

**PROBLEM OF SURROGACY IN INDIA: NEED OF
EXHAUSTIVE LEGISLATION**

A

MINOR RESEARCH PROJECT IN THE SUBJECT OF LAW

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Dr. Pahuja Rekha Purushottamdas
(Principal Investigator)

DECLARATION

I hereby declare that the work incorporated in the Minor Research project entitled “Problem of Surrogacy in India: Need of Exhaustive Legislation” is original and has been carried out by me and the data incorporated in the project work are obtained during the research work and the material from other sources included in the project is duly acknowledged.

Dr. Pahuja Rekha Purushottamdas
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Chapter –1
INTRODUCTION

Marriage as an institution is the social order through which a married couple wish to beget a child¹. But however if the couple is infertile due to any reason whatsoever, the desire remains, unfulfilled. Over a couple of centuries, this desire of an infertile couple was being fulfilled through adoption. In western countries we see that the Law relating to Adoption is universal. However if we look at the situation in India the corresponding law is not universal but different laws are applied to different persons depending upon their caste. For example: Hindu Adoption and Maintenance Act, 1956 applies to the Hindus only.

The modern science and technology has provided new opportunities for infertile couples to what is called as 'Surrogacy' in medical terminology. In spite of controversial moral and ethical issues arising due to surrogacy, it has been gaining popularity across the world, especially if we see the position in Western countries where adoption is not easy to come by². It is stated that one out of six couples have the problems of infertility. Some of these couples use medical treatments to overcome this problem, for others however there is no such help which is available. These are the cases where the woman has undergone a hysterectomy or she has suffered multiple miscarriages, or she is born without a womb wherein the surrogacy comes to rescue such infertile couple. At the same time, it is being a very complicated issue involving with numerous moral and ethical questions and exploitation of women needs to be governed by law. Therefore the researcher seeks to address one such question with regard to issue of surrogacy in India and, in the process, analyzes its various dimensions in order to ascertain the basis which makes it imperative for the legislature to pass a law to explicitly address the issue.

¹Dr. Nandita Adhikari, law & medicine, 2nd edn. Central law publication at p-155

²Anil Trehan, article on surrogate motherhood in India: A Conceptual and Effectual Analysis and Recommendations of Indian Surrogacy Law Centre, Nyaya Deep the Official Journal of NALSA vol – x issue – 4.oct.2009 at p-23

Let us analyze the historical background and meaning of term surrogacy first.

1.1 Historical background-

Surrogacy is not so new so far as new reproductive technologies are concerned. The practice dates back to Biblical Times. The Old Testament offers the example of Abraham's infertile wife Sarah, who commissions her maid Hagar to bear her child by persuading Abraham to sleep with her. Similarly Rachel the barren wife of Jacob commissions her maid Bilhal to have a child by convincing Jacob to sleep with her. Some people say the practice of surrogacy started even before Biblical Times though off records³.

Hindu mythology also offers instances of surrogacy and reflects the secrecy that still surrounds surrogacy practice. Gandhari, who was the wife of king Dhritrashtra, conceived the children but her pregnancy went on for nearly two years, after which she delivered a mass. Bhagwan Vyas who found 101 cells were normal in the mass. These cells were then put in the nutrient medium and were grown to what is called as in vitro till the full term. Of these, hundred developed into male children, and one as female⁴.

Also, we can see that Lord Gautama produced one son and one daughter who were both test tube babies. Bharadwaj⁵ produced Drona. The birth of Drishtyadumna and Draupadi was also an example of the super natural powers of the Rishis.

In the Bhagvata Purana Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devki's womb transferred to womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby Balaram, brother of Krishna and secretly raised the child while Vasudev and Devki told Kansa the child was born dead

³Dr. c.p. gupta & Dr. Suresh Bhaira "Right to health : A socio legal perspective in relation to Reproductive & surrogated Motherhood", an article published in Law Profiles –A Monthly Legal Journal in English; vol.3, issue 6 June 2012 at p-11

⁴Dr.S.A.Karandikar & Dr.Asok Yende, "Human Rights Law" Aarti & Company, 2012 edn, pg. no.611

⁵ www.geni.com/people/drona-dronacharya-bharadwaja/600000000

Also Another instance of surrogacy can be seen in Mahabharatha it is that of panduraja and his wife kunti as Panduraja was cursed to never beget a child and thus unable to provide heir to the kuru throne, Pandu begs his devoted wife kunti to beget a child with a surrogate father a saintly Brahman kunti was blessed by Durvasa with the power to call demigods by Durvasa with the power to call demigods and she begot three sons with Dharmavayu and Indra.

We can also see the mention where number of religions and civilization has celebrated surrogate mothers for their good deeds and services. During the period of 1980's there is mention that the surrogate mothers were used by the gay community to make their families then it was frowned up by the society. It is also stated that the American Indians were the first ones who truly begins the surrogate mother history in this part of the world .So we are looking back to the 1899's for the beginning of this part of the story. If an Indian woman was found to be infertile then her husband was supposed to go to the chief of his tribe and seek for help .Thereafter, the husband would then be sent to check the medicine man who would give the wife certain herbal concoctions After that the witch doctor said nothing could be done to help his wife, the husband would go to see the chief. He would be allowed to take other woman and make her pregnant, possibly, so that he would be able to become a father of son to carry on his tribe. The barren wife would have relations with the child. He would stay with his birth mother.

The American Indians were not the only civilization who were using the surrogate mothers to carry on the family name and bloodline back, it has been heard that in the recent European history, particularly in Spain for Kings to take in several surrogate mothers until he was born a son. The surrogate mother of the child would then become a nanny to the entire royal child. The children would believe themselves to be genetically related to the king and queen. Never knowing the truth obviously, things like this were kept secret, if not; questions would be asked about their rights to the throne.

In America the very first surrogacy Agency was opened by a lawyer namely Noel keane back in the late 1970 to early 1980 He created many more agencies abided by the surrogacy arrangement laws .Since then we can see that there have been more than 3000 births out of surrogacy arrangement laws. It is worth noting that the world's second and India's first IVF (In vitro fertilization) baby named kanupriya alias Durga was born in the city of Kolkata on Oct 3rd 1978 about 2 months after in Great Britain on July 25 1978 since then we can see there is rapid development in the field of Assisted Reproductive Technology ⁶.

1.2 Meaning of the term surrogacy –

The word surrogate has its origin in Latin surrogates is a past participle of 'Surrogare' meaning substitute, that is a person appointed to act in place of another. Thus surrogate mother is a woman who bears a child on behalf of another woman either from her own egg or from the implantation in her womb of fertilized egg from another woman ⁷.

1.2.1 According to Black's law Dictionary ⁸–

Surrogacy means:

“The process of carrying and delivering a child for another person.”

1.2.2 The New Encyclopedia Britannica⁹ defines –

“Surrogate motherhood as the practice in which a woman bears a child for the couple unable to produce children in the usual way.”

1.2.3 The Report of the Committee of Enquiry in to Human Fertilization and Embryology or the Warnock report (1984)¹⁰ termed surrogacy as

“The practice where by one woman carries a child for another with the intention that the child should be handed over after birth.”

⁶Law Commission of India (Report No 228) Aug 2009,p-9 :<http://www.lawcommisionofindia.nic.in>

⁷Law Commission of India (Report No 228) Aug 2009:<http://www.lawcommisionofindia.nic.in>

⁸ Ibid note 8

⁹ Ibid note 8

¹⁰SmitaChandra India& surrogacy – a Washing Machine in exchange of child, Law 2 vol. 11 No 05 issue 129. dated 24-05-2012: <http://ssrn.com/abstract=1762401>

1.2.4 A standard definition of ‘surrogacy’ is offered by the American Law Reports in the following manner:

“..... A contractual undertaking where by the natural or surrogate mother for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father , to bear and delivers the child to the natural father and to terminate all of parental rights subsequent to the child birth.”

1.2.5 The Assisted Reproductive technologies (Regulation) Bill 2010¹¹ in its Draft defines surrogacy U/S 2(aa)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 handover the child to the person or person for whom she is acting as a surrogate.”

In medical parlance – the term surrogacy means using of a substitute mother in the place of natural mother.

1.3 When Surrogacy arrangement is resorted to:

Surrogacy arrangement may be resorted to in the following manner:-

1. A woman is unable to become pregnant as she has had a hysterectomy or is missing a part of her uterus, uterine lining, ovaries or other parts of the genital tract.
2. A woman may have health condition that makes pregnancy dangerous or she may not be able to carry a baby to term.
3. A couple in a male same –sex relationship may wish to have a child using their sperm.
4. A man may wish to have a child, but have no partner.
5. A woman, who has embryos in storage with her male partner, dies and the man wishes to use the embryos to have a child.¹²

¹¹Draft of the Assisted Reproductive Technologies (Regulation) Bill 2010, Ministry of health & family Govt of India, New Delhi, JCMR New Delhi

¹²Dr.S.A.Karandikar&Dr.AsokYende,“Human Rights Law”Aarti& Company,2012edn,pg. no.612

1.4 Categories of surrogacy :

Black's Law Dictionary categories surrogacy into two classes¹³:-

1. Traditional Surrogacy and
2. Gestational Surrogacy

1.4.1 Traditional surrogacy- It is also known as straight method of surrogacy. In this type of surrogacy, a woman provides her own egg, which is fertilized by artificial insemination and she gives birth to child for another person.

1.4.2 Gestational Surrogacy –It is also known as a host method. It is a pregnancy wherein one woman that is the genetic mother provides the egg, which is fertilized and another woman (the surrogate mother) carries the fetus and gives the birth to the child. The embryo is created by the process of IVF (in-vitro fertilization) which is implanted into the surrogate mother.

Traditional surrogacy may be called as partially or genetically contracted motherhood because surrogate mother is impregnated with the sperm of the intrude father making her both the genetic and the gestational mother, the child share make up of the commissioning father and the surrogate mother.

1.4.2.1 In vitro fertilization:

It is a process by which egg cells are fertilized by sperm outside body-in vitro. In Vitro Fertilization is a major treatment when the other methods of reproduction have failed. The process involves hormonally controlling the ovulatory process, removing ova (eggs) from the woman's ovaries and letting sperm fertilize them in a fluid medium¹⁴.

1.4.2.2 Artificial insemination:

Artificial insemination is a process by which sperm is placed into the reproductive tract of female for the purpose of impregnating the female by using the

¹³Law Commission of India (Report No 228) Aug 2009:<http://www.lawcommissionofindia.nic.in>

¹⁴Dr.S.A.Karandikar&Dr.AsokYende,"Human Rights Law"Aarti& Company,2012edn,pg. no.610-11

means other than sexual intercourse or natural insemination. In humans it is used as an assisted reproductive technology, using either sperm donor in cases where male partner produces no sperm or woman has no male partner¹⁵

1.4.3 Altruistic surrogacy –

It is a situation where surrogate receives no financial reward for her pregnancy or on the relinquishment of the child, although usually all the expenses related to pregnancy and birth are paid by the intended parents such as medical expenses, maternity, clothing and other related expenses.

1.4.4 Commercial surrogacy¹⁶ –

In this form of surrogacy the gestational carrier (surrogate mother) is paid to carry a child to maturity and is generally resorted to by well off infertile people who can afford the cost involved or people who save and borrow with the view to fulfill their dreams of being parents. This medical procedure is lawful in various countries including India where due to excellent medical infrastructure, high international demand and easy availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes also called as “womb for rent”, “Out Sourced pregnancies” or “baby farms.”

1.5 Statement of problem –

After business process, knowledge process and legal process outsourcing, genetic pool banks of India are the latest outsourcing industry from India. Our country is one of the very few countries in the world which has legalized commercial surrogacy in the absence of law by the decision of honorable Supreme Court of India in the year 2008. Its more than 20 billion rupees that is 25000 crores business in a year with reproductive tourism industry growing by leaps and bounds. As the most Western countries have realized the downside of surrogacy, India too is required to consider the same.

¹⁵ Ibid note 15 p-610-611

¹⁶ Ibid not no 2.pg no 31& 32/Nyaya DEEP.

Pregnancy affects woman's health and one cannot know all the long term consequences of repeated pregnancies. Studies have shown that repeated pregnancies can even affect cardiovascular health¹⁷ which the poor illiterate woman in India may not know. A baby we know that soaks up nutrition from mother's body and though she might have a better diet during the pregnancy due to the money and care offered by the biological parents but it is also to be taken into consideration that her health may not be that good enough to begin with. As we know that in India women are not as healthy as they are in developed countries due to the poorer nutrition levels since childhood.

There are different effects of short term and long term pregnancy short term effects range from fatigue and vomiting to the swelling of joints and long term effects range from scarring, varicose veins to loose skin and as for complications of pregnancy they are so many. Some of these complications are life threatening like breast cancer. Poor women who rent out the womb do not care or even think about these things. And even if middle class women go for it, the motive is money and that makes the women vulnerable to exploitation.

There are some other negative aspects of surrogate motherhood. As the apex court of India, has in the absence of law, legalized the commercial surrogacy in the year 2008 since then many people feel that the day will not be away when educated working women will start hiring wombs to prevent a break in their career! To take an extreme scenario baby 'factories' could sprung up very soon!! A scene from a horror movie, which fortunately will not see the light of a day as most countries have realized downside of surrogacy, India too is required to consider the same.

1.11 **Significance of study –**

Surrogacy is a very knotty issue in India due to non-intervention of law. Law is to act as an ardent defender of human liberty and an instrument of distribution of positive entitlements. At present surrogate motherhood in India involves a business of \$445 billion

¹⁷Nita Surrogacy in India problems & Laws Nov. 1, 2007, tags: surrogacy.

faces severe pressures from different social concerns. Even the law in its favors is criticized. Should the law let the business or save the society from onslaught of capitalism??

As it is stated earlier that why India has become a much favored destination and also the places where surrogacy is rapidly booming like commercial industry. It is really a matter of concern that in spite of a very good report submitted by Justice Dr. A. R. Lakshmanan, chairman of law commission of India in the year 2009 was not converted into good deal of legislation by the Indian parliament. If the practice keeps growing the way it is, it could change from a medical necessity for infertile women to a convenience for the rich with specially the wealthy couples of the West choosing commercial surrogacy over a natural childbirth because of the pain and stress of natural childbirth causing the whole industry to be framed out. Some bioethicists are concerned that Indian surrogates are being badly paid for their surrogacy and that they are working as surrogates in a country with a comparatively high maternal death rate.¹⁸ However high maternal death rate is found in the poorest of the poor section of the population in India who may not get access to proper medical facility in time or from amongst many who opt not to access them because of superstition and illiteracy, and mostly women from poor background do this work.

1.12 Objectives of study –

The objectives of the present study are as follows

1. To examine the concept of surrogate motherhood in ancient times.
2. To analyze the human rights perspective of surrogacy
3. To analyze the international views on surrogacy.
4. To study the Indian position on Surrogacy.

¹⁸Unicef India – statistics

5. To conduct survey in few ART clinics, and also to collect opinion from law experts
6. To Study Indian Judicial approach towards surrogacy.
7. To conclude with proper recommendations.

1.14 Scope of study -

The research problem under study is a universal one. It being an unregulated in spite of being complicated invites a great attention. The entire study includes understanding, need of surrogate motherhood analyzing international perspectives of surrogacy and balancing between the right of reproduction and right to health there by suggesting the good deal of rules and regulation to our country after carefully considering the societal feelings and acceptance to the said practice. The main emphasis will be on protecting the society from onslaught of capitalism over Asian poverty and thereby to stop the exploitation of poor women who are being used as a commodity or a machine of reproduction.

1.15 Research Methodology:

The method of study is doctrinal as well non doctrinal type of research. Under non doctrinal method the researcher has prepared questionnaire for fertility experts and for Law experts separately and has collected their views and opinion through questionnaire method.. Also under doctrinal method, the researcher has collected the data which include studying the laws of various countries on surrogacy, 228th report of Law Commission of India, Guidelines issued by Indian council of medical research, judicial approach across the world and in India in the absence of law, various articles written on surrogacy and opinion of legal experts on surrogacy etc. Both the methods have helped the researcher in gaining the thorough knowledge of the concept.

1.17 Scheme of study:

The first chapter deals with the introductory part of the term surrogate motherhood.

The second chapter deals with the human rights jurisprudence and surrogacy.

The third chapter deals with the International scenario on surrogacy. The researcher has analyzed the legal and judicial position of England and Australia.

The fourth chapter deals with the Indian position on surrogacy.

The fifth chapter is titled as Empirical study on surrogacy and practical realities of socio-legal problems.

The last chapter deals with the conclusion and suggestions. The researcher after completion of research has submitted the conclusion and suggestions.

Thus, Surrogacy being a worldwide phenomenon needs to be properly regulated. Therefore, it can be said that it is a time that our Parliament to consider at length and also to convert the Assisted Reproductive Technology (Regulation) Bill, 2010 into good deal of legislation. So that there will be proper checks and controls on the Assisted Reproductive Technology Clinics and the rights of all the parties involved, such as the intended parents, the surrogate mother and the most important the surrogate child will be regulated properly and thereby there will be prohibition of poverty stricken Indian women to be the victims of commercial surrogacy. It is advisable to protect the society from onslaught of capitalism over Asian poverty and thereby stop the exploitation of poor Indian women being used as machines. The human race carries on its back the guilt of many errors and faults, but let us hope that this Act does not get itself included in that erroneous list and does really see the light of the day in its intended full form and glory at the interest.

Chapter -2

Human Right Jurisprudence

of Surrogacy

2.1 “Human rights”- Meaning of-

Human Rights means the rights relating to life, liberty, equality, dignity of individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.¹⁹

For centuries past, women all over the world have not only, been denied full justice, social, economic and political but as a “weaker sex” they have been used, abused, exploited and, then discarded to lead immoral, street vagrant and destitute life till their death. Although they constitute about half the total population and have contributed and sacrificed not less than men in the national freedom struggles at any point of time but they have been deprived of their due shares in various areas of activities and have been subjected to inhuman and humiliating wrongs from birth to death for no sin. The general though unfortunate fact has ever since, been that women are sub-human species, an object of contempt and ridicule, a commodity for barter, an expendable asset and a plaything for mere sexual enjoyment. The ancient Judo-Christian Society regarded women as “a scorpion ever ready to sting”, and Pagan Arab saw in her the devil’s whip. The Indian regarded women as social evil to be burnt at pyre of her husband. Nowadays, however, women have broken their ill social shackles and are ready to face the contemporary

¹⁹ Protection of Human Rights Act, 1993, Section 2(1)(d)

challenges without any help and hesitation and, consequently, March 8, is formally observed and celebrated in several countries, including India, as a mark of integrated achievements towards the equality of rights, status and dignity of women and their equal participation in economic, social and cultural development in contemporary world scenario.²⁰

Women constitute about one half of the global population, but they are placed at various disadvantageous positions due to gender differences and bias. They have been the victims of violence and exploitation by the male dominated society all over the world. Ours is a tradition-bound society where women have been socially, economically, physically, psychologically and sexually exploited from time immemorial, sometimes in the name of religion, sometimes on the pretext of writings, in the scriptures and sometimes by the social sanctions. The concept of equality between male and female was almost unknown to us before the enactment of the Constitution of India. Of course, the preamble of The Constitution, which is the supreme law of the land, seeks to secure to its citizens including women folk, justice- social, economic and political, liberty of thoughts, expressions, belief, faith and worship, equality of status and opportunity and to promote fraternity assuring the dignity of individual.

Origin of human Rights:

The protection of rights of human being was deeply inserted in the Babylonian Laws, Assyrian Laws, Hittiti Laws and Dharma of Vedic time in India²¹ Description of protection of right was widely and wisely discussed by Plato, Greek and Roman philosophers. Their discussion was based on religious foundation. Right to vote, Right to trade, Right to access to justice to their citizen etc., were given by different Cities belonging to the State of Greece.

²⁰ Dr. Awasthi&Kataria,"Law relating to Protection of Human Rights", Orient Publishing Company, New Delhi* Allahabad, p-3

²¹ Justice P.N. Bhagwati, Supreme Court of India in the "Seminar of Human Rights" organized by I.L.A. Allahabad submitted in the inaugural address

Human Rights are to be seen from different angles viz, human right to Reproduction and infertile couple, human right to Health and surrogate mother, and human right of Child and the surrogate child human rights to practice any profession, trade etc. and ART clinics. Let us consider them in detail:

2.2 Human Right relating to Reproduction

The United Nations Charter published in 1945 did not define reproductive rights. Three years later, the UN adopted the Universal Declaration of Human Rights (UDHR), the first international legal document to delineate human rights. The UDHR does not mention reproductive rights. Reproductive rights began to appear as a subset of human rights in 1968. The provision was made under article 16 that -

(1)"Men and women of full age, without limits due to race, nationality or religion, have the right to found a family."²²

(2) The family is natural and fundamental to the protection by society and the State.

In 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 12 made essentially the same statement ("Convention for the Protection of Human Rights and Fundamental Freedoms").²³

During the 1990s, a series of important United Nations conferences emphasized that the well-being of individuals, and respect for their human rights, should be central to all development strategies. Particular emphasis was given to reproductive rights as a cornerstone of development.

Reproductive rights were clarified and endorsed internationally in the Cairo Consensus that emerged from the 1994 International Conference on Population and Development. This constellation of rights, embracing fundamental human rights established by earlier treaties, was reaffirmed at the Beijing Conference and various international and regional agreements since, as well as in many national laws. They include the right to decide the number, timing and spacing of children, the right to

²²United Nations Universal Declaration of Human Rights,1948 :<http://www.un.org/en/documents/udhr/>.

²³European Convention for the Protection of Human Rights and Fundamental Freedoms. 1950

voluntarily marry and establish a family, and the right to the highest attainable standard of health and also education among others.

Attaining the goals of sustainable, equitable development requires that individuals are able to exercise control over their sexual and reproductive lives. This includes the rights to:

- Reproductive health as a component of overall health, throughout the life cycle, for both men and women
- Reproductive decision-making, including voluntary choice in marriage, family formation and determination of the number, timing and spacing of one's children and the right to have access to the information and means needed to exercise voluntary choice
- Equality and equity for men and women, to enable individuals to make free and informed choices in all spheres of life, free from discrimination based on gender
- Sexual and reproductive security, including freedom from sexual violence and coercion, and the right to privacy²⁴.

Judicial Approach:

In the case of *Jack T. Skinner vs. State of Oklahoma*²⁵ the Supreme Court of America in a unanimous decision found that the Oklahoma law providing for involuntary sterilization violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution of America.

The State argued that they were attempting to prevent "criminal traits" from being passed down through the generations, but the Court rejected this argument:

Thus in this case, the U.S. Supreme Court held that the act of marriage and act of procreation are the fundamental rights of all the people, even though the Constitution does not specifically provide them as such. Thus, a private sphere of conduct between individuals was being recognized.

²⁴ <http://www.unfpa.org/rights/rights.htm>

²⁵ http://atheism.about.com/library/decisions/privacy/bldec_SkinnerOK.htm

In India, the Andhra Pradesh High Court in the case of *B.K.Parthasarathi Vs. Government of Andhra Pradesh and Others*²⁶ relying upon the case of Jack T. Skinner Vs. State of Oklahoma which is cited above, upheld “the right of “reproductive autonomy” of an individual as a facet of his “right to privacy” and also agreed with that decision given in Skinner’s case which characterized the right to reproduce as “one of the basic civil rights of man”.

The Court said that the personal decisions of the individual about the birth and the number of babies called 'the right of reproductive autonomy' is a facet of a 'right of privacy.' The American Supreme Court in *Skinner v. Oklahoma*²⁷, characterized the right to reproduce as a "one of the basic civil rights of man."

The right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the State into such a decision making process of the individual is scrutinized by the constitutional Courts both in this country and in America with great care.

In the case of *Griswold v. Connecticut*²⁸ the constitutionality of a statute which sought to restrict the right of married persons to use contraceptive devices fell for the consideration of the Court. The majority of the American Supreme Court held that this statute impermissibly limited the 'right of privacy' of the married persons. Justice Douglas who delivered the majority opinion, traced this 'right of privacy' to several guarantees of the Bill of Rights. The Court held that the impugned statute regulated a personal marital relationship without an identifiable and legitimate relationship and would expose the married couple to an inquiry into the intimate details of their relationship.

In *Eisenstadt v. Baird*²⁹, the Supreme Court invalidated a statute which prohibited the distribution of contraceptives to unmarried persons on the ground that it violated the

²⁶ AIR 2000 A. P. 156

²⁷ 316 US 535,

²⁸ 381 US 479

²⁹ 405 US 38

equal protection clause as the Court found no rationale or legitimate distinction between uses of contraceptives by married or unmarried persons.

In *Roe v. Wade*³⁰, the Court held that the right to have an abortion was a part of the fundamental constitutional right of privacy of the woman and such a right could be interfered with by the State only to promote a compelling interest of the State. The protection of the health of the woman was held to be a compelling interest of the State.

All the above-mentioned cases, of course, deal with the right of the individual either a man or a woman to take a decision not to reproduce and where the State sought to interfere with such a decision making process, irrespective of the conclusion reached by the Court in each of the individual cases, the Court recognized in all-these decisions that the 'right of privacy' is not an absolute right and such a right could be restricted if required to promote some compelling interest of the State. The court held the said provision as not violative of constitutional provisions.

The Supreme Court of India upheld the two living children norm to debar a person from contesting a Panchayat Raj election but it refrained from stating that the right to procreation is not a basic human right³¹.

Thus, if reproductive right gets Constitutional umbrella, Surrogacy which allows an infertile couple to exercise that right also gets the same Constitutional protection.

2.3 Human Right relating to Health:

Article 25 of Universal Declaration of Human Rights, 1948 states that-

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

³⁰ 410 US 113

³¹ *Javed vs state of Haryana* (2003) 8 SCC 369

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

*Articles 11 and 12 of International Covenant on Economic, Social and Cultural Rights, 1966*³² say that- State parties to the Covenant recognize the right of every person to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to continuous improvement of living conditions. Article 12 guarantees everyone to the enjoyment of the highest attainable standard of physical and mental health.

Similarly, Article 5 of Convention on Elimination of All Forms of Racial Discrimination, 1966 states the right to public health, medical care, social security and social services along with the other rights mentioned in that article.

Article 10, 12, 14 of Convention on Elimination of All Forms of Discrimination against Women ensures the health, family planning, access to health care services, appropriate services in connection with pregnancy etc.

These Human Rights relating to health set out in above treaties include human rights to-

- The highest attainable standard of physical and mental health including reproductive and sexual health.
- Equal access to adequate health care and health related services regardless of sex, race or other status.
- Equal distribution of food.
- Access to safe drinking water and sanitation.
- An adequate standard of living and adequate housing.
- A safe and healthy environment.
- A safe and healthy workplace and to adequate protection for pregnant women in work proven to be harmful to them.

³²Dr.Awasthi and Kataria, "Law relating to Protection of Human Rights", Orient Publishing Company, New Delhi* Allahabad,2006edn.p1223-1224

- Freedom from discrimination and discriminatory social practices including female genital mutilation, prenatal gender selection and female infanticide.
- Education and access to information relating to health including reproductive health and family planning to enable couples and individuals to decide freely and responsibly all matters of reproduction and sexuality.

The Constitution of India doesn't recognize 'right to health' as a fundamental right³³. But however the same is implicit under right to life which in turn is a fundamental right. Various provisions relating to health care and protection can be found in the directive principles of state policy enshrined in the Constitution of India. These are:

Article 38 imposes a liability on the State that it will secure a social order for the promotion of welfare of the people, but without public health it cannot be achieved. It means without public health, general welfare of the people is impossible.

Article 39(e) provides that³⁴- "State shall direct its policy towards securing that the health and strength of workers, men and women and the tender age of children are not abused."

Article 41 imposes a duty upon the State to public assistance basically for those who are sick and disable. Further article 42 casts a duty to provide maternity relief, thereby protecting the health of infant and the mother after delivery of the child.

Article 47 imposes duty upon the State³⁵"to raise the of level of nutrition and standard of living of its people and the improvement of public health as among the primary duties".

In *Consumer Education and Research Center V Union of India*³⁶The Supreme Court has laid down that the aim of social justice is to attain substantial degree of social, economic and political equality, which are the legitimate expectations. The state should provide facilities and opportunities to reach at least minimum standard of health,

³³Dr.C.P.Gupta,An article on "Right to health : A Socio Legal Perspective In Relation To Reproductive And Surrogate Motherhood"p-9

³⁴ **Dr. J.N.Pandey, "The Constitutional Law Of India", Central Law Agency,47th edn.p-406**

³⁵ Dr. J.N.Pandey, "The Constitutional Law Of India", Central Law Agency,47th edn.p-410

³⁶ AIR 1995 SC 922

economic security and civilized living while sharing according to the capacity, social and cultural heritage.

Pregnant Women and newly mothers with their little ones enjoy special protection, because child bearing and child rearing necessitate social and economical support. The main aim of human rights is to accord equal opportunities for free and full development; hence methods of eliminating discrimination include redressing factual inequalities in the enjoyment of right. Societal and legal protections aim to compensate for this biological difference. This protection drives from the acknowledgement that child bearing and child rearing are societal functions, hence compensation is earned by women who perform it. It is not granted them for the mere fact that they are women³⁷.

Surrogate mother is also a human being. She does have all the human rights relating to health as are cited above. As it is obvious that surrogacy is not a typical pregnancy and there are more issues connected to it which are more complicated. Kishwar Desai³⁸ said that “In assisted reproductive technology – a woman actually ‘lends’ out her womb, sometimes at great physical risk. There is no guarantee that the implantation will be successful or that the hormonal medication given to the women will not hurt her health.” She further said that “Even in the harvesting of donor eggs, certain risks are always involved – but when money is at stake risks are often undermined and the only positive aspects are played up.”

Pregnancy affects woman’s health and one cannot know all the long term consequences of repeated pregnancies. Studies have shown that repeated pregnancies can even affect cardiovascular health³⁹ which the poor illiterate woman in India may not know a baby soaks up nutrition from its host body and though the mother might have a better diet during the pregnancy because of the money and care provided by the biological

³⁷Dr.C.P.Gupta,An article on “Right to health : A Socio Legal Perspective In Relation To Reproductive And Surrogate Motherhood”, Law Profiles Journal, vol. No. 3 Issue-6, June-2012 p-10.

³⁸Kishwar Desai talks of surrogacy, IVF in new book, Press Trust of India, 29 Mar 18:08pm available at <http://ibnlive.in.com/news/kishwar-desai-talks-of-surrogacy-ivf-in-new-book/243888-40.html>

³⁹Nita Surrogacy in India problems & Laws Nov. 1, 2007, tags: surrogacy available at: <http://nitawriter.wordpress.com/2007/11/01/surrogacy-law-to-be-drafted-in-india-at-long-last/>

parents her health may not be that good enough to begin with in India women are not as healthy as they are in developed countries due to poorer nutrition levels since childhood.

There are different effects of short term and long term pregnancy short term effects range from fatigue and vomiting to the swelling of joints and long term effects range from scarring, varicose veins to loose skin and as for complications of pregnancy they are so many. Some of these complications are life threatening like breast cancer poor women who rent out the womb do not care or even think about these things. And even if middle class women go for it the motive is money and that makes the women vulnerable to exploitation.

In May 2006, a Chinese couple from Singapore made surrogacy arrangements with an Indian mother of two through a Mumbai Hospital. The Surrogate Indian mother was implanted with the embryo produced from gametes of Chinese couple. The Chinese woman could produce an egg but could not hold an embryo. Three attempts became futile. The surrogate mother after the birth of baby was not allowed to see it so as to avoid a mental link. However DNA tests were carried out to avoid any controversy⁴⁰.

There are some other negative aspects of surrogate motherhood as the Apex Court of India, has in the absence of law, legalized the commercial surrogacy in the years 2008 since then many people feel that the day will not be away when educated working women will start hiring wombs to prevent a break in their career! To take an extreme scenario baby factories could spring up very soon!! A scene from a horror movie , which fortunately will not see the light of a day as most countries have realized downside of surrogacy India too is required to consider the same.

The Critics labels the issue of surrogacy like commercialization of birth⁴¹, renting of wombs, women's rights, baby-selling etc. They are of the opinion that this process of surrogacy is unnatural and therefore wrong. They argue that the body of surrogate mother

⁴⁰ Dr. Nandita Adhikar, "Law and Medicine" 2nd edn, Central Law Publications, chapter -7 "surrogate motherhood" p-160

⁴¹ Dr. Nandita Adhikar, "Law and Medicine" 2nd edn, Central Law Publications, chapter -7 "surrogate motherhood" p-161

is simply used as an incubator by the commissioning couple. They also assert that the institutionalization of surrogacy may promote an undesirable means of family making. They plead that the process may ultimately lead to commodification of women. It may be a tool in the hands of wealthy people to tempt poor people to sell their organs for monetary benefits and ignore human emotions and physical discomfort.

2.4 Human rights relating to special care and assistance:

Children are innocent, vulnerable and dependent . Taking note of all the relevant Resolutions of the United Nations and recognizing that children's rights require special protection and call for continuous improvement of the situation of children all over the world, as well as their development and education in condition of peace and security etc. the United Nations adopted the Convention on Rights of Child on 12-12-1989 by remembering the UN charter and Universal Declaration of Human Rights, 1948.

Family is a fundamental group of society and the natural environment for the growth and the well-being of all its members particularly the children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities with the community. It is also recognized that child should grow in the family environment and in the atmosphere of love, happiness and understanding. The child should be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the UN charter.

Article 25(2) of Universal Declaration of Human Rights, 1948 states that children are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection⁴².

The need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child, 1924 and the UN declaration of the Rights of Child, 1959.

⁴²Dr.Awasthi and Kataria, "Law relating to Protection of Human Rights", Orient Publishing Company, New Delhi* Allahabad,2006edn.p-

Further, the United Nations Convention on Rights of Child, 1989⁴³ recognized the following rights of child:

- a) Right to life
- b) Right to acquire nationality
- c) To preserve his or her identity
- d) A child shall not be separated from his parents
- e) The views of child will be given due weight
- f) Right to freedom of expression
- g) Right to freedom of thought, conscience and religion
- h) Right to freedom of association and to freedom of assembly
- i) Right to privacy
- j) Right to be protected against illegal attacks on his or her reputation
- k) Right to social, Moral and spiritual well-being
- l) Rights of child for the purpose of adoption
- m) Rights of disabled child to enjoy a decent life
- n) Rights of child in respect of highest attainable standards of health
- o) Right to family environment
- p) Right to education(compulsory and free primary education)
- q) Right to standard of living adequate for the child's physical, mental, spiritual and social development.
- r) Right to his/her welfare and so on.

The human rights of the surrogate child can be discussed as under:

1. Disrespecting the dignity of surrogate child:

Surrogate child is a of fusion of sperm and an ovum, through which zygote is created from which human being comes into being. Treating zygote as commodity is nothing but grave disrespect of the dignity of human person.⁴⁴

⁴³Dr.S.A.Karandikar&Dr.AsokYende,"Human Rights Law"Aarti& Company,2012edn,pg. no 383

2. Right to breast feed:

In surrogacy the most important right of child to breast feed is neglected Which is violation of article 25 of Universal Declaration of Human Rights and Article 11 of International Covenant on economic Social and Cultural Rights, 1966 which guarantee the nutritional right and the right to adequate food.

3. Refusal to accept the custody of child:

As per surrogacy arrangement after the birth of child, the surrogate mother hands over the child to the intended parents for their adoption. But parents show no interest and refuse to accept the surrogate child after his or her birth in case he or she is born abnormal. And if the intended parents or parent are forced to accept the abnormal child will be deprived of love and affection which is his very sacred right. Thus there is always a danger of rejection of handicapped children and these children will be prejudiced their psychological well-being and future interest.

4. Right to get natural love and affection:

As the surrogacy is an unnatural process so there may be denial of the natural love and affection from the intended parents which may affect surrogate baby's entire mental growth and development.

5. Psychological threatening to child:

According to Elizabeth Anderson⁴⁵ - "It is not in the best interest of child to discover that her gestational mother gave her away in return for money, shortly after its birth". Also the opponents of surrogacy maintain that the knowledge of the means of their birth will make such children psychologically disturbed.

6. Issue regarding Citizenship of surrogate baby:

⁴⁴ L.D'Souza surrogacy violates human Rights, Catholic Bishops Conference Avertanus of India, C.B.C.I.Goa, sep 07.2010.

⁴⁵ Emily Jackson, "surrogacy", Medical Law –Text cases and material, Oxford 2007, pg no. 897-898

Another issue relates to the citizenship of surrogate baby. As it happened in the case of Baby Manji Yamada⁴⁶ – Wherein the arranging mother who was no longer interested in baby and the arranging father who wanted the baby but certain provisions of Indian law relating to citizenship posed a hindrance, was widely reported by the media. For some period of time Baby Manji became stateless till the case was finally decided by the supreme court of India. In this case for the first time the Supreme Court of India was required to examine issues relating to surrogacy agreement and subsequently Indian Council of Medical Research (ICMR) proposed the draft of Assisted Reproductive Technology (Regulation) Bill 2008 which unfortunately could not be converted into an Act. This case threw light on the risks of children born through international surrogacy.

2.5 Human right to run Assisted Reproductive Technology Clinics:

Article 23 of Universal Declaration of Human Rights 1948 says that –

- (1) Everyone has right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.
- (2) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection⁴⁷.

The same right is also guaranteed under article 19(1) (g)⁴⁸ of Indian Constitution which says that-

“All citizens shall have the right to practice any profession or to carry on any occupation, trade or business”

However, the right is not an absolute one. It can be restricted by the State under article 19(6) in the interest of public. Accordingly, it being the right of ART clinics to carry on and to provide the services relating to assisted reproductive technology are imposed upon certain duties under the guidelines issued by ICMR in 2008 and also

⁴⁶ (2008) W.P.(C) no 369

⁴⁷ Justice A.D.Mane, "Lectures on Human Rights", 2007 edn, Hind Law House, p-419

⁴⁸ Dr.J.N.Pandey, "The Constitutional Law of India" 47th ed., Central Law Agency, p-215

various the drafts relating to ART(Regulation) have been introduced but no Bill has seen the light of the day so far.

These are the various human rights of all the parties involved in surrogacy arrangement. Surrogacy being a very complex issue needs a good deal of legislation or judicial activism which calls for laying down an effective principle for regulating the aforesaid arrangement. Either the law makers should enact such legislation which shall respect the rights of all the parties involved viz. the infertile couple, the surrogate mother and the most important the surrogate baby so that best interest of society in general will be secured. Else the honorable judiciary shall invoke the principle for filling up the vacuum. Of the two rights viz. right of reproduction and right to health, the one which is of paramount importance shall be given due consideration by both the organs of the State that the Legislature and the Judiciary for the sake of achieving at perfect balancing of rights and thereby achieving at the ultimate goal of justice. In my opinion altruistic surrogacy should be allowed and commercial surrogacy should be banned so as to achieve a perfect balance among the rights of all the parties involved.

Chapter – 3

INTERNATIONAL SCENARIO

OF SURROGACY

This chapter deals with the legal position as well as judicial approach towards surrogate motherhood in United Kingdom and in Australia. Let us analyze the legal and judicial attitude towards surrogacy.

3.1 United Kingdom:

3.1.1 Regulation of surrogacy: -

There have been two major reports into the regulation of surrogacy in the UK. Although the principal focus of the Warnock Committee Report⁴⁹ published in 1984, was the regulation of embryo research and fertility treatment, it also considered the practice of surrogacy while not recommending its complete prohibition, the majority of the Warnock Committee was clearly of the view that regulation should be designed to discourage people from entering into surrogacy arrangements. Its recommendations were never fully implemented.⁵⁰

Thirteen years later, the government commissioned a report from the Brazier Committee⁵¹ whose recommendations are described below. While undoubtedly less hostile to the surrogacy than the Warnock committee, the Brazier committee was nevertheless again concerned that regulation should not appear to either endorse or encourage the practice of surrogacy. It estimated that between 100 and 180 surrogacy arrangements were made in the UK each year, resulting in 50-80 births. Approximately half of all surrogate mothers are initially unknown to the commissioning couple, while friends, sisters and sisters in law are the most common known surrogates. Dispute between surrogate mothers and commissioning couples are unusual. The Brazier Report estimated that disputes occur in 4-5 percent cases, which given the small number of births, means that there will seldom be more than one dispute each year. Despite of that it does raise certain ethical and legal questions.

⁴⁹ Warnock Committee Report, 1984 available at http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf

⁵⁰ Emily Jackson, 'Medical Law, Text Cases & Materials', "Surrogacy", Oxford, 2007, p-873

⁵¹ Margaret Brazier, Alastair Campbell, and Susan Golombok, Surrogacy: Review for Health Ministers of Current arrangements For Payments and Regulation (HSMO London 1998) CM 4068 (hereafter Brazier)

Thus, in United Kingdom's based on the recommendations of Warnock Committee, "The Surrogacy Arrangement Act, 1985" was brought into force. Under this Act surrogacy arrangements are made legal but the Act prohibits advertising and other aspects of commercial surrogacy. The Act prohibits giving or taking of money or other benefit (other than expenses reasonably incurred) in consideration of the making of order or handing over of the child⁵²

3.1.2 Non enforceability:-

It is not an offence to enter into surrogacy arrangement but the agreement itself is not enforceable. Section 1B of the Surrogacy Arrangement Act, 1985, which was inserted by the Human Fertilization of Embryology Act, 1990 says that:

Surrogacy Arrangement Act 1985 section 1B:

"No surrogacy arrangement is enforceable by or against any of the persons making it."⁵³

Hence the commissioning couple cannot sue the surrogate mother if she refuses to handover the baby, and nor can she sue them if she does not receive any of the agreed payments or if they refuse to take the baby after birth.

So while it is lawful to enter into surrogacy contract, none of the parties are bound by any of the obligations it purports to contain. Given that surrogacy arrangements are so precious, it is perhaps surprising that disputes are so rare.

3.1.3 Commercialization:-

The Surrogacy Arrangement Act, 1985 was passed in order to prohibit commercial surrogacy. It also makes the publication or distribution of advertisements indicating willingness to take part in surrogacy arrangements a criminal offence.

Surrogacy Arrangements Act, 1985 (section 2):-

1) No person shall on commercial basis do any of the following acts in U.K that is:

⁵² Smith Chandra, An article on "India and Surrogacy: A washing Machine in exchange of child", Law Z Magazine, vol. 11, No.05, issue 129, p-25

⁵³ Emily Jackson, 'Medical Law, Text Cases & Materials', "Surrogacy", Oxford,2007, p-875

(a) Initiate or take part in any negotiation with a view to making of the surrogacy arrangements.

(b) Offer or agree to negotiate the making of a surrogacy arrangement or;

(c) Compile any information with a view to its use in making or negotiating the making of surrogacy arrangements.

2) A person who contravenes subsection (1) above is guilty of an offence but it is not a contravention of that subsection –

(a) For a woman, with a view to becoming a surrogate herself, to do any act mentioned in that subsection or to cause such an act to be done or.

(b) For any person with a view to surrogate mother carrying a child for him to do such an act or causes such an act to be done.

3) For the purposes of this section, a person does not act on commercial basis (subject to subsection (4) below) if –

(a) Any payment is at any time received by himself or another in respect of it or

(b) He does it with a view to any payment being received by him or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement.

In this section payment does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother.

Section 3: Advertisements about surrogacy⁵⁴ –

(1) This section applies to any advertisement containing an indication (however expressed)

(a) That any person is or may be willing to enter into a surrogacy arrangement or to negotiate or facilitate the making of a surrogacy arrangement.

(b) That any person is looking for a woman willing to become a surrogate mother or for persons wanting a woman to carry a child as surrogate.

(2) Where a newspaper or periodical containing an advertisement to which this section applies is published in the United Kingdom, the proprietor, editor or publisher of the newspaper or periodical is guilty of an offence.

⁵⁴Keneddy & Grubb- 'Medical Law' –'surrogacy', 3rd ed. Oxford 2005, p 1382

While commercial surrogacy is in theory, forbidden by section 1, in practice things are rather different, and typically surrogate mothers receive around £10000 to £15000 for their services.⁵⁵

The reason for this gap between theory and practice is that the courts are entitled to authorize payments made in contravention of the ban on commercial surrogacy. If the court considers that it is in the child's interest to remain with the commissioning couple retrospective authorization of any illegal payments, is in practice, relatively straightforward.

There is, of course, an important difference between the courts willingness to retrospectively authorize illegal parents when it would be in child's best interests and prospectively condoning payments to surrogates.

The Court of Appeal in a leading case of *Briody v St. Helens and Knowsley Area Health Authority*⁵⁶ considered – Whether Mrs. Briody had intended to employ a surrogate mother in California, and the legality of agreement led Ebsworth J. to reject her claim. Before Court of appeal Mrs. Briody instead claim for the cost of entering into a lawful surrogacy arrangement in the U.K. However, Mrs. Briody's case was again rejected, in part because of the chance of success was 'vanishingly small' (less than 1%), and the court did not think that it would be reasonable to fund a procedure with such a high chance of failure. Hale LJ concluded that 'expenditure on surrogacy in this case is not "reasonable" and the defendant should not be required to fund it.'

3.1.4 Status:

The rules governing the attribution of mother and fatherhood are different.

3.1.4.1 Relating to maternity: There are 3 possible ways in which a child's mother could be identified:

⁵⁵Emily Jackson, 'Medical Law, Text Cases & Materials', "Surrogacy", Oxford, 2007, P-876.

⁵⁶(2001) EWCA civ 1010, (2002) QB 856

Firstly, the legal mother could be the woman who gestate the pregnancy and gives birth means the surrogate mother.

Secondly, legal motherhood could be synonymous with genetic motherhood so that the woman whose egg was fertilized would be resulting child's mother. In full surrogacy, this would be the commissioning mother, and in partial surrogacy, the surrogate mother.

Thirdly, legal motherhood could vest in woman who intends to raise the child. That is the commissioning mother.

Thus the legal definition of 'mother' in the U.K is clear and unequivocal: the woman who gives birth to a baby is its mother.

Section 27(1) - Human Fertilization and Embryology Act, 1990:

“The woman, who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.”

Thus, the law does not distinguish between different types of surrogacy and as the surrogate mother will always be the child's legal mother from birth, regardless of whether she is genetically related to the baby. As the legal mother, the surrogate mother has the right to decide whether to keep the child, or to handover it to the commissioning couple.

3.14.2 Relating to paternity:

In England the rebuttable presumption of legitimacy within marriage would lead to surrogate mother's husband being treated as the legal father of the child from birth. This will be rebuttable by DNA test establishing that the surrogate mother's partner is not in fact the child's genetic father. DNA test would (unless donated sperm was used) identify the commissioning father as the child's father.

There is also a rebuttable presumption that the man who is registered the father on birth certificate is the child's father. If the surrogate mother registers her partner on the child's birth certificate, the presumption that he is the father could again be rebutted by DNA tests which will show that he is not. In case of commissioning father,

however, DNA tests will usually confirm his paternity. Since section 111 of the Adoption and Children Act, 2003 says that man who is registered on the child's birth certificate automatically acquires parental responsibility for the child, regardless of whether he is married to Child's mother.

3.1.5 Transferring legal parenthood:

As the surrogate mother will be the Child's legal mother from birth, and the commissioning father will only occasionally be the child's legal father, if commissioning couple want to become Child's legal parents they will either have to apply for a parental order under section 30 of the Human Fertilization and Embryology Act, 1990 or apply to adopt her.

3.1.5.1 Section 30⁵⁷ - Parental orders:

This section says that-

- (1) The court may make an order providing for a child to be treated in law as the child of the parties to a marriage if-
 - a) The child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination.
 - b) The gametes of the husband or the wife , or both, were used to bring about the creation of the embryo and
 - c) The conditions in sub sections (2) to (7) are satisfied.
- (2) The husband and the wife must apply for the order within six months of the birth of the child.
- (3) At the time of application and of the making of the order-
 - (a) The child's home must be with the husband and the wife.
 - a) The child's home must be with the husband and the wife.
 - b) The husband or the wife or both of them must be domiciled in the U.K.
- (4) At the time of the making of order both the husband and wife must have attained the age of 18.

⁵⁷Human Fertilization & Embryology Act ,1990

(5) The court must be satisfied that both the father of the child (including a person who is the father by the virtue of section 28) where he is not the husband and the woman has carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

(6) Subsection (5) does not require the agreement of a person who cannot be found or who is incapable of giving agreement and the agreement of woman who carried the child is ineffective. If given by her less than six weeks after the child's birth.

(7) The court must be satisfied that no money or other benefit (other than expenses reasonably incurred) has been given or received by the husband or the wife for or received by the husband or the wife for or in consideration of -

a) Making of the order

b) Any agreement required by subsection (5)

c) The handing over of the child to the husband and the wife or

d) The making of any arrangements with view to the making of the order, unless authorized by the court.

3.1.5.2 Adoption:

The adoption process is onerous and time consuming. In order to be eligible to adopt a child, the criteria in the Adoption and Children Act, 2002 must be satisfied and potential adopters must endure rigorous scrutiny by local authority social workers over a prolonged period of time. If the surrogate mother does not want the child, but for some other reasons the couple is ineligible for a parental order, adoption will usually be in the best interest of the child. But where the surrogate mother has changed her mind and an adoption application is made, the situation is much less straightforward. Under section 52 (1) of the Adoption and Children Act, 2002, the parents must consent to a child's adoption, unless they cannot be found or are incapable of consenting, or the court is satisfied that 'child's welfare' requires that their consent should be dispensed with.

In Re Mw (Adoption: Surrogacy)⁵⁸

⁵⁸ (1995)2 FLR 789

The applicants for adoption, a husband and wife, had entered into surrogacy agreement with the mother for which she was to receive £7500. The child (M) was handed over after birth and had lived with the applicants since then. Subsequently the mother and the applicants disagreed about contract. The mother launched a publicity campaign in the press and on television, publishing photographs of the baby and causing the applicants considerable distress. She opposed the application of the child, who was now 2 and ½ years old.

3.1.5.3 Informal Transfers:

While parental orders and adoption are the only ways in which the commissioning couple can become the legal parents of the child born following a surrogacy arrangement, this does not mean that every surrogate birth is followed by a formal application for legal parenthood. A child may be handed over by the surrogate mother, and live with the commissioning couple without any legal formalities. Brazier Report suggested that ‘a substantial proportion of commissioning couples are failing to apply to the courts to become the legal parents of the child.

3.1.6 Judicial Approach⁵⁹:

The attitude of judiciary can be traced through a brief review of well known cases. The earliest example-

A Vs. C⁶⁰

In this case an unmarried couple arranged for a prostitute’s friend to be inseminated on the understanding that the resultant child was returned to them, a fee of £3000 was involved. The mother changed her mind and the father applied for access, this was granted in the child’s best interests. Nevertheless, on appeal Ormrod LJ described the agreement as ‘pernicious and void’ and the father as being ‘a constant reminder of the

⁵⁹ Mason & Mccall Smith’s, “Law & Medical Ethics”, ‘surrogate motherhood’ 7th ed. 2006 J.K Mason & G.T. Laurie, Oxford, pg no 110 & 111

⁶⁰ (1984)14 Fam Law 241, (1985) FLR 445

whole sordid story, the Court of Appeal unanimously reversed the decision and decreed that the father should not be allowed to see his son.

In Re C (a minor)⁶¹

An American couple arranged a surrogacy in England through a commercial agency. As soon as the child was born, the local authority obtained a place of safety order under sec. 28 of the Children and Young Persons Act, 1969, in the belief that it would be abandoned by its mother, the genetic father then initiated ward ship proceedings. Latey J. refused to discuss the rights and wrongs of surrogacy and concentrated solely on the welfare of the child- how she had been born was irrelevant. On these grounds he considered that no one was better equipped than the commissioning couple to care for her, accordingly, he gave them care and control while at the same time, continuing the ward ship, even so, permission was given for the baby to live outside the jurisdiction. For present purposes, the most important aspect of the case is that the judge rejected suggestions that the commissioning couple were unfit parents because they had entertained a commercial surrogacy arrangement.

In Re P (minors) (Wardship: Surrogacy)⁶²

In this case the surrogate declined to hand over the twins she had conceived by a married professional man. The children were made wards of court and were allowed to stay with their natural mother; the court action was essentially a matter of custody. By the time the case is that the judge rejected the suggestions that the commissioning couple were unfit parents because they had entertained a commercial surrogacy arrangement.

In Re W (minors) (surrogacy)⁶³

The judge was prepared to pre-empt the law in order to ensure bonding of 'womb leased' twins with their genetic parents. Following this there was a comparative dearth of new cases until the leading Scottish case of C vs S⁶⁴. The marked change in reportage

⁶¹ (1985) FLR 846

⁶² (1987)2 FLR 421

⁶³ (1991) F. LR 385

⁶⁴ (1996) SLT 1387

probably does no more than reflect the fact that surrogacy is now so well established that cases are now no longer regarded as meriting report unless there are special circumstances. Even so, there are sporadic newspaper reports of examples which have had a less than happy ending.

3.2. Australia:

Surrogacy legislation across Australia is complex, as each State or territory adopts its own regulatory approach. The one consistent factor between all jurisdictions is that commercial surrogacy arrangements are completely prohibited.⁶⁵ However approaches in relation to altruistic surrogacy differ significantly. The respective position in different States in Australia is as follows-

3.2.1 Queensland:

Altruistic surrogacy is legal under Surrogacy Act, 2010 where as commercial surrogacy is illegal. Surrogacy is available to heterosexual couples, same sex couples and single men and women, provided in cases where a woman is involved, that she is an “eligible woman” within the meaning of the Act. This means that the woman must not be able to conceive naturally, or if she can conceive she must be unable, on medical grounds, to carry a pregnancy or give birth to a healthy child. The inclusion of a social need for surrogacy as well as medical need under the legislation ensures access to surrogacy extends to males, irrespective of whether they are single or in a same-sex relationship.⁶⁶

3.2.2 New South Wales:

Altruistic surrogacy is made legal under the Surrogacy Act, 2010 and whereas commercial surrogacy is illegal. Surrogacy is open to single persons, heterosexual couples and same sex couple. The legislation is similar to the current legislation in Queensland.

3.2.3 Victoria:

There is legislation named Assisted Reproductive Treatment Act, 2008⁶⁷

⁶⁵ Malcolm Smith, an article titled, “Surrogacy Laws in Queens Land: One step forward and two steps back?” in Academia.edu published in The Queens Land Lawyer in Sep 2012.(2012) 32 QLD Lawyer 123.

⁶⁶ Ibid note 124

⁶⁷ [https://.www.fertilityconnections.com.au/info/for-surrogacy](https://www.fertilityconnections.com.au/info/for-surrogacy)

under which commercial surrogacy is banned only in Victoria. It does not ban Victorians from accessing overseas commercial surrogacy clinics. Under this Act, surrogacy is available to single man and woman, heterosexual couples and same sex couples. However the Victorians legislative regime has an added requirements if as is generally the case, the surrogate mother requires assisted reproductive technology from registered ART provider to achieve the pregnancy. In this case, the surrogacy arrangement must be approved by the patient review panel. Without such approval, the registered ART provider is not able to provide reproductive services to a woman under surrogacy arrangement. Despite this requirement the marital status and /or sexuality of the parties to the surrogacy arrangement are not matters that the patient review panel is required to take into account when considering an application for surrogacy.⁶⁸

The main aim of parties to surrogacy arrangement apart from achieving a successful pregnancy and birth is for the intended parents to become the child's legal parents. The legislation in most Australian jurisdictions outlines a procedure that enables the transfer of legal parentage from the surrogate or birth mother to the intended parents. The effect of parentage order is that it affords legal recognition to the relationship between the intended parent or parents and the child. Such an order also extinguishes the status of birth parent or parents as the legal parents of the child. Significantly, the statutory provisions in New South Wales, Victoria, and Queensland enables single people, same sex couples and heterosexual couples, to obtain parentage orders following the birth of the child by way of surrogacy arrangement.

3.2.4 Australian Capital Territory:

The legislation Parentage Act, 2004 bans the commercial surrogacy anywhere in the world.⁶⁹ It is criminal offence to arrange for commercial surrogacy. Under the Act,

⁶⁸Malcolm Smith, an article titled, "Surrogacy Laws in Queens Land: One step forward and two steps back?" in Academia.edu published in The Queens Land Lawyer in Sep 2012.(2012) 32 QLD Lawyer 123

⁶⁹www.Fertilityconnections.com.au/info/for-surrogacy

heterosexual couples and same sex couples can obtain parentage orders while single persons cannot.

3.2.5 South Australia:

The Family Relationships Act, 1975 prohibits commercial surrogacy only in South Australia and altruistic surrogacy is only legal for couples consisting of opposite sex. It means single individuals and same sex couples are banned from altruistic surrogacy and hence singles and same sex couple cannot get parentage order accordingly.

3.2.6 Tasmania:

Under Surrogacy Contract Act, 1993 the commercial surrogacy is banned only in Tasmania. The Act does not ban Tasmanians from accessing overseas commercial surrogacy clinics. Recently the parliament has passed, “Surrogacy Bill 2011” in Tasmania under which part 7 sections 38 to 41 deal with the provisions of prohibition of commercial surrogacy arrangements and brokerage or advertising etc. The preamble says that-

“An act to provide for the transfer of parentage of children in relation to whom certain non-commercial surrogacy arrangements are made before their birth, and to prohibit commercial surrogacy arrangements and certain associated actions, and for related matters.”⁷⁰

3.2.7 Western Australia:

Under the Surrogacy 2008, commercial surrogacy is banned only in Western Australia. Western Australia regulator threatened with prosecution those mentioning overseas commercial surrogacy clinics.⁷¹ The Act requires surrogacy arrangement to comply with the provisions strictly and such arrangement must be approved by the Reproductive Technology Council.⁷²

3.2.8 Northern Territory:

⁷⁰www.Parliament.tas.gov.au/bills/Bills2011/reprint/7-0201.pdf

⁷¹www.Fertilityconnectionss.com.au/info/for-surrogacy

⁷²www.rtc.org.au/consumer/surrogacy-wa.html.

In all Australian jurisdictions but the North Territory, commercial surrogacy is prohibited and criminalized.⁷³

3.2.9 Judicial Approach:

In Re: Evelyn⁷⁴

It was an interfamilial, altruistic case that went wrong and resulted, ultimately, in a residency dispute in the full court of family court. The final decision was in favor of surrogate mother, a Conclusion based largely, but not entirely, on the assumption that the child's best long term interests lay in preservation of her natural bonding with her biological mother- this despite of the fact that she had lived with the commissioning couple for the first year of her life. Both the trial judge and the full court also considered that the ambience of surrogate's family was preferable for the child. Nevertheless, some residual determinative rights were granted to the commissioning couple.

In *Hubert and Juntasa*⁷⁵ and *Johnson and Chompnut (2011)*⁷⁶

In this case the question before Watts J. was whether entry into a commercial surrogacy in Thailand was criminal offence in New South Wales. His Honor decided that- it is not clear that it could be said that the offence has an effect in the State of New South Wales.

In Re mark (an application was made relating to parental responsibilities)⁷⁷

In this case a couple from Victoria entered into a surrogacy contract under which a woman in California agreed to bear a child for them. For this purpose the ovum was supplied by an anonymous woman and one of the applicants as per the agreement provided the sperm. The aforesaid contract was illegal in Victoria where the intended parents were residing but it was valid and enforceable in California, where it was made and performed. The intended parents applied for parenting orders by consent in the

⁷³ Marry Keyes, an article, "Cross- border surrogacy agreements", (2012)26 Australian Journal of Family Law: www.98.griffith.edu.au/dspace/bitstream/handle/10072/48503/80585-1.pdf?sequence=1

⁷⁴ (1998) FLC 92

⁷⁵ [2011] FamCA 504 p-13

⁷⁶ [2011] FamCA 505 p-12

⁷⁷ (2003) 31 Fam LR 162

Family Court. The birth mother and her husband were served with notice of the Australian proceedings and chose not to participate, a factor which was clearly significant in the decision. Brown J. mentioned that if the birth mother and her husband had participated in the proceedings, this may have exposed them to legal proceeding for breach of surrogacy agreement but it is not a matter to which this court can have a regard. Consequently Brown J. considered that the parenting orders sought were by the consent of parties. The significant factor was birth mother's lack of objection for parental orders. Therefore, it was held that illegality of agreement was not a relevant consideration in the present case.

In Re x and y (foreign surrogacy)⁷⁸

The court observed that the court would almost inevitably have to make defacto order enforcing the agreement because it is almost impossible to imagine a set of circumstances in which by the time the case comes to the court, the welfare of any child specially a foreign child would not be gravely compromised by a refusal to make an order. One might note that their welfare would be gravely affected if the intended parents were prosecuted, convicted and sentenced under the legislation dealing with the surrogacy.

In Dudley and Chedi⁷⁹

The intended parents acts in entering into a commercial surrogacy agreement was certainly illegal under Queensland law at the time the agreement was made, and referred the matter to the Queensland Director of prosecutions. These cases give the most explicit attention to the issue of illegality in any of the reported decisions of the Australian courts. Notwithstanding this, Watts J.'s conclusion was the same as in other cases, relying on the evidence that the birth mother had relinquished her responsibility and consented to the parenting orders, the outcome was consistent with the surrogacy agreements.

In M. and L. Kirkman, My Sister's child⁸⁰

⁷⁸ (2008) EWHC 3030 (Fam)

⁷⁹ (2011) Fam CA 502

⁸⁰Max Charles Worth, "Bioethics",- future leaders or www.futureleaders.com.au/book-chapters/PDF/issues-time/max-Charlesworth.PDF.

Maggie Kirkman who was married, had undergone a hysterectomy and that is why she could not bear a child. She was however able to produce an ovum which was then fertilized by the sperm of a known donor since her husband was infertile. Her sister Linda, who had given birth to two children in her marriage, offered to have Maggie's embryo, produced by IVF, implanted in her. A fortunate circumstance was that Linda's husband had undergone a vasectomy after the birth of his two children, so that, so long as Linda remained married to him, she was technically in an "infertile situation". This was important because under the Victorian Infertility (Medical Procedures) Act, 1984 an IVF embryo can be transferred into the womb of a fertile woman. At all events the embryo transfer from Maggie to Linda was successful and the child (a daughter Alice) was duly born to Linda, its gestational mother, and then given into the care of its genetic mother Maggie. Under Common Law a child is deemed to be the child of the woman, who gestates it, so the child in this case had to be formally adopted by the genetic mother Maggie.

The Kirkman sisters' case received wide publicity and was extremely important in shaping people's perceptions about surrogate motherhood. Both of them were highly intelligent women who knew exactly what they were doing, both had altruistic motives, no one was being exploited, and since the child was genetically the mother's offspring, it was not being "sold or exchanged".

The Kirkman sisters' case raised the number of questions: is surrogate motherhood, where one woman freely consents to bear a child for another woman, morally wrong because it is only married men and women who have a right to have children? Are women, who enter into an arrangement with a surrogate mother to have child, being "selfish" in that they want to have child at any cost? Are they brainwashed into thinking that they can only be "real women" if they have children? Shouldn't they just accept the fact that they are infertile and can't have a child? Is the child of a surrogacy arrangement like to feel that she is a "commodity", and to be psychologically harmed by the fact that she has three "parents" (the woman who gestated her in her womb, the woman who

contributed the ovum from which she was born, the donor who gave his sperm)? Thus, after careful analysis of legal and judicial approach of above two developed countries, it can be said that as India should also make up the legislation on similar terms.

Chapter-4

LEGISLATIVE AND

JUDICIAL PERSPECTIVE OF

SURROGACY IN INDIA

We know that the the world's second and India's first IVF(in vitro fertilization) baby Kanupriya alias Durga was given birth in Kolkatta on 3rd October 1978 about two months after the world's first IVF boy, Louise Joy who was born in Great Britain on 25th 1978. Since then the field of Assisted Reproductive Technology (ART) has developed rapidly.⁸¹

In India surrogacy is fast growing but an unregulated industry, according to an earlier Confederation of Indian Industry estimate, was expected to generate as much as \$2.3 billion annually by 2012.⁸² The last few years have seen 150 per cent rise in surrogacy cases in India. The Gujrat town of Anand is known as hub of surrogate mothers.⁸³

Thus India has become a much favoured destination for infertile couples from across the globe. The key reasons for its dominance include much lower cost of treatment, large number of women willing to engage in surrogacy arrangement, less restrictive laws, lack of Assisted Reproductive Technology Regulations⁸⁴, illiteracy and poverty.

In United States of America, a surrogate mother costs approximately \$70000, however in India it is slash down to \$7000⁸⁵. In one report it is claimed that there are about 500 fertility treatment clinics across the country with more than a tenth in Mumbai alone.⁸⁶

Even though, the Indian Council of Medical research has framed the national guidelines to regulate surrogacy⁸⁷, these are merely guidelines. All that surrogate

⁸¹www.lawcommissionofindia.nic.in/reports/report228.pdf p-4

⁸² The law Library of Congress, Bioethics Legislation in selected countries, 2012, Global Legal Research Centre, Washington: www.loc.gov/law/help/bioethics-2012-008118Final.pdf.

⁸³N.B.Sarojini and Aastha Sharma, an article on 'Guidelines not enough, enact surrogacy laws', August 2008, Nation Page, pg. 13, column 2

⁸⁴ Ibid note 162

⁸⁵ Anil Trehan, an article "Surrogate Motherhood in India", Nyaya Deep, The official Journal of NALSA, Vol. X, issue 4.10.2009, p-25

⁸⁶ Swati Deshpande, TNN, 'Time for Law on Assisted Fertility Technology', says an expert, Times of India, july13, 2012, 02.14 AM IST, available at: <http://timesofindia.indiatimes.com/city/mumbai/Time-for-law-on-assisted-fertility-technology-experts-say/articleshow/14857486.cms>

⁸⁷www.nitawriter.wordpress.com/2007/11/01/surrogacy-law-to-be-drafted-in-india

mothers need to sign a “contract” with the childless couple. There are no stipulations as to what will happen if this contract is violated.

Thus, according to Critics and the Activists, the lack of legal framework and the increasing commercialization of the industry have left the room for unethical medical practices and the exploitation of both the surrogate and infertile couples.⁸⁸

Let us discuss the legal frame work that is applied in the absence of specific Act on the subject in India:

4.1 Legislative Frame work in India:

As per records in the year 2000, a set of draft guidelines regarding the status of surrogacy was prepared and in the year 2005 finalized guidelines were prepared and further in the year 2008draft Bill was finalized and in the year 2009⁸⁹ the Law Commission gave its 228th Report and now in the year 2010 a changed Draft Bill regarding legalizing surrogacy in India which is ready but not yet passed.⁹⁰

Let us discuss the very valuable report called 228th Report submitted to the Union Ministry of Law and Justice, Ministry of Law and Justice, Government of India under the chairmanship of Dr. Justice A.R. Lakshmanan on the 5th day of August 2009.⁹¹

4.1.1 Law Commission of India (Report No. 228) – titled as “Need for legalization to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to surrogacy”:

The Report is divided into four parts. Part-I deals with the introductory aspect of surrogate motherhood such as meaning of surrogacy, and its types, reproductive tourism in India, legal and moral issues arising out of surrogacy with judicial attitude in the country an different cases in India and Foreign Country such as United States of America, and it has also dealt with the situation of how motherhood is turned out as an enigma with

⁸⁸ www.lawcommissionofindia.nic.in/reports/report228.pdf.

⁸⁹ Mrs. AdhilakshmiLogamurthy, an article on “Legalizing surrogacy in India” available at: http://www.indianwomenlawyers.com/national_conference.pdf

⁹⁰ www.bionews.org.uk/pg-88796.asp

⁹¹ www.lawcommissionofindia.nic.in/reports/report228.pdf. on p-8 of the report

the help of different cases in United States of America and United Kingdom and also in India.

Part-II of the report talks about the Draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008. The Report stated that the Bill acknowledges surrogacy agreements and their legal enforceability and thus Bill has treated surrogacy agreement on par with the other contracts and hence the provisions of Indian Contract Act, 1872 and other laws will be made applicable. The aforesaid Report further indicates that chapter-I of the Bill deals with the definitions. Chapter-II deals with the constitution of the National Advisory Board for ART and State Boards for ART etc. Chapter III lays down the procedure for registration of ART Clinics. Chapter IV prescribes the duties of ART Clinics. Further, chapter V provides for sourcing, storage, handling and record keeping for gametes embryos and surrogates. Chapter VI regulates research on embryos. Chapter VII deals with the rights and duties of patients, donors, surrogates and children. Chapter VIII deals with offences and penalties and the last chapter deals with the miscellaneous provisions.

Part-III of the Report is titled as “Seminar on Surrogacy- Bane or Boon”- A seminar was held at the Indian International Centre on 13.02.2009 in which certain lacunae were raised in the ART Bill of 2008 of which answers were discussed.

The last part –IV, perhaps very important and precious one dealt with the conclusion and recommendations made by the Law Commission of India which unfortunately did not get the legal sanctity by the policy makers and hence did not see the light of the day. Some of those recommendations are as follows:-

1. Surrogacy arrangements will continue to be governed by contract among the parties. It contains all terms which require the consent of surrogate mother, her husband and other family members to allow her to bar the child, reimbursement of all reasonable expenses to the surrogate mother and willingness of surrogate mother to hand over the child born to the commissioning parent or parents after

birth and so on. A very important recommendation made was that such an arrangement should not be for commercial purposes.⁹²

2. It also recommended providing for financial support for the surrogate in case of death of commissioning couple or individual before the delivery of child or divorce between the parents etc.
3. Other recommendation was dealing with the aspect that one of the intended parents should be donor as well.
4. The birth certificate should contain the name or names of the commissioning couple.
5. Sex selective surrogacy should be prevented..
6. Cases of abortion should be regulated by the Medical Termination of Pregnancy Act, 1971 only and so on.

Let us consider the provisions of the proposed Bill titled as “The Assisted Reproductive Technologies (Bill), 2010” which is expected to be passed very soon.

4.1.2 The Assisted Reproductive Technologies (Regulation) Bill, 2010⁹³:

The proposed legislation is divided into nine chapters dealing with the preliminary part, constitution of various authorities to regulate Assisted Reproductive Technology, procedure for registration and complaints, duties of assisted reproductive technology clinics, sourcing, storage, handling etc. for gametes, embryos and surrogates, regulation of research on embryos etc. and rights and duties of patients, donors, surrogates and children. The last two chapters describe the offences and penalties and miscellaneous provisions. Thus, it can be seen that the prime focus of the Bill is to regulate the mushrooming of assisted reproductive technology clinics. However it could not be passed.

4.1.3 New Indian Visa Regulations Dated 9 July, 2012 for commissioning parent(s) extracted from third party correspondence with the Ministry of Home Affairs, Government of India effective 15 November, 2012-

⁹² www.lawcommissionofindia.nic.in/reports/report228.pdf on p-25

⁹³ Draft of Assisted Reproductive Technology (Regulation) Bill, 2010 available at: <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>

Visa for Foreign Nationals intending to visit India for Commissioning Surrogacy:⁹⁴

It may be noted that the foreigners visiting India for commissioning surrogacy are required to apply for Medical Visa with the following conditions:

- The foreign man and woman are duly married and the marriage should have sustained for at least two years.
- The Embassy of the foreign country in India or the Foreign Ministry of the country should give letter which should be enclosed with the visa application showing clearly that:
 - Their country recognizes surrogacy; and
 - The surrogate child/children to be born to the commissioning couple through the Indian surrogate mother shall be permitted entry into their country as their own child/children of the couple which is commissioning the surrogacy.
- The commissioning couple will furnish an undertaking that they would take care of the child/children born through surrogacy.
- The treatment should be done only at one of the registered ART clinics recognized by the Indian Council of Medical Research (ICMR).
- The couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother.
- Before the grant of visa, the couple needs to be informed that before leaving India for their return journey, 'exit' permission from FRRO /FRO would be required. Before granting the 'exit' the FRRO /FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child/children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement.

⁹⁴ Anil Malhotra and Ranjit Malhotra, "Surrogacy in India- A Law in the Making", Universal Law Publishing Co., New Delhi-India p18-21

- Further it may be noted, for drawing up and executing the agreement cited above, the foreign couple can be permitted to visit India on a reconnaissance trip on Tourist Visa, but no samples may be given to any clinic during such preliminary visit.
- If the listed conditions are not fulfilled, the visa application shall be rejected.

A letter of support for you to submit along with your visa application confirming points that the foreign country permit surrogacy and that the child/children born through surrogacy will be permitted entry into the foreign country as their biological child/ children born through surrogacy.

Following is the gist of the New General Indian Visa Regulations Dated 9 July, 2012 for commissioning parent(s) the Ministry of Home Affairs, Government of India effective 15 November, 2012.

- The appropriate visa category for commissioning surrogacy is a medical visa. Tourist visa is not the appropriate visa category for surrogacy and legal action will be taken for violation of visa conditions. All concerned have been advised that they should verify the type of visa before undertaking surrogacy treatment and that it should be ensured by all concerned.
- The foreign man and woman intending to commission surrogacy should be duly married and their marriage should have sustained for at least two years and that current Indian laws do not recognize gay marriages.
- The foreign couple commissioning surrogacy should be in possession of a letter from the Embassy of the foreign country in India or the foreign ministry of their country stating that their country recognizes surrogacy and the child/ children to be born to the commissioning couple through the Indian surrogate will be permitted entry into their country as a biological child/ children of the foreign couple commissioning the surrogacy.

- The foreign couple commissioning surrogacy is required to furnish an undertaking that they would take care of the child/ children born through surrogacy in India through the surrogate mother.
- The foreign couple should produce a duly notarized agreement between the applicant foreign couple and the prospective Indian surrogate mother.
- The treatment concerning surrogacy should be done only at one of the registered ART clinics recognized by Indian Council for Medical Research.
- The foreign couple before leaving India for their return journey would require 'exit' permission from the Foreigners Regional Registration Office (FRRO)/Foreigners' Registration Office (FRO) and should be carrying a certificate from the ART clinic concerned regarding the fact that the child/children have been duly taken custody of by the foreigner and the liabilities toward the Indian surrogate mother are fully discharged as per their agreement. A copy of the birth certificate(s) of the surrogate child/ children will be retained by the FRRO /FRO along with the photocopies of the passport and visa of the foreign parents for purposes of record.

4.2 Surrogacy and Judicial response in India:

Legal uncertainties surround the parenthood and citizenship as a result of international surrogacy agreements, particularly those entered into in India.⁹⁵The contemporary cases decided by the Indian courts will demonstrate the judicial attitude towards this critical subject in the absence of clerical guidelines.

4.2.1 Baby Manji Yamada vs. Union of India and others⁹⁶

The relevance of this case lies in it being not only the first decision relating to surrogacy made by the apex court but also in bringing to light the absence of regulation of the existing surrogacy industry in our country. Thus, it can be said to be the direct

⁹⁵Annika Toublessou, "Contracting the New Delhi Belly: Responding to the practice of international surrogacy" a dissertation , university of Otago, Oct.2012, p-13 available at: <http://www.otago.ac.nz/law/research/journals/otago043937.pdf>

⁹⁶Supreme court of India, W.P. (c) No. 369 of 2008, Decided on :29.09.2008

precursor of the newly enacted Assisted Reproductive Technologies (Regulation) Bill, 2010 which followed the 2008 draft Bill.⁹⁷The case developed in the backdrop of the Gujrat riots of 2008. Baby Manji was born on 25th July 2008 to Japanese biological parents who came to Anand in the year 2007, looking for surrogates.⁹⁸The egg extracted from her biological mother, Dr. Ikufumi Yamada was fertilized by her father, Dr. Yuki Yamada's sperm. The fertilized egg was implanted into the womb of surrogate mother. An arrangement was made with Pritiben Mehta and soon she became pregnant with the child.⁹⁹ But unfortunately during the period of pregnancy the couple got divorced and father was refused adoption as a single male, a prohibited act under India law.¹⁰⁰It is not clear from the judgment if surrogacy was responsible for the matrimonial discord.¹⁰¹

The father had to go to Japan due to expiry of his visa and thus the baby was kept under the care and supervision of her paternal grandmother in the clinic in Anand district. She was issued a birth certificate in the name of her genetic father by the Municipality of Anand district. According to the existing laws prevailed in the country, the birth certificate would entitle Mrs. Yamada to adopt the baby. The baby was moved to Arya Hospital on 3rd Aug 2008 in Jaipur city following the law and order situation in Gujrat and she was being provided with much needed care including being breast fed by a woman.¹⁰²

Subsequently, writ petition was filed before the Divisional Bench of Rajasthan High Court claiming the writ of Habeas corpus by a NGO, named M/s Satya in public

⁹⁷Jwala D. Thapa, *The Babies M; the Relevance of Baby Manji Yamada V. Union & India (UOI) AND in the matter of Baby "M"*, The West Bengal National University of Juridical Sciences (NUJS), Pg.96: http://jils.ac.in/wp-content/uploads/2011/12/1_prelims_jils.pdf

⁹⁸ Ibid note no. 194 at p-97

⁹⁹Meenakshi Kurpad, an article, "commercial surrogacy & family law reform In India", Academia.edu. p-09

¹⁰⁰ Annika Toublesson, "Contracting the New Delhi Belly: Responding to the practice of international surrogacy" a dissertation, university of Otago, Oct.2012, p-13 available at: <http://www.otago.ac.nz/law/research/journals/otago043937.pdf>

¹⁰¹ Ibid note 194 at p-97

¹⁰²Anil Trehan, An article on "surrogate Motherhood in India :A conceptual & Effectual Analysis & Recommendations of Indian Surrogacy Law Centre", Nyaya Deep -The official Journal of NALSA, Vol-x issue 4, oct – 2009, p.-28

interest. The petition was filed against the union of India through Ministry of Home affairs, State of Rajasthan through the principal secretary, the Director General of police, Jaipur city (East), Jaipur.

The Supreme Court said that –

“We need not to go into the locus standing of respondent no 3 and/ or whether bonafides are involved or not. It is to be noted that the commission for to be noted that the commission for protection of Child Rights Act, 2005 has been enacted for the protection of child rights and children’s courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto.”

Thus, the Supreme Court of India, in its judgment, delegated the entire responsibility on the commission on protection of child Rights for the purpose of deciding the legality of surrogacy. Thus, the case sparked huge media attention both in India and worldwide. Several questions were raised and there was no clear answer ‘as there is no law to regulate or no system even to gauge the extent of surrogacy incidents in the country.’¹⁰³ More importantly, it highlighted the need for legislation to regulate commercial surrogacy in India.

4.2.2 Jan Balaz vs. Anand Municipality¹⁰⁴

In this case twin babies were born to German national through Indian Surrogate mother in Anand District in Gujarat. In Germany there is complete ban on surrogacy. It does not recognize surrogate child as its own national. It is landmark case because in the absence of precedent Gujarat High Court conferred nationality on twin babies fathered through compensated surrogacy arrangement. The court held that-

“We are primarily concerned with the rights of the two new-born innocent babies, much more than the rights of biological parents, surrogate mother, or the donor of ova.”

4.3 Other Non judicial Cases of surrogacy in India:

¹⁰³ Meenakshi Kurpad, an article, “commercial surrogacy & family law reform In India”, Academia.edu.,p-12-13

¹⁰⁴ AIR 2010 Guj 21 also see <http://www.legalcrystal.com/747551>

4.3.1 An Israeli Gay couple case:

Yonathan aged 30 years and Omer aged 31 years have been together for the past seven years and once decided to start a family. As the Law of "Israel doesn't allow same-sex couples to adopt or have a surrogate mother. So they started scouting and found that only India and United States offer surrogacy to same sex couple. They heard about Rotunda clinic through friends and say it was the `personal touch' that appealed to them. Therefore, they felt that they could get a surrogate mother in India rather than in the US, which is more prosperous. The cost too was a consideration. The entire process cost nearly half of what it would have been in the US. The other factors which flocked them to choose India were less distance from their homeland country with easy availability of surrogate mothers, easy paperwork and cheap costs have earned a reputation for its surrogacy programme, with Anand in Gujarat often being referred to as the `surrogacy capital of the world'.¹⁰⁵

It was also reported that since 2005 the Rotunda clinic itself has seen 40 same-sex couples. Yonathan and Omer first came to Mumbai in January for an IVF cycle when Yonathan donated his sperm. "We were in constant touch over email, sending them the ultrasound," said Dr Allahbadia, who said the couple is now keen to have another child and they've requested the same donor so that they could have "real siblings".

In this case, Israeli gay couple Yonatan and Omer Gher¹⁰⁶ became parents in India on October 12, 2008 when their child was conceived with the help of a Mumbai based surrogate mother in a fertility clinic in Rotunda, in Bandra, proving once again that India is a preferred destination for infertile couples as well as gay couples seeking surrogacy. It

¹⁰⁵ Madhavi Rajadhyaksha, an article ,” Israeli gay couple gets a son in India”in Times of India, TNN | Nov 18, 2008, 12.49 AM IST available at: <http://timesofindia.indiatimes.com/india/Israeli-gay-couple-gets-a-son-in-India/articleshow/3724754.cms>

¹⁰⁶ Anil and Ranjit Malhotra, an article on “Commercial Surrogacy in India- Bane or Boon” : www.reunite.org/edit/files/articles/commercial_surrogacy_in_India-Bane/boon.pdf

is reported that 3.8 Kilo baby boy Evyatar was born to them at Hiranandani Hospital in powai (Mumbai) on oct.12 2008.¹⁰⁷

Yonaten and Omer Gher reportedly first came to Mumbai in January 2008 for an IVF cycle when Yonaten is stated to have donated his sperm. Thereafter, they selected an anonymous mother after child was born, the gay couple left for Israel with the child on November 17, 2008. Even though homosexuality was an “unnatural offence” under the provisions of section 377 of Indian Penal Code, 1860, there is no bar to gay couples hiring a surrogate mother to deliver children for homosexual couples in India.¹⁰⁸

4.3.2 Amir khan and Kiran Rao’s surrogate baby –

Actor Amir Khan and wife Kiran Rao have been blessed with a baby boy through a surrogate.¹⁰⁹ Amir khan’s son was born on 1st.12.2011, through IVF to a surrogate mother at a private clinic in Mumbai. The couple resorted to IVF due to medical complications.

Earlier, Amir announced the news by saying, “Due to medical complications, we were advised to go for IVF-surrogacy.”¹¹⁰

“Amir khan’s decision will encourage families to consider IVF-surrogacy for women who may find difficulties in carrying their baby” says Dr. Firuza Parikh, who heads the IVF department of Jaslok Hospital Mumbai.¹¹¹

“There is a lot of social stigma associated with the procedure, but the fact that, a celeberrity has endorsed the cause, will encourage the couples”; says Dr. Kaberi Banerjee, IVF specialist, Max Healthcare.¹¹²

4.4 Arrangements relating to the registration of births regarding children born out of surrogacy arrangements in India:¹¹³

¹⁰⁷ Kumar Rajendran, an article, “Surrogacy- Renting a womb”, in academia.edu: www.academia.edu/1744770/surrogacy-renting-a-womb

¹⁰⁹ www.indianexpress.com/news/aamir-khan-kiran-rao-have-baby-boy-via-surrogate/884259/

¹¹⁰ <http://www.ndtv.com/article/bollywood/aamir-and-kirans-baby-named-aazad-rao-khan-156856>

¹¹¹ Shara Ashraf, Navdeep Kaur, Marwah, “Amir Khan flooded with queries on IVF surrogacy”, in Hindustan Times, New Delhi, December, 06, 2011

¹¹² Ibid note 206

In India at the moment, we do not have any legislation on legal parentage as a result of surrogacy arrangements. At the moment, in India we have the Registration of the Births and Deaths Act, 1969, which does not contain any provision regarding parentage as a result of a surrogacy arrangement. The said enactment laid down by the Parliament of India came into force on 31 May, 1969. Surrogacy parentage was not an issue at the time the said legislation came into being. Neither, have there been any amendments or additions with regard to any surrogacy issues in the said enactment pertaining to the registration of births and deaths in the Indian jurisdiction.

That in so far relating to arrangements for registration of births of children born out of surrogacy arrangement is concerned, in India reference is drawn to the relevant provisions of the ICMR Guidelines, 2005 and the ART Bill, 2010.

Para 3.5.4 of the ICMR Guidelines, 2005 clearly provides that the birth certificate of children born out of a surrogacy arrangement, shall be in the name of the genetic parents.

Para 3.5.4 of the ICMR Guidelines, 2005 provides as follows:

"A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering she must mention that she is a surrogate mother 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, as this would post legal issues, particularly in the untoward event of maternal death (in whose names will the hospital certify this death?). The birth certificate 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. 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

¹¹³ Anil MalhotraRanjitMalhotra, "Surrogacy in India- A Law in the Making", Universal Law Publishing Co., New Delhi-India pp-51-53

between the couple and the proposed surrogate mother. An oocyte donor cannot act as a surrogate mother for the couple to whom the oocyte is being donated."

Likewise, attention is drawn to Chapter VII of the ART Bill, 2010, which deals with rights and duties of patients, donors, surrogates and children. In this regard attention is invited to para 34 (10) of Chapter VII which provides as follows:

"The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of individual/individuals who, commissioned the surrogacy, as parents."

Hence, from a combined reading of the relevant provisions in the ICMR Guidelines, 2005, and the ART Bill, 2010, it can be safely asserted that the birth certificates of children born out of surrogacy arrangements should be in the name of the commissioning parents.

The said certificates are issued under Sections 12 and 17 of The Registration of Births and Deaths Act, 1969. For ease of reference, Section 12 of the 1969 Act reads as under:

"12. *Extracts of registration entries to be given to informant.*- The Registrar shall, as soon as the registration of a birth or death has been completed give, free of charge, to the person who gives information under section 8 or section 9 an extract of the prescribed particulars under his hand from the register relating to such birth or death."

It is important to mention, normally the practice followed by Government hospitals and nursing homes in India, is that they forward particulars of all births with the relevant details to the designated authorities under the provisions of the Registration of Births and Deaths Act, 1969. This is a mandatory and a statutory duty of the medical officer of such an institution, prescribed under Section 8 of the Registration of Births and Deaths Act, 1969. Furthermore, the certified copy of the birth certificate is a public document in terms of Section 76 of the Indian Evidence Act, 1872.

It is equally important to refer to Section 17 of the Registration of Births and Deaths Act, 1969. The same reads as under:

"17. Search of births and deaths register.-

- (1) Subject to any rules made in this behalf by the State Government, including rules relating to the payment of fees and postal charges, any person may-
 - (a) cause a search to be made by the registrar for any entry in a register of births and deaths;
 - (b) obtain an extract from such register relating to any birth or death: Provided that no extract relating to any death, issued to any person, shall disclose the particulars regarding the cause of death as entered in the register.
- (2) All extracts given under this section shall be certified by the Registrar or any other officer authorised by the State Government to give such extracts as provided in section 76 of the Indian Evidence Act, 1872 (1 of 1872), and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates."

Here it is submitted that in terms of clause 2 of Section 17 of the 1969 said Act, a birth certificate is admissible in evidence as far as the factum of birth is concerned. So, it can be argued that this is the legal position as to parentage of children born as a result of surrogacy arrangements in the Indian jurisdiction.

4.5 POSITION IN TERMS OF THE NATIONALITY OF CHILDREN BORN OUT OF SURROGACY ARRANGEMENTS IN INDIA:¹¹⁴

The legislation which deals with the acquisition and determination of Indian citizenship is the Citizenship Act, 1955. This enactment provides four modes of acquisition of citizenship which are contained in Sections 3, 4, 5 and 6 and the same are reproduced hereunder:

Section 3- Citizenship by birth-

¹¹⁴ Anil MalhotraRanjitMalhotra, "Surrogacy in India- A Law in the Making", Universal Law Publishing Co., New Delhi-India pp-53-57

- (1) Except as provided in sub-section (2), every person born in India,-
 - (a) on or after the 26th day of January, 1950, but before the 1st day of July 1987;
 - (b) on or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;
 - (c) on or after the commencement of the Citizenship (Amendment) Act, 2003, where-
 - (i) both of his parents are citizens of India; or
 - (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.
- (2) A person shall not be a citizen of India by virtue of this section if at the time of his birth-
 - (a) either his father or mother possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be, is not a citizen of India; or
 - (b) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.

Section 4- Citizenship by descent-

- (1) A person born outside India shall be a citizen of India by descent,-
 - (a) on or after the 26th day of January, 1950, but before 10th day of December, 1992, if his father is a citizen of India at the time of his birth; or
 - (b) on or after the 10th day of December, 1992, if either of his parents is a citizen of India at the time of his birth:

Provided that if the father of such a person referred to in clause (a) was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless-

- (a) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of this act, whichever is later, or, with the permission of the Central Government, after the expiry of the said period; or
- (b) his father is, at the time of his birth, in service under a Government in India:

Provided further that if either of the parents of a person referred to in clause (b) was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section, unless-

- (a) his birth is registered at an Indian consulate within one year of its occurrence or on or after the 10th day of December, 1992, whichever is later, or with the permission of the Central Government, after the expiry of the said period; or
- (b) either of his parents is, at the time of his birth, in service under a Government in India:

Provided also that on or after the commencement of the Citizenship (Amendment) Act, 2003, a person shall not be a citizen of India by virtue of this section, unless his birth is registered at an Indian consulate in such form and in such manner as may be prescribed,-

- (i) within one year of its occurrence or the commencement of the Citizenship (Amendment) Act, 2003, whichever is later; or
- (ii) with the permission of the Central Government, after the expiry of the said period:

Provided also that no such birth shall be registered unless the parents of such person declare, in such form and in such manner as may be prescribed, that the minor does not hold the passport of another country.

- (1A) A minor who is a citizen of India by virtue of this section and is also a citizen of any other country shall cease to be a citizen of India if he does not renounce the citizenship or nationality of another country within six months of attaining full age.
- (2) If the Central Government so directs, a birth shall be deemed for the purposes of this section to have been registered with its permission, notwithstanding that its permission was not obtained before the registration.
- (3) For the purposes of the proviso to sub-section (1), any person born outside undivided India who was, or was deemed to be, a citizen of India at the commencement of the Constitution shall be deemed to be a citizen of India by descent only.

Section 5- Citizenship by Registration-

- (1) Subject to the provisions of this section and such other conditions and restrictions as may be prescribed, the Central Government may, on an application made in this behalf, register as a citizen of India any person not being an illegal migrant who is not already such citizen by virtue of the Constitution or of any other provisions of this act if he belongs to any of the following categories, namely:-
 - (a) a person of Indian origin who are ordinarily resident in India for seven years before making an application for registration;
 - (b) a person of Indian origin who is ordinarily resident in any country or place outside undivided India;

- (c) a person who is married to a citizen of India and is ordinarily resident in India for seven years before making an application for registration;
- (d) minor children of persons who are citizens of India;
- (e) a person of full age and capacity whose parents are registered as citizens of India under clause (a) of this subsection or sub-section (1) of section 6;
- (f) a person of full age and capacity who, or either of his parents, was earlier citizen of independent India, and has been residing in India for one year immediately before making an application for registration;
- (g) a person of full age and capacity who has been registered as an overseas citizen of India for five years, and who has been residing in India for one year before making an application for registration.

Explanation 1.- For the purposes of clauses (a) and (c), an applicant shall be deemed to be ordinarily resident in India if-

- (i) he has resided in India throughout the period of twelve months immediately before making an application for registration; and
- (ii) he has resided in India during the eight years immediately preceding the said period of twelve months for a period of not less than six years.

Explanation 2.-

- (1) For the purposes of this sub-section, a person shall be deemed to be of Indian origin if he, or either of his parents, was born in undivided India or in such other territory which became part of India after the 15th day of August, 1947.
- (2) No person being of full age shall be registered as a citizen of India under sub-section (1) until he has taken the oath of allegiance in the form specified in the Second Schedule.

- (3) No person who has renounced, or has been deprived of, his Indian citizenship or whose Indian citizenship has terminated, under this act shall be registered as a citizen of India under subsection (1) except by order of the Central Government.
- (4) The Central Government may, if satisfied that there are special circumstances justifying such registration, cause any minor to be registered as a citizen of India.
- (5) A person registered under this section shall be a citizen of India by registration as from the date on which he is so registered; and a person registered under the provisions of clause (b) (ii) of Article 6 or Article 8 of the Constitution shall be deemed to be a citizen of India by registration as from the commencement of the Constitution or the date on which he was so registered, whichever may be later.
- (6) If the Central Government is satisfied that circumstances exist which render it necessary to grant exemption from the residential requirement under clause (c) of sub-section (1) to any person or a class of persons, it may, for reasons to be recorded in writing, grant such exemption.

Section 6- Citizenship by naturalization-

- (1) Where an application is made in the prescribed manner by any person of full age and capacity not being an illegal migrant for the grant of a certificate of naturalization to him, the Central Government may, if satisfied that the applicant is qualified for naturalization under the provisions of the Third Schedule, grant to him a certificate of naturalization:

Provided that, if in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the Third Schedule.

(2) The person to whom a certificate of naturalization is granted under subsection (1) shall, on taking the oath of allegiance in the form specified in the Second Schedule, be a citizen of India by naturalization as from the date on which that certificate is granted."

Since there is no exclusive and separate legislation governing nationality and citizenship issues of children born out of surrogacy arrangements in India, hence, in such a situation all nationality and citizenship issues will be governed by the abovementioned provisions of the Indian Citizenship Act, 1955.

4.6 REACTIONS AND RESPONSES OF FOREIGN GOVERNMENTS Most foreign embassies have indicated on their web sites that Indian Government now requires medical visas for foreigners coming to India for surrogacy. Besides, stringent DNA tests are already in place to establish genetic connections for parentage and foreign nationality. Indian Consulates overseas and Visa Facilitation Services (VFS) have also notified that foreign nationals must ascertain beforehand whether their country permits surrogacy and that they cannot enter India for surrogacy purposes by tourist visas. The British High Commission, New Delhi, in advance preparation, by its letter of 30 October, 2012 to the India High Commission, London, states that the British Government recognises surrogacy and makes provisions for commissioning couples for children born overseas through surrogacy. The UK Human Fertilization and Embryology Act, 1990 is cited in support. It allows surrogacy if one parent is genetically related to the surrogate child and no money other than reasonable expenses are paid in respect of the surrogacy arrangement. Alternatively, the said letter also takes support of the UK Human Fertilization and Embryology Act, 1990, for providing parental orders to commissioning parents. This letter is stated to be a request for entertaining

applications for medical visas for purposes of surrogacy in India as per requirements of the new Indian Medical Visa Regulations.¹¹⁵

For purposes and ready reference, a letter dated 30 October, 2012, written by the British High Commission, New Delhi to the Indian High Commission, London which gives out all the relevant details in so far surrogacy arrangements in UK are concerned as also hands out the details for making an application for a medical visa to India in support of the surrogacy case is quoted for complete details in this regard as hereunder:

"Following an RTI request by the Indian Surrogacy law Centre, I have come to learn of new visa conditions issued by the Ministry of Home Affairs as stated in their letter of 9 July, 2012 to ShriAmarendraKhatua, Additional Secretary (PV) MEA ref. F.No.25022/74/2011-F.I

These new conditions stipulate that "a letter from the Embassy of the foreign country in India or the Foreign Ministry of the foreign country should be enclosed with the visa application stating clearly that (a) the country recognises surrogacy and (b) the child/ children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/ children of the couple commissioning surrogacy."

The Department of Health holds the lead responsibility for making law and policy on surrogacy in the United Kingdom. The Human Fertilization and Embryology Act, (HFE Act, 1990) applies to all of the United Kingdom and is the Act which regulates parental orders. Other aspects of Surrogacy are regulated in the UK by the Surrogacy Arrangements Act, 1985. For the purpose of this visa application, the United Kingdom recognizes surrogacy in India so long as it meets the conditions set out by the UK Human Fertilization and Embryology Act, 1990. The Act allows for a child to be treated in law as the child of a couple if the child is genetically related to at least one of the commissioning couple and no money other than reasonably incurred expenses has been paid in respect of the surrogacy arrangement.

¹¹⁵ Anil MalhotraRanjitMalhotra, "Surrogacy in India- A Law in the Making", Universal Law Publishing Co., New Delhi-India pp-104-107

Because of the different scenarios that can arise in inter-country surrogacy, the way that a child born as the result of a surrogacy arrangement through an Indian surrogate mother may be brought into the United Kingdom will depend on individual circumstances. Therefore, we advise parents to seek advice before undertaking surrogacy arrangements.

British commissioning parents seeking nationality documents for a child born through an Indian surrogate mother follow one of the following routes:

Route A If the child gains British citizenship automatically, he/she may freely enter the UK once a British citizen passport has been obtained on his/her behalf. There are three requirements that need to be met for a child born of a surrogacy agreement to be automatically eligible to hold British citizenship. These are:

- 1) The surrogate mother must be unmarried at the time the child is born.
- 2) The commissioning father must be the biological father of the child.
- 3) The commissioning father must be a British citizen, otherwise than by descent.

Where there is no automatic claim to British citizenship, the commissioning parents may apply to UKBA to register the child as a British citizen under section 3(1) or 3(2) of the British Nationality Act 1981. If the surrogate mother is married, once paternity and/or parental responsibility is established, a child can be registered as a British citizen. Registration under section 3(1) of the British Nationality Act confers "British citizenship other than by descent" upon the child. This is the same status as if they had been born in the United Kingdom to a British citizen parent.

Route B If the male of the commissioning couple meets the definition of "a parent" for the purpose of the Immigration Rules, there is a route of entry for the child under paragraph 297 of the Immigration Rules as a dependent child. If the surrogate mother is unmarried, the biological father will be considered as the resultant child's father, so long as he is so identified on official documentation and can

prove his connection by way of accredited DNA evidence. Where he cannot pass on British citizenship to the child, but can still establish his paternity to the child and, if the surrogate mother has renounced her parental responsibilities (at least 6 weeks after the birth), it will be open to him to apply for entry clearance on behalf of the child. If successful, this will enable him to bring the child to the UK under Paragraph 297 of the UK Immigration Rules and the child would be granted Indefinite Leave to Enter the UK.

Route C If either of the commissioning couple has a genetic connection with the child, the couple may seek entry clearance to bring the child to the UK to apply for a UK parental order within 6 months of the birth. A parental order reassigns parenthood, extinguishing the parental status of the surrogate parents, and conferring full parental status and parental responsibility on the commissioning parents. A child who is the subject of a parental order made in the UK after 6 April, 2010 will become a British citizen from the date of the order if either of the persons who obtained the order is a British citizen. For each route, parents will need to provide the relevant supporting documents to evidence their application and can only apply once the child is born:

Further information on the UK immigration rules relevant to international surrogacy can be found in the UKBA Inter-country surrogacy leaflet:

www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/Inter-country-surrogacy-leaflet

As the British government recognizes surrogacy and makes provisions for the commissioning couple of a child I children born overseas to apply for entry to the United Kingdom, I should be grateful if you would accept this letter, enclosed with applications for medical visas for the purpose of surrogacy, as meeting the requirements as set out under MHA instructions to the MEA of 9 July, 2012".

The above authentic information is the best source of guidance in respect of applications for UK Nationals who are applying for an Indian Medical Visa in support of a surrogacy arrangement in India.

In nutshell, it can be said that, a there is no specific law on the aforesaid subject, the legal framework if at all can be seen in our country, it exist in the form of guidelines laid down by Indian Council of Medical Research, recommendations made by Law Commission of India, the Draft of Assisted Reproductive Technology Regulations Bill, 2010, and the various notifications issued by the ICMR from time to time. The provisions of the Citizenship Act, 1955, Registration of the Births and Deaths Act, 1969The Guardians and Wards Act., 1890 (GWA),The Hindu Minority and Guardianship Act, 1956 (HMGA) and The Hindu Adoptions and Maintenance Act, 1956 (HAMA), Indian Contract Act,1872 etc. are considered and applied by the Indian Judiciary to deal with such type of matters

CHAPTER -5

SURROGATE

MOTHERHOOD:

AN EMPIRICAL STUDY

Surrogate motherhood is variously described in emotive terms such as “rent a womb” or, on the other hand, “gift of love” or “gift of life” depending on a particular viewpoint. Regardless, surrogacy is a source of considerable legal, moral and ethical debate all over the world.

A surrogate mother¹ is a woman who agrees to be artificially inseminated with the sperm of a man whose own wife is incapable of conceiving or carrying a child to term. In the typical case, the surrogate mother conceives, carries the child for nine months, gives birth, and then releases her parental rights, giving up the child to the infertile couple for adoption. Although surrogacy has occurred throughout history, the issue is currently firm on the public agenda. New reproductive technologies have added significantly to the potential of surrogacy, making it necessary for the law to specifically address all aspects of the issue. There are moves to introduce surrogacy legislation in India.

Few really acknowledge and understand the utter seriousness of this issue that is gaining such widespread notoriety. It is important to note the problem with all of the issues raised for and against surrogacy is that the principles do not apply generally. People involved in surrogacy arrangements are individuals and they may or may not be affected or influenced by each of the factors related to surrogate motherhood. There is a strong need for Indian research on the effects of surrogacy on commissioning parents and surrogate mothers and its impact on the emotional, social and intellectual development of children born from a surrogacy arrangement.

A survey in this regard was conducted in various states of India. The methodology adopted for this study was exploratory research of the social and legal aspects involved in surrogate motherhood through the means of a survey. The tools included two separate structured questionnaires¹¹⁶ for legal experts and medical experts. One questionnaire of total of thirty-seven questions to be filled by IVF clinics/doctors and other questionnaire of total of thirty questions to be filled by law experts were drafted for the purpose of

¹¹⁶ Survey Questionnaire appended in Appendix I & II

gathering the information about different aspects of surrogate motherhood. The sample size consisted of one hundred legal experts including lawyers and law Professors and fifty IVF clinics including other fertility doctors. The final report aims to recommend the major findings for future policy implications. Followings are the findings based on this survey.

1. The clinic follows the norms of PC & PNDT Act and guidelines of Indian Council of Medical Research, 2005-

The Pre-Conception and Pre-Natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 2003, (PC & PNDT Act) are followed by the clinic whereas the guidelines given by Indian Council for Medical Research though not binding are also followed by the Clinic. It was observed from the survey that 90% of the clinics are regulated by present law i.e. PC & PNDT Act and regulated by ICMR guidelines. Whereas 10 % of the clinics have their own rules and policies for the regulation of their clinics.

Implementation of PC & PNDT Act and guidelines of ICMR, 2005

Sr. No.	Response	Frequency	% age
1.	PC & PNDT Act, &ICMR Guidelines, 2005	45%	70%
2.	Own Rules/Policies	05%	30%
Total		50	100%

2. General conception of the term Surrogate Motherhood-

Surrogacy is not a new term in India, but many people have a least idea about the concept of surrogate motherhood. It was asked from various legal experts as well as medical experts as how do they see surrogacy. Majority of them that is almost 50 % of legal experts and 80 % of medical experts many of them ART experts and other medical practitioners regarded surrogacy as a “boon for infertile couples.” Very few of them referred it as “baby selling” or “immoral practice”.

3. Necessity to have Contract for Surrogacy

It is many times debated in India that for surrogacy arrangement whether there is requirement to enter into legal contract between the parties i.e. the surrogate mother and the intended parents. The Survey reveals that nearly 90% of legal experts favored the presence of a formal contract between both the parties whereas only 10% were of the view that such a contract is not that much necessary. And so far as ART experts and other medical practitioners are concerned nearly 75 % of the IVF clinics/doctors said that there is a formal contract between the said parties. 25 % said that surrogacy contract is not necessary and it only depends upon the wish of parties.

**Table showing Necessity to have Contract for Surrogacy
Opinion of Law Experts**

Sr. No.	Response	Frequency	% age
1.	Yes	90%	90%
2.	No	07%	07%
3.	Not necessarily	03%	03%
4.	Can't say	00%	00%
Total		100	100%

Opinion Medical Experts

Sr. No.	Response	Frequency
1.	Yes	37.5%
2.	No	05%
3.	Not necessarily	7.5%
4.	Can't say	00%
Total		50

4. Surrogacy arrangements ensuring the best interest of all parties involved-

As we know that the surrogacy arrangements directly affect the intended parents, surrogate mother as well as the child to be born. When it was asked, many legal experts that is around 50 % considered the best interest of all of them. The other fractions in the survey supported them individually. And similarly majority that is around 50 % of IVF clinics/doctors supported the best interest of all the parties involved in a surrogacy arrangement.

Sr. No.	Response	Legal experts	ART Experts & Other doctors
1.	Child to be Born	30	15
2.	Surrogate Mother	16	7.5
3.	Intended Parents	04	2.5
4.	All of above	50	25
Total		100	20

5. Regarding frequency of surrogacy cases per year-

When asked about frequency of cases it was found that 70% of IVF clinic on an average handles less than 10 cases per year. Around 20 % of IVF clinics were handling 10 to 25 cases yearly. There were around 10% well-established clinics which were handling 25 to 50 cases yearly. But in any case no clinic was handling more than 50 cases per year.

Sr. No.	Response	Frequency
1	Less than 10	35
2	10 to 25	10
3	25 to 50	05
4	More than 50	Nil

6. Reason to act as surrogate mothers-

In the survey it was found that the main reason which makes women to act as surrogate was compelling commercial factor which was around 75%. Generally, the surrogate women belong to economically and socially weaker sections of the society. With the view to fulfill some of their pressing demands such as food, shelter, education for their children and wellbeing of the entire family. But sometimes it is entirely altruistic when it is done by a relative or family friend of the infertile couple to help them fulfill their dream of parenthood. It was found in the survey that 5 % of IVF clinics/doctors have done altruistic surrogacy. 20 % of them said that they have faced surrogacy cases for both the purposes i.e. commercial as well as altruistic.

Sr. No.	Response	Frequency
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1	Commercial	37.5.
2	Altruistic	2.5
3	Both	10
4	None of above	00
Total		50

7. Method to arrange a surrogate mother for clients-

It was asked from the IVF clinics/doctors that how do they arrange a surrogate mother for their clients. 25 % replied that the intended parents themselves arrange for a surrogate mother. Whereas 60 % said that they arrange surrogate mothers through their own records or databases. 5 % told that surrogate mother herself approach to them. 10 % told that they find surrogate mothers through advertisements.

Sr. No.	Response	Frequency
1	Through own Data Base	30
2	Advertisement	05
3	Surrogate Mother Herself	2.5
4	Intended Parents	12.5
Total		50

8. Arrangement of genetic material to initiate a surrogacy procedure in absence of intended couple producing eggs/sperm-

During the survey it was found that around 75% Clinics they arrange it from independent sperm/egg banks. Whereas nearly 20 % of them said that intended couple itself arranges for it. 5 % said that they have their own prepared list of donors to whom they contact in case of need. Nobody responded positively that it is arranged though advertisement.

Arrangement of Genetic material by IVF Clinics

Sr.No.	Response	Frequency
1	From sperm/egg banks	37.5

2	List of donors	2.5
3	Advertisement	00
4	By Intended Couple	10
Total		50

9. Amount of money generally paid to the surrogate mother for carrying the pregnancy-

During survey, it was found that most of the fertility clinics pay amount between 3 to 5 lacs to surrogate mothers.

10. Marital status of surrogate mother-

During survey around 60 % of the legal experts opined that the woman acting as a surrogate mother shall be married. Whereas around 15 % expressed that the unmarried women can act as surrogates and 25 % were of the opinion that she can be a widow or divorcee/separated

In response to the same question 80% IVF clinics/doctors said that generally surrogate mother is a married woman and some cases even a widow/divorcee/separated woman can be surrogate mother. But in no case they had performed surrogacy with an unmarried woman as surrogate mother.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Married	60
2.	Unmarried	15
3.	Widow/Divorcee/separated	25

Total		100
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Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Married	40
2.	Unmarried	00
3.	Widow/Divorcee/separated	10
Total		50

11. Requirement of consent of family members for acting as surrogate mother-

During survey it was found that around. 70 % of legal experts told that it is necessary for woman to take consent of her husband and other family members. 10 % were of the opinion that only the woman entering the surrogacy contract should decide for herself. Whereas others opined that (nearly 20%) consent of husband alone is sufficient.

Whereas 80 % of IVF clinics/doctors said that husband's consent is necessary before entering into a surrogacy contract. Only 10% of them told that surrogate mother can enter a surrogacy contract on her own without taking anybody's permission. Rest 10% told that consent of all family members is necessary.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Surrogate Mother only	10
2.	Her Husband only	20
3.	Her Family Members &	70

	Husband	
Total		100

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Surrogate Mother only	05
2.	Her Husband only	40
3.	Her Family Members	05
Total	All of above	50

12. Necessity for surrogate mother to have a child/ children of her own-

During the survey it was noticed that 55 % of the legal experts said that it does not matter that the surrogate mother is having the children of her own or not. Whereas 35 % told that she must have at least one child of her own whereas 10 % told that surrogate mother should have at least 2 children of her own. On other hand nearly 80% of IVF clinics/doctors told that surrogate mother should have at least one child of her own. Whereas 10 % said for two children while other 10 % said it's not necessary that she should have a child as a precondition for entering into surrogacy contract.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	At least one	35
2.	At least two	10

3.	No child at all	00
4	Does not matter	55
Total		100

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	At least one	40
2.	At least two	05
3.	No child at all	00
4.	Does not matter	05
Total		50

13. Age limit of a woman to act as surrogate mother-

Majority of Art experts that is nearly 55% were of the view that the ideal age for a woman to act as surrogate is between 26 to 35 years whereas 45 % were of the view that the correct age for a woman to act as surrogate mother should be in between 18 to 25. Nobody suggested the age between 13 to 18 and 36 to 45 years.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Under 18	00
2.	18 to 25	22.5

3.	26 to 35	27.5
4.	36 to 45	00
5.	45 and above	00
Total		50

14. Insurance cover for surrogate mother-

The very important question is surrogacy arrangement whether a surrogate mother who bears the pregnancy has potential health and life risks should be insured or not. It was answered by almost 35% of medical experts that a surrogate mother should be provided with insurance cover for her health only whereas nearly, 60 % favored for both types of insurance i.e. for protecting her health and her life as well. Very few of them that is nearly 5 % of them supported the life insurance policy only.

On other hand, around 50% of legal experts were of the opinion that she should be provided with both type of insurance covering health and life cover. Whereas around 30% supported for health insurance only. 20% told that life protection alone is required.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Life Insurance	20
2.	Medical and Health Insurance	30
3.	Both of above	50
4	No insurance at all	00
Total		100

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Life Insurance	2.5
2.	Medical and Health Insurance	17.5
3.	Both of above	30
4.	No insurance at all	00
Total		50

15. Number of times a woman can become surrogate-

During survey around 15 % of medical experts opined that, a woman with good health can become surrogate mother for three times. While 50 % of them were of the view that a woman can undergo surrogacy for two times in her life time. Remaining 35 % were of the view that she should bear pregnancy for another only once in her life time due to as risk involved in such type of pregnancy.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Only once	17.5
2.	Twice	25
3.	Thrice	7.5
4.	Any number of times	00
Total		50

16. Right to abort the child in case of any health complication-

It was found that nearly 80% of legal experts in the survey opined that the surrogate mother must have the right to abort the child if there is any threat to her health or life. Whereas nearly 10% told negatively. Remaining 10% did not form any opinion whether she should be given such right or not.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Yes	80
2.	No	10
3.	Can't say	10
Total		100

17. Wellbeing of the surrogate mother during the gestational period-

When it was asked from medical experts that who will be responsible to take care of surrogate mother during gestational period then about 20 % of IVF clinics/doctors said that it is the responsibility of intended parents to take care of surrogate mother. Nearly 5 % of them told that IVF clinic also makes arrangement to secure wellbeing of surrogate mother. Whereas 70 % said that it is the joint responsibility of all of them. Only 5 % of them told that the surrogate mother herself is responsible to secure her wellbeing.

On other hand, various legal experts that is around 80 % opined that the intended parents are responsible to secure the wellbeing of surrogate mother. Whereas 15 % of them were of the opinion that all the parties are responsible to secure the wellbeing of surrogate mother during her gestational period. 5 % of them told that IVF clinic shall make the arrangement to secure wellbeing of surrogate mother during her gestational period.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Intended parents	80
2.	Surrogate mother herself	00
3.	IVF clinic itself	05
4.	All of above	15
Total		100

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Intended parents	10
2.	Surrogate mother herself	2.5
3.	IVF clinic itself	2.5
4.	All of above	35
Total		50

18. Duration during which the expenses of surrogate mother to be borne by intended parents-

When it was asked from finite set of legal experts that till what period of time surrogate mother's expenses shall be borne by intended parents then almost 70% replied that till the surrogate woman is free from all health issues caused to her out of surrogacy whereas 20% said that till the custody of child is handed over to the intended parents.

Almost 08% said that till the birth of child and other 02% said that till the life time of surrogate mother as she gives a priceless gift to intended parents.

On other hand ART experts responded more or less the same with only difference that instead of bearing the expenses for whole life of surrogate they said till the delivery of child.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Till the birth of the child	08
2.	Till the custody handed over	20
3.	Till surrogate mother is free from all the health complications arising due to pregnancy	70
4	Till life time	02
Total		100

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Till the birth of the child	05
2.	Till handing over the child	10
3.	Till surrogate mother is free from all the health complications arising due	35

	to pregnancy	
4.	Till life time	00
Total		50

19. Time frame in which the child must be handed over to the intended parents-

During the survey it was found that in majority of the cases that is in 90% the baby is handed over to the intended parents immediately after the birth. 10% responded that the custody of child is handed over nearly after span of 40 days so that baby gets much needed breast feed.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Immediately after birth	45
2.	After 40 days	05
3.	After 6 months	00
4.	Within a year	00
Total		50

20. Provision for counseling to the surrogate mother and intended parents-

It was found in the survey that in order to ensure smooth functioning of surrogacy contract almost 85 % ART clinics/doctors provide counselling services to both the parties so that any type problem such as emotional instability should not occur. Few of them that is around 10% said that such counselling is provided occasionally that too if needed in a particular case. Whereas 5% told that such situation has not occurred so they have not provided any counselling so far.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Always	42.5
2.	Occasionally	05
3.	Never	2.5
4.	Refer them to professionals	00
Total		50

21. Responsible to take the custody of the child in case of incapacity of intended parents-

It is a really very important to consider a situation if any incapacity occur due to illness, death or some other inevitable reason who shall be made responsible to take the custody of surrogate baby. Almost 30% of legal experts opined that in case of incapacity of intended there should be some person appointed in the contract who shall take the custody of the child if any incapacity occurs. Whereas 35 % of them said the surrogate mother should be made responsible as she is also the mother of the child. Only 5% were of the opinion that child should be given to orphan homes. Remaining all told that some close relatives shall be made responsible to take the custody of child. The Art and other medical experts responded more or less the same

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Surrogate Mother	35
2.	Relatives of Intended	30

	Parents	
3.	Orphan homes	05
4	Guarantor	30
Total		100

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Surrogate Mother	17.5
2.	Relatives of Intended Parents	15
3.	Orphan homes	2.5
4.	Guarantor	15
Total		50

22. Citizenship of child in case of foreign couple-

It is another important issue in case if the intended parents belong to foreign nation. Around 65 % of the legal experts told that such child should belong to the country of the foreign couple. Whereas as nearly as 35 % of them opined that the child to be born shall be given dual citizenship, one of the country of surrogate mother as well as intended parents.

Opinion of Legal Experts

Sr. No.	Response	Frequency
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1.	Surrogate Mother	35
2.	Relatives of Intended Parents	30
3.	Orphan homes	05
4	Guarantor	30
Total		100

23. Status of surrogate child-

During the survey it was found that nearly 15 % of the legal experts said that surrogate child shall be recognized as adopted child whereas the majority of them that is around 80% were of the view that the baby shall be considered as the natural or legitimate child of the intended parents. Only 05% of them were opined that such child could be given a special status of “*surrogate child*”.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Natural/Legitimate child	80
2.	Adopted child	15
3.	Surrogate child	05
4	No such status	00
Total		100

24. Legal mother of the surrogate child-

Majority of the legal experts around 90% were of the view that the intended mother should be considered as the legal mother of the surrogate child as she is the person who is desperately in need of child and because of whose need the whole process is undertaken. Whereas only 10 % opined the gestational/surrogate mother should be regarded as the legal mother of the child. The other two options were not considered by them.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Intended Mother	90
2.	Gestational/Surrogate Mother	10
3.	Genetic Mother	00
4	All the three	00
Total		100

25. Motive of the donors behind donating genetic material-

During survey it was asked from ART experts that what is generally the motive of the donors behind donating genetic material. It was replied that around 60 % of them said that that they go for it due to financial needs. Whereas 30 % told that do it out of self-motivation. Only 10 % are of the view that they do so, on humanitarian grounds and also at the request of their relative or friends sometimes.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Monetary benefits	30

2.	Self-Motivation	15
3.	Humanitarian Grounds	2.5
4.	At the request of relatives/friends	2.5
Total		50

26. Disclosure of identity of the gamete donor-

During the survey when the above question was asked to legal experts then around which 50 % replied that the on demand from intended parents' identity of gamete donor should be disclosed. Whereas 25 % of them responded that if court orders then only it should be disclosed. yes. Whereas only 10% said that it shall never be disclosed. Rest of them said it can be disclosed. On other hand, around 60% of the ART clinics/ other medical doctors said that on demand from intended parents' identity of gamete donor should be disclosed. Nearly 35 % of them were against the disclosure of identity of donor and 5 % told the identity of donor should be disclosed as per court order or some other exigency.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Yes in all cases	15
2.	No	10
3.	On the demand by intended parents	50
4	on some exigency (court order/ medical	25

	emergency	
Total		100

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Yes in all cases	00
2.	No	17.5
3.	On the demand by intended parents	30
4.	on some exigency (court order/ medical emergency)	2.5
Total		50

27. Whether the intended parents want to know about the surrogate mother's details such as her complexion, social and family status etc.-

When during the survey it was asked from ART clinics/other medical experts that whether the intended parents want to know the details about the surrogate mothers such as her complexion, social and family status and background, her qualifications before entering a surrogacy arrangement, then nearly 75% of them replied that yes very often intended parents are curious to know about all such details. Whereas almost 10% said that very rarely they ask about such details. While 15 % said that always the intended parents ask about such details.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Yes, Always	7.5
2.	Very Often	37.5
3.	Very Rarely	05
4.	Never	00
Total		50

28. Demand from intended couples about peculiar features of the child to be born-

When it was asked from ART clinics/other medical experts that Whether intended couples ask for peculiar features of the child to be borne by virtue of advanced technology then nearly 75% of them replied yes always whereas 10 % of them said that sometimes they ask for peculiar features. 15% of them told that many times they do this because of the request of intended parents.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Yes, Always	37.5
2.	Sometimes	05
3.	Many times	7.5
4.	Never	00
Total		50

29. Sex selection of fetus by IVF Clinics-

During the survey when it was asked from ART clinics/other medical experts that Whether you know any IVF clinic which offers sex selection of fetus then they were reluctant to answer this question as it is legally punishable therefore the response recorded from them was around 90 % of them said that they are not aware about any IVF clinic which offers sex selection of fetus. Whereas 5% told that no IVF clinic offers sex selection of fetus. Remaining told that its difficult to say whether they do it or not.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Yes	00
2.	No	37.5
3.	Cannot say	2.5
4.	Not possible in IVF	2.5
Total		50

30. Right of surrogate child to know about the identity of the surrogate mother-

During the survey when the above question was asked to legal experts then around 30% told that the surrogate child should have the right to know about the identity of the surrogate mother whereas about 40 % said that the identity of surrogate mother shall be disclosed as per the order of the court. Rest 30% told that whenever there is any medical urgencyit can be disclosed to the surrogate child.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Yes	30
2.	No	00
3.	when required for medical reasons	30
4.	As per court's order	40
Total		100

31. Opinion about commercial surrogacy-

When it was asked from legal experts as to what they compare commercial surrogacy as it was revealed that about 75 % of them opined that it is not correct to compare commercial surrogacy with organ selling or with prostitution business. While 25 % compared it with womb renting for commercial gains.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Yes it is	00
2.	No it cannot be compared	75
3.	Up to some extent	25
4.	No such answer	00
Total		100

32. Any sort of prohibition or restriction on surrogate mother's activities during the

gestational period would amount to denial of fundamental right of life and personal liberty-

During the survey it was noticed that almost 70% of the legal experts opined that any kind of prohibition or restriction on surrogate mother's activities during the gestational period would not amount to denial of fundamental right. Whereas around 20 % are of the view that yes to some extent it infringes personal liberty of surrogate mother. Whereas 10% told that it is difficult to give opinion on this question.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Yes it is	00
2.	No	70
3.	Up to some extent	20
4.	Can't say	10
Total		100

33. Exploitation of surrogate mother by Foreign intended couples due to lack of ART Regulations-

During the survey it was asked from the legal experts that what they think that Due to lack of ART Regulations whether surrogate mother is exploited by Foreign intended couples. It was replied by almost 50% legal experts that there is exploitation of rural, illiterate poor women by foreign intended couples as well as by commercial agencies. Whereas about 35 % opined that that there is no exploitation of surrogate women. However, remaining of them were of the view that there is exploitation of poor Indian surrogate mother by intended parents to some extent.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Yes	50
2.	No	35
3.	To some extent	15
4.	Can't say	00
Total		100

34. Arrangement by IVF Clinic regarding preparation of documents (such as passport and visa) required for taking the child to the native country of intended parents-

During the survey it was asked from ART experts and other medical practitioners that whether they make the arrangement of preparing documents such as passport and visa required for taking the child to the native country of intended parents. They that is almost 80% replied that they refer them to formal agencies for completing all such formalities. Only 10 % of them told that they are providing such services. While other 10% said that they do not make such arrangement.

Opinion of Medical Experts

Sr. No.	Response	Frequency
1.	Yes	05
2.	No	05
3.	Refer them to formal agencies	40
4.	foreign couples themselves make arrangement	00

Total		50
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35. Opinion regarding making of special law regulating surrogacy in India-

During the it was asked from legal experts as to whether there is a need to make special law regulating surrogacy in India in absence of specific law. Then about 60 % of legal experts said yes there is great need in our country to have specific law on this special issue as India is hub of surrogacy at international level. Whereas 25 % were of the view that existing laws are sufficient such as PC&PNDT Act, 2003, ICMR Guidelines, 2005 and Indian Contract Act, 1872. While 15 % told that amendment in the existing laws should be made.

Opinion of Legal Experts

Sr. No.	Response	Frequency
1.	Yes	60
2.	No	00
3.	Existing laws are sufficient	25
4.	Amendment in the existing laws should be made	15
Total		100

Chapter 6

Conclusion and suggestions

This chapter deals with the conclusion and suggestions. At present India is the largest provider of surrogacy services in the world, surpassing even the United States. Whether surrogacy is good or bad is immaterial. What really matter is whether surrogate woman in India would be treated with dignity, respect and honor which they desperately deserve being human person. Surrogacy in India can be supported only if surrogate mothers have a choice in becoming pregnant in ways they choose, opting to use their own eggs or clients or genetic materials. The mothers need to be able to opt out or into procedures such as transvaginal ultrasounds. They should have the choice to stay at home with their own families or live in dormitories. The mother must be allowed to birth babies in ways they choose rather than being systematically cut open preterm. If the surrogate mothers wish, the intended parents need to work at maintaining ongoing social relationships with them. If and when surrogate mothers are treated as full human beings, with respect for their emotional, physical and intellectual, well-being, their sense of self dignity, and body intact, then transnational surrogacy can be supported.

Therefore, after analyzing the existing legal framework, judicial approach towards surrogacy in India, it can be concluded that it is proper time that India should have a good law which will treat all such surrogate women on equal footing with other working class women. The law commission should consider the international perspectives on surrogacy in general and the circumstances prevailed in India in particular to understand it the best and provide a clear cut good deal of rules and regulations to our own country after carefully considering the societal feelings and acceptance towards surrogacy.

Thus, in sum and substance, it is now time to take stock, evaluate, assess and decide the future course of surrogacy. There has to be a clear mandate visible and available to all those who want to embark on this adventurous journey on the road to surrogacy. At the same time, the medical professionals need to aid and assist the Government in preparing a new draft law of surrogacy, with proper checks, safeguards, safety measures and adequate precautions to ward of ills of commercial over tones of surrogacy. A proper law must rein in all concerned.

Suggestions: The prospective law should take care of following things:

1. The surrogate children should be allowed to remain with the surrogate mothers for at least period of one year in order to have breast feeding.
2. The law shall contain provision to treat surrogate women with dignity, respect and honor
3. Surrogacy contract shall satisfy all elements of valid contracts such as free consent of surrogate mother to bear a child, agreement of her husband and other family members for showing their willingness, medical procedure of artificial insemination, repayment of all the reasonable expenses for carrying a child to full term, willingness to handover the child born to the commissioning parents etc.
4. In the event of unexpected occurrence like the death of commissioning couple or divorce between the intended parents or due to dispute, or some other reasons if there is refusal to take the delivery of child, then such arrangement should contain a provision relating to providing monetary benefit to surrogate child up to 18 years.
5. A surrogacy arrangement should provide for life and health insurance cover for the surrogate mother.
6. After breast feeding period, the surrogate mother shall relinquish all parental rights over the child.
7. The surrogate and intended parent/ parents should receive independent legal consultation before the conception in order to understand the legal complications of such contract.
8. The surrogate child should be genetically related to at least one of the commissioning couple means .The reason is that bond of love and affection with child emanates from biological relationship and also the chances of various kinds of child-abuse which have been seen in cases of adoption will be minimized.
9. The surrogate child shall be considered as the legitimate child of the commissioning parents and the birth certificate should contain the name of Commissioning parent.
10. Foreign couples should furnish an evidence that surrogate child will get the citizenship of intended parent's home country.
11. The commissioning parents shall be legally bound to accept the child in spite of any abnormality that the child may have.
12. All the contracting parties that is the intended parents and the surrogate mother should undergo psychological screening (examination) even though there is genetic link. Such

information of psychological screenings should be disclosed to all the parties. So that neither the surrogate nor the parents sign a contract that they otherwise would not.

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Annexure-I

Survey Questionnaire for UGC Sponsored Minor Research Project

“Problem of Surrogacy in India: Need of exhaustive Legislation”

From ART / Fertility Medical Expert

Name of Researcher:- Asst. Prof. Rekha Pahuja, S.S.Maniyar Law College, Jalgaon

Name of person giving information:-

Taluka.....District.....Age.....

Occupation.....Qualifications.....

1. Does the clinic follow the norms of PC & PNDT Act and guidelines of Indian Council of Medical Research, 2005 as to practice?
 - a) Yes, Fully
 - b) Partially
 - b) Not at all
 - d) Own Rules and Regulations
2. How do you see surrogacy?
 - a) Boon for Infertile Couples
 - b) Baby Selling
 - c) Immoral Practice
 - d) Service to Humanity
3. What do you think whether it is necessary to have a legal contract between the parties i.e. the surrogate mother and the intended parents?
 - a) Yes
 - b) No
 - c) Not Necessary
 - d) Can't Say
4. Whether surrogacy arrangement ensures best interest of all the parties involved?
 - a) Yes of all parties involved
 - b) Only intended parents
 - c) Commissioning party and ART Clinic
 - d) only Art Clinics
5. What is the frequency of surrogacy cases per year in your clinic?
 - a) Less than 10 surrogacy cases
 - b) 10 to 25
 - c) 25 to 50
 - d) More than 50
6. Why women become ready to be surrogate mothers?
 - a) Due to compelling economic necessity
 - b) Having close ties with the party
 - c) Both a and b
 - d) None of the Above
7. How do you arrange a surrogate mother for your clients?
 - a) Through own channel/ Data Base
 - b) Advertisement
 - c) Surrogate Mother herself approaches
 - d) Intended Parents

8. from where does your clinic arranges genetic material to initiate a surrogacy procedure in case intended couple is unable to produce eggs/sperm?
 - a) From sperm/egg banks
 - b) List of donors
 - c) Advertisement
 - d) Intended Couple arranges for it
9. How much amount of money is generally paid to the surrogate mother for carrying the pregnancy?
 - a) Up to one Lac
 - b) Between 1 lac to 3 lacs
 - c) Between 3 lacs to 5 lacs
 - d) between 5 lacs to 6 lacs
10. In your opinion, what should be the marital status of the surrogate mother?
 - a) Married
 - b) Unmarried
 - c) Divorcee/ separated
 - d) Widow
11. Whether acting as surrogate mother is required to take consent of her family members?
 - a) Yes, it is mandatory to take only husband's consent.
 - b) Consent of all the family members is required
 - c) Her own consent is sufficient.
 - d) All the above
12. Is it necessary that surrogate mother must have a child/ children of her own before acting as surrogate mother?
 - a) At least one child
 - b) At least two children
 - c) Must not have any child at all
 - d) does not matter
13. What should be the age limit of a woman to act as surrogate mother?
 - a) From 13 to 18 Years
 - b) Above 18 to 25 Years
 - c) From 26 to 35 Years
 - d) From 36 to 45 Years
 - e) Above 45 Years
14. In surrogacy arrangement whether a surrogate mother who is having potential health and life risks should be insured or not.
 - a) Yes, for her Life (Life Insurance)
 - b) Yes, for Medical and Health Insurance
 - c) Both of above
 - d) No insurance at all is needed
15. In your opinion what number of time a woman can undergo surrogacy?
 - a) Only once
 - b) Twice
 - c) Thrice
 - d) Any number of times
16. Whether the surrogate mother has the right to abort the child if there is any threat to her health/ life in case she carries on with pregnancy?

- c) Intender Mother
d) All the above
26. What is the general motive of the donors behind donating genetic material?
a) Monetary Aspects
b) Self-Motivation
c) Want to help friends/ relative on their request
d) Humanitarian Grounds
27. Whether identity of the gamete donor should be disclosed to the intended parents with the donors consent?
a) Yes . in all cases
b) No
c) On the demand by intended parents
d) on some exigency (court order/ medical emergency)
28. Whether the intended parents want to know about the surrogate mothers details such as her complexion, social and family status and background, her qualifications etc before entering a surrogacy arrangement?
a) Yes, Always
b) Very often
c) Rarely
d) Never
29. Whether intended couples ask for peculiar features of the child to be born?
a) Yes, Always
b) Sometimes
c) Many times
d) Never
30. Whether you know any IVF clinic which offers sex selection of fetus?
a) Yes
b) No
c) Can't say
d) Not possible in IVF procedure
31. Whether surrogate child has right to know about the identity of the surrogate mother?
a) Yes
b) No
c) When required for medical treatment of child
d) When ordered by the Court
32. What do you compare commercial surrogacy as-
a) Organ selling
b) Prostitution
c) Womb for rent
d) None of the above
33. Whether any kind of prohibition or restriction on surrogate mother's activities during the gestational period would amount to denial of fundamental right of life and personal liberty under Article 21 of the Constitution?
a) Yes
b) No
c) To some extent
d) can't say
34. Whether prohibition of surrogacy contracts would amount to violation of 'right to privacy' or 'right to procreate' as is implicit under Article 21 of the Constitution of India?
a) Yes
b) No
c) To some extent
d) can't say

35. Due to lack of ART Regulations what do you think whether surrogate mother is exploited by Foreign intended couples?
- a) Yes
 - b) No
 - c) To some extent
 - d) can't say
36. Whether your IVF Clinic makes the arrangement of preparing documents (such as passport and visa) required for taking the child to the native country of intended parents?
- a) Yes
 - b) No
 - c) Clinic refers them to formal agencies
 - d) foreign couples make arrangement on their own
37. What do you think whether there is a need to make special law regulating surrogacy in India?
- a) Yes
 - b) No
 - c) Existing laws are sufficient (PC&PNDT Act, 2003, ICMR Guidelines, 2005, and Indian Contract Act, 1872)
 - d) Amendment in the existing laws should be made
38. Whether new law should ban the surrogacy altogether?
- a) Yes
 - b) No
 - c) Only Commercial surrogacy should be banned
 - d) Can't say anything

Annexure-II

Survey Questionnaire for UGC Sponsored Minor Research Project

“Problem of Surrogacy in India: Need of exhaustive Legislation”

From Legal Expert

Name of Researcher:- Asst. Prof. Rekha Pahuja, S.S.Maniyar Law College, Jalgaon

Name of person giving information:-

Taluka.....District.....Age.....

Occupation.....Qualifications.....

1. How do you see surrogacy?
 - a) Boon for Infertile Couples
 - b) Baby Selling
 - c) Immoral Practice
 - d) Service to Humanity
2. What do you think whether it is necessary to have a legal contract between the parties i.e. the surrogate mother and the intended parents?
 - a) Yes
 - b) No
 - c) Not Necessary
 - d) Can't Say
3. Whether surrogacy arrangement ensures best interest of all the parties involved?
 - a) Yes of all parties involved
 - b) Only intended parents
 - c) Commissioning party and ART Clinic
 - d) only Art Clinics
4. Why women become ready to be surrogate mothers?
 - a) Due to compelling economic necessity
 - b) Having close ties with the party
 - c) Both a and b
 - d) None of the Above
5. How much amount of money is generally paid to the surrogate mother for carrying the pregnancy?
 - a) Up to one Lac
 - b) Between 1 lac to 3 lacs
 - c) Between 3 lacs to 5 lacs
 - d) between 5 lacs to 6 lacs
6. In your opinion, what should be the marital status of the surrogate mother?
 - a) Married
 - b) Unmarried
 - c) Divorcee/ separated
 - d) Widow
7. Whether acting as surrogate mother is required to take consent of her family members?
 - a) Yes, it is mandatory to take only husband's consent.

- b) Consent of all the family members is required
 - c) Her own consent is sufficient.
 - d) All the above
8. Is it necessary that surrogate mother must have a child/ children of her own before acting as surrogate mother?
- a) At least one child
 - b) At least two children
 - c) Must not have any child at all
 - d) does not matter
9. What should be the age limit of a woman to act as surrogate mother?
- a) From 13 to 18 Years
 - b) Above 18 to 25 Years
 - c) From 26 to 35 Years
 - d) From 36 to 45 Years
 - e) Above 45 Years
10. In surrogacy arrangement whether a surrogate mother who is having potential health and life risks should be insured or not.
- a) Yes, for her Life (Life Insurance)
 - b) Yes, for Medical and Health Insurance
 - c) Both of above
 - d) No insurance at all is needed
11. Whether the surrogate mother has the right to abort the child if there is any threat to her health/ life in case she carries on with pregnancy?
- a) Yes
 - b) No
 - c) Can't say
12. Who will ensure the wellbeing of the surrogate mother during the gestational period?
- a) Intended parents
 - b) Surrogate mother herself
 - c) IVF clinic itself
 - d) All of above
12. Till what duration the expenses of surrogate mother should be borne by intended parents?
- a) Till the birth of the child
 - b) Till the birth of the child
 - c) Till surrogate mother is recovered from health issues caused due to surrogacy
 - d) Till her entire life.
13. What should be the time frame in which the child must be handed over to the intended parents?
- a) Immediately after birth
 - b) After 3 months
 - b) After 6 months
 - d) on expiry of one year of birth
14. In case of any incapacity of intended parents to take the custody of the child then who should be made responsible to take the custody of the child
- a) Surrogate Mother
 - b) Kin of Intended Parents
 - c) Some Orphan homes
 - d) Guarantor/Surety of contract

15. In case of foreign couple, what should be the citizenship of the child to be born?
- a) Citizenship of surrogate mother b) Citizenship of intended parents
c) Citizenship of both the parties d) None of the above
16. What should be the status of child to be born out of surrogacy arrangement?
- a) Natural/Legitimate child b) Adopted child
c) Surrogate child d) None of the above
17. Who should be the legal mother of the surrogate child?
- a) Genetic/ Biological Mother b) Gestational /Surrogate Mother
c) Intender Mother d) All the above
18. What is the general motive of the donors behind donating genetic material?
- a) Monetary Aspects b) Self-Motivation
c) Want to help friends/ relative on d) Humanitarian Grounds
their request
19. Whether identity of the gamete donor should be disclosed to the intended parents with the donors consent?
- a) Yes . in all cases b) No
c) On the demand by intended parents d) on some exigency (court order/ medical
emergency)
20. Whether surrogate child has right to know about the identity of the surrogate mother?
- a) Yes b) No
c) When required for medical treatment of child
d) When ordered by the Court
21. What do you compare commercial surrogacy as-
- a) Organ selling b) Prostitution
c) Womb for rent d) None of the above
22. Whether any kind of prohibition or restriction on surrogate mother's activities during the gestational period would amount to denial of fundamental right of life and personal liberty under Article 21 of the Constitution?
- a) Yes b) No
c) To some extent d) can't say
- 23.. Whether prohibition of surrogacy contracts would amount to violation of 'right to privacy' or 'right to procreate' as is implicit under Article 21 of the Constitution of India?
- a) Yes b) No
c) To some extent d) can't say

24. Due to lack of ART Regulations what do you think whether surrogate mother is exploited by Foreign intended couples?
- a) Yes
 - b) No
 - c) To some extent
 - d) can't say
25. What do you think whether there is a need to make special law regulating surrogacy in India?
- a) Yes
 - b) No
 - c) Existing laws are sufficient (PC&PNDT Act, 2003, ICMR Guidelines, 2005, and Indian Contract Act, 1872)
 - d) Amendment in the existing laws should be made
26. Whether new law should ban the surrogacy altogether?
- a) Yes
 - b) No
 - c) Only Commercial surrogacy should be banned
 - d) Can't say anything