the genetic parents name will be mentioned in the birth certificate of surrogate child. This is in conflict with the right to anonymity of the donor and may deter the donor to participate in such surrogacy arrangements. Thus even though the guidelines say that the surrogate child will be the legitimate child of intended parents, the mentioning of genetic parents name in certificate will create problem for intended parents. This is because their name will not be there in the birth certificate if they have not contributed the genetic consent of both spouses, and with all the attendant rights of parentage, and inheritance.

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The Government of India, realising the increasing need to regulate ART practices and surrogacy in the country, took steps for establishing a binding legal framework. As a result, the Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 were drafted. This Bill and the Rules were drafted by a 15 member committee consisting of experts from ICMR, representatives from Ministry of Health and Family Welfare and ART specialists. However, the Parliament has failed to adopt it as law. The growing need to regulate ART practices and particularly surrogacy was also discussed by the Law Commission of India.

6.1.2. The Report of Law Commission of India

The Law Commission of India after a detailed discussion submitted its report to the Government of India in August 2009. This report is titled as —Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy. The Law Commission has observed: —the legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human

liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.

Considering, the ground realities of surrogacy practices in India, the Law Commission in its report gave the following recommendations:

1. Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all 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 arrangement should not be for commercial purposes.
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. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
7. Right to privacy of donor as well as surrogate mother should be protected.
8. Sex-selective surrogacy should be prohibited.

9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act, 1971 only.

The Law Commission thus recommended that active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. Similar concern has been raised by Indian Judiciary in the case of *Jan Balaz v. Anand Municipality*. The Gujarat High Court stated that, —the legislature has to address lot of issues like rights of the children born out of the surrogate mother; rights and duties of the donor and the surrogate; and various other legal, moral and ethical issues. The Court referred to the guidelines issued by ICMR as well as the ART (Regulation) Bill, 2008 and observed that, —there is an extreme urgency to adopt a legislation answering all the issues raised by surrogacy. Considering the pressing need for a legal framework, a draft bill was prepared by a 12 member committee including experts from ICMR, Ministry of Health and Family Welfare and specialists in the field of ART and was presented before the winter session of Parliament in 2010. However this Bill has not been yet officially enacted as legislation.

6.1.3. The ART (Regulation) Bill, 2010 vis-a-vis Surrogacy

The Bill was made for providing a national framework for the accreditations, regulation and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto. The Bill defines surrogacy as, —an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate. The Bill provides for the establishment of a National Advisory Board and State Board for exercising the jurisdiction and powers and to discharge the functions and duties conferred or imposed on the Boards by or under this Act.

The Bill legalizes the surrogacy practices in India by stating that, both the couple/ individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable. The Bill provides that, subject to the provisions of this

Act and the rules and regulations made there under, assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples . Thus regardless of being fertile or infertile the couple or individual can avail surrogacy in India. They can obtain the service of a surrogate through an ART bank , which may advertise to seek surrogacy. But no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy. However, the Bill prohibits ART clinics from advertising to seek surrogacy for its clients.

The Bill provides the criteria for acting as a surrogate and states that, no woman of less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act. It also states that, no woman shall act as a surrogate for more than five successful live births in her life, including her own children. Only Indian citizens shall have a right to act as a surrogate, and no ART bank/ART clinics shall receive or send an Indian for surrogacy abroad. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate. Further, any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.

The Bill lays down certain duties for the surrogate mother. It provides that, a surrogate mother shall, in respect of all medical treatments or procedures in relation to the concerned child, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate mother, and provide the name or names and addresses of the person or persons, as the case may be, for whom she is acting as a surrogate. In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as a surrogate. A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy. Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act that would harm the foetus during pregnancy and the child after birth, until the time the child is handed over to the designated person(s). Most importantly, the Bill states that, a surrogate mother shall relinquish all parental rights over the child.

The Bill also provides various rights to a surrogate mother. All information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction. The surrogate mother can receive the agreed amount as compensation for acting as a surrogate as per the surrogacy agreement from the couple or individuals seeking such service. Further, the Bill states that, a surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them.

The Bill also lays down certain rights and duties for the intended parents. The couples/ individuals who avail the service are entitled to receive a birth certificate for the baby born through surrogacy mentioning that such couples/individuals are the parents. The parents of a minor surrogate child have the right to access information about the donor, other than the name, identity or address of the donor, or the surrogate mother, when and to the extent necessary for the welfare of the child. It is the duty of persons who avails such surrogacy services to bear all expenses of the surrogate pregnancy. This expense includes those related to such pregnancy achieved in furtherance of ART as well as during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice to the biological parent or parents 219 . The expenses also include insurance for the surrogate mother and the child until the child is handed over to them or any other person as per the agreement and till the surrogate mother is free of all health complications arising out of surrogacy²²⁰. Most importantly, the Bill mandates that the person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act. Further, the Bill states that, if the intended parents are a non-resident Indian, they should appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy, till the child/ children are delivered to the foreigner or foreign couple or the local guardian.

The ART Bill, 2010 contains numerous provisions for the protection of interests and welfare of the surrogate child. To avoid any misuse of ART techniques, the Bill provides that, the Pre-implantation Genetic Diagnosis shall be used only to screen the embryo for known, pre-existing, heritable or genetic diseases or as specified by the Registration Authority. It prohibits any sex

selection and makes such activities as criminal offence. Regarding the status of the child, the Bill states that, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse. A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties. In case of a single woman the child will be the legitimate child of the woman, and in case of a single man the child will be the legitimate child of the man. The Bill further states that, in case a married or unmarried couple gets divorced or separates, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple. A child born as a consequence of a foreigner or a foreign couple seeking surrogacy, in India, shall not be an Indian citizen.

The child's right to know his origin is also protected under the Bill. It states that, a child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother. However, personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother. But these personal identifications can be disclosed with the prior informed consent of the genetic parent or parents or surrogate mother.

It is relevant to point out here that, the ART Bill, 2010 is based on the 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India' issued by the ICMR in 2005. The Bill, attempts to regulate the process of surrogacy and answer some of the issues raised by surrogacy practices. However, the Bill fails to address certain complex issues relating to surrogacy and thus suffers from various draw backs. The Bill legalizes commercial surrogacy and declares that such agreements are legal and enforceable. It is to be noted that the Law Commission of India has also recommended the legalization of surrogacy arrangements but has also stated that such arrangements should not be for commercial purpose. Thus this provision of the Bill is contradictory to the recommendations made by the Law Commission of India.

The Bill is also silent about the various conducts which may be considered as a breach of such agreements and its remedies. The Bill has neither designated, nor authorized, nor created any Court or judicial forum to resolve issues which require adjudication in problems arising out of surrogacy

agreements. The absence of such a designated Court or judicial forum, would create difficulties to the parties in case of any dispute arising out of a surrogacy agreement because the parties may be from different parts of India as well as from various foreign countries.

The ART Bill, similar to the ICMR guidelines allows only gestational surrogacy arrangements. However, the prohibition of traditional surrogacy causes hardships to persons who wish to have a child through surrogacy as they need to arrange for an egg donor if the female partner is unable to contribute her egg.

Moreover, compared to gestational surrogacy, traditional surrogacy is more easy, safe and successful method. A potential surrogate as per the Bill should be below 35 years of age while the ICMR guidelines states the maximum age limit as 45 years. Thus there is a conflict between the ART Bill proposed by the legislature and ICMR guidelines framed by the medical experts. Further, the Bill proposes that surrogate woman can have maximum five pregnancies including her own. However it does not specify the maximum number of ART cycles she can undergo. It is necessary to mention that the number of live births is not equivalent to the number of ART cycles because the success rate of ART procedures is low and the surrogate may be required to undergo numerous ART cycles. Such repeated ART procedures may adversely affect the health of the surrogate which the Bill does not address adequately⁷⁷. Most importantly, the Bill does not mention the circumstances in which a surrogate woman can abort her surrogate pregnancy.

The ART Bill mandates that, the persons who initiate surrogacy for begetting a child should accept the child after its birth and any refusal would amount to an offence. However the deterrent effect of this provision is reduced in case of foreign couple / individuals who avail surrogacy service because the Bill mentions that in case of refusal by the intended parents to accept the child, the local guardian appointed by such couple will be responsible to accept the child. Thus the real culprits, i.e. the person who initiated the surrogacy can absolve themselves from liability by simply refusing to accept the child. Moreover, though there is an offence of refusal to accept, the implementation of punishment would be difficult in such cases as the persons are in foreign countries. Thus a major lacuna in the Bill is that, though majority of persons availing surrogacy in India are from foreign countries the Bill does not contain any provision to compel the persons to

⁷⁷ Nivedita Menon, —The Regulation of Surrogacy in India – Questions and Concerns, SAMA, New Delhi, available at <<http://kafila.org/2012/01/10/the-regulation-of-surrogacy-in-india-questionsand-concerns-sama/>> 20.9.2012

stay back in India upto the birth of the child. The Bill however is an earnest attempt towards regulating surrogacy arrangements in India. But, due to the various drawbacks as discussed above, the Bill is inadequate to deal effectively with the whole issues surrounding the surrogacy practices in India and to protect the interests of various stakeholders. In this context it is relevant to mention here that, in 2012 an application was filed under

Right to Information Act, 2005 seeking clarification from Government of India about the status of ART Bill, 2008 by Mr. Hari G. Ramasubramanian, Founder of India's First Fertility Law Firm, viz. Indian Surrogacy Law Centre (ISLC). Reply was given by the Legislative Department, Ministry of Law and Justice on 19th July, 2012 wherein it stated that a new proposal to enact legislation titled —Assisted Reproductive Technology (Regulation), 2012 had been received from the Department of Health and Family Research, Ministry of Health and Family Welfare⁷⁸. Thus at present in India, in the absence of a specific legislation the ICMR Guidelines, 2005 are the only available regulatory framework for dealing with surrogacy.

6.1.3.The ART Regulation Bill, 2008

Section 2(aa) defines surrogacy as an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate. Section 2(bb) defines surrogate mother as a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple / individual that had asked for surrogacy. Section 2(cc) defines surrogacy agreement as a contract between the person(s) availing of assisted reproductive technology and the surrogate mother.

Section 34 deals with rights and duties in relation to surrogacy. It talks about the rights and duties of a woman entering into the surrogacy agreement. It says that there shall be an enforceable agreement between intended parents and surrogate, all expenses of this pregnancy will be taken

⁷⁸ Hari G. Ramasubramanian, —Assisted Reproductive Technology (Regulation) Bill pending with the Legislative Department, available at <<http://indiansurrogacylaw.com/assisted-reproductivetechnology-regulation-billpending-legislative-department-ministry-law-justice/>> 20.9. 2012

care of by the intended parents, the terms and conditions of the contract shall be decided by the parties themselves, after the delivery of child the surrogate will have to relinquish all her rights over child, no woman who is below the age of 21 and above the age of 35 years can be a surrogate, to be a surrogate the woman must be physically and medically fit, she cannot act as a surrogate for more than 5 live births including her own children, the surrogate can undergo 3 embryo transfers for the same couple and can go for surrogacy for maximum 3 couples, the name of the surrogate shall not be mentioned on the birth certificate, etc.

All these rights and duties regarding surrogacy which are enshrined in this draft bill are mostly client (intended parents) biased. No physical integrity is provided to the surrogate, even the right to terminate this pregnancy is not given to her and in fact a declaration is demanded from her and her husband that they have not been involved in any sort of extra marital sex from last 6 months. Even the right to have the name of surrogate on the birth certificate of the child is not provided, if they want a provision of adding the name of all the three parents could be introduced. Before getting into this agreement a medical test of surrogate is conducted in order to check her medical fitness and to see that she is HIV negative but no such test is conducted on intending parents, thus completely ignoring the probability of surrogate getting AIDS through the transferred embryo. The bill also talks about three successful live births along with permitting three Embryo Transfers for a particular couple which will legally allow surrogate to undergo nine cycles, which may result in hazardous consequences for her health. Leaving aside the health aspect this bill is a mere lucrative for ART clinics and Semen banks as the couples coming for surrogacy pay most amount to these clinics and banks and the clauses of agreement between surrogate and client is left upon them. knowing the fact that most woman agreeing for surrogacy belong to a poor family and are illiterate and the gap between them and their clients is huge because of which they are unable to understand the terms of contract and negotiate upon them in spite of this there is no provision in the bill regulating this contract. The bill has thus ignored the role of legal support required by a surrogate in order to get a fair contract. Moreover the bill nowhere talks about the situations which may turn up during pregnancy. What if the woman dies while delivering the child or what if a miscarriage happens or the child is still born. No such situation is discussed in the bill, a provision of insurance for the surrogate by the clients must be insured by the bill.

Section 35 deals with the determination of status of child born with assisted

reproductive technologies. A child born with the help of ART is considered to be a legitimate child. In case of surrogacy as soon as the child is born it is taken away from the surrogate and hence is deprived of the right of breast feeding. This early separation from surrogate is at the cost of baby's immunological and psychological health thus depriving him the right to breast feed even for 3 months. The citizenship of the child belongs to the country to which the intended parents belong and not to India.

6.1.4. SURROGGACY REGULATION BILL (2015-2016),(2019-2020)**The Surrogacy(Regulation) Bill, 2016**

The Surrogacy (Regulation) Bill, 2016 was introduced by Minister of Health and Family Welfare, Mr. J. P. Nadda in Lok Sabha on November 21, 2016. The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple and agrees to hand over the child after the birth to the intending couple.

The Surrogacy (Regulation) Bill, 2016 proposes to regulate surrogacy in India by permitting it as an option for couples who cannot naturally have children, have a lack of other assisted reproductive technology options, are keen to have a biological child, and can find a surrogate mother among their relatives. Altruistic surrogacy, which means an arrangement without transfer of funds as inducement, is currently practised in some centres in India, though the majority of surrogacy centres use women who are paid for their services²³. The child born through surrogacy will have all the rights of a biological child. Indian infertile couples between the ages of 23-50 years (woman) and 26-55 (man) who have been married for five years and who do not have a surviving child will be eligible for surrogacy. The surrogate mother should be a close relative of the intending couple and between the ages of 25-35 years and shall act as a surrogate mother only once in her lifetime. Implementation will be through the national and State surrogacy boards. Any establishment found undertaking commercial surrogacy, abandoning the child, exploiting the surrogate mother, selling or importing a human embryo shall be punishable with imprisonment for

a term not be less than 10 years and with a fine up to Rs.10 lakh. Registered surrogacy clinics will have to maintain all records for a minimum period of 25 years.

What happens when the child is born handicapped and no one wants it? Should the surrogate and the couple be unknown to each other? Should the child be told or there should be total confidentiality? What if wife's sister donates the eggs and the husband's brother donates the sperms and the fertilization in vitro is carried out and subsequently it is implanted into the wife's uterus? When after the multiple implantation the time comes to selective abortion, what criteria should be applied and which fetus is to be aborted? Will there be sex selective abortion?24

6.1.4.1 REGULATION BILL 2019-2020

(Ministry: Health and Family Welfare)

The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019. The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.

Regulation of surrogacy: The Bill prohibits commercial surrogacy, but allows altruistic surrogacy. Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.

Purposes for which surrogacy is permitted: Surrogacy is permitted when it is: (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any condition or disease specified through regulations.

Eligibility criteria for intending couple:

The intending couple should have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority.

A certificate of essentiality will be issued upon fulfilment of the following conditions:

- (i) a certificate of proven infertility of one or both members of the intending couple from a District Medical Board;
- (ii) an order of parentage and custody of the surrogate child passed by a Magistrate's court; and
- (iii) insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.

The certificate of eligibility to the intending couple is issued upon fulfilment of the following conditions:

- (i) the couple being Indian citizens and married for at least five years;
- (ii) (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband);
- (iii) they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and
- (iv) (iv) other conditions that may be specified by regulations.

Eligibility criteria for surrogate mother: To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to be: (i) a close relative of the intending couple; (ii) a married woman having a child of her own; (iii) 25 to 35 years old; (iv) a surrogate only once in her lifetime; and (v) possess a certificate of medical and psychological fitness for surrogacy. Further, the surrogate mother cannot provide her own gametes for surrogacy.

Appropriate authority: The central and state governments shall appoint one or more appropriate authorities within 90 days of the Bill becoming an Act. The functions of the appropriate authority

include; (i) granting, suspending or cancelling registration of surrogacy clinics; (ii) enforcing standards for surrogacy clinics; (iii) investigating and taking action against breach of the provisions of the Bill; (iv) recommending modifications to the rules and regulations.

Registration of surrogacy clinics: Surrogacy clinics cannot undertake surrogacy related procedures unless they are registered by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority.

National and State Surrogacy Boards: The central and the state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB), respectively. Functions of the NSB include, (i) advising the central government on policy matters relating to surrogacy; (ii) laying down the code of conduct of surrogacy clinics; and (iii) supervising the functioning of SSBs.

Parentage and abortion of surrogate child: A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. An abortion of the surrogate child requires the written consent of the surrogate mother and the authorisation of the appropriate authority. This authorization must be compliant with the Medical Termination of Pregnancy Act, 1971. Further, the surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.

Offences and penalties: The offences under the Bill include: (i) undertaking or advertising commercial surrogacy; (ii) exploiting the surrogate mother; (iii) abandoning, exploiting or disowning a surrogate child; and (iv) selling or importing human embryo or gametes for surrogacy. The penalty for such offences is imprisonment up to 10 years and a fine up to 10 lakh rupees. The Bill specifies a range of offences and penalties for other contraventions of the provisions of the Bill.

CHAPTER-7

EFFECT OF SURROGACY ON WOMAN'S HEALTH

7.1.HEALTH RISKS ASSOCIATED WITH SURROGACY

In the US, surrogates are given no more than two embryos for their safety, whereas in India, surrogates are implanted with up to five embryos in order to increase the chances of pregnancy. Using such a large number of embryos increases health risks for babies and the mother. Chances of post-partum depression of surrogates are more with the child that grew in mother's womb. Pregnancy, birth and the post-partum period includes complications such as pre-eclampsia and eclampsia, urinary tract infections, stress incontinence, hemorrhoids, gestational diabetes, life-threatening hemorrhage and pulmonary embolism. Multiple pregnancy increases the likelihood of requiring an operative delivery. A surrogate host of advanced maternal age has increased risk of perinatal mortality, perinatal death, intrauterine fetal death, neonatal death. There is a greater risk to the mother of pregnancy induced hypertension, stroke and placental abruption. When hormones or drugs the surrogate is instructed to take, all drugs have side-effects. Many women undergoing Artificial insemination also take fertility treatments, increasing the likelihood of an adverse reaction and risks involved with the procedure. Issues such as premature delivery, genetic malformation and infections which lead to increased hospitalization of newborn are important issues to be considered in surrogacy contract. Many surrogate mother's breastfeed the newborns during the first few hours following birth. However, parents find difficulty in initiating the breast feeding and in establishing the bonding between mother and child in case of surrogacy. One of the major draw backs of induced lactation in most surrogates or adopting mothers rarely produced the same quantity of breast milk as a new mother immediately following child birth. This presents a problem in terms of infant nutrition.

7.2.SURROGACY AND WOMAN'S RIGHT TO HEALTH: INDIAN SCENARIO-

The concept of surrogacy in India is not new. Commercial surrogacy or "Womb for rent," is a growing business in India. In India, English speaking environment and cheaper services attract the willing clients. Future projections of surrogacy practice range from opportunity to exploitation - from rural women in India uplifted out of poverty to a futuristic nightmare of developing country baby farm. In case of surrogacy in India, it is hard to tell that whether these women are exercising their own personal rights or whether they are forced to become surrogate mothers due to their mother-in-law's or husband's desire to fulfill material and financial needs.

Opponents of surrogacy argue that the practice is equivalent to prostitution and by virtue of that similarity, it should be disallowed on moral grounds. Surrogacy contracts are "dehumanizing and alienating since they deny the legitimacy of the surrogate's perspective on her pregnancy. Surrogate mother tries to avoid developing a special bond with the child in her and views the pregnancy as merely a way to earn the much-needed money. The payment for bodily services dehumanizes the surrogate mother and exploits her reproductive organs and capability for personal gains of the wealthy.

In fact, outsourcing surrogacy is an exploitative practice in India. Currently, no law exists to protect the surrogate mother in case of birth complication, forced abortion etc.

Since 2002, commercial surrogacy has almost become legal in India and India has become a sort of leader in it. This is the reason that has led critics to allege that surrogacy business is exploiting poor women in country like India already having high maternal mortality ratio. According to estimates, which might be conservative - the business of surrogacy in India is already touching \$445-million a year.

Surrogate motherhood as an arrangement, in which a woman takes no ownership of the child born, has raised moral, ethical social and legal questions about both woman and the "Commissioned baby." According to legal experts

"...if surrogacy becomes an avenue by which women in richer countries choose poorer women in

our country to bear their babies, then it is economic exploitation, a kind of biological colonization."

The Ministry of Women and Child Development is examining the issue of surrogate motherhood in India for bringing up a comprehensive legislation. A draft legislation on surrogacy-prepared by the Indian Council of Medical Research (ICMR) has recommended strict penalties for offenders and a tight regulation on Assisted Reproductive Techniques (ART). The draft law restricts the number of embryo transfers a mother can go through to 3 times for the same couple, if the first two attempts fail and it also adds that no woman should act as a surrogate for more than three live births in her life. In fact, these are the only guidelines framed by the ICMR and the Ministry of Health and Family Welfare in 2005. ICMR guidelines, states, "A relative, a known person as well as a person unknown to the couple may act as a surrogate mother for couple. In case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate." The experts believe that surrogacy propels childless couples needlessly toward commercial surrogacy. Section 3.10.5 of the guidelines states that "a surrogate should be less than 45 years" being the upper age without mentioning the minimum age to be surrogate. So does that mean an 18 year old or someone even younger, can become surrogate mother? Before accepting a woman as a possible surrogate for a particular couple, the ART Clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full term pregnancy." These guidelines are skewed and thoughtless. The bifurcated role of woman in surrogate arrangements is prompting renewed assessment of the meaning of motherhood and designation of maternal rights.

7.3.SOCIAL AND PSYCHOLOGICAL CONTEXT OF SURROGACY ON WOMAN-

Commercialization of surrogacy creates several social conflicts. Given the extreme vulnerability, one-third of the Indian women due to poverty, exclusion from and marginalization in labor and job markets, patriarchal social and family structures and low educational levels, the financial gain through surrogacy become a key push factor. Since most surrogate mothers are not from well-off sections and the motive primarily is monetary so they are easily exploited by the agents working for commissioning parents. Secrecy and anonymity creates a negative environment that affects human relations within and outside families.

Surrogacy carry social stigma in the society as it is equated with prostitution and by virtue of that it is argued that it should be disallowed on moral grounds. Surrogate mothers are kept in isolation from families and allowed to meet families in weekends, which are against the human rights. Hence, there are number of ethical, social, legal and psychological issues associated with surrogacy, which require urgent need for framing and implementation of law.

7.4.EXPLOITATION OF SURROGATED WOMAN AND CHILDREN-

One of the objections against the legality of surrogacy contracts is that it is similar to trafficking in women and children⁷⁹. Trafficking in women and children is an offence both at international⁸⁰ and domestic levels. Trafficking is defined as a trade in something that should not be traded in for various social, economic or political reasons. The concept of human trafficking refers to the criminal practice of exploiting human beings by treating them like commodities for profit.

In India there are various legal provisions for dealing with trafficking in women and children. Most importantly, the Constitution of India, under Article 23 provides that, “trafficking in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law”. However there is no specific definition of trafficking in human beings in India. In the absence of such a definition, the definition of trafficking in human beings at international level can be considered in India also.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children defines human trafficking as:

(a) the recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, or abduction, or fraud, or deception, or the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other

⁷⁹ Raghav Sharma, “An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India”, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=997923> 6.8.2012.

⁸⁰ for example, The Convention on the Rights of the Child, 1989 and its Optional Protocol Sale of Children, Child Prostitution and Child Pornography, 2000; Convention on Elimination of All Forms of Discrimination Against Women, 1979; UN Convention Against Transnational Organized Crime, 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing above Convention, 2000, etc.

forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article⁸¹.

Thus trafficking of women means, the recruitment, transportation, transfer, harboring or receipt of women, by means of the threat or use of force or other forms of coercion, etc. In a surrogacy contract all these features are absent and thus it cannot be equated with trafficking. The trafficking of children is the recruitment, transportation, transfer, harboring, or receipt of children for the purpose of exploitation. It is to be noted that in a surrogacy the child is begetted not for the purpose of exploitation but for fulfilling the long cherished desire of the intended parents to have a child of their own. The surrogate child is begetted with the intention to bring it up like any other child of their own. Hence a surrogacy contract cannot be considered as violative of human trafficking laws.

7.5.COMMODIFICATION AND BABY SELLING-

One of the serious objections regarding the legality of surrogacy contract is that, commercial surrogacy is a form of baby selling. This objection is based on the premise that the payment of compensation to the surrogate mother is similar to a consideration in contract, and the intended parents are purchasing the child. This objection was highlighted by the Waller Report of Victoria in 1984. The Report criticized commercial surrogacy and stated that such arrangements as “agreements for the sale and purchase of a child, the buying and selling of children has been condemned and proscribed for generations. It should not be allowed to reappear”⁸².

⁸¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women

⁸² In May 1982 the State of Victoria appointed a Committee to consider the social, ethical and legal issues arising from in vitro fertilization. This Committee is popularly known as Waller Committee and its report (Waller Report) was published in August 1984. See, Louis Waller, *Victoria- Committee to Consider the Social, Ethical and Legal Issues Arising from In-Vitro Fertilization*, Govt. Printer, Melbourne, (1986).

The basis for such criticism against surrogacy contracts and specifically against commercial surrogacy is that, like baby-selling, commercial surrogacy places a child in a home without considering whether the prospective parents would be suitable to raise the child. Instead, money is paid to the surrogate in exchange for the baby and her parental rights, and thus, the couple has bought a baby. To examine the issue whether commercial surrogacy contract amounts to baby selling one needs to look into the meaning of “sale”

A “sale” can be defined as, “an act of meeting prospective buyers and providing them with goods or service in return of money or other required compensation”.

Every sale thus includes, “an exchange of goods or services for money”. In a surrogacy contract the surrogate woman is being paid compensation for handing over the baby to the intended parents. Thus there is an exchange of baby and parental rights for money in surrogacy contracts. However an important question to be answered is whether such an exchange involves an exchange of commodity, i.e. can a baby, or the parental rights to a child, be considered as “goods”? Generally, “goods” are defined as things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid. Thus goods must be, both existing as well as identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell. In a surrogacy contract, no child exists at the time of the contract and the parties to such an agreement have no parental rights. Hence the definition of “goods” is not satisfied because not only is the child non-existent, but also the surrogate mother has no parental rights to the child.

Now the question arises that if the child is non-existent at the time of the contract can the surrogacy contract be treated as a contract to sell future goods? In order to contract to sell a future good, one must have a right to the future goods at the time of contract. However the gestational surrogate never has any rights to the child she carries⁸³. Thus a child is neither an existing good nor a future good and a child born to a surrogate mother thus fails to meet the

⁸³ Barbra E. Homier, “Gestational Surrogacy: An Appeal to Reform Michigan’s Surrogate Parenting Act”, p.21, available at <http://www.law.msu.edu/king/2003/2003_Homier.pdf> 10.6.2012.

definition of “goods” . Hence a surrogacy contract does not come within the meaning of “sale of goods” as well as “contract to sell”. The above reasoning was applied by US Court in the *Johnson case* and the Court ruled that there is no sale of baby involved in surrogacy contracts⁸⁴.

In India, the law relating to sale of goods is governed by the Sale of Goods Act, 1930. The Act defines a contract of sale of goods as, “is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price”. It further provides, „where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell”. In both the situations the subject matter of a sale is goods. The definition of the goods is given under the Act as „every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale”. In order to be a “good” as a subject matter of sale, such “goods must be in existence. Likewise to constitute an agreement to sell, the seller should have a right over the subject matter of sale. However, as discussed above in case of a surrogacy contract, the subject matter of such contract i.e., the child is not in existence at the time of contract. So also the surrogate mother is not having any parental rights over the future child. Thus by applying the same reasoning as discussed in *Johnson case*, it can be seen that in India also, the surrogacy contracts cannot be considered as a contract for sale or agreement to sell. In order to justify that surrogacy contract is not a baby selling contract; it is further argued by some authors that in most of the surrogacy arrangements, the intended parents contribute the genetic material for the child. In such cases where there is genetic contribution by the intended parents, the payment made to the surrogate mother should be considered as a payment for her willingness to be impregnated with the embryo created through such genetic material and for carrying the child to full term. Thus the intended parents are the real owners of the child and therefore they cannot purchase a thing in which they already hold an interest i.e. parenthood⁸⁵. In cases where

⁸⁴ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) at p.784.

⁸⁵. Haberfield, *Surrogate Motherhood in Victoria: What Now for Altruistic Surrogacy?*, Monash University, Melbourne, (1988), p.13.

the surrogate mother contributes the genetic material, it may be argued that, she has an interest over the child and relinquishing the same for money is equivalent to baby selling. However, it is submitted that, in such a case the surrogate mother is simply donating her genetic material and the intention is to beget a child for the intended parents. Once the donation is made the donor does not have any interest or right over the donated matter and cannot claim it back. The reason is that, if the right of the donor over the donated material is recognized by law it would adversely affect the various types of donations made in medical field like blood donation, eye donation, kidney donation, etc. Likewise, in cases where genetic material is contributed by anonymous donor, the intended parents who accept such genetic material have the right over it. Therefore, in every case of surrogacy arrangement only the intended parents have the right over the genetic material. Thus it can be concluded that since intended parents already have a right over the genetic material they cannot purchase the resulting child; so also the surrogate mother is not having any right over the child and therefore is not selling the child. Hence it is submitted that a surrogacy contract cannot be termed as a contract for baby selling. Some authors have also criticized surrogacy contracts as a contract promoting commodification of child. In this context it is submitted that, surrogacy contracts does not amount to commodification of child. This is because a child is not a „good“ or „commodity“ for sale. It is to be noted here that, the word commodity is a generic term for a class of goods. It indicates any marketable item produced to satisfy wants or needs. It is used to describe a class of goods for which there demand is, but which is supplied without qualitative differentiation across a market and in fact it is difficult to identify from where it was produced. It is submitted that a surrogate child does not come within the meaning of a commodity as the child is not a class of goods.

It is accepted that a surrogate child is begetted to satisfy the desire of another individual; however a child is not produced in mass like any other commodity. In fact every surrogate child is unique and different from the other and begetted only to satisfy the desire of a particular intended parents/parent. Therefore, a surrogate contract cannot be termed as commodification of child. Professor Epstein also argues that surrogacy contracts do not commodify children. He states that, a commodity is typically meant for consumption and does not have a unique subjective value. In other words, a commodity may be perfectly substituted with another unit. However a baby is unique and cannot be perfectly substituted. Thus the term „commodity“ is inappropriate to describe the relationship of a parent to a child and hence it is impossible for a surrogacy contract to

commodify a child. Thus it can be safely concluded that a surrogacy contract, whether altruistic or commercial is neither a contract for baby selling nor an agreement to sell and nor a contract for commodification of child

7.6. POTENTIAL FOR ECONOMIC EXPLOITATION-

Another major criticism specifically against commercial surrogacy contracts is that, it would lead to exploitation of poor women who may be induced to become surrogates because of their own financial need or their families. It is argued that surrogacy contracts open up the possibilities of economic exploitation of poor women who may be forced to act as a surrogate for the rich due to economic necessity⁸⁶.

This argument is based on the idea that economic necessity could force some poor women to enter into surrogacy agreements which they otherwise would not have entered. Large sums of money could entice such women to become surrogates without truly understanding the nature of the process. With the increasing incidents of surrogacy, the middlemen or brokers also come into picture to provide information to the intended parents as well as clinics regarding the availability of surrogates. It is argued that, such a practice has the potential to cause exploitation of surrogate women as they mostly belong to poor families, are illiterate and are not aware of their legal rights. The term exploitation means, when women consent to a transaction which is either harmful or unfair to her, and does so because some aspect of her character or circumstances is used against her by the other party (or parties) to the agreement.

Harm occurs when the surrogate is traumatized by the experience of handing over the child she has carried for nine months or suffers any harm or injury during the surrogacy pregnancy or during childbirth. It is submitted that, prior to the surrogacy arrangement, the women is aware of the fact that she has to hand over the child after birth to the intended parents. In fact, the sole purpose of surrogacy is to beget a child for another. Therefore, it cannot be criticized that the surrogate woman would be traumatized by the experience of handing over the child she has carried for nine months. It is accepted that some of the surrogate woman may generate an emotional bond with the child

⁸⁶ Kevin Tuininga, "The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law", 41 *Creighton Law Review*, 185 (2008), at p.195.

they carried and may undergo trauma. It may also be due to the feeling of shame or guilt regarding the act they have done. This can be taken care of by providing proper counseling and guidance prior to the initiation of contract as well as during surrogate pregnancy⁸⁷.

Regarding the criticism that, the surrogate woman may suffer harm or injury as a result of surrogacy process, it is submitted that every pregnancy involves an inherent danger to the woman. Likewise there are many activities which have an inherent danger but are not prohibited. For example, working in military, police, working in underground mines, working in certain factories, etc. But these activities are not prohibited due to the danger involved in them. Moreover in every surrogacy contract, the parties are free to make provisions to deal with any unwarranted situations causing harm or injury to the surrogate women. The parties can fix the liability as well as make provisions for insurance policy in favour of surrogate in case of any harm or injury to the surrogate woman. Thus the possibility of a harm or injury to the surrogate woman is not a ground to negate the validity of a surrogacy contract.

The critics argue that exploitation may be there if the contract is unfair and the surrogate is induced to accept a smaller financial settlement than she would be able to demand if her bargaining position were stronger. However the supporters of commercial surrogacy claim that the exploitation is not always inherent in the practice of surrogacy contracts. On the contrary the woman may actually be in a position to negotiate favorable terms, given the strong desire of the intended parents for a child⁸⁸. So also, if a surrogacy contract is criticized as economic exploitation only because the surrogate woman is poor and illiterate, then logically it follows that every other contract which a poor and illiterate woman enters into should also be considered as economic exploitation and must thus be prohibited. By applying the same logic a surrogacy contract shall be accepted if the surrogate woman is economically well-off and literate. Hence there is no justification in criticizing a surrogacy contract as economic exploitation just because the surrogate is poor and illiterate.

Further, the intended parents opt for surrogacy procedure to fulfill their long cherished desire of begetting a child. It is not a one-day decision, but a decision which might have been taken after trying other methods of procreation and years of emotional stress. Thus the object of intended parents is to beget a child and they may be ready to spend any amount of money of course

⁸⁷ Ragonne, H., *Surrogate Motherhood: Conception in the Heart*, Westview Press, New York, U.S.A. (1994).

⁸⁸ Werheimer, A., *Exploitation*, Princeton University Press, Princeton, U.S.A. (1996).

depending on their financial position. They would also be very careful in selecting a surrogate woman and would not want to cheat her because they would not like any dispute later which may affect the outcome of the surrogacy. Therefore, they would be very careful in making the terms and conditions of the contract. It is accepted that there can be exploitation by middleman and brokers. However it can be taken care of by proper regulation of surrogacy contract through legislation. The supporters maintain that surrogacy contracts could be regulated so as to minimize the danger of exploitation, and by preventing surrogacy firms from applying undue pressure on women to agree to ungenerous settlements⁸⁹.

⁸⁹ Fabre, C., *Whose Body is it Anyway? Justice and the Integrity of the Person*, Oxford University Press, U.K. (2006), p.211.

CHAPTER-8

JUDICIAL PRONOUNCEMENTS-

Analysis of Case Law

Baby Manji Yamada vs. Union of India (UOI) and Another⁹⁰ (2008)

Facts:-

The petition was filed under Article 32 of the Indian Constitution. This was regarding the custody of child named Manji Yamada. The petition was filed by the grandmother of the child Emiko Yamada. Union of India through Home Ministry, State of Rajasthan through the Principle Secretary, Director General of Police, Government of Rajasthan and the Superintendent if Police, Jaipur were made the opposite parties. This case is very relevant because it brought the light on the issues of surrogacy for the first time and there were no laws regarding this matter. Thus, it can be said that this case directed for the formation of Assisted Reproductive Technologies Bill, 2010. This case is also important because it was decided on the facts which were presumed that the surrogacy is legal in Indian context. At that time, there were the guidelines of the presumption of the legality of surrogacy of the Indian Council of Medical Research, 2006 which found no place in judgement of the Supreme Court in the above mentioned case.

Baby Manji was born on 25th July, 2008 where the commissioning parents were from the Japan. The egg was donated by the mother, Dr. Ikufumi Yamada and was fertilised by the sperm of her father Dr. Yuki Yamada. After this there was implantation of egg in the Indian surrogate mother. The biological parents soon developed some marital problems and got separated. The mother returned to Japan. After some time the father also returned because of the expiration of the visa. Baby was under the care of her paternal grandmother. She was issued a birth certificate in the name of her biological father. According to the existing laws it should had been certified to the mother to adopt the baby. Because of the Gujarat riots baby was shifted to Rajasthan for the treatment of

⁹⁰ 44 Baby Manji Yamada vs. Union of India & Another. (2008). (2008) 13 SCC 518. Mukherjee,S. (2011). Legal and Ethical Issues of Commercial Surrogacy: An Overview. Indian Legal Aspects of Commercial Surrogacy.

infection. The petition was filed in Rajasthan High Court which stated the illegality of the surrogacy and stressed on the need of the law on it. This was challenged by the grandmother for the sake of the baby.

Judgement:-

The Supreme Court held that there was no ground of filing petition in High Court as there was no interest of Public Interest Litigation was found. The court set aside the judgement of High Court. The order was made to issue the passport for the baby and visa for the extension of grandmother. The Supreme Court judgement also included in its judgement "Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms". Later, Baby Manji was issued an Identification Certificate instead of passport to move out of the Indian Territory.

JAN BALAZ V. ANAND MUNICIPALITIES AIR 2010 GUJ21

More recently in the matter of Jan Balaz vs. Anand Municipality, a German couple entered into a contract with a surrogate mother named Marthaben Immanuel Khrishti. Twin children were born.

The German couple were working in the United Kingdom and the children required Indian passports to travel. Since their citizenship was being litigated in the courts the passport authorities withheld the passports.

Germany is the parent state of the German couple, did not recognize surrogacy. The Supreme Court denied the passports but granted an exit permit to the children and the German authorities decided to give the couple an opportunity to adopt the children and fight for their rights.

Renting out her womb to US couple, has costed the life of Premila Vaghela, a resident of Amraiwadi.

1. Premila Vaghela died in the eighth month of her pregnancy.
2. Doctors conducted an emergency Caesarean and saved the baby boy.
3. There was almost no coverage of Premila's death in the United States

In Re Baby M Case

In this case traditional surrogacy was done by a couple. The surrogate was impregnated by the way of artificial insemination and an agreement was made wherein the intended parents agreed to pay \$10,000 to the surrogate. The baby was to be given to the biological father after the birth and his wife was to adopt the baby as hers thus relinquishing all the rights of surrogate over the baby. After the delivery of baby M the surrogate was unable to separate herself from the baby and thus filled an application in the court demanding the custody of child.⁹¹

The court of New Jersey analysed the situation and said that they invalidate this contract of surrogacy as it conflicts with law and is against the public policy of the state. While the court recognized the depth of the yearning of infertile couples to have their own children, they find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. They accepted surrogate to be the natural mother of baby, but gave the custody of the child to the biological father allowing a mother's visitation rights to the surrogate.

⁹¹ In Re Baby M Case (1988).NJ.41301

*Johnson v. Calvert*⁹²

In this case Johnson, the surrogate mother was in no way connected to the child, the embryo completely belonged to the intended husband and wife. According to the agreement the intended parents agreed to pay the amount decided in installments. While the surrogate was pregnant she demanded the whole amount and said in failure of which she will hold the baby.

The biological father filled a case seeking his rights as a legal parent. Johnson alleged that she is the biological mother of the baby, on testing it showed that she was nowhere related to the baby. The court held that when a fertilized egg is formed from the reproductive cells of a husband and wife and is then implanted into the uterus of another woman, resulting in a child that is unrelated to her genetically, the natural parents are the husband and wife thus, taking away all the parental rights from surrogate and declaring the biological parents as the legal parents.

⁹² 5 Cal.4th 84 (1993)

CONCLUSION AND SUGGESTION

CONCLUSION-

The children are the brightest treasures we bring forth in this world. The love and happiness which is spread by innocent children is incomparable in the world. The birth of children is celebrated as a joyous occasion and gifts and offerings are made to God to express one's gratitude and happiness. Since ancient times the task of giving birth and rearing of children has been accomplished through the institution of marriage and family. In fact the importance of child in a marriage and a family has been emphasized and accepted in various religious scriptures and cultures all over the world. The major religions of the world i.e. Hinduism, Christianity and Islam have given utmost importance to the begetting of a child by individuals. Apart from religious and cultural motives, there are various other inter-dependant reasons for begetting a child such as personal, family, social and legal. With the advent of the concept of human rights, the innate desire of an individual to beget a child has been recognized as a basic human right and established as a right to procreation.

The legal framework for the right to procreation as a human right is derived from various international human right documents such as, the *Universal Declaration of Human Rights*, 1948; the *International Covenant on Civil and Political Rights*, 1966; the *International Covenant on Economic, Social and Cultural Rights*, 1966; and the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979 as well as regional human right documents like the *European Convention on Human Rights*, 1950; and the *American Convention on Human Rights*, 1969, etc. It is true, that, the right to procreation is not expressly defined by most of these documents. However, this right is a facet of various other human rights that are already recognized under these documents. The rights such as the right to life, the right to reproductive health, the right to personal freedom, the right to privacy, the right to equality and non-discrimination, the right to marriage and to found a family, right to decide the number and spacing of one's children, etc. are rights that are considered as the basis for right to procreation. Moreover, the right to procreation is expressly mentioned under the *Convention on the Rights of Persons with*

Disabilities, 2006 and the Protocol to *African Charter on Human and People's Rights*, 1998. The right to procreation is seen recognized under various domestic jurisdictions including India.

The right to procreation is one of the basic and fundamental rights of an individual and is a means to fulfill the innate desire of an individual to beget a child.

However a large section of the population is unable to satisfy this right due to infertility caused by various medical and social reasons and as a result they remain childless. The childlessness has a severe impact on the individual's personal, family as well as social life. Due to the serious impacts of childlessness as well as the stigma associated with it, there has been a search for finding appropriate solutions for overcoming childlessness.

Attempts to find solutions for overcoming childlessness are not a new phenomenon but have been in existence since ancient times. In fact, all the major religions of the world have recognized and accepted the fact that some couples may not be able to have a child due to various reasons and hence prescribed different methods for begetting a child not only by conjugal relationship but also through non-conjugal and other means.

Traditionally, various rituals and practices were seen followed to overcome childlessness and some of these practices like fasting, visiting temple, etc. are followed even today. The development of society and legal systems led to the emergence of adoption as a mechanism for overcoming childlessness and to enable infertile couples to have a child. However the mechanism of adoption could not fulfill the innate desire of an individual to have a genetically related child of their own. This desire led to the search for newer methods and experiments in the field of human reproduction. As a result, the Assisted Human Reproductive Technologies have developed for overcoming childlessness and to help the individuals to beget a child genetically related to them. The most commonly used ART's are Artificial Insemination, In-Vitro Fertilization and Surrogacy. Though these technologies fulfill the desire of an individual to beget a child, they are criticized on the basis of various human rights, legal, ethical and moral grounds. Among these methods of ART's, surrogacy is the most widely used method and also most controversial.

Surrogacy in itself is not a treatment for infertility but a method which allows individuals/couples to beget a child genetically related to them. Surrogacy is an arrangement which enables couples or individuals who wish to beget a child but are unable or unwilling to sustain a pregnancy due to various reasons, to become parents of a genetically related child with the help of another. Though the practice of surrogacy to beget a child dates back to ancient times and is mentioned in Hindu

mythology as well as in Bible, the developments in modern medical science and technology have made this method more accessible and convenient. Today, the various methods of ART and particularly surrogacy have made it possible for couples or individuals to beget a child without sexual intercourse. The woman or surrogate conceives, gestates and delivers a baby to such couple either for commercial or for altruistic reasons. In such arrangements generally the intended parents who wish to have a child may contribute genetic material, or sometimes genetic material may be contributed by surrogate mother or may be by donor/donors. Depending upon the contribution of genetic material as well as payment of compensation, there are different types of surrogacy arrangements. In gestational surrogacy or full surrogacy arrangements, the intended parents or donors are contributing the genetic material. In traditional or partial surrogacy, the surrogate mother contributes the genetic material. In case of commercial surrogacy arrangements, the surrogate woman receives a compensation for the services which she performs while in altruistic surrogacy arrangements, there is no payment involved.

The method of surrogacy offers various advantages when compared to any other ART's as well as adoption. First of all it fulfills the innate desire of an individual who wish to have a genetically related child. Secondly, it is the last resort available to those couples, where the woman is unable to carry a baby to full term due to various medical reasons. Thirdly, this method allows the socially infertile individuals like gays, lesbians, divorced and unmarried, to beget a child. Finally, it can avoid years of mental and physical sufferings caused by prolonged treatment of infertility to the couples/individuals. Due to these advantages, surrogacy has emerged as an attractive option during the last few decades for couples/individuals who wish to beget a child.

The increased use of surrogacy has generated a huge debate and controversy among the society as well as legal fraternity due to its potential to affect various human rights. Legal and human rights issues raised by surrogacy have been discussed in various cases like, *Baby M1*; *Johnson v. Calvert*; *Buzzanca v. Buzzanca*; and *Soos v. Superior Court of the State of Arizona*, etc. These cases brought to the forefront issues like legality of surrogacy practices, validity of commercial surrogacy, enforcement of surrogacy contracts, parentage of surrogate child, rights of surrogate women, rights and duties of intended parents and the rights of surrogate child. Thus a need was felt for regulating surrogacy and it led to the adoption of legal measures by various countries depending upon their approach to surrogacy.

There is no consensus among the international community regarding the legal systems required for surrogacy and therefore different countries have adopted diverse legal framework best suiting their political, religious and cultural interests. Some countries like France, Austria, Germany, Sweden, Norway and Switzerland, etc. have banned all types of surrogacy while some countries like, United Kingdom, Greece, Denmark, Netherlands, and Belgium, etc. have allowed only altruistic surrogacy.

However countries like Georgia, Ukraine, Russia, Armenia, Iran and Bahrain, etc. have allowed all types of surrogacy.

These differences in approaches in legal framework towards surrogacy, has led the couples/individuals who wish to have a child through surrogacy to select those countries which are surrogacy-friendly. As a result, the past two decades have seen the emergence of cross border surrogacy practices. Among the various surrogacy – friendly countries, India has become a favorite destination for such couples/individuals. The factors like, availability of well qualified and experienced doctors, quality facilities in clinics at low cost compared to other countries, English speaking staff, and most importantly easy availability of surrogate women at a low cost and minimum regulatory framework have contributed towards the development of India as an international centre for surrogacy services. The surrogacy business in India currently is estimated to be approximately \$450 -500 million a year.

In India, though surrogacy has developed as a million dollar business, there are no specific legislations for the regulation and control of surrogacy. The two draft Bills introduced by the Government of India in 2008 as well as in 2010, for regulating the practices of assisted reproductive technologies including surrogacy in India have not yet been enacted as law. In the absence of such specific legislations, the *ICMR National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India* , are the only available regulatory framework. However, these guidelines are not binding and are primarily focusing on the regulation of ART clinics. The Law Commission of India in its 228th Report has recommended the need for adopting a pragmatic approach to regulate surrogacy in India. The Indian Judiciary has in the landmark case of *Jan Balaz v. Anand Municipality and Others* emphasized the urgent need for a legislation to deal with

various issues raised by surrogacy. Thus the need for a specific legislation dealing with surrogacy cannot be ignored any longer due to the fact that, India is one of the major hubs for surrogacy in the world. The notable absence of specific legislation creates hurdles for the stakeholders involved in surrogacy because surrogacy is the most controversial form of ART and raises various conflicting social, legal and human rights issues. Hence in order to protect the rights and interests of the various stakeholders, the issues related to these stakeholders such as intended parents, surrogate mother, surrogate child as well as issues related to surrogacy contracts require immediate and detailed analysis and solution.

The developments in medical science and technology and establishment of legal system have created a growing awareness regarding the concept and use of surrogacy as well as various legal and human rights issues relating to the stakeholders involved in surrogacy. All the major legal and human rights issues and controversies related to surrogacy practices can be clustered under four major heads, i.e. the issues related to intended parents, surrogate mother, surrogacy contracts and the issues concerning surrogate child.

The intended parents constitute an important stakeholder in surrogacy as such arrangements come into existence only because of the desire of the intended parents to have a child. The basic question whether a couple or individual can have access to surrogacy is highly debatable with conflicting opinions. The right to access to surrogacy can be traced to the right to procreation and moreover, it is a facet of the right to personal liberty; right to found a family; to decide the number and spacing of children; right to privacy; and right to enjoy benefits of scientific and technological progress. Though the right to be an intended parent and right to have access to surrogacy is recognized implicitly by every country which allows surrogacy, this right is not available to each and every individual. Thus there are various eligibility criteria related to age, infertility, marital status, and contribution of genetic material etc. as discussed in the above chapters. In India, currently there is no such restriction and thus anybody can be an intended parent.

The interest of the intended parents need to be given adequate attention due to the fact that, surrogacy is the last option available to them and any failure in the arrangement would be detrimental to them. Unfortunately, most of the countries have not considered the issue of various rights and duties of intended parents seriously.

However, a close examination of many surrogacy arrangements, legal provisions and case laws indicates that, the intended parents are entitled to the following rights, such as right to select a surrogate mother; right to impose restrictions upon surrogate mother; right to information and visit surrogate mother during pregnancy; right to custody and parentage of child; right to maternity and paternity leave for intended parents. Most of the countries which have regulated surrogacy practices have not expressly mentioned these rights except the right to custody and parentage of child.

The success of surrogacy arrangements depends largely on the fulfillment of certain duties by the intended parents. The important duties are: to refrain from sex selection and improvement of non-medical characteristics; to pay the agreed sum; to accept the child after birth; to maintain surrogate child as natural child; and to appoint local guardian. Most of the legal systems have mentioned these duties either directly or indirectly. Though, the current regulatory framework in India also mentions about these rights and duties of intended parents, it fails to provide a mechanism to enforce them. Thus the rights and duties of intended parents need to be addressed effectively by law.

The next stakeholder of utmost importance in a surrogacy arrangement is the surrogate mother or woman. In fact without the help of surrogate woman, a surrogacy arrangement is not possible. The various issues affecting surrogate mother can be classified under three heads, i.e. whether there is a right to act as a surrogate or to rent the womb and if yes who can act as a surrogate; what are the rights of a surrogate mother; and what are the major duties of a surrogate. Though, some of the countries have adopted a regulatory framework to deal with surrogacy, all these vital issues have not been addressed adequately. An analysis of the legal framework dealing with regulation of surrogacy in different countries reveals that there is no consensus among the countries with respect to the question, whether there is a right to act as a surrogate or right to rent womb? In India, there is no express or implied prohibition as well as no express recognition. At the same time the judicial decisions as well as the existing regulatory framework shows that the right to act as a surrogate or to rent womb is not prohibited in India.

The claim that a woman has a right to rent her womb or to act as a surrogate can be justified on the ground that such right originates from the three basic human rights i.e. right to personal liberty and right to privacy; property rights over human body; and right to benefit from progress in science and technology. At the same time this right to act as a surrogate is not an absolute right and can be restricted like any other human rights. Therefore, in order to exercise this right a woman must satisfy certain eligibility criteria relating to age, mental and physical health, previous child birth, marital status, and relation with intended parents, etc. However, these factors have not been adequately addressed by legislations regulating surrogacy in most of the countries.

The regulatory regime established in most of the countries have also failed to address adequately, the major concerns related to the rights and duties of surrogate mother. This issue is of utmost importance and needs to be addressed clearly so as to ensure that, interests of surrogate mother are protected and the surrogacy arrangements are not derogatory to the inherent dignity and worth of surrogate women. An analysis of legal provisions in different countries shows that, a surrogate mother is entitled to have the following rights such as, right to an informed consent; right to receive expenses of pregnancy and hospital treatments; right to receive reasonable insurance expenses; right to compensation; right to remain anonymous; right to visitation; and right to maternity benefits. Though these rights are important to protect the interests and rights of surrogate women, most of the countries have not recognized all these rights. However, in India, the *ICMR Guidelines* recognizes most of these rights except, right to receive reasonable insurance expenses; right to visitation and right to maternity benefits.

The duties of surrogate mother have not also been addressed clearly by the legislations and in fact it is left to the parties themselves to determine the duties of surrogate mother. From the practices of surrogacy arrangements, the following duties can be identified: the duty to carry the child for a full term; duty to relinquish the right over the child and to hand over the child; duty to avoid those practices which adversely affect the normal development of the child; duty to disclose hereditary or any other communicable diseases; duty to permit medical examination; duty to undergo regular medical checkups during pregnancy; duty to disclose details about the family, marital status and number of children; duty to take adequate health care during pregnancy; and duty to abstain from visiting. These duties may conflict with the basic human rights of surrogate and may appear at the first instance to be derogatory to the dignity and worth of a woman. However, as the surrogate

woman is entering into the surrogacy arrangement voluntarily it cannot be criticized on these grounds. The present regulatory framework in India, i.e. *ICMR Guidelines* mentions some of these duties like, duty to relinquish the right over the child and to hand over the child; and duty to disclose hereditary or any other communicable diseases. The *ICMR Guidelines* are voluntary in nature and absence of binding legal provisions creates a hurdle in the enforcement of these rights and duties of a surrogate woman in India.

The success of surrogacy arrangement depends upon the proper fulfillment of rights and duties of the stakeholders i.e. intended parent/parents and the surrogate mother involved in surrogacy. Usually the rights and duties of the parties to a surrogacy are expressed in the form of agreements or formal contracts. However the surrogacy contracts may give rise to various legal and human right issues and hence their legality and enforceability is highly controversial. The approach of countries all over the world towards this issue is also not uniform. Different approaches can be seen taken such as, prohibition of all types of surrogacy contracts; prohibition of only commercial surrogacy contracts; and to allow all forms of surrogacy contracts. Due to the ambiguity prevailing regarding the legality of surrogacy contracts, issues raised by such contracts become difficult to answer. In the absence of a specific law for regulating surrogacy in India, the legal principles governing contracts as codified in the Indian Contract Act, 1872 can be applied to determine the question whether surrogacy contracts are valid and enforceable. A surrogacy contract between the intended parents/parent and the surrogate woman can be considered as a contract within the meaning of Indian Contract Act, 1872 due to the fact that there is an offer from intended parents/parent and an acceptance by the surrogate woman. Moreover there is *consensus-ad-idem* between the intended parents/parent and surrogate woman as well as free consent by the surrogate woman and a lawful consideration and lawful object.

However it may be argued that altruistic surrogacy contracts are not valid contracts as they do not involve monetary considerations. This argument can be rebutted on the ground that altruistic contracts are made on account of love and affection, and even if a total stranger acts as a surrogate the act is providing a gift of life to the intended parents/parent and thus it comes within the ambit of exceptions mentioned under Section 25 of the Indian Contract Act, 1872. Further, the object of surrogacy contracts is to beget a child which is a basic human right recognized under international and national law. This position coupled with the absence of a legal provision prohibiting the

begetting of a child through surrogacy strengthens the contention that surrogacy contracts are having a lawful object and thus valid. However, though a surrogacy contract satisfies all the essential ingredients of a valid contract, the question whether it should be enforced is highly controversial and debatable issue all over the world. Surrogacy contracts are severely criticized on the ground that they are opposed to public policy and morals, would lead to exploitation and commodification of women, baby selling and positive eugenics. The strongest criticism against surrogacy contracts is that it creates a market for gestational and genetic services, leads to commodification of women and reduces a surrogate woman to the status of an incubator or breeder machine. However, such criticisms can be negated due to the fact that every individual has a right to procreation which includes the right to beget with the help of another. Hence, instead of prohibiting surrogacy on such grounds, the surrogacy practices can be regulated through appropriate legislations by the State so as to prevent any misuse.

Further, a surrogacy contract is not a contract for sale, and in fact involves in most of the cases, genetic contribution by the intended parents/parent and hence cannot be equated to baby selling. So also a surrogacy contract is entered into by the intended parents/parent to fulfill their long-cherished desire of begetting a child and hence they would not like to cheat the surrogate or exploit her as it would affect their own interest of begetting a child. However, to avoid any such possibility, the terms and conditions can be clearly laid down in the surrogacy contract which can be regulated by legislations. Further, surrogacy procedure does not involve any sexual intercourse between the surrogate woman and the intended father or male donor and thus does not amount to prostitution or adultery. Moreover, surrogacy is not causing any injury or harm to public welfare. On the contrary, it is helping a section of the society to fulfill their desire of begetting a biologically related child. Thus a surrogacy contract is to be considered legal and enforceable. One of the pertinent questions that arise in this regard is the appropriateness of remedies for any breach of surrogacy contracts. Breach of surrogacy contracts raises major legal and human rights concerns. The breach can occur by the act or conduct of intended parents/parent or by the surrogate woman either prior to artificial insemination or implantation of embryo; after AI or implantation of embryo; or after the birth of the surrogate child. In such circumstances of breach, the remedies like damages and specific performance of contract can be utilized by the parties depending upon the type of breach. The ambiguities and uncertainties surrounding the legality of surrogacy contracts and remedies for

any breach can be resolved only through a proper and adequate legislation by the State. Such a specific legislation is imperative for India for ensuring protection of rights and interests of the stakeholders involved in surrogacy and achieve a happy outcome from surrogacy arrangements.

The basic reason for the interaction between the surrogate woman and the intended parents is to facilitate the bringing into existence of a child through surrogacy. However, the child is not a party to such discussion and hence it is the most vulnerable among all other stakeholders in surrogacy and may be exposed to the negative impacts of surrogacy arrangements. Thus, the protection of interests and rights of surrogate child is of utmost importance. One of the serious threat to the welfare of surrogate child is the refusal by the intended parents/parent to accept the child due to certain circumstances like separation or divorce between them and also in cases of multiple or defective birth. All the countries with legal provisions to deal with surrogacy have cast an obligation on intended parents to accept the surrogate child and in some countries any denial to accept the child has been made an offence. However the imprisonment or other punishment may be for a specified period and would not help to serve the interests of the child. Thus in spite of having genetic parents or intended parents as the case may be, the child would remain an orphan and forced to live in an orphanage.

Another controversial issue affecting the interests of the surrogate child is the question regarding the legal status of the child due to the interference of a third party or third parties, i.e. surrogate, egg donor or sperm donor. This issue has been discussed in many cases and the opinion of the court has been that, the surrogate child is a lawful child of the intended parent/parents because they have given their consent.

The laws in most of the countries including India provides that a child born through surrogacy shall be presumed to be the legitimate child of the intended parent/parents. Though there are various theories propounded by various authors to identify the legal parentage of a surrogate child, the theory of “intent-based parenthood” is considered as the most appropriate theory in case of a dispute regarding the parentage of such child. The fact that the child has come into existence only because of the intention of the intended parents supports this view. This theory is also supported by law in countries like USA, UK, Western Australia, and Queensland which provide that intended parents can become legal parents of surrogate child only through a parental order by the

appropriate authority. However in India, though *ICMR Guidelines* provide that child born through ART shall be presumed to be legitimate child of the couple for all purposes, the absence of a binding legal provision for applying for a parentage order creates difficulties for the intended parents.

A very pertinent issue relating to the welfare of the surrogate child is the issue of custody of the child. Custody disputes between the intended parents and surrogate mother are most common and often affect the very purpose of surrogacy arrangements.

The refusal of surrogate mother to hand over the child is considered as a violation of duty by surrogate mother and a breach of contract. In the event of custody dispute between the intended parents themselves the judicial approach universally including India has been to consider the *best interests of the child* as the guiding factor for deciding the custody of the child. However in cases where intended parents are of same sex i.e. gays or lesbian couples and both of them are equally competent to protect the welfare of the child, the determination of custody is in a legal dilemma. The legal provisions of many countries have not considered this issue and in the absence of any guiding principle, the determination of custody and settlement of such disputes seems difficult for courts.

The welfare and interests of the surrogate child need urgent and adequate attention due to the fact that the welfare of surrogate child is interlinked with numerous issues which have an impact on the rights of the child. Though the international conventions and declarations expressly recognize the rights of every child such as, right to life; right to non-discrimination; right to know his/her origin; right to preserve his/her identity and right not to be separated from parents; the protection of these rights is a complex and daunting challenge in case of a surrogate child. This is due to the fact that a surrogate child is born through the involvement of third party or parties and the rights of the surrogate child often come into conflict with the rights of other stakeholders involved in surrogacy i.e. surrogate woman or donor or intended parents themselves. For example, an important right of the child is to know his/her origin as it is essential for establishing its identity; for understanding genetic origin for medical purposes and also for preventing incestuous relationships between surrogate children born through same surrogate or donor. However this right is in conflict with the right of surrogate woman or donor to remain anonymous. Though most of

the countries have provided legal provisions for maintaining anonymity of the surrogate or the donor, they have also adopted provisions for disclosing genetic history of the child in certain circumstances. However, regarding the disclosure of personal identity of the surrogate or donor, the legal opinion is divided. In India all genetic and medical information about the surrogate mother and donor can be provided to the surrogate child except information relating to their personal identity such as name and address. Regarding the right to maintenance and right to inheritance, it is universally accepted among all the legal systems that the surrogate child would be presumed to be the natural born child of the intended parents and hence have all the rights similar to a child born through sexual intercourse.

The issue of citizenship of surrogate child has also emerged as a contentious issue due to the increasing number of cross-border surrogacy practices in India. The Gujarat High Court in the case of *Jan Balaz v. Anand Municipality and Others* has settled this issue by holding that, a child born to an Indian surrogate mother in India would be considered as an Indian citizen. However, the Draft ART Bill, 2010 has made a departure from this decision by stating that if a foreigner or a foreign couple seeks sperm or egg donation or surrogacy in India the surrogate child even though born in India to an Indian surrogate shall not be an Indian citizen. This conflict would naturally get resolved when the Bill gets passed in the Parliament. Increasing use of surrogacy has also raised various other issues such as selection of sex of the child, creation of designer babies and establishment of non-traditional families. The concerns regarding sex selection and creation of designer babies have been well addressed by laws all over the world including India. The countries have adopted various legislations prohibiting such practices and making it an offence.

However a limited use of pre-implantation genetic diagnosis is allowed for medical purposes. Further, the concern that, surrogacy would lead to creation of non-traditional families such as gay or lesbian family and it would affect the child's welfare, is not having any force due to the fact that, there are no studies to prove that children raised by such families may be adversely affected due to absence of mother-figure or father figure.

However such concerns cannot be ruled out completely in near future and therefore need to be addressed adequately by the State. In view of the increasing use of surrogacy, and considering the fact that, the interest and welfare of the child depends upon the stakeholders involved in surrogacy, it is the duty of the State to ensure that proper and adequate legal provisions are made to protect

the interests and rights of the surrogate child. Thus the interests and rights of each and every stakeholder are equally important in every surrogacy arrangement and adequate steps are to be taken by the State to protect such interests and rights.

Though surrogacy raises a myriad of legal and human rights issues, it is a boon to those individuals or couples who wish to beget a biologically related child. Therefore, surrogacy practices would continue to take place all over the world, irrespective of the hardships and disputes involved. Hence, prohibiting surrogacy practices or considering the surrogacy contracts as null and void is not a wise step in a welfare State. On the contrary, such a step would deprive a large section of the population of their basic human right to beget a child. Moreover, it may lead to such practices being carried out secretly and may cause harm to the interests of all stakeholders. Hence, it is necessary to develop an appropriate legal framework for regulating surrogacy. In India there is no specific law dealing with surrogacy and the existing legal provisions are inadequate to cope up with the various legal and human rights issues raised in surrogacy arrangements. Therefore a specific law dealing with surrogacy is a dire necessity in India due to the fact that, the surrogacy practices are on the rise in the past few years. Any such legislation should expressly declare both altruistic and commercial surrogacy as legal as well as declare surrogacy contracts as valid and enforceable. It should necessarily take care of the conflicting interests of various stakeholders involved in surrogacy and strike a balance between their interests and also the interests of society.

SUGGESTIONS

The following suggestions can be made for regulating surrogacy in India.

General Suggestions

(i) The right to procreation is a basic human right. Hence it has to be defined clearly and specifically under international human rights law and municipal laws. Considering the importance of having a child in all societies as well as the fact that childlessness has serious adverse impact on the life of such couples/individuals, the right to procreation must extend to include the right to access to assisted human reproductive technologies for begetting a child.

(ii) In view of the increasing instances of cross-border surrogacy practices, it is necessary that international community must come to a consensus regarding the legality of such practices so as to avoid hardships to the intended parents/parent and surrogate child. Therefore every country may consider the surrogacy practices performed in another country as valid and legal for its citizens if they go to some other country for availing the benefits of surrogacy in that country and come back with a surrogate child. In this regard it is suggested that a declaration or a convention may be adopted at international level for recognizing overseas surrogacy practices as well as to accept the parentage certificates issued by another country.

(iii) In order to deal with any dispute relating to surrogacy and surrogacy contracts, states shall establish a designated court comprising of legal and medical experts.

Suggestions in relation to Surrogate Mother

1. The right to act as a surrogate for another must be considered as a facet of right to personal liberty and privacy of a woman. However reasonable restrictions can be imposed on this right of a woman to act as a surrogate. Such reasonable restrictions are necessary to avoid any indiscriminate use of such right by women and misusing the right for purely commercial purposes like a business.

2. The legal framework for regulating surrogacy arrangements shall clearly specify the eligibility criteria as to who can be a surrogate. The State however can take into account the moral, social, ethical, legal and human rights aspects while specifying the eligibility criteria. An unmarried girl shall not be allowed to act as a surrogate.

A married woman can be allowed to act as a surrogate only with the consent of her husband. However divorced or widowed women can be allowed provided if they satisfy other relevant criteria. The surrogate woman shall be above 25 and below 45 years of age; must be free from any hereditary or communicable diseases; and must be physically and mentally fit to carry a child to full term. A relative shall be allowed to act as a surrogate only if she is having the status of a sister or sister-in-law and only for gestational surrogacy.

The maximum number of children to be allowed for a woman may be fixed as three in her lifetime, including her own children as well as through surrogacy.

3. There is a need to specify clearly the duties of a surrogate mother for ensuring the success of surrogacy arrangements and protecting the interests of intended parents/parent and surrogate child.

The following duties have been identified as essential viz

- (a) Duty to disclose details about the family, marital status, number of children, and hereditary or any other communicable diseases;
- (b) Permit medical examination and regular medical check-ups as required prior to and after successful surrogacy procedures;
- (c) To take adequate health care during pregnancy and to avoid habits like taking alcohol, drugs, smoking, etc. which adversely affect normal development of the child;
- (d) The surrogate must carry the child for a full term and shall relinquish all her parental rights over the child after its birth and hand over the child to the intended parents/parent; and

- (e) The surrogate shall also abstain from visiting the child and shall not interfere in the relation between the intended parents/parent and the surrogate child.

4.The rights of the surrogate woman must be stated clearly. She shall be provided with the following rights, *viz*

- (a) right to informed consent and proper counseling prior to initiation of surrogacy process;
- (b) to receive all expenses for pregnancy and hospital treatments as well as insurance coverage;
- (c) to receive compensation as agreed by the parties;
- (d) to remain anonymous; and
- (e) a limited right to visitation can be allowed subject to the consent of intended parents/parent.

5. The Maternity Benefit Act, 1961 must be amended so as to include within its ambit the surrogate woman also, if she is a working woman. The welfare provisions of the Act such as, prohibition of hazardous employment, and other eligible leave with pay etc. must be provided to surrogate woman. However in surrogacy as the child is handed over to the intended parents/parent immediately after birth, the maternity leave to a surrogate mother can be limited to such period as required for improving the health of the surrogate mother as per medical advice. The monetary maternity benefits must be given to a surrogate woman only in case of altruistic surrogacy and not in case of commercial surrogacy.

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