

CHAPTER –I

1. INTRODUCTION:

“Surrogacy is a Human Victory over the Nature”¹

Motherhood is the most respected and idealized stages in a woman's life. In India,² a woman is respected only as a wife, if she bears a male child. As quoted below:

*“A Woman becomes complete when she gives birth to her own child and to be called mother. But unfortunately this gift is not equally distributed by god to every woman. There are many women who suffer infertility due to reasons like meeting with an accident, irregularity in reproductive system or infertility in a spouse. But science has overcome these causes of infertility and has come out with great solution or as we can say an option to replace adoption that’s surrogacy. A boon for childless couples who want their own child”.*³

Marriage is a sacramental institution, where every couple has the desire to have the child. However, this desire remains unfulfilled due to infertility. According to the Assisted Reproductive Technology (Regulation) Bill, 2010, in the world around 15 percent couples are found infertile.⁴ *The World Health Organization (WHO)* has declared the infertility as a disease and reported that, India has an estimated 19-20 million infertile couples.⁵ Thus, the infertility has become one of the most common medical and social problems. Infertility has become the reason for the marriage collapse, divorce, desertion and may result in heavy psychological consequences. In

¹Charushila , “Surrogacy -- A Hope”, C.f. <http://www.lawyersclubindia.com/articles/Surrogacy-A-Hope-3319.asp#.VJVY-cDnA> as visited on 13/12/2014 at 7 p.m

² Because of India is a patriarchal society. See book of Kamla Basin, “What is Patriarchy,” Edn. 1993, Reprinted 2014, Women Unlimited Edition, New Delhi. at p. 6

³*Supra note 1*

⁴ The Assisted Reproductive Technologies (Regulation) Bill-2010, at p. 1 available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf.

⁵ Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medico legal Issues’, [New Delhi: Jaypee Brothers Medical Publishers PVT. Ltd.,] 1st Edn., 2015, p. 5

India, from the ancient time the desire to have the child is satisfied by adopting the child, but today adoption law is not universal like western countries.

With the enormous advancement of science and technology has provided various ART techniques⁶ such as Artificial Insemination (AI),⁷ *In Vitro Fertilization (IVF)*⁸ or *Intracytoplasmic Sperm Injection (ICSI)*⁹ or Surrogacy¹⁰. Recently, the surrogacy has become the best option for infertile couples, single person and gay and lesbian persons of their own genetic babies. “The one of the most important medical advances is the birth of the *World’s first IVF child, Loiuse Joy Broun in Great Britain on July 25, 1978* and the *world’s second and India’s first IVF baby Kanupriya alias Durga was born in Kolkata on October 3, 1978.*”¹¹ On 23rd June, 1994 the first Indian surrogate child was born in GG Hospital Chennai.¹²

The term surrogacy means where a woman consented to bear the child with the intention to relinquish the baby upon the birth to the commissioning couple. The surrogacy is classified as traditional,¹³ gestational,¹⁴ altruistic,¹⁵ or commercial¹⁶ surrogacy. In commercial surrogacy a surrogate mother is hired and compensated for carrying the child of the commissioning couple where as in altruistic surrogate does not receive any monetary compensation.

According to the *International Committee Monitoring Assisted Reproductive Technologies (ICMART)*, 2015 reported that, present World’s total IVF babies now soars beyond 6 million.¹⁷ In India the record of ART data is not available. Recently,

⁶ *Infra* at p. 30

⁷ *Infra* at p. 31

⁸ *Infra* at p. 32

⁹ *Infra* at p. 35

¹⁰ *Infra* at p. 40

¹¹ *Infra* at p.

¹² Surrogacy India Guide, available at <http://www.globaldoctoroptions.com/book/export/html/432> visited on 12/12/2013

¹³ *Infra* at p. 56

¹⁴ *Infra* at p. 57

¹⁵ *Infra* at p. 60

¹⁶ *Infra* at p. 60

¹⁷ European Society of Human Reproduction and Embryology [ESHRE], Focus on Reproduction, September 2015, p. 17 available at <https://www.eshre.eu/Publications/Focus-on-Reproduction.aspx> visited on 12/10/2015.

however, Dr. Nayana Patel's Akansha Infertility Centre, Anand has reached milestone birth of the '1000th Surrogacy Baby.'¹⁸

Today, India has become an international hub for commercial surrogacy and had business an annual worth of at least \$445 million (Rs 2,900cr).¹⁹ According to the National Commission for women (NCW) around 3,000 clinics across India are offering surrogacy services.²⁰ According to the report of the Confederation of Indian Industry (CII) in 2012 that, every year 10,000 foreign couples visit to India for surrogacy arrangement and the industry generates the business of \$2 billion a year.²¹ The conference of the Centre for Social Research (CSR) reported that around 48 to 50 percent commissioning parents are coming from western countries, remaining are the Non-Resident Indians (NRIs) and local people.²² In India, prior to the notification of government on 4th November, 2015 regarding ban on foreigners for surrogacy, it reported in approximately 80 % births of the surrogate children of the foreigners.²³

Today's world is called as the '*Google Babies World*', because, various agencies, through the internet are providing the online shopping of the surrogate, Ova and sperms with beautiful surrogacy packages. There are various players are associated with the surrogacy industry at a national and international level like travel agencies, industry of hospitality, law firms, agents, departments of medical tourism, and surrogacy shelter homes. Because of the growth in the surrogacy business, many women are turning for becoming a surrogate, so it may be called as '*Third World of*

¹⁸ P. C. Vinoj Kumar, The Weekend Leader, Vol. 6, Issue 42., 19th Oct., 2015, available at <http://www.theweekendleader.com/Success/2280/joy-to-couples.html> visited on 20/10/2015 at 2.00 pm

¹⁹ HINDUSTAN TIMES, 'Govt bans import of human embryos for commercial surrogacy', New Delhi, Oct 28, 2015 16:29 IST, c.f <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

²⁰ SAMA Report 2012, 'Birthing A Market, A Study on Commercial Surrogacy', P. 7 available at http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11.00 am

²¹ THE HINDUSTAN TIMES, 'Commercial surrogacy: The half mothers of Anand,' Namita Kohli, Hindustan Times, <http://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html>, Visited on 10/11/2015 at 2.30 pm

²² Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

²³ The HINDU, Dr. Soumya Swaminathan (Director General, Indian Council of Medical Research), "Why the Surrogacy Bill is necessary," C.f. <http://www.thehindu.com/opinion/op-ed/why-the-surrogacy-bill-is-necessary/article9040755.ece>

Surrogate'.²⁴ Sometimes it is also called as one kind of profession like any other profession.

Therefore, India has become the world's top most '***International Reproductive Tourism Destination***' as such '***No Law Prohibit and No Law Permit***' because of easy accessibility of a huge group of women are wishing to become surrogate mothers, an excellent medical practitioners, cheap costs of surrogacy, and close observation of surrogates.²⁵

At present surrogacy seems to be a better option for infertile couples to fulfill their parenting dream. The last three decades, there is a huge growth of infertility clinics and surrogacy centers. Such clinics are growing like mushroom around the country.

In the case of ***Baby Manji Yamada v. Union of India***,²⁶ the Supreme Court observed that the "commercial surrogacy" arriving as the "industry proportions is sometime referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms."

In some of the States of USA, the commercial surrogacy recognized as illegal and unenforceable. In Australia, the commercial surrogacy is treated as a criminal offence. Since 2004, only altruistic surrogacy has been allowed in Canada and New Zealand. The surrogacy arrangement is unlawful in France, Germany and Italy. Now days the surrogacy has become an international level problem.

The lifeline of the surrogacy is the ***Article 21 of the Constitution of India, which*** confirms the reproductive rights to every individual irrespective any gender or any nationality of the person.²⁷ This right is also recognized in most of the previous and recent international human rights instruments as well as the regional treaties.

The practice of surrogacy is alleged as illegal, unethical and immoral practice. The surrogacy agreement involves the various social, ethical, legal, psychological and medical issues. The general issues such as, whether to become a surrogate mother is legal in India? Whether the surrogate child born to an Indian surrogate mother in cross

²⁴ *Infra* at p. 210

²⁵ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*', (1st Edn. Universal Law Publication Co.), New Delhi, 2013., P. 15

²⁶ AIR 2009 SC 84

²⁷ *Infra* at p. 288

broader surrogacy arrangement can be an Indian citizen or not? Whose name will be entered as a legal parent on the birth certificate of the surrogate child? What will happen if the surrogate mother declines to give the custody of the child or blackmails to the commissioning couple for it? Or if the commissioning parents refuses to take custody the child, who will be responsible to take custody of the child? Whether the commissioning parents are under legal obligation to take custody of the disabled child? It is also alleged that surrogacy amounts to the commodification of women, sale of the child. It is like the prostitution, slavery. The commodification of women violates the status and dignity of both the surrogate women and the surrogate child. The problems of exploitation, compensation of surrogate women and the custody, parentage, citizenship, abandonment of the surrogate child and human trafficking has become severe, consequences of ban on the commercial surrogacy.

Presently, in India '**No Law and No Precedent**' is available for solving these conflicting interests. The commercial surrogacy was legalized in India since 2002.²⁸

In 2005, the Indian Council of Medical Science (ICMR)²⁹ has provided the National Guidelines for accreditation supervision and regulation of the assisted reproductive technology in India. But being non statutory body these rules are frequently violated by the ART clinics. In 2009, the **Law Commission of India 228th Report**³⁰ has recommended the need of surrogacy legislation for regulation of ART and for defining the rights and liabilities of the parties of surrogacy arrangements.

There are several drafts of **Assisted Reproductive Technology (Regulation) Bills, 2008,**³¹ **2010**³² were prepared for the regulation of ART industry. But these Bills were suffered from many drawbacks. The Government has passed the New Indian Visa Regulation, 2012 for prohibition of foreign single persons and homosexual couples for surrogacy in India. **The ART Bill, 2014**³³ was published on 30th September 2015 for the general public and stakeholders comments and suggestions. The Supreme Court of India has sustained the matter of surrogacy in **Jayashree Wad case** with **Jan**

²⁸ *Infra at p. 98*

²⁹ *Infra at p.99*

³⁰ *Infra at p. 107*

³¹ *Infra at p. 104*

³² *Infra at p. 109*

³³*Infra at p. 118*

*Balza Case*³⁴ as it involves the various complicated issues which need to be solved through legislation.

The *notification issued on 4th November 2015*³⁵ by the Ministry of Health and Family Welfare, Government of India, regarding not to support commercial surrogacy and prohibited all foreigners for availing the service of surrogacy in India.

On 24th August, 2016, the draft of the Surrogacy (Regulation) Bill, 2016 was presented by the External Affairs Minister Sushma Swaraj in a press conference with the object to prevent unethical practices of surrogacy, prevention of exploitation of the surrogate mother and protection of the rights of surrogate children.³⁶ The Bill, 2016 has banned the commercial surrogacy and legalized altruistic surrogacy, which is restricted only to Indian heterosexual married couple only who have completed 5 years of their marriage.

Recently, *on 21st November, 2016 the Surrogacy (Regulation) Bill, 2016*³⁷ is introduced in the House of Lok Sabha of the Parliament.³⁸ Presently, we do not have any statutory law on surrogacy for regulation of it. Therefore, one can assume that the surrogacy law is still in the womb of the Parliament.

1.1. SIGNIFICANCE OF THE STUDY

“Surrogacy a ray of hope to a childless couple”

Now, we are entering into a new age, where it is scientifically possible that, the baby can be created in a Petri dish from the egg of a woman and sperm of a man which results into embryos and that can be transferred into women to gestate. “It is reported that infertility affects about 1 out of 6 couples.”³⁹ Hence, surrogacy is a good option

³⁴ *Infra at p. 321*

³⁵ *Infra at p. 131*

³⁶ DECCAN HERALD, “Govt. clears bill seeking complete ban on commercial surrogacy”, New Delhi, Aug 24, 2016, (PTI), C. f., <http://www.deccanherald.com/content/566651/bill-proposes-complete-ban-commercial.html>, visited on 25/08/ 2016 at 11.00 pm

³⁷ *Infra at p. 134*

³⁸ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, Visited on 21/11/2016 at 3.00 pm

³⁹ Rent a womb, available at: <http://www.delhi-ivf.com/surrogacy>, visited on 12/10/2011 at 2.00 pm

for infertile couples, unmarried couples, and single persons, gay and lesbian. So, now everyone can have babies. Despite of the controversial ethical and legal issues charged on the surrogacy, a surrogacy has been gaining a lot of popularity in the world. Currently in the media, surrogacy has become a hot topic. Surrogacy finds a good place in newspapers, magazines, TV shows and movies. However, before the exploitation of the surrogate, some issues are needed to be properly settled. There are various, social, ethical, moral and legal issues are connected with the surrogacy, which may cause great debate in the society such as:

1. Should women be paid for being surrogates?
2. Is India promoting, “reproductive tourism?
3. Does the law protect the surrogate Mother?
4. What will happen if the surrogate women refuse to relinquish the child?
5. Who will be responsible to take custody of the child, if the child has the serious disabilities?”⁴⁰
6. Is surrogacy leading to the destruction family structure of India?
7. Who is the real and legal mother of the child born out of surrogacy arrangement?
8. Whether the surrogacy agreement amounts to exploitation of the surrogate women?
9. Whether the surrogacy arrangement amounts to the sale of the child?
10. Whether the surrogacy arrangement is immoral, unethical, against the public policy?
11. Whether the surrogacy agreement is the violation of the dignity of the womanhood guaranteed by the Article 21 of the Constitution of India?
12. What will be the consequences of the ban on commercial surrogacy?

Today, India has become the top most international surrogacy destination. The commercial surrogacy is legal in India, where a surrogate woman is compensated for carrying a child for another. The surrogacy centers are rapidly increasing in India, and there is no specific law which will regulate and control these surrogacy agencies and assisted reproductive technologies. The issues arise out of cross broader surrogacy has also become an international problem. In most of the foreign countries, surrogacy law is still insufficiently settled. There are some of the countries where surrogacy is banned such as China, France, Italy, Canada, Australia, Germany and USA banned

40 Ethical Problems Surrounding surrogate Motherhood, available at <http://yale.edu/ynhti/curriculum/units/2000/7/00.07.05.x.html>

the provisions of the surrogate mothers. Hence, it becomes necessary to study the laws of surrogacy prevailing in various countries. However, the Indian Council of Medical Research (ICMR) had given guidelines in 2005 but those are not strictly adhered by assisted reproductive clinics.

The Indian Council of Medical Research (ICMR) has prepared the draft of, ‘The Assisted Reproductive Technologies (Regulation) Bill 2008’, but it suffered from many defects. Thereafter, on 5th August 2009 the Law Commission of India in its report No. 228th suggested the need for legislation to regulate assisted reproductive technology clinics as well as the rights and obligations of the parties to a surrogacy. After that, the drafts of ‘The Assisted Reproductive Technologies (Regulation) Bills – 2010 and 2014’ were prepared and published by the Government of India. However, all the drafts of the ART Bills, 2008, 2010, 2014 and the new Surrogacy (Regulation) Bill, 2016 are criticized from several ways. The Apex Court and the High Courts of India has finding the difficulties in deciding the matters of surrogacy due to lack of legislation. There is no legislation or precedent on surrogacy in this country.

The private Bills named *The Surrogacy (Regulation) Bill, 2014*, had by Dr. Kirit Premjibhai Solanki, Member of Parliament from Gujarat. *The Maharashtra Assisted Reproductive Technology (Regulation) Bill, 2011* were prepared due to the initiative of the Devendra Fadanvis. However, both the private Bills failed to become the law.

The government of India has, has issued a notification on 4th November, 2015 which has banned the commercial surrogacy and also prohibited all foreign couples for commissioning surrogacy in India.

Recently, *on 21st November, 2016 the Surrogacy (Regulation) Bill, 2016* has introduced in the House of Lok Sabha of the Parliament. The Bill, 2016 has banned the commercial surrogacy and legalized altruistic surrogacy, which is restricted only to Indian heterosexual married couple only who have completed 5 years of their marriage.⁴¹

⁴¹ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, Visited on 21/11/2016 at 3.00 pm

It is also reflected that the government itself is in confusion about the provisions in the surrogacy law. Therefore, it becomes a very necessary to study the various issues and the rights of the parties of surrogacy arrangements.

1.2. OBJECTIVES OF THE STUDY

As the researcher is academician, one of the main objects of this research study is to have sound intellectual grounding in the area of the role of social, ethical and moral issues in legalizing surrogacy in India. Following are the notable objects of research:-

- To study the importance and significance of the Assisted Reproductive Technology, in the modern era.
- To understand the working of the practice of surrogacy in India and suggest a better mechanism for India.
- To study the ART Bill 2008, 2010, 2014 and the recent Surrogacy (Regulation) Bill, 2016 for regulation and supervision of the assisted reproductive technologies, and surrogacy and hurdles this came in the way of enacting it.
- To study the working of the commissioning of the surrogacy along with government notifications.
- To study the Social, Legal, Moral and Ethical issues surrounding the surrogacy and to find out whether it is a boon or a bane.
- To study the various international human rights laws for protection of the rights of the parties of the surrogacy and the surrogate child.
- To provide different remedies which can supplement and not supplant to the remedy by way of surrogacy.
- To analyze and compare the mechanisms adopted in various countries and to identify the best experiences and make a mold which would be most suitable for Indian economical, socio-cultural, and politico-legal system.
- To find out the consequences and effects of surrogacy as a growing role in India.

- To describe the role of the Legislature, Judiciary, Administrative bodies, Medical Science, etc., with reference to surrogacy institutions in India which are dealing with framing, interpreting, implementing or notion of surrogacy policy.

To achieve the above objectives, the researcher has confined the scope of his research to the legal aspects of the surrogacy along with the social and ethical issues attached to it.

1.3. HYPOTHESIS OF RESEARCH

- 1) Surrogacy is a problem in the present social, legal and commercial set up in India.
- 2) Surrogacy is low cost and the legal environment favourable for the commissioning parents.
- 3) Surrogacy is affecting reproductive rights of women in general and health rights, in particular directly or indirectly.
- 4) There is ominous need of comprehensive legislation for regulation and control of surrogacy in India. Presently in India no statutory law existing on the surrogacy arrangement. The ICMR guidelines 2005 are not sufficient to address the problems arising out of surrogacy. By way of this hypothesis the researcher wants to find out whether special law is needed for proper regulation and supervision of the surrogacy arrangement in India? Or Whether the Surrogacy (Regulation) Bill – 2016 is required to be reviewed?
- 5) The Hon'ble Apex Court of India has failed to fill the gap existing in the Indian legislative policy on surrogacy. Yet, the Supreme Court of India has not provided any guideline for regulating the surrogacy Clinics and for protecting the rights of parties to surrogacy arrangement and the imposition of duties on them. The researcher wants to find out that whether the Supreme Court will succeed in filling the gap prevailing in the Indian legislative policy on surrogacy?

- 6) There are no internationally recognized laws for surrogacy, so many parents and children can be left vulnerable or even Stateless, and hence it is a violation of human rights.

1.4. RESEARCH METHODOLOGY OF THE STUDY

The methodology adopted for the purpose of this research study was mainly doctrinal approach with the qualitative and quantitative research. The researcher has gathered the information from various books, journals, research papers, research reports. In order to understand the jurisprudence of surrogacy throughout the world in comparison with position in India, the research work primarily reviewed and analyzed the related literature consisting of reports and publications of various organizations, Surrogate Centers, Social Centers, research institutes, Firms etc., working in the area of Surrogacy. Recent position was being studied with the use of the internet, journals, reports, booklets, newsletters, photographs, films and newspaper clippings, etc. Hence, the literature review was the main method of data collection. The study focused on various Human Rights Reports, U.N. Conventions and other national and international statutes dealing with surrogacy and related aspects. The relevant data was gathered from various websites, e-newspapers, e-journals, foreign books, periodicals, reports of NGO's and the opinions of doctors, surrogate mothers, commissioning couples on T. V programs, or published newspapers, etc. The researcher had collected some reported and pending cases in the various Courts of India and the foreign judgments.

Based on the qualitative data gathered from literature review and different thymes relevant to the research was studied and analyzed and conclusions drawn with workable suggestions and recommendations. The study mainly resorted to the use of secondary sources of literature and adhered to historical and an analytical method of research. In short, the research was doctrinal in nature.

1.5. SCOPE OF THE STUDY

The finding of the research study will help to identify the problems faced by the community in the present and future because of the issues of the surrogacy. If the suggestions and recommendations are taken by the government positively, we can

expect of the proper legislation for regulation and supervision of the practice of surrogacy in India. The arrangement of surrogacy is achieved through scientific research and reproductive technology in the recent years. It is being practiced without the being proper law and legislation, consequently the interests of agencies are exploiting women by making her a machine for a creation of children for the childless couple and earning money making it as a trade or business, The micro level study of the subject is purely restricted to the “*Social, Ethical Issues for Legalizing Surrogacy in India*”. Whereas, when the study is taken at the macro level, the scope is essentially extended to the allies topics around which the surrogate women and surrogate children are revolving in the present set of the society.

The scope of the study of this topic is purely taken up on a micro level, but somewhat, macro level study is also made because it is important to evaluate the impact the social, ethical, moral and legal issues from the perspective of the Indian society. In the present setup derived purposeful result for framing up required law on legislation on the subject.

The scope of this study is also equally significant to educate the society for the childless couple and single persons, homosexual couple’s reproductive rights and the remedies available to have their own biological children. In the event of infertility either in wife or in husband as well as too educates such society on their available legal rights. Thus, the study of this subject is not only purposeful for the law, but also in social, moral, ethical, legal issues, medical and psychological issues. Therefore, the scope of this study may be turned as Socio-legal research. Future research may be taken up through the various branches of social sciences.

1.6. LIMITATION OF THE STUDY

The study of the several issues of the surrogacy is a cumbersome subject matter. Because of the absence of the proper codified surrogacy law, the practice of surrogacy has become very complex as it involves various issues such as legal, social, ethical, medical, commercial and psychological issues. Therefore, it also requires the interdisciplinary, multidisciplinary research.

However, the researcher has limited the study to the selected topic of the social, ethical and legal issues in the surrogacy arrangement along with the study of the Constitutional and judicial approach towards it.

1.7. REVIEW OF LITERATURE:

The researcher has collected the colossal volumes of literature and studied the various surrogacy laws, Acts of the different countries like US, UK, Australia, European Countries, Russia, South Africa, Israel, China, Japan and Thailand, including the several drafts of Surrogacy laws, rules, regulations, Guidelines and notifications of the India. The researcher has studied the articles of various authors from the Journals, e-journals, and newspapers. In addition to this, the researcher has gathered the information from the published research papers, research reports of the several Non-Governmental organizations, social centers, research institutes and law firms through the internet. The researcher also scrutinized the numerous international conventions, regional treaties, protocols of various countries in respect of surrogacy and reproductive rights. Besides this, the researcher gone through the various case laws developed by the Indian and foreign Judiciary.

There are a number of foreign and Indian books published on the surrogate Motherhood, Surrogacy issues such as medico-legal, social and ethical, economical and its related topics.

The book of *“Surrogacy Medico- legal Issues”* written by an advocate *Gehna Vaishnavi* and a doctor *Navneet Tatkhar*, contains the judicial pronouncements of eminent jurists around the globe in relation to surrogacy and portrays the new definition as to what now constitutes a ‘family’. The law as studied in the book safeguards all aspects of surrogacy and helps to make a right decision. The book includes foreign judgments and Indian judicial precedents which have set benchmarks as to how to deal with this issue. A worldwide perspective of all such laws as regards, this issue concerning each and every aspect dealing with surrogacy has been incorporated in the book. The book also highlights the pain of families struggling to have children without being bothered about the consequences. It will also be

informative for the development of statutes in India. It also states the rise of Indian economy due to surrogacy cannot be hidden. India provides best medical facilities and expert medical faculty in much cheaper rates as compared to USA. In Amrita Pande's book on "Wombs in Labor: Transnational Surrogacy in India", is based on fieldwork conducted between 2006 and 2011. The research has included the interviews with 52 surrogates, their husbands and in-laws, 12 intending parents, three doctors, three surrogacy brokers, three hostels matrons, and servile nurses. The book provides the analysis of existing debates on assisted reproductive technology. It deals with the contradictory history of the rise and spread of surrogacy in India. It means the Indian state is aggressively anti-natalist, and despite of the ostensible change in population policies over time, the sterilization of women, especially young, lower-class women, remains the mainstay of these policies. The book states the involvement and awareness of the surrogate about the surrogacy processes, the contract, and payment, as well as their experience of surrogacy before the actual delivery. It reflects that a perfect commercial surrogate is not found ready-made, but is actively produced in fertility clinics and surrogacy hostels. Surrogacy is remarkable as a form of labor in the way it requires the laborer to be both a mother and worker. One of the most unusual aspects of surrogacy as labor is its extreme corporality: the resources, the skills, and the ultimate product are derived primarily from the body of the laborer. The body is central, and hence the body is monitored, disciplined, and controlled. In the Concluding section, the book has revealed many paradoxes of the surrogacy. In order to consider about the future policy options, it evaluates the paradoxical nature of surrogacy in general as well as concerns specific to the form that commercial surrogacy takes in India. The book discussed the two possible choices of surrogacy: an outright ban (national, transnational) on surrogacy or a regulatory framework. Pande suggested the former is not just unfeasible but also undesirable in the Indian context. Instead of a ban, she advocated for a better understanding of this complex labor market and subsequently its transformation through policies based on the real lived experiences of the surrogates. Finally, it is said that a global issue like transnational surrogacy cannot be dealt with nationally and regulations cannot preclude international awareness and dialogue.

The book of *“Outsourcing the Womb”* given by ‘France Winddance Twine,’ has provided the critical examination of assisted reproductive technologies (ART and the gestational surrogacy industry in a global market. This book provides a comparative analysis of the use of assisted reproductive technologies in Egypt, India, Israel, and the United States. By providing a comparative analysis of this industry across several national contexts the book disentangles the roles that race, religion, class inequality, religious law, and global capitalism play in the surrogacy market. This book draws on case studies from Egypt, India, Israel, and the United States to examine the ways that race, class, gender, religion, nationality, and legal regimes structure the experience of contract pregnancy. A comparative analysis of this industry in both developing nations such as India as well as the United States and Israel provides a more compelling, critical and complex view of a form of women’s labor that is being outsourced and constitutes a growing segment of the medical tourism industry.

The researcher has studied the book on *“Surrogacy in India a Law in the Making”* of the authors of Adv. Anil Malhotra and Ranjit Malhotra. This book discusses the complicated Procedures of adoption in India. The statutory Hindu Laws do not permit adoption to non-Hindus. However, the wombs on rent are easily available. The commercial surrogacy is developed in such way that which resulted into approximately 200,000 ART Clinics across the country are offering artificial insemination, in-vitro fertilization and surrogacy. In this book the researcher has gathered the information about the Assisted Reproductive Technology Bill, 2010. The medical Visa Regulations, 2012 prohibited the foreign homosexuals for commissioning surrogacy in India and allowed only foreign married heterosexual couples only on medical Visa. The book provides the provision of the application of section 9 of the Civil Procedure Code, 1908 for enforcement of the surrogacy agreement in the absence of the surrogacy law.

The author ‘Field Maratha’ in the book of *“Surrogate Motherhood- the Legal and Human Issues”* sorted out the legal issues involved in the surrogate motherhood. In most states it still is not decided what rules will apply to surrogacy. It is stated that the legal solution to the surrogacy is not enough, but the Problem rest on value judgment. It is also said that the task of the public generally, and not just of Lawyers, politicians, or courts, to resolve those issues of value. It states about the spectrum of positions that

might be adapted to deal with surrogacy and the reasoning that might support them. The contracts made before birth should be unenforceable in the context of surrogate motherhood, just as they already are in the context of adoption. Moreover, a mother who withdraws from a surrogacy contract should be entitled to retain custody of her child without having to prove to a court that she would be a better parent than the biological father.

1.8. CHAPTERIZATION AND SCHEME OF PRESENTATION

The Research study of this thesis work has been divided into six chapters, including the introduction, the gist of this chapter is appended below to have a bird's eye view of the total work.

Chapter –II

The researcher in the chapter of “*Conceptualization and the Evolution Of Surrogacy*” has focused on various factors such as historical background of surrogacy in India and abroad, the meaning and definitions of surrogacy, surrogate mother, types of surrogacy, reasons for surrogacy, who is having right to become a surrogate mother, who is having right to take benefit of the service of surrogacy in India and the procedure of surrogacy and its health risk and the arguments for and against the surrogacy. The researcher has also studied the success rate and cost of surrogacy. In this chapter the researcher has also studied the meaning of assisted reproductive technologies and its available various techniques, as the surrogacy is also the one form of assisted reproductive technology. While doing the study of assisted reproductive technology the researcher has also gone through the researcher has also focused on the various health risk factors after the use of ART procedure and IVF surrogacy and lastly the chapter closes with a conclusion.

Chapter-III

In the chapter of “*Dimensions and Prospective of Legislation on Surrogacy*” the researcher has studied the various regulations, notifications, laws, guidelines, such as

ICMR Guidelines 2005 and the draft of the Assisted Reproductive Technology Bills, 2008, 2010, and 2014 and its criticism.

The researcher has also focused on the *New Indian Visa Regulations, 2012*, the Law of Commission of India Report of the 228th on surrogacy as well as the notifications, 2015 of the Ministry of Health and Family Welfare, Government of India. The recent Surrogacy (Regulation) Bill, 2016 deals with silent features and criticism on it, the international scenario of surrogacy laws and finally conclusion of this chapter. Till today, no law on the surrogacy has been passed by the Parliament for the regulation of the surrogacy industry.

Chapter-IV

In Chapter-IV, titled as ***“Social, Ethical and Legal Issues in Surrogacy Arrangement,”*** the researcher finds that the surrogacy arrangement has centrally four issues such as the right to procreate, commercialization of surrogacy, exploitation of the surrogate women and the status of the surrogate children.

In this chapter the researcher has mainly concentrated on the social, ethical and legal issues in surrogacy. The researcher has commenced the study of this chapter with relationship amongst surrogacy, law and morality.

Thereafter, the researcher has in detailed critically analyzed the various issues of exploitation of surrogate women. It has also discussed the exploitation of surrogate women in payment of compensation, abortion. The researcher has studied the concept of informed consent of surrogate women status of abortion, sex selection test. The researcher has studied the most vital part of the entire research that the whether the surrogacy contract is immoral, unethical contracts as it commodification of women, sale of the child, therefore against the public policy. It has also discussed the whether the surrogacy amounts to prostitution or adultery, human trafficking and forced slavery.

Apart from this the researcher has discussed, whether surrogacy arrangement will destroy the family structure of India. It has studied the various legal issues such as who is having legal parental rights of the child and who is real and legal mother of the

surrogate of the child. In this chapter also discussed the issues arising out of cross border such as citizenship, nationality, legal parentage, custody, abandonment, and the legitimacy of the child. The researcher has made the study of the contractual aspect of the surrogacy the agreement, i.e. whether the surrogacy agreement is against the public policy? And finally the chapter ends with the overall conclusion on it.

Chapter- V

Researcher under the chapter of “*International Conventions, Constitution of India and Judiciary towards Surrogacy*” has been discussed about the various international Conventions pertaining to surrogacy rights, especially rights for the protection surrogate and the surrogate child, the Constitutional Status of the surrogacy in India and various foreign and Indian case laws regarding the development of surrogacy laws.

Chapter VI

The final and concluding Chapter six is the “*Conclusion and Suggestions.*” The researcher has made reasonable attempts to emphasize that the Society needs the reproductive technology. The right to procreate is the fundamental, natural human right of every person. It is guaranteed by the several international human rights instruments as well as the Article 21 right to life and personal liberty of the Indian Constitution. Every person has the fundamental right to marry and create a family.

Hence, it is very important to understand, the need of surrogacy from the Indian perspective.

Therefore, the legalization of surrogacy is the necessary in order to protect the reproductive liberty of the people and for giving social justice to them.

CHAPATER- II

CONCEPTUALIZATION AND EVOLUTION OF SURROGACY

2 . INTRODUCTION

Women are blessed with a beautiful gift of giving *BIRTH TO LIFE*...

Surrogacy is one of the currently available methods of assisted reproductive technologies. It becomes popular due to the increasing number of infertile couples. In surrogacy service women agrees to carry the child for the purpose of surrendering the child upon the birth to the commissioning couple. In India it is very necessary the commissioning couple should be infertile. Thus, the medical and social factor has contributed to the popularization of surrogate motherhood. In the Indian society, a woman is respected as a wife only if she gives birth to the child.⁴² The ability to procreate children is one of the most cherished gifts of the nature. In the Indian society the universality of marriage, is an accepted norm followed by the universality of having children. The research study has proved that one-in-six couples have the infertility problems. Many of the couples take the help of the medical treatment to overcome infertility problems, but for some people no option is available. Hence, surrogacy is one of the answers to the infertility issues faced by modern women today the desire to have one's own flesh and blood as a progeny has made surrogacy an excellent option but due to social norms surrogacy has been considered as taboo in Indian culture.⁴³

The researcher in the chapter of conceptualization and the evolution of surrogacy has focused on various factors such as historical background of surrogacy in India and abroad, the meaning and definitions of surrogacy, surrogate mother, types of surrogacy, reasons for surrogacy, conditions for becoming a surrogate mother, the right to avail the service of surrogacy in India and the procedure of surrogacy and its health risk as well as the arguments for and against the surrogacy. The researcher has

⁴² This is also to establish her husband's masculinity and sexual potency and continue lineage of her husband.

⁴³ Gehna Vaishnavi, Navneet Tatkar ' Surrogacy Medico legal Issues,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.3

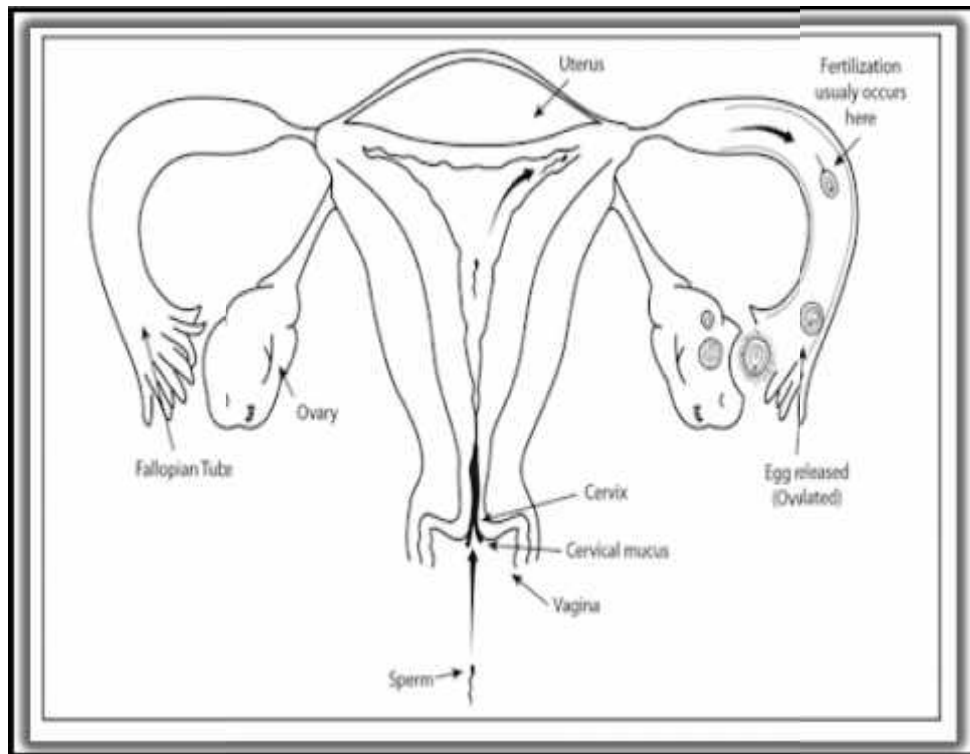
also studied the success rate and cost of surrogacy. However, in order to understand the detailed conceptual part of surrogacy it is very necessary to first understand how the natural conception takes place and how the infertility becomes the hurdle for achieving the natural conception. The researcher has also studied the meaning of infertility as well as its causes. Today, the medical sciences have invented the various solutions for the procreation of children through the method of assisted reproductive technologies. Thus, the researcher has also studied the meaning of assisted reproductive technologies and its available various techniques, such as Artificial Insemination (AI), *in vitro fertilization* (IVF) and its procedure, Intrauterine Insemination (IUI), eggs, sperms and embryo donation, Cryopreservation techniques, Intra Cytoplasmic Sperm Injection (ICSI), Pre-Implantation Genetic Diagnosis (PGD), Zygote Intra Fallopian Transfer (ZIFT), Gamete Intra Fallopian Transfer (GIFT), Surrogacy and very recent technique of assisted reproduction to artificial reproduction. The researcher has also focused on the various health risk factors due to the use of ART procedure and IVF surrogacy and lastly the chapter closes with a conclusion.

2.1 NATURAL/ UNASSISTED REPRODUCTION

The assisted reproductive technology plays helpful role in the life of the infertile couples. However, before understanding the ART procedure, it is important to know the process of natural conception. Generally, in natural conception a man ejaculates the semens into the woman's vagina at the time of ovulation.⁴⁴ When an egg is mature, the pituitary gland sends a surge of luteinizing hormone (LH) that causes the follicle to rupture and release (ovulation) a mature egg (Image No. 1)

⁴⁴ The ovulation is a complex event controlled by the pituitary gland located at the base of the brain. During the ovulation period a ovary releases an egg. The pituitary gland releases follicle-stimulating hormone (FSH), which stimulates follicles in one of the ovaries to begin growing. The follicle produces the hormone estrogen and contains a maturing egg.

Image No. 1. Process of Unassisted/Natural Reproduction⁴⁵



Thereafter, in ovulation the egg is pulled out up by one of the fallopian tubes. Usually, the fertilization happens inside the fallopian tube, hence for the purpose of fertilization the man's sperm must reach to the fallopian tube. Thus, the fertilized egg continuously moves into the uterus and embeds in the uterine lining, where it develops.⁴⁶ However, there are certain couples in the society who cannot conceive the child by natural process due to any medical or genetic reasons. As per the Hague conference on Private International Law, 2014, that, 1 out of 6 couples worldwide is infertile.⁴⁷ Hence, to provide the solution to the cause of infertility the assisted reproduction technology came into existence for the conception of a child with the help of science and technology.

⁴⁵ American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

⁴⁶ *Ibid*

⁴⁷ Hague Conference on Private International Law, "The Desirability And Feasibility Of Further Work on The Parentage / Surrogacy Project", April 2014 at p. 8 available at https://assets.hcch.net/upload/wop/gap2014pd03b_en.pdf visited on 23/12, 2014

2.2. INFERTILITY:

The Assisted reproductive Technology has been accepted as a medical treatment for infertility. It is reported that around 15 per cent couples of the world are infertile.⁴⁸

The *Hague conference on Private International Law, 2014*, has reported that, in 2010, it is that estimated 48.5 million couples worldwide were said to be infertile.⁴⁹

India has an estimated 19-20 million infertile couples, according to the World Health Organization (WHO).⁵⁰

Generally, the term infertility⁵¹ means the incapability of the spouse to conceive a pregnancy by following one year of unprotected sex between them.⁵²

The *World Health Organization (WHO)* provides a **clinical definition of infertility**, that infertility as “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.”⁵³ The World Health Organization (WHO) and the American Society for Reproductive Medicine (ASRM), have recognized the infertility as a disease.

*Infertility*⁵⁴ means the inability to conceive after at least one year of unprotected coitus or an anatomical⁵⁵ or physiological condition⁵⁶ that would prevent a couple from having a child.⁵⁷

⁴⁸ The Assisted Reproductive Technologies (Regulation) Bill-2010, at p.1 available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf.

⁴⁹ Hague Conference on Private International Law, “The Desirability And Feasibility Of Further Work on The Parentage / Surrogacy Project”, April 2014 at p. 8 available at https://assets.hcch.net/upload/wop/gap2014pd03b_en.pdf visited on 23/12,2014

⁵⁰ Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medico legal Issues’, [New Delhi : Jaypee Brothers Medical Publishers Pvt Ltd, 1st Edn., 2015, p. 5

⁵¹ Infertility can be in several different forms, such as *resolved infertility* (pregnancies that occur after 1 year of trying without medical intervention), *primary infertility* (never pregnant), or *secondary infertility* (failure to conceive after having previously delivered an infant without the use of infertility treatment).

⁵² However, the definition of infertility varies widely depending upon the type of information and the purpose for which the information collected. For example, some clinical definitions of infertility include women aged 35 years or older after 6 months of trying to conceive.

⁵³ <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/>

⁵⁴ Infertility defined under the Assisted Reproductive Technologies (Regulation) Bill-2014, U/S 2 (v). The definition of infertility, given by ART Bill, 2014, has been included anatomical or physiological condition so it includes any couple who because of any deformity with the bodily structure part is unable to achieve pregnancy is infertile according to the definition of ART Bill, 2014, so this definition is wider than the definition given by the WHO.

⁵⁵ Anatomical means: relating to the structure of the body, available at <http://www.thefreedictionary.com/anatomical>.

However, the definition of infertility (i.e. the couple required to prove 5 year period of infertility) of the recent draft of the Surrogacy Regulation Bill, 2016⁵⁸ has come into conflict with the ART Bill, 2014, and the above mentioned definitions. Hence, it need to be altered by the government.

According to the **World Fertility Report, 2013** published by the United Nations Department of Economic and Social Affairs has stated that some of the countries of the world are having the high fertility ratio, i.e. Per woman 3.2 and some of the countries are having low fertility like per woman 2.0 children. According to the ICPD, in the year 1990-1995 around 105 countries had high fertility level as against in 2005-2010 it was only 66 countries. As per the ICPD in 1994, 51 countries had the low-fertility and today's 70 countries had lower fertility levels. It means per woman 2.0 children or less.⁵⁹

The growth of infertility is also seen among the Indian couples. As per the survey, conducted by a pharmaceutical company in India in nine major cities⁶⁰ which also endorsed by the Indian Society for Assisted Reproduction (ISAR), founds that around 46% of the couples are suffered from infertility problems at the age of 31 to 40 years and out of them 49% had already taken treatment of in vitro fertilization. As per the World Bank Statistics, 2013 that 41% infertility is found in male person due to low sperm count. Dr. Hrishikesh Pai, President of ISAR said, around 40% females are

⁵⁶ Physiological condition is the condition or state of the body or bodily functions, available at <http://www.finedictionary.com/physiological%20condition.html>.

⁵⁷ The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 4 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

⁵⁸ Section 2 (p) of The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 2, Visited on 21/11/2016 at 3.00 pm.

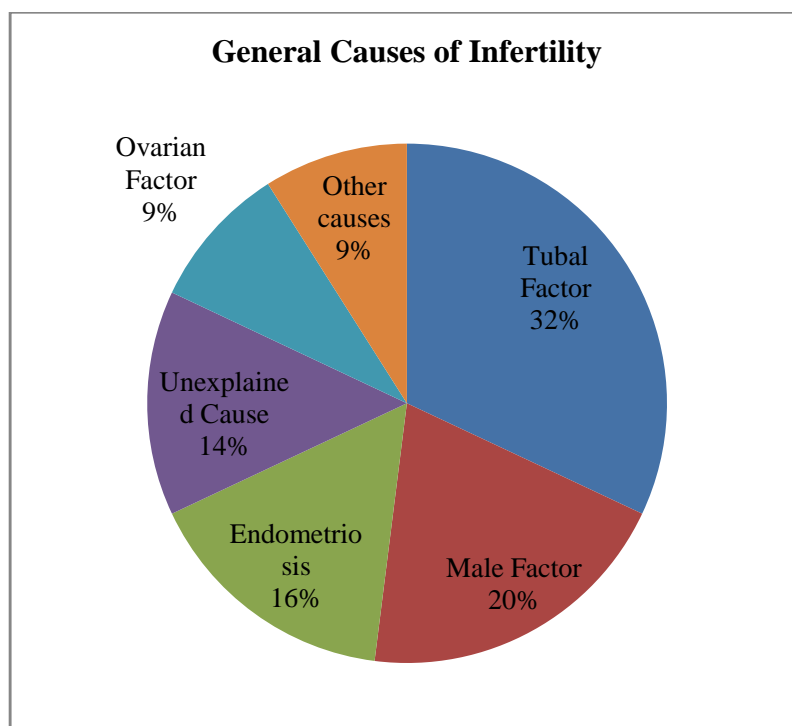
⁵⁹ United Nations Department of Economic and Social Affairs Population Division, *The World Fertility Report 2013: Fertility at the Extremes* at p. 3, available at <http://www.un.org/en/development/desa/population/publications/pdf/fertility/worldFertilityReport2013.pdf> visited on 15/11/2014 at 2.25 pm

The high-fertility countries are increasingly concentrated in sub-Saharan Africa while low fertility countries have moved from being predominantly European to include countries from Asia and Latin America and the Caribbean. For the purposes of this report, 66 countries are categorized as high fertility (i.e., countries or areas with total fertility of more than 3.2 children per woman in 2005-2010) and 70 countries are categorized as low fertility (i.e., countries or areas with total fertility of 2.0 children per woman or less in 2005-2010).

⁶⁰ A survey conducted by the pharmaceutical company on the major cities of India i.e. Kochi, Agra, Hyderabad, Bangalore, Chennai, Kolkata, Delhi, Mumbai and Ahmedabad. They interviewed 2,562 people who visited 100 clinics of doctors or attended patient camps. According to survey, around 63% of couples seeking treatment were in the 31-40 age groups.

suffering from the poly cystic ovarian disorder (PCOD).⁶¹ The infertility rate of India under the age group of 15- 49 years in a rural area is 3.38 Million and in urban area 4.82 Million. The prevalence rate of infertility is 8.2 Million (3.8 %).⁶²

Chart No. 1 General Causes of Infertility⁶³



The assisted reproductive treatment has been accepted as a medical treatment for infertile couples. Therefore, to overcome childlessness, the society needs the reproductive technology as a procreation is a part of life, everyone is entitled to procreation.

⁶¹ Another major finding was that the infertility problems prevailed even among the young generation. Nearly 34 percent of the couples, aged between 21 and 30, opted assisted reproduction technology (ART) after they experienced difficulties in conceiving naturally.

Editorial in the Time of India, 20 September, 2013 available at <http://timesofindia.indiatimes.com/city/mumbai/Infertility-experts-say-63-childless-couples-consulting-them-in-prime-reproductive-age/articleshow/22784337.cms> visited on 10 Aug.2014 at 3.00 pm.

⁶² Shivani Sachdev, 'ART Bill, 2013 and Dos and Don'ts for Surrogacy/ Third Party ART in India', uploaded on 22April 2014, Source – Registrar General of India, 2005 Sample Registration System, 2009 ICMR Study, 2011, available at <http://www.slideshare.net/shivanisachdev58/art-bill-2013-and-dos-and-donts-for-surrogacy-third-party-art-in-india> vi visited on 05/12/2014 at 7.53 pm

⁶³ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', [New Delhi : Jaypee Brothers Medical Publishers pvt Ltd, 1st Edn., 2015, p. 22

2.2.1. Causes of Infertility:

Infertility may cause due to various reasons such as genetic abnormalities, reproductive aging, certain acute and chronic diseases, behavioral risk factors (e.g., body weight, smoking), and exposure to certain environmental, occupational, and infectious agents.⁶⁴ However, the cause of infertility is generally diagnosed only when a man, woman, or couple try to become pregnant.

1. Female Related Factors:

The known causes of female infertility are

- Ovulatory Dysfunction
- Tubal, and pelvic pathology
- Unexplained infertility

- **Ovulation Dysfunction:**

Ovulation means the release of ovum or female gamete through the graffin in the follicle at monthly intervals. The ovulatory dysfunction is the abnormalities related to defective ovulation.⁶⁵ There are many factors like reproductive aging, abnormal hormonal milieu, premature ovarian failure and abnormalities in the hypothalamic-pituitary axis which may be responsible for ovulatory dysfunction.

Due to the abnormal hormonal milieu causing defective ovulation like the polycystic ovarian disease (PCOD), thyroid disorders and abnormal prolactin secretion. If ovulation induction is not successful, then the ovum donation is an important opinion with the use of ART.⁶⁶

⁶⁴ Centre for Disease Control and Prevention [CDC], National Public Health Action Plan for the Detection, Prevention, and Management of Infertility, June 2014 at p. 10 available at http://www.cdc.gov/reproductivehealth/Infertility/PDF/DRH_NAP_Final_508.pdf visited on 05/06/2015 at 5.00 pm

⁶⁵ Reproductive aging is an important which can lead to ovulatory dysfunction. At the onset of puberty the germ cell population is about 300,000 and over the next 35-40 years of reproductive life, only about 400 oocytes will ovulate. By age 40, the number of declines in 25,000 and at menopause less than 1000 follicles remains. Thus, the number of follicles steadily declines with increasing age and changes in the hypothalamic pituitary hormone secretion also occur.

⁶⁶ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', [New Delhi : Jaypee Brothers Medical Publishers Pvt Ltd, 1st Edn., 2015, p. 25

- **Tubal, and Pelvic Pathology**

Tubal and pelvic pathology form is the important cause of infertility which affects both younger and older women. Genital tuberculosis is a common cause of tubal factor infertility in India with an incidence of 9.3 reported in patients with infertility in New Delhi. A female genital tuberculosis have been described as a disease of young women, 80% of these being diagnosed between the ages of 20-40 years. The pelvic inflammatory disease (PID) forms another important cause of tubal factor infertility. Because of tubal damage that results in blockage or damage of ovum down the tubes such that, the passage of ovum down the tubes is impeded or stopped the preventing fertilization tubal damage factor prevents the union of sperm and ovum where fertilization occurs.⁶⁷

- **Unexplained infertility**

Unexplained infertility means when, after systematic evaluation no cause for the infertility is found. This unexplained infertility is about 10%, which may be 30% among the infertile population. It may be due to as abnormalities of gamete, abnormalities in embryo development, or psychological factor for which there is no valid diagnostic test.⁶⁸

2. Male Related Factor:

The causes of male infertility are to be found either in the quality or quantity of sperm produced and the problem with the tubes carrying sperm, the problem with getting an erection, problem with ejaculation.⁶⁹ A small number of males are congenitally unable to produce a sufficient quantity of sperm, or indeed any sperm at all, to achieve

⁶⁷ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', [New Delhi : Jaypee Brothers Medical Publishers Pvt Ltd, 1st Edn., 2015, p. 25

Uterine leiomyomas can be seen in 20-40 by women reproductive age group and in 5-40 of infertile women. The impact of uterine myomas as enlargement of fallopian tube, displacement of cervix Asherman's syndrome develops as a result of genital tuberculosis. Endometriosis is pelvic pathology causes abnormalities in follicular development, tubal transport weak endometrial function, adverse effect of peritoneal fluid on sperm mobility and tubal ciliary function.

⁶⁸ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', [New Delhi : Jaypee Brothers Medical Publishers Pvt Ltd, 1st Edn., 2015, p. 26

⁶⁹ <http://www.hfea.gov.uk/infertility.html> visited on 05/10/2011 at 2.00 pm

fertilization by natural means. Male infertility can also be caused by genetic disorders.⁷⁰ Infertility in men can be evaluated by a semen analysis.

According to Centre for Disease Control and Prevention, there are also certain factors which may contribute to the abnormal semen analysis, which may include the varicoceles a condition in which the veins in a man's testicles are large and cause them to overheat. The heat may affect the number or shape of the sperm. The medical conditions or exposures are diabetes, cystic fibrosis, trauma, infection, testicular failure, or treatment with chemotherapy or radiation. The unhealthy habits such as heavy alcohol use, testosterone supplementation, smoking, anabolic steroid use, and illicit drug use.⁷¹ Male factors may be contributing factors in 20-40 of couples with reproductive failures.⁷²

3. Behavioral Factors:

Such as diet, exercise, sleep, psychological and physiological stress, caffeine consumption, tobacco and alcohol use, weight gain or loss, nutritional disorders, illicit or prescription drug use, and illicit use of anabolic steroids and growth hormones.⁷³

4. Occupational and Environmental Hazard:

Such as radiation, repetitive motion or posture, injury (e.g., reproductive or urinary tract trauma, such as that experienced during military duty), or natural or synthetic chemicals and compounds with hormonal activities (e.g., endocrine disruptors).⁷⁴

5. Genetic reasons:

70 Report of the Commission on Assisted Human Reproduction, 2005 at P. 5 available at <http://health.gov.ie/wp-content/uploads/2014/03/Report-of-The-Commission-on-Assisted-Human-Reproduction.pdf>, visited on 11/10/2012 at 2.10.pm, Inflammation of the prostate gland may reduce the inherent capacity of sperm for spontaneous movement (motility). The other factors can also contribute to infertility. For example, mump sin post (infectious viral disease) pubertal life or injury to the testes may result in failure to produce sperm or in the production of poor quality sperm.

71 <http://www.cdc.gov/reproductivehealth/infertility/> visited on 11/05/2013 at 5 pm.

72 Supra 51 at p. 27

73 Centre for Disease Control and Prevention [CDC], National Public Health Action Plan for the Detection, Prevention, and Management of Infertility, June 2014 at p. 11 available at http://www.cdc.gov/reproductivehealth/Infertility/PDF/DRH_NAP_Final_508.pdf visited on 05/06/2015 at 5.00 pm

74 Centre for Disease Control and Prevention [CDC], National Public Health Action Plan for the Detection, Prevention, and Management of Infertility, June 2014 at p. 11 available at http://www.cdc.gov/reproductivehealth/Infertility/PDF/DRH_NAP_Final_508.pdf visited on 05/06/2015 at 5.00 pm

Generally, it is hard to decide correctly the genetic role to the infertility. There are various genetic causes of infertility which may be chromosomal abnormalities, single gene disorders and phenotypes.⁷⁵ There are some genetic factors⁷⁶ which affect mainly male persons and some affects both male as well as female persons.⁷⁷

6. Social reasons:

Apart from medical reasons, there are reasons of lifestyle or convenience which might prompt a woman to consider surrogacy rather than to carry child herself.

- **Gay couple:** It is obvious; neither of the couple can carry a pregnancy so one of the options to have a child is via surrogacy.
- **Lifestyle:** The reason of lifestyle or convenience which might prompt women to consider surrogacy rather than to carry child such as the pregnancy impact on a career, aesthetic consideration to avoid.

At the end it would like to say that the infertility affects a substantial number of couples in reproductive age group. The causes of infertility have several female and male factors. In female factors are ovulatory dysfunction, tubal pathology, genital tuberculosis, pelvic inflammatory disease, anatomic uterine abnormalities endometriosis, etc. Where male factors also contributing factor in many of the cases which may be due to hypothalamic pituitary disorders, primary gonadal disorders, disorder of sperm transport.

2.3. ASSISTED REPRODUCTIVE TECHNOLOGY

A new revolution has been taken place in the last three decades the way that children enter families has been changed radically. The assisted reproductive technology such as *in vitro fertilization* (IVF), Embryo Transfer (ET), Intrauterine Insemination (IUI)

⁷⁵ Phenotypes means the observable physical or biochemical characteristics of an organism, as determined by both genetic makeup and environmental influences, available at <http://www.thefreedictionary.com/phenotype>

⁷⁶ Kavita Shah, Gayathri Sivapalan, et. al., "The genetic basis of infertility", (Cell and Chromosome Biology Group, Department of Biological Sciences, Brunel University, UK, 2003) p. 13 available at <http://www.ncbi.nlm.nih.gov/pubmed/12814343> visited on 09/12/ 2012 at 1.00 pm.

⁷⁷ The example of genetically factors affects male and females such <http://www.ncbi.nlm.nih.gov/pubmed/12814343> visited on 09/12/ 2012 at 1.00 pm.

⁷⁷ The example of genetically factors affects male and females such as chromosome translocations affect both males and females, whereas a Klinefelter syndrome and the subsequent infertility phenotype caused by it are specific to males.

and Surrogacy has replaced sexual reproduction and also the method of adoption for infertile heterosexual couples and for same sex couples. These assisted reproductive technologies have challenged the idea of “natural” reproduction and of the meaning of parenthood.

In India a woman without the children face various kinds of problems like miseries, stigma in her life. The childless women loose her identity and status in the family and even in society and also lose her intimate relation with the husband. If women do not have a child she is considered as barren women. Therefore, when all hopes are lost for begetting a child, a childless couple will left no other option but to adopt a child or remain childless throughout their life, but now the assisted reproductive technology has replaced adoption method for infertile couples who have dreams of becoming parents. Therefore, the medical science and technology has made miracle to have own biological child to the infertile couples, singles and homosexuals. In ART treatment the pregnancy is conceived through the artificial means. The term ART techniques has also include the third party reproduction, i.e. surrogacy or use of gamete (eggs or sperms) or embryo donor.

2.3.1 Object of Assisted Reproductive Technology

The Prime object of reproductive technology is to make research on infertility, the birth of human beings (test tube basis) to educate and to help the childless couples to get their own genetic children and to continue the lineage of the family through artificial methods of reproduction, the secondary object of reproductive technology is to remove the stigma of childlessness and to beget the child artificially to the childless couples.

However, before proceeding to the detailed study of assisted reproductive technology and the concept of surrogacy, it is very necessary to first know the meaning of infertility, its causes and what solutions are available to curb this infertility and how to achieve parenthood.

2.4 ASSISTED REPRODUCTIVE TECHNIQUES

A Reproduction without Sex.....

Every person has the fundamental right to marry and establish their own family. A reproduction is a fact of life, but it has always fascinated humans. In many traditional societies, infertility is often believed to be caused by a curse or evil spirit. Therefore, some magical rites are often used to propitiate the gods and the spirit. In a patriarchal society like India the issue of reproduction has always been central in women's lives. Until the end of the nineteenth century infertility was generally believed to be entirely a female condition. Childless women were considered as 'barren' and the male never even considered as responsible factor. Due to inability to conceive, many spouses suffer feelings of failure and guilt towards their partners, once he or she is found to be infertile. However, infertility is seen as a biological problem due to non functioning or malfunctioning of reproductive organs, hence system in need of repair, therefore viewed as a disease in women's lives. To overcome the misery of infertility the research began in the 19th century. However, some of those techniques used today have been used for hundreds of years in ancient society.

'Reproduction as defined by the Oxford English dictionary is 'the action or process of forming or creating or bringing into existence again.' The sociological meaning of human reproduction, however, has been broadened to cover the reproductive process which includes sexuality reproductive pathologies and reproductive technologies. Hence, for the purpose of this study, reproduction is used to refer to the process relating to conception, pregnancy and birth in a socio- economic and cultured context.⁷⁸

The most of the techniques used in assisted reproduction or artificial reproduction were first used in animals such as cows and sheep.

The term new reproductive technologies have been used in the process of human reproduction in following three areas:

78 Jyostna Agnihotri Gupta, 'New Reproductive Technologies, Women Health and Autonomy', Sage Publication, 1st Edn., 2000, p.14

- i) For the prevention of conception and birth these include contraceptives as well as methods of pregnancy termination.
- ii) For assisting reproduction (aiding or stimulating conception).
- iii) For genetic purposes and for prenatal diagnosis (including sex detection and sex pre selection).⁷⁹

However, it is said that, reproductive technologies have fragmented the process of procreation, Firstly, with the development of contraceptive technologies, it became possible to have sex without procreation and thereafter with the development of technologies such as insemination and in vitro fertilization, it became possible to have reproduction without sex.

There are various techniques are invented by medical sciences for procreation of children artificially. The important techniques of ART are as follows:

1. Artificial Insemination [AI]:

Artificial Insemination (AI) is the oldest known assisted reproductive technology (ART). The first known scientific artificial insemination found in the year 1799 and the successful use of artificial insemination in human dates from 1870.

In the artificial insemination method a woman is inseminated with a sperm of man's, produced after masturbation action without having sexual intercourse. It is a simple procedure involving man's sperm been placed into women's vagina. When the husband's sperm is used, then it is called as artificial insemination by the husband's sperm (AIH) and in case of the use of donor sperm is identified as artificial insemination by donor sperm (AID).⁸⁰ However, the Roman Catholic Church is

⁷⁹ Jyostna Agnihotri Gupta, 'New Reproductive Technologies, Women Health and Autonomy', Sage Publication, 1st Edn., 2000, p.15

⁸⁰ Usually, when the husband or partner has the low sperm count or may genetic disorder which may transfer to the children then in such cases the donor sperms are used, where the sperm of husband and donor are mixed (AIM). Generally, the women are inseminated with 3-4 times during the period of her one menstrual cycle. The same procedure is repeated over a period of six months, i.e. 18-24 inseminations. Semen quality is often improved with spinning it so that, only wealthy concentrated sperm is collected and used for insemination. In most of countries AID is not readily available to all women. Therefore, lesbian women or single heterosexual women often resort to self-insemination by obtaining sperm from donor either friends or someone usually known to them who agree to help them in this manner and sometime donor recruited through request placed in women managing or daily newspaper or on websites. Self insemination is basically a simple technique, all that is necessary is

against the method of artificial insemination because they treat it as sinful, because it severs the communication between two spouses. The AID method is charged as adulterous because it violates the sacramental tie of the marriage. The Islam religion also considers AID as adulterous. Some of them even called as it is not different from adultery- “technological adultery.”⁸¹

2. In Vitro Fertilization: [IVF]:

The term *in vitro* has taken from the [Latin] meaning *within the glass*. In vitro fertilization of eggs from mammals began to be developed in the 1930s; however, research in eggs taken from women took longer to develop. The ‘IVF’ technique became known to the world, only after the World’s first ‘IVF baby’ *Louise Brown*, born in *Great Britain* in July 25, 1978.⁸²

In the IVF method⁸³ where a man’s sperm and a woman’s eggs are fertilized outside the body, i.e. into a laboratory in the Petri dish. This treatment can also be performed by using either donated sperm or donated eggs, or both.⁸⁴

Image No. 2. Stereo Dissecting Microscope with Petri Dish and Pipette Used in IVF Laboratory



clean 2 c.c. syringe and can be performed at home, however, now with the fear of HIV / AIDS many prefer to artificially insemination at a clinic to be certain the sperm has been medically screened.

81 Jyotsna A. Gupta, ‘New Reproductive Technologies, Women’s Health and Autonomy’, New Delhi: Sage Publication (2000), at pp. 344, 345

82 Jyotsna A. Gupta, ‘New Reproductive Technologies, Women’s Health and Autonomy’, New Delhi: Sage Publication (2000), at P. 345

83 The more than one embryo’s are transferred into the woman’s uterus for development. Sometimes the surplus embryos are cryopreserved for future use. The IVF treatment generally used for infertility treatment, such as endometriosis and male infertility or unexplained infertility of both spouses.

84 Human Fertilization Embryology Authority, <http://www.hfea.gov.uk/fertility-treatment-options-surrogacy.html#wrapper> visited on 12/11/2011 at 11 am.

In IVF treatment the following fundamental steps are involved cycle, which are mainly ovarian stimulation, egg retrieval, fertilization, embryo culture, and embryo transfer.⁸⁵ A

The IVF Procedure is as follows:

- **Ovarian Stimulation:**

The treatment of IVF cycles typically starts from the third day of menstruation. Normally a woman ovulates only one egg in each month. However, in order to produce multiple eggs by a woman the fertility drugs⁸⁶ are often given to her. Generally, about 8 to 14 days are of the stimulation period. The human chronic gonadotrophin (hCG) injection is given for maturation and fertilization of eggs. Generally, 34 to 36 hours after the hCG injection, but before the ovulation takes place eggs are retrieved from the body of the women.⁸⁷

- **Eggs Retrieval:**

The procedure of egg retrieval is performed at the hospital by a transvaginal route. A needle, guided by ultrasound imaging, is inserted through the vaginal wall into the ovaries, where the follicles containing the eggs are punctured and aspirated. The released eggs are transferred to the lab where their developmental stage is assessed. General anesthesia is usually used for this simple procedure.⁸⁸ Removal of multiple eggs can usually be completed in less than 30 minutes. Laparoscopy can also be used to retrieve the eggs by using a small telescope placed in the umbilicus. (Image No. 3).⁸⁹

85 American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

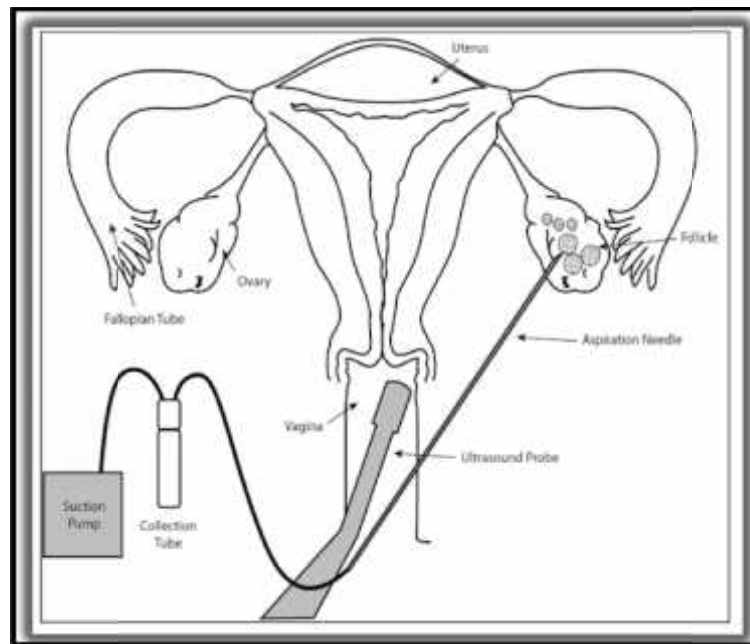
⁸⁶ The clomiphene citrate and letrozole are administered orally while the other medications like human chronic gonadotrophin (hCG) and follicle- stimulating hormone (FSH) are given by injection.

⁸⁷ American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

⁸⁸ <http://www.medtrottersonline.com> visited on 21/10 2010 at 2.00 pm.

⁸⁹ American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_I

Image No. 3 Egg retrieval is usually performed through the vagina with an ultrasound- guided needle⁹⁰



- **Fertilization and Embryo Culture:**

After the eggs are retrieved, they are examined in the laboratory for maturity and quality. Mature eggs (Image No.4) are placed in an IVF culture medium and transferred to an incubator to await fertilization by the sperm.

Image No. 4. A mature, unfertilized egg⁹¹



nfo_Booklets/ART.pdf visited on 10/11/2015 at 4 pm. 89 <http://www.medtrottersonline.com> visited on 21/10 2010 at 2.00 pm.

89 American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_I nfo_Booklets/ART.pdf visited on 10/11/2015

⁹⁰ *Ibid*

⁹¹ <http://www.advancedfertility.com/immature-ivf-eggs.htm>

Fertilization may be accomplished by insemination, where motile sperms are placed together with the oocytes and incubated overnight or by intracytoplasmic sperm injection (ICSI), where a single sperm is directly injected into each mature egg (Image No. 5). Usually 65% to 75% of mature eggs will fertilize after insemination or ICSI. Two days after the egg retrieval, the fertilized egg has divided to become a 2- to 4-cell embryo. By the third day, a normally developing embryo will contain approximately 6 to 10 cells (Image No.6). By the fifth day, a fluid cavity forms in the embryo, and the placenta and fetal tissues begin to separate. An embryo at this stage is called a blastocyst. Embryos may be transferred to the uterus at any time between one and six days after the egg retrieval.⁹²

Image No. 5 Intra cytoplasmic sperm injection (ICSI), in which a sperm is directly injected into each mature egg to facilitate fertilization⁹³



Image No.6 a fertilized egg has now divided into 6 to 10 cell embryo.⁹⁴



92 American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

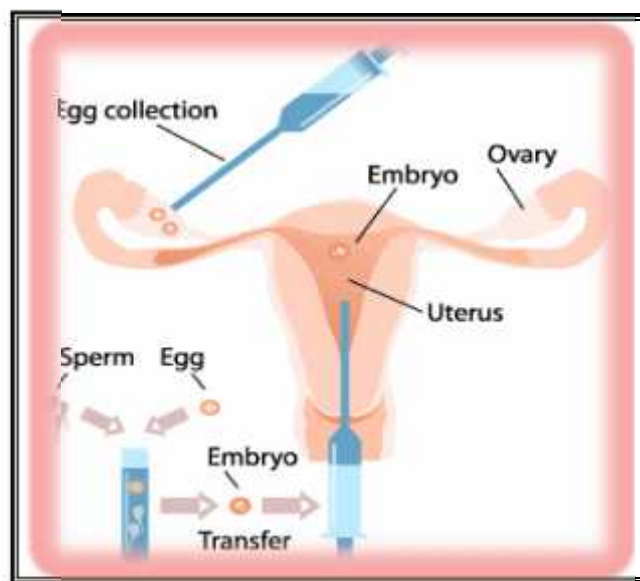
93 <http://wellcomeimages.org/>

94 <http://wellcomeimages.org/>

- **Embryo Transfer:**

The next step in the IVF process is the embryo transfer. This is simple and painless procedure which does not require sedation or anesthesia. The embryos are laden on a small plastic catheter (a long, thin sterile tube), which is gently introduced through the cervix into the uterus. Once in the uterine cavity, the embryos are gently released and the catheter is withdrawn.⁹⁵ The maximum number of embryos transferred is based on the patient's age and other individual patient and embryo characteristics.

Image No. 7 Embryo transfer is performed through the cervix⁹⁶



However, the success rate of an IVF depends upon a number of factors, such as the patient characteristics and treatment approaches therefore, the success rate also differs from clinic to clinic.⁹⁷

⁹⁵ <http://www.medtrottersonline.com> visited on 21/10 2010 at 2.00 pm.

⁹⁶ https://www.google.co.in/search?q=IVF+images&tbn=isch&imgil=AuGHJTQyf67PWM%253A%253BBBeKmsy4QLBigWM%253Bhttp%25253A%25252F%25252Fqsota.com%25252Ffiv-in-vitro-fertilization%25252F&source=iu&pf=m&fir=AuGHJTQyf67PWM%253A%252CBeKmsy4QLBigWM%252C_&biw=1143&bih=734&dpr=0.9&usg=__3hrW32xURmFn4RgAJkxe9P9Ryv%3D&ved=0ahUKEwj6gO2Inr3JAhWEJI4KHx9oA1AQyjcILw&ei=xeteVrqKMoTJuAT_0I2ABQ#imgsrc=AuGHJTQyf67PWM%3A&usg=__3hrW32xURmFn4RgAJkxe9P9Ryv%3D

⁹⁷ For example, the type of patients accepted into the program and the numbers of embryos transferred per cycle affect the program's statistics. It is also important to understand that pregnancy rates and live birth rates are different, because pregnancy does not always result in a live birth.

3. Cryopreservation:

The extra embryos remaining after the embryo transfer, which may be cryopreserved (frozen) for future transfer.⁹⁸ The cryopreservation technique makes a future ART cycles simpler, less expensive, and less invasive than the initial IVF cycle, since the woman does not require ovarian stimulation or egg retrieval.⁹⁹

4. Intrauterine Insemination [IUI]:

IUI is a simple and less costly procedure of ART, which requires no retrieval of eggs or transfer of embryos. A sperm which is specially selected by embryologist is inserted directly into the uterus of the women when she ovulates. The fertility drugs are often used to increase the chances of pregnancy during ovulation. The benefit of this procedure is that it is a very cheap, no surgical procedure, as well as less supervision is required. Thus, the IUI technique is with or without ovarian hyper stimulation. It is like an artificial insemination, the only difference being that semen is placed inside the uterus instead of upper vagina or cervix.¹⁰⁰

5. Sperm, Egg, and Embryo Donation

In infertility treatment the couple may choose to use a donor if there is a problem with their own sperm or eggs, or if they have a genetic disease that could be passed on to a child. Donors may be known or anonymously. In most cases, donor sperm is obtained from a sperm bank. Both sperm and egg donors undergo extensive medical and genetic screening, as well as testing for infectious diseases. Donor sperm is frozen and quarantined for six months, the donor is re-tested for infectious diseases, including the human immunodeficiency virus (HIV), and sperm are only released for use if all tests are negative. Donor sperm may be used for insemination or in an ART cycle.¹⁰¹

⁹⁸ Once frozen, embryos may be stored for prolonged periods, and live births have been reported using embryos that have been frozen for almost 20 years. However, not all embryos survive the freezing and thawing process, and the live birth rate is lower with a cryopreserved embryo transfer.

⁹⁹ American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

¹⁰⁰ Jyotsna A. Gupta, 'New Reproductive Technologies, Women's Health and Autonomy', New Delhi: Sage Publication (2000), at P. 349

¹⁰¹ American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, P. 14 available at

Donor eggs are an option for women with a uterus who are unlikely or unable to conceive with their own eggs.¹⁰² Egg donors undergo much the same medical and genetic screening as sperm donors. Egg donation is expensive because donor selection, screening, and treatment additional costs of the IVF procedure. However, the relatively high live birth rate for egg donation.

However, when both husband and wife are infertile, then in such cases, both donor sperm and eggs are used as well donated embryos may also be used.¹⁰³

6. Gamete Intra Fallopian Transfer (GIFT):

In Gift process, eggs are removed from women and placed in one of the fallopian tubes along with the man's sperm. This allows fertilization to take place inside there. Therefore, this variation is actually an in Vivo fertilization, not an *in vitro fertilization*. It has a much higher success rate than a normal IVF as it is usually with women who have no problems with their fallopian tubes.¹⁰⁴

7. Zygote Intra Fallopian Transfer (ZIFT):

It is also known as PROST (pronuclear stage tubal transfer). It is a mixture of IVF and GIFT. In this, egg is collected and fertilization is done in Petri-dish Eighteen hours later the zygote (egg) is replaced in the fallopian tube.¹⁰⁵

The eggs are retrieved and fertilized on one day and the embryo is transferred into the following. However, this procedure is more expensive than IVF or GIFT.

https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

¹⁰² Recent advances in oocyte freezing, though, have made this a possibility. Egg donors assume more risk and inconvenience than sperm donors. The egg donor must undergo ovarian stimulation and egg retrieval. During this time, the recipient (the woman who will receive the eggs after they are fertilized) receives hormonal medications to prepare her uterus for implantation. After the retrieval, the donor's eggs are fertilized by sperm from the recipient's partner and transferred to the recipient's uterus. The recipient will not be genetically related to the child, but she is a biological parent in the sense that she will carry the pregnancy and give birth.

¹⁰³ American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, P. 14 available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

¹⁰⁴ Jyostna Agnihotri Gupta, 'New Reproductive Technologies, Women Health and Autonomy', Sage Publication, 1st Edn., 2000, p.349

¹⁰⁵ *Ibid*

8. Pre -Implantation Genetic Diagnosis (PGD):

Pre- Implantation genetic diagnosis is a technique in which an embryo formed through IVF is tested for specific genetic disorders (e.g. cystic fibrosis) or other characteristics prior to implantation.¹⁰⁶ So this technique is helpful to identify genetically abnormal embryos and improve health outcomes.

9. Intra Cytoplasmic Sperm Injection (ICSI):

ICSI is a more recent development associated with IVF. This is used when sperm count is very low or when the sperm has difficulty penetrating the egg. In ICSI a single sperm is injected into the center of the ovum (egg) to effect fertilization, before the fertilized ovum transferred to the uterus of the women.

10. From Assisted Reproduction to Artificial Reproduction:

A very recent report published by the *European Society of Human Reproduction and Embryology [ESHRE]*, Focus on Reproduction, *September 2015* stated that the techniques of assisted conception by artificial means, like the creation of sperm cells and oocytes through substantial manipulation of stem cells. As per the ESHRE Report, the clinical application of such ‘artificial gametes’ could substantially change the field of reproductive medicine. Thus, the artificial gamete could offer *firstly* genetic parenthood to all couples, including those who do not have functional gametes or those in whom both partners have the same types of gametes (gay or lesbian couples). *Secondly*, while the current treatment aim to bypass infertility by establishing a single pregnancy some approaches with artificial gametes may even cure infertility altogether.

The creation of artificial gametes would accrue in two phases. *In Phase I*, male or female stem cells would be obtained which contains the patient’s own DNA. In *Phase II*, these stem cells would be differentiated in vitro or in vivo into sperm cells or oocytes and these cells would then be used for assisted conception. Thus, this new

¹⁰⁶ Indian Council of Medical Research (ICMR), ‘National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India,’ 2005, at p. 9 at 1.2.27., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

research would be helpful for getting genetic parenthood and will also cure infertility.¹⁰⁷

2.5 SURROGACY

In the world the most practiced assisted reproductive technique by the childless couple is in vitro fertilization (IVF) and the surrogacy. IVF can be operated in two ways; one method is where the biological mother becomes pregnant via embryo transfer with a child of her own eggs in which she is the natural mother. But the other method is when the genetic mother is unable to be impregnated with the embryo due to medical reason the embryo is transferred to another women's. This arrangement in medical science is called as "surrogacy".

In surrogacy a pregnancy may be carried by the egg donor (traditional surrogate) or by another woman who has no genetic relationship to the baby (gestational carrier). If the embryo is to be carried by a surrogate, pregnancy may be achieved through insemination alone or through ART. The surrogate will be biologically related to the child. If the embryo is to be carried by a gestational carrier, the eggs are removed from the infertile woman, fertilized with her partner's sperm, and transferred into the gestational carrier's uterus. The gestational carrier will not be genetically related to the child.¹⁰⁸

However, there are a number of health risks for women and children associated with IVF, which includes hyperstimulation syndrome, spontaneous abortion or miscarriage, ectopic pregnancy, multiple births, difficult labour and caesareans premature births, low weight at birth, prenatal and neonatal mortality and genetic disorders /defects.

2.5.1 Concept of Surrogacy

107 European Society of Human Reproduction and Embryology [ESHRE], Focus on Reproduction, September 2015, p. 24, available at <https://www.eshre.eu/Publications/Focus-on-Reproduction.aspx> visited on 10/10/2015

108 American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, P. 14 available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

The mother and motherhood are known to the world only in two forms, one is natural mother who conceives, carries, gives the birth and nourishes the child. The other form is an adoptive mother, who could not bear the child in a natural way because of known or unknown medical problem. Today, the concept of motherhood has been changed in various forms with the advent of science and technology. How the motherhood is known to the world as a natural mother, adoptive mother, biological mother, genetic mother, commissioning mother, social mother and the surrogate mother.

The meaning of the term 'surrogate' is a substitute. There are *two forms of surrogacy* one when a surrogate has a child for a couple where the husband is the genetic father and the surrogate is the genetic mother. And the other form is called as host mothering where surrogate carries the genetic child of both husband and wife through an IVF/GIFT technique which requires the doctor intervention.¹⁰⁹

In other words, surrogacy means a woman hired to act in the place of another woman. Thus, a surrogate woman is a woman who carries the baby for a woman either from her own egg or from fertilized egg from another woman. Before, introduction of the ART techniques the conception of natural surrogacy was the only method available for assisting the infertile women to have their own children, later on artificial insemination (AI) was accepted, which became the usual means of achieving pregnancy. Therefore, the assisted reproductive techniques (ART) such as IVF¹¹⁰ became available.

The surrogate mother basically is a woman who bears a child for another couple. And the child born out of surrogacy arrangement is called as a surrogate child. The surrogacy in India mostly depends upon the contract form and signed by the parties.

¹¹¹ The surrogacy involves multifaceted issues like social, ethical, medico-legal still it is booming global business. Surrogacy has created a number of challenges, when

109 Anil Trehan, "Surrogate Motherhood In India: 'A Conceptual and Effectual Analysis and Recommendations of Indian Surrogacy Law Centre,' X, Issue 4 (2009) , NAYA DEEP at p.23.

¹¹⁰ In IVF technique, the eggs of a woman (who could not herself bear a child) and the sperms of her husband were fertilized *in vitro* and thereafter the embryos were placed into a suitable host enabling them to have their own biological child.

¹¹¹ The IVF surrogacy is an acceptable option in India. The reasons for India emerging as a hub of fertility tourism are availability of medical facility by the top most hospitals and women's are willing to outsource their bodies for nine months in lieu of monetary compensation and the absence of any specific laws.

surrogacy arrangements involve parties of different countries i.e. Cross Broader Surrogacy.

Despite, of the various controversial issues attached to the surrogacy, the medical science is trying to establish the treatment of surrogacy as best option childless couples to fulfill their dream of becoming parents by proving woman's body as a wonderful reproductive machine. Thus, the study of the conceptual part of surrogacy would be incomplete without the study of history of surrogacy.

2.5.2 History of Surrogacy

The practice of surrogacy was in the existence from the ancient time. However, a very recently it is recognized as a treatment for infertility.

In ancient India, a mythological epic has also shown occurrences of surrogate pregnancies. Thereafter, the enormous advancement of medical science and technology has brought a drastic change in the arena of surrogacy.

The researcher has divided historical background of the surrogacy into *Three Periods*:

2.5.2.1 Ancient Period

2.5.2.2 Medieval Period

2.5.2.3 Modern Period

The details of above three periods are as follows:

2.5.2.1 Ancient Period:

The incapability of people to have children and to continue their family line is known from the ancient time. Thus, the history of surrogacy during ancient period is again subdivided into two groups:-

a. Ancient Period of Surrogacy in India

b. Ancient Period of Surrogacy in Abroad

a. Ancient Period of Surrogacy in India

In the ancient India, a mythological epic has shown the occurrences of surrogate pregnancies.

In the epic of Mahabharata, the king Kansa had locked his **sister Devaki** and her husband Vasudev into the prison cell due to prophecy forecasting his death at the hands of his sister's eight sons. The King Kansa killed the first six newborn of Devaki. The mythology describes, that Devaki had miscarriage of the seventh child Balram, who in reality was secretly transmitted to the womb of the Rohini by the will of God. As per Bhagwad Gita that Lord Krishna was born without sexual union and was conceived by the divine 'mental transmission' from the mind of Vasudeva into the womb of Devaki.¹¹²

Likewise, in the epic of Mahabharata, it is also believed that **Gandhari**, the wife of King Dhritrashtra who had conceived had a prolonged pregnancy for nearly two years. The Bhagwan Vyasa described, that Gandhari delivered a mass of material that contained 101 normal cells, which after being put in a nutrient medium to grow up full term as a 100 male children- the Kauravas- and one female child called Dusheela.¹¹³

Again in Mahabharata a Kunti conceived her eldest son Karna through the Sun God. A Kunti, while still very young, had occasion to serve Rishi (sage) Durvasha. She looked after him with great dedication. The Rishi Durvasha was highly pleased. He gave Kunti a mantra (chant) and said that whichever God, she would think of after reciting the mantra, would appear before her and bless her, with a son endowed with his own godly qualities.¹¹⁴

In the epic of Ramayana the King Dashrath was unable to impregnate any of his three wives, ultimately he seeks the help of a Sage, who gave some 'kheer' (rice pudding; probably a euphemism for sperm in a holy text book) which he has given to

112 Gehna Vaishnavi, Navneet Tatkhar ' Surrogacy Medicolegal Issues,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.8

113 *Ibid*, at p. 30

114 http://karna.org/story_behind_karna.html

one of his wives to distribute equally among them. All three wives get pregnant and he becomes the father of four sons.¹¹⁵

These various mythological examples show the existence of the practice of surrogacy in India in untitled form, and now it is titled as a surrogacy by the scientific technology. It can be said that in the ancient time, the procreation of children was the magical power of the God and today it is the magical power of the science and technology.

b) Ancient Period of Surrogacy in Abroad

In Bible

The first case of surrogate motherhood was found in the Old Testament. So long as 2000 BC, When maidservant Hagar had become a surrogate mother to bear the Abraham's child, as his wife Sarah could not become pregnant and Hager bore the Abraham's son, Ishmael.¹¹⁶ In another biblical example (Genesis 30), Rachel, who was childless used her slave girl Bilha to bear child of Jacob.¹¹⁷

In ancient Greeks myth states, that the men in the role of forefather such as Zeus giving the birth to Athena from his head. The Immaculate conception of virgin Mary through Holy Spirit in the Holy Bible.¹¹⁸ The Babylonian law and custom allowed the practice of traditional surrogacy and infertile couple could use this surrogacy method to avoid divorce.¹¹⁹

From the ancient time the society has accepted the surrogacy as a method procreation of children with the object to avoid the divorce and continue the family line. The researcher after the study of ancient history of surrogacy in India and abroad, it's found that, the surrogacy method was used during ancient period with the sole

115 Jyostna Agnihotri Gupta, 'New Reproductive Technologies, Women Health and Autonomy', Sage Publication, 1st Edn., 2000, p. 343

¹¹⁶ Holy Bible, The Book of Genesis at p.16 c.f. Textbook of Assisted Reproductive Technologies 3rd Edn. 2009, David k Gardner, Ariel Weissman (ed.), InformaPublicaion. London, at p. 817

¹¹⁷ Richel Cook, ed., 'Surrogate Motherhood, International Perspective,' (Hart Publication, 2003), P. 243

118 Jyostna Agnihotri Gupta, 'New Reproductive Technologies, Women Health and Autonomy', Sage Publication, 1st Edn., 2000, pp.337-338

119 Cf. <http://en.wikipedia.org/wiki/Surrogacy>

purpose to have genetically related offspring's and for the continuation of the family line.

2.5.2.2. Medieval Period:

During the medieval period there is enormous advancement of medical Science and technology, which has provided various assisted reproductive technologies such as Artificial Insemination (AI), Intrauterine Insemination (IUI) and recently developed the In Vitro Fertilization (IVF) which gives the option to the infertile couples to build their own family. With the purpose of detailed understanding of the medieval period the researcher has again divided the medieval period in two sub types:

- a. Medieval Period of Surrogacy in India**
- b. Medieval Period of Surrogacy in Abroad**

a. Medieval Period of Surrogacy in India:

In India during the medieval period there is lots of development of science and technology, which has gifted in vitro fertilization (IVF) technique for the Indian childless couples. It is a great proud to the Indian that the India's first and world's second IVF baby, Kanupriya alias Durga was born in Kolkatta on October 3, 1978.”¹²⁰This credit goes to Dr. Subhash Mukhopadhyay who brought India's first IVF baby in the world. Durga, the India first ‘test tube baby’ was born just 67 days after the “The world's first IVF baby Louise Joy Brown, born on July 25, 1978 in Great Britain.”¹²¹

But instead of recognition of his marvelous achievement Dr. Mukhopadhyay was charged as an accused before the expert committee called on 18th November 1978 to decide whether his innovation could fight the infertility? ¹²²

120 Law Commission of India Report No. 228th, at P. 6, available at lawcommissionofindia.nic.in/reports/report228.pdf

121 Gehna Vaishnavi, Navneet Tatkhar ‘ Surrogacy Medicolegal Issues,’ Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.9

122 Gehna Vaishnavi, Navneet Tatkhar ‘ Surrogacy Medicolegal Issues,’ Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 10

The Constituent Committee had never ever seen the embryos in their lifetime, yet they delivered their final report that Dr. Mukhopadhyay alleged was false and counterfeit and held him guilty for the creation of in vitro fertilization technique. In addition to insulting, an injury that, Dr. Mukhopadhyay

Finally, after 27 years of his death, the Indian Council of Medical Research (ICMR) has acknowledged the contribution of Dr. Mukhopadhyay as a creator of India's first tube baby and even the international scientific community has also accepted Dr. Mukhopadhyay achievements by enlisting his name as a medical scientist in the prestigious '*Dictionary of Medical Biography*'. Thus, the justice has finally, seen to be done in Dr. Mukaopadhyay's case as a scientific father of IVF in India for his greatest contribution in the new reproductive technology.¹²³

b. Medieval Period of Surrogacy in Abroad

The potential of IVF as a treatment for infertility was recognized by the **Prof. Robert Edwards** in the year 1950, while functioning at the National Institute for Medical Research in London. He had carried out pioneering research over several years in animal reproductive biology using the mouse model. This came of great help in achieving the objective to translate the results for human use. After his continuous hard work has paid the dividends in 1978 with the historic achievement of the successful birth of the ***world's first In Vitro Fertilized (IVF) Baby Louise Joy Brown on July 25, 1978 in Great Britain***. Because of the tireless efforts by Edwards and Patrick Steptoe a pioneer of laparoscopy technique had established an infertility clinic at the Born Hall in Cambridge,¹²⁴ and further they developed the technique of intracytoplasmic sperm injection (ICSI).¹²⁵

was not allowed to carry out further research and even not permitted to present his findings at a Tokyo conference. Despite of great contribution in the history of new reproductive technology, he was however not appreciated and not recognized hence, Dr. Mukhopadhyay finally killed himself by hanging on June 19, 1981. A great injustice was done to medical science because his contemporaries were doubtful of his greatest achievement. It was due to Dr. T.C. Anand Kumar's (Director of Institute of Research in Reproduction) from Indian Council of Medical Research (ICMR) efforts that ICMR recognized the hard work of Dr. Mukhopadhyay in 2002.

123 Gehna Vaishnavi, Navneet Tatkar '*Surrogacy Medico legal Issues*,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 11

124 *Ibid*

¹²⁵ In intracytoplasmic sperm injection (ICSI) technique, a single sperm is micro injected into the cytoplasm of a mature egg. For his greatest invention of IVF technique, Dr. Prof. Robert Edwards was awarded the Nobel Prize in the year 2010. Today, this IVF technique has become a fortunate thing to the childless couples of the world. In Great Britain, Australia and USA until December 1980 conservative mentality asserted that stimulated cycles were unsuitable for oocyte collection and therefore oocyte collection was restricted to natural cycles. Thereafter, in 1981 the Australian's announced the birth of IVF babies by using clomiphene citrate for ovarian stimulation.

In 1982 USA reported birth of an IVF baby and used human menopausal gonadotropin (HMG) and human chorionic gonadotrophin (HCG) with success.¹²⁶ The first **gestational surrogate baby** was reported by USA in **1985**. In United Kingdom since 1980, the IVF surrogacy has been accepted as a treatment option for the infertile couples, however, in between the report of the Warnock committee published in 1984 which has recommended the treatment involving any form of surrogacy should be made illegal.¹²⁷ The Attorney Noel Keane is called as the maker of the legal idea of the surrogacy arrangement.¹²⁸ It is found that during the medieval period there is lot development in science and technology, which gave hike to the growth in the assisted reproductive technology.

2.5.2.3. Modern Period:

In the modern period there is a significant development in assisted reproductive technology, and huge use of surrogacy as an option by the infertile couples. And the latest innovation in the assisted reproductive technology is that the now the world is moving from assisted reproduction to artificial reproduction, i.e. the use of artificial sperms or eggs created from stem cells for procreation of the child. In the world around 600 surrogate babies were born during the period of the 1976 to 1988 and this number has increased more than 5,000 births from 1988 to 1992.¹²⁹ ***On June 23rd, 1994, the India's first surrogate child was born in GG Hospital, Chennai.***¹³⁰

As per the Report of the Hague Conference on Private International Law, 2014, after the first birth of IVF baby in 1978 that around 5 million IVF babies has born in the worldwide. Today, in the world around 1.5 million ART cycles are performed each

126 Gehna Vaishnavi, Navneet Tatkhar ' Surrogacy Medico legal Issues,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 11

127 Utian WH, Sheen LA, Goldfarb JM, Kiwi R, Successful pregnancy after in vitro fertilization and embryo transfer from infertile women to a surrogate. N Engl J Med 1985; 313: 1351-2 cf. Textbook of Assisted Reproductive Technologies, on 'gestational Surrogacy' by Peter R Brinsden, edited by David K Gardner Ariel Weissman, Informa Healthcare Publication, 3rd Edn. 2009 at p.817

128 Cf. <http://en.wikipedia.org/wiki/Surrogacy>

129 Gehna Vaishnavi, Navneet Tatkhar ' Surrogacy Medico legal Issues,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 15

130 Surrogacy India Guide, available at <http://www.globaldoctoroptions.com/book/export/html/432> visited on 12/12/2013

year, with an estimated 350,000 babies born. The number of ART cycles has increased from 5 to 10% per annum in most of the developed countries.¹³¹

As per the latest report of the *European Society of Human Reproduction and Embryology [ESHRE], September 2015*, and it is also reported by the *International Committee Monitoring Assisted Reproductive Technologies (ICMART)* that, the world's total IVF babies now soars beyond 6 million. And it also estimated that the around 1.6. Million cycles now being performed each year and around 4, 30,000 babies are born. The state of China is performing more cycles than any other country and the Japan also which has performed 268,255 cycles recorded in 2011. The USA has recorded 142,000 cycles in 2011, with the Europe's biggest nations, France and Spain, on 72,000 and 88,000 respectively.¹³²

However, in above mentioned reports the ART cycles performed by the India ART clinics have not been mentioned otherwise the number would be flayed more. In the India the ART data record is not available, however, a very recently in the month of October 2015 a leading ART clinic i.e. Akansha Infertility Centre located at Anand, has celebrated birth of the 1000th surrogate baby.¹³³ Today, India has become an international hub for commercial surrogacy and had business an annual worth of at least \$445 million (Rs 2,900cr).¹³⁴ According to the National Commission for women

131 Hague Conference on Private International Law, "The Desirability And Feasibility Of Further Work On The Parentage / Surrogacy Project", April 2014 available at https://assets.hcch.net/upload/wop/gap2014pd03b_en.pdf visited on 23/12/2014

132 European Society of Human Reproduction and Embryology [ESHRE], Focus on Reproduction, September 2015, p. 17 available at <https://www.eshre.eu/Publications/Focus-on-Reproduction.aspx> visited on 12/10/2015, The worldwide data of ART cycles are maintained by the International Committee Monitoring Assisted Reproductive Technologies (ICMART) and in the state of the US, the Society for Assisted Reproductive Technology (SART) and The Center for Diseases Control and Prevention (CDC) are maintaining the record of ART cycles. But in India no such type of ART data or children born out of surrogacy are not available and even the Indian Council Medical Research (ICMR) or the Department of Health Research, of Government of India have not maintained any record of it. However, the individual ART clinic has been maintained it, but they reluctant to provide correct and exact data.

133 P. C. Vinoj Kumar, The Weekend Leader, Vol. 6, Issue 42., 19th Oct., 2015, available at <http://www.theweekendleader.com/Success/2280/joy-to-couples.html> visited on 20/10/2015 at 2.00 pm

134 HINDUSTAN TIMES, 'Govt bans import of human embryos for commercial surrogacy', New Delhi, Oct 28, 2015 16:29 IST, C.f <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

(NCW) approximately more than 3,000 ART clinics of the India are providing surrogacy services.¹³⁵

The above figures reflect the India has become top most destinations for reproductive factory. In the modern period the number of infertile couples is increasing in parallel the use of assisted reproductive technology especially the use surrogacy is also increasing. There are many of the Bollywood celebrities who have opted the IVF surrogacy such as Shah Rukh Khan, Amir Khan, **Farah** Khan and Sohail Khan etc.

Today, the use of surrogacy does not remain limited to the infertile couples only, but it is also providing opportunity to the single person, homosexuals and even Transgender are also claiming right to become parents. However, in India after recent Surrogacy Regulation Bill 2016 the service of surrogacy is limited to the Indian infertile heterosexual married couples only.

2.5.3 Meaning of Surrogacy

Literally, the word 'surrogacy' means 'substitution' or 'replacement'. A 'surrogate women' is called as a 'substitute mother'. In surrogacy a surrogate woman is agreed to bear a child for another woman either for financial or sympathetic reasons. The surrogate is also called as the 'substitute' or 'tentative' mother of the child as she conceives, bears and delivers a child on behalf of another woman who may be later on recognized as the 'real' i.e. social and legal mother of the child.

Generally, in 'genetic surrogacy', also known as 'partial surrogacy', a woman's egg is fertilized with the sperm of the man (the commissioning father) through artificial insemination. The surrogate may be a genetic mother of the child, however, she handovers the role of social or legal mother to another woman called as the commissioning mother of the child. Thus, there is a genetic link between the surrogate and the child. If the commissioning father is infertile or not interested to transfer of the defective genes to the child, then in such case the surrogate's egg is fertilized with a donor sperms is referred as 'total surrogacy'.

135 SAMA Report 2012, 'Birthing a Market, A Study on Commercial Surrogacy', P. 7 available at http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

In another form of surrogacy, in which in vitro fertilization process is used. In IVF surrogacy, the eggs and sperms are taken from the commissioning couple or from the anonymous donors and subsequently the embryo is placed into the surrogate womb. It is called as 'gestational surrogacy' or 'full surrogacy' because surrogate women carry out the functioning of gestation for the commissioning couple. However, in such type of surrogacy there is no genetic link between the surrogate and the child.

2.5.3.1 Definitions of Surrogacy:

The word “surrogate,” is originated from the *Latin* word “Subrogare,” it means “substitute” or “deputy”- that is, a person appointed to act in the place of.¹³⁶

Generally, the surrogacy means when a woman bears a pregnancy and delivers the baby for another woman, either from the use of her own egg or from the placed of fertilized eggs of another woman in her womb.

It is difficult to give uniform and universal definition of surrogacy. There are various definitions of surrogacy and each one has the own notion over the subject matter.

1) “The Black’s Law Dictionary defines the surrogacy as the process of carrying and delivering a child for another person.”¹³⁷

The definition which is given under the black’s law dictionary is very short but concise.

2) The Warnock Committee Report (1984): defines surrogacy as a practice in which woman agrees to carry a child for another person with the intention to hand over the child after birth.¹³⁸

The definition of the Warnock Report (1984) has cleared that intention that after the birth of the child the surrogate woman has to surrender the child to the couple. But it

¹³⁶ Anu, Pawan Kumar, et.al., ‘ Surrogacy and Women’s Right to Health In India: Issues and Perspective, Indian Journal of Public Health, Volume 57, Issue 2, April-June, 2013, available at <http://www.ijph.in/article.asp?issn=0019-557X;year=2013;volume=57;issue=2;spage=65;epage=70;aulast=Anu%2C> visited on 7/02/15 at 9.00 pm.

¹³⁷ Law Commission of India Report No. 228th, at P. 9, available at lawcommissionofindia.nic.in/reports/report228.

¹³⁸ *Ibid*

is not specifically made clear that whether single person has the option of surrogacy or not.

3) In medical Phraseology, the expression of surrogacy means a woman acting as a substitute mother in the position of the natural mother.¹³⁹

4) The American Law Reports (1989): defines a very standard of surrogacy that, surrogacy is a contractual undertaking whereby natural or the surrogate mother, for a fee, agrees to conceive a child to the natural father and to terminate all of her parental rights subsequent to the birth of the child.¹⁴⁰

5) The New Assisted Reproductive Technology (Regulation) Bill, 2014 under Section 2 (zq) defines the surrogacy as an arrangement where the surrogate carry the pregnancy of the child through the method ART with the intention to deliver the baby to the commissioning parents and in which the surrogates and her husband gametes are not used in it.¹⁴¹

6) The surrogacy (Regulation) Bill, 2016 under Section 2 (zb) defines that the "surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth.¹⁴²

The definitions of surrogacy given under the ART Bill, 2014 has covered the various relevant points, such as there should be an agreement between the parties before the pregnancy, neither the surrogate or her husband donates the gametes (i.e. Eggs of women or sperm of men) to the commissioning parties, but the definition of the latest Bill, 2016 is silent on it. However, in both definitions the surrogate has to relinquish the baby to the commissioning couple.

2.5.3.2 Definitions of Surrogate Mother:

139 Cf. <http://en.wikipedia.org/wiki/Surrogacy>, as visited on 25th October 2010.

140 Gehna Vaishnavi, Navneet Tatkar ' Surrogacy Medico legal Issues,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.5

141 The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 6 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>

¹⁴² The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 3, visited on 21/11/2016 at 3.00 pm.

The term surrogate mother has been defined widely by the various writers and different views have expressed from time to time. A surrogate mother is commonly called as a woman who carries a pregnancy to the infertile couples.

1. The Encyclopedia Britannica defines “Surrogate Motherhood” as the Practice in which a woman (surrogate mother) bears a child for a couple unable to produce children, usually because the wife is infertile or unable to carry a pregnancy to term. The surrogate is impregnated either through *ARTIFICIAL INSEMINATION* (usually with the sperm of the husband) or through the implantation of an embryo in produced by in vitro fertilization. The surrogate traditionally given up all parental rights, though this has been subject to legal challenge.¹⁴³

The definition given under the encyclopedia Britannica is very wide and provides couple can use the method of surrogacy only when women is infertile but now days many of women choosing surrogacy to avoid psychological and financial pressure.

2. The Black’s Law Dictionary: A surrogate woman is, a woman who carries a child to term on the behalf of other women and assigns her parental rights to that woman and the father.¹⁴⁴

3. According to Peter R. Brisden the term Surrogate Mother or Surrogate means the women who carries and delivers a baby for another.¹⁴⁵

4. Under the Law Commission of India Report No. 228th, 2009, defines, the surrogate is the woman who carries the baby for the woman created either by the use her egg or transfer of a fertilized egg of another woman.¹⁴⁶

5. The New Assisted Reproductive Technology Bill, 2014 Under Section 2 (zr) defines “surrogate mother”, means a woman who is a citizen of India and is a resident of India, who agrees to have an embryo generated from the sperm of a man who is not

143 Encyclopedia Britannica (India) Pvt. Ltd., New Delhi., Impulse Marketing, New Delhi, 2005, vol. 9 at p. 178. In India the Assisted reproductive Technology Bill, 2010 and 2014 has prohibits the use of surrogate eggs for the commissioning couple.

144 Bryan A. Garner, Black’s Law Dictionary, 7th Edn.1999, west group publication Delhi, at p. 1458.

145 Peter R. Brisden, Textbook of Assisted Reproductive Technologies edited by David Gardner Ariel Weismann, Informa Healthcare Publication London, 3rd Edn. 2009 at P.818

146 Law Commission of India Report No. 228th, at P. 9, available at lawcommissionofindia.nic.in/reports/report228.pdf. as visited on 15th May 2011 on 1400 hrs.

her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the commissioning couple that had asked for surrogacy.¹⁴⁷

6. The Surrogacy (Regulation) Bill, 2016 Section 2 (ze) defines the “surrogate mother” means a woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of the embryo in her womb.¹⁴⁸

However, the use of surrogate gametes (eggs) for commissioning of surrogacy is permitted by the Indian Law Commission Report No. 228th 2009, however it is forbidden by the both Assisted Reproductive Technology (Regulation) Bill, 2010, 2014 and the Bill, 2016.

2.5.3.3 Definition of Commissioning Couple/Intending Couple:

i. The Assisted Reproductive Technology Bill, 2014, under Section 2 (h), provides the definition of “Commissioning Couple” means the infertile married couples approaches to the authorized ART clinic or bank for ART services.¹⁴⁹

ii. The Surrogacy Regulation Bill, 2016 Section 2 (r) states that the “intending couple” means a couple who intended to become parents by the use of surrogacy and has medically certified as infertile couple.¹⁵⁰

The present Bill, 2016 makes the compulsory for the intending couple to carry the certificate of infertility for commissioning of the surrogacy services.

2.6. SURROGACY ARRANGEMENT:

Generally, the surrogacy arrangement¹⁵¹ means an arrangement where a woman makes the agreement to carry the child for a couple or a person with the purpose to

147 The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 7 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

¹⁴⁸ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 3, Visited on 21/11/2016 at 3.00 pm. However, the surrogate required to fulfill the conditions laid down in section 4 (iii) (b).

149 The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 3 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

¹⁵⁰ Supra at 129

¹⁵¹ Supra at 130,

relinquish the child after birth to the commissioning parents. According to the ART Bill, 2014 the Surrogacy agreement is made between the commissioning couple and the surrogate mother for the ART services.

In other words, surrogacy arrangement is nothing but an arrangement between the surrogate mother and childless couple or another person who may be single persons with the intention to deliver the child after the birth to the commissioning couple.

2.6.1. Transnational/Global Surrogacy Arrangement:

When the commissioning couple makes the surrogacy agreement with a surrogate woman beyond the international borders, i.e. the women of the other country is called as the transnational surrogacy arrangement. So, this arrangement may be a commercial in nature because surrogate is paid for carrying the child of the commissioning couple. However, it is said that the western commissioning couples or persons enters into surrogacy arrangements with a vulnerable woman of the lower-resource countries such as India or Thailand. It may be due to less cost surrogacy or commercial surrogacy may be less restrictive than in their own countries.¹⁵²

2.7. PARTIES INVOLVED IN SURROGACY ARRANGEMENT:

The following parties are involved in the surrogacy arrangement:

- Commissioning couple
- Surrogate Mother
- Surrogate Husband
- Fertility specialists
- Medical Practitioners and Lawyers,

152 Nicole F. Bromfield, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations, published online 1st July 2014, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 12/11/2014 at 10.30. pm

- Surrogacy Clinic
- Appropriate Authority¹⁵³

2.8. REASONS FOR SURROGACY:

The first and foremost reason for surrogacy arrangement is that it fulfills the strong desire to have one's own genetic child and replaces the earlier option of adoption to the infertile couple. Thus, the surrogacy is an excellent option to fulfill dream of becoming parents of one's own flesh and blood as a progeny.

Besides this, there are also various other reasons for availing the service of surrogacy. These are as follows:

- i) **Female infertility:** It may be due to medical or natural reasons which make the carrying of pregnancy or delivery risky. Thus, the early menopause or late marriages in urban areas may be reasons for female infertility.
- ii) **Risky Pregnancy:** Sometimes the commissioning women may be fertile and healthy, but still she prefers the someone else to carry the pregnancy and labor on behalf of her in order to avoid risk of pregnancy by her.
- iii) **Same Sex Couple:** Surrogacy provides the best option for the same sex couples to fulfill their dream of becoming parents of their own child. However, it may not be possible to have a child by the natural way.
- iv) **Single Parent:** A single person can become parents of their own child with the help of surrogacy method.¹⁵⁴

Apart from the above reasons, there are also other persons who enter into the surrogacy arrangement that is the Indian surrogate women who are poor such as daily wage earners or who have no employment or husband do not contribute sufficiently to

¹⁵³ Appellate Authority as per the New Surrogacy Bill, 2016

¹⁵⁴ Surrogacy Laws in India, available at http://www.surrogacylawsindia.com/index_inner.php?id=%2012&menu_id=1 , visited on 24-12-12 at 11.00 am.

family, so such poor and unemployed women enters into surrogacy arrangement and becomes the surrogate mother for the reason of money.¹⁵⁵

2.9. TYPES OF SURROGACY

Mainly, Surrogacy is divided into four types, which are given as below:

2.9.1. TRADITIONAL SURROGACY major types of surrogacy

2. 9.2. GESTATIONAL SURROGACY major types of surrogacy

2.9.3. ALTRUISTIC SURROGACY

2.9.4. COMMERCIAL SURROGACY¹⁵⁶

The explanation of the above mentioned types of surrogacy is as follows:

2.9.1. Traditional / Natural Surrogacy:

The traditional surrogacy is also called as Straight method, wherein the surrogate mother is pregnant with her own genetic child. However, the child was conceived with the aim to relinquishing the child to be raised by the biological his wife. The child may be conceived through natural insemination (sexual intercourse) or home artificial insemination using fresh or frozen sperms or IUI (Intrauterine Insemination). Thus, in traditional surrogacy the sperm of the male commissioning couple or donor sperm may be utilized. In the case of the 'commissioning couple' being both females and single woman partners, then the donor's sperm may be used.¹⁵⁷ According to the 228th Law Commission of India Report, 2009, the traditional surrogacy' may be understood to be a partial or genetically contracted motherhood.¹⁵⁸ Therefore, the method of surrogacy is called as traditional because under such arrangement the

155 G. A. Solanki, Birth Orders, Baby Farms, and Surrogate Motherhood a Womb for Rent, available at http://worldwidejournals.com/gra//file.php?val=October_2012_1350412513_d4107_36.pdf, visited on 13/01/2013 at 9.00 am.

156 Charushila, "Surrogacy -- A Hope", <http://www.lawyersclubindia.com/articles/Surrogacy-A-Hope-3319.asp>

157 Cf. <http://en.wikipedia.org/wiki/Surrogacy>, as visited on 25th October 2010.

158 Law Commission of India Report No. 228th, at P. 10, available at lawcommissionofindia.nic.in/reports/report228.pdf. as visited on 15th May 2011 on 1400 hrs.

commissioning husband is the biological father of the child and the surrogate woman is the biological mother of the child.¹⁵⁹

It is clear from the concept of traditional surrogacy that surrogate mother provides her eggs to the commissioning couple; however, as both the Assisted Reproductive Technology (Regulation) Bill, 2010, 2014 and the Bill, 2016 prohibits the surrogate mother from donating her eggs to the same commissioning couple. If surrogate mother is allowed to provide her egg it creates medical as well as legal problems like who can be called as the actual mother of the child.

However, the supporters of the traditional surrogacy provide that the genetic link of the surrogate is not so vital than the link between the commissioning couple with their child.¹⁶⁰

The traditional surrogacy is much more financially affordable as compared with gestational surrogacy, which involves the in vitro fertilization process. However, there are certain issues attached with traditional surrogacy, which have to be taken into consideration such as family history of any medical disorder or a history of genetic birth defects of the surrogate mother. Ultimately, in traditional surrogacy the surrogate woman has genetic link with the baby, thus she becomes the biological mother of the surrogate baby.

2.9.2. Gestational Surrogacy:

Gestational Surrogacy is also identified as the host or full surrogacy. It is a totally modern method, because it depends upon the IVF (In vitro fertilization) technology where the egg of the commissioning mother or a donor egg fertilized with the sperm of the commissioning father or a donor sperm. Thereafter, the doctor inserts the good embryo into the womb of surrogate women. The surrogate after the delivery of the child handovers the baby to the commissioning parents according terms of the contract. Most significant part of the gestational surrogacy is that the surrogate has no genetic link with the baby. And there may be cases where the commissioning parents may use both the donor sperms and eggs, so they are the biological parents of the

159 Anil Trehan, "Surrogate Motherhood In India: A Conceptual and Effectual Analysis and Recommendations of Indian Surrogacy Law Centre", X, Issue 4 (2009) , NAYA DEEP at p.23.

160 Surrogate Motherhood Ethical or Commercial, Centre for Social Research (CSR), at p.13 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf> , visited on 23/10/ 2013 at 12.00 pm

child to be called as legal parents of the child.¹⁶¹ However, in India, according to the ART Bill, 2014 one of the commissioning parents of the couple must be a donor in surrogacy transaction.

In other words, in gestational surrogacy the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father or to a parent who is unrelated to the child (e. g. Because the child was conceived using egg donation, sperm donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.¹⁶²

Thus, in gestational surrogacy an embryo is generated through the IVF process and placed into the womb of the surrogate.¹⁶³ Now in most of the countries the gestational surrogacy is recognized as a treatment option for the infertile couples.¹⁶⁴

However, in gestational surrogacy the intended parents have to pay the IVF clinic cost, IVF medications, surrogate compensation and fees for lawyers. So this entire fee structure puts a huge financial burden on the couple seeking surrogacy. Besides this, the gestational surrogacy is a very more complex, expensive, and time consuming process and requires too much medical interference, but still the number of gestational surrogacy is increasing due to the reason to get the genetic child of their own.

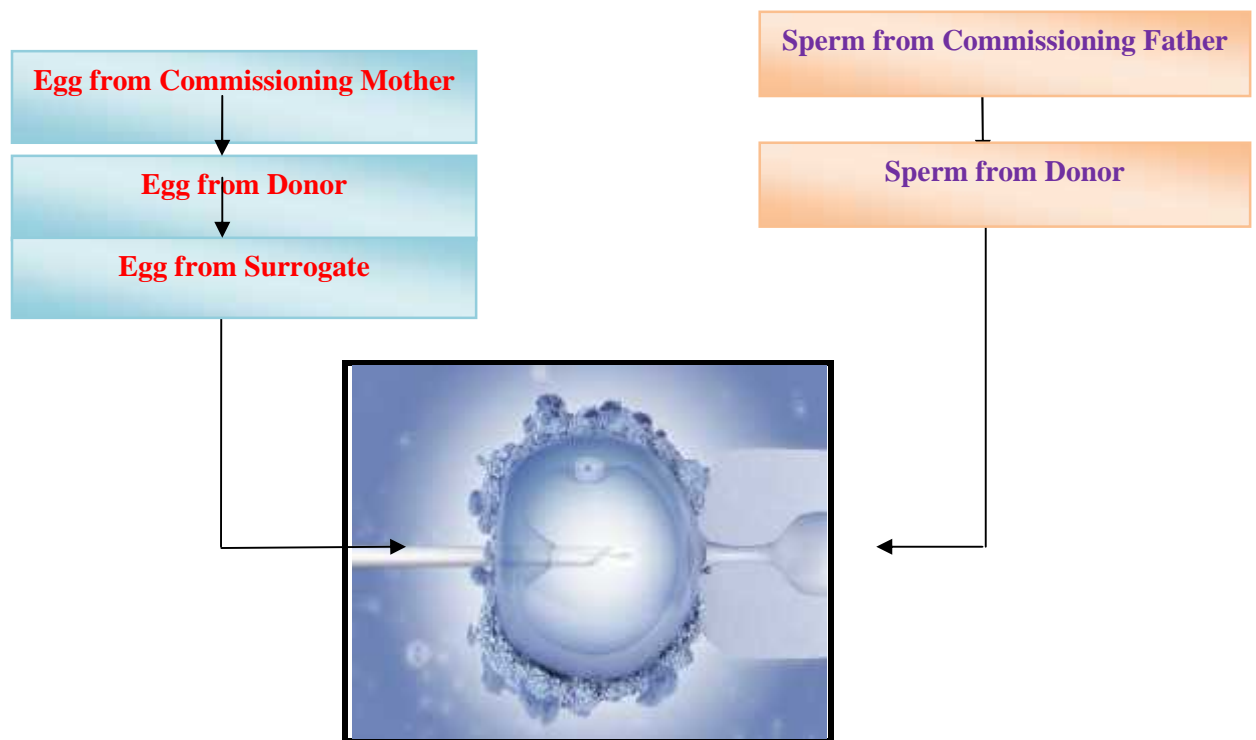
161 Gehna Vaishnavi, Navneet Tatkar ‘ Surrogacy Medico legal Issues,’ Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 30

162 Cf. <http://en.wikipedia.org/wiki/Surrogacy>, as visited on 25th October 2010.

163 Law Commission of India Report No. 228th, at P. 9, available at lawcommissionofindia.nic.in/reports/report228.pdf. as visited on 15th May 2011 on 1400 hrs.

164 Peter R Brinsden.(ed.), Textbook of Assisted Reproductive Technologies, Informa Healthcare House, London, 3rd edn., 2009 at p. 817

Chart No. 2 Gestational Surrogacy



In gestational or IVF surrogacy a child may be related to the legal parent's i.e. commissioning couple in any of the following four ways:

- i. **Linked to Legal Mother (Use of Commissioning Mother's Egg and Donor Sperm):** When the mother cannot carry the pregnancy herself, but she is able to produce her egg, however, the father lacks viable sperm. Then, in such case mother's egg and the donor sperm are fertilized in *In vitro* and the embryo is transferred into the womb of the surrogate mother.
- ii. **Linked to Legal Father (Use of Donor Egg and Commissioning Father's Sperm):** The mother is infertile and cannot produce viable eggs. Then donor eggs and father's sperm may be used in vitro fertilization. The embryo is transferred into the womb of the surrogate women.
- iii. **Linked to Both Parents (Use of Both Commissioning Mother's eggs and Father's Sperms):** When the commissioning mother is incapable to bear the child,

then in such case an embryo is created by the use of both commissioning couples egg and sperm which is fertilized through the IVF process and thereafter, transferred into the womb of the surrogate. In such case the child is biologically related to both the parents.

iv. Unlinked to Commissioning Parents (Use of Both Donor egg and Donor Sperm): If the commissioning parents are unable to create an embryo of their personal egg and sperm. Then in such case the donated embryo or embryo created by use donated sperm and egg and transferred into the womb of the surrogate. The frozen embryo may also be available.¹⁶⁵ Thus, when both donated sperm and egg is used then in such case child is not genetically connected with the commissioning parents and it is similar to the adoption process.¹⁶⁶

2.9.3. Altruistic surrogacy:

Altruistic Surrogacy is also called as the free surrogacy. In altruistic surrogacy the surrogate does not receive any financial reward or fee for carrying the baby of the commissioning parents. However, all the expenditure regarding the pregnancy and delivery of the child has to be paid by the commissioning parents. It has the different aspect as regard to the commercial criteria. It deals with affection and care as consideration which is the most relevant criteria.¹⁶⁷ Generally, in altruistic surrogacy, a surrogate mother is the closest relatives or friends of the intended parents.

2.9. 4. Commercial surrogacy:

The commercial surrogacy is also known as the paid surrogacy. Where the surrogate women are hired and paid for bearing of the child of the commissioning parents. The commercial surrogacy is legal in India as well as some of the countries. It becomes popular because of the number of reasons such as excellent medical infrastructure,

165 Gehna Vaishnavi, Navneet Tatkhar ‘ Surrogacy Medico legal Issues’, Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 36

¹⁶⁶ In adoption the adoptive parents are the legal parents of the child, even though they are not genetically related to the child.

¹⁶⁷ Gehna Vaishnavi, Navneet Tatkhar ‘Surrogacy Medico legal Issues’, Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 29, However, The New Assisted Reproductive Technology (Regulation) Bill, 2014, under section 46 (12) provides that no assisted reproductive technology clinic shall obtain or use sperm or oocyte donated by a relative or known friend of either of the parties seeking assisted reproductive technology treatment or procedures. It means the ART, Bill, 2014, prohibits use of gametes known persons.

high international demands, unregulated laws till date and ready availability of poor surrogates.

However, commercial surrogacy is criticized in a number ways, such as it represents selling of baby as a 'product'. And it is also charged with a lot of emotional, moral and ethical issues. Sometimes it is also called by using probably offensive words like **"Wombs for rent," "outsourced pregnancies," or "baby farms."**

Since 2002, the commercial surrogacy has been legalized in India, because the government has promoted the medical tourism from abroad. Therefore, India became the top most country in international surrogacy. The Indian surrogates become very popular in international surrogacy industry due to the low cost. The Indian ART clinics provide a complete surrogacy package¹⁶⁸ to their patients, which may have cost around \$10,000 and \$28,000 only. Therefore, the low cost surrogacy is the one of the main reasons for choosing India as a surrogacy destination by the foreign commissioning couple. Later on in *Baby Manji case*¹⁶⁹ the Supreme Court of India has given green signal for commercial surrogacy, which has again increased the more international confidence for commissioning of surrogacy in India.¹⁷⁰

The Law Commission of India in its 228th Report has also stated that the India has become the favorable reproductive tourism destination for foreign commissioning couples.¹⁷¹

Thus, now the surrogacy industry has reached business of at least \$445 million annually.¹⁷² The Chairperson Lalit Kumarmanglam of the *National Commission of*

¹⁶⁸ The surrogacy package includes the fertilization, the surrogate's fee, and delivery of the baby at a hospital charges.

¹⁶⁹ Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518., Recently, the Hon'ble Supreme Court of India in the case Jayshree Wad vs. Union of India civil writ petition, 95/2015 issued notice to Government of India to ban commercial surrogacy to all foreigners thereafter the Government of India through its notification dated 4th November banned commercial surrogacy in India also banned all foreigners commissioning surrogacy in India.

¹⁷⁰ Charushila, "Surrogacy -- A Hope", <http://www.lawyersclubindia.com/articles/Surrogacy-A-Hope-3319.asp>, as visited on 22nd January 2011 at 1400 hrs.

¹⁷¹ Law Commission of India Report No. 228th, at P. 9, available at lawcommissionofindia.nic.in/reports/report228.pdf. as visited on 15th May 2011 on 1400 hrs. According to the 228th Law Commission Report, i. Around 1/3rd fee as compared to developed countries like the USA ii. Less cost-effective treatment for infertility in India. ART industry is now a 25,000 core rupees pot of gold. Anand, a small town in Gujarat, become a favorable place for commercial surrogacy arrangement. Wombs in India are for rent which are converted into babies for foreigners and procure dollars for Indian surrogates."

Women (NCW) said in the *'The Economic Times'* that India has become the surrogacy hub in the entire world and 17-20 percent annual growth. And it is also said that around 30,000 illegal fertility clinics are operating in the country with the majority of them being located in Gujarat, Maharashtra and Delhi.¹⁷³ According to the *Report of Confederation of Indian Industry, 2012* that every year around 10,000 foreign commissioning couples visit to India just for ART services and out of which about 30% are homosexuals or single persons.¹⁷⁴

However, it is argued that the commercial surrogacy that surrogacy is alike to the baby selling, hence the law which prevents the sale of human organs should be made applicable to the surrogacy arrangement. Whereas, some of them say that surrogacy arrangement is a win-win situation to the commissioning couple and surrogate women. Therefore, the surrogacy satisfies the needs the two distressed women.¹⁷⁵

The report of the Permanent Bureau of the Hague Conference on Private International Law has also noted the majority of the countries have prohibited the commercial surrogacy.¹⁷⁶ In some minority States, the surrogacy arrangement is the regulated form, whereas in other States it is in the unregulated form. The *Hague Conference Reported* that the transnational surrogacy has become a huge business in the world and India is the most popular reproductive tourism center, which having the surrogacy business around \$400 to \$500 million per year. But, the transnational surrogacy has

172 HINDUSTAN TIMES, 'Govt bans import of human embryos for commercial surrogacy', New Delhi, Oct 28, 2015 16:29 IST, C.f. <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

173 The Economic Times, 'Blanket ban likely on NRIs, PIOs, foreigners having kids through surrogacy', 'By PTI | 15 Oct, 2015, 10.49 PM IST c. f. <http://economictimes.indiatimes.com/news/politics-and-nation/blanket-ban-likely-on-nris-pios-foreigners-having-kids-through-surrogacy/articleshow/49391832.cms> visited on 24/10/2015 at 12.39 pm.

174 Gehna Vaishnavi, Navneet Tatkar ' Surrogacy Medico legal Issues', Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 31

175 Surrogate Motherhood Ethical or Commercial, Centre for Social Research (CSR), at p. 15 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf> , visited on 23/10/ 2013 at 12.00 pm

176 Surrogacy has been banned in much of Europe, for example, usually on the ground that it commodifies women. See Article Hochschild, *Childbirth at the Global Crossroads*, 20 AMERICAN PROSPECT, Sept. 19, 2009, at 25, 27 (stating that surrogacy is banned in China, New York and much of Europe), available at <http://prospect.org/article/childbirth-global-crossroads-0> (last visited Mar. 13, 2012); Hague Conference on Private Int'l Law, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, at 3, Parel. Doc. No. 11 (Mar. 2011), available at <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf> (last visited Mar. 13, 2012) [hereinafter Hague Conf. on Private Int'l Law].

also raised various complicated issues like issues of visitation, custody, paternity, maternity, and children's rights.¹⁷⁷

In India, presently the proposed Assisted Reproductive Technology (Regulation), Bill, 2014 has banned surrogacy to all foreigners and allowed only to foreigner married to an Indian citizen, Overseas Citizen of India (OCIs), Non Resident Indians (NRIs) and People of Indian Origin (PIOs)¹⁷⁸

At the end, I would say, the India has emerged as a reproductive tourism destination and growing like a mushroom due to small fee of surrogacy, availability of specialist doctors, easy accessibility of poor surrogates, ban of surrogacy in most of the countries and lastly most importantly the absence of surrogacy law in India.

Recently, on 14th October 2015,¹⁷⁹ the Hon'ble Apex Court of India in *Jayshree Wad Vs. Union of India*¹⁸⁰ has issued notice to the Indian Government to ban the commercial surrogacy to foreign couples and revise the policy which permitting the import of human embryos. Thereafter, immediately the Department of Health Research of the Government of India issued notification on 4th November 2015 regarding not to support commercial surrogacy to foreign couples. It is restricted to the Indian married couples only.¹⁸¹ At present, in India the draft of the surrogacy Bill, 2016 prohibited the commercial surrogacy and recognized it as a criminal offence. Thus, today only altruistic surrogacy is available to the Indian infertile couple.

2.10. WHO CAN BECOME A SURROGATE MOTHER IN INDIA?

If any woman decided to become as a surrogate mother then she should fit for becoming it. Hence, all the cautions, conditions and its consequences should be taken into consideration by the surrogate woman before going to become as a surrogate.

¹⁷⁷ Barbara Stark, 'Transnational Surrogacy and International Human Rights Law' July 27, 2012, at p.3 available at 370 available at http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1719&context=faculty_scholarship visited on 26/10/2015 at 2.40 pm

¹⁷⁸ The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 44 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

¹⁷⁹ Amit Anand Choudhary, TNN | Oct 15, 2015, 02.55AM IST, 'SC suggests ban on commercial surrogacy,' [c.f.http://timesofindia.indiatimes.com/india/SC-suggests-ban-on-commercial-surrogacy/articleshow/49365734.cms](http://timesofindia.indiatimes.com/india/SC-suggests-ban-on-commercial-surrogacy/articleshow/49365734.cms)

¹⁸⁰ Civil writ petition 95/2015 C.f. <http://courtnic.nic.in/courtnicsc.asp>

¹⁸¹ C.f. <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> visited on 10/11/2015 at 9.30.pm

However, any woman who decides to become a surrogate mother has to comply with the conditions given by the Surrogacy (Regulation) Bill,¹⁸² 2016, which are as follows:

1. The surrogate mother should have the 'CERTIFICATE OF ELIGIBILITY' issued by the appropriate authority.
2. A woman must be an ever married woman and having at least one healthy child.
3. A woman can become a surrogate or help in surrogacy or provide her egg only once in her lifetime.
4. The woman should be between the ages of 25-35 years.
5. She must possess the medical and psychological fitness certificate from a medical practitioner.
6. A woman must be close relatives of the intending couple to act as a surrogate mother.
7. The surrogate is entitled to claim the remuneration from intending couple to act as a surrogate woman except medical bills and insurance coverage.
8. A woman must give informed consent to act as a surrogate.
9. A woman must be a citizen of India to act as a surrogate and the resident of India.¹⁸³

Besides the above mentioned conditions, the following are the some of the conditions which were mentioned in the Previous ART Bill, 2014 to act as surrogate mother.¹⁸⁴

10. The written consent of the husband of surrogate woman is mandatory prior to become a surrogate.
11. A surrogate woman is required to enter into a surrogacy agreement with the commissioning couple and she is bound by it.
12. During the period of surrogacy agreement, the surrogate husband is under obligation to take care of their own existing children and for this purpose he required to give written consent of the same.

¹⁸² Section 4 (b) provides the eligibility for becoming surrogate mother under the Surrogacy (Regulation) Bill, 2016, C.f., The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 5, Visited on 21/11/2016 at 3.00 pm.

¹⁸³ *Ibid*

¹⁸⁴ The Assisted Reproductive Technologies (Regulation) Bill-2014, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

13. A woman who agreed to act as a surrogate must be good in overall health and she must be free from any kind diseases, especially the sexually transmitted diseases (STD) like HIV or AIDS as well as all other diseases in a communicable form or thyroid.
14. To act as a surrogate a woman must have 'Aadhar Card' as a evidence of the identity.
15. The surrogate woman is required to give declaration that from the last 6 months before becoming surrogate she has not done any blood transfusion.
16. A woman who agreed to act as a surrogate mother shall not act as an oocyte donor for the commissioning couple.
17. A surrogate woman is allowed only a three times embryo transfer for the same commissioning couple.
18. The surrogate must be agreed that the embryo which is going to be transferred in her womb for the carrying pregnancy for another is created from the sperm of another male which is not of her husband and the egg from another female.
19. The surrogate women must agree for surrendering the surrogate child to the commissioning parents.
20. It is the mandatory duty of the surrogate women to renounce all parental rights over the child to the commissioning couple.¹⁸⁵
21. A woman intended to become surrogate is required to give her informed consent for the surrogacy arrangement.¹⁸⁶

¹⁸⁵ According, to the previous Assisted Reproductive Technology Bill, 2010, a surrogate mother should be of age 21 to 35 years, presently as per the ART Bill, 2014 the surrogate should be minimum age of 23 years so it increased from 21 to 23 of minimum age and if the closest relatives decided to become surrogate then they should be of same generation of the commissioning couple, however, the New ART Bill, 2014, has prohibited the use sperm or oocyte donated by a relative or known friend of either of the parties seeking assisted reproductive technology treatment or procedures., and also the provision of the giving written consent by the husband of the surrogate regarding take care of the well being of the existing child/children of their own, especially during the surrogacy agreement period and till his wife who is acting as a surrogate mother is free from the obligation of the agreement is newly added under the ART Bill, 2014 which was not in the ART Bill, 2010. The Assisted Reproductive Technologies (Regulation) Bill-2014, at pp. 43, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

¹⁸⁶ The reason is that women has experienced pregnancy prior to the surrogate arrangement and has the knowledge on which she is giving her decision.

22. She shall be morally and psychologically stable and also free from any criminal record.¹⁸⁷
23. However, there are some other medical conditions which may prevent a woman from becoming a surrogate mother, such as overweight, heavy smoker, drinker, so such woman is not suitable to act as a surrogate.
24. It is very important that a woman who is consenting to act as a surrogate shall have the emotional support of a partner, family or friends during the pregnancy as well as after delivery.
25. It is very important that the surrogate should be provided with legal consultation in order to understand the terms of surrogacy contract and the legal consequences of it.¹⁸⁸

Thus, today a foreign woman cannot act surrogate mother India in India, however, it is also suggested that during the gestation period of Indian surrogate women should not be allowed to go abroad because due to the chance of conducting sex selection test in outside the India.

A very recently, on 15th October 2015, in The Economic Times, the chairman Laiti Lumarmaglam of the National Commission of Women [NCW] said to the Health Ministry of India to allow single women whether they are widowed or divorced to act as surrogate.¹⁸⁹

Thus, becoming a surrogate mother is really not easy task a proper planning, caution and counseling are required. But after the study of surrogacy it can be seen that many of the poor and illiterate women are choosing to become a surrogate for the

187 Grayce P. Storey, "Ethical Problems Surrounding Surrogate Motherhood", <http://yale.edu/ynhti/curriculum/units/2000/7/00.07.05.x.html> as visited on 10th August 2011 on 14 hrs.

188 Surrogacy India., http://delhi-ivf.com/become_surrogacy.html, as visited on 12th September 2011 at 1000 hrs.

189 The Economic Times, 'Blanket ban likely on NRIs, PIOs, foreigners having kids through surrogacy', 'By PTI | 15 Oct, 2015, 10.49 PM IST c. f. <http://economictimes.indiatimes.com/news/politics-and-nation/blanket-ban-likely-on-nris-pios-foreigners-having-kids-through-surrogacy/articleshow/49391832.cms> visited on 24/10/2015 however, the Assisted Reproductive Technology (Regulation), Bill 2010, was allowed single women to act as surrogate mother.

satisfaction of the economic need and sometime even the closest relatives, friends become the surrogate mother for the saving the family of intended parents.

2.11. WHO CAN OBTAIN SERVICE OF SURROGACY IN INDIA?

Today, according to the recent Surrogacy Regulation Bill, 2016 only an Indian married infertile couples are allowed to avail the surrogacy services in India.¹⁹⁰

As per the Surrogacy Bill, 2016 the following conditions are required to fulfill by the intending the couple in order to avail the surrogacy services.

1. The couple must carry the 'CERTIFICATE OF ESSENTIALITY' issued by the appropriate authority for availing the service of surrogacy from the government registered surrogacy clinic.¹⁹¹
2. The Indian heterosexual couples must be married, at least for the period of 5 years and either one or both of them have to prove the infertility problem.
3. The commissioning woman must be between 23 to 50 years of age and the commissioning man must be between 26 and 55 years.
4. They must approach only to close relatives for surrogacy arrangement.¹⁹²

Thus, the Surrogacy Bill, 2016 prohibits the following persons for opting surrogacy service in India:¹⁹³

- i. Single person
- ii. Couples in live-in relationships
- iii. Homosexual couples
- iv. All Foreigners, including NRI and PIO and OCI
- v. The heterosexual married Indian couples having a surviving natural, adopted or surrogate child is not eligible for opting surrogacy for another baby.¹⁹⁴

190 The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 5, Visited on 21/11/2016 at 3.00 pm

¹⁹¹ Section 4 (a) of the Bill, 2016 provides that the intending couple must carry the certificate of essentiality issued by the appropriate authority, about the infertility certificate issued by District Medical Board, an order of parentage and custody of the surrogate child passed by the JMFC Court, Insurance coverage to a surrogate mother.

¹⁹² Supra at 173

¹⁹³ *Ibid*

Therefore, now the practice of surrogacy is available only to the Indian married heterosexual couples only after satisfaction of the conditions to the appropriate authority laid down in section 4 (a) of the Bill, 2016.

2.12. A WOMAN WHO REQUIRED SURROGACY ARRANGEMENT:

A. *In Vitro Fertilization (IVF) Surrogacy Method:*

- i. Principally, the *IVF* surrogacy arrangement is suggested to the female who produce the eggs, but do not have the uterus for carrying the baby. In following cases we can say the women can obtain service of surrogacy:
 - a) Natural missing of the uterus.
 - b) Removal of the uterus by surgical operation because of the cancer, severe bleeding during Caesarean or in split uterus.
- ii. In case of a female whose uterus is abnormal. The uterus may be said as abnormal or malformed in following cases such as unicornuate uterus,¹⁹⁵ T shaped uterus, bicornuate uterus with¹⁹⁶ or damaged uterus because of T.B of the endometrium,¹⁹⁷ severe Asherman's Syndrome¹⁹⁸ or uterine surgeries for damaged or fibroid uterus which are incapable to carry a pregnancy, therefore, suggested for IVF surrogacy arrangement.
- iii. Frequent miscarriages or continual fail of IVF cycles.

¹⁹⁴ The Bill, 2016 allows the commissioning of surrogacy to the intending couple who is having the mentally or physically challenged child or the child suffered from life threatening disorder or fatal illness. However, the certificate issued by the District medical Board regarding no permanent cure of the child.

¹⁹⁵ Unicornuate uterus -a unicornuate uterus is the half the size of a normal uterus and there is only one fallopian tube. Because of its shape, it is described as a uterus with one horn. It is a rare abnormality, affecting about one in 1,000 women. It develops in the earliest stages of life, when the tissue that forms the uterus does not grow properly. If you have a unicornuate uterus, you probably have two ovaries but only one will be connected to your uterus., *c.f.* <http://www.babycentre.co.uk/a551934/abnormalities-of-the-uterus-in-pregnancy#ixzz3te5do5ve>

¹⁹⁶ Bicornuate uterus- instead of being pear-shaped, this type of uterus looks more like a heart, with a deep indentation at the top. It is called a uterus with two horns, because of its shape. It's thought that fewer than one woman in 200 women has a bicornuate uterus. *C.f.* <http://www.babycentre.co.uk/a551934/abnormalities-of-the-uterus-in-pregnancy#ixzz3te7uSI00>

¹⁹⁷ Endometrium -the membrane that lines the uterus of a female mammal. A fertilized egg must attach itself to the endometrium to continue to develop., *c.f.* <http://www.thefreedictionary.com/endometrium>

¹⁹⁸ Asherman syndrome (ash-er-m n) n. a condition in which amenorrhea and infertility follow a major hemorrhage in pregnancy. It may result from over vigorous curettage of the uterus in an attempt to control the bleeding. This removes the lining, the walls adhere, and the cavity is obliterated to a greater or lesser degree. *C.f.*, <http://www.encyclopedia.com/doc/1O62-Ashermansyndrome.html>

- iv. A Woman who is suffering from the diabetes, cardiovascular disorders,¹⁹⁹ or kidney diseases.
- v. A Woman with Rh inappropriateness²⁰⁰

B. Natural or Traditional Surrogacy:

- i. In case of the woman's ovaries are not functioning properly, then use of donor egg is the option.
- ii. If the risk of passing a genetic disease to the child.²⁰¹

However, according to the Dr. Aniruddha Malpani (IVF Specialist) that, the surrogacy arrangement is required only a small section of the women and not all women. According to him, in majority cases, women have the normal uterus or couple may opt to use the donor eggs or donor embryos instead of using surrogacy option.²⁰²

It is seen that many of the women are taking the help of surrogacy arrangements, even though they are capable of bearing children's themselves, but they choose the surrogacy option for avoiding physical, psychological, social burden. However, as per the surrogacy Bill, 2016 the Indian heterosexual married couples must prove to the infertility problem suffered either by one or both.²⁰³

2.13. PROCEDURE FOR IVF SURROGACY

Before the arrival of assisted reproductive technology, the natural surrogacy was the only means of helping to some infertile women to have children. Thereafter, the assisted reproductive technique came into existence which introduced artificial

¹⁹⁹ Cardiovascular disorders- any abnormal condition characterized by dysfunction of the heart and blood vessels. *C. f.*, <http://medical-dictionary.thefreedictionary.com/Cardiovascular+disorders>

²⁰⁰ Rh means -rhodium a blood typing group, When a mother is Rh negative and her baby is Rh positive, she may develop antibodies to the baby's blood that will cause it to hemolyze. Rh incompatibility means- An incompatibility in Rh types between a donor and recipient, or between an fetus—who is Rh positive, and the mother—who is negative and produces antibodies against the fetus' RBCs, which pass to the placenta, and cause HDN i.e. Hemolytic disease of the newborn *c.f.*, <http://medical-dictionary.thefreedictionary.com/Rh+incompatibility>

²⁰¹ Low Cost Surrogacy in India, <http://www.medicaltourismco.com/assisted-reproduction-fertility/low-cost-surrogacy-india.php> as visited on 10th August 2011 on 15.00 hrs

²⁰² Dr. Aniruddha Malpani, "Surrogacy in India - the real, picture, <http://doctorandpatient.blogspot.com/2006/07/surrogacy-in-india-real-picture.html>, July 27, 2006 as visited on 20th March 2011 at 1100 hrs

²⁰³ Supra note 173

insemination. The artificial insemination method of surrogacy was more socially accepted than natural surrogacy. With the advancement of modern assisted reproductive technique *In vitro fertilization* (IVF) method became available for infertile couples. Today, this technique has become more useful and popular for achieving the pregnancy. In this method the egg of the infertile woman and the sperm of the husband are fertilized in the *in vitro* i.e. in a Petri dish. And the embryo is generated with the help of the IVF technique and transferred into the womb of the surrogate to have their own genetic children. This is known as IVF surrogacy, which gives full opportunity to the infertile couples to have their own genetic child. If the commissioning couple (infertile couple) has decided to have children through IVF surrogacy then the following procedures have to be taken into consideration:

1. Counselling before surrogacy arrangement:

The first and foremost step before going for surrogacy is the counselling to the commissioning couple and to the surrogate. The counselling will help the couple to know the challenges they will face while going for surrogacy method. It is very necessary to know the commissioning couple the technique by which they are going to achieve pregnancy. The cost of the treatment, the chances of success of treatment, the chances of multiple pregnancies, possibility that the child may bear with abnormal or any defects, all this is required to be discussed with the couple, surrogate women and also the treating doctor, the legal adviser. The surrogate required to understand the full implication of treatment and the method used for achieving pregnancy i.e. IVF surrogacy. However, in India the ART Bill, 2014 and the surrogacy Bill, 2016 prohibits the use of eggs of the surrogate. The health risk associated with the pregnancy, such as the possibility of caesarean operation, cooperation of family members and most important is the relinquishment of the baby after birth to the commissioning couple. The counselling is also needful if the surrogacy treatment fails.

The Assisted Reproductive Technology Bill, 2014 under Section 46 (6) has made mandatory duty to the all ART Clinics in India to give medical counseling to commissioning couple regarding the implications and probability of success of ART

procedures²⁰⁴ and the recent Surrogacy Bill, 2016 under section 6 makes the mandatory condition of written informed consent of the surrogate in her language.²⁰⁵ The ART clinics are bound to give a reason for suggesting the surrogacy treatment to the commissioning couple. However, if the couple decided to avail the surrogacy service thereafter, the medical test for various diseases of the surrogate and commissioning couple is compulsory.

2. Medical Test for Various Diseases:

Before entering the surrogacy agreement by the commissioning couple and the surrogate women are required to be medically examined for various diseases such as hepatitis B, hepatitis C, various venereal diseases Research Laboratory (VDRL), especially sexually transmitted diseases such as HIV/AIDS and the blood group test. Such diseases are harmful to the health of the child and the surrogate.

Section 46 (1) of the ART Bill, 2014²⁰⁶ provides that the ART clinics and banks are under obligation to conduct the medical test of various diseases of the infertile couples, surrogate women and gamete donors. The object of conducting medical test is to avoid health risks to the commissioning couple, surrogate or child,²⁰⁷ however the new Bill, 2016 under section 4 (b) (IV) states about the medical and psychological fitness certificate of the surrogate and not of the commissioning couple.²⁰⁸

A surrogate woman is also medically tested for sexually transmitted diseases, such as HIV/AIDS and all other communicable diseases, thyroid problem and cardiovascular diseases.²⁰⁹

204 Section 46 (6) of the ART Bill further states that the ART Clinics shall inform the commissioning couple of the advantages, disadvantages and cost of the procedures, their medical side effects, risks including the risk of multiple pregnancy, the possibility of adoption, and any such other information which may help the commissioning couple arrive at an informed decision that would be most likely to be the best for the commissioning couple. The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 30 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

²⁰⁵ Supra note 173 at p. 61

206 The Assisted Reproductive Technologies (Regulation) Bill-2014, at p.29, published on 30th September, 2015, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

²⁰⁷ The medical test is conducted basically for examining the sexually transmitted diseases such as HIV/AIDS and all other communicable diseases. The object of conducting medical test is to prevent health risk to the commissioning couple, surrogate or child.

²⁰⁸ Supra note 173 at p. 6

209 Section 60 (6) of The Assisted Reproductive Technologies (Regulation) Bill-2014, at p.44 published on 30th September, 2015, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

3. Surrogacy Agreement:

A very phenomenal stage in the procedure of surrogacy is the making of surrogacy agreement. For entering into an agreement, the surrogacy parties should have the consensus ad idem and the meeting of the minds. It means the parties should understand the intention and the fundamental terms of the contract. In India, since there is no law on surrogacy, the parties are legally bound, only by the surrogacy agreement; hence they are totally relying upon surrogacy agreement. It is very important that the parties shall devote full attention to making the perfect surrogacy agreement as it should not be declared as void or voidable by the Court. The surrogacy agreement is very sensitive; various social, ethical, medico-legal issues are attached to it. Therefore, it should be drafted very carefully by the experienced person because the terms used in the agreement play a vital role while interpreting its real meaning.

The surrogacy agreement is as an agreement between the commissioning couple and the surrogate woman. It provides the necessity and desire to opt of surrogacy, wherein the surrogate woman carries the baby of the commissioning parents.”²¹⁰ According to the Assisted Reproductive Technology Bill, 2014 the surrogacy agreement means an agreement between the commissioning couple availing of the assisted reproductive technology and the surrogate mother.²¹¹ It is also necessary to consider, whether the international surrogacy agreement enforceable in both countries.²¹² According to the Surrogacy Bill, 2016 the surrogacy clinic after checking the ‘Certificate of Essentiality’ of the intending couple and ‘Certificate of Eligibility’ of the surrogate can proceed towards the surrogacy procedure.²¹³ However, the latest Bill is silent on the surrogacy agreement between the parties as well as the consent of the surrogate husband.

210Charushila , “Surrogacy -- A Hope”, <http://www.lawyersclubindia.com/articles/Surrogacy-A-Hope-3319.asp>, as visited on 22nd January 2011at 0900 hrs.

211. Section 2 (zs) of The Assisted Reproductive Technologies (Regulation) Bill-2014, at p.7 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

²¹² However, it should be compatible with the laws of India and the Home Land of the Intended Parents. In such cases, the Intended Parents have to make sure that the surrogacy agreement is enforceable according to the laws of their land as well. These agreements shall have an impact over the nationality of the surrogate child. If this agreement is declared as a void or voidable according to the laws the land of the Intended Parents, the agreement shall go unvalued and loses its sanctity.²¹² However, today in India the foreigners are not permitted to avail the service of the surrogacy.

²¹³ Supra note 173 at p. 5

4. Major steps involved in IVF Surrogacy

In IVF surrogacy procedure involves the work up of the genetic father and genetic mother and the treatment of host mother. It is very important to take into consideration in IVF surrogacy that both parents can become genetic parents or will require an ovum donation or sperm or egg donation or both sperm or egg donation. In IVF surrogacy the following major steps are involved:

The primary step is the matching cycles of the genetic mother and the surrogate by adjusting menstruation dates by oral contraceptive pills. When the cycle starts, the surrogate is put onto estrogen tablets to prime the uterus. The protocol used for the genetic mother is day 2 protocols (antagon protocol) is done by giving the oral contraceptive pills in the previous month or the other way is, day 21 protocol, depending on the age of the genetic mother and the other test results. On the 2nd day of the periods, gonadotropin injections are started. In both the cases, the patients are monitored daily. When the follicle reaches 18 mm size, HCG trigger is given. The surrogate is started with the progesterone tablets on the day of HCG injection that is given to the genetic mother. The oocyte (egg) retrieval is done 36 hours later, which is generally day 12 or 13 of the cycle. On the same day the genetic father gives his semen sample. The eggs of the genetic mother are fertilized with sperms of the genetic father in the laboratory by IVF / ICSI procedure. The resulting embryo is then transferred into the womb of the surrogate under ultrasound guidance. The surrogate is then put on luteal support using progesterone tablets / injections, and pregnancy is confirmed 15 days later.”²¹⁴ Thus, after the study of both procedures of IVF and IVF surrogacy, it is found that IVF surrogacy procedure is the same like a general procedure applied for IVF such as ovarian stimulation of the genetic mother, egg retrieval or ovum pick up thereafter fertilization of egg with sperm and the embryo culture and lastly the transfer of the embryo into the womb of the surrogate. The only difference is that the embryo is placed into the womb of the surrogate woman instead of the commissioning mother because this is the main crux of the surrogacy.

214 Low Cost Surrogacy in India, <http://www.medicaltourismco.com/assisted-reproduction-fertility/low-cost-surrogacy-india.php> as visited on 10th August 2011 on 15.00 hrs.

2.14 HEALTH RISK ASSOCIATED WITH IVF SURROGACY

The health risk is associated with the treatment of the assisted reproductive method including surrogacy procedure. The complications may arise in patients undergoing in ART treatment, hence, its need to be discussed with the surrogate and commissioning couple before undergoing to the treatment. This ART treatment carries the major health risk to the surrogate mother and also to the surrogate child. The following are some of the major health risk associated with the IVF surrogacy.

1. Risk of ovarian stimulation like ovarian hyper stimulation syndrome (OHSS)
2. Risk of ovarian cancer
3. Complications during ovum pick up (egg retrieval)
4. Risk of multiple pregnancy
5. Risk of pre term birth due to multiple pregnancy
6. Risk of ectopic pregnancy
7. Risk of spontaneous miscarriage
8. Risk of birth defects, singleton child, low birth weight

1. Risk of ovarian stimulation like ovarian hyper stimulation syndrome (OHSS):

In ovarian hyper stimulation, the ovaries become swollen and painful. Ovarian stimulation is used in both types of surrogacy i.e. in traditional surrogacy and gestational surrogacy. In gestational or IVF surrogacy may involve the intended mother, surrogate host or an oocyte donor depending upon who is contributing the egg for IVF. Each of them is at risk of ovarian hyper stimulation syndrome (OHSS) which could be mild, moderate or severe. In the ‘mild category of OHSS’ the clinical systems are usually nausea, vomiting, abdominal discomfort, abdominal distension and/ or diarrhea.²¹⁵

Around 30% of the women suffer from the OHSS which can be treated with painkillers.²¹⁶ The laboratory findings are normal except for the elevation of urinary

215 Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medicolegal Issues’, [New Delhi: Jaypee Brothers Medical Publishers pvt Ltd, 1st Edn., 2015, p. 39.

216 American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at

steroid levels. In the 'severe category of OHSS' the additional features are abdominal pain marked abdominal distension, ascites, dyspnea, and decreased urine output. Approximately, 2% women have the severe OHSS problem.²¹⁷ A mild OHSS can be managed conservatively and the moderate OHSS requires the close medical supervision and in a few cases may require the hospitalization. The severe OHSS is the life threatening condition which needs the urgent medical treatment. Generally, in critical cases it is suggested to terminate the pregnancy.

2. Risk of Ovarian Cancer:

According to the American Society for Reproductive Medicine (ASRM) in its a guide for a patient, stated that there is risk of ovarian cancer to woman due to the use of fertility drugs. However, the various latest reports suggest that the fertility drugs are not the reason for ovarian cancer. Today, many of the researchers are trying to solve the ambiguity about the existence of risk or not. However, it is recommended that the women's ovaries should be examined before the use of ovulation medications.²¹⁸

3. Complications during Ovum Pick up or Eggs Retrieval:

The complication may arise during the ovum pick up are the aspirating bleeding from ovaries following follicular aspiration and vaginal puncture sites. The use of ultrasound to guide the needle may damage to the adjacent organs like the bladder, the bowel and the blood vessels.

It is found that out of 1000 patients; only one patient required the major surgery for repairing the harm caused due to the egg retrieval.²¹⁹

4. Risk of multiple pregnancy:

https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

217 American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

218 American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

219 *Ibid*

Generally in assisted reproductive technology procedure more than one embryo is placed into the uterus of the surrogate woman for achieving a high success rate of pregnancy but which may result in multiple pregnancies.

A woman who is having a multiple pregnancy may require the bed rest even for months or stay in the hospital for avoiding the early delivery.²²⁰

5. Risk of pre term birth due to multiple pregnancy:

There is a high risk of pre term delivery of the babies in multiple pregnancies. In multiple pregnancies the premature babies are born for the survival. This premature baby requires the intensive care and bears the lifetime risk of handicaps. However, even a singleton baby (single baby) conceived through the use of the ART procedure having the highest risk of premature delivery or low weight of the baby.²²¹

6. Risk of Ectopic Pregnancy:

The ectopic pregnancy means a pregnancy where the fetus develops outside the womb, generally in a Fallopian tube. The risk of ectopic pregnancy following from IVF may occur in 4-5% of patients. If ectopic pregnancy occurs, then vaginal ultrasound is needed for all pregnancies following from the IVF to check the location and the number of pregnancies. The ectopic pregnancy is more common in ART procedure than natural conception.²²²

7. Risk of Spontaneous Miscarriage:

The risk of spontaneous miscarriages following from IVF procedure is increased and primarily relates to their own risk factors such as age, infertility, multiple pregnancies.²²³ The ASRM in its a guide for a patient, stated that if bleeding or pain has occurred before the completion 13 weeks, then it may be a signal of a possible miscarriage or ectopic pregnancy. Thus, the early bleeding in women is common in

²²⁰ *Ibid*

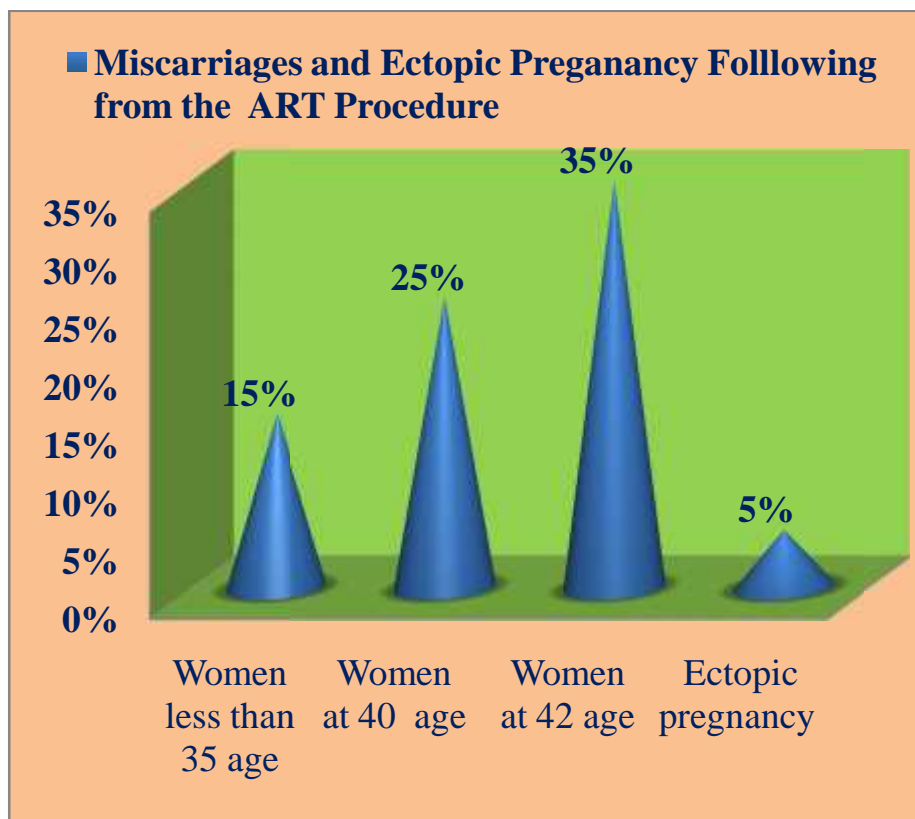
²²¹ American Society for Reproductive Medicine [ASRM], Assisted Reproductive Technology, A Guide for Patients, 2015, available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf visited on 10/11/2015 at 4 pm.

²²² Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medicolegal Issues', [New Delhi : Jaypee Brothers Medical Publishers pvt Ltd, 1st Edn., 2015, p. 40

²²³ *Ibid*

the treatment of the IVF²²⁴ or GIFT²²⁵ techniques. As per the ASRM report the miscarriage happens around 15% to the women who is less than 35 age, 25% at 40 age and 35% in the women at 42 age because of the use of ART procedure. Additionally the chances of about 5% of ectopic pregnancy in the ART techniques.²²⁶

Chart No. 3 Miscarriages and Ectopic pregnancy following from ART Procedure



8. Risk of birth defects, singleton child, low birth weight

The risk of birth defects is more common in infants born out of ART procedure as compared to infants born natural conception. The Centers for Disease Control and Prevention (CDC) in its the National Public Health Action Plan for the Detection, Prevention, and Management of Infertility, 2014 stated that infants born out of ART procedure, even singleton births has the increased risk of low birth weight (<2,500 grams) as well as higher risk of birth defects.²²⁷

²²⁴ *in vitro fertilization* (IVF)

²²⁵ *Gamete intrafallopian transfer* (GIFT)

²²⁶ Supra note 184

²²⁷ Centre for Disease Control and Prevention [CDC], National Public Health Action Plan for the Detection, Prevention, and Management of Infertility, June 2014 at p. 5 available at

The researcher after the detailed study of infertility treatment such as intrauterine insemination (IUI), *in vitro fertilization* (IVF), intracytoplasmic sperm injection (ICSI), and basically the IVF surrogacy, it is found that the **MAJOR HEALTH RISK IS INVOLVED IN ART PROCEDURE WHICH SIGNIFICANTLY AFFECTS THE HEALTH OF THE MOTHER AS WELL CHILD BORN OUT OF IT**. Sometimes such treatment may cause the risk to life of the women. It is nothing physical exploitation of surrogates. In majority cases the ART clinics transfers, the more than four to five embryos in the womb of the surrogate in order to achieve the success rate of pregnancy but it dangerously affects on the health of surrogate women. But despite of this the surrogacy method provides the opportunity to the commissioning couples to become parents of their own genetic baby.

2.15. SUCCESS RATE OF SURROGACY

India has become top most International surrogacy destination for the infertile couples coming from various parts of the world including the UK, Australia and US as well as other countries. Before passing of the New Indian- Visa Regulations, 2012, even foreign single person, homosexuals were also allowed for commissioning surrogacy in India. The India has become a top reproductive destination because of the high success rate in gestational surrogacy, which may be due to the use of best technology by the Indian clinics, high qualified fertility specialist, and low cost of surrogacy and easy availability of poor and fertile surrogate women which contributed much more for its great success.

In the US, the Centers for Disease Control and Prevention (CDC) and the Society for Assisted Reproductive Technology (SART) makes known online of all SART member clinics summary reports on assisted reproductive technology programs which also includes the success rate of IVF surrogacy. However, in India there is no such type of collection of online data system is available and even no centralize data of all ART clinics are available. The most of the ART clinics maintain and publish their

individual success rate of IVF surrogacy on the website. Hence, there is the different success rates of the several of ART clinics are available.

Generally, the success rate of surrogacy in India is calculated in the number of live births per transfer embryo.²²⁸ The Bourne Hall Clinic located in the United Kingdom, which is the leading IVF center of the world, reports a live birth rate of 37% per genetic couple and 34% per surrogate host.²²⁹

The success rate of surrogacy depends upon a number factors such as the woman's age, use of fresh or frozen embryo, the number of embryos transferred into the womb of a surrogate and the patient characteristics, so it may affect lot to the clinics success rate, therefore different fertility clinics gave different rates. The success rate here means the pregnancy, which results in the live birth of the child that is the women took the baby at home. After the study of success rate surrogacy it is found that many fertility centers have published different success rate according to the patient's treatment.

1. Success Rate of Surrogacy of India's Five Most Fertility Centers

The Chart given below shows the success rate 2015 of surrogacy, which is displayed on the website of the respective five main fertility centers of India, however, only the data of the Akansha infertility center are collected from the Wikipedia site because it is not available on the site of the Akansha infertility clinic. In column No.1 the Ankansha infertility center's shows the success rate of surrogacy is around 44%²³⁰ and the Rotunda Hospital located Mumbai, shows that 54% success rate of 2012 because of 2015 data are not available on site.²³¹ The Delhi IVF fertility center of Delhi shows the 55% of the success rate of surrogacy.²³² The Dr. Padmaja Hospital in

228 <http://www.drmlpani.com/articles/ivf-surrogacy-india-advantages-of-going-the-indian-way> visited on 10/11/2013 at 2.45. pm

229 Gehna Vaishnavi, Navneet Tatkar ' Surrogacy Medico legal Issues', Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 29

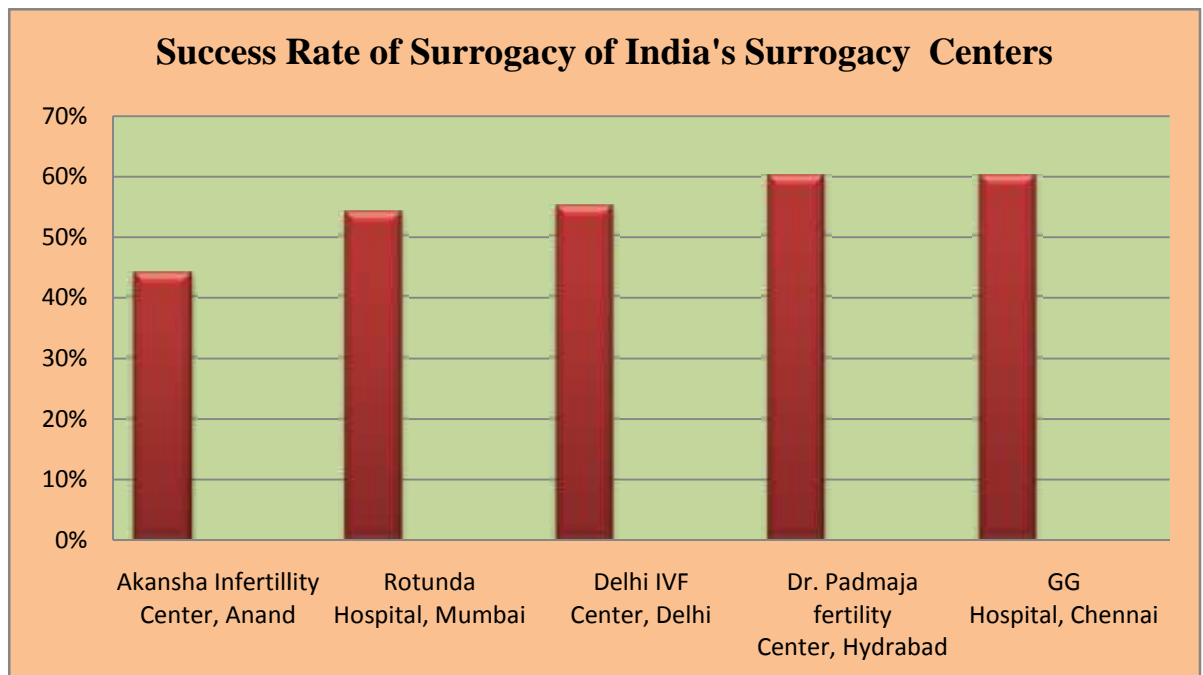
²³⁰ https://en.wikipedia.org/wiki/Akanksha_Infertility_Clinic

²³¹ <http://www.iwannagetpregnant.com/about-us/success-rates/>

²³² http://www.delhi-ivf.com/success_rates.html

Hyderabad shows 60% success rate of surrogacy,²³³ which is also same of the GG Hospital, Chennai that is the 60%.²³⁴

Chart No. 4 Success Rate of India's Surrogacy Centers



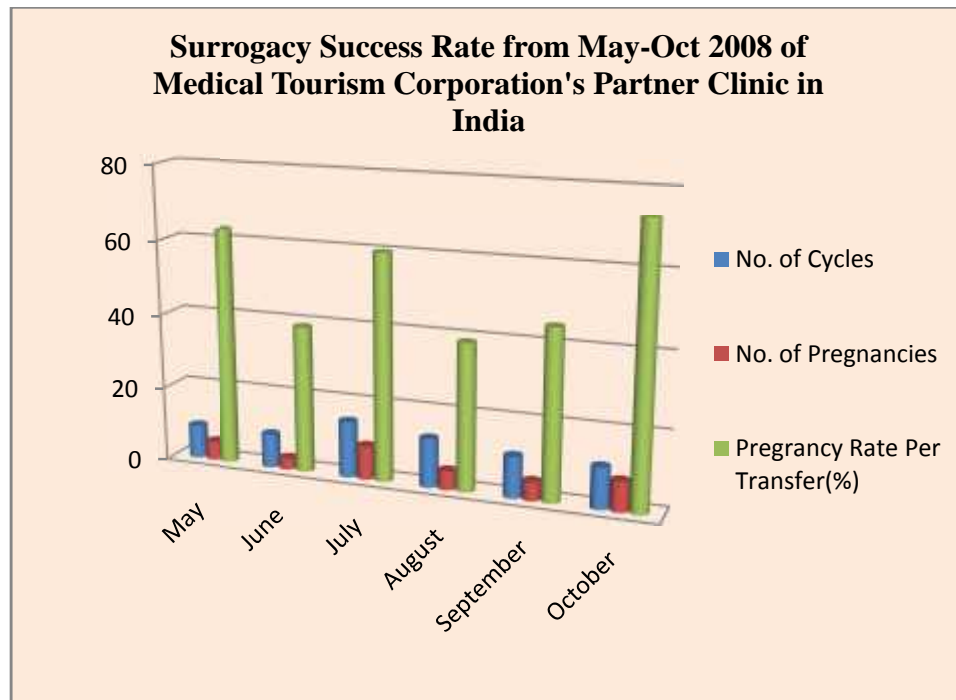
2) In 2008 the Medical Tourism Corporations Partner Clinics in India published two charts of success rate of surrogacy. The chart below shows the most recent success rates in India.

a) The first chart depicts that the success rate with fresh surrogacy cycles where donor eggs were used.

²³³ <http://www.drpadmajasurrogacy.com/surrogacy.html#>

²³⁴ <http://www.ghospital.in/success/rates/>

Chart No. 5 Surrogacy Success Rate from May-Oct 2008 of the Medical Tourism Corporation's Partners Clinic in India



The chart shows that in the month of May there were 9 cycles conducted out of which 5 pregnancies were confirmed and the pregnancy rate per transfer was 63%. During June month 9 cycles were conducted and only 3 pregnancies were confirmed with 39% very low pregnancy rate per transfer. In the month of August 15 cycles were conducted out of which 9 were confirmed as pregnancies and 39% pregnancy rate per transfer. During the September month there were 11 cycles and only 5 were confirmed with 45% success rate per transfer. And in the month of October out of 11 cycles 5 were confirmed as pregnancies. The 73% pregnancy rate is as per transfer. The pregnancy rate was low in the month of June and August almost 39% only and the higher was in the October which is around 73%.²³⁵

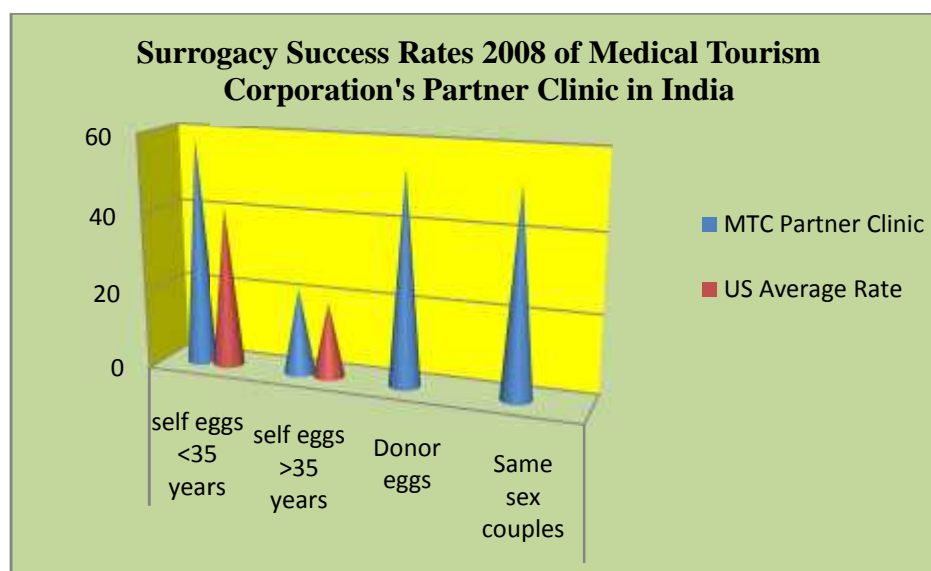
b) The second chart demonstrates surrogacy success rates in different categories:

The chart shows the self eggs are used in the womb of the women of the age less than 35 years, the Indian Partner clinic shows the surrogacy success rate of 58% and the

²³⁵ Indian Gestational Surrogacy Success Rate. Jan. 7th, 2009, <http://www.medicaltourismco.com/medical-tourism/india-gestational-surrogacy-success-rate/>, as visited on 1st August 2011 at 0900 hrs.

US is 41%. If the self eggs are used in the women if more than 35 years of age, then the success rate of Indian Partner clinic is of 22% and US is 19%.

Chart No. 6 Surrogacy Success Rate 2008 of the Medical Tourism Corporation's Partners Clinic in India



The chart depicts the India's success rates match with the US success rate or are sometimes better than the U.S. and also shows the age of the women is very vital criteria for achieving pregnancy, because of the women are above the age of 35 years, the success rate of pregnancies are very low and also shows In case of donor eggs are used, then the success rate is 54% and in same sex couples 52% of the Indian Partner clinic.²³⁶

2.16. COST OF SURROGACY

There are various reports and opinions which shows the different figures regarding the cost of surrogacy. However, after the study of the cost of surrogacy, it is the strong opinion that the low cost of surrogacy in India as compared to developed countries like US, UK and other countries is one of the prime reasons for the foreign couples

236 Indian Gestational Surrogacy Success Rate. Jan. 7th, 2009, <http://www.medicaltourismco.com/medical-tourism/india-gestational-surrogacy-success-rate/>, as visited on 1st August 2011 at 9.00 pm. However, today in India commercial surrogacy is banned to all foreigners and the surrogacy is allowed only to Indian married couple only as per latest regulation of Ministry of Health and Family Welfare, department of Health research dated 04 November 2015 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> visited at 10/11/2015 at 12.30. pm.

for commissioning surrogacy in India. Therefore, India has become top most global surrogacy factory for foreign couples.

India had become an international hub for commercial surrogacy business had an annual worth of at least \$445 million (Rs 2,900cr).²³⁷ As per the National Commission for Women, around 3000 illegal fertility clinics are operating in the country with the majority of them being located in Gujarat, Maharashtra and Delhi and also with a 17-20 percent annual growth.²³⁸ The Center for Social Research, (CSR), has conducted research study in the two major cities such as Delhi and Mumbai stated that the business of surrogacy is estimated to be around \$ 500 million.²³⁹

The 228th Law Commission of India Report provides that in commercial surrogacy the surrogate women even paid by the surrogacy agents. In India, fee for surrogacy is approximately \$ 25,000 to \$ 30,000, which is one third of the United States.²⁴⁰ According to the Medical Tourism Corporations Partner Clinics in India the surrogacy package²⁴¹ goes around 22,000 to 35,000 US Dollars.²⁴² As per the SAMA report, the surrogacy industry has reached the business of all over the years worth more than USD 400 million and around 3,000 Indian ART clinics²⁴³ providing the surrogacy services.²⁴⁴ The SAMA report says in India the surrogacy cost is about 5, 00,000 Lakh rupees which is around \$11,000. In the United States, the exclusive cost of surrogacy,

237 HINDUSTAN TIMES, 'Govt bans import of human embryos for commercial surrogacy', New Delhi, Oct 28, 2015 16:29 IST, *c.f.* <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

238 The Economic Times, 'Blanket ban likely on NRIs, PIOs, foreigners having kids through surrogacy', 'By PTI | 15 Oct, 2015, 10.49 PM IST *c. f.* <http://economictimes.indiatimes.com/news/politics-and-nation/blanket-ban-likely-on-nris-pios-foreigners-having-kids-through-surrogacy/articleshow/49391832.cms> visited on 24/10/2015 at 12.39 pm

239 Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p. 75 available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm

240 Law Commission of India Report No. 228th, at P. 11, available at lawcommissionofindia.nic.in/reports/report228.pdf, as visited on 15th May 2011 on 1400 hrs.

241 The surrogacy package includes the doctor fee, legal fees, surrogate work up, antenatal care, delivery charges, surrogate compensation, egg donor, drugs and consumables, & IVF costs.

242 Low Cost Surrogacy in India, <http://www.medicaltourismco.com/assisted-reproduction-fertility/low-cost-surrogacy-india.php> as visited on 10th August 2011 on 15.00 hrs.

²⁴³ Reported by the National Commission for Women (NCW).

²⁴⁴ SAMA Report 2012, Birthing A Market, A Study on Commercial Surrogacy, P. 7 available at http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

is approximately \$15,000 and in the United Kingdom which is around £10,000.²⁴⁵ It is said that the foreign peoples make the surrogacy agreements with the vulnerable women of lower-resource countries i.e. India or Thailand. The reasons for making a surrogacy agreement in India by the foreign couples may be low cost surrogacy or absence of surrogacy law or an extremely restrictive surrogacy law in their own countries.²⁴⁶ A full-term surrogate pregnancy in Thailand and India typically costs \$63,000 to \$72,300. In the U.S. it can run up to \$226,000, according to the Hague report.²⁴⁷

However, the Center for Social Research, (CSR),²⁴⁸ has revealed that, the *cost of surrogacy is not the important factor for the foreign couples* for commissioning surrogacy in India. It is reported by the CSR that only 43.30% in Anand and 16.70% in Surat of the foreign commissioning parents considered the money as a main factor for entering into surrogacy agreements in India. While, the majority commissioning parents of Surat said that money is not the important factor for them. As per the CSR report, the ART clinics charge the fee approximately 12 to 15 lakh rupees for the surrogacy arrangement in India.²⁴⁹

A very famous of Dr. Nayana Patel's Anakasha infertility center at Anand charges Rs. 14 lakh as a surrogacy cost, which is also includes the charges for IVF (in-vitro

²⁴⁵ Besides the fee, surrogacy clinics offer the catering services to their national and international clients. There are several groups associated with ART clinics such as tourism departments, the hospitality service providers, travel agencies, law firms, surrogacy, shelter homes and various surrogacy agents. C.f. SAMA Report 2012, Birthing A Market, A Study on Commercial Surrogacy, P. 7 available at http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

²⁴⁶ Nicole F. Bromfield & Karen Smith Rotabi, 'Global Surrogacy, Exploitation, Human Rights and International

Private Law: A Pragmatic Stance and Policy Recommendations,' Published online: 1 July 2014, p. 124, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendatio

²⁴⁷ Amel Ahmed, 'Offshore babies: The murky world of transnational surrogacy,' 11, 2014 9:00 August PM <http://america.aljazeera.com/articles/2014/8/11/offshore-babies-thebusinessoftransnationalsurrogacy.html> visited on at 07/12/2014 at 3.00 pm

²⁴⁸ The Center for Social Research CSR has conducted the research study in the three major cities of Gujarat i.e. Anand, Surat and Jamnagar.

²⁴⁹ Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p. 75 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 12/05/14 at 12.25 pm

fertilization), payment for surrogate around 5 lakh, her accommodation, medicines, food, delivery charges, and ante-natal check up.²⁵⁰

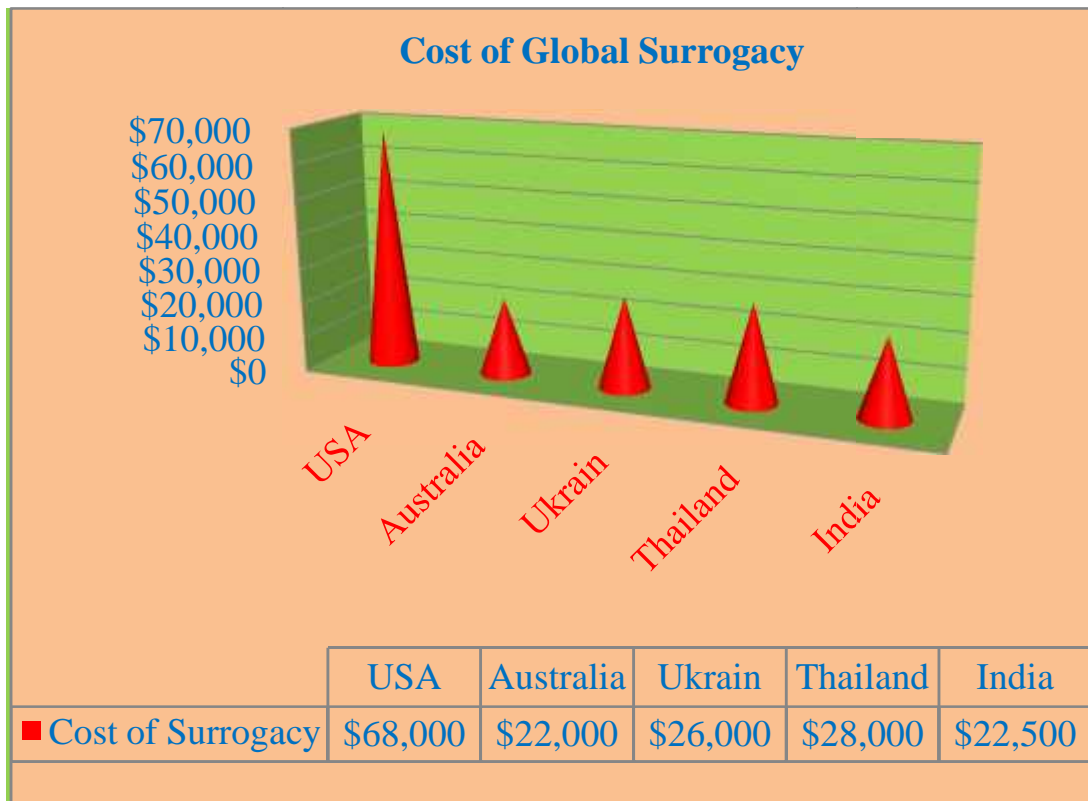
2.16.1. Cost of Global Surrogacy:

The cost of global surrogacy is varying from country to country depending upon the legalization of commercial surrogacy in that country. The chart given below represents the cost of surrogacy of the state of the USA is around \$ 68,000/- which is higher cost as compared to other states. The cost of surrogacy in the Australia is of \$ 22,000/- which is the very low cost of surrogacy because in the state of the Australia the commercial surrogacy is prohibited and altruistic surrogacy is allowed. Therefore, the commissioning parents are liable to pay medical expenses only. The cost of surrogacy in Ukrain shows the \$26,000/- and Thailand is about \$28,000/-. In India the cost of surrogacy is about \$22,500/-which is very low cost of surrogacy.²⁵¹ Therefore, in India the low cost surrogacy is the main reason for the foreign couple for availing the service of surrogacy and the commercial surrogacy arrangement is illegal in the UK.

250 P C Vinod Kumar, The Weekend Leader, posted 19th October 2015, Vol. 6 Issue 42, available at <http://www.theweekendleader.com/Success/2280/joy-to-couples.html>, visited on 11/11/2015 at 1.00 pm

251 <http://www.familiesthrusurrogacy.com/surrogacy-by-country>, visited on 08/12/2014 at 11.00 am

Chart No. 7 Cost of Global Surrogacy



The above figures show the lot of difference between USA and India. And also provides the lowest cost of surrogacy in India is not only the reason for commissioning surrogacy in India, but also the surrogacy is either illegal or prohibited in their countries.

2.17. ARGUMENTS FOR AND AGAINST THE SURROGACY

The persons who are in against the surrogacy would like to ban surrogacy completely. However, those who are in support of surrogacy would like to legalize the surrogacy. And those persons who are neutral say surrogacy as a controversial topic.

2.17.1 Arguments For Surrogacy

The surrogacy supporter states that the surrogacy is the *best option to have one's own genetically related child*. The infertile couples are those who do not have their own child through natural means. The surrogacy creates a chance for to the commissioning couple to have their genetic offspring either by using gametes (sperm or eggs) of the both commissioning couple or by using donor gametes. But the essential is that at least one party from the commissioning couple should provide their genes.

Some of them said that the **surrogacy is a good alternative to the adoption method**. The excellent feature of having an own biological child the surrogacy has become more favorable to the infertile couple instead of using a complex procedure of adoption. Thus, the process of surrogacy is often considered as more satisfying than adoption. The adoption may or may not be viable for any couple and it does not result in genetically related children.

According to the Report of Commission on Assisted Human Reproduction, 2005 because of the **shortage of children available for the adoption**, the practice of surrogacy might be the only option for some people having the family, especially in cases of non-traditional families where adoption poses particular problems.²⁵² The Report of Centre for Social Research provides that surrogacy arrangement is helpful for all parties; it means **the surrogacy satisfies the needs of two distressed women**. In other words, in surrogacy *“the barren gets a baby, the broke gets a bonus.”* Generally, the surrogate woman utilizes the amounts which she earns.²⁵³ Many of the supporters of surrogacy stated that the **right to procreate is the basic human right**. It is also protected by the Constitution of India as well as the Constitution of other countries and various international conventions. According to Margaret Jane Radin (1988) that if the men’s money transactions are accepted for donation of sperm, hence the surrogacy transactions should also to be permitted to the women.²⁵⁴ Thus, the **reproductive liberty** has wired the surrogacy transactions. Therefore, the freedom of the bearing of the child is highly protected by the USA.²⁵⁵ **A Surrogacy as autonomy and free choice** as far as it does not harm to others and hence gets the broad area for doing what one wants thus, it closely relates to the commissioning parents and the surrogates.²⁵⁶

252 <http://health.gov.ie/wp-content/uploads/2014/03/Report-of-The-Commission-on-Assisted-Human-Reproduction.pdf>, visited on 13/10/2014 at 2.50 pm

253 Centre for Social Research (CSR), ‘Surrogate Motherhood- Ethical or Commercial,’ p. 16 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 12/05/14 at 12.25 pm

254 Centre for Social Research (CSR), ‘Surrogate Motherhood- Ethical or Commercial,’ p. 16 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 12/05/14 at 12.25 pm

255 Committee on Ethics Surrogate Motherhood, The American Congress of Obstetrician and Gynecologist., Number 3, February 2008, available at <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Surrogate-Motherhood> visited on 13/02/2014 at 2.30. pm

²⁵⁶ Thus, the surrogacy arrangements relates to the commissioning parents and the surrogate women. However, the surrogacy practice often tends to be slightly different though, because duress and coercion affect the extent to which someone has free choice.

According to the Judge Posner (1987) for improving the **surrogacy trade markets, it is very necessary that it should be organized efficiently**. And if the parental rights are prohibited, then the black markets will come into existence.²⁵⁷

The feminist view is that **a surrogacy as a sale of service and not as a baby selling**. The terminology concerning surrogacy reflects that the father is using the arrangement because it is important to him to reproduce himself. In case of women it is same as she would like to produce the child with her own genes. A feminist professor Margaret Radin has pointed out that the characterization of surrogacy as a sale of service and not as a baby selling, that the baby is not the surrogate mother but belongs to the genetic parents who donated egg or sperm. If we think that ordinary a mother paid to relinquish a baby for adoption is selling a baby, but if she is surrogate, she is merely selling the gestational services, it seems that we are assuming that the baby cannot be considered the goods of a surrogate. But the baby is someone else who availed the services of surrogate only for the growing child in the womb of the surrogate mother.

Most of the supporters of surrogacy said that the intended couples and surrogate has to be made free in the matter of reproduction. The majority of the women become the surrogate for gifting surrogacy services to needy couples.²⁵⁸ Generally, the infertile couple often chooses the surrogacy arrangement due to its high success rate. It is said that the **remuneration** is paid to the surrogate for proving surrogacy services, efforts, and time and not for the purpose of selling of the baby and also not for renting a womb. The supports of the surrogacy argue that surrogacy gives the opportunity to the **single woman or man as well as the homosexual couples to become parents of their own biological child**.²⁵⁹

257 According to Posner, it is better to acknowledge the existence of such a market in order to better control it and make it more efficient. He gave an example of the adoption process he says, due to the complicated adoption regulations in many countries, people go to other countries to evade the regulations creates the vast black market. Centre for Social Research (CSR), 'Surrogate Motherhood-Ethical or Commercial,' p. 16 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 12/05/14 at 12.25 pm

258 Committee on Ethics Surrogate Motherhood, The American Congress of Obstetrician and Gynecologist., Number 3, February 2008, available at <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Surrogate-Motherhood> visited on 13/02/2014 at 2.30. pm

259 The Assisted Reproductive Technology (Regulation) Bill, 2014 prohibits the single person as well as homosexuals from entering into surrogacy arrangement, Today, the service of surrogacy is available

2.17.2 Arguments against Surrogacy

Considerably, there are more arguments have been advanced against the use surrogacy arrangement. It is argued that surrogacy involves the menace to the surrogate women, the surrogate child and even to the commissioning parents. In surrogacy arrangement the supreme consideration is the child's best interest; therefore the society has the right to prohibit such kind of practice of surrogacy for protecting the well being of the child.

Risk to the child born: It is argued that in surrogacy arrangement a definite risk involved with the surrogate child, but it is not so with the adopted child. Unlike the position when the child is adopted. In surrogacy arrangement the commissioning parents are required to fulfill only the condition of payment of surrogacy. Hence, there is no guarantee to get the suitable parents to the child Therefore, the authors against surrogacy argues that the practice of surrogacy is injurious to the surrogate child. It is also harmful to the surrogate women and her own children. Ultimately, surrogacy is dangerous to the whole society.

In a surrogacy arrangement if any child is born with the disability, then there are the cases where the custody of the child is rejected by the intended parents. Thus, it may produce significant harm to the society and especially on children. Hence, in surrogacy arrangement the surrogate babies are more vulnerable than the matured person. Hence, such harm to the surrogate baby is a very grave because he has no choice in such case.²⁶⁰ A very recent example of Baby Gammy's case²⁶¹ the Australian couple rejected the custody of the Baby Gammy because of he suffered from the Down syndrome disease. Hence, such rejection of the child often produces, the more harm to society and children.

only to heterosexual married infertile Indian couples only and it is prohibited to all foreign couples after the latest government instructions dated 04/11/2015 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> visited on 15/11/2015 at 3.30 pm.

260 Committee on Ethics Surrogate Motherhood, The American Congress of Obstetrician and Gynecologist., Number 3, February 2008, available at <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Surrogate-Motherhood> visited on 13/02/2014 at 2.30. pm

261 <http://www.dw.de/gammy-case-may-end-commercial-surrogacy-in-thailand/a-17842291> visited on 23/12/14 at 12.00 pm

Risk to the surrogate mother: The risk to the surrogate mother could be quite substantial. A woman who agrees to bear a surrogate baby is vulnerable for a various reasons. There are several possibilities of exploitation to surrogate.

Kembrell says in surrogacy arrangement the surrogates are **exploited physically, economically, emotionally and socially.**²⁶² The most of the women became the surrogates for the want of money in order to sustain their family life. Kembrell even further argued that **the practice of surrogacy is nothing new form of slavery of the women.** He says, during the period of slavery, slave women were utilized for giving delivery to the baby. He says the surrogate mothers are nothing but slaves of todays.

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The practice of surrogacy even treated unnatural because it separates the genetic, gestational and social roles of motherhood. Hence, the society should not interfere with the laws of nature by adjusting the natural or standard physiology of reproduction.²⁶⁴ The surrogate mother exposes herself to risk to her health arising from complications of pregnancy or otherwise. In any pregnancy, there are risks to the women's life and health. And this new assisted reproductive has increased more risk to the health of women.

Horsburgh (1993) is against to the surrogacy arrangement because of the surrogates are physically exploited. He says due to commissioning couple's requests or medical cause the surrogate required to abort the foetus against her wish and which may severely affect her health.²⁶⁵

²⁶² In addition, to that even agent are often involved in it. In surrogacy arrangement the women have to go through the severe process of bearing of the child and finally the surrogates are required to relinquish the baby to the commissioning couple. The majority of the surrogate women is unknown about their legal rights. Due to the poverty they are incapable to take the services of the advocates. And upon the signing of the surrogacy agreement she is under obligation to follow it.

263 Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial,' p. 17 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 12/05/14 at 12.25 pm The surrogates are doing the role of the slave and have possessed no legal rights as a mother. According to Kembrell there is similarity between slave mothers and surrogate mothers as the slave mothers were not talking openly about their pregnancy and the currently same circumstances are facing by the surrogates as they are also are not disclosing the surrogacy arrangement due to the social stigma attached with the surrogacy.

264 C.f. <http://health.gov.ie/wp-content/uploads/2014/03/Report-of-The-Commission-on-Assisted-Human-Reproduction.pdf>, visited on 13/10/2014 at 2.50 pm

265 Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial,' p. 17 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 12/05/14 at 12.25 pm

Besides the above argument, even it is further argued that there might be chances of coercion to the women in close relation to become a surrogate for the family. The surrogacy arrangement may give mental stress to the surrogate. It is also stated that the surrogacy arrangement has transformed the women's reproductive abilities and the child become the commodity which is sold and purchased in surrogacy market.²⁶⁶

According to Radin, the **surrogacy agreement is nothing but a baby selling agreement. The surrogate children are delivered as a commodity.** The parental rights over the child are relinquished on payment of the certain amount. Thus, every surrogate child is treated as a commodity in the market, which has a bad impact on personhood. Therefore, Radin says the surrogacy is a baby selling market is incorrect.²⁶⁷

According to Field if surrogacy was made illegal, then the practice of surrogacy would go on the underground which may be more harmful. The surrogacy even violates the norm and intention of the God's word on the marriage and sexual relation. In commercial surrogacy it involves the argument that surrogate baby as a commodity which may be bought and sold. The surrogacy is **only for wealthy people**: It alleged that the surrogacy is very expensive; it is not even possible for the middle class family to afford the cost of surrogacy. Hence, only wealthy people can afford it.

Besides the above arguments the practice of surrogacy, even argued that:

- The surrogacy arrangement involves a long and complicated process; hence it requires patience on the part of the intended parents.
- The surrogate mother has required going through a lot of medically persistent procedures. This might affect on her health.
- Homosexuals and transgender should not be allowed to avail the service of surrogacy.
- Not all the clinic support the surrogacy, hence it might difficult for getting right clinic.

266 Committee on Ethics Surrogate Motherhood, The American Congress of Obstetrician and Gynecologist., Number 3, February 2008, available at <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Surrogate-Motherhood> visited on 13/02/2014 at 2.30. pm however, in India the relative or friend are prohibited to become as a surrogate mother even ca not be gamete donor under the new ART Bill, 2014.

267 Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial,' p. 18 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 12/05/14 at 12.25 pm

- Critical conditions arise when both the surrogate and commissioning couple refuses to claim the custody of the abnormal child.²⁶⁸
- There are no uniform surrogacy laws it varies from nation to nation.
- Commercial surrogacy has become the highly controversial topic, as it involves many ethical, social and legal complexities.

2.18. CONCLUSION:

Motherhood is near to divinity. It is the highest, holiest service to be assumed by mankind. It places her who honors its holy calling and service next to the angels.²⁶⁹ Every person has the right to get married and establish his or her family. However, the desire to have children remains unfulfilled due to infertility reason. It is found that around 1 out of six couples is infertile. The international organizations such as the World Health Organization (WHO) have declared the infertility as a disease. The miracle of the science in the form of assisted reproductive technology came into existence for providing the chance to infertile couples to become parents of the child of their own flesh and blood. Now days the method of surrogacy²⁷⁰ has become the very popular and most useful method due its two magnificent features, firstly it gives the genetic link of the child to the couple and secondly, it provides the alternative to the method of adoption, due to complicated procedure and even not universally applicable to all religion. The history of surrogacy reflects the existence of the traditional form surrogacy in India and abroad.

The Indian government has legalized the commercial surrogacy from 2002 itself, and foreigners were allowed to visit India for medical tourism. Therefore, India has become top most reproductive tourism destinations. The low cost of the surrogacy is not the main reason, but the absence of law is the main reason of the foreign couples for commissioning of surrogacy in India. The exploitation of surrogate women and the protection of the rights of the children are the main issues of the surrogacy. In

268 Charushila, "Surrogacy -- A Hope", <http://www.lawyersclubindia.com/articles/Surrogacy-A-Hope-3319.asp>, as visited on 22nd January 2011 at 0900 hrs.

²⁶⁹ <https://www.mormon.org/blog/100-inspiring-quotes-about-being-a-mother>

²⁷⁰ The surrogacy means when a woman carries a pregnancy and gives birth to a baby for another woman, either from her own egg or from the implantation in her womb of fertilized eggs from other women.

IVF surrogacy involves the various health risks to the life of the surrogate and the child. Hence, in today's condition the protection of the rights of surrogate and the children more important. According to the CRC²⁷¹ the 'best interest

of child' is the most paramount over the interest of others. In India still today, there is no online surrogacy data collection system of the surrogacy clinics as in the country of US.

Ultimately, the researcher would say that the surrogacy technique has provided the opportunity not only to the infertile couples, but also same sex couples, single person to fulfill their dream of becoming parents. Before undergoing the surrogacy treatment, the surrogate, his husband and the commissioning couple should be counseled of medical, psychological and legal. Besides this there may be situation where, the failure of ART attempt the couples may get frustrated, angry and stressful, in such situation the support of family members and friends play a vital role. A psychological counseling has also played crucial role in the encouragement of the couples.

²⁷¹ Convention on Rights of Child (CRC)

CHAPTER –III

DIMESIONS AND PROSPECTIVE OF LEGISLATION ON SURROGACY

3. INTRODUCTION

“A SURROGACY LAW STILL IN THE WOMB.....

In human society the family is an indispensable institution. ‘Henry Maine’ says the term family means where the family is joined in food, worships and estate. An individual can become a member of the family by birth, marriage, adoption and now surrogacy. However, it is found that around 15 % couples are infertile in the world.²⁷² The World Health Organization (WHO), stated that in India around 19-20 million couples are infertile.²⁷³ Therefore, surrogacy is the last ray of hope for the infertile couple to have their own genetic children.

The term surrogacy means the delivering of a child for another person. The surrogacy is classified as traditional, Gestational, altruistic or commercial surrogacy. In commercial surrogacy a surrogate woman is paid for bearing the child of another person. In most of the developed States such as United Kingdom, the parties are prohibited from entering into the commercial surrogacy agreement. Majority of the US States the commercial surrogacy is illegal. Whereas, the state of Australia has recognized the commercial surrogacy as a penal offence. A Canada and New Zealand States have legalized the altruistic surrogacy. Whereas, the France, Germany and Italy countries have neither recognized the commercial or altruistic surrogacy. The country of Israel has recognized the birth mother as a real mother of the surrogate baby.²⁷⁴

If the Indian Government passes the law on surrogacy, India will become the first State who has legalized the commercial surrogacy.²⁷⁵ The Assisted reproductive

²⁷² The Assisted Reproductive Technologies (Regulation) Bill-2010, at p. 1 available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf.

²⁷³ Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medicolegal Issues’, [New Delhi : Jaypee Brothers Medical Publishers pvt Ltd, 1st Edn., 2015, p. 5

²⁷⁴ Anil Malhotra, Ranjit Malhotra, ‘Surrogacy in India, *A Law in the Making*’, Universal Law Publication Co. New Delhi, 2013 Edn., P. 8

²⁷⁵ However, very recently on 24th August 2016 the Union Cabinet has approved the Surrogacy Regulation Bill, 2016, through which they declared the legalization of the altruistic surrogacy in India.

technology has rapidly developed after birth of the India's first ART baby Kanupriya in 1978.²⁷⁶ Today, India has become a '*Reproductive Tourism Supermarket*' as such '*No Law Prohibit and No Law Permit.*' It may be due to the most of the women are interested to become surrogates, cheap costs, excellent infrastructure of medical, close observation of surrogates and more 200,000/- in vitro Fertilization clinics.²⁷⁷

Before passing of the New Indian Visa Regulation, 2012 many foreigners, including single gay, lesbian and heterosexual couples were visited India for surrogacy. Therefore, India has become the top most '*International Reproductive Tourism Destination*' and reported its annual business of \$ 445 million,²⁷⁸ and around 3000 illegal fertility clinics are operating in the country stated by the National Commission for Women (NCW).²⁷⁹ Thus, the surrogacy industry has created a platform for India medical experts and to the government to gain as much profit out of it. And the law of the surrogacy is still in the womb, so it may be a main cause for mushrooming growth of the surrogacy industry.

In India, orphaned children are around 12 million, but the Guardian and Wards Act, 1890 are not permitting the adoption to Muslims, Christians, Jews and Parsis. However, they can be only "Guardians" of the child and even the Hindu Adoption and Maintenance Act, 1956 (HAMA) allows only Hindu persons to adopt the Child. Thus, Non Hindu or foreigner at most can be guardian of the child but cannot be a parent of the adoptive child.²⁸⁰ However, the surrogacy is fulfilling the dream of becoming parents of their own genetic child.

In India, since 2002 the commercial surrogacy officially permitted, but still no specific law on surrogacy for regulating such huge surrogacy factory. In 2005, Indian Council of Medical Science (ICMR) has provided the National Guidelines for

²⁷⁶ The world's second and India's first IVF baby Kanupriya alias Durga was born in Kolkata On October 3, 1978, about two months after the world's first IVF baby Louise Joy Brown was born in Great Britain on July 25, 1978.

²⁷⁷ Supra note 238

²⁷⁸ HINDUSTAN TIMES, 'Govt Bans Import of Human Embryos for Commercial Surrogacy', New Delhi, Oct 28, 2015 16:29 IST, *c.f.* <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

²⁷⁹ The Economic Times, 'Blanket ban likely on NRIs, PIOs, foreigners having kids through surrogacy', 'By PTI 15 Oct, 2015, 10.49 PM IST *c. f.* <http://economictimes.indiatimes.com/news/politics-and-nation/blanket-ban-likely-on-nris-pios-foreigners-having-kids-through-surrogacy/articleshow/49391832.cms> visited on 24/10/2015 at 12.39 pm

²⁸⁰ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*', Universal Law Publication Co. New Delhi, 2013 Edn., P. 6

accreditation supervision and regulation of the assisted reproductive technology in India. But being non statutory body these rules are frequently violated by the ART clinics today there is a need of mandatory law to regulate the surrogacy arrangement to prevent the exploitation of surrogates and to curtail the unethical practice of ART clinics. As observed by the Apex Court of India in *Baby Manji Yamada's Case*,²⁸¹ that the “commercial surrogacy” attaining the “industry proportions is sometime referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms”. Thereafter, the draft of ART Bill 2008, 2010 was prepared for the regulation of ART industry. The New version of ART Bill, 2014²⁸² was published on 30th September 2015 till 15th October 2015 for the general public and stakeholders comments and suggestions. Thereafter the notification issued on 4th November 2015²⁸³ by the Ministry of Health and Family Welfare, Government of India, regarding not to support commercial surrogacy and also prohibited all foreigners for availing the service of surrogacy in India. Recently, on 24th August 2016, the new draft of the Surrogacy Regulation Bill, 2016 is presented by the External Affairs Minister Sushma Swaraj in a press conference²⁸⁴ and on 21st November, 2016 the government has introduced the said Bill, 2016 before the Parliament in the House of Lok Sabha.²⁸⁵

Thus, the New Surrogacy (Regulation) Bill 2014, has recognized altruistic surrogacy and permitted only to the Indian married couple.

In this chapter the researcher has studied the various surrogacy laws, rules and the guidelines, such as ICMR Guidelines 2005 and the draft of the Assisted Reproductive Technology Bill 2008, 2010, the Surrogacy Regulation Bill, 2016 and 2014, its criticism. The researcher has also focused on the New Indian Visa Regulations, 2012, the Law of Commission of India Report of the 228th on surrogacy as well as the recent

²⁸¹ AIR 2009 SC84

²⁸² The Assisted Reproductive Technology (Regulation) Bill, 2014, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

²⁸³ C.f. <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> visited on 10/11/2015 at 9.30 pm

²⁸⁴ The Union Cabinet has cleared the proposed draft of the Surrogacy (Regulation) Bill 2016 on 24th August 2016. However, till 21st November, 2016 the draft copy of the Bill was not published by the Health Ministry on public domain.

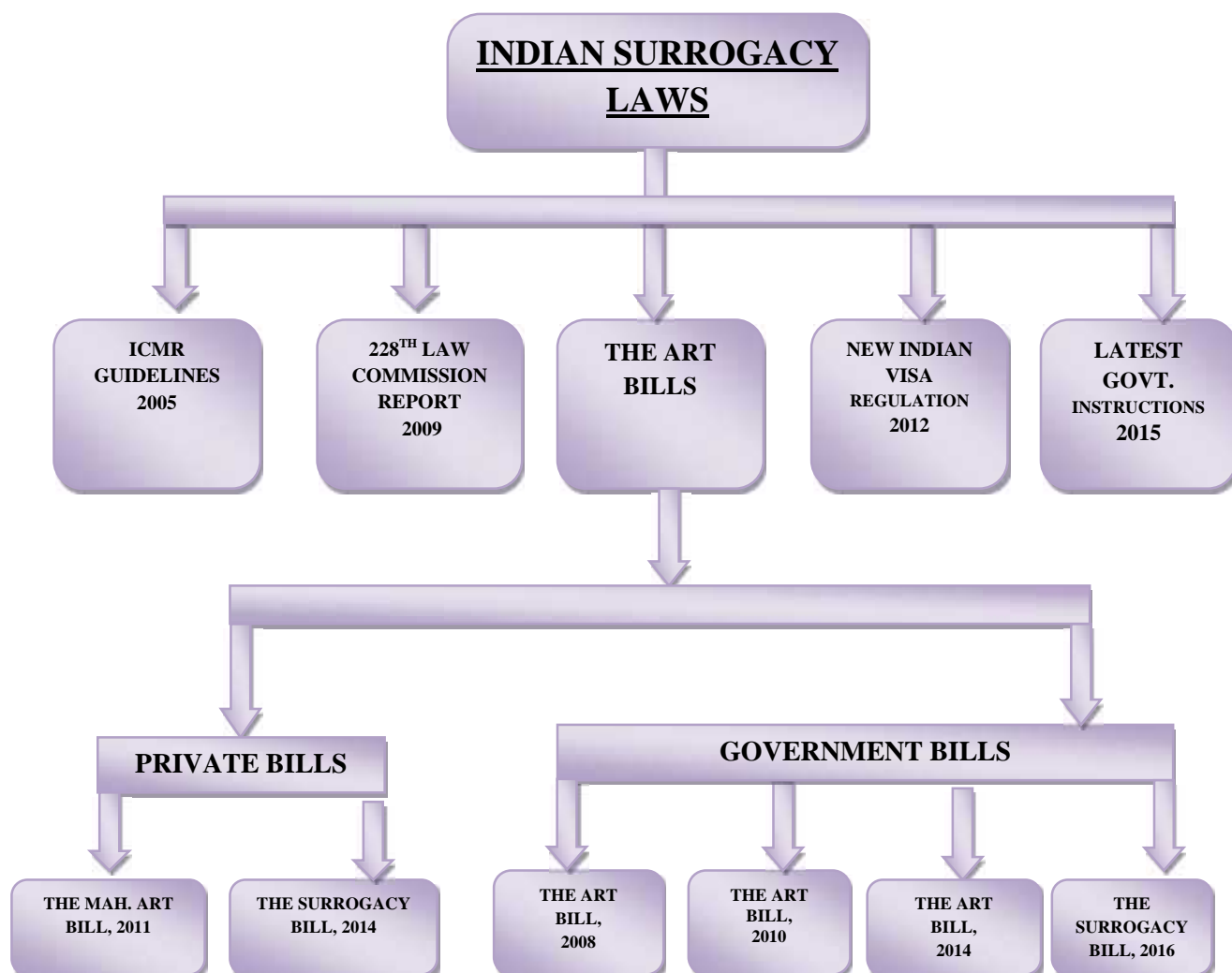
²⁸⁵ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, visited on 21/11/2016 at 3.00 pm.

notifications, 2015 of the Ministry of Health and Family Welfare, regarding the prohibition of the commercial surrogacy and lastly international scenario of surrogacy laws with overall conclusion of this chapter. Today, in India there is no law of the surrogacy passed by the Parliament to regulate the business of surrogacy; however it is pending before Lok Sabha. Therefore, there is an urgent need of surrogacy legislation for protection of the rights of surrogate and children.

3.1. SURROGACY LAWS IN INDIA

In the last few years India has become the most well-liked reproductive tourism place for the foreign commissioning couples. This is because of mainly three reasons; the first and foremost reason is that there is still no law in India for governing surrogacy. These situations have allowed the ART clinics to practice and flourish like mushrooms. The second is the low cost of surrogacy as compared to western countries. And the third is the easy availability of poor fertile surrogate mothers. This has made India as a popular reproductive tourism destination. The following chart depicts the development of various laws relating to surrogacy.

Chart No. 8 Indian Surrogacy Laws²⁸⁶



3.2. CONFEDERATION OF INDIAN INDUSTRY (CII), 2002

Commercial surrogacy officially legalized in India since, 2002

For the first time the seeds of surrogacy officially rooted in the Indian soil in 2002, When India has taken efforts to promote medical tourism with the object to attract foreign couples to visit India.

²⁸⁶ Supra at ICMR National Guidelines 2005, 22th Law Commission Report, 2009, ART BILL 2008, 2010 & 2014 Maharashtra ART Bill 2010, Previous surrogacy Bill 2014, New Indian Visa Regulation, 2012, Latest Govt. Instructions 2015 and the New The surrogacy regulation Bill, 20.

According to the bulletin of the World Health Organization (WHO), the Confederation of Indian Industry (CII) in 2002 were published the report regarding the promotion of medical tourism by the Indian government. It was supported by the then Finance Minister of India Jaswant Singh, whose want to become India as a “global health destination.”²⁸⁷ Hence, for promoting the medical tourism he provided certain facilities as improvement in airport infrastructure and financial incentives, the cheaper rate of interest on loans and less import duties on medical equipments in the hospital. As a result the medical tourists raised the number in 2005 from 150,000 to 450,000 in 2008.²⁸⁸ However, it is sad that India is getting profit from such globalization and outsourcing business and which is nothing but a new form of consumer diplomacy, whereby foreigners who receive medical services in India help the country to promote itself as a business and tourism destination. India hosts medical tourists from industrialized States, like the UK and the US, and also from neighboring countries like Bangladesh, China and Pakistan. This has created intense regional competition with Malaysia, Singapore and Thailand.²⁸⁹ Therefore, the promotion of medical tourism industry is the main reason for becoming India as world’s top most reproductive tourism destination.

Taking into consideration, the growing legal implications and complications, the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) have come out with National Guidelines in 2005 with object to regulate, monitor and certify all ART hospitals and Clinics.

3.3. INDIAN COUNCIL OF MEDICAL RESEARCH GUIDELINES, 2005

In 2005, the ICMR along with Health Ministry has made the National Guidelines for Certification, Monitor and Regulation of the Assisted Reproductive Technology clinics and hospitals in India.

At present, in India there is neither legislation nor precedent for regulating the surrogacy arrangement. Hence, with the object to regulate the assisted reproductive

287 C.f. <http://www.who.int/bulletin/volumes/85/3/07-010307/en/> visited on 23/10/2013 at 2.00 pm

288 Centre for Social Research (CSR), ‘Surrogate Motherhood- Ethical or Commercial’, p. 22 available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm

289 C.f. <http://www.who.int/bulletin/volumes/85/3/07-010307/en/> visited on 23/10/2013 at 2.00 pm

technology, the ICMR came up with the guidelines and tried to fill a lacuna of statutory laws. However, the draft Assisted Reproductive Technology (Regulation) Bill and Rules has been prepared in 2008 and revised in 2010 and again in 2014, but till date the ART Bill has not become law to regulate the surrogacy arrangement. Today, only ICMR guidelines 2005 are regulating the assisted reproductive technology clinics. The chapter III of ICMR guidelines provides the practice code for ART clinics, moral, ethical contemplation as well as legal issues.

3.3.1. Significant Aspect of Guidelines

The researcher after the study of ICMR guidelines has given the some of the following significant aspect of these guidelines:

- The ART clinics are restricted from becoming the party of the commercial surrogacy agreement.
- A gamete donor and the surrogate women are bound to surrender the all parental rights over the child.
- The sex selection or abortion of any foetus is prohibited.
- The maximum three embryos are allowed to transfer in surrogate womb.
- An oocyte donor cannot be a surrogate woman of the same commissioning couple.
- The consent of the spouse is required for any the ART procedure.
- For providing treatment of AIH or ART to the HIV-positive woman then the ART clinics are bound by the decision of Case of *Mr. X v. Hospital Z*²⁹⁰ or the any recent ART laws of India.²⁹¹
- The surrogate child is required to be adopted by the biological, i.e. genetic parents;²⁹² therefore, the DNA test is compulsory.²⁹³

²⁹⁰ *Mr. X v. Hospital Z*, (1998) 8, the Supreme Court held that although the “right to privacy” is the fundamental right under Art. 21 of the but it is not an absolute right and restrictions can be imposed on it for prevention of crime, disorder or protection of health or protection of rights and freedoms of rights and freedom from others. According to the Supreme Court if a person suffering from AIDS even prior to the marriage, he has no right to marry so long as he is not fully cured from the disease. As such when the patient was found to be HIV (+ve), the discloser by the Doctor was not violative of either the rule of confidentiality or the patient’s right to privacy as the lady with whom the patient was likely to be married was saved by such disclosure or else she too would have been infected with dreadful disease, if the marriage had taken place.

²⁹¹ National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, at p. 63 at 3.12., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00 am.

²⁹² Under Para 3.10.1. Of the ICMR guidelines states that the child born through surrogacy must be adopted by the genetic (biological) parents but this may not be possible for non -Hindu commissioning

- The surrogacy option should be available only to the infertile patients.²⁹⁴
- There should be a written document about the payment of the amount given to the surrogate. It should include all the expenses of the pregnancy and delivery.
- The Clinics are prohibited from involvement of financial matter of surrogacy
- The commissioning couple or semen bank is responsible for finding of a surrogate and not the ART Clinics.
- A surrogate mother should not be over 45 years of age.
- Only three times any woman is allowed to become the surrogate women.
- The surrogate is prohibited from using drugs and any blood transfusion during the pregnancy.
- Any known person or relative of the commissioning couple is allowed to become a surrogate woman of the same commissioning couple.²⁹⁵
- A surrogate child is presumed to be a legitimate child of the commissioning couple.
- A surrogate child is entitled to all the legal rights such as the parental maintenance, succession, inheritance as well as all other basic rights.
- In the surrogacy arrangement if donated sperm or egg is used for the birth of the surrogate baby, then in such case the baby has the right to know²⁹⁶ the information about his/ her genetic parents.²⁹⁷

couples because under the Hindu adoption Maintenance Act, 1955 allows adoption only to Hindu parents.

²⁹³ National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, at p.68 at 3.10., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. a.m.

²⁹⁴ Who are physically or medically impossible/ undesirable to carry a baby to term?

²⁹⁵ National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, at p.68 at 3.10., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00 am. The ICMR guidelines has only mentioned maximum age for becoming surrogate mother but failed to mention minimum age as per the New ART, Bill, 2014 the surrogate woman must be between 25-35 years of age. In ART Bill, 2014, relative or known person are not allowed to act as surrogate mother for the commissioning couple. Prohibition of surrogate women to act as a oocyte donor for the commissioning couples also not mentioned in the ICMR guidelines 2005. However, if the relative acting as surrogate then relative should belong to the same generation as the woman desiring the surrogate.

²⁹⁶ However, the right to know does not include the information about personal identity of the genetic parents such as such as name, address, parentage, etc.

²⁹⁷ National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, at p. 70 at 3.12., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am. Under this guideline it is permitted to ART clinics to transfer the embryo max. 3 in the womb of surrogate but for achieve more success rate clinics are transferring more than six embryos which severely affects the health of the surrogate women.

- Thus ICMR guidelines have considered the single or gay parents as custodial parents of the child because it has recognized the genetic parents as the parents of the surrogate.²⁹⁸

However, the important concern about these guidelines is that, it is being non statutory, the ART clinics are frequently violating it. The ICMR guidelines have focused only on the regulation of ART clinics, but failed to make provision on the important part of the protection of rights of surrogate women and surrogate baby as a result the exploitation of surrogate mother, issues such as custody, citizenship and parentage of the surrogate child and the insurance of the surrogate mother and surrogate child has arisen.

According to the National Commission for Women (NCW), around 3000 illegal fertility clinics are operating in the country with the majority of them being located in Gujarat, Maharashtra and Delhi and also with a 17-20 percent annual growth.²⁹⁹ However, as per the approved list of ART clinics published by the ICMR on 30/09/2015 shows only 385 confirmed ART clinics in India.³⁰⁰

3.4. THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2008

The ART, Bill, 2008 made an attempt to regulate the surrogacy in India. This was also released by the government for public opinion. The draft of the Assisted Reproductive Technology (Regulation) Bill, 2008 has prepared by the Health Ministry with the help of medical specialist of the ICMR with object to regulate and monitor the ART all over India.³⁰¹

²⁹⁸ Gehna Vaishnavi, Navneet Tatkhar 'Surrogacy Medico legal Issues,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p..60

²⁹⁹ The Economic Times, 'Blanket ban likely on NRIs, PIOs, foreigners having kids through surrogacy,' By PTI | 15 Oct, 2015, 10.49 PM IST c. f. <http://economictimes.indiatimes.com/news/politics-and-nation/blanket-ban-likely-on-nris-pios-foreigners-having-kids-through-surrogacy/articleshow/49391832.cms> visited on 24/10/2015 at 12.39 pm

³⁰⁰ <http://www.icmr.nic.in/icmrnews/art/List%20of%20Enrolled%20ART%20Clinis-5%203%202015.pdf> visited on 15/11/2015 at 2.30 pm

³⁰¹ Gehna Vaishnavi, Navneet Tatkhar 'Surrogacy Medico legal Issues,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p. 61

3.4.1. Salient Features of the ART Bill, 2008:

1. The Central Government may, by notification, establish National Advisory Board and also State Boards.
2. These Boards shall be considered as the Civil Court and each proceeding termed as the judicial proceedings.
3. All ART clinics shall register themselves with the Registration Authority.
4. The Bill prohibits any kind of the practice of ART by the Semen Banks, ART clinics, or research institutes without the registration under the said Act.³⁰²
5. It is the duty of the ART clinics that the surrogate women, gamete donors and the ART patients should have the medical examination of diseases especially the sexually transmitted diseases or others.
6. The ART clinics shall keep any information confidential about clients, donors and surrogate mother.³⁰³
7. The ART Bill allows the commission of surrogacy to all persons, including single male or female person, married or unmarried couples and same sex couples.
8. The surrogacy parties, i.e. the surrogate women and commissioning couple are required to enter into a surrogacy agreement, which is bind up on them.
9. The surrogate women and the gamete donor are bound to renounce the all parental rights over the surrogate baby.
10. The commissioning parent is bound by all the expenditures incurred at the time of pregnancy and after the delivery till the child is ready to be delivered.
11. The Bill provides the payment of monetary compensation to the surrogate women.³⁰⁴
12. The surrogate women must be between the 21 to 45 years of age and allowed maximum of three live births in her life.
13. Only registered semen banks are allowed to provide services of surrogates to the Commissioning couple and the ART clinics are restricted.
14. The names of the commissioning parents are allowed on the birth certificate of the surrogate baby as a parent.

³⁰² C.f. http://www.prindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf visited on 25/10/2010 at 3.00 pm

³⁰³ *Ibid*

³⁰⁴ C.f. http://www.prindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf visited on 25/10/2010 at 3.00 pm

15. The commissioning couple under obligation to take custody of the child despite of any abnormality or any deformity in the child.
16. The local guardian is required to be appointed by the foreign commissioning couple for taking care of the surrogate during the pregnancy period.³⁰⁵
17. The surrogate child is considered as the legitimate child of the commissioning parents.
18. The commissioning couple is prohibited from the concurrent transport of embryos in the surrogate women as well as in another woman.³⁰⁶

After the study of the Assisted Reproductive Technology Bill, 2008,³⁰⁷ it is found that the Bill was based on the ICMR National Guidelines, 2005. And these 'ICMR National Guidelines 2005' were suffered from many drawbacks which are again continued with some old and some new flaws. In further discussion the researcher has described how the ART Bill, 2008 is criticized in a number ways.

3.4.2. Criticism on the Assisted Reproductive Technology Bill, 2008

The Bill was drafted by the expert persons from the various fields, but unfortunately it suffers from a lot of drawbacks hence, it was criticized tremendously. Even it is alleged that the Bill is based on ICMR guidelines which were already carrying the stigma of lacunas which again continued in the Bill with some old and new issues.

In following the researcher has given the various criticisms on the Assisted Reproductive Technology Bill, 2008:

³⁰⁵ C.f. http://www.prindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf visited on 25/10/2010 at 3.00 pm. Foreign and non-resident Indian (NRI) commissioning parents shall provide the ART clinics with documentation that they would be able to take the child born surrogacy outside the country. A child may, upon reaching 18 years of age may obtain any information about genetic parents or surrogate mother except personal identifiable information about them.

³⁰⁶ Gehna Vaishnavi, Navneet Tatkhar 'Surrogacy Medico legal Issues,' Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn. at p..66

³⁰⁷ The Assisted Reproductive Technology Bill, 2008 was drafted by the committee consisted of three lawyers from the Public Interest Legal Support and Research Centre (PILSARC), four representatives of service providers, including the famous ART clinic, Rotunda; three government representatives; an eminent molecular biologist as its chairperson, and an Indian Council of Medical Research (ICMR) officer as member-secretary. Representatives of women's organizations, consumer groups, public sector obstetric and pediatric service providers, and experts in ethics, child development and child psychology.

1. The Bill lacks in the preamble itself. It is likely to regularize and promote the interest of the ART clinics rather than regulate and monitor of assisted reproductive technology.
2. The ART Bill is oppressive as it protects only the interest of its providers and the commissioning parents. As rightly said by the Nelson Mandela that for the protection of the sanctity of law the legislation must be challenged if it is oppressive.³⁰⁸
3. The Bill actively promotes the medical tourism and legalizes the commercial surrogacy. Therefore, fails to protect the interest of the surrogate mother and the surrogate child.
4. According to the ART Bill the surrogate mother is prohibited from donating her eggs, hence, she required to undergo a very complicated, expensive and hazardous in vitro fertilization procedure instead of a simple procedure of Intrauterine Insemination (IUI). And because of this provision the infertile couple has to search for the surrogate as well as an egg donor.
5. This Bill itself is a self- contradictory, it doesn't protect the anonymity of the surrogate. The legislation makes it mandatory for the surrogate to register her name for medical treatment for acting as a surrogate mother for the commissioning parents and if she is required to disclose her identity then how her privacy and anonymity will be protected.³⁰⁹
6. If the commissioning parents are foreigner or non- resident Indian (NRI) then they are required to appoint local guardian during the gestation period for taking care of the surrogate, but the Bill has not specifically stated the exact role and responsibility of local guardian.
7. The Bill is not clear about the legal parentage of surrogate child. Even the Bill has not adequately answered for the situations such as the commissioning couple does not want the child or if they pass away or separated from each other or abandon the child in case of deformity.

³⁰⁸ Imrana Qadeer, 'The ART of marketing babies,' Indian Journal of Medical Ethics Vol. VII. No. 4 October-December 2010, p. 209, available at <http://www.issuesinmedicaethics.org/index.php/ijme/article/view/260/449>, visited on 14/11/2011 at 2.00 pm. Nelson Mandela while addressing at convocation ceremony ,1990 held at Jawaharlal Nehru University he said for the purpose of protection of sanctity of law the legislation must be challenged when it becomes oppressive.

³⁰⁹ Sarojini N. B, Aastha Sharma, The draft ART (Regulation) Bill: in whose interest? Indian Journal of Medical Ethics Vol. VI. No. 1 January-March 2009, p. 36, available at <https://idl-bnc.idrc.ca/dspace/bitstream/10625/46448/1/132936.pdf> visited on 23/04/2011 at 12.00 pm

8. There is a need of clarification about the presumption of the commissioning parents name as the genetic parents on the birth certificate of the child.
9. The Bill is vague about the eligibility of different sexual orientation for accessing these technologies. And it also required giving explanations about the prohibition of use of gametes from the relatives or known person and also the prohibition of use of the genetic surrogacy.³¹⁰
10. Under the Bill the surrogacy agreement enforceable by the parties, but the State is not a party to the agreement.
11. Under the Bill, the commissioning couple has given a lot of powers such abortion right, termination of pregnancy in case of any abnormality in the child or multiple pregnancies. Thus, due to this demand by the commissioning parents sometimes the surrogate may cause a health risk even risk of death.³¹¹
12. The Bill has given too much power to the ART clinics and the sperm banks, which leads to the exploitation of the surrogate and gamete donors.
13. It is illegal that clinics should not be a party for the identification of the surrogate mother, sometimes even acts as a legal representative of the surrogate mother with the sperm bank.
14. The Bill has not made and simply ignored the provision regarding the damage to health and the possible death of surrogate mother during the gestation period.
15. The Bill has recognized the monetary compensation to the surrogate.³¹²
16. According to the ART Bill the surrogate mother can undergo three live births in her lifetime and also maximum of three embryo transfers for the same couple. It means she is allowed to undergo nine embryo transfers for three different couples which may affect on her health badly.³¹³
17. The surrogate women has to surrender all parental rights over child to the commissioning couple, but in Australia, US, France and Netherland countries the

³¹⁰ *Ibid at p. 37*

³¹¹ Imrana Qadeer, 'The ART of marketing babies,' Indian Journal of Medical Ethics Vol. VII. No. 4 October-December 2010, p. 211, available at <http://www.issuesinmedicalethics.org/index.php/ijme/article/view/260/449>, visited on 14/11/2011 at 2.00 pm.

³¹² This draft Bill ignored the legal definition and mixed compensation with wages by stating that a surrogate mother may receive monetary compensation for agreeing to act as a surrogate mother or her services.

³¹³ Imrana Qadeer, 'The ART of marketing babies,' Indian Journal of Medical Ethics Vol. VII. No. 4 October-December 2010, p. 213, available at <http://www.issuesinmedicalethics.org/index.php/ijme/article/view/260/449>, visited on 14/11/2011 at 2.00 pm

surrogate mother has the right to change her mind but in Indian ART Bill, 2008 grants total security to the commissioning couple.

18. This ART Bill was against the State policies itself such as two child policy, maternal mortality, human trafficking, gender exploitation, sale of child, sale of human body organs which are against the State laws.³¹⁴
19. The Bill 2008, has prohibited the any advertisement by ART clinics, however the many ART clinics doing advertisement through the newspaper, websites about their success rate and it also permits homosexuals to avail the service of surrogacy in India.
20. Lastly the ART Bill, 2008 has neither created nor authorized judicial or quasi judicial authority for deciding any issues which arose due to the surrogacy arrangement.³¹⁵

Thus, the ART Bill 2008 criticized tremendously, but New version of the ART Bill, 2014 also carries some of the drawbacks of the ART Bill, 2008, which again continued and issues of parentage, custody, and nationality of the child and exploitation of surrogate mother and continues till date in India no legislation on surrogacy.

The researcher has found that the ART Bill, 2008 is based on the National Guidelines of ICMR 2005. Therefore, the same flaw in the law carried forwarded further ART Bill 2008 which has left to answer a vital part of the protection of rights child and the surrogate mother.

3.5. LAW COMMISSION OF INDIA, 228TH REPORT ON “NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY”

On the 5th day of August, 2009 the 18th Law Commission of India³¹⁶ has presented the 228th Report to the Government of India.

³¹⁴ *Ibid*

³¹⁵ Gehna Vaishnavi, Navneet Tatkhar ‘Surrogacy Medico legal Issues,’ Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.68

³¹⁶ C.f. <http://lawcommissionofindia.nic.in/reports/report228.pdf>, visited on 23/05/2011 at 4.15. pm., The 18th Law Commission of India was constituted on 1st September, 2006 headed by Dr. Justice AR. Lakshmanan, the Chairman, Law Commission of India, who submitted a Report 228th on “Need For Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of

3.5.1. Observations and Recommendations of the Law Commission of India

The following are observations and recommendations of the Law Commission of India.

1. The commissioning couple and the surrogate women are required to enter into the surrogacy contract, but it should not be from a commercial point of view.³¹⁷
2. There should be a provision in the surrogacy agreement about the economical support to the surrogate baby in case of death or divorce of the commissioning parents.
3. There should be provision of life insurance for the surrogate.
4. In surrogacy agreement one of the commissioning parents should be a gamete donor.³¹⁸
5. The surrogacy Law itself has to declare the surrogate child as a legitimate child of the commissioning parent.
6. There should be the names of the commissioning couple as a parent on the birth certificate of the surrogate baby.
7. The law should take care of the privacy of the gamete donor and the surrogate women.
8. In surrogacy arrangement the sex-selection should be prohibited.
9. The Medical Termination of Pregnancy Act 1971 should be made applicable to the termination of the surrogacy pregnancy.³¹⁹

Parties to a Surrogacy” to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India.

³¹⁷ The surrogacy agreement shall contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc.

³¹⁸ Because of the bond of love and affection to a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child, which is resorted to if biological (natural) parents and adoptive parents are different.

³¹⁹ C.f. <http://lawcommissionofindia.nic.in/reports/report228.pdf>, visited on 22/01/2011, at 4.15. pm.

After the study of this report, it is found that the Law Commission favours the legalization of altruistic surrogacy and prohibits the commercial surrogacy in India. The law commission through its report tried to protect the rights and interest of the child and surrogate. It has highlighted a very important areas which are left by the ART Bill, 2008, such as artificial insemination instead use of complicated and expensive in vitro fertilization procedure, the legitimacy of a child, name of the commissioning couple on the birth certificate and right of privacy of donor and surrogate mother, cases of abortion and lastly insurance cover to a surrogate mother.

Thus, the Law Commission has adopted a pragmatic approach towards the infertile couples and tried to harmonize the actual reality of the surrogacy. The commission suggests the need of checks and balances in order to prohibit the exploitation of the parties of the surrogacy and illegitimate practice of commercial surrogacy.³²⁰

3.6. THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2010

The Law Commission of India after submission of its report 228th with the view to enact the surrogacy legislation for regulating the ART centers and protecting the rights and duties of the surrogacy parties. Thereafter, the Government of India has again prepared the ART Bill, 2010 with the object³²¹ to cover the issues which are left unaddressed by the ART Bill, 2008.

3.6.1. Significant Features of the ART Bill, 2010

The researcher has given some of the significant features of the ART Bill, 2010, are as follows:

³²⁰ *THE HINDU*, 'DR. AR. Lakshmanan' "Legalize Altruistic Surrogacy, Prohibit Commercial Ones" August 15, 2010, available at <http://www.thehindu.com/todays-paper/tp-features/tp-openpage/legalise-altruistic-surrogacy-prohibit-commercial-ones/article571607.ece>, visited on 24/07/ 2011.

³²¹ The Assisted Reproductive Technologies (Regulation) Bill-2010, at p. 2 available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf., The Assisted Reproductive Technology (Regulation), Bill, 2010 was prepared with the object to provide a national framework for the accreditations, regulation and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services.

- The ART Bill, 2010 has allowed the commissioning of surrogacy to the all persons such as single person, married or unmarried heterosexual or homosexual couples.³²²
- It has legalized commercial surrogacy, allowed the payment of compensation to surrogate women, treatment expenses and life insurance.³²³
- The parties of the surrogacy arrangement have to enter into a surrogacy agreement and which is binding upon the parties.
- A surrogate woman must be between 21-35 year of age.
- A surrogate woman is permitted to deliver the five winning live births including her own children.
- The surrogate is bound to give up all parental rights above the child to the commissioning couple.
- A surrogate has to be medically tested such as sexually transmitted and various contagious diseases.³²⁴
- The ART clinics are prohibited from advertising for surrogacy arrangement, but allowed to the couple and semen bank.
- A surrogacy is recommended to the patients who are medically unfit to bear the baby.³²⁵
- A surrogate has allowed undertaking the embryo transfer for maximum period of three times for the same commissioning couple.
- The name of commissioning parent should bear on the birth certificate of the surrogate child.
- The commissioning parents are under a duty to take the custody of the child, even in the case of abnormality of the child and the denial of it would amount the offence under the ART Act, 2010.
- A surrogate woman is prohibited donating eggs to the same commissioning couple to whom she intends to become a surrogate.³²⁶

³²² Ibid at 25

³²³ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*', Universal Law Publication Co. New Delhi, 2013 Edn., P. 36

³²⁴ The Assisted Reproductive Technologies (Regulation) Bill-2010, at p. 26, available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf.

³²⁵ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*', Universal Law Publication Co. New Delhi, 2013 Edn., P. 38

³²⁶ The Assisted Reproductive Technologies (Regulation) Bill-2010, at p. 27, available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf.

- The foreign commissioning parents have to appoint a local guardian for taking care of the surrogate during and after the pregnancy.³²⁷
- If the foreign commissioning parents failed to take custody of the child, then the local guardian is under obligation to take care of the child and thereafter, he requires to give the child to the adoption agency. In such case the child will be provided with Indian citizenship.³²⁸
- The surrogate and the child have to be adequately insured by the commissioning couple.
- The surrogate child is deemed to be the legitimate child of the commissioning parents and even a couple gets divorced or separated the child shall be the legitimate child of the couple.³²⁹
- It has prohibited the sex-selective techniques and MTP Act, 1971 is made applicable to the cases of abortions.

This Bill is drafted by a committee consisting of professionals of both legal and medical fields and they tried to overcome the pitfalls in the ART Bill, 2008, however this Bill, 2010 also suffered from various criticisms.

3.6.2 Criticism on The Assisted Reproductive Technology (Regulation) Bill, 2010

The ART Bill, 2010 has also considered being incomplete to give proper justice to the parties of the surrogacy. Therefore, it was challenged from Socio-ethical, medico-legal ways and criticized severely. The following are the criticisms of the Bill, 2010.

1. According to the SAMA group,³³⁰ the revised Bill, 2010 is highly imbalanced, exploitative and unfavorable to the surrogate mother.
2. As per the Bill, 2010 the compensation should be paid to the surrogate in five installments, i.e. 75 %, to be made as the fifth and final installment, whereas in the

³²⁷ Further, the party seeking the surrogacy must establish through proper documentation that the country of their origin permit surrogacy and the child born through surrogacy in India will be permitted entry in the country of origin as a biological child of the commissioning couple/ individual.

³²⁸ The Assisted Reproductive Technologies (Regulation) Bill-2010, at p. 27, available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf.

³²⁹ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, A Law in the Making', 'Universal Law Publication Co. New Delhi', 2013 Edn., P. 37

³³⁰ Nivedita Menon, 'The Regulation of Surrogacy in India – Questions and Concerns: SAMA', January 10, 2012, available at <http://kafila.org/2012/01/10/the-regulation-of-surrogacy-in-india-questions-and-concerns-sama/>, Visited on 20/05/2012 at 12.00 pm

2008 draft, payment was divided into three installments, with 75% of the payment to be made in the first installment itself.

3. The Bill has allowed the use of only *in vitro fertilization* (IVF) or embryo transfer (ET) procedure and prohibited intrauterine insemination (IUI) a simple procedure for gestational surrogacy.
4. The revised draft Bill, 2010 has also increased the number from three (in Draft Bill, 2008) to five of permitted successful live births for a surrogate including her own children.³³¹
5. According to the Bill, the surrogate mother can undergo maximum three times of embryo transfer for per couple, but number of couples have not mentioned in the Bill, thus, it means she can undergo many cycles and embryo transfers for many couples before achieving the permissible limit of five successful live births. So, it may adversely affect the health of the surrogate and may chance of exploitation.
6. A Bill is required to give more explanation about the nature and extent of insurance by the commissioning couple to the surrogate, especially in regard to the post-delivery follow up and care.
7. The Bill allowed the single person, married or unmarried couple to the avail the service of surrogacy In India. But under the Bill, the ‘couple’ means two persons who are having sexual relations which is lawful in India. And also provided both married and unmarried couples, as being in a marriage or relationship is legal in India. Therefore, it is not clear how these three definitions will be read together. The Bill has also allowed the surrogacy to the gay couple. After the decision of the Delhi High Court in *Naz Foundation case*³³² homosexuality does not remain as an ‘Unnatural offence’ and the court had struck down the section 377 of I.P.C. as a unconstitutional. Thus, today, the gay relation has become legal in India.³³³
8. As the Bill has been given a very vital responsibility of taking care of the child to the local guardian therefore, it very necessary that the role of the local guardian is required to be clearly defined for preventing the misuse of it.

³³¹ Ibid

³³² 160 (2009) DLT 277,

³³³ Nivedita Menon, ‘The Regulation of Surrogacy in India – Questions and Concerns: SAMA’, January 10, 2012, available at <http://kafila.org/2012/01/10/the-regulation-of-surrogacy-in-india-questions-and-concerns-sama/>, Visited on 20/05/2012 at 12.00 pm., Today as per the New India Visa Regulation, 2012 does not permit to service of surrogacy to the foreign single person and homosexual persons.

9. The Centre for Social Research (CSR) has criticized that the Bill has not provided any informed consent form to the surrogate mother about the possible side-effects. Hence, the Bill seems to be a safeguard provider of the commissioning couples, but it does not seem to be protecting the rights of the surrogate.³³⁴
10. In surrogacy arrangement the risk of the commodification of children and parenthood, chances of exploitation of women.³³⁵
11. The Bill has neither authorized nor created any Court or judicial or quasi judicial body for solving the disputes arising out of surrogacy. As established the Court in the Hindu Marriage Act or the Guardians and Wards Act. In cross broader surrogacy there are already issues of parentage, nationality, passport, grant of visas, which requires the judicial forum for determining and adjudication of these problems.³³⁶
12. The National Board and State Board authorities will encourage the ART and surrogacy arrangement. And no Judge or judicial officer is appointed in the Borads. Therefore, it is difficult to the conduct judicial proceeding by these Boards.
13. The chapter 8 of the ART Bill, states about offences and penalties, but the question is who will determine offences and who will adjudicate these offences and impose the penalties. Therefore, until a proper judicial authority is established all issues relating to the surrogacy will remain as a doubtful, uncertain and incomplete.³³⁷
14. A Catholic Church in Kerala has criticized the ART Bill, that it will destroy the family system of India.³³⁸ Surrogacy and sperm, ovum banks are going to change the basic concepts and definitions of marriage, family, blood relation, father, mother, etc. So, this ART Bill is going to radically alter our society and our family structure and its values.³³⁹

Thus, the ART Bill also failed to protect the interest of surrogate women and the big drawback of this Bill that, it has neither authorized and nor created any court for deciding and adjudication of the issues which may arise out of surrogacy ART.

³³⁴ Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p.27 available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm.

³³⁵ *Ibid*

³³⁶ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, A Law in the Making', Universal Law Publication Co. New Delhi, 2013 Edn., P.26

³³⁷ *Ibid*

³³⁸ Kerala Church criticizes surrogacy Bill, June 24, 2010, available at <http://www.cathnewsindia.com/2010/06/24/kerala-church-criticizes-surrogacy-bill/>, visited on 21/10/2011 at 3.30. pm

³³⁹ C.f. <http://www.ernakulamarchdiocese.org/presseng.pdf>

Meanwhile, the private Bill of the Maharashtra Assisted Reproductive Technology (Regulation) Bill, 2011 was prepared for securing the interest of the surrogate and the child as well as controlling and regulating the ART clinics in Maharashtra.

3.7. THE MAHARASHTRA ASSISTED REPRODUCTIVE TECHNOLOGY BILL, 2011

According to DNA Newspaper³⁴⁰ that Devendra Phadanvis the then Bharatiya Janta Party (BJP) leader (now chief Minister of Maharashtra) was prepared the private members Bill called as the Maharashtra Assisted Reproductive Technology Bill, 2011, to regulate surrogacy in the Maharashtra State. According to Phadnvis that National Bill is required to regulate surrogacy across the country, but still such Bill not approaching, hence, he has taken the lead as there are more surrogacy cases in Maharashtra state rather than Gujarat. Therefore, the Bill tried to regulate the ART industry by giving protection to the surrogate mother against exploitation as well as to curb the threat of illegal abortions especially female foetus after sex determination tests. As per the DNA, the Bill was presented in the constituent assembly on 17th December, 2011 for further discussion but failed to take lead further.³⁴¹

However, the Maharashtra, Private ART Bill was the weakest as compared to the Central Bill of Government of India. Thus, till date there is neither central nor state law for regulating the ART industry. The ART Bill, 2010 had the liberal approach, allowing individual, married, unmarried couples and even the homosexuals the right to use ART for the production of their baby. After the Israeli Gay couples case³⁴² and considering the interest and growth of the children in a normal environment and protection surrogate women, Indian Government had issued the new Indian visa regulation for foreign nationals visiting India for surrogacy arrangement.

³⁴⁰ 'DNA' Newspaper, 'Bill to regulate surrogacy in Maharashtra', Published: Sunday, Dec 18, 2011, 8:00 IST, Place: Nagpur, C.f. http://www.dnaindia.com/india/report_bill-to-regulate-surrogacy-in-maharashtra_1627180, visited on 20/12/12 at 9.00 a.m.

³⁴¹ 'DNA' Newspaper, 'Bill to regulate surrogacy in Maharashtra', Published: Sunday, Dec 18, 2011, 8:00 IST, Place: Nagpur, C.f. http://www.dnaindia.com/india/report_bill-to-regulate-surrogacy-in-maharashtra_1627180, visited on 20/12/12 at 9.00 a.m.

³⁴² The Times of India, Mumbai, 18-11-2008, The gay couple Yonathan and Omer could not adopt or have a surrogate in Israel. Because, Israeli law does not allow the same –sex couple to adopt or to have surrogate mother. Therefore, they came to India and in Mumbai. Yonathan donated his sperm. They selected a surrogate mother. Baby Evyatar was born. The gay couple took son Evyatar to Israel. Israeli government had required them to do a DNA test to prove the paternity before the baby's passport and other documents were prepared.

3.8. NEW INDIAN VISA REGULATION, 2012

The Ministry of Home Affairs has issued new Indian visa regulation dated 9 July, 2012³⁴³ for foreign citizens planning to visit India for entering into a surrogacy arrangement. The foreigners were required to apply for a *Medical Visa* for commissioning the surrogacy in India along with the following mandatory conditions needs to be fulfilled:

1. The foreign heterosexual commissioning couple must be married couple and marriage must be continued at least for a period of 2 years.
2. They should carry the letter of their Embassy stating clearly that:
 - (a) Their country recognizes surrogacy and
 - (b) The children born through the Indian surrogate to the commissioning parents would be permitted entry into their country as a biological child of the couple.³⁴⁴
3. The foreign couple has to give an undertaking that they would take care of the surrogate child.
4. The surrogacy treatment should be taken only at the duly registered ART clinics as recognized by ICMR.
5. The foreign commissioning couple is required to produce the notarized surrogacy agreement between the couple and the Indian surrogate.
6. The surrogacy visa application may be discarded, if the couple fails to fulfill the conditions.³⁴⁵

However, the couples were allowed to visit India on a tourist VISA but only for executing the surrogacy agreement and not for giving samples.

³⁴³ 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, available at http://www.icmr.nic.in/icmrnews/art/MHA_circular_July%209.pdf visited on 11/12/2012 at 3.30. pm

³⁴⁴ New Indian Visa Regulations, dated 9 July 2012, available at http://www.icmr.nic.in/icmrnews/art/MHA_circular_July%209.pdf, p.1, visited on 11/12/2012 at 3.30. pm

³⁴⁵ *Ibid*

The Foreign couple before leaving India for their return journey would require 'Exit' permission from the Foreigner Regional Registration Office (FRRO)/ Foreigner Registration Office (FRO) and should carry certificate from the ART clinic concerned regarding the fact that the child/children have been duly taken custody by the foreigner and the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement. A copy of the birth certificate(s) of the surrogate child/children will be retained by the FRRO/FRO along with photocopies of the passport and visa of the foreign parents.

MEDICAL VISA REGULATION HARMONISED WITH THE EXISTING INDIAN AND FOREIGN LAW OF COUNTRIES OF COMMISSIONING PARENTS.

Thus, the new Indian Medical visa regulation has disallowed the Indian visa to foreigners whose countries prohibit the surrogacy and harmonized with those foreign nations whose citizens wish to wrongfully patronize surrogacy in India.³⁴⁶

However, on 5 February, 2013, a limited relaxation in such matters has been permitted on a case to case basis by the Ministry of Home Affairs, where a surrogacy had already commissioned and children born in the year 2013. However, infants born from such surrogacy arrangement to foreign parents will not be granted Indian Citizenship.³⁴⁷

Thus, the new Indian visa regulation had banned the foreign single, unmarried and gay parents for commissioning surrogacy in India on tourist visa by restricting surrogacy only to married couples. However, today, according to recent notification published on 4th November 2015 by the Ministry of Health and Family Welfare, Government of India that only an Indian married couple is allowed to avail surrogacy in India and prohibited all foreigners for commissioning surrogacy in India as well as banned commercial surrogacy in India.

3.9. THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION), BILL, 2013

The Ministry of Home affairs were taken the initiative to present the ART Bill, 2013 in the winter session of the Parliament 2014.³⁴⁸ However, it was not presented in the Parliament and even not made open to the public opinion. It was stated that, the Bill

³⁴⁶ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*,' Universal Law Publication Co. New Delhi, 2013 Edn., P. 16. Foreigners visit to India on tourist visa for the purpose commissioning surrogacy. Because of many of countries has prohibited the commercial surrogacy such as in UK commercial surrogacy is illegal though permit reasonable expenses to surrogate mother. In most of US states, compensated surrogacy is either illegal or unenforceable. In Australia arranging commercial surrogacy is the criminal offence. In New Zealand and Canada and France commercial surrogacy or other surrogacy is unlawful and in Israel commercial surrogacy is illegal and law only accept the surrogate mother to be real mother therefore unmarried couple, gay lesbian approaches the India because in India no declares the it illegal therefore the new visa regulation tried to change scenario of surrogacy in order to cope with surrogacy law of the foreign countries.

³⁴⁷ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*,' Universal Law Publication Co. New Delhi, 2013 Edn., P. 16

³⁴⁸ C.f. <http://blog.indiansurrogacylaw.com/assisted-reproductive-technology-bill-in-indian-parliament>

were contained the provisions about the limit of surrogate mother, compensation payable to surrogate and to impose ban on single foreign nationals and unmarried couples coming to India for commissioning the surrogacy.³⁴⁹ The division bench headed by Chief Justice Sanjay Kishan Kaul of Punjab and Haryana High Court who passed the order on 23 April 2014 in *Sudan National case*³⁵⁰ that the guidelines circulated by the Ministry of Home Affairs (MHA) in July 2012 under the Foreigners law for regulation of surrogacy in India shall prevail over the any other similar guideline issued earlier. The Central government also informed to the High Court that the ART Bill 2013, had been drafted by the Health Ministry and it will be finalized with the formation of a new government at the Centre in 2014.

3.9.1. Suggestions to the ART Bill, 2013:

1. The Directorate General of Health Services (DGHS), Ministry of Health:

- Surrogacy should be permissible only to Indian couples and not to the foreigner couples.
- Surrogacy should be allowed to married heterosexual couples and not for the single male or female person or gay couple.
- A woman must be allowed to become surrogate only a one time during her lifetime.³⁵¹

2. The Union Women and Child Development Ministry (UWCDM):

- The commission of surrogacy has to be permitted to single persons as well as gay couples.
- Maximum four pregnancies should be allowed to the surrogate with her children.³⁵²

³⁴⁹ Gehna Vaishnavi, Navneet Tatkhar ‘ Surrogacy Medico legal Issues,’ Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.70

³⁵⁰ Ibid. at 71 In Sudan National Case the writ petition was filed Sudan national, Shihabeldin, a bachelor who had came to India with the hopes of becoming single parent through surrogacy in India and challenged the New visa regulation of the Ministry Home Affairs which restricts international surrogacy arrangements to married couple and bars international surrogacy for single foreign nationals and unmarried couples. The Court dismissed the petition initially stating that the ART Bill 2010 is pending before the parliament hence court cannot void the vacuum in the absence of law.

³⁵¹ Gehna Vaishnavi, Navneet Tatkhar ‘ Surrogacy Medico legal Issues,’ Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.71

³⁵² However, the Assisted Reproductive Technology (Regulation) Bill, 2013 had proposed that surrogate mothers should not have more than three pregnancies.

- A minimum compensation should be paid to the surrogate mother after the embryo transfer is complete, irrespective of success or failure of the procedure and coverage of the medical risk.³⁵³

3.10 THE SURROGACY (REGULATION) BILL, 2014

The private Bill No.61 of 2014 had been introduced by Dr. Kirit Premjibhai Solanki, MP from Gujarat in Loksabha on August 8, 2014³⁵⁴ to regulate surrogacy in India. However, it has also remained in a latent state. The following are the some of the significant features of the Bill:

- This is a private Bill introduced by an individual member of parliament and not the government sponsored Bill.
- It deals with the surrogacy arrangements only and not the Assisted Reproductive Technology.
- It allows the commercial surrogacy to the foreign commissioning couples.
- The Bill has excluded the ART Banks therefore the identification of surrogate and egg donors are questionable.
- Under the Bill the commissioning couple is bound to provide the insurance to the surrogate.
- The Bill allows the commissioning surrogacy by the gay couples.³⁵⁵

3.11 THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2014

For the want of codified law to govern the surrogacy, the Indian Council of Medical Research (ICMR) issued the National Guidelines in 2005 to verify the unprofessional practices of assisted reproductive technology. The ICMR National Guidelines are non-statutory hence; it lacks the legal sanctity and fails to bind the ART Clinics. Therefore, the Ministry of Health and Family Welfare, Government of India prepared the draft of the Assisted Reproductive Technology (Regulation), Bill, 2008 and which

³⁵³ Gehna Vaishnavi, Navneet Tatkhar ‘ Surrogacy Medico legal Issues,’ Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.72

³⁵⁴ C.f. <http://blog.indiansurrogacylaw.com/surrogacy-bill-2014-introduced-at-indian-parliament/>

³⁵⁵ Gehna Vaishnavi, Navneet Tatkhar ‘ Surrogacy Medico legal Issues,’ Jaypee Medical Health Publisher, New Delhi, 2015, 1st Edn., at p.147

was revised in 2010. The ART Bills and Rules 2008 and 2010 were comprehensively circulated for public opinions and suggestions. However, the Bill of 2008 and 2010 were severely criticized for various issues.

Thus, the new version of the Assisted Reproductive Technology (Regulation), Bill, 2014³⁵⁶ is drafted by the Ministry of Health and Family Welfare, Government of India. The draft Bill is divided into X Chapters and contains the 95 Sections which covered various topics and added new provisions. The brief details of the chapters of the Bill, 2014³⁵⁷ are as below.

The *Chapter First* contains the several definitions. The *Chapter Second* deals with the authorities to regulate assisted reproductive technology such as the establishment of the National Board, State Board, National Registry and State Registration Authority and its powers, functions and procedure. The *Chapter Third* states the procedures relating to the registration and complaints of the ART Banks and ART Clinics. The *Chapter Fourth* lays down the several duties required to be followed by the ART Banks and ART Clinics,³⁵⁸ The *Chapter Fifth* deals with the procedural part regarding sourcing, storage, handling and keeping of record of embryos, gametes, and surrogates. The *Chapter Six* deals the provisions about the regulation of the human research embryos. The *Chapter Seven* provides the various rights and obligations of the parties of surrogacy arrangement and others person's duties.³⁵⁹ The *Chapter Eight* prescribes the various offences and punishment regarding the surrogacy arrangement. The *Chapter Nine* provides the finance, accounts, audits and reports. Lastly, the *Chapter Ten* is titled as "Miscellaneous" provisions.³⁶⁰

³⁵⁶ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm. The draft of the Assisted Reproductive Technology (Regulation), Bill, 2014 published by the Ministry of Health and Family Welfare, through its Department of Health Research, Government of India, on September 30, 2015 for general public and stakeholders for comments and suggestions. However, the rules regarding the assisted reproductive technology are not published by the government.

³⁵⁷ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

³⁵⁸ Duties such as the ART clinics and banks have to ensure the eligibility of patients to avail the service of surrogacy, professional counseling, informed decision and also not offer a couple with a child of pre-determined sex.

³⁵⁹ The ART patients, gamete donors, the surrogate women, commissioning couple and the surrogate babies.

³⁶⁰ The miscellaneous provisions includes power of central government to issue directions to the National Board and National Registry, Power of state government to issue directions to the State Board, the power to search and seize records etc. and power to make rules and regulations.

3.11.1. Salient Features of the ART Draft Bill, 2014 Comprises Of³⁶¹

1. The draft Bill provides for the establishment of the National and the State Advisory Boards and the National Registry.³⁶²
2. The ART Bill, 2014 recognizes the commercial surrogacy.³⁶³
3. The commissioning couple and the surrogate women are required to come into a surrogacy agreement. It is mandatory for the parties of the agreement to follow it.
4. The commissioning couple shall pay all the expenses (including insurance) incurred during the period of pregnancy and after delivery and till the child is ready to be delivered as per medical advice. And if any complications arise during pregnancy,³⁶⁴ then in such cases the insurance to be provided to the surrogate.
5. The surrogate may also receive monetary compensation from the commissioning couple for agreeing to act as surrogate. And the funds have to be directly transferred into the surrogate's bank account in the varied stages since from the date of signing of the surrogate agreement till the delivery of the baby to the commissioning couple.³⁶⁵
6. The surrogate woman is under a duty to relinquish all parental rights above the surrogate baby to the commissioning parents.
7. A woman who agreed to act as a surrogate must be between 23 to 35 age group and she should be an ever married Indian woman.
8. She should have her own one child of the age of 3 years minimum.

³⁶¹ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

³⁶² These authorities are established for giving accreditation, regulation and supervision of assisted reproductive technology clinics and banks.

³⁶³ According to recent notification published on 4th November 2015 by the Ministry of Health and Family Welfare, which prohibits the commercial surrogacy in India. So, today commercial surrogacy is not allowed in India.

³⁶⁴ The complications may arise during the pregnancy such as Gestational Diabetes, Chronic Hypertension etc., which are likely to continue for the rest of her life.

³⁶⁵ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 43 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

9. She is permitted to become surrogate only a one winning live birth and there should be a 2 year gap between two deliveries.³⁶⁶
10. A surrogate woman is allowed to undergo maximum three ART cycles.
11. The Bill makes the mandatory medical examination of varied kinds of diseases such as sexually transmitted³⁶⁷ and other communicable diseases of the surrogate women. It also provides the medical test of thyroid and cardiovascular disease of the surrogate.³⁶⁸
12. The commissioning couple is required to approach only to the registered ART bank for getting the service of a surrogate woman.³⁶⁹
13. The Surrogate mother is allowed to undergo maximum three times embryo transfer for the similar commissioning couple.
14. The Bill states the name of the commissioning couple as parents on the birth certificate of the surrogate child.
15. The draft Bill prohibits the surrogacy for foreigners, but it permits to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen.³⁷⁰
16. Irrespective of any abnormality of the surrogate baby, the commissioning parents are under legal obligation to take the custody of the child.

³⁶⁶ *Ibid*

³⁶⁷ HIV/AIDS diseases

³⁶⁸ Besides the above mentioned medical test the surrogate has to declare in writing that she has not received a blood transfusion or a blood product in the last six months.

³⁶⁹ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 44 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.,

However, such advertisement should not contain any details relating to the caste, ethnic identity or descent of any of the parties of the surrogacy and the assisted reproductive technology clinic is prohibited from doing advertise to seek surrogacy for its clients. But still today many of the ART clinics doing advertisement like success rate, cost of surrogacy through websites and newspaper for attracting clients.

³⁷⁰ However, according to recent notification published on 4th November 2015 by the Ministry of Health and Family Welfare, Government of India, that only an 'Indian married couple' is allowed to avail surrogacy and all foreigners are prohibited from commissioning surrogacy in India and it also debarred commercial surrogacy in India. However, the previous ART Bill of 2008 and 2010 were permitted the surrogacy to single person, unmarried and married couples. Therefore, many gay couples availed the service of surrogacy in India. Thereafter, the new India Visa Regulation 9th July, 2012, imposed restrictions on single person, unmarried couple and homosexual couples to commissioning surrogacy in India.

17. During the pregnancy period, if any abnormality is found in the child, in such case the commissioning couple is under the legal bound to insure the child adequately.
18. The Bill makes the provision for utilization of insured amount of compensation for the growth of the surrogate child in case of accidental death of the commissioning parents during or in the process of delivery of the child
19. For the commissioning of surrogacy in India the foreign commissioning couple married to Indian citizen is required to visit on a 'Medical Visa'.³⁷¹
20. A surrogate is prohibited from donating her eggs for the same commissioning couple to whom she becomes the surrogate. And also commissioning couple is required to submit certificate that the surrogate child / children are genetically related to them.
21. The commissioning parents are prohibited from involvement of the surrogate baby in any sort of paedophilia or pornography.
22. The surrogate husband is required to give written approval to his wife to act as a surrogate and for taking care of the children during the surrogate's gestation period.³⁷²

371 The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 45 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm. Under the ART Bill, 2014 an Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to Indian citizen if commissioning surrogacy in India, then they are bound by the following conditions i. They have to produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother. ii. They are required to produce an undertaking that they would take care of the child/children born through surrogacy. iii. They require 'exit' permission from the FRRO/FRO concerned for the child or children born through surrogacy before leaving India. iv. They should be married couple and their marriage should have sustained at least for two years. v. The commissioning woman should be unable to conceive the child. vi. They are required to appoint local guardian for taking care of the surrogate during and after the pregnancy, till the child or children are delivered to the commissioning couple or the local guardian. The child/ children born through should be insured till the age 21 years or till the couple takes custody of the child/children through appropriate Insurance Policy like Jeevan Balya, whichever is earlier. vii. There should be use of gamete at least one of the commissioning couple for the creation of embryo. viii. They should establish that the child or children born through surrogacy in India have the permitted entry in the Country as a biological child or children of the commissioning couple. ix. If an Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian, fails to take delivery of the child or children within the one month from the date of the birth of the child, then local guardian is legally bound to take delivery and care of the child or children and after completion of the said one month, he can hand over the child or children to an adoption agency and also entitled to claim the Indian citizenship under the Indian citizenship Act, 1955. x. Thereafter, the insurance coverage signed by the commissioning couple at the time of agreement for the well being and maintenance of the child or children will take care of till the age of twenty-one years by the Insurance Agency.

³⁷² The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 46 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

23. A commissioning couple is allowed to take service of only one surrogate woman and prohibited the simultaneous embryo transfer in woman as well as in the surrogate.
24. The Indian citizen is permitted to act as a surrogate. The Bill also prohibits an Indian woman from acting as a surrogate in the foreign country.
25. A surrogate mother shall not engage in any act such as unprotected sex with her husband. With the view to prevent causing harm to the child, the Bill prohibits the surrogate and her husband from engaging in any kind of extramarital relationship during the period of pregnancy.³⁷³
26. The surrogate women and the child are required to be adequately insured by the commissioning couple.
27. It is the duty of the ART bank to act as legal representative and mental health counselor of the surrogate as well as to defend any legal case on behalf of the her with free of cost.
28. The surrogate's family has to be appropriately compensated in case of the death of the surrogate women during the gestation period.
29. At the time of delivery the life of surrogate should be protected over the life of the unborn baby. And the surrogate should be paid full amount as decided in the agreement.
30. The Bill makes provision for the payment of different amount of compensation to the surrogate women by the Indian commissioning and by the Overseas Citizen of India, People of Indian Origin Cardholder, Non Resident Indians and foreigner married to an Indian citizen.³⁷⁴
31. In case of death or disability of the surrogate during the gestation period, then it will be presumed to be caused by the negligence of the ART clinics.

³⁷³ *Ibid*

³⁷⁴ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 50 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm. However, this provision seems to be discriminatory as it states different amount of payment by the Overseas Citizen of India, People of Indian Origin Cardholder, Non Resident Indians and foreigner married to an Indian citizen and the Indian commissioning couple. In such case the government should fix minimum amount criteria for the payment of compensation to surrogate or otherwise provide service of surrogacy in government Hospitals to the Indian commissioning couple.

32. The Bill recognizes the surrogate baby as a legitimate baby of the commissioning parents born out of valid wedlock.
33. A child born to a woman with the use of stored sperm of her dead husband is considered as the legitimate child of the couple.
34. The child is deemed as a legitimate child of the couple even in case of the commissioning couple gets separated or divorced after making a surrogacy agreement.
35. A surrogate child born to the OCI, PIO, NRI or a foreigner married to an Indian citizen is to be granted Overseas Citizenship of India³⁷⁵ and not an Indian Citizenship.
36. A surrogate child after attaining 18 years of age has the right to know the information about the donor or surrogate mother except personal identification of them.³⁷⁶

The researcher after detailed study of the New Draft of ART Bill, 2014 founds that the number of changes has been made in the Bill, and it also protected the most of interest of the surrogate and the child/ children. And also inserted new provisions to monitor and regulate the ART clinics and banks with the object to have safe and ethical practices. However, this Bill also suffered from some lacunas so, it criticized rigorously.

3.11.2. Flaw in the ART Draft Bill, 2014

The proposed draft Bill suffers from the very crucial flaw, which are given as below:

1. Despite of the various social, ethical and legal issues attached to the commercial surrogacy, like the previous Bill of 2008, 2010, this ART Bill, 2014 has also recognized the commercial surrogacy. Because Section 60 (3) (a) of the Bill 2014

³⁷⁵ Under Section 7A of the Citizenship Act, 1955

³⁷⁶ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 52 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

However, the personal identification may be disclosed with the prior consent of the donor or surrogate, in case of life threatening medical conditions arise which requires the physical testing or samples of the donor or parents or surrogate.

itself, states that the surrogate is entitled to get the monetary compensation from the commissioning couple.³⁷⁷

2. According to Adv. Anurag Chawla, that the Bill creates discrimination between two groups of foreign couples by allowing access of surrogacy to OCI, PIO or NRI, and a foreigner married to an Indian citizen and banning other foreigners. If the purpose of the Bill is to prohibit unethical practices of surrogacy, then how it will stop by banning one group of people. And the Bill has also made discrimination regarding payment of compensation by foreign couples and Indian Couples. There should be same compensation to be paid by the Indian couple and foreign couples to surrogate.³⁷⁸
3. According to the Bill, the surrogate mother must be married women, however, the National Commission for women (NCW) has suggested that, the Bill should be allowed single, divorcee and widow women to become a surrogate mother and the Bill does not talk about the commissioning of surrogacy by the single person³⁷⁹ or the persons in live in relationship.³⁸⁰ Thus, the Bill has made discrimination in the access of surrogacy, which is against the new adoption rules³⁸¹ and the Juvenile Justice (Care

³⁷⁷ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 52 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

Recently, the Government of India after submission of affidavit in Jayashree Wad v. Union of India (Civil writ petition 95/2015, still pending in the Supreme court of India) case, the Ministry of Health and Family Welfare issued the notification on 4th November 2015, that not to support the commercial surrogacy in India and also prohibited all foreigners for commissioning surrogacy in India. Therefore, today till passing of the legislation on ART the commercial surrogacy is banned in India.

³⁷⁸ THE HINDUSTAN TIMES, 'Commercial surrogacy: The half mothers of Anand,' Namita Kohli, Hindustan Times, <http://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html>, Visited on 10/11/2015 at 2.30 pm. Because the Section 60 (31) of the ART Bill, 2014 provides that, "the minimum compensation to be paid to a surrogate mother by an Overseas Citizen of India, People of Indian Origin Cardholder, Non Resident Indians and foreigner married to an Indian citizen shall be different than the amount to be paid by an Indian commissioning couple."

³⁷⁹ THE TIMES OF INDIA, Foreigners may be Barred from Commissioning Surrogacy in India, Sushmi Dey, TNN | Oct 16, 2015, 08.52PM IST, available at <http://timesofindia.indiatimes.com/india/Foreigners-may-be-barred-from-commissioning-surrogacy-in-India/articleshow/49418285.cms>, visited on 24/10/2015 at 2.00 p.m.

³⁸⁰ THE TIMES OF INDIA, 'Couple living together will be presumed married, Supreme Court rules,' Amit Anand Choudhary | TNN | Apr 13, 2015, 02.06 AM IST, C.f. <http://timesofindia.indiatimes.com/india/Couple-living-together-will-be-presumed-married-Supreme-Court-rules/articleshow/46901198.cms>, visited on 15/06/2015 at 12.00 p.m., In *S. Khushboo v. Kanniammal & Anr* JT 2010 (4) SC 478 and recently again the Supreme Court ruled that, if an unmarried couple is living together as husband and wife, then they would be presumed to be legally married. Therefore, today in India live in relationship is not only legal, but also a woman is treated as a legally wedded wife and even entitles to inherit the property of dead partner.

³⁸¹ Guidelines Governing Adoption of Children, 2015, of 5 (c) provide the single female is eligible to adopt a child of any gender, issued by Ministry of Women and Child Development on 17th July, 2015,

and Protection of Children), Act, 2015³⁸² allows the single parents as well as foreigners to adopt the child.

4. The Bill has made the gender discrimination on the basis of sexual organ by not recognizing the right to become parents of the Transgender Person, unmarried heterosexual Couples, Gay and Lesbian.³⁸³ A very recently on the 25th September 2015 Report, published by the Ethics Committee of American Society for Reproductive Medicine (ASRM), which has recommended to have ART services to a transgender person.
5. The Bill has not made any Code of Ethics to ART Clinics and banks for assessing the patients and their partner before commencement of surrogacy treatment in order to avoid risk of significant harm or neglect to any child/ren (like in Baby Gammy's case, the father of baby Gammy was previously convicted for child abuse) which is also suggested by the Hague conference on Private International Law held on March 2014.³⁸⁴
6. According to SAMA group, in the draft Bill, 2014, the certain clauses are related to women selling their services (surrogacy, egg donation). As per the draft Bill, a woman is restricted to one live birth; however, it does not mean that the woman will not be

p. 68, available at http://cara.nic.in/writereaddata/UploadedFile/NTESCL_635760082361561985_english%20guidelines.pdf visited on 10 / 09/2015 at 3.00 p.m.

³⁸² The Juvenile Justice (Care and Protection of Children), Act, 2015, available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, Visited on 05/01/2016 at 11.00 am. The Juvenile Justice (Care and Protection of Children), Act, 2015 has received the assent of the President on 31st December 2015, it allows adoption to the single and divorcee person and also permit the inter country adoption, so, now foreigner can also adopt the child in India irrespective of their religion.

³⁸³ The Ethics Committee of the American Society for Reproductive Medicine on 'Access to fertility treatment by gays, lesbians, and unmarried persons: a committee opinion, C.f. https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/fertility_gaylesunmarried.pdf, visited on 11/05/2014 at 4. p.m. The committee is of opinion that, the assisted reproduction should be made available equally without regard to marital/partner status or sexual orientation.

³⁸⁴ The Hague conference on Private International Law, 2014, "A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements." C.f. <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>, visited on 21/11/2014 at 10 am. The Hague conference on Private International Law, stated that, in order to avoid risk of significant harm or neglect to any child/ren, the ART clinics are required to take into consideration following guidelines before commencing any treatment to a patient or their partner in surrogacy: i. Previous conviction relating to harming children (like in Baby Gammy's case, the father of baby Gammy was previously convicted for child abuse), violence against any child or any serious discord in the family environment. ii. Past or present circumstances which shows legal inability to take care throughout childhood for any child who may be born, such as mental or physical condition. iii. Drug or alcohol abuse, medical history states that child may be born may suffer from the medical condition that likely to cause catch serious harm to the child.

subjected to multiple IVF cycles to ensure that one live birth. Therefore, it may affect the health of the surrogate woman.

7. The prohibition of unprotected sex between surrogate mother and her husband and prohibition on having an extramarital relationship which restricts their *right to autonomy*. And also the extra marital relationship of the surrogate and her husband is quite difficult to find out and control.
8. The ART Bill has allowed the clinics to disclose characteristics of the surrogate/donor. This could have implications on choosing the caste, colour and educational qualifications of the donor/surrogate mother. Therefore, the monitoring procedures will remain to be a challenge.³⁸⁵
9. The Bill has not made provision for the medical test of the husband of the surrogate Mother. As per the ART Bill, 2014 during the gestation period there should not be unprotected sex between surrogate and her husband, however there may be chance of unprotected sex between them. So surrogate and her husband are required to be medically tested for sexually transmitted diseases i.e. HIV/AIDS.
10. Section 46 (14) (a) of the ART Bill, 2014 provides that, the ART treatment should be given to a woman above the age of 23 and below the age of 50 years. Here the contradiction arises with the provision of section 60 (5) which provides women is allowed to act as a surrogate mother up to the age of 35 years only, so here there is a need to clarify the provision.³⁸⁶
11. There is no provision in the draft Bill about the breastfeeding by the surrogate mother due to fear of emotional attachment with the child.³⁸⁷
12. The section 60 (7) of the ART Bill, 2014 prohibits the ART banks from making advertisement regarding the caste, descent of any of the parties, ethnic identity,

385 THE HINDUSTAN TIMES, 'Commercial surrogacy: The half mothers of Anand,' Namita Kohli, Hindustan Times, <http://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html>, Visited on 10/11/2015 at 2.30 pm.

³⁸⁶ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 32 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

³⁸⁷ SAMA Report 2012, 'Birthing A Market, A Study on Commercial Surrogacy,' P. 70 available at http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am .According to SAMA Report, the surrogate mothers are not allowed to breastfeeding to chil/ren due to fear of emotional attachment with the child. It is against a State's own breastfeeding Campaigns just like "*Ma ka doodh shishu ke liye varadan, Janma ke ek ghante ke andar aur 6 mahine tak sirf stanpan*" and also against the Article of Convention of the Rights of Child (CRC). Such prohibition adversely affect on the health of the surrogate mother and child. It is right of surrogate mother as well as the right of the child to have breastfed.

however, the word '*religion*' has not been mentioned in the Bill.³⁸⁸ According to the SAMA group many times the commissioning parents choose the surrogate relating to their religion or choose the upper class woman.³⁸⁹

13. The ART Bill has not mentioned the number of embryos to be placed into the womb of the surrogate.³⁹⁰ Section 60 (9) of the Bill, 2014 provides the surrogate mother is allowed only three times successful transfer embryos for the same couple,³⁹¹ but it has not specified how many times she is allowed to undergo embryo transfer in her life time till is achieving successful birth.
14. Section 60 (17) (a) of the ART Bill, 2014³⁹² prohibits the surrogate for becoming an egg donor for the commissioning couple, however because of this prohibited provision the surrogate mother is required to undergo very complicated, harmful and expensive *in vitro fertilization (IVF)* procedure, therefore, it is suggested the use of simple, less expensive procedure of IUI and which is also not harmful to her health, hence surrogate should be allowed to donate her eggs for the couple.
15. The ART Bill, 2014 has also lacked in stem cell research provision. Globally, much research is going on stem cell for creation of artificial sperm and eggs, it is said that now the world is moving from assisted to artificial reproduction, however, in India the draft of the ART Bill, lacking in the provision of stem cell research.

Thus, there are various changes has been made in the new version of ART Bill, 2014 in order to give a real test of justice to the parties of surrogacy. The assisted reproductive technology Bill has added new provisions such as agreement must be in the local language of the surrogate, she is allowed only three successful embryos transfer for the same couple, insurance and legal assistance to the surrogate, best interest of the child is also protected through the insurance, appointment of local

³⁸⁸ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 44 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

³⁸⁹ SAMA Report 2012, 'Birthing A Market, A Study on Commercial Surrogacy,' P. 39 available at http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

³⁹⁰ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 34 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

³⁹¹ *Ibid* at 44

³⁹² The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 46 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

guardian and custody to adoption agency if the commissioning couple failed to claim and the punishment is also enhanced in various offences.

3.12. JAYASHREE WAD V. UNION OF INDIA AND ORS³⁹³

A public interest litigation filed by the Adv. Jayashree Wad on the various issues relating to the commercial surrogacy. The two most highlighted issues of the case are:

- i. That commercial surrogacy had become uncontrollably hence, required to be regulated by law.
- ii. The Government notification, 2013 permitted the import of human embryos as 'goods.'³⁹⁴ Hence, it has become the concrete way to the foreigners to transport the frozen human embryos.³⁹⁵

Thereafter, the Supreme Court³⁹⁶ has issued notice to the Government for re-examining the human embryo import policy. The Court said, it is the primary duty of the legislature to make law on surrogacy as it involved various moral and ethical issues and it causes exploitation of poor surrogate women. Today, India has become an international hub for commercial surrogacy, with the business estimated at \$445 million (Rs 2,900cr) annually. A bench said, "*We are wondering whether we can entertain this petition and make a judicial legislation. We can't...but should we?*" as it is the domain of the executive. A Solicitor General Ranjit Kumar said, to the court that the ART Bill, 2014 is in the consultative process and it may require three months before referring to the Parliament. In this case a Senior Counsel Shekher Naphade, appearing for the petitioner, cited the case of *Vishakha & Ors v. State of*

³⁹³ W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

³⁹⁴ Policy for import of Human Embryo, Notification No.52 (RE – 2013)/2009-2014, New Delhi, dated 2nd December, 2013 C.f. <http://dgft.gov.in/Exim/2000/NOT/NOT13/not5213.htm>, visited on 25/10/2015 at 11.00 am. In exercise of power conferred under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 read with paragraph 2.1 of the Foreign Trade Policy, 2009-2014, as amended by the Central government as "Import of Human Embryo will be 'free' subject to a 'No Objection Certificate' from Indian Council of Medical Research (ICMR)."

³⁹⁵ THE TIMES OF INDIA, 'SC Suggests Ban on Commercial Surrogacy,' Amit Anand Choudhary, TNN | Oct 15, 2015, 02.55AM IST, C.f. <http://timesofindia.indiatimes.com/india/SC-suggests-ban-on-commercial-surrogacy/articleshow/49365734.cms>.

³⁹⁶ Bench of Justices Ranjan Gogoi and N.V. Ramana

*Rajasthan & Ors*³⁹⁷ and suggested to make law on the issues of surrogacy as such in India no law on surrogacy.³⁹⁸ In this case the court has framed 14 issues and asked the government to file a response on it.³⁹⁹ Thus, in response to the answer, the Government of India has filed an affidavit in the Supreme Court on 28th October 2015, which states as follows:

- The Government will not support commercial surrogacy.
- Only altruistic surrogacy would be permitted.
- No foreigners can avail surrogacy services in India.
- Surrogacy would be available "only for Indian couples".⁴⁰⁰
- A Ban on import of human embryos for commercial surrogacy and allowed for research purpose only.⁴⁰¹

However, the researcher in this case has observed that, instead of giving answers to the questions asked by the Supreme Court, the Government has submitted the affidavit of prohibition of commercial surrogacy for foreigners escaped from the liability to address the rights of the surrogate, the donor and the commissioning

³⁹⁷ In *Vishakha & Ors v. State of Rajasthan & Ors* AIR 1997 SC 3011, a Writ Petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India. In order to fill the vacuum in existing legislation, the Hon'ble Supreme Court of India has laid down the guidelines to prevent the sexual harassment of women at working place.

³⁹⁸ THE TELEGRAPH, 'Embryo Import Curb Call', 14 OCT 2015, available at www.telegraphindia.com/1151015/jsp/nation/story_48101.jsp#.Viuo9245G1t, visited on 24/10/2015 at 5.30. pm

³⁹⁹ THE TIMES OF INDIA, 'SC Suggests Ban on Commercial Surrogacy,' Amit Anand Choudhary, TNN | Oct 15, 2015, 02.55AM IST, C.f. <http://timesofindia.indiatimes.com/india/SC-suggests-ban-on-commercial-surrogacy/articleshow/49365734.cms>. The Supreme Court has framed 14 issues and asked government to give answer on it the some of issues are as follows. Who is the real mother of the child a surrogate woman or genetic woman (who donated her eggs) or the commissioning woman? Whether commercial surrogacy amounts to renting of a womb? Whether commercial surrogacy is immoral and is opposed to public policy and therefore void under section 23 of the Indian Contract Act? Whether commercial surrogacy amounts to economic and psychological exploitation of the surrogate mother? Whether commercial surrogacy is inconsistent with the dignity of Indian womanhood and therefore violative of Article 21 of the Constitution? Whether import of human embryo amounts to Commoditization of human life and thus violates article 21 of the Indian Constitution? Whether the notification dated 2.12.2013 of the GOI issued under S.5 of the Foreign Trade (Development & Regulation) Act is violative of Articles 21 & 23? Whether human rights of a surrogate child born out of commercial surrogate are violated and as such child would face psychological & emotional problems.

⁴⁰⁰ IBN, 'Government Set to Make Commercial Surrogacy Illegal, to Be Allowed only For Infertile, Married Indian Couples', Ashok Bagriya CNN-IBN, Posted on: 02:30 PM IST Oct 28, 2015, C.f. <http://www.ibnlive.com/news/india/government-set-to-make-commercial-surrogacy-illegal-to-be-allowed-only-for-infertile-married-indian-couples-1157430.html>, Visited on 29/10/2015 at 12.00 p

⁴⁰¹ HINDUSTAN TIMES, 'Govt. Bans Import of Human Embryos For Commercial Surrogacy', Updated: Oct 28, 2015 16:29 IST C. f. <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.html>, visited on 29/10/2015 at 6 pm.

couple. Thus, as per the submitted affidavit, the government removed the notification of import of human embryo and issued the instructions regarding the commissioning of surrogacy.

3.13. CIRCULAR OF THE GOVERNMENT OF INDIA REGARDING COMMISSIONING OF SURROGACY- INSTRUCTIONS, 2015

After submission of affidavit in the Supreme of Court of India in case of *Jayashree Wad Case*,⁴⁰² the Health and Family Welfare Ministry, Government of India on 4th November, 2015 the most urgently issued the instructions regarding the commissioning of surrogacy.⁴⁰³ The government said till the enactment of the proposed legislation of the Assisted Reproductive Technology (Regulation) Bill, 2014, the instructions will prevail and will be applicable to the Surrogacy Clinics/ ART Clinics/ IVF Clinic/Genetic Counseling Centers/Genetic Laboratories/ART Banks or any other clinical establishment which offers the surrogacy services or the Assisted reproductive Services.

The instructions are as under:⁴⁰⁴

- i. Not to support the commercial surrogacy.
- ii. Import of 'Human Embryo' is prohibited except for research purposes.
- iii. All Surrogacy Clinics/ ART Clinics/ IVF Clinic/Genetic Counseling Centers/Genetic Laboratories/ART Banks or any other Clinical establishment should not import human embryo for the purpose of offering the surrogacy services.
- iv. The Indian Missions and FRROs/FROs⁴⁰⁵ are bound by the following instructions:
 - a. Visa should not be issued to foreign nationals to visit India for commissioning of surrogacy.

⁴⁰² W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), *C.f.* <http://courtnic.nic.in/courtnicsc.asp>

⁴⁰³ 'Latest Circular Regarding Commission of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm

⁴⁰⁴ 'Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, p. 2 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm

⁴⁰⁵ FRROs: Foreign Regional Registration Officers, FROs: Foreign Registration officers

- b. The Overseas Citizen of India (OCI) cardholders should not be granted permission for commissioning of surrogacy in India.⁴⁰⁶
- c. The exit permission should not be granted to the child born through surrogacy to foreign Nationals including OCI cardholders. However, if the child born to foreign National through surrogacy already commissioned, on or before the issue of this circular then exit permission will be decided by the FRROs/ FROs on case to case basis.
- d. If the visa is granted by FRROs/ FROs to foreign Nationals and to the OCI card holders for commissioning of surrogacy in India from the date of this circular then said visa may be canceled and the applicant may be informed immediately.
- v. However, there may be cases before the issue of this circular which might have initiated for the commissioning of surrogacy, including import of ‘Human Embryo’ and implantation thereof into the surrogate mother or child/ children born from it. Such cases may be allowed to complete the process already initiated in order to avoid more complications. However, all such cases are required to approach the State Health authorities for permission on a case to case basis.⁴⁰⁷
- vi. For the unethical practice in surrogacy and illegal determination of sex to be dealt with the as per the provisions of the Pre –Conception and Pre- Natal Diagnostic Techniques (Prohibition) Act, 1994
- vii. Therefore, till the passing of the ART legislation, the ICMR Guidelines, 2005 will be remaining in force. However, if the conflict between the guidelines and this instruction arise then instructions 2015 will prevail over the said guidelines 2005.⁴⁰⁸
- viii. The above mentioned instructions having the immediate effect.

The researcher after detailed study of the circular found that till the enactment of proposed the Assisted Reproductive Technology Bill, 2014, the above mentioned

⁴⁰⁶ However, the New ART Bill, 2014 , an Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to Indian citizen were permitted the commissioning of surrogacy in India, but the latest instructions of the government has banned all foreigners from commissioning the surrogacy in India. The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 45 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> , visited on 15/10/2015 at 2.00 pm.

⁴⁰⁷ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015’, issued by the Department of Health Research, Government of India, on 4th November, 2015, p. 2 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> , visited on 10/11/2015 at 4.00 pm

⁴⁰⁸ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015’, issued by the Department of Health Research, Government of India, on 4th November, 2015, p. 3 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> , visited on 10/11/2015 at 4.00 pm

circular will prevail. And also if said circular comes in conflict with the 'National Guidelines of ICMR 2005, then also this circular⁴⁰⁹ will prevail over the National Guidelines.

Thus, following the order of the Supreme Court in *Jayashree Wad case*⁴¹⁰ and the publication of circular by the government regarding prohibition commercial surrogacy and disallowing all foreigners from commissioning the surrogacy in India, it is said that this direction may push *surrogacy industry into black marketing*.⁴¹¹ According to Ms. Sharmila Rudrappa,⁴¹² the Centre's move to ban commercial surrogacy and encourage to altruistic surrogacy, which may give the result that the *rich families can compel their poorer relatives or maids to engage in "altruistic" surrogacy* for them, therefore the exploitation of the surrogate mothers will be more.⁴¹³ Dr. Nayana Patel, one of India's leading fertility specialists, said that the there is no exploitation of the surrogate mother, people voluntarily enters into the surrogacy contract. She said, however, there is need of strict checks and counter

⁴⁰⁹ M. P. Jain Indian Constitutional Law, Justice Ruma Pal, Samaraditya Pal, Sixth Edn. Reprint 2012, LexisNexis Butterworths, Wadhwa, Nagpur. At p. 917

The Constitution of India provides the definition of law under Article 13 (3) : In this article, unless the context otherwise requires, (a) "Law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. Therefore, the word 'circular' does not come under the definition of law under article 13 (3) (a). The Supreme Court in *Bijoe Emmanuel and Ors. v. State of Kerala and Ors.*, (1986) 3 SCC 615 at Para 13 held that, "*The circulars have no legal sanction behind them in the sense that they are not issued under the authority of any statute.*" In *Re: Ramlila Maidan Incident* (2012) 5 SCC 1 at Para 30, the Hon'ble Supreme Court held that, "*The restriction can be imposed only by law or under the authority of law. It cannot be imposed by exercise of executive power without any law to back it up.*"

⁴¹⁰ W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

⁴¹¹ THE ECONOMIC TIMES, 'Ban on surrogacy for foreigners: How Governments recent decision will push a booming industry into black market' G Seetharaman, ET Bureau Nov 8, 2015, 04.00 AM IST, C.f. <http://m.economictimes.com/news/politics-and-nation/ban-on-surrogacy-for-foreigners-how-govts-recent-decision-will-push-a-booming-industry-into-black-market/articleshow/49703554.cms>, visited on 13/11/2015 at 2.00 pm

⁴¹² Ms. Sharmila Rudrappa: A Professor of Sociology and Asian American Studies at the University of Texas.

⁴¹³ THE TIMES OF INDIA, [BENGALURU], 'Ban on surrogacy will lead to exploitation, 'Sunitha Rao R,TNN | Nov 13, 2015, 05.47 AM IST, C. f. <http://timesofindia.indiatimes.com/city/bengaluru/Ban-on-surrogacy-will-lead-to-exploitation/articleshow/49763078.cms>, visited on 14/11/2015 at 11.00 am

checks, but the government's action is discriminatory against foreigners who were also desperate to have children.⁴¹⁴

3.14. THE SURROGACY (REGULATION) BILL, 2016

Recently, on 21st November, 2016, the government has introduced the Surrogacy (Regulation) Bill, 2016 before the Parliament in the House of Lok Sabha.⁴¹⁵ On 24th August 2016, the draft of the Bill was presented by the External Affairs Minister Sushma Swaraj in a press conference along with the Health Minister JP Nadda.⁴¹⁶ The Bill is made with a view to prevent unethical practices of surrogacy. Thus, the basic aim of the Bill is to regulate surrogacy services in India, to prevent the exploitation of surrogate mothers, to protect the rights of surrogate children and to prohibit the commercial surrogacy.

3.14.1. Significant Features of the Surrogacy (Regulation) Bill, 2016

1. Recognized 'Altruistic Surrogacy' and banned 'Commercial Surrogacy':

The Surrogacy Regulation Bill, 2016 has recognized altruistic surrogacy and prohibited the commercial surrogacy.⁴¹⁷ According to the Bill, the couples are prohibited from payment of monetary compensation in terms of cash or kind to surrogate mother; however they are allowed to pay only medical bills and insurance coverage to the surrogate. It is said that the government instead of regulating the surrogacy industry, simply banned it.⁴¹⁸

⁴¹⁴ ABC NEWS, 'India to ban surrogacy services to foreigners through the Supreme Court,' Updated Wed at 4:58 pm 28-10-15, C.f. <http://www.abc.net.au/news/2015-10-28/india-to-ban-booming-surrogacy-service-to-foreigners/6894104>, visited on 30/ 10/2015 at 3.30 pm

⁴¹⁵ The Surrogacy Bill No. 257 has been introduced in Lok Sabha on 21st November, 2016. The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, visited on 21/11/2016 at 3.00 pm.

⁴¹⁶ The Union Cabinet has cleared the proposed draft of the Surrogacy (Regulation) Bill 2016 on 24th August 2016. However, till 21st November, 2016 the draft copy of the Bill was not published by the Health Ministry on public domain.

⁴¹⁷ Cabinet approves introduction of the surrogacy (Regulation) Bill, 2016, c.f., <http://www.prsindia.org/uploads/media/MPR/MPR-%20August%202016.pdf>, The Health Ministry has decided to ban the commercial surrogacy as India has emerged as international surrogacy hub for foreign couples.

⁴¹⁸ Avni Shrivastav, "Barren Surrogacy Bill prescribes the ideal "Parivar," September 1, 2016, C.f. <http://www.livelaw.in/barren-surrogacy-bill-prescribes-ideal-parivar/>, Visited on 02/09/2016, at 9.00 pm

2. Who is Eligible for opting Surrogacy?

As per the Bill, for the commissioning of surrogacy the Indian heterosexual couples must be married, at least for the period of 5 years and either one or both of them have to prove the infertility problem.⁴¹⁹ The commissioning woman must be between 23 to 50 years of age and the commissioning man must be between 26 and 55 years.⁴²⁰ They must approach only to a close relative for surrogacy arrangement. The couple must carry the certificate of essentiality issued by the appropriate authority for availing the service of surrogacy from the government registered surrogacy clinic.⁴²¹

3. Who are not eligible for opting Surrogacy?

According to the Surrogacy (Regulation) Bill, 2016 the following persons are debarred for opting surrogacy arrangement in India.

- i. Single person
- ii. Couples in live-in relationships
- iii. Homosexual couples
- iv. All Foreigners, including NRI and PIO and OCI⁴²²
- v. The heterosexual married Indian couples having a surviving natural, adopted or surrogate child is not eligible for opting surrogacy for another baby⁴²³ and the couple who have not completed five years of their marriage.

4. Who can be a Surrogate Mother?

The Bill, 2016 under section 4 (b) states that the surrogate mother should have the eligibility certificate issued by the appropriate authority, that woman is an ever

⁴¹⁹ Malavika Ravi , August 31, 2016, "A Critical Analysis Of The Surrogacy Regulation Bill 2016" *c f*, http://www.feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/#.V-AqIDU6R_k, visited on 19/9/16, At 8.00 pm. As per the Bill,

⁴²⁰ DECCAN HERALD, "Govt clears bill seeking complete ban on commercial surrogacy", New Delhi, Aug 24, 2016, (PTI), *C. f.*, <http://www.deccanherald.com/content/566651/bill-proposes-complete-ban-commercial.html>, visited on 25/08/ 2016 at 11.00 pm

⁴²¹ Section 4 (a) of the Bill, 2016 provides that the intending couple must carry the certificate of essentiality issued by the appropriate authority, about the infertility certificate issued by District Medical Board, an order of parentage and custody of the surrogate child passed by the JMFC Court, Insurance coverage to a surrogate mother.

⁴²² *Ibid*

⁴²³ The Bill allows the commissioning of surrogacy to the intending couple who is having the mentally or physically challenged child or the child suffered from life threatening disorder or fatal illness. However, the certificated issued by the District medical Board regarding no permanent cure of the child.

married woman and having at least one healthy child. A woman is allowed to become a surrogate and help in surrogacy or provide her egg only once in her lifetime. The woman should be between the age of 25-35 years and must possess medical and psychological fitness certificate from a medical practitioner. The Bill allows a woman to donate her egg or oocyte for surrogacy. A woman who is close relatives of the intending couple is only permitted to act as a surrogate mother.⁴²⁴ The intending couple is prohibited from the payment of remuneration to a surrogate woman.

5. The Bill prohibits the producing of the children for the purpose of sale, prostitution or any other form of exploitation.

6. The Bill prohibits the husband of a surrogate or a relative or intending couple or any person from making any query or encouragement to a woman for conducting the surrogacy procedure on her except the purpose mentioned under section 4 of clause (ii).

7. The Bill under section 6 provides that requisition of written informed consent of the surrogate in her language about the side effects of the surrogacy procedure on her.

8. The Bill under section 7 prohibits the abandonment of the surrogate child by the intending couple whether born in Indian or outside on the grounds such as any other medical condition or genetic or birth defect or sex of the child or conception of more than one surrogate child.⁴²⁵

9. The surrogate child is recognized as a biological child of the intended couple and having the right to over the property equal to the natural child.⁴²⁶

10. The Bill prohibits any kind of force on the surrogate mother for conducting abortion of her by the surrogacy clinic, laboratory, clinical establishment, organization, or by any person.

⁴²⁴ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 5, visited on 21/11/2016 at 3.00 pm.

⁴²⁵ *Ibid* at p. 6

⁴²⁶ *Ibid*

11. The Bill makes the **compulsory the registration of surrogacy Clinic** under the surrogacy Act, 2016.⁴²⁷

12. Establishment of National Surrogacy Board and State Surrogacy Boards:

For regulating surrogacy clinics the Bill has made the provisions for the establishment of the National Surrogacy Board at central level⁴²⁸ and State Surrogacy Board⁴²⁹ at every State and Union territory level which will be run by the Health Ministry.⁴³⁰

13. Establishment of Appropriate Authority:

The Bill under section 32 provides the establishment of one or more appropriate authority for each State and Union territories which is headed by the Health Ministry. The appropriate authority has to maintain the record of registration of surrogacy clinics, issue a certificate to the intending couple and surrogate mothers and grant a license to the surrogacy clinics.⁴³¹

14. Offences and Punishments Under the Bill:

The Bill recognized the commercial surrogacy as a criminal offence and provided following type of punishments.

i. Imprisonment Minimum of 10 Years and Fine up to 10 Lakh:

The Bill provides, if any person or surrogacy clinics or any other establishment agreed to engage in commercial surrogacy, abandonment or exploitation of the child, exploitation of surrogate mother, selling or importing a human embryo is punishable with imprisonment for a term not less than 10 years and with a fine up to Rs.10 lakh.⁴³²

⁴²⁷ *Ibid*

⁴²⁸ *Ibid at p. 7*

⁴²⁹ *Ibid at p. 10*

⁴³⁰ HuffPost India, "9 Things You Should Know About The Proposed Surrogacy Bill In India," Indrani Basu, August 24, 2016 19:48, C. f. <http://www.huffingtonpost.in/2016/08/24/9-things-you-should-know-about-the-proposed-surrogacy-bill-in-in/>, visited on 25/08/2016 at 10.00 am

⁴³¹ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 12, visited on 21/11/2016 at 3.00 pm.

⁴³² *Ibid at P. 13*

ii. Imprisonment Minimum of 5 Years and Fine up to 5 Lakh:

The Bill provides the punishment for the commencement of commercial surrogacy by any person or intending couple with any of the medical practitioner is punishable with imprisonment of 5 years and fine up to 5 Lakh.

iii. Imprisonment Minimum of 3 Years, and Fine up to 5 Lakh:

The Bill prescribe the imprisonment of 3 years and fine up to 5 lakh for contravention of any of the provisions of the Act or rules for which no specific punishment is given.

iv. Presumption of offence of surrogacy:

The Bill provides the presumption of offence committed by the surrogate husband or the intending couple or any other relative by compelling a woman to act as a surrogate woman or donate gametes, and such person is liable for abetment of offence which is punishable with imprisonment of 5 years and fine up to 5 Lakh.⁴³³

15. The Bill states that every offence under this is cognizable, non-bailable and non-compoundable.

16. The Court cannot take cognizance of offence, unless the complaint is filed by the appropriate authority, any officer or an agency authorized by the government or any person or social organization has given the notice of minimum 15 days to the appropriate authority with the intention to give a complaint to the Court.

17. The Courts not below the rank of a Metropolitan Magistrate or a Judicial Magistrate first class is empowered to entertain the offence under this Act and the provision of the plea of bargaining is not applicable to the offence committed under this Act.⁴³⁴

18. The surrogacy Clinic is required to maintain birth record of the surrogate child for the period of 25 years.

The Bill has been made with a clear intention to curb the unethical practices of surrogacy by the surrogacy Clinics in order to prevent the exploitation of surrogate

⁴³³ *Ibid at p. 14*

⁴³⁴ *Ibid at p. 15*

mother, abandonment, exploitation of the child as well as prevention of surrogacy rackets, the role of intermediaries, and monopoly of wealthy people in a surrogacy arrangement. Thus, the Bill is trying to solve the issues arising out of the commercial surrogacy, however, it is said that the government instead of regulating simply prohibited the commercial surrogacy arrangement.

3.14.2. Criticism on the Surrogacy (Regulation) Bill, 2016

Presently, the Central Government has introduced the new Surrogacy (Regulation) Bill, 2016 in the Parliament on 21st November, 2016 which has been made with the view to eradicate the unethical practices of surrogacy such as the ban on commercial surrogacy, exploitation of the surrogate mother and protection of rights of surrogate children. However, the sudden stand of the Central Government on surrogacy law has not been digested by the general public as well as medical practitioners. Hence, the Bill, 2016 has suffered from several criticisms which are given as below:

1. The blanket ban on Commercial Surrogacy is undemocratic and regressive:
The blanket ban on commercial surrogacy by the government is called as undemocratic and regressive, which will be more expensive and hazardous to the people.
2. Bill is not in harmony with the Constitution of India:

The Bill is not in harmony with the Constitution of India, as it excludes the single person,⁴³⁵ live-in couples, homosexuals,⁴³⁶ foreigners and Indian heterosexual married couples who have not completed five years of their marriage for entering into a surrogacy arrangement. Therefore, it clearly

⁴³⁵ A Cambridge study reflects that children of single mothers by choice are better well adjusted to the world than children of divorced parents. *C.f.* Avni Shrivastav, "Barren Surrogacy Bill prescribes the ideal "Parivar," September 1, 2016, *C.f.* <http://www.livelaw.in/barren-surrogacy-bill-prescribes-ideal-parivar/>, Visited on 02/09/2016, at 9.00 pm.

⁴³⁶ A Central Minister Sushma Swaraj in press conference very specifically said that, in Bill the surrogacy for homosexual couples is prohibited as it is against "Indian ethos". However, homosexuality has been continuously mentioned in several Indian texts. Therefore, it shows the clear denial of justice to the homosexual community. It is pertinent to note that today, homosexuality is not treated as a disease.

amounts to discrimination on the basis of nationality, marital status, age and sexuality as a violation of Article 14 and 21 of the Constitution of India.⁴³⁷

3. Violation of Reproductive Autonomy:

The new Surrogacy Bill is not in consonance with Article 21 of the Indian Constitution, as it violates the right to reproductive autonomy guaranteed under right to personal liberty to the surrogate woman as well as the commissioning couple. Thus, it is a prerogative right of every of person to have children born either naturally or through surrogacy or through adoption. Hence, the State cannot possess the right to decide the mode of parenthood.⁴³⁸ India is a signatory to the Universal Declaration of Human Rights, therefore it is also a violation of Article 16 of the said Declaration.⁴³⁹

4. The Bill has focused mainly on banning surrogacy more than regulating it.
5. The Bill appears menace to the livelihood of many poor surrogates.

The surrogacy arrangement helps the surrogate women to educate their children, set up their business and economic support to families. According to Amrita Pande, a ban on commercial surrogacy is a clear denial of the voluntary nature of labour to surrogate therefore; it does not seem to be logical.⁴⁴⁰ By recognizing altruistic surrogacy, the surrogate is deprived of compensation, as ‘money’ is the main reason of the Indian surrogate women to become surrogates.

⁴³⁷ **Article 14** of the Constitution of India guarantees everybody “equality before the law and equal protection of the laws”. **Article 21** guarantees right to life and personal liberty.

⁴³⁸ Avni Shrivastav, “Barren Surrogacy Bill prescribes the ideal “Parivar,” September 1, 2016, C.f. <http://www.livelaw.in/barren-surrogacy-bill-prescribes-ideal-parivar/>, Visited on 02/09/2016, at 9.00 pm.

⁴³⁹ Article 16 of the UDHR guarantees men and women of full age the right to marry and found a family.

⁴⁴⁰ THE HINDU, Amrita Pande, “Surrogates are workers, not wombs” August 29, 2016 01:20 IST, C.f. <http://www.thehindu.com/opinion/op-ed/surrogates-are-workers-not-wombs/article9043014.ece>, Visited on 30/08/2016 at 9.00 am

6. Chances to go Underground, Black-marketing of Surrogacy or shift to another Country:

It is a highest apprehension that the ban on commercial surrogacy will have an impact on surrogacy practice, as it may go underground so black marketing will start. Therefore, there will be more exploitation of surrogate women as she will not be able to claim her legal rights and she will lose her bargaining power and the surrogacy industry will shift to another country.⁴⁴¹

7. No New Permanent Regulatory Authority:

The Bill has neither created new regulating authority nor created new posts. The proposed Bill has established a National Surrogacy Board and State Surrogacy Boards, however the current regulating authorities are already established in the previous draft Bills of the ART, 2010 and 2014 as National Board and State Board.⁴⁴²

8. Need of only a close of relatives to act as a surrogate is not justifiable:

According to Bill, only close relatives are allowed to become a surrogate for the intending couple.⁴⁴³ However, the question is how many close relatives will be ready to act as a surrogate for the commissioning couple? How many couples have the close relatives? How many women will be ready to act as a surrogate without the compensation? This provision also violates the personal space and confidentiality of the commissioning couple and the surrogate mother⁴⁴⁴ and limits the possibilities of surrogacy arrangements⁴⁴⁵ and provides

⁴⁴¹ *Ibid*,

As it was happened in India when Indian government banned the surrogacy arrangement to homosexual couples through the New Indian Visa Regulation Policy, 2012, thereafter the surrogacy business has shifted to Nepal, Thailand and Malaysia.

⁴⁴² Cabinet approves introduction of the “Surrogacy (Regulation) Bill, 2016” August 24, 2016, *C.f.* <http://www.livelaw.in/cabinet-approves-introduction-surrogacy-regulation-bill-2016/> Visited on 19/09/2016, at 2.00 pm

⁴⁴³ In other countries who have allowed the altruistic surrogacy, but it is not limited to relatives, and one-time pregnancy.

⁴⁴⁴ The Times of India, ‘Why surrogacy bill 2016 demands an immediate change? Dr Rita Bakshi, August 30, 2016, 11:17 am, *C.f.* <http://blogs.timesofindia.indiatimes.com/your-fertility-friend/why-surrogacy-bill-2016-demands-an-immediate-change/>

⁴⁴⁵ Malavika Ravi, “A Critical Analysis Of The Surrogacy Regulation Bill 2016” August 31, 2016, *c.f.* http://www.feminismindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/#.V-AqIDU6R_k, visited on 19/9/16, At 8.00 pm, The adoption method does not satisfy desire of the people to have biological child as a true heir.

the chance of force by the family members on a woman to become a surrogate mother for the couple.

9. The Bill has also not defined the term of close relatives who are eligible to become surrogate mothers for intending couple.
10. The Bill has recognized orthodox moral, ethical principles by allowing the surrogacy option only to heterosexual married couples.
11. Dissatisfactory view of Government to prove infertility issues by Couples:

The Bill has made a condition that the firstly couple has to prove the infertility issue before entering into a surrogacy arrangement. But the view of the government seems to be dissatisfactory to couples, because there may be people who may be suffering from mental, physical, or emotional reasons, so they may be unable to have children.⁴⁴⁶

12. The definition of infertility prescribed by the Surrogacy Bill, 2016, i.e. the period of 5 years is in conflict with the definition provided by the WHO, the old ART Bills, 2010 and 2014 and the medical terms as it says the period of infertility is 1 year only.⁴⁴⁷
13. Government's harsh approach towards people who in need of second child through surrogacy:

The government has shown harsh attitude towards the people who in need of second child through the surrogacy. Today, no Indian law prohibits the people to have a second child except the new Surrogacy Bill, 2016. However, there may be cases where the pregnancy or delivery of the women may not be possible due to medical reasons. In such cases the surrogacy is the last hope to the people.

⁴⁴⁶ *Supra* at 386

⁴⁴⁷ *Supra* at 378,

According to section 2 (p) of the Surrogacy Bill, 2016 the infertility means "inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception, however, the said definition come into conflict with the definition of infertility of the World Health Organization (WHO) and the previous ART Bills, 2010 and 2014 and as per the medical terms which prescribe the period of one year only.

14. Unfair and unreasonable condition of completion of minimum 5 year period of marriage for entering into surrogacy arrangement:

As per the Bill, the couple has to be completed minimum 5 year period of marriage for availing of the service of surrogacy, however, this provision found to be unfair and unreasonable in following situations:

- i. In case of late marriages of the people in today's world.
 - ii. In case of early menopause of women (around at 29 to 34 years of age)⁴⁴⁸
 - iii. In case of married woman without the uterus either by birth or removed by operation and if the couple desired to have a child through surrogacy.
15. The Bill is meaningless towards the surrogate women and the intending couple, so there is an urgent need to change it.
16. The Surrogacy Bill, 2016 is incomplete and insufficient without the ART provisions:

The IVF procedure is the crux of the surrogacy arrangement and may require other ART procedures in surrogacy. Therefore, the government just merely providing the surrogacy law will not be sufficient and complete without the passing of the ART Law.

17. The Bill has excluded the OCI, PIO and NRI peoples from entering into surrogacy however, they are citizens of India.
18. The Bill is indirectly encouraging the intending couple to enter into the surrogacy arrangement with outside the India.
19. The Bill has not prescribed the conditions in which a surrogate may abort the child at any stage of the surrogacy.⁴⁴⁹

⁴⁴⁸ The Hindu, "Indian Women Facing Early Menopause: Survey, New Delhi 27, 2016," C.f., <http://www.thehindu.com/sci-tech/health/indian-women-facing-early-menopause-survey/article8776103.ece> Visited on 28/06/2016, Nearly 4 per cent of Indian women experience signs of menopause between 29 and 34 years of age, says a recent survey conducted by The Institute for Social and Economic Change (ISEC). The figure goes up to 8 per cent in the case of women between 35 and 39 years of age.

⁴⁴⁹ Section 9 of the Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842,at p. 8, Visited on 21/11/2016 at 3.00 pm

20. The Bill has not prescribed the time period within which the appropriate authority has required to give the certificate of essentiality to the intending couple and certificate of eligibility to the surrogate mother for initiation of the surrogacy procedure in government registered surrogacy clinic.
21. The Bill failed to make the provision for a review or appeal procedure, if the application for the certificates of the intended couple or surrogate mother is rejected by the appropriate authority.
22. The Bill is silent on the following some important provisions about the surrogacy:
 - i. Surrogacy agreement between the parties of surrogacy.⁴⁵⁰
 - ii. Maximum number of attempts of surrogacy cycles allowed to surrogate till achieving one successful live birth.
 - iii. Medical test of surrogate, her husband and intended couple for the various sexually transferable diseases, including HIV/ AIDS.⁴⁵¹
 - iv. Medical, Legal and psychological assistance and counseling to surrogate before and after the surrogacy procedure.
 - v. Maximum number of embryos or gametes permitted to be transferred into the womb of a surrogate.
 - vi. Monetary compensation to surrogate, including her loss of earnings during period of surrogacy.
 - vii. Place of Stay of Surrogate during period of surrogacy i.e. whether home or surrogacy shelter home.
 - viii. Relinquishment of all parental rights over the child by the surrogate mother.
 - ix. No provision for breastfeeding by the surrogate mother.

The Bill has not prescribed the conditions in which the person, organization, surrogacy clinic, laboratory or clinical establishment may allow to force a surrogate may abort the child at any stage of the surrogacy in which the person, organization, surrogacy clinic, laboratory or clinical establishment may allow to force

⁴⁵⁰ The Bill under section 6 provides that the information of side effects and after effects of surrogacy procedure should be given to the surrogate before she undergoes to surrogacy procedure and it also states that the written informed consent of the surrogate shall be taken in her language which she understand. It means the only prescribe written consent of the surrogate but what about the written document between the intending couple and surrogate.

⁴⁵¹ The Bill under section 4 (iii) (b) (IV) provides the requirement of medical and psychological fitness certificate of surrogate from registered medical practitioner but absence of provision about the fitness certificate of the intending couple.

- x. Insurance by the intended couple to defected/disabled child.
- xi. Compensation for the growth of child in case death or divorce of intended couple.
- xii. Confidentiality of the information of the surrogate mother as close relatives is allowed to act as surrogate.
- xiii. Appointment of Local guardian for taking of the Child if the couple failed to take custody of the child.⁴⁵²
- xiv. Surrogate not to engage in unprotected sex with husband during the gestation period.
- xv. Surrogate and her husband not to engage in an extramarital relationship with others during the gestational period.
- xvi. Protection of the life of the surrogate over the unborn child.
- xvii. Requisition of ADHAR Card as a proof of identity of the surrogate mother.
- xviii. Assessment of the intending couple before initiation of surrogacy procedure for the welfare of the child.
- xix. Presumption of death or disability caused to surrogate by negligence of the surrogacy clinics.
- xx. Punishment for advertisement and conducting of pre-natal determination of sex.
- xxi. Collection of centralize online surrogacy data system of the surrogacy clinics.
- xxii. Post intensive care of the surrogate.
- xxiii. Use of stored sperm of dead husband by an ever married commissioning woman.

The researcher after the study of the new Surrogacy Regulation Bill, 2016 has found that the Bill is inadequate for protecting the best interest of the child, protection of the

⁴⁵² Notwithstanding the Bill has provided the punishment of 10 year and fine up to 10 lakh rupees to the intended couple, if the couple failed to take custody of the child or abandon the child, hence there should be provision for the appointment of local guardian for taking care of the child until the matter is resolved by the Court.

rights of intending couples and the surrogate mother as the it has excluded the vital part of the ART procedure, duties of the surrogacy clinic, ART clinics and banks and the rights and duties of the parties of the surrogacy arrangement.

3.15. CHART No. 9 COMPARISON AMONG THE ART BILLS, 2008, 2010, 2014 AND THE SURROGACY (REGULATION) BILL, 2016

SR. NO.	PARTICULARS	THE ART BILL, 2008⁴⁵³	THE ART BILL, 2010⁴⁵⁴	THE ART BILL, 2014⁴⁵⁵	THE SURROGACY BILL, 2016⁴⁵⁶
1	Object of the Bill	Regulation & supervision of ART	Accreditations, regulation & supervision, Prevention of misuse, & safe and ethical practice of ART	National, State Advisory Boards & National Registry for accreditation, regulation & supervision of ART clinics & banks, Prevention of misuse of ART & surrogacy & Safe and ethical practice of ART service.	To prevent unethical practices of surrogacy, prohibition of commercial surrogacy, Prevention of exploitation of surrogate mother, and Protection of rights of surrogate child.
2	Authorities under the Bill.	National Advisory Board, State Advisory Boards, Registration Authority	National Advisory Board, State Advisory Boards, Registration Authority	National Advisory Board, State Advisory Boards, National Registry	National Surrogacy Board, State Surrogacy Boards, Appropriate Authorities

⁴⁵³ The Assisted Reproductive Technologies (Regulation) Bill-2008, C.f. http://www.prsindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf visited on 25/10/2010 at 3.00 pm

⁴⁵⁴ The Assisted Reproductive Technologies (Regulation) Bill-2010, available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf.

⁴⁵⁵ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf>, visited on 15/10/2015 at 2.00 pm.

⁴⁵⁶ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 8, Visited on 21/11/2016 at 3.00 pm

3	Whether the ART/ Surrogacy Bill have legalized the commercial surrogacy?	Yes	Yes	Yes	No (Only Altruistic surrogacy Permitted)
4	Who can avail services of surrogacy?	Any Person i.e. Married Couples, Unmarried Couples, Single Person, homosexual couples	Any Person i.e. Married Couples, Unmarried Couples, Single Person, homosexual couples	All Indian Married Infertile Couple (Including OCI, PIO, NRI & FMIC) ⁴⁵⁷	All Indian Married Infertile Couple. (excluded single person, Live in couples, Homosexual couples, all foreign persons, OCI, PIO, NRI & FMIC, Indian married couple who have not completed 5 yrs. of marriage or Married couple having a natural or adopted child)
5	Where to obtain service of surrogacy?	Semen Bank	ART Bank	ART Bank	Surrogacy Clinic
6	Whether the surrogacy agreement between the parties of surrogacy is compulsory?	Yes	Yes	Yes	No
7	Language of Surrogacy agreement	Not Mentioned	Not Mentioned	Local Language of parties surrogacy	-----

⁴⁵⁷ Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen(FMIC)

8	Who can become a surrogate?	Any woman (Married or not)	Only Indian Citizen (Married or not)	Only Indian Ever married woman only	Only Indian Ever married woman and close relatives of intended couple
9	Age of surrogate	21-45	21-35	23-35	25-35
10	Prohibition to act as an oocyte donor by surrogate	Prohibited	Prohibited	Prohibited	prohibited
11	How many times a woman is allowed to become a surrogate for successful live birth?	Three successful live births	Five successful live births	One successful live birth	Only once
12	Max. cycles of medications permitted to surrogate	Not Mentioned	Not Mentioned	Three	Not Mentioned
13	Medical test of surrogate for disease, including HIV/ AIDS	Yes Mentioned	Yes Mentioned	Yes Mentioned	Yes Mentioned
14	Medical test of the husband of surrogate, including, HIV/ AIDS	No	No	No	No
15	Legal assistance and counseling to surrogate	No	No	Yes (ART Bank)	Not Mentioned
16	Allowed max. transfers to surrogate.	Three	Three	Three	Not Mentioned
17	Name of person on birth certificate of the Surrogate child.	Genetic (biological) parents	Commissioning parents	Commissioning couple as a parent	Not Mentioned
18	Monetary Compensation to surrogate	Yes	Yes	Yes	Prohibited

19	Mode of Payment of amount of compensation.	Not mentioned	Not mentioned	Transfer of funds in Bank account of surrogate	Prohibited
20	Provision of Relinquishment all parental rights over the child by the surrogate	Yes	Yes	Yes	No
21	Insurance to surrogate	Yes	Yes	Yes	Yes
22	Insurance for any complications arise during pregnancy to surrogate.	No	No	Yes	Yes
23	Surrogate's Right to breastfeed	Not Mentioned	Not Mentioned	Not Mentioned	Not Mentioned
24	Surrogate's right to change the mind before the giving custody to the commissioning couple.	Not Mentioned	Not Mentioned	Not Mentioned	Not Mentioned
25	Whether the commissioning couple is under legal obligation to accept custody of the baby despite of abnormality?	Yes Mentioned	Yes Mentioned	Yes mentioned	Yes mentioned
26	Insurance to defected/disabled child	Not Mentioned	Not Mentioned	Yes mentioned	Not Mentioned
27	Compensation for the growth of child in case death of commissioning couple.	Not Mentioned	Not Mentioned	Yes mentioned	Not Mentioned
28	Medical visa for foreigner commissioning surrogacy in India	Not Mentioned	Not Mentioned	Medical Visa required to Foreign person married with Indian citizen	Prohibited to Foreigner
29	Information of surrogate mother is to keep confidential	Yes Mentioned	Yes Mentioned	Yes Mentioned	Not Mentioned
30	Appointment of Local Guardian for taking care of the child.	Yes Mentioned	Yes Mentioned	Yes Mentioned	Not Mentioned
31	Local guardian duty to give custody of the child to an adoption agency if the couple failed claim within one month from birth & child right to claim Indian Citizenship.	Not Mentioned	Yes Mentioned	Yes Mentioned	Not Mentioned
32	Surrogate not to engage in unprotected sex with husband during the gestation period.	Not Mentioned	Yes Mentioned	Yes Mentioned	Not Mentioned

33	During the surrogacy period, the Surrogate and her husband duty not to engage in extramarital relationship.	Not Mentioned	Not Mentioned	Yes Mentioned	Not mentioned
34	Compensation to surrogate's family members in case of death after conception	Not Mentioned	Not Mentioned	Yes Mentioned	Yes Mentioned
35	Protection of the life of the surrogate over the unborn child and also the full payment agreed in the agreement.	Not Mentioned	Not Mentioned	Yes Mentioned	Not Mentioned
36	Different of amount of compensation have to pay by the Indian commissioning couple and OCI, PIO, NRI & FMIC	Not Mentioned	Not Mentioned	Yes Mentioned	Not Allowed
37	Requisition of ADHAR Card as a proof of identity of surrogate.	Not Mentioned	Not Mentioned	Yes Mentioned	Not Mentioned
38	Presumption of death or disability caused surrogate by negligence of the ART clinics	Not Mentioned	Not Mentioned	Yes Mentioned	Not mentioned
39	Presumption of legitimate child of the commissioning parents.	Yes Mentioned	Yes Mentioned	Yes Mentioned	Yes Mentioned
40	Citizenship of the child born to foreign couple.	Not Mentioned	Indian Citizenship – If child given to Adoption Agency	i. Indian Overseas Citizenship - OCI, PIO & FMIC ii. Indian Citizenship – If child given	Ban on Foreigners

				to Adoption Agency	
41	Child's right to ask information about donor & surrogate except personal identification	Yes Mentioned	Yes Mentioned	Yes Mentioned	Not Mentioned (Woman in Close relation allowed to act as a surrogate)
42	Punishment for advertisement of pre-natal determination of sex	Imprisonment Up to 5 year & Fine not specified	Imprisonment Up to 5 year & Fine not specified	Imprisonment Up to 5 year or Fine up to 10 lakh or both	Not Mentioned
43	Punishment for commercial surrogacy or its advertisement, racket, abandonment or exploitation of the child and surrogate mother, selling, purchasing, trading or importing a human embryo and Gamete for surrogacy.	-----	-----	-----	Imprisonment of 10 years and fine up to 10 lakh rupees.
44	Punishment for contravention of any provisions of the ART Act or rules./ Surrogacy Act	Imprisonment Up to 3 years & Fine not specified	Imprisonment Up to 3 years & Fine not specified	Imprisonment Up to 5 years or Fine up to 10 lakh or both	Imprisonment of 5 years and Fine up to 10 lakh
45	Punishment for Subsequent contravention of any provisions of the ART Act/ surrogacy Act	Imprisonment Up to 5 year & Fine not specified	Imprisonment Up to 5 year & Fine not specified	Imprisonment Up to 7 year or Fine up to 15 lakh or both	Imprisonment Up to 10 years and fine up to 10 lakh rupees.
46	Punishment for conducting pre-natal diagnostic techniques.	Imprisonment Up to 3 year & Fine not specified	Imprisonment Up to 3 year & Fine not specified	Imprisonment Up to 5 year or Fine up to 10 lakh or both	Not Mentioned
47	Punishment for sale, of any human embryo for research	Imprisonment Up to 3 years & Fine not specified	Imprisonment Up to 3 years & Fine not specified	Imprisonment Up to 5 years or Fine up to 10 lakh or	Imprisonment of 10 years and Fine up to 10 Lakh

				both	
48	Punishment for use of a broker or inter-mediators for obtaining gamete or surrogate	Not Mentioned	Imprisonment Up to 3 years and fine not specified	Imprisonment Up to 3 year or Fine up to 5 lakh or both	Imprisonment of 10 years and Fine up to 10 Lakh
49	Who can take cognizance of the offence?	Not Mentioned	Not Mentioned	National Board or State Board or officer authorized	Appropriate Authority, or any Govt. authorized officer or agency or any person or social organization.
50	Who is having the power to try the offence?	Not Mentioned	Not Mentioned	Metropolitan Court or JMFC	Metropolitan Court or JMFC
51	Offence Cognizable / Non-cognizable / Non Compoundable	Cognizable	Cognizable	Cognizable	Cognizable, Non Bailable and Non Compoundable

3.16. CURRENT POSTION OF THE SURROGACY LAWS IN INDIA

Presently, in the absence of any law to govern surrogacy, the ICMR Guidelines, 2005 are in force in India for regulating surrogacy practice. But these guidelines do not possess any statutory value; therefore they are not justifiable and enforceable in the Court. The Supreme Court in *Baby Manji Yamada v. Union of India*⁴⁵⁸ observed in Para 3 of the said judgment that “there is no law governing subrogation in India and in name of surrogacy, lot of irregularities are being committed and money making racket being perpetuated, therefore, the Union of India should enforce the stringent laws relating to surrogacy.” Recently, the Supreme Court of India in the combined cases of *Jayashree Wad v. Union of India & Ors*⁴⁵⁹ with *Union of India & Anr. v. Jan Balaz & Ors*⁴⁶⁰ said to the Union of India that “it is the primary duty of the legislature to make legislation on surrogacy. Now a situation has arisen where we are issuing

⁴⁵⁸ AIR 2009 SC84 at 150

⁴⁵⁹ W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

⁴⁶⁰ Civil Appeal No. (s) 8714/ 2010 (Pending in the Supreme Court of India) C.f. <http://courtnic.nic.in/courtnicsc.asp>

directions on all issues which are in the domain of the executive. *We are wondering whether we can entertain this petition and make a judicial legislation. We can't...but should we?*"⁴⁶¹

In 2009, the Law Commission of India in its Report No. 228th has suggested the requirement of surrogacy law for regulating the ART clinics and the defining the rights and duties of the parties of the surrogacy.⁴⁶² The government of India had prepared the Assisted Reproductive Technology (Regulation) Bill, 2008, it was revised in 2010. The new version of the ART Bill 2014, were published by the government on 30th September, 2015 to till 15th November 2015, for comments and suggestions from all stakeholders and public. However, all the drafts of the ART Bills were suffered from various drawbacks. On 4th November, 2015 the Department of Health Research, Government of India, has issued the letter of instructions⁴⁶³ regarding prohibition of commercial surrogacy and also banned all foreigners for commissioning surrogacy in India. Recently, recently, on 21st November, 2016, the government has introduced the Surrogacy (Regulation) Bill, 2016 before the Parliament. Thus, the said Bill, 2016 is pending before the Lok Sabha. Therefore, today **“Only altruistic surrogacy permitted to the Indian infertile Married Couple.”**

Presently, the surrogacy in India is governed by the ICMR, National Guidelines, 2005 as well as the recent instructions of the Department of Health Research issued on 4th November, 2015.⁴⁶⁴ And if the conflict arises between the National Guidelines, 2005 and the instructions of the Department of Health Research then the instructions, 2015 will prevail over the ICMR, National Guidelines, 2005.⁴⁶⁵

⁴⁶¹ THE TELEGRAPH, 'Embryo Import Curb Call', 14 OCT 2015, available at www.telegraphindia.com/1151015/jsp/nation/story_48101.jsp#.Viuo9245G1t, visited on 24/10/2015 at 5.30. pm

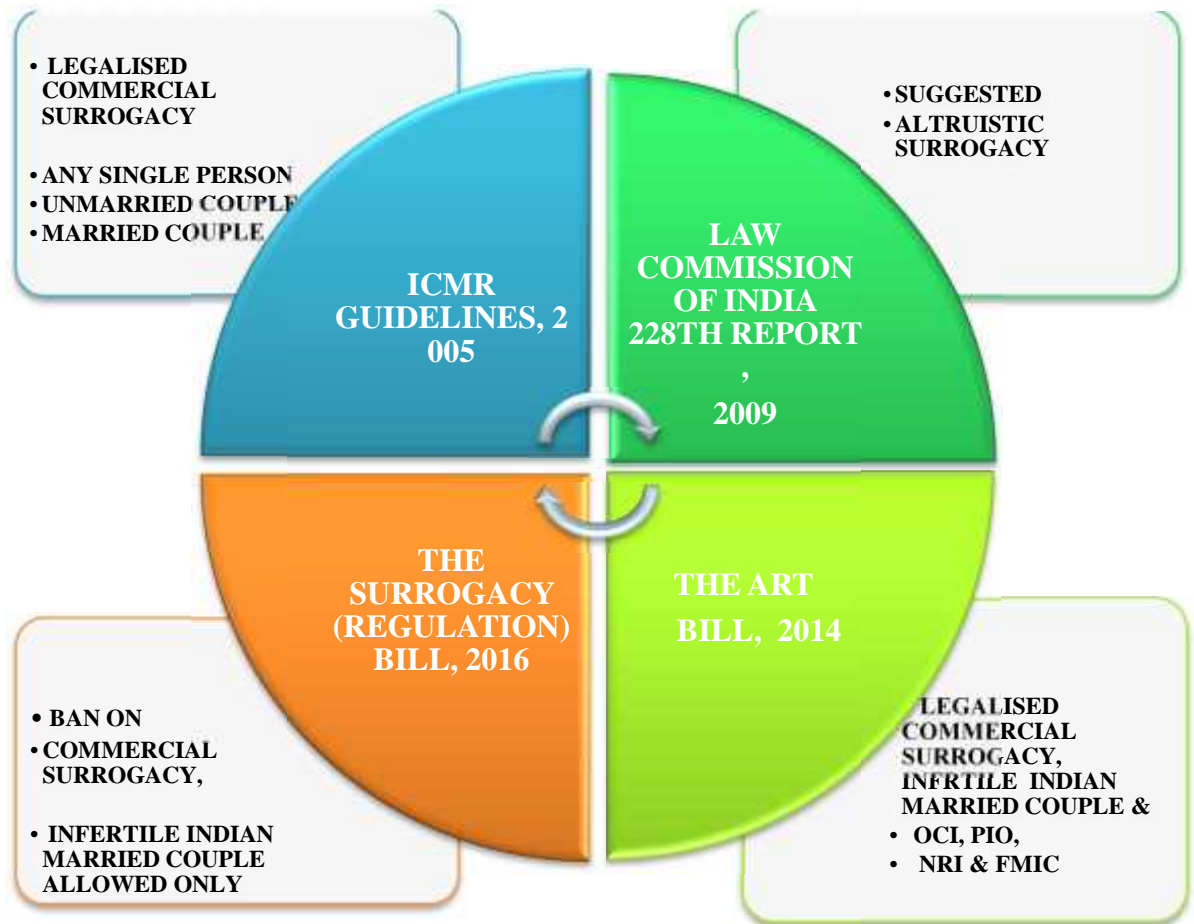
⁴⁶² C.f. <http://lawcommissionofindia.nic.in/reports/report228.pdf>, visited on 23/05/2011 at 4.15. pm.

⁴⁶³ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, p. 2 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm

⁴⁶⁴ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm

⁴⁶⁵ Ibid at p. 3

CHART No.10 CURRENT POSTION OF THE SURROGACY LAWS IN INDIA



3.17. REMEDY IN ABSENCE OF CODIFIED SURROGACY LAW, IN INDIA

Since, the absence of the specific law to govern the surrogacy in India; the ICMR Guidelines, 2005 are not mandatory, therefore not able to enforce in the Courts. The parties of the surrogacy, required to enter into a surrogacy agreement for surrogacy arrangement. In case of any dispute or issues relating to the custody, nationality, parentage, compensation, insurance, etc. has occurred out of the surrogacy agreement, and then the party of the surrogacy agreement can approach to the civil court. The validity and enforceability of the surrogacy agreement can be tested through the *Civil Suit under Section 9 of the Civil Procedure code 1908* for seeking appropriate relief as is admissible to parties under Indian law. *Section 9 of the CPC, 1908* permits

Courts “to try all Civil Suits unless they are expressly or impliedly barred.”⁴⁶⁶ However, this option can be exercised only when the surrogacy agreement is valid under Section 10 of the Indian contract Act 1872. The Section 10 of the Indian Contract Act, 1872,⁴⁶⁷ provides that the “All agreements are contracts if they are made by free consent of the parties competent to contract, for law consideration and with a law object, and are not expressly declared to be void.”

Chart No. 11 Enforceability of the Surrogacy Agreement



NEED TO REDRAFT OF SURROGACY LAWS WHICH PRHIBITS SINGLE PERSONS AND FOREIGN NATIONALS FROM BECONING PARENTS AMOUNT TO DISCRIMINATION

The proposed draft of the ART Bill 2014 and the New Surrogacy Regulation Bill, 2016 has restricted the surrogacy only to the infertile Indian married couple and debarred the all single, unmarried couple, gay couples, foreigners, including, the OCI, PIO and foreigner married to Indian citizen. The previous draft of the ART Bills, 2008 and 2010 were also allowed the service of surrogacy to married or unmarried couples, gay couples as well as single male or female person and all foreign nationals.

⁴⁶⁶ C. K. Thakkar (Takwani), “Takwani Civil Procedure Code” Eastern Book Co Lucknow. 6th Edn. 2011, p. 49

⁴⁶⁷ Dr. R. K Bangia’s, Indian Contract Act, Allahabad law Agency 14th Edn. P. 82

The Apex Court of India in *Baby Manji Yamada v. Union of India Case*⁴⁶⁸ observed that in “commercial surrogacy,” agreement the commissioning parents may be a single male, thus the Court granted the baby Manji custody to the Japanese grandmother and her divorced father. The High Court of the Gujarat in *Jan Balaz v. Union of India*⁴⁶⁹ has held that the children born in India to Indian surrogate are Indian citizens; therefore Indian passports should be issued to them.

The most significant contradiction and inconsistency has arisen from the Guidelines Governing the Adoption of Children, 2015,⁴⁷⁰ for inter-country adoptions which has got the statutory sanction under the Juvenile Justice (Care and Protection of Children) Act, 2000. Recently on 31st December, 2015 the Government has passed the Juvenile Justice (Care and Protection of Children) Act, 2015⁴⁷¹ which specifically provides that a child may be given in adoption to single person irrespective marital status and it also allows inter-country adoption to all foreigners irrespective any religion. Thus, the proposed ART Bill, 2014, the surrogacy Bill, 2016 and the instructions of the Department of Health Research are coming in conflict with the New Guidelines Governing Adoption of Children, 2015 and also with new the Juvenile Justice (Care and Protection of Children) Act, 2015, for debarring the single person and foreign nationals for commissioning of surrogacy in India.

The Supreme Court in *Stephanie Joan Becker v. State and Anr.*,⁴⁷² case granted the adoption of a girl orphan child of 10 years of age to the 53 years single woman by relaxing the guidelines of the CARA.

⁴⁶⁸ AIR 2009 SC84

⁴⁶⁹ Civil Appeal No. (s) 8714/ 2010 (Pending in the Supreme Court of India) *C.f.* <http://courtnic.nic.in/courtnicsc.asp>. Presently, the decision of the Gujarat High Court has been stayed by the Supreme Court. However, the twin German children in the case were permitted to leave India upon the directions of the apex Court. The main issue of Nationality and citizenship, being of grave importance, is still undecided.

⁴⁷⁰ Guidelines Governing Adoption of Children, 2015, Ministry of Women and Child Development, issued the Notification on 17th July, 2015, p. 68, available at http://cara.nic.in/writereaddata/UploadedFile/NTESCL_635760082361561985_english%20guidelines.pdf visited on 10 / 09/2015 at 3.00 p.m.

⁴⁷¹ The Juvenile Justice (Care and Protection of Children), Act, 2015, available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, visited on 05/01/2016 at 11.00 am. The Juvenile Justice (Care and Protection of Children), Act, 2015 has received the assent of the President on 31st December 2015, it allows adoption to the single and divorcee person and also permit the inter country adoption, so, now foreigner can also adopt the child in India irrespective of their religion.

⁴⁷² (2013) 12 SCC 786

In *Shabnam Hashmi vs. Union of India*,⁴⁷³ 2014, the Supreme Court recognized the right to adoption as a fundamental right of the every person, irrespective of any religion. The Court recognized the transgender as the third gender is entitled to adopt the child. The Court also said that, “discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality of the law or the equal protection of the laws guaranteed under our Constitution.” According to Adv. Anil Malhotra⁴⁷⁴ a wide interpretation should be given to the word “person” so as to include the foreign nationals.⁴⁷⁵ Therefore, today there is a need of the redraft of surrogacy laws as it prohibits the single persons as well as foreigners from becoming parents, which amounts the discrimination on grounds of sex, gender identity and nationality.

3.18. INTERNATIONAL SCENARIO OF SUROGACY LAWS

On July 25, 1978 the birth of first *IVF* baby Louise Brown has provided momentum to the ever growing assisted reproductive technology procedure. This experimental birth opened doors of scientific engineering of children and gave rise to commercialization of IVF technique universally. In today’s international scenario, where there are several ethical, social, medical and legal issues involved in the surrogacy and now surrogacy is the subject international importance despite of this, it has become the one of the most significant commercial industries in medical field. The researcher in this topic has discussed the position of the surrogacy law from an international perspective.

3.18.1 United States of America:

The status of surrogacy laws is not uniform in the United States. The different State laws which regulate, prohibits the surrogacy contracts or some of them permit the contractual surrogacy agreements.⁴⁷⁶

⁴⁷³ (2014) 4 SCC 1

⁴⁷⁴ Anil Malhotra is the author of *Surrogacy in India-A Law in the Making*. He is a Chandigarh-based practicing lawyer.

⁴⁷⁵ THE HINDU, “Ending discrimination in surrogacy laws”, Anil Malhotra, May 3, 2014, available <http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece#comments> , visited on 10/02/2015 at 9.30 am

⁴⁷⁶ Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* Rachel Cook et al. eds., HART

- i. **States Which Prohibits the Surrogacy:** The State of *Arizona* prohibits the surrogacy arrangement. The Arizona Supreme Court has declared the surrogate as a legal mother of a surrogate child.⁴⁷⁷ The *New York State* clearly considers the surrogacy contract against public policy, hence, prohibits the commercial surrogacy as well as altruistic surrogacy. A State of *Michigan* through its Surrogate Parenting Act bans the surrogacy and impose the fines of up to \$10,000 or jail time up to 1 year whoever enters into surrogacy agreements.⁴⁷⁸
- ii. **States Which Permits the Surrogacy:** There are various states of the US which directly permits the surrogacy either through statute or case law. In Florida the surrogacy contract is valid, binding and enforceable in court of law. Whereas the Arkansas's law is not expressly permitted, but allows the surrogacy contract as valid and declares the biological father as a legal father. *Nevada* law makes the contracts valid, but restricts the compensation to medical and living expenses for the birth of the child. *Illinois State* allows the traditional surrogacy, but contracts should fulfill requirements of the Gestational Surrogacy Act.⁴⁷⁹ *In Canada*, only altruistic surrogacy is permitted by the Assisted Human Reproduction Act.⁴⁸⁰ Thus, besides the above mentioned states, the *California, Maryland and New Hampshire* also friendly States with surrogacy.
- iii. **States Who's Legislation Silent on the Surrogacy:** In such States the Courts decide the validity of the surrogacy contract is valid by applying the Precedent

PUBLICATION 2003). p. 23, In the past, several Bills were introduced in the House of Representatives that would have prohibited commercial surrogacy, but none to date have been enacted into law by Congress, thus there is no federal law on the subject of surrogacy. Even the National Conference of Commissioners on Uniform State Law was unable to achieve any nationwide consensus on the issue. The statute that they ultimately approved, the Uniform Status of Children of Assisted Conception Act (the USCACA), sets forth two radically different and inconsistent approaches to surrogacy: one alternative would make surrogacy contracts void and unenforceable, while the other alternative would enforce surrogacy contracts so long as they comply with the statutory requirements. The choice between these two alternative, is left to the individual states, which are entirely free to adopt either version of the uniform statute or to reject both alternatives altogether.

⁴⁷⁷ ARIZ. REV. STAT. ANN. § 25-218(B) (2007).

⁴⁷⁸ *Cara Luckey*, "COMMERCIAL SURROGACY: IS REGULATION NECESSARY TO MANAGE THE INDUSTRY?" 2/8/2012 p. 229 *C.f.* http://hosted.law.wisc.edu/wjlg/issues/fall_2011/luckey.pdf, Visited on 23/10/2013 at 11.50. am

⁴⁷⁹ *Cara Luckey*, "COMMERCIAL SURROGACY: IS REGULATION NECESSARY TO MANAGE THE INDUSTRY?" 2/8/2012 p. 230 *C.f.* http://hosted.law.wisc.edu/wjlg/issues/fall_2011/luckey.pdf, Visited on 23/10/2013 at 11.50. am

⁴⁸⁰ Anu, Pawan Kumar, et.al., "Surrogacy and Women's Right to Health in India: Issues and Perspective," *Indian Journal of Public Health*, Vol. 57, Issue 2, April-June, 2013 p. 66, *C.f.* http://www.ijph.in/temp/IndianJPublicHealth57265-3083616_083356.pdf, visited on 24/02/ 2014 at 3.50. pm

and the principles of public policy. *In Doe v. Doe*⁴⁸¹ case the commissioning father and mother has the dispute regarding custody of surrogate child. In this case, the Court refused to declare the commissioning mother as the legal mother of the surrogate child as well as parentage over the child. In New Jersey State there is not specific prohibition and acceptance of the surrogacy arrangement. In *Baby M Case*⁴⁸² the New Jersey Supreme Court declared the surrogacy contracts are against the public policy of the New Jersey law so void, and unenforceable. Recently, the six judges bench of the New Jersey Supreme Court *in Re-TJS Case*⁴⁸³ held that the intended mother was required to adopt the child born to surrogate in order to be a legal mother.

Recently, the *US Citizenship and Immigration Services Department* through its policy added the surrogate mother (non-genetic gestational mother) in the definition of “mother” and “parent” under the Immigration and Nationality Act. Therefore, now the surrogate mother has the right to petition for US citizenship if she is a surrogate for couples holding US citizenship because at the time of birth of the surrogate child the surrogate is recognized as the legal parent of the child.⁴⁸⁴

3.18.2 United Kingdom (UK)

The commercial surrogacy arrangement is not legal in the UK. The Surrogacy Arrangements Act, 1985 combined with the Human Fertilization and Embryology Act, 1990, provides the workable framework for surrogacy arrangement. The commercial surrogacy arrangement is an criminal offence and punishable with the fine and/or up to 3 years imprisonment under the Surrogacy Arrangements Act

⁴⁸¹ Doe v. Doe, 710 A.2d 1297, 1319-20 (Conn. 1998) , C.f. Cara Luckey, “COMMERCIAL SURROGACY: IS REGULATION NECESSARY TO MANAGE THE INDUSTRY?” 2/8/2012 p. 230 C.f. http://hosted.law.wisc.edu/wjlg/issues/fall_2011/luckey.pdf, Visited on 23/10/2013 at 11.50. am
⁴⁸² 537A.2d1227 (NJ1988), C.f. Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES Rachel Cook et al. eds., HART PUBLICATION 2003). p. 26

⁴⁸³ Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medico legal Issues’, [New Delhi : Jaypee Brothers Medical Publishers pvt Ltd, 1st Edn., 2015, p. 91

⁴⁸⁴ Policy Alert, U.S. CITIZENSHIP AND IMMIGRATION SERVICES 28th October 2014, C.f. <http://www.uscis.gov/policymanual/Updates/20141028-ART.pdf>

1985.⁴⁸⁵ However, it allows the altruistic surrogacy with the payment of reasonable expenses incurred for the birth of the child.

3.18.3 Australia:

All States in Australia except the State of Tasmania, under the surrogacy Contracts Act 1993 prohibits the commercial surrogacy but legalize the altruistic surrogacy is legal. However, the commercial surrogacy agreement is a criminal offence in all states. According to the Western Australia Surrogacy Act, 2008 whoever enters into the commercial surrogacy agreement punishable with a fine of \$24 000 or imprisonment for 2 years.⁴⁸⁶ The *Kirkman Sisters case (1988)*⁴⁸⁷ is also known as the 'My sister's Baby', in this case Linda Kirkman became the surrogate mother to her older sister Maggi's genetic child. After the birth of the baby girl, she was surrendered to the Maggie and her husband. The Kirkman sisters were entered into the altruistic surrogacy arrangement, however, the Australian community was against them for type of arrangement. Thereafter, the Australia State settled the legal battle by making commercial surrogacy as illegal.

3.18.4 New Zealand:

In the State of New Zealand the practice of surrogacy has the following three characteristics: firstly, there is no specific legislation on surrogacy. The adoption law manages the cases of surrogacy. Secondly, there is an absence of guidelines for monitoring private surrogacy arrangement. Finally, a comprehensive system to manage the surrogacy arrangement which includes the use of health professionals.⁴⁸⁸ Thus, till 1993 the surrogacy arrangement was unregulated later on, the Interim National Ethics Committee on Assisted Reproductive Technologies (INECART) was established by the Government. However, in the year 1995, INECART was

⁴⁸⁵ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', [New Delhi : Jaypee Brothers Medical Publishers Pvt Ltd, 1st Edn., 2015, p. 88

⁴⁸⁶ 8, Division 2, Part 2 of the Western Surrogacy Arrangement Act, 2008 C.f . http://www.rtc.org.au/docs/090513_A1_Surrogacy_Act_2008_%28WA%29.pdf visited on 23/11/2013 at 5 pm

⁴⁸⁷ Report on 'Review of the Western Australia Surrogacy Act 2008' by the 'FINRRAGE' Feminist International Network of Resistance to Reproductive and Genetic Engineering, Australia, C.f. https://www.health.wa.gov.au/chiefmedicalofficer/docs/2014_04_24FINRRAGE.pdf

⁴⁸⁸ Ken Daniels, " The Policy and Practice of Surrogacy in New Zealand " in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES Rachel Cook et al. eds., HART PUBLICATION 2003). p.61

substituted by the *National Ethics Committee on Assisted Human Reproduction (NECAHR)*,⁴⁸⁹ for considering surrogacy and other related issues. The committee recognized altruistic surrogacy and issued guidelines for granting approval to IVF surrogacy.

3.18.4 South Africa:

South Africa has recognized the altruistic surrogacy and prohibited commercial one. The commissioning parents and surrogate mother are required to enter into surrogacy agreement and before the fertilization takes place, and agreement is required to be validated from the High Court.⁴⁹⁰ After the birth of the child the surrogate mother can change her mind within the period 60 days for relinquishment of the surrogate baby to the couple. She has the right to terminate the pregnancy. The surrogate is under the duty to surrender the child to the commissioning couple.

3.18.5 Israel:

Israel is the first nation in the world who has legalized the commercial surrogacy as like India.⁴⁹¹ In 1990 the 'Aloni Commission' was established to consider implications of religious, ethical, legal, social and IVF treatment.⁴⁹² The gestational surrogacy arrangement was legalized by the Israel government in March 1996, under the "*The Embryo Carrying the Agreement (Agreement Authorization & Status of the Newborn Child)*."⁴⁹³ The Israeli Country has established a comprehensive regulatory system for the protection of the surrogate and the commissioning parents, however till date, it is lacking in India. Therefore, Israel is called as the "pro-natalist" society large as it places larger importance of bearing children. In Israel the "Approvals Committee," approves the surrogacy contracts that are having the charge

⁴⁸⁹ NEW ZEALAND LAW COMMISSION, 'NEW ISSUES IN LEGAL PARENTHOOD,' March 2004 C.f. http://www.nzlii.org/nz/other/nzlc/pp/PP54/PP54-4_.htm

⁴⁹⁰ Anu, Pawan Kumar, et.al., "Surrogacy and Women's Right to Health in India: Issues and Perspective," Indian Journal of Public Health, Vol. 57, Issue 2, April-June, 2013 p. 66, C.f. http://www.ijph.in/temp/IndianJPublicHealth57265-3083616_083356.pdf, visited on 24/02/ 2014 at 3.50. pm

⁴⁹¹ Nuphar Lipkin and Etti Samama, 'Surrogacy in Israel, Status Report 2010 and Proposals for Legislative Amendment, C.f. http://isha.org.il/wp-content/uploads/2014/08/surrogacy_Eng001.pdf

⁴⁹² RHONA SCHUZ, 'Surrogacy in Israel: An Analysis of the Law in Practice', in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES Rachel Cook et al. eds., HART PUBLICATION 2003). p.35

⁴⁹³ The Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child), 1996. Statute Book 176.

of judicial review. The surrogate mother is protected from exploitation by providing safeguards for physical and psychological suitability assessments and informed and voluntary consent.⁴⁹⁴ The surrogate has been compensated for her time, loss of income, pain and paid for legal and other insurance expenditures. In Israel the surrogate should be a single, widowed or divorced woman and she should not be married woman. Only heterosexual couples are permitted to enter into surrogacy arrangement. Thus, it prohibits Gay couples from availing the service of the surrogacy. Israel is the first nation in the world who facilitates the State financed commercial surrogacy agreements.⁴⁹⁵

3.18.6 Russia:

In Russia, both gestational and commercial surrogacy is legal. Russia is considered as the heaven for the surrogacy, as there is no specific legislation for the regulation of surrogacy. A prior approval from any board or Court is not required in Russia for entering into surrogacy arrangement.⁴⁹⁶

The surrogate children are registered as per the Clause 4, Article 51, Clause 3, Article 52 of the Russian Federation's Family Code and Clause 5, Article 16 of the Federal Law on Civil Status Records, 1997.

3.18.7 Germany, France, Italy, Georgia and Switzerland:

In **Germany** like France, Italy and Switzerland prohibits the surrogacy arrangement. A Germany law states that, "No Medical practitioner should perform artificial insemination or embryo donation on a woman who is willing to hand over the child to the commissioning parents upon birth." In **France**, the commercial or altruistic surrogacy arrangement is illegal under Article 16-7 of the Civil Code 1996. The

⁴⁹⁴ Cara Luckey, "COMMERCIAL SURROGACY: IS REGULATION NECESSARY TO MANAGE THE INDUSTRY?" 2/8/2012 p. 227, C.f. http://hosted.law.wisc.edu/wjlg/issues/fall_2011/luckey.pdf, Visited on 23/10/2013 at 11.50. am

⁴⁹⁵ France Twine, "Outsourcing the womb," First published 2011, Routledge Publication New York, at p.42

⁴⁹⁶ K. Svitnev, 'Legal control of surrogacy – International perspectives', http://www.jurconsult.ru/publications/ethical_dilemmas/13_Legal%20control%20of%20surrogacy%20-%20international%20perspectives.pdf, p. 155 visited on 24/09/2014 at 11.00 pm
Article 35 of the Basic Law of the Russian Federation for Citizens' Health Protection, which provides that each adult woman of childbearing age has the right to artificial fertilization and the implantation of an embryo. A 35-year-old Nataliya Gorskaya, became the first single surrogate woman in Russia after defending her right to become a mother through surrogacy in a St. Petersburg Court.

highest Court in France, i.e. the *Cour de Cassation*, ruled that surrogacy was contrary to the principle of the non-commercialization of the human body. In *Italy*, all surrogacy arrangement is prohibited through the Italian civil code 1942, art. 1325, as according to the Italian law, surrogacy agreement is against the public policy.⁴⁹⁷ Surrogacy in Georgia is legal including an ovum and sperm donation. However, no parental rights over the child are given to donor or surrogate.⁴⁹⁸ In Switzerland, surrogacy is clearly forbidden by the Federal Act on Medically Assisted Reproduction. The Constitution of Switzerland prohibits the Surrogacy through its Article 119, Which provides, “The donation of embryos and all forms of surrogate motherhood are unlawful.”

3.18.8 Ukraine:

Surrogacy has been totally legal in the country of Ukraine since 2000. A donor or a surrogate mother has no parental rights over the child born. The commissioning parents are the legal parents of the surrogate child. In Ukraine the permission for entering into the surrogacy arrangement is not required from any Board or from the Court; however, only written informed consent form is necessary under Order No. 771 of the Ukrainian Health Ministry. However, the Clause 123 of the Family Code of Ukraine regulates the surrogacy arrangement.⁴⁹⁹ Presently, due to flexible surrogacy law Ukraine has become a favorable destination of surrogacy for all foreigners therefore; the surrogacy scandals were increased in Ukraine State. For avoiding the surrogacy scandals the Bill, No. 8282 was introduced to ban all foreigners. However, the surrogacy is legal in Ukraine.⁵⁰⁰

3.18.9 China:

⁴⁹⁷ A Paper by The Iona Institute, ‘The Ethical Case Against Surrogate Motherhood: What We Can Learn From The Law Of Other European Countries’, C.f. <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>

⁴⁹⁸ Anu, *et al.*: Surrogacy and Women’s Right to Health in India 67, Indian Journal of Public Health, Volume 57, Issue 2, April-June, 2013, p. 66, C.f. http://www.ijph.in/temp/IndianJPublicHealth57265-3083616_083356.pdf, visited on 24/02/ 2014 at 3.50. pm

⁴⁹⁹ K. Svitnev, ‘Legal control of surrogacy – International perspectives’, http://www.jurconsult.ru/publications/ethical_dilemmas/13_Legal%20control%20of%20surrogacy%20-%20international%20perspectives.pdf, p. 155 visited on 24/09/2014 at 11.00 pm

⁵⁰⁰ *Ibid* at 161

Bill, No. 8282 “On Amendments to Legal Acts of Ukraine Concerning Limitations on Use of Assisted Reproduction Technologies” (Ukraine 2011), was brought in order.

A China has banned the commercial surrogacy. Since 1994, a gestational surrogacy has emerged in China, however, in early 2000s an unregulated market was flourishing in China. Therefore, the Chinese government prohibited the commercial surrogacy on the grounds of its implications for defining true parenthood.⁵⁰¹ In China it was reported the birth of around 25,000 surrogate children. The surrogates are recruited through the internet. Recently, there has been huge growth of the underground surrogacy industry. China becomes one of the few Asian nations to have taken a firm stance on commercial surrogacy from the outset.

3.18.10 Thailand:

In the month of February 2014, Thailand's Parliament has passed a law on surrogacy, to ban all foreigners from seeking surrogacy services in Thailand. After the Indian Government banned the surrogacy to same sex couples and single person thereafter, Thailand has emerged as the South Asia's a top destination for fertility tourism. However, Thailand was shocked by several surrogacy scandals last year, like *in Baby Gammy case*, an Australian couple had abandoned their Down Syndrome baby boy and taken with them only custody the his healthy twin sister back to Australia. Another case involved a Japanese man who fathered at least at least 16 babies using Thai surrogates in what local Thai media called the "baby factory".⁵⁰² The Thai law prohibits commercial surrogacy serving foreign clients, with violations, punishable up to 10 years imprisonment and a fine of up to 200,000 lac (USD 6,200).⁵⁰³

After the world's shocking incident of the Baby Gammy in Thailand. The Hague Conference⁵⁰⁴ was called and issued the report on international surrogacy expressing concerns over the exploitation of women and the status of children born out of surrogacy arrangements. Its Permanent Bureau has studied issues relating to cross-

⁵⁰¹ ISS (International Institute of Social Studies), 'Report on Global Surrogacy 2014', C.f. <http://repub.eur.nl/pub/77402>

⁵⁰² Reuters, 'Thailand bans surrogacy for foreigners in bid to end 'rent-a-womb' tourism,' BY AUKKARAPON NIYOMYAT, BANGKOK, Thu Feb 19, 2015 11:36 pm EST C.f. <http://www.reuters.com/article/us-thailand-surrogacy-idUSKBN0LO07820150220>, visited on 02/03/2015 at 12.00 pm

⁵⁰³ IBN LIVE, 'Thailand Bans Commercial Surrogacy,' Posted on: 05:51 PM IST Aug 07, 2015, Cf. <http://www.ibnlive.com/news/world/thailand-bans-commercial-surrogacy-1034148.html> visited on 30/10/15 at 2.00 pm

⁵⁰⁴ The Hague Conference on Private International Law, "A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS", March 2014 at available at http://www.hcch.net/upload/wop/gap2014pd03c_en.pdf, visited on 23/12, 2014

border recognition of parent-child relationships and the status of children, including international surrogacy and also discussing the ways to improve international standards around the evolving practices of cross-border surrogacy.

3.19. CONCLUSION

The right to procreate is the natural fundamental human right of the every individual. After the birth of India's first and the world's second IVF baby Kanupriya in 1978 the assisted reproductive technology has been rapidly developed and today, India has become the '**World's top most Reproductive Tourism Destination.**' It is also reported that the surrogacy has the annual business of \$ 445 million,⁵⁰⁵ and around 3000 illegal fertility clinics are operating in the Country as stated by the National Commission for Women (NCW).⁵⁰⁶ The main reason behind the boom of the surrogacy that '*No Law Prohibit and No Law Permit*' the surrogacy," it means in India surrogacy is legal.

In India, the Guardian and Wards Act, 1890 are not allowing the adoption to Muslims, Christians, Jews and Parsis, despite of the fact that orphan children around 12 million requires the parents for their care. These persons can be appointed only as "Guardians" as well as adoption of the Child under the Hindu Adoption and Maintenance Act, 1956 (HAMA) restricted only for Hindus. Thus, Non Hindu or foreigner at most can be guardian of the child but cannot be a parent of the adoptive child.⁵⁰⁷ However, the surrogacy is fulfilling the dream of becoming parents of their own genetic child. Since 2002 commercial surrogacy officially permitted in India, but presently no statutory law for regulating the surrogacy industry. In 2005, National Guidelines of the ICMR have provided for regulating the assisted reproductive technology in India. But being non statutory body these rules are frequently violated by the ART clinics today there is a need of mandatory law to regulate the surrogacy arrangement to prevent the exploitation of surrogates and to curtail the unethical practice of ART clinics. As observed by the Apex Court in *Baby Manji Yamada's*

⁵⁰⁵ HINDUSTAN TIMES, 'Govt Bans Import of Human Embryos for Commercial Surrogacy', New Delhi, Oct 28, 2015 16:29 IST, C.f. <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

⁵⁰⁶ The Economic Times, 'Blanket ban likely on NRIs, PIOs, foreigners having kids through surrogacy', 'By PTI 15 Oct, 2015, 10.49 PM IST c. f. <http://economictimes.indiatimes.com/news/politics-and-nation/blanket-ban-likely-on-nris-pios-foreigners-having-kids-through-surrogacy/articleshow/49391832.cms> visited on 24/10/2015 at 12.39 pm

⁵⁰⁷ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*', Universal Law Publication Co. New Delhi, 2013 Edn., P. 6, However, after recent The Juvenile Justice care and Protection Act, 2015 and New Adoption Guidelines allows adoption of the child to the single person and also the foreigners irrespective any religion.

Case,⁵⁰⁸ that the “commercial surrogacy” attaining “industry proportions is sometime referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms”. Thereafter, the draft of ART Bill 2008, 2010 was prepared for the regulation of ART industry. The New version of ART Bill, 2014⁵⁰⁹ was published on 30th September 2015. The Government has issued notification on 4th November 2015⁵¹⁰ regarding not to support commercial surrogacy and also prohibited all foreigners for availing the service of surrogacy in India. Presently the special surrogacy regulation Bill, 2016 has recognized the altruistic surrogacy restricted to the close relatives and banned commercial surrogacy. Therefore, today the Surrogacy arrangement is limited to the Indian infertile married couple only. However, the Bill, 2016 also suffered from several drawbacks which need to be redrafted as it should not violate basic human and Constitutional right of the person.

Lastly, we can say the surrogacy is the last ray of hope to overcome from both biological and social infertility. Therefore, now the legalization of surrogacy is the necessary in order to protect the rights of the surrogate, the commissioning parents and the surrogate child. Without the protection of law, there is no guarantee whether the ART/ surrogacy Clinics are following the safety rules or principles of medico-ethical practice. The total prohibition of surrogacy may lead to the other problems of surrogacy such as underground and black marketing of surrogacy. Despite of simplicity and low cost features of the traditional surrogacy, but it involves many ethical, moral and legal problems. Therefore, the gestational surrogacy arrangement as a last option to the infertile couple should provide by the government. However, the present situation becomes very critical after considering the changing stand of the Central Government on surrogacy, which clearly shows that the government itself is not clear on what exactly provisions, should be included in the surrogacy legislation for regulating it. Therefore, today there is the urgent need of surrogacy legislation for protecting the rights of the surrogate and the child, the reproductive right of the every person and it required to be in tune with the new adoption policy, 2015.

⁵⁰⁸ AIR 2009 SC84

⁵⁰⁹ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

⁵¹⁰ C.f. <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> visited on 10/11/2015 at 9.30.pm

CHAPTER- IV
SOCIAL, ETHICAL AND LEGAL ISSUES IN SURROGACY
ARRANGEMENT

4. INTRODUCTION

“They want me to be the surrogate.

It’s her egg and his sperm.

I’m just the oven.

It’s totally their bun.”

Phoebe Buffay⁵¹¹

The Preamble of the Assisted Reproductive Bill, 2014 is made with the object to have the ethical and safe practice of ART services by the ART clinics⁵¹² which also include the surrogacy arrangement. However, the practice of surrogacy is alleged as illegal, unethical and immoral practice. Today, however, many of the surrogacy agreements are entered by the commissioning couples. It may be due to ‘*No Law Permit and No Law Prohibit*’⁵¹³ the surrogacy arrangement in India. There are many of the ART Clinics, institutions, organizations or companies, which are offering surrogacy services. Various law firms in India which have started their practice in the area of surrogacy services.⁵¹⁴ Today, India has become the ‘***World’s top most Reproductive Tourism Destination.***’ It was reported that the surrogacy has the annual business of \$ 445 million,⁵¹⁵ and around 3000 fertility clinics are operating in the Country as stated

⁵¹¹ Aristides N. Hatzis, “Just the Oven”: A Law & Economics approach to Gestational Surrogacy Contracts” *at p.1, C.f.* https://www.researchgate.net/publication/228261279_Just_the_Oven_A_Law_Economics_Approach_to_Gestational_Surrogacy_Contracts, visited on 25/05/2012 at 11.00 am

⁵¹² The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 2, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

⁵¹³ As per the latest instructions of the Government and order of the Supreme Court of India in *Jayashree Wad case*, till passing of the ART Bill the commercial surrogacy is prohibited in India and also banned all foreign nationals from commissioning the surrogacy in India.

⁵¹⁴ Apoorva Mishra, “Surrogacy Transaction A Perspective on the Constitutional and Contractual Aspects”, 3(1)NLUJ Law Review 134 (2015), C. f. <http://www.nlujodhpur.ac.in/downloads/lawreview/7.pdf>

⁵¹⁵ HINDUSTAN TIMES, ‘Govt Bans Import of Human Embryos for Commercial Surrogacy’, New Delhi, Oct 28, 2015 16:29 IST, c.f. <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

by the National Commission for Women (NCW).⁵¹⁶ In 2012, the Confederation of Indian Industry (CII) has stated that, every year 10,000 foreign couples visit to India for surrogacy arrangement and the industry generates the business of \$2 billion a year.⁵¹⁷ Dr. Mishra⁵¹⁸ said in the conference of the Centre for Social Research, around 48 to 50 percent commissioning parents are coming from western countries, remaining are the Non-Resident Indians (NRIs) and local people.⁵¹⁹

According to the '*Sakal*' *Marathi Newspaper* has published reports on 11th June, 2013, that the Maharashtra State is the top most State in India for the surrogacy arrangement.⁵²⁰ Recently, Dr. Nayana Patel has reached milestone birth of the '*1000th Surrogacy Baby*' at her clinic.⁵²¹

Today's world is called as the '*Google Babies World*', because the various agencies, through the internet are providing the online shopping of the surrogate, Ova and sperms. For example, [www. Iwanttogetpregnant.com](http://www.Iwanttogetpregnant.com) that offers surrogacy services in India.⁵²² Many of the surrogacy Clinics through its beautiful advertisement and surrogacy packages attracts the commissioning couple for entering into the surrogacy arrangement. Due to the growth in the surrogacy business, many women are turning for becoming a surrogate, so it may be called as '*Third World of Surrogate*'. In India, there are various players are associated with the surrogacy industry at a national and international level like hospitals, surrogacy agents, surrogacy hostels, travel agents, law firms, medical tourism departments. And the majority of the Indian ART clinics have the contacts with the foreign medical tourism agencies and hospitals for getting

⁵¹⁶ The Economic Times, 'Blanket ban likely on NRIs, PIOs, foreigners having kids through surrogacy,' By PTI 15 Oct, 2015, 10.49 PM IST c. f. <http://economictimes.indiatimes.com/news/politics-and-nation/blanket-ban-likely-on-nris-pios-foreigners-having-kids-through-surrogacy/articleshow/49391832.cms> visited on 24/10/2015 at 12.39 pm

⁵¹⁷ THE HINDUSTAN TIMES, 'Commercial surrogacy: The half mothers of Anand,' Namita Kohli, Hindustan Times, <http://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html>, Visited on 10/11/2015 at 2.30 pm

⁵¹⁸ Dr. Manasi Mishra - Head, Research Division, Centre for Social Research.

⁵¹⁹ Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

⁵²⁰ Sakal, "*Surrogacy Madhye Maharashtra Aaghadiwar*" Tuesday, 11th June 2013 Pune, at p. 9,

⁵²¹ P. C. Vinod Kumar, The Weekend Leader, Vol. 6, Issue 42., 19th Oct., 2015, available at <http://www.theweekendleader.com/Success/2280/joy-to-couples.html> visited on 20/10/2015 at 2.00 pm

⁵²² France Winddance Twine, 'Outsourcing the Womb,' at p.30, 1st Pub. Routledge Taylor and Francis Group, New York London, 2011.

foreign clients.⁵²³ However, there is no single statistics of surrogacy arrangement or online database of surrogacy clinics are available in India.

The surrogacy arrangement has challenged by the society and law in terms of recognition and regulation.⁵²⁴ The surrogacy agreement involves the various social, ethical, legal, psychological and medical issues. The general issues such as, whether it is lawful to become surrogate in India? Whether the surrogate child is entitle for Indian citizenship? Whether on the birth certificate of the surrogate child the name of the commissioning parent will appear? What will happen if surrogate refuse to deliver the baby to the commissioning parents or she blackmails to the commissioning parents for giving custody of the child? Who will be liable for the custody of the child, if the commissioning parents fail to take custody of the child due to the disability of the child or dislike the sex of the child or due to divorce or death of the couple?⁵²⁵ The embryos are imported as goods from foreign countries for the surrogacy in India. It is also alleged that it commodifies the human body, where the child becomes the mere object of a legal transaction, and surrogate mother becomes as an incubator. Therefore, such commodification violates the dignity of both the surrogate mother and the child.⁵²⁶ In a surrogacy arrangement around six people can have the parental right over the surrogate child. One of the dangers of the ethical issues of the surrogacy that use of surrogacy arrangement within the prohibited relationship. According to the International Institute of Social Studies that ‘one young girl, inseminated with the sperm of her stepfather for the child of her mother’⁵²⁷ there are many of the cases where women had used the sperms of the brothers for conceiving the child.

⁵²³ Sama–Resource Group for Women and Health, Report 2012 on “Birthing A Market: A Study on Commercial Surrogacy,” at p. 8 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11.00 am

⁵²⁴ Apoorva Mishra, “Surrogacy Transaction A Perspective on the Constitutional and Contractual Aspects”, 3(1)NLUJ Law Review 134 (2015), C. f. <http://www.nlujodhpur.ac.in/downloads/lawreview/7.pdf>

⁵²⁵ Supra note 9

⁵²⁶ A Paper By The Iona Institute: The Ethical Case Against Surrogate Motherhood:, C.f. <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>, visited on 20/11/2014 at 2.30 pm

⁵²⁷ International Institute of Social Studies (ISS), Report on “Global Surrogacy Practices”, December 2014, at p. 12 C.f. <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm

However, many of the countries realized the danger of the surrogacy therefore, they have enacted the legislation which completely bans the surrogacy arrangement with the view to protect the greatest interest of the surrogate child and prevent the exploitation of the surrogate mother. However, besides the India more recently, the countries of Thailand,⁵²⁸ Mexico, and Ukraine have emerged as destinations for inter country surrogacy arrangements.

However, the commercial surrogacy reflects the win-win situation of the infertile couple to have genetic child and the surrogate women's need of money.

According to the researcher, the surrogacy arrangement has centrally four issues such as the right to procreate and enforceability of the surrogacy agreement, exploitation of the surrogate women and the status of the child. In this chapter the researcher has mainly concentrated on the social, ethical and legal issues in surrogacy. However, the researcher has also discussed the medical and psychological issues.

4.1. **SOCIAL AND ETHICAL ISSUES IN SURROGACY**

The groundbreaking progress in reproductive technology, such as *in vitro fertilization* (IVF), artificial insemination, Intra Uterine Insemination (IUI) and the surrogacy arrangement etc.,. However, the surrogacy method has challenged the marital relationship between spouses due to the involvement of the third party, but there is a grave impact on moral, ethical, social and religious values of the society. The traditional notions of morality and religion are under challenge and the law is having trouble because of the new issues raised by the reproductive technology.⁵²⁹ The practice of surrogacy is also surrounded by the various ethical, moral, social, legal and psychological issues. There are four reasons why surrogacy becomes controversial. The first is the introduction of commercialization in a surrogacy arrangement. Second, it involved the 'manipulation' and 'handling' of 'human gametes and embryos outside of the body, which 'raised the problem of moral responsibility and legal ownership. The third issue of reproduction across traditional bodily boundaries, whether it is relevant to procreate. Fourthly, the surrogacy explicitly puts birth outside the

⁵²⁸ Recently, Thailand country has passed the law on surrogacy prohibited the commercial surrogacy arrangement.

⁵²⁹ Hon'ble Dr. Justice Balbir Singh Chauhan, "Women, Law and Morality" at p. 12, Bharati Law Review, Vol. I-Issue 3 Jan – Mar, 2013.

boundary of the marriage or partnership, and allows a child to be intentionally procured from beyond that boundary.⁵³⁰ The Surrogacy (Regulation) Bill, 2016 and previous ART Bill, 2014 has made with the objective to curb the *unethical practices of surrogacy*.⁵³¹ In this chapter the researcher is explaining the relationship amongst the surrogacy, law and morality with various social and ethical issues of surrogacy.

4.1.1. Relationship between Law, Morality and Surrogacy

i. Concept of Law and Morality

Ethics, morality and public morality have always influenced the legal policies of India. A code of ethics is a set of moral beliefs and behaviors put in place by a group of people that all agree to live by once in place, the belief and behaviors help to keep the society on a status quo.⁵³² In other words, ethics is nothing but science of human conduct. It deals with how man behaves and what should be ideal human behavior. It means ethics are concerned with good or proper human conduct in the light of public opinion. And interestingly, public opinion varies from place to place from time to time and from people to people.⁵³³ Therefore, legislation must be based on ethical principles. It must not be divorced from ethical values. No law can be good if it is not based on sound ethical principles.⁵³⁴ According to Dr. Sethna in the mirror of community's laws are reflected its culture, its ideology and it's Miranda. According to "*doctrine of factum valet*" an act which is in contravention of some moral injunctions should be considered valid if accomplished in fact.⁵³⁵ C. K Allen states that the relationship between law and morality: "*our judges have always kept their fingers delicately but firmly*

⁵³⁰ Rachel Cook and Shelly Day Sclater (eds), "Surrogate Motherhood: International Perspective," p. 122, Hart Publishing, Oxford –Portland Oregon, 2003.

⁵³¹ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p.19, Visited on 21/11/2016 at 3.00 pm.

⁵³² Dr. Nagarathna A, "Impact of the Principles of Ethics And Morals on the Process Of Criminalization and Criminal Law Policies," at p. 52, KLE Law Journal, Issue No. 1, 2014

⁵³³ V. D. Mahajan, "Jurisprudence and Legal Theory" at p. 18, 5th Edn. Eastern Book Company reprinted 2001.

⁵³⁴ *Ibid* at 19

⁵³⁵ *Ibid* at 97

upon the pulse of accepted morality of the day." Lord Mansfield says that, the law of England prohibits everything which '*contra bonos more*'.⁵³⁶

Every law who does not meet the test of morality becomes the subject of debate by the society.⁵³⁷ According to the natural law school advocated by St. Thomas Aquinas and Professor Lon Fuller that every law must satisfy the test of morality and if the law does in accordance with the natural code, then such law has to be rejected by the society as a moral code comes from the God. However, according to the positive law supporter Jeremy Bentham and John Stuart Mill that law should be enforced as it is, even though it fails to satisfy the test of morality.

According to them, a man is free to perform his activity as per his own will, if it does not harm to others. According to Bentham provides the *theory of utilitarianism i.e the greatest happiness of the greatest number of people*. Jeremy Bentham's ethical system is based on the happiness of larger number of persons. Thus he has given '*calculus of happiness*' through which we can calculate the consequences of any law or action in the condition of pleasure and pain to the society.⁵³⁸ However, John Mill suggested that, there were higher and lower pleasures and society should prefer the higher ones: "Better to be dissatisfied than a fool satisfied." By lower pleasures, he meant pleasures of flesh, and by higher pleasures, he meant pleasure of the intellect. According to Edwin Schur there may be victimless crimes which do not harm anyone such as homosexuality, drug and abuse abortion. Therefore, the Parliament and the Judiciary should be very cautious and conscious about altering laws concerning morality.

ii. Difference between Law and Morality

A person may be punished if he violated the law. However, in morality, there may be coercion. In today's world the assisted reproductive technology challenged both law and morality. The law is influenced by religion, and in a traditional society has never had a dominating character; but religion and morality had played a very dominant role. Therefore, one may say that law and morality

⁵³⁶ *Ibid at 103*

⁵³⁷ Hon'ble Dr. Justice Balbir Singh Chauhan, "Women, Law and Morality" at p. 12, Bharati Law Review, Vol. I-Issue 3 Jan – Mar, 2013.

⁵³⁸ *Ibid at 14*

had played a very dominant role, as they are two sides of the same coin.⁵³⁹ Morality seeks to influence our behavior by way of our desires, where law is the backup option and targets our desires. Issues like pornography, prostitution, homosexuality and now surrogacy are the areas of our own consciousness and hence it is an area of conflict between law and morality which still continues. Morality cannot play any role in legal areas like business law, company law, cyber law, tax laws, trade laws, etc. However, it may have a vital role in laws like SITA (Suppression of Immoral Traffic in Women and Girls Act, 1956), and PITA (Immoral Traffic (Prevention) Act, 1956). Therefore, there cannot be any hard and fast rule of universal application in this regard. At the most, it can be concluded that the level of enforcement of moral standards depends upon case to case.

In Manu Smriti, a woman had been put on the highest pedestal, as while dealing with the status of the women it says:

यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः ।

यत्रैतास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः ॥

अर्थ = जहां पर स्त्रियों की पूजा होती है, वहां देवता रमते हैं ।

जहाँ उनकी पूजा नहीं होती, वहाँ सब काम निष्फल होते हैं ।

Yatra Naryastu Pujoyante Ramante Tatra Devata /

*Yatra itaastu: Na Pujoyante Sarvaastatrafalaah Kriyaah :II*⁵⁴⁰

Means: Where women are honoured, the deities are pleased; where they are dishonored, all their religious acts become fruitless.

However, while dealing with her contractual rights, Manu Smriti provides:

Rakshathi Koumare

Bhartha Rakshathi Youvane

Puthra Rakshathi Vardhake

Na Sthree Swathantray Maharti.....”

⁵³⁹ ⁵³⁹ Hon’ble Dr. Justice Balbir Singh Chauhan, “Women, Law and Morality” at p. 12, Bharati Law Review, Vol. I-Issue 3 Jan – Mar, 2013.

⁵⁴⁰ Manu, Ch III - 56

Her father protects her in childhood; her husband protects her in young age; her sons protect her in old age; she is never fit for independence.

Both the texts have to be reconciled giving harmonious construction and to be read in such a manner that both may co-exist. Thus, Sir Henry Maine, a great scholar of Hindu law explained that woman had been deprived of the right to enter into a contract being very emotional.⁵⁴¹

In England, *the Wolfenden Report 1957* was produced after a long debate on the relationship between law and morality. The committee recommended that the law should not interfere in the private life of the citizen in case of prostitution and homosexuality. The protection of individual freedom is more important than morality. *In U.K. Gillich v. West Norfolk and Wisbech Area Health Authority*,⁵⁴² the Court addressed the questions regarding the validity of the circular regarding contraception to girls, under the age of 16 was challenged. In this case the Court held that, a doctor who has given treatment and contraceptive advice to a girl under 16 years of age without the consent of her parents, would not be committed any of the offence the Sexual Offences Act, 1956. The Court also rejected the submission that such provision of advice on the use of contraceptive to a girl under 16 would encourage participation in sexual activities, and this practice would offend basic principles of morality and religion which ought not to be sabotaged by the National Health Service.

However, the rape within marriage is an offence in western society. In *R v. R*⁵⁴³ the House of Lords examined the provisions of section 1 (1) of Sexual Offences

⁵⁴¹ Hon'ble Dr. Justice Balbir Singh Chauhan, "Women, Law and Morality" at p. 16, Bharati Law Review, Vol. I-Issue 3 Jan – Mar, 2013.

⁵⁴² *U.K. Gillich v. West Norfolk and Wisbech Area Health Authority* 1985 3 ALL ER 402.

Ms. Gillick sought declaration from the Court against the health authorities on the issuance of the said circular. She argued that the health Service authorities in law had no competence to give advice to a girl below 16 years of age; as such advice would adversely affect the rights of her children. Further, it would affect Ms. Gillick in her capacity as a parent and custodian of her daughters as it would be against her rights to effectively discharge her duties as parent and custodian. Ultimately, the House of Lords by majority of 3:2 rejected her claim as the House held that having regard to the reality that a child becomes increasingly independent as it grows older and that parental authority dwindles correspondingly, the law did not recognize any rule of absolute parental authority until a fixed age. Instead, parental rights were recognized by the law only as long as they were needed for the protection of the child and such rights yielded to the child's right to make its own decisions when it reached a sufficient understanding and intelligence to be capable of making up its own mind.

⁵⁴³ *R v. R* (1992) 1 AC 599.

(Amendment) Act, 1976, in a case where the accused admitted to having forcible sexual intercourse with his wife. He was charged for rape and assault. The Court came to the conclusion that the supposed marital exemption in rape formed no part of the law of England. Therefore, the law cannot presume to be a deemed consent of the wife for sexual intercourse with her husband. "Therefore, a husband could be convicted of rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse."

In *Lata Singh v. State of U.P. & Anr.*,⁵⁴⁴ the Supreme Court quashed the complaint under sections 366 and 368 Indian Penal Code, 1860 lodged by the brother of the petitioner therein against the petitioner and her husband as she had married, inter caste observing that a major girl: "Is free to marry anyone she likes or to live with anyone she likes."

In *S. Khushboo v. Kannimmal*,⁵⁴⁵ the Supreme Court quashed criminal prosecution against the appellant for preaching in favour of live-in relationships. The Court said, if two different sex adults with consent having live- in relationship, which does not amount to any offence, punishable under any penal law.

Thus, after study of above judgments it shows that the Court has rejected numerous arguments on the ground morality as being of no concern to the legal issue before it.

iii. Law, Morality and Women's Right to Have Artificial Insemination

In *R. v. Human Fertilization and Embryology Authority*,⁵⁴⁶ case issue before the Court was regarding the interpretation of the provisions of the Human Embryology and Fertilization Act, 1990 and the European Community Treaty.

However, in India, under section 375 of IPC, husband may be held guilty for the offence of rape with his own wife if she under the fifteen years of age.

⁵⁴⁴ *Lata Singh v. State of U.P. & Anr.* AIR 2006 SC 2522

⁵⁴⁵ *S. Khushboo v. Kannimmal* AIR 2010 SC 3196

⁵⁴⁶ *R. v. Human Fertilization and Embryology Authority, Ex Parte Blood*(1997) 2 All ER 687

In the said case, Mr. and Mrs. Blood got married in 1991. They planned to have a family in 1994. However, before the applicant Mrs. Blood could conceive, her husband contracted meningitis, and lapsed into a coma. On the request of Mrs. Blood sperms were collected by electro ejaculation for use by her at a later stage for artificial insemination, and were entrusted to the Infertility Research Trust for storage.

The applicant wanted to use the sperms of her husband for artificial insemination, which was collected through the electro ejaculation as the husband is in a coma. However, the authority rejected her request for getting treatment in U.K. or in Belgium country. According to the authority for the treatment the donor and the receiver of sperms should be together. Finally, the Court granted permission to Mrs. Blood for the use of sperm of the Mr. Blood on the ground that the written consent of Mr. Blood is not possible as he is in a coma but considered his will to have the family before his death. Thus, the Court said, she has the right to get treatment in any of the European country and the Court treated this case as a special case and the granted the permission on humanitarian ground than legal arguments.

iv. Surrogacy, Law and Morality

The surrogacy arrangement has challenged the various social and ethical issues. These issues have become the red signals for legalizing the surrogacy India. It is said that the surrogacy arrangement has directly threatened to the family structure of India. It is against Indian culture as unnatural, Immoral and unethical. In surrogacy the ethical issues arises at least in three levels. The first is whether surrogacy of any kind is moral or immoral. And another is, whether surrogacy of any kind should be legal and, if so, which kind and what form it should take. And finally, the consequences of allowing some form of surrogacy to be practiced. Most of the arguments supporting the morality of surrogacy begin with some kind of fundamental liberty⁵⁴⁷ or fundamental right. Some abolitionists argue that surrogacy is immoral hence; it should be banned or restricted. Whereas those who are in favour of the liberty argument says that the surrogacy is part of a fundamental freedom which people should enjoy. The interest invoked might be a general interest in liberty. There are two most common kinds of liberty these are freedom of contract and reproductive freedom.⁵⁴⁸ Some says surrogacy must be allowed whatever concerns it might raise and others would argue equally strongly

⁵⁴⁷ In American discourse fundamental liberties are normally represented as rights, and this formulation has influenced most discussions of surrogacy in the literature.

⁵⁴⁸ Rachel Cook and Shelly Day Sclater (eds), "Surrogate Motherhood: International Perspective," p. 127, Hart Publishing, Oxford –Portland Oregon, 2003.

that it must be prohibited regardless of the benefits it might bring.⁵⁴⁹ *The Warnock committee* viewed that surrogacy is ‘almost always unethical.’⁵⁵⁰ Anglo-American world, it has been widely accepted that private surrogate relationships should not be prevented by the law, as the technology required is in fact do-it-yourself and it would be wrong to criminalize the birth of any child so conceived.⁵⁵¹ There has also been a widespread preference for ‘gift’ over ‘contract’ surrogacy arrangements.⁵⁵² The primary legal issues therefore include whether surrogacy contracts should be permissible, whether if permissible they should be enforceable, and whether if enforceable, the remedy for failure to comply with the contract should include ‘specific performance.’⁵⁵³ **In *Baby Manji Yamada’s case*,**⁵⁵⁴ Mr. Yamada sperm was fertilized with donated the egg through the IVF process, which was implanted into the womb of the surrogate woman. Therefore, in such arrangement Mrs. Yamada had no genetic involvement in the birth of the child. In a ***US gay couple (Fister and Michael)*** case US gay couple came to Hyderabad in 2009. One of them has donated his sperm fertilized with donor egg and transferred into the womb of the surrogate. Thus, the surrogate woman given birth to the genetic child of the US gay Couple.⁵⁵⁵

In fact, in the case of surrogacy, there are many questions about enforcing a contract with the surrogate mother.

Therefore, the question is whether the surrogacy contract is valid or not, Whether it is against the public policy under section 23 of the Indian contract Act, 1872. Whether the surrogate child amounting to commodity as it sold for consideration.

⁵⁴⁹ Absolutist moral arguments against surrogacy on, say, Qu’ranic or Catholic grounds, would not normally be considered compelling reasons, or even candidate reasons, for public policy decisions in a liberal and pluralist society.

⁵⁵⁰ Supra note 21 at 2.

⁵⁵¹ Rachel Cook and Shelly Day Sclater (eds), “Surrogate Motherhood: International Perspective,” p. 133, Hart Publishing, Oxford –Portland Oregon, 2003.

⁵⁵² The ethical purity of ‘gift’ surrogacy can however be questioned, as family pressure can be as or more exigent and extortionate as market pressure, without the protection which contract might afford and with the real risk of the breakdown of such ‘loving’ relationship under the strain.

⁵⁵³ ‘Specific performance’ means that a contracting party is ordered to perform precisely what he or she had contracted to do. Its rejection means that a singer who is ill, for example, will not be ordered to sing anyway, but rather to pay damages to the venue she lets down. In the case of surrogacy, ‘specific performance’ would require a birth mother who had contracted to do so, to hand over the child to the commissioning parents.

⁵⁵⁴ *Baby Manji Yamada v. Union of India & Anr.*, AIR 2009 SC84

⁵⁵⁵ Hon’ble Dr. Justice Balbir Singh Chauhan, “Women, Law and Morality” at p. 21, Bharati Law Review, Vol. I-Issue 3 Jan – Mar, 2013

In such case, a party may rescind the contract on the ground that the child is not as per the requirements decided under the contract. Therefore, under such situation, a party may reject the goods and may claim damages for it.⁵⁵⁶

The significant questions are whether the surrogacy contract is same like to the any other contracts? It also gives rise to several serious questions of morality, such as whether the artificial insemination amounts to adultery. Whether surrogacy contract amounts to exploitation of poor surrogate women? Besides these issues other issues are whether the child born out of the surrogacy contract can claim the succession of property? Whether the surrogate child can inherit the coparcenary property? Whether the surrogate children can be treated as born out of the voidable and void marriages under section 26 of the Special Marriage Act, 1954 and section 16 of the Hindu Marriage Act, 1955. Therefore, whether the surrogate children are entitled only of the share in self acquired property of the commissioning parents and not of the coparcenary property of any of the relatives of his or her parents.⁵⁵⁷

In *Oxford v. Oxford*,⁵⁵⁸ case the Canadian Court granted the divorce to the party on the ground of adultery as the wife acted a surrogate woman for another.

The surrogacy arrangement involves the various social, ethical, legal and medical issues such as whether the surrogate has given informed consent? Whether the surrogate woman is emotionally attached with child? Whether any surrogacy has any psychological effects on the growth of the child?⁵⁵⁹ Whether the commercial surrogacy contract is unethical and immoral, therefore it is against the public policy? What effect it will have on the other children of the surrogate mother when they see their mother handing over the baby to some strangers?⁵⁶⁰ To what extent is it right for society to permit women to make contracts about the use of

⁵⁵⁶ *Ibid*

⁵⁵⁷ Smt PBK Kalliani Amma & Ors. v. K. Devi & Ors., AIR 1996 SC 1963; Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685.

⁵⁵⁸ *Oxford v. Oxford* 58 O L R 251 (1921).

⁵⁵⁹ Sugato Mukherjee, "Legal and Ethical Issues Of Commercial Surrogacy: An Overview," C.f. https://www.academia.edu/1955503/legal_and_ethical_issues_of_commercial_surrogacy_in_india_an_overview, visited on 24/12/2013

⁵⁶⁰ P. Lakshmi, "Surrogacy: The Nine Month Rental Agreement," Indian Journal Of Legal Philosophy ISSN :2347-4963 Volume 2, Issue 2, June 2014, C.f. <http://www.ijlp.in/ijlp/imageS/IJLP-Volume-2,%20Issue-2,%20June-14.pdf>

their bodies? Whether the surrogacy contract is like any other type of employment or like prostitution contract, or slavery? Whether the State can compel the surrogate woman under “specific performance” for the birth of the baby, if she wishes to abort it? ⁵⁶¹

According to Morgan the surrogacy contract has created an environment of moral uncertainty, social anxiety, and emotional ambivalence. However, Amrita Pande says the surrogacy is not an unethical and immoral arrangement. It is a gestational labour. She says if we see the surrogacy through the lens of morality, we may see the surrogacy as immoral and undesirable act. It defies the laws of nature, family, religion and commercialization of motherhood, but it is not true. ⁵⁶² The researcher in the following research study has elaborated various social, ethical, moral issues in regard to the surrogacy in order find out whether the surrogacy agreement is moral or immoral.

4.2 SURROGACY ARRANGEMENT

Surrogacy can be called as a technique as well as a form of transaction, where the parties give rise to new relation towards each other, and it is based on necessity and desire of the parties to have their own genetically or biologically related child. Surrogacy is a ‘necessity’ for those who are economically vulnerable and are unable to maintain themselves with the help of available resources, and a ‘desire’ of those who are otherwise incapable to procreate or conceive the child of their own. ⁵⁶³

The attorney Noel Keane is called as the architect of the **first formal surrogacy agreement (*Baby M Case*)** in the year 1976. ⁵⁶⁴

⁵⁶¹ Dr G A Solanki, Birth Orders, Baby Farms, and Surrogate Motherhood- A Womb for Rent, GRA; Global Research Analysis International: Vol II Issue 5. October 2012 ISSN NO 2277 -8160, C.f. http://worldwidejournals.com/gra//file.php?val=October_2012_1350412513_d4107_36.pdf

⁵⁶² Amrita Pande, “Wombs in Labor: Transnational Surrogacy in India.” at p. 171, Columbia University Press, New York, 2014.

⁵⁶³ Apoorva Mishra, “Surrogacy Transaction A Perspective on the Constitutional and Contractual Aspects”, 3(1)NLUJ Law Review 134 (2015), C. f. <http://www.nlujodhpur.ac.in/downloads/lawreview/7.pdf>

⁵⁶⁴ Babu Sarkar, “Commercial Surrogacy: Is it morally and ethically acceptable in India?,” The Practical Lawyer, Cite as: (2011) PL December S-11, C. f. http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=22512, 2,

In India, the **Assisted Reproductive Technology Bill, 2014**, defines the surrogacy agreement as the agreement between the surrogate and the commissioning couple for providing surrogacy services”⁵⁶⁵ A surrogacy arrangement has also defined by the Supreme Court of India in *Baby Yamada v. Union of India*⁵⁶⁶ case.

According to the researcher, the surrogacy agreement is nothing but an arrangement between the surrogate mother and the childless couple with the intention to relinquish the child after the birth to the commissioning couple. In surrogacy arrangement, the assistance of the sperms or egg donor is taken, if the commissioning couple is unable to produce the gametes. And in transnational surrogacy the commissioning couple makes the agreement with surrogate women of the other country, which is also called “**Cross Border Surrogacy.**” However, the Surrogacy agreement has challenged by both the society and the law, in terms of its recognition and regulation. It is said that the western couples enter into the surrogacy agreement with the developing countries like India or Thailand due to reasons of the cheap cost, no law on surrogacy and more restrictive laws in their countries.⁵⁶⁷ Most of the countries across the world either deem it partially or completely illegal or make it valid to the extent of altruistic surrogacy. In some countries, the commissioning parents are declared as the legal parents of the surrogate child born.⁵⁶⁸ The primary difficulty lies in the surrogacy arrangement while recognizing its exact nature. Some called, it is an industry, and some say it is a service or a contract for a particular purpose. Besides this some say it is unethical, immoral practice equal to prostitution, exploiting the poor woman and also destroying the family structure. Till today, in India the practice of surrogacy is neither legal nor expressly prohibited by law;⁵⁶⁹ hence the status of the surrogacy agreement has become the controversial on various grounds such as whether the

⁵⁶⁵ The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 7 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

⁵⁶⁶ *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84, The Hon’ble Supreme Court of India defines the surrogacy arrangement is an agreement whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise, but hand over to a contracted party.

⁵⁶⁷ Nicole F. Bromfield, ‘Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations, published online 1st July 2014, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 12/11/2014 at 10.30. pm

⁵⁶⁸ Apoorva Mishra, “Surrogacy Transaction A Perspective on the Constitutional and Contractual Aspects”, 3(1)NLUJ Law Review 134 (2015), C. f <http://www.nlujudhpur.ac.in/downloads/lawreview/7.pdf>

⁵⁶⁹ *Jan Balaz vs. Anand Municipality*, AIR 2010 Guj 21 at 14

surrogacy agreement is illegal in India? Whether commercial surrogacy is morally and ethically acceptable in India? Is the contract itself valid? Whether surrogate should be paid for surrogacy transaction? Whether this agreement leads to commercialization of surrogacy?⁵⁷⁰ Whether the surrogacy agreement amounts to the exploitation of the surrogate woman? Whether surrogacy contract amounts to use of woman as commodity? Whether the surrogate agents are entitled to claim the commission out of the surrogacy arrangements?⁵⁷¹ Whether the surrogacy agreement amounts to prostitution, slavery or “wombs on rent”? Whether commercial surrogacy involved the sale of a child in view of the fact that the surrogate mother relinquishes her parental rights for money? Whether the commercial surrogacy is unethical and immoral agreement and against the public policy, hence it should be declared as void u/s 23 of the Indian Contract Act 1872. Whether the surrogacy agreement is enforceable under section 10 of the Indian Contract Act, 1872?⁵⁷² Whether the surrogacy transaction would destroy the family structure of the society? In regard to the various issues of the surrogacy arrangement, it becomes questioned *whether the social and ethical issues are really creating difficulty for legalizing surrogacy in India?* In the following research study, the researcher has given the detailed aspect of various social and ethical issues as well as legal, psychological and medical issues of the surrogacy.

4.1.2. Exploitation of Surrogate Women

Exploitation of surrogate women is the one of the most serious charge against the surrogacy arrangement. It has claimed that commercial surrogacy morally and ethically objectionable because it is exploitative. Therefore, the questions arise that *whether surrogacy contracts are exploitative? And whether exploitation is a valid reason for prohibition of these arrangements?*⁵⁷³ According to Imrana Qadeer, when women voluntarily accept the surrogacy arrangement, then she should get

⁵⁷⁰ Dr G A Solanki, “Birth Orders, Baby Farms, and Surrogate Motherhood- A Womb for Rent,” GRA; Global Research Analysis International: Vol II Issue 5. October 2012, C.f. http://worldwidejournals.com/gra//file.php?val=October_2012_1350412513_d4107_36.pdf

⁵⁷¹ Surrogate Motherhood, C.f. <http://legal-dictionary.thefreedictionary.com/Surrogate+Motherhood>, visited on 29/05/2013 at 11.00 am

⁵⁷² Jayashree Wad Vs. Union of India & others W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

⁵⁷³ Maratha A. Field, “Surrogate Motherhood, the Legal and Human Issues,” 1st Edn. Harward Press Paper back Edition, 1990, London, at p. 25

dignity, self respect, social status, equal chances, adequate salary, and freedom of decision.⁵⁷⁴ It has been said that the surrogate women has been exploited from socially, economically, psychologically and medically. The researcher has categorized and given the detailed elucidation of the exploitation of surrogate women in following ways:

1. Social and Economical Exploitation
2. Psychological and Emotional Exploitation
3. Physical Exploitation

4.1.2.1. Social and Economical Exploitation:

Dr. V.M. Katoch,⁵⁷⁵ while addressing at National conference on surrogacy, said that in India surrogacy is the commercial activity, therefore, needs extensive regulation which leads to continual exploitation. Dr. Katoch stated that there should not be exploitation or unfairness in the society, but however it is happening and it seems that power play and exploitation have become the way of life.⁵⁷⁶ Surrogacy is considered as the noblest service, because it helps the childless couples to have their own genetic baby. As we cannot say all women are doing just for good reason, i.e. just for helping to the others, but there may be various reasons to become the surrogate. Generally, it is said that *“money” is the main motivating factor* for women to becoming a surrogate, but then is it money factor motivates the surrogate women towards exploitation? The researcher through its study has found that there are various reasons which lead the women to become the surrogate mother in India. Therefore, in order to understand whether there is exploitation of surrogate women or not, it is very necessary to first understand the socio-economic background of the surrogate women.

i. Surrogate Vulnerable in Socio- Economic Background:

⁵⁷⁴ Imrana Qadeer, “The ART of Marketing babies,” C.f. <http://www.issuesinmedicalethics.org/index.php/ijme/article/view/260/449>

⁵⁷⁵ Dr. V.M. Katoch, Secretary, Health Research, Ministry of Health & Family Welfare, Government of India.

⁵⁷⁶ Centre for Social Research (CSR), Report of the National Conference on Surrogacy, “A Policy Dialogue on Issues around Surrogacy in India” held on 22nd to 23rd September 2014 in Delhi, C.f. https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

Amrita Pande's⁵⁷⁷ research shows that 34 out of 42 the majority of Indian surrogates comes from the below the poverty line. According to Pande surrogacy as a legitimate form of labor⁵⁷⁸ and money is the main motivational factor for joining the program and they are doing this for money, because of need and not for greed.⁵⁷⁹ The Centre for Social Research in its report stated that the monthly income of the most of the surrogate mothers is not more than Rs. 1,000-2,000.⁵⁸⁰ According to SAMA Report,⁵⁸¹ 8 out of 12 surrogate mothers have the monthly income below 10,000/- including their husband's earnings. Thus, the income alone is the main reason of the women for making surrogacy contract.⁵⁸²

As per the report of **Centre for Social Research** published on "**Surrogate Motherhood Ethical or Commercial**" that the majority of the surrogates are uneducated, house maids, sometimes engaged in construction work or nurses and lives in the slum areas. The surrogate women are from lower middle class family. A woman becomes surrogate because of the various reasons such as an urgent need of money, maintaining families, for buying a house or children's education or for her unemployed and drunkard husband's business.⁵⁸³

⁵⁷⁷ Amrita Pande is the senior lecturer in sociology at University of Cape Town and the author of the book "Wombs in Labor, Transnational Surrogacy in India."

⁵⁷⁸ Amrita Pande, "Wombs in Labor: Transnational Surrogacy in India." Columbia University Press, New York, 2014, at Appendix C: Table AP. 1 Surrogates at Arman Clinic.

⁵⁷⁹ Radio Review: Thinking Allowed - Commercial Surrogacy in India, BBC Radio 4, Monday 9 March 2015, Presented by Professor Laurie Taylor, C.f. <http://www.bbc.co.uk/radio/programmes/a-z/by/india/current>, visited on 24/10/2015 at 3.30.pm

⁵⁸⁰ Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p. 77 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 21/10/2013 at 2.30. pm. The Centre for Social Research has conducted its research in cities of Anand, Surat and Jamnagar and collected sample size of 100 surrogate mothers. The surrogate mothers monthly income is not more than Rs. 1,000-2,000. (35% in Anand, 42.86% in Surat and 40% in Jamnagar)

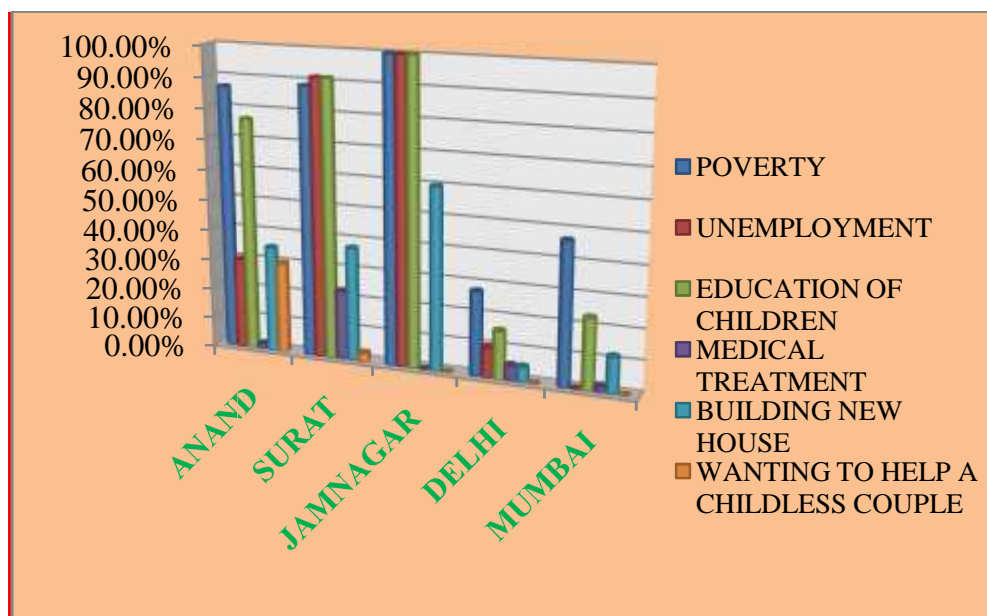
⁵⁸¹ Sama is a Delhi-based resource group working on issues of women's health and rights. This Group has conducted research studies on Commercial Surrogacy and published report as "**Birthing A Market: A Study on Commercial Surrogacy**" This group has collected sample size of 12 surrogate mothers from the Delhi and Punjab State. However, 1 out of 12 surrogate mother was the source of income her current surrogacy arrangement.

⁵⁸² Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," Table -2 at p. 36 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

⁵⁸³ Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p. 38 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 21/10/2013 at 2.30. pm

POVERTY, UNEMPLOYMENT, EDUCATION OF CHILDREN, MEDICAL TREATMENT, ILLTERACY, LESS INCOME ARE THE MAIN FACTORS FOR BECOMING SURROGATE WOMEN.

Chart 12 Factors Influencing Women to Become Surrogate Mother



The above graph represents that in Anand around 86.7% , in Surat 88.6%, and 100% in Jamnagar, 27.85% in Delhi and 46.91% in Mumbai provides the ***poverty was the main reason for becoming surrogate women.*** In Anand 30%, Jamnagar 100%, in Delhi 10%, whereas the surrogate in Surat 91.4% given their unemployment reason. The medical treatment is the reason 1.7% in Anand, 22.9% in Surat, and 5% and 2% of the Delhi and Mumbai respectively. Further, the surrogate women in Anand 76.7%, in Surat 91.4%, 15.82% in Delhi, 23.46% and all surrogates in Jamnagar, said the education of their children was the main factor for acting as surrogate. The reason of the building of the new house was the factor for becoming surrogate women in Anand 35%, Surat 37.5%, whereas 60% in Jamnagar and 5% and 12% Delhi and Mumbai⁵⁸⁴

⁵⁸⁴ Centre for Social Research (CSR), 'Final Report Surrogate Motherhood- Ethical or Commercial', p. 56 available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf> , 12/05/14 at 12.25 pm, The Centre for Social Research has conducted two research studies. This research has conducted mainly in two cities Delhi and Mumbai and collected sample size of 100 surrogate mothers and submitted the final report on "Surrogate Motherhood Ethical or commercial."

cities respectively. Whereas the factor in helping the childless couple in Anand 30%, in Surat 2.9% only.⁵⁸⁵

In Sama report one of the surrogate mother (SP4) said that,

*“It is money that gets you to do everything. One has compulsions at home. Everyone is sitting with a lot of tension at home. No one does it because they enjoy (shauk nahi hota) bearing someone else’s child.”*⁵⁸⁶

Dr. Ranjana Kumari⁵⁸⁷ even said the involvement of unregistered agencies in surrogacy arrangements, which attract the prospective vulnerable, poor, migrant women as surrogate mothers with the promise of huge sum at the end of the pregnancy.⁵⁸⁸ However, some researcher says in order to avoid economic exploitation of the surrogate mother the government should provide a safety net in the form of employment. If there is a safety net, then prospective surrogate mothers will not fall into such desperate situations.⁵⁸⁹

ii. Exploitation in Payment of Compensation:

The surrogate women are even exploited in payment of compensation. No fixed criteria about the amount of compensation to the surrogate. It is subjectively fixed by the ART clinics. Generally, approximately Rs. 12-15 lakhs surrogacy amount is charged by the clinics for the providing surrogacy facility to the commissioning couple.⁵⁹⁰ However, the surrogacy cost varies from clinic to clinic as no fixed guidelines for the payment of remuneration to the surrogate.

⁵⁸⁵ Centre for Social Research (CSR), ‘Surrogate Motherhood- Ethical or Commercial’, p. 38 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 21/10/2013 at 2.30. pm. . The Centre for Social Research has conducted its research in cities of Anand, Surat and Jamnagar and collected sample size of 100 surrogate mothers and submitted the report on “Surrogate Motherhood Ethical or commercial.”

⁵⁸⁶ Sama–Resource Group for Women and Health, Report 2012 on “Birthing A Market: A Study on Commercial Surrogacy,” Table -2 at p. 50 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

⁵⁸⁷ Director, Centre for Social Research (CSR), Delhi

⁵⁸⁸ Supra at 15

⁵⁸⁹ Aristides N. Hatzis, “Just the Oven”: A Law & Economics approach to Gestational Surrogacy Contracts” C.f. https://www.researchgate.net/publication/228261279_Just_the_Oven'_A_Law_Economics_Approach_to_Gestational_Surrogacy_Contracts, visited on 25/05/2012 at 11.00 am

⁵⁹⁰ Supra at 22 p. 75

According to Dr Mishra⁵⁹¹ the compensation of the surrogate mothers ranges from 2.5 lakhs to 4 lakhs at a maximum depending on single child/twins. But, ultimately the surrogate gets between 70,000/ to 1 lakh after relinquishing the child/children.⁵⁹² Whereas Ms. Shamina Shafiq, Member, National Commission for Women (NCW), said the most of the exploitation happens due to the terms of the contract and in compensation dealings.⁵⁹³ The least amount paid is to the surrogate around Rs 1, 10,000 and the highest is Rs 3, 70,000 in installments either directly from commissioning parents or agents or consultants.⁵⁹⁴ It is found that a very small portion of the amount is given to the surrogate before the birth of the surrogate baby from the total amount of the remuneration.⁵⁹⁵ According to the International Institute of Social Studies, those Indian surrogate women receive only 25 per cent of the payment before or during pregnancy and 75 per cent at the end. Thus, the clinics are having greater control over women working as surrogates.⁵⁹⁶ This shows that the surrogate women are under the mercy at clinics payment till she delivers the child.

According to Pande, the commissioning couple saves more amounts as compared to foreign countries' compensation. She said they pay around £20,000 compared with up to £70,000 in California, but the lion's share take by the clinic and surrogate gets only £5,000 a disproportionately small amount. Still, women are pressured for becoming a surrogate by her husband or in-laws.⁵⁹⁷ Thus, the surrogate women are exploited in payment of compensation; however Amrita Pande's opinion that it is one kind women labour just like other type of labour so should get protected.

⁵⁹¹ Dr. Manasi Mishra, Head, Research Division, CSR, has conducted two research studies on surrogacy in Gujarat (Anand, Surat and Jamnagar), Delhi and Mumbai and submitted reports on "Surrogate Motherhood: Ethical or Commercial" to Centre of Social Research.

⁵⁹² Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f. https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

⁵⁹³ *Ibid*

⁵⁹⁴ Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," Table -2 at p. 110 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

⁵⁹⁵ *Ibid*

⁵⁹⁶ International Institute of Social Studies (ISS), Report on "Global Surrogacy Practices", December 2014, at p. 12 C.f. <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm

⁵⁹⁷ *Supra* at 18, In India there are various laws which protect the women if her husband or his relatives force the women to act as a surrogate. Such victim women are protected under section 498A of the Indian Penal Code and also protected under the Protection of Women against Domestic Violence Act, 2005. The researcher in further studies is giving the detailed information of various Indian laws and International Conventions for protection of women.

However, it is said that laws are incapable to keep up with the profitable business of using poor women to carry children for wealthier parents.⁵⁹⁸ Ultimately, it reflects the class divisions in surrogacy transaction, where the rich couples intentionally or unintentionally are taking advantage of poorer women by offering them a sum of money in the form compensation.⁵⁹⁹ A very recent example of Baby Gammy case, where the commissioning couple abandoned the child due to suffered from Down syndrome.

iii. Base of Selection Good Looking, Fairy Skin and Upper Caste:

It is observed by the many of the research projects, that the surrogate women are selected on the basis of religion, caste, good looking and special preference is given to the fairy skin women. According to Anil Trehan⁶⁰⁰ foreigner couples are interested in the women belonging to Northern India, because they are healthy and whitish in colour.⁶⁰¹ According to Dr. Reddy⁶⁰² the surrogate women are selected on the basis skin colour, hair texture, education, social habits and physical features, etc.⁶⁰³ In the SAMA report, it stated that selection criteria is decided by the commissioning couple, doctor and agents. Generally, *the surrogate women are selected on the basis of physical characteristics such as colour of skin, height and weight. Besides these, some other characters like age, number of her own children, caste and religion considered as the base for selection of the surrogate.* According to SAMA, the commissioning couple said the surrogate's standard of living should be good as well as her beautiful features also considered. One of the doctors said the surrogates are rejected on the basis of low caste and dark complexion. If women belong to high caste are preferred more and paid more than others.⁶⁰⁴ Amrita Pande, posed one question, that in an era of

⁵⁹⁸ Amel Ahmed,, "Offshore babies: The murky world of transnational surrogacy," August 11, 2014 9:00PM ET C.f. <http://america.aljazeera.com/articles/2014/8/11/offshore-babies-thebusinessoftransnationalsurrogacy.html>, Visited on 07/12/2014 at 3.00 pm

⁵⁹⁹ Cara Luckey, COMMERCIAL SURROGACY: IS REGULATION NECESSARY TO MANAGE THE INDUSTRY?, 0 2/8/2012 3:02 PM, C.f. http://hosted.law.wisc.edu/wjlg/issues/fall_2011/luckey.pdf, visited on 05/ 08/ 2014

⁶⁰⁰ Anil Trehan, Part- Time Lecturer, Department of Law, G.N.D.U., Regional Campus, Gurudaspur.

⁶⁰¹ Anil Trehan, "Surrogate Motherhood in India: A Conceptual and Effectual Analysis and Recommendations of India surrogacy Law Centre," NAYA DEEP, Vol. X, Issue 4, Oct-2009 at 25

⁶⁰² Dr. Sunita Reddy, Professor, Centre for Community Medicine, JNU

⁶⁰³ Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f. https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

⁶⁰⁴ Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," C.f.

modern technologies, differentiations based on caste, religion and race are losing ground?⁶⁰⁵

It is true that the surrogate and child are not genetically related with each other, still the couple's demand for it. According to the *Iona Institute research paper* that the couple thinks they have invested the money in surrogacy transactions and this economic reason compel them to make such demands for the want of a good looking child with high academic potential. The report even stated that contracting parents may choose women who is capable to produce a "*Perfect Baby*" by putting questions like education, occupation, career goals, religion, musical abilities and sexual life of a surrogate.⁶⁰⁶ Thus, the above studies show the surrogate women are exploited and discriminate on the basis section criteria.

iv. Stay in Surrogacy Hostel/ Shelter Home/ Dormitory

Generally, during the pregnancy the surrogate women resided in the surrogacy shelter home as they do not want to disclose their pregnancy to the society.

As per the research of the *Centre for Social Research*, around 65% in Delhi and 56% Mumbai the surrogate women stayed in shelter home. It is mainly two reasons, first the social stigma attached with the surrogacy and the second the clinic prefers to stay in shelter for taking care of the surrogate during the pregnancy and avoiding infection of sexual transferable diseases such as HIV and preventing sexual relationship with husband.⁶⁰⁷ It is said that Indian became popular for surrogacy tourism destination in transnational surrogacy; it may be due to the reason of the *use of 'surrogacy hostels.'*⁶⁰⁸

http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

⁶⁰⁵ Centre for Social Research (CSR), 'Final Report Surrogate Motherhood- Ethical or Commercial', p. 56 available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm

⁶⁰⁶ A Paper By The Iona Institute: The Ethical Case Against Surrogate Motherhood: C.f. . <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>, visited on 20/11/2014 at 2.30 pm

⁶⁰⁷ Centre for Social Research (CSR), 'Final Report Surrogate Motherhood- Ethical or Commercial', p. 56 available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm

⁶⁰⁸ Radio Review: Thinking Allowed - Commercial Surrogacy in India, BBC Radio 4, Monday 9 March 2015, Presented by Professor Laurie Taylor, C.f. <http://www.bbc.co.uk/radio/programmes/a-z/by/india/current>, visited on 24/10/2015 at 3.30 pm

However, according to *SAMA*, the clinic imposes the restriction on sexual activity of the surrogate with her husband and because of this surrogate may get separated from her husband. In hostel the surrogates have to follow a regulated diet and physical activity. It shows that the surrogates are under control and constant supervision of the clinic.⁶⁰⁹ One of the most concern issues of the surrogate own children who need love and care of the surrogates, but which does not get due to stay in a shelter home. Thus, she gets separated from her family and the society in the interest of health and care of the birth child.

4.1.2.2. Psychological and Emotional Exploitation:

Most of the time the surrogate women are psychologically and emotionally exploited by the surrogacy clinic, commissioning couple and intermediaries, which are given by the researcher as follows:

i. Relinquishment of the Baby:

The most psychologically and emotionally difficult part of the surrogacy is the relinquishment of the child to the commissioning couple. It is said that the processes of pregnancy and birth of child create not only a social but also a special biological bond between child and birth mother, but if it intentionally broken then it victimizes both the birth mother and the child. However, due to the absence of biological link, which separates the surrogate from emotional attachment with the child.⁶¹⁰

Generally, the commissioning parents and clinic takes the decision for relinquishment of the baby, however the surrogate is nowhere in such decision. However, the

⁶⁰⁹ Sama–Resource Group for Women and Health, Report 2012 on “Birthing A Market: A Study on Commercial Surrogacy,” at p. 72 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am. The New Assisted Reproductive Technology Bill, 2014, however, is silent on the stay of surrogate women in shelter home but imposed restrictions under section 26 (d) that during pregnancy surrogate and her husband cannot have extra marital relationship. The surrogate is also prohibited from sexual relationship with her husband during pregnancy. This is not nothing but restriction on liberty and privacy of the surrogate women.

⁶¹⁰ International Institute of Social Studies (ISS), Report on “Global Surrogacy Practices”, December 2014, C.f. <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm

research study of Centre for Social Research has found that very few surrogates faced difficulty while relinquishing the child to the couple.⁶¹¹

The relinquishment of the baby has created the ethical issue like how *a woman gives the birth to the baby with the intention to relinquish it*. However, it is justified on the grounds that someone will take the liability of the child only upon that promise, the surrogate women provides the germinal material for the growth of the child. But, the surrogacy arrangements cannot be called as ethical, because the surrogate women give the birth to the baby only for getting money from it.⁶¹²

According to the *Iona Institute*, the surrogate and contracting couple's think that the surrogate pregnancy as a business transaction therefore, surrogate psychologically isolate herself from the child during pregnancy. However, the long-term difficulties have been reported by women relinquishing a child for adoption same thing happen in surrogacy also. The psychological and medical reports show that the emotional link formed during the pregnancy between the birth mother and the child.⁶¹³ And the same psychological link was shown in the Bollywood movie '*Chori Chori Chupke Chupke*'⁶¹⁴

ii. Change of Mind:

It is said that there is emotional labour to the surrogates, while separating the surrogate baby from them, but such emotional labour remain as unaccounted and invisible.⁶¹⁵ However, presently no data available on such subject, therefore, more research is required because the surrogate may develop the feelings towards the child

⁶¹¹ Centre for Social Research (CSR), 'Final Report Surrogate Motherhood- Ethical or Commercial', p. 89 available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm
In Anand 6.7%, in Surat 2.9% and in Jamnagar around 40%,⁶¹¹ and in Delhi 4% and Mumbai only 2.04% of the surrogates had the special bond with the child.

⁶¹² Supra at 49 page 77

⁶¹³ A Paper By The Iona Institute: The Ethical Case Against Surrogate Motherhood:, C.f. . <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>, visited on 20/11/2014 at 2.30 pm

⁶¹⁴ "*Chori Chori Chupke Chupke*" it is shown in the Bollywood movie that couple hires a sex worker to undertake a surrogacy for them. The husband (Salman Khan) impregnates the surrogate (Preity Zinta) but initially she refused to hand over the child to the couple because she get emotionally attached to the child during pregnancy, latter on at the end of the movie she relinquished the baby to the couple.

⁶¹⁵ Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," at p. 106 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

during the pregnancy, even though surrogacy transaction is created for the money purpose by the surrogate. The surrogate is having the right to change her mind after the delivery of the baby.

The Ethics Committee of the American Society for Reproductive Medicine has suggested that the surrogate should get the psychological evaluation and counseling before she act as surrogate.⁶¹⁶ In a very famous *Baby M Case*⁶¹⁷ Mary Beth Whitehead a surrogate woman has changed her mind for giving custody of the baby to the commissioning parents. The New Jersey Court granted the custody of the baby to the commissioning couple and visitation right to Whitehead.

In South Africa under the South Africa Children's Act, 2005 recognizes the commissioning parents to be legal parents, however, if the surrogate having the genetic link with baby the in such case she has the right to change her mind within 60 days from the date of the birth of the surrogate baby.⁶¹⁸

4.1.2.3. Physical Exploitation:

Presently, in India there is no law on surrogacy, only ICMR National Guidelines, 2005 are available for regulating and monitoring the ART Clinics and banks in India. But being non statutory guidelines they are frequently violated by the surrogacy clinics. According to the National Commission for Women (NCW) in India currently 3000 ART clinics are working,⁶¹⁹ but as on date 24/10/2015 only 385 registered ART

⁶¹⁶ Ethics Committee of the American Society for Reproductive Medicine, (ASRM), "Consideration of the gestational carrier: a committee opinion" C. f. http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/Cosideration%20of%20the%20gestational%20carrier2013.pdf, visited on 24/07/2014 at 11.00 pm

⁶¹⁷ *Baby M case*, 537 N.J. 396, (1988). Mary Beth Whitehead entered into a contract to be impregnated with the sperm of a man whose wife's health made it unadvisable for her to bear a child. After the birth Whitehead changed her mind as she wanted to keep the child. Eventually the case went to the New Jersey Supreme Court. the court held that the surrogacy contract was invalid because it violated the New Jersey law against exchange relating to obtaining a child and court granted custody of child to the commissioning couple with the visitation right to whitehead.

⁶¹⁸ C.f. https://en.wikipedia.org/wiki/Surrogacy_laws_by_country, However, in India the ART Bill, 2014 also does not prescribe the provision regarding right to change the mind by the surrogate before or after the birth of the child.

⁶¹⁹ The Economic Times, 'Blanket ban likely on NRIs, PIOs, foreigners having kids through surrogacy,' By PTI | 15 Oct, 2015, 10.49 PM IST c. f. <http://economictimes.indiatimes.com/news/politics-and-nation/blanket-ban-likely-on-nris-pios-foreigners-having-kids-through-surrogacy/articleshow/49391832.cms> visited on 24/10/2015 at 12.39 pm

clinics and banks are shown in the approved list of ICMR site.⁶²⁰ It means all others clinics are illegally running as they like. Ms. Lopamudra Mohanty⁶²¹ also questioned about the quality of service given by the ART Clinics which results in the physical exploitation of the surrogates.⁶²² How the surrogates are exploited by the surrogacy clinics are given by the researcher as follows.

i. No Informed Consent:

According to the Ethics Committee of the American Society for Reproductive Medicine, those surrogates women have *right of informed Consent about the risks of the surrogacy process and of pregnancy*.⁶²³ The women who work as a surrogate have little knowledge about her right and risk associated with the surrogacy process.⁶²⁴ The majority of the surrogates are socially and economically vulnerable and because of the primary level of education or illiteracy, they become incapable to understand the agreements terms and conditions. Most of the time the *agreements are in English language only*. So surrogate just sign the agreement decided by the clinics and the commissioning couple in their favoured. However, it is found that the clinics are not taking consent for the transfer multiple embryos, foetal reduction, Caesarean section,⁶²⁵ abortion and even sex determination test. According to the

⁶²⁰ Indian Council of Medical Research (ICMR), New List of approved ART Clinics, C.f. http://www.icmr.nic.in/icmrnews/art/New%20list%20of%20approved%20ART%20Clinics_24.10.2015.pdf, Visited on 10/10/2015 at 12.00 pm

⁶²¹ Director, Ministry of Women & Child Development, Government of India

⁶²² Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f. https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view, She said the quality of services in some clinics is highly doubtful because there is no accreditation, supervision and regulatory body for ART clinics and banks which are offering ART services.

⁶²³ Ethics Committee of the American Society for Reproductive Medicine, (ASRM), "Consideration of the gestational carrier: a committee opinion" C. f. http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/Cosideration%20of%20the%20gestational%20carrier2013.pdf, visited on 24/07/2014 at 11.00 pm

⁶²⁴ Nicole F. Bromfield, "Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations," Published online: 1 July 2014, C.f. https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 20/08/2014 at 3.40 pm

⁶²⁵ P. Lakshmi, "Surrogacy: The Nine Month Rental Agreement," Indian Journal Of Legal Philosophy ISSN :2347-4963 Volume 2, Issue 2, June 2014, C.f. <http://www.ijlp.in/ijlp/imageS/IJLP-Volume-2,%20Issue-2,%20June-14.pdf>

Sama report 7 out of 12 the majority of the surrogates were not informed about the multiple transfer of embryo and Caesarian delivery.⁶²⁶

The medical process of surrogacy involves the high health risk of the surrogate and surrogates are physically, emotionally and psychologically exploited by the ART clinics. The Sama report has described the clinic *transfers the multiple embryos* into the womb of the surrogate women, which results into the ectopic pregnancies, multiple gestation pregnancies, spontaneous abortion, premature deliveries, and birth complications, fetal reduction which affects severely on the health of women.⁶²⁷ In order to get pregnant with a healthy foetus the surrogate mothers are required to undertake IVF sessions of twenty to twenty five times.⁶²⁸ The multiple pregnancies put *miscarriage risk, early deliveries, obstetric problems, and birth difficulties and maternal morbidity*. In multiple pregnancies 7 times higher risk rate than the singleton pregnancies.⁶²⁹ The *foetal reduction test*⁶³⁰ causes premature labour, infection, uterine bleeding, and loss of all fetuses.⁶³¹

In the surrogacy process, there is a *high rate of Caesarean- Sections* as compared to the natural conception of the child. According to the Amrita Pande research report 36 out of 38 the majority of surrogate mothers undergone for Caesarean section where as the same surrogates 37 out of 38 were given the normal delivery of their own child.⁶³² It is really shocking how the clinics are playing with the health of surrogates. The SAMA has reported that out of the five surrogates only one had a normal delivery and remaining four surrogates gone through Caesarean operation at the time of

⁶²⁶ Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," Table -6 at p. 69 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf, visited on 23/10/2013 at 11. 00 am

⁶²⁷ Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," at p. 152 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf, visited on 23/10/2013 at 11. 00 am The Assisted Reproductive Technology (Regulation), Bill, 2014 under section 60 (9) has allowed only three embryo transfer into the womb of the surrogate and permitted maximum three cycles of medication.

⁶²⁸ Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p. 38 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 21/10/2013 at 2.30. pm.

⁶²⁹ Ibid

⁶³⁰ Foetal reduction is used to selectively terminate fetuses in multiple gestation pregnancies. A saline solution is injected into the uterus to abort some fetuses.

⁶³¹ Supra at 67

⁶³² Amrita Pande, "Wombs in Labor: Transnational Surrogacy in India." Columbia University Press, New York, 2014, at Appendix C: Table AP. 2 Contraceptive Use and Caesarian section at Arman Clinic.

delivery.⁶³³ Sometimes this medical process of surrogacy causes the death of the surrogate mother. As the news article published by *THE TIMES OF INDIA* about the *sudden death of a surrogate mother due to the absence of post delivery care*.⁶³⁴ It is found that there is no provision for the post delivery care of the surrogate in the surrogacy agreements as a surrogate role ends with the delivery of the child. The latest Surrogacy Bill, 2016 states about requisition of the written informed consent of the surrogate woman.

ii. Status of Abortion in Surrogacy Arrangement:

In surrogacy contract a very crucial question is *whether surrogate women required submitting to an abortion if the commissioning couple wishes?*⁶³⁵ Answer is 'No' but it is found that if the foetus with abnormality or Down syndrome, etc., the surrogate women required to submit her to abortion and in most of the cases the choice of abortion is decided by the commissioning couple. According to the CSR research report out of 100 surrogate women, in Anand 80% surrogate women, and all surrogates in Jamnagar and Surat aborted the child due to abnormality and Down syndrome. If the abortion takes place the surrogate receives only one third of the compensation of the total agreed amount.⁶³⁶ It is even observed that to induce the abortions the clinics administer the abortion pills without the knowledge of the surrogate which is nothing but the clear cut violation of women's reproductive rights⁶³⁷ In a very famous *Baby Gammy Case*,⁶³⁸ the Australian commissioning

⁶³³ Supra at 67 p. 68

⁶³⁴ THE TIMES OF INDIA, "Surrogate Mother Dies of Complications," May 17, 2012, C.f. <http://timesofindia.indiatimes.com/city/ahmedabad/Surrogate-mother-dies-of-complications/articleshow/13181592.cms>, The 30-year old surrogate, Premila Vaghela was suddenly died in Ahmedabad. She was being treated under Dr Manish Banker of Pulse Hospital. However, she was eight months pregnant and delivered the child through caesarean and was kept in NICU (Neonatal Intensive Care Unit) to recuperate from early birth. After delivery, Premila was taken to Sterling Hospital for better intensive care. The doctors claim that she was brought to hospital in a critical condition as she was suffering a major cardiac arrest, they tried to resuscitate her, but she failed to respond and died. *The New ART Bill, 2014* has made the provision for the insurance of the surrogate mother, compensation to the members of the surrogate family in case of death of surrogate and the presumption of death caused by the negligence of the surrogacy clinic.

⁶³⁵ Amel Ahmed., "Offshore babies: The murky world of transnational surrogacy," August 11, 2014 9:00PM ET C.f. <http://america.aljazeera.com/articles/2014/8/11/offshore-babies-thebusinessoftransnationalsurrogacy.html>, Visited on 07/12/2014 at 3.00 pm

⁶³⁶ Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p.45 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 21/10/2013 at 2.30. pm

⁶³⁷ Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f. https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

couple forced Thai surrogate to abort the foetus suffered from Down's syndrome but she refused to abort. Therefore, the commissioning couple abandoned the child after his birth and left with his twin healthy sister Pipah.

In India the termination of pregnancy is regulated by the Medical Termination of Pregnancy Act, 1971⁶³⁹ and induced abortion is the criminal offence under Sections 312 to 316 of the Indian Penal Code.⁶⁴⁰ However, in surrogacy transaction the

⁶³⁸ Bio News, "Surrogacy, motherhood and Baby Gammy," 11 August 2014, *C. f.* http://www.bionews.org.uk/page_444683.asp

⁶³⁹ The Medical Termination of Pregnancy Act 1971, in India the termination of pregnancy requires the consent of the women and all termination done after the 20 weeks are illegal. Section 3 of the MTP Act allows the termination of pregnancy by the registered medical practitioner 1. If the pregnancy is within 20 weeks 2: The continuance of the pregnancy would involve a risk to the life of the pregnant women ;or 3: A risk of grave injury to the her physical or mental health ;or 4: If the pregnancy is caused by rape; or 5: There exist a substantial risk that, if the child were born it would suffer from some physical or mental abnormalities so as to be seriously handicapped; or 6: Failure of any device or method used by the married couple for the purpose of limiting the number of children; or 7; Risk to the health of the pregnant woman by the reason of her actual or reasonably foreseeable environment. Thus, the Act does not permit termination of pregnancy after 20 weeks. The medical opinion must off course be given in "good faith." Section 4 specifies that a pregnancy can be terminated in government hospitals only or place which is approved by the government. Thus in case of abortion the consent of the woman is the essential factor.

The Medical Termination of Pregnancy (Amendment) Act, 2002, in order to legalize and regulate the termination of pregnancy the MTP Act 1971 was amended on December 18, 2002. The complications of illegal and unsafe abortions in India are the major factor for the high rate of maternal mortality. The amended Act aimed to eliminate the abortions by the untrained persons, unhygienic conditions and to reduce the maternal mortality rate. The major changes made by the Act, 200 that the word "lunatic" substituted by the word "mentally ill person" in order to cover a wider variety of mental diseases and disorders person and MTP centers at district level rather than the state capital and the punishment to clinics which are not authorized to conduct abortions.

The Medical Termination of Pregnancy (Amendment) Bill, 2014, The Ministry of Health and Family Welfare's, Maternal Health Division has proposed to amend the existing Medical Termination of Pregnancy Act, 1971, for the changes such as to substitute the word by the "Registered Health Providers", to the word by "Registered Medical Practitioners," to the allow abortion until the 24th week of pregnancy, to protect the privacy pregnant women whose pregnancy is terminated and to increase the punishment for illegal abortions.

⁶⁴⁰ K.D. Gaur, "Textbook on Indian Penal Code" 4th Edn. Universal Law Pub New Delhi, 2013, at pp. 559,

Section 312 of the Indian Penal Code provides that "whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to 3 years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine." Sec 312 of the Code permits termination of pregnancy of medical grounds in order to protect the life of the mother. The unborn child in the womb must not be destroyed unless the destruction of the child is for the purpose of preserving the yet more precious life of the mother. The provision by implication recognizes that the foetus has the right to life. Section 313 states that when the termination of pregnancy is caused without the consent of the women, punishment may extend to imprisonment for life or imprisonment of either description for a term, which may extend to 10 years or fine. Section 314 states if the death of the woman is caused by an act done with intent to cause miscarriage with her consent, punishment may extend to 10 years of imprisonment and fine, and if it is done without her consent, imprisonment for life or ten years and fine. Section 315 states an act done with the intent to prevent a child from being born alive or to cause it to die after death is punishable up to 10

surrogate women's position is socially and economically vulnerable and its undue advantage taken by the upper class people. The surrogacy Bill, 2016 prohibits any person for forcing the surrogate for conducting abortion.

iii. Sex Determination Test

In India, sex determination test is prohibited by the Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994⁶⁴¹ and this Act is equally applicable to the surrogacy arrangement. It is alleged that in most of the surrogacy arrangement the sex determination tests are conducted by the doctors.

As per the report of the *Centre for Social Research* that generally five or more healthy embryos are implanted into the uterus of the surrogate by the clinic out of which three embryos stay alive which are normally two female and one is a male. Around in the fifth month of the pregnancy, the foetal reduction test is conducted for removing of the third foetus which is usually the female foetus. Therefore, it is said that sex selective test is carried out in surrogacy Clinics without giving information to the surrogate. It is also reported by the CSR that out of a fifties, in Anand 50%

years of imprisonment or fine or both. And section 316 provides the causing of death of a quick unborn child by an act amounting to culpable homicide is punishable up to 10 years of imprisonment and fine.

⁶⁴¹Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994 and also recommended by the Law Commission of India in its 228th report 2009, that sex determination cases in surrogacy arrangement should be regulated by the PCPNDT Act, 1994, thus after amendment in PCPNDT Act in 2012 the sex determination test in surrogacy transaction is regulated by the PCPNDT act, 1994. Therefore now the surrogacy arrangements are bound by the provisions of the PCPNDT Act because of the word used pre-conception as well as the word 'Sex selection.' The word 'Sex selection' defined by the PCPNDT Act that any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex.

This Act is made with object to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide Section 6 of the PCPNDT Act absolutely prohibits sex selection before and after conception or sex determination of any foetus or any pre-natal diagnostic techniques including ultra sonography for the purpose of determining the sex of a foetus by the Genetic Counseling Centre or Genetic Laboratory or Genetic Clinic or by any person. Under Section 23 of the PCPNDT Act, sex selection and Sex determination is the criminal offence. Therefore, any doctor who performs such test is punishable with the rigorous imprisonment up to three year and fine up to ten thousand rupees and for subsequent offence with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees. or any person who takes the help of any of medical practitioner or any other person for sex selection or for conducting pre- natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees. Section 27 states that every offence under this Act is the cognizable, non -bailable and non- compoundable.

commissioning couple, in Surat 72.22% and all of the commissioning couple from the Jamanagar told that sex selection test is conducted by the clinics.⁶⁴² According to the Amrita Pande the Pre- Implantation Genetic Diagnosis (PGD) technique⁶⁴³ is used for the sex selection for a boy.⁶⁴⁴ Even it is alleged that Bollywood Star Shahrukh Khan and his wife had conducted, the sex determination test before their third child born through surrogacy.⁶⁴⁵ Thus, the gender selection has become a major factor for the increase in surrogacy. As per the Census Report, 2011 the child sex ratio is at 914 girls for every 1000 boys.⁶⁴⁶ Recently, an *IPad* size portable ultrasound machines are used for conducting foetal sex determination test. There is no regulation in USA on sex selective abortion. It is reported that most of the Indian couples, especially couples from Punjab are visiting US for infertility treatment and conducting sex determination test.

In the case of *Amy Antoinette McGregor & Anr. V. Directorate of Family Welfare, Govt Of Nct of Delhi & Anr*,⁶⁴⁷ the Australian couple decided to proceed with the gestational surrogacy arrangement in India. Therefore, they filed a writ petition claiming that the couple wishes to have a male or female child should be allowed to make use of the pre-natal diagnostic techniques to have a child of both sex to balance their family. The Delhi High Court dismissed the petition on the ground of hostile discrimination, unreasonable classification and misconceived. The intention of the legislation is prevention of misuse of pre-natal diagnosis for sex determination, since such determination is legislatively perceived to lead to female foeticide.

⁶⁴² Supra 77 at p.45 & 65

⁶⁴³ Pre- Implantation Genetic Diagnosis (PGD) Technique is used to identify the genetic disorders in embryo, but in India it is also used by the doctors for the sex selection for a boy. PGD is the embryo screening technique. It is conducted three days after fertilisation; a single cell is removed from each part of the embryos that have been created through in vitro fertilization (IVF). These cells are tested and one or more embryos that meet the specified criteria-in case of sex selection for a boy those with both X and Y chromosomes are implanted in the women's body. The PGD technique adds between \$3000 and \$5000 to the cost of an IVF cycle.

⁶⁴⁴ Amrita Pande, "Wombs in Labor: Transnational Surrogacy in India." Columbia University Press, New York, 2014, at p. 219

⁶⁴⁵ Varsha Deshpande has filed a petition under the PCPNDT Act 1994, that Shahrukh and his wife Gauri had conducted a sex determination test for their third child born through surrogacy. C.f. <http://indiatoday.intoday.in/story/hc-notice-to-shah-rukh-khan-bmc-in-sex-determination-case/1/328458.html>

⁶⁴⁶ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi, 2015, p. 157

⁶⁴⁷ Amy Antoinette McGregor & Anr.V. Directorate of Family Welfare, Govt of Nct of Delhi & Anr.C.f. <http://lobis.nic.in/ddir/dhc/NVR/judgement/29-10-2013/NVR24102013CW63322013.pdf>

iv. Surrogates Right to Breastfeed:

Generally, the surrogate mothers are not allowed to breastfeed the child because of the fear that surrogate's may develop love for the child. Therefore, the surrogate women required to hand over the child immediately after the birth to the commissioning couple. According to the SAMA, the surrogate women were given injections or drugs for stopping lactating of them. The SAMA reported that, 4 surrogates out of the 5 were not permitted to breastfeed the children.⁶⁴⁸

Does this prohibition of breastfeeding is medically and ethically right? The answer is No, because the prohibition from breastfeeding seriously affects the health of both the surrogate as well as the child who is in need and has the right to have milk. It is also against the State's own breastfeeding Campaigns that "*Ma ka doodh shishu ke liye vardan, Janma ke ek ghante ke andar aur 6 mahine tak sirf stanpan*" and also against the policy of the United Nations Convention of the Rights of Child (UNCRC).⁶⁴⁹

The researcher has observed from the study that the surrogate mothers are maliciously exploited by the various persons such as doctors, commissioning couple, agents, society and even her the family members may force her to become a surrogate. She is exploited because she is vulnerable socially and economically. Hence, the question arises that it is whose responsibility to protect the surrogate form the exploitation? And who will take responsibility of the surrogate health? The answer is its States responsibility to take care of surrogate health and to protect her from the exploitation by enacting the regulatory law on surrogacy and making the infertility treatment in the public sector instead of the private sector, it means the infertility treatment should be added in the National Health Policy Scheme and also promote for insurance policies for infertility treatment so that poor people can afford it.

⁶⁴⁸ SAMA Report 2012, 'Birthing A Market, A Study on Commercial Surrogacy,' P. 70 available at http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

⁶⁴⁹ Article 24(2e) of the United Nations Convention on Rights of Child (UNCRC), provides that State shall ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, *the advantages of breastfeeding*, hygiene and environmental sanitation and the prevention of accidents

4.2.2. Commercial Surrogacy and Commoditization of a Woman's Body⁶⁵⁰

The commercial surrogacy contracts are challenged as immoral contracts because it amounts to commodification⁶⁵¹ of reproduction. Therefore, it has raised various ethical issues such as, whether the commercial surrogacy contracts are immoral contracts as it amounts to commodification of the woman's body? Whether the commercial surrogacy amounts to the sale of the child because surrogate relinquishes her parental rights for money? Whether profit-making surrogacy amounts to wombs on rent or service or amounts to prostitution? Whether the sale of child amounts to the human trafficking?

There are two different ways in which surrogacy may be held to commodify reproduction. One charge is that it commodifies the women's reproductive capacity, putting some women into the role of 'paid breeder' in a way which is incompatible with a society in which individual are valued for themselves. The other charge made by anticommodificationist that surrogacy commodifies children, in that the babies involved are 'paid for' and so 'sold.'⁶⁵²

4.2.3. Commercial Surrogacy and Sale of Child⁶⁵³

According to Dr. Ranjan Kumari, Director, Centre for Social Research (CSR), the commercial surrogacy is promoting the commodification of a woman's body.⁶⁵⁴ Ketchum (1989) stated that surrogacy arrangements are nothing but the women's are selling their bodies and their babies. According to Anderson the surrogacy

⁶⁵⁰ The commercial surrogacy is called as immoral as it is amounts commodification of woman's body and sale of child. Hence, the issue is whether commercial surrogacy amounts to commodification of woman's body?

⁶⁵¹ Meaning of Commodification: According to Encyclopedia the commodification means the process whereby goods and services which were formerly used for subsistence purposes are bought and sold in the market. C.f. <http://www.encyclopedia.com/doc/1O88-commodification.html>., Whereas as *Margaret Radin* defines the commodification in monetary terms all things of value to the person including person

al attributes and relationships; they are considered fungible and commensurable; their only value is their exchange value. C.f. ARISTIDES N. HATZIS, "Just The Oven": A Law & Economics Approach to Gestational Surrogacy Contracts, https://www.researchgate.net/publication/228261279_Just_the_Oven_A_Law_Economics_Approach_to_Gestational_Surrogacy_Contracts,

⁶⁵² Rachel Cook and Shelly Day Sclater (eds), "Surrogate Motherhood: International Perspective," p. 126, Hart Publishing, Oxford –Portland Oregon, 2003.

⁶⁵³ Whether the commercial surrogacy is sale of child?

⁶⁵⁴ Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f. https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

arrangements are immoral on two grounds firstly; it commodifies women's reproductive labour, where the producer surrenders their product of labour to the market. And the second the surrogate labour violates their claim to dignity and kindness, because the norms of market humiliate her.⁶⁵⁵ Merrick says in surrogacy contracts the payments are not made for the service of the surrogate, but for the relinquishment of the surrogate child and for surrendering parental claim over the child by the surrogate. Therefore, the surrogacy transaction amounts to the sale of the child as a product.⁶⁵⁶ Whereas the Iona Institute, states that the surrogacy contract comprises the dignity of the child by making the child the object of a contract as a commodity and it also comprises the dignity of the surrogate women, even though she voluntarily participate in the transaction is, but by merely treating her as a 'womb for hire.'⁶⁵⁷ Thus, the above statements reflect that surrogacy transaction amounts to the commodification of the woman's body, where the surrogate alienates her parental rights to the couple for the money. Hence, the child becomes the object of use rather than subjects of love, where the surrogate becomes the objects of use rather the subject of respect.

However, some further argued that in gestational surrogacy what is bought and sold. *Is it the child?* The *answer is no* because the embryo belongs to the parents, therefore we cannot say it is baby selling. A surrogate cannot sell something which she does not have i.e. parental rights to the new born baby. It means the surrogate is selling her labour, her gestational services just like other similar services which are offered by women by using her bodies and transferred to another person in employment contracts like nannies, wet-nurses, models, athletes, actresses, manual labourers, maids, career soldiers, etc. According to the Wertheimer that the surrogate is not selling a piece of herself but she is just doing trade-off, offering the services by using a part of her body, i.e. her uterus as just like she uses her hand or her brain for obtaining something. For a surrogate the emotional, physical cost is having less value than the compensation which she is going to achieve it has more value for her than

⁶⁵⁵ Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," p. 21 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

⁶⁵⁶ *Ibid*

⁶⁵⁷ A Paper By The Iona Institute: The Ethical Case Against Surrogate Motherhood: C.f. <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>, visited on 20/11/2014 at 2.30

other cost.⁶⁵⁸ However, Barbara L. Atwell says that the couples are paying fee not for purchasing of the services of the surrogate, but for the purchasing of the baby. Because the fee structure of the surrogacy agreement clearly reveals that the fee paid not for her service, but for the purchasing of the child just like as the buyer pays the amount for the purchase of the house. He says the biological father purchases the biological mothers parental right by making payment to the surrogate which is nothing but the price of the child. A surrogate accepts the money and purposefully conceive the child and not accidentally.⁶⁵⁹ According to Bryn Williams-Jones, when we treat the surrogacy arrangement as purely contract, then the surrogate has to be compensated for her services and surrendering a product, namely the child.⁶⁶⁰ Another most significant issue against the surrogacy transaction that use of the uterus by the surrogate mother in commercial surrogacy contracts, Whether surrogacy arrangement amounts the offence under the Transplantation of Human Organs Act, 1994.⁶⁶¹ The

⁶⁵⁸ ARISTIDES N. HATZIS, “Just the Oven”: A Law & Economics Approach to Gestational Surrogacy Contracts, *C.f.* https://www.researchgate.net/publication/228261279_Just_the_Oven'_A_Law_Economics_Approach_to_Gestational_Surrogacy_Contracts, Visited on 21/10/2013 at 2.30. p

⁶⁵⁹ Barbara L. Atwell, “Surrogacy and Adoption: A Case of Incompatibility,” *COMBIA HUMAN RIGHTS OF LAW REVIEW*, VOL.20, p. 45, 1989, available at: <http://ssrn.com/abstract=1512914> Surrogacy and Adoption: visited on 04./03/2015 at 3.30.pm, According to Barbara Atwell the evils of baby selling are present in surrogacy arrangement; therefore, the child’s best interest will not be protected by profit motive black marketer. He says the evils of baby selling are present in surrogacy in three ways: i. the fee that surrogate receives may induce her to act not in the child’s best -interest but in her own best interest. ii. The biological father will not necessarily behave any differently from any other unrelated black marketer. iii. Organizing the fee is the primary purpose of the organizations so it will not act for the benefit the child. And even the genetic tie, between the father and child does not ensure that the child’s best interests will be served. In cases of divorce or separation, many biological fathers fail to provide for their children’s best interests by neglecting to make child support payments. History demonstrates that such a bond does not preclude baby-selling. It is well documented that during the embarrassing time when slavery was legal, white slave masters often raped slave women, creating mulatto babies. These slave owners, however, were not concerned with the health and welfare of these babies and often sold them as they sold other slaves. The preamble of the Convention of the Rights of Child (CRC) states that in all actions relating to the child, the best interests of the child shall be protected.

⁶⁶⁰ Bryn Williams Jones, “Commercial Surrogacy and the Redefinition of Motherhood, available at https://www6.miami.edu/ethics/jpsl/archives/papers/comsur_williamsjones.html, Visited on 29/05/2013 at 7.00 pm

⁶⁶¹ The Transplantation of Human Organs Act, 1994, Section 19 of the Act prohibits the commercialization of human organ and provides the the punishment for the same. Section 19 provides that Whoever –(a) makes or received any payment for the supply of, or for an offer to supply, any human organ; (b) seeks to find person willing to supply for payment any human organ; (c) offers to supply any human organ for payment; (d) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ; (e) takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the initiation or negotiation of any arrangement referred to in clause (d); or (f) publishes or distributes or causes to be published or distributed any advertisement- (a) inviting persons to supply for payment of any human organ; (b) offering to supply any human organ for payment; or (c)

Transplantation of Human Organs Act, 1994, prohibits the sale, loaning, and commercialization of the trade of human organ.⁶⁶² Therefore, the surrogacy transaction is inconsistent with the Transplantation of Human Organ Act, 1994. According to medical data⁶⁶³ every year in India most of the people are dying for want of kidneys, hearts and liver transplantation. It is very bad to say that the organs which save the life are not easily available, but the on rent the surrogate wombs are easily available in India. In the medical field the surrogacy is legal therefore; it is prospering like a mushroom.

2.2.4. Surrogacy and Prostitution⁶⁶⁴

The practice of surrogacy is also charged as unethical, immoral practice because it is similar to the practice of prostitution and slavery. According to Dworkin surrogacy should be considered as a form of prostitution, it contractualises the reproduction just as sexuality has long since been contractualised in the prostitution market.⁶⁶⁵ Our law is against prostitution which prohibits the women from selling their bodies for money, hence surrogate should also be prohibited from contracting to use their bodies to produce the child for someone else.⁶⁶⁶ However, some protectionist says why women should not be allowed to use their bodies to make money rather than engaging in some other work. If the arrangements are satisfactory to the people, then it should not be prohibited.⁶⁶⁷ According to Amrita Pande, there is a moral difference between surrogacy and the sex work. The baby sellers who sold their genetic babies and body

indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d), shall be **punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and shall be liable to fine which shall not be less than ten thousand rupees** but may extend to twenty thousand rupees: provided that the court may, for any adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than two years and a fine less than ten thousand rupees.

⁶⁶² S. 2 (h) of the Transplantation of Human Organ Act, 1994, defines the “*human organ*” means any part of a human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be replicated by the body.

⁶⁶³ Anil Malhotra, Ranjit Malhotra, ‘Surrogacy in India, *A Law in the Making*’, Universal Law Publication Co. New Delhi, 2013 Edn., P. 8

In India there is a need of every year of about 1,75,000, kidney's, 50,000/- hearts and 50,000 livers for transplantation and each year about 1,40,000 people die waiting for kidney.

⁶⁶⁴ Whether the practice of surrogacy is one kind of prostitution?

⁶⁶⁵ Supra note 90

⁶⁶⁶ Maratha A. Field, “Surrogate Motherhood, The Legal and Human Issues,” at p. 28, 1st Edn. Harward Press Paper back Edition, London, 1990.

⁶⁶⁷ Ibid at 29

sellers women who had sex for money which morally distant from surrogates.⁶⁶⁸ She said the practice of surrogacy frequently misunderstood in India as surrogates are prostitutes who have to sleep with their clients to get pregnant. Amrita Pande cited the example of Meena a surrogate woman. Here Meena's husband persuaded her to become a surrogate woman. He needed the money to pay the mortgage for his roadside barber stall. Meena accepted to become as a surrogate out of desperation, but emphasizes that her act of desperation was morally less tainted than stealing, murdering or sleeping with someone. As Meena said....

"I don't think there is anything wrong with the surrogacy.

We need money, they need child. The important thing is

that I am not doing anything wrong for money- not

stealing or killing anyone. And I am not even

*sleeping with anyone"*⁶⁶⁹

Thus, the above example shows that the surrogacy is morally far different from prostitution as it is a technological reproduction which has no connection with sexual relation.

4.2.5. Surrogacy and Slavery

The practice of surrogacy is also compared with slavery as it is a new form of slavery. When we look back to the history of surrogacy the Biblical example from Genesis, a Rachel was incapable to give birth to the child, so her slave or servant Bilah became the surrogate to Jacob child. Bilah gives the birth two sons, Rachel names and considers her children. Which is the oldest example of surrogate mothers? As the servants, concubine or slaves with no rights. These women had little control over their bodies or their reproductive labour, which could be used as their mistress and the patriarchs for whom they served as surrogates. They were used to conceive the child that was genetically related to the father. These women like U.S. slaves were not

⁶⁶⁸ Amrita Pande, "Wombs in Labor: Transnational Surrogacy in India." at p. 132, Columbia University Press, New York, 2014.

⁶⁶⁹ *Ibid*

recognized as legal mother of the child.⁶⁷⁰ As it found that there are many similarities between surrogacy practice and slavery. In today's contemporary world, once the surrogate signs the agreement the surrogacy, she is under obligation to follow the agreed terms of the contract. She required living in shelter home. Therefore, surrogate become under control of the clinic and the commissioning couple. She does not have control over her body, if the commissioning couple wants to abort the child on the ground of physical abnormality; she required doing so, as her opinion is immaterial. She cannot have sexual relation with her husband during pregnancy; she cannot go outside, required to follow a regular diet as like she is reproductive machine. And even she is not declared as the mother of the baby in the eye of law. So she is having the status as like slaves. She has to relinquish the baby to the couple after the birth. Surrogate cannot change her mind. She cannot meet the child in the future as her identities are kept confidential. She has paid for giving the service of the birth of the child.

According to Kembrell, the surrogacy arrangement is the new appearance of slavery of women. He says in old times the slave women were utilized for giving birth to the child. The slaves were not carrying any legal rights. Because of the social stigma the slaves were not freely talk about the delivery of the child. After considering the today's legal status of the surrogate, they do not have any legal rights. She is not called as a mother of the child. She has to live in shelter home, even cannot speak about the pregnancy with her relatives and friends. From the point of view of commoditisation of the surrogate children, in contemporary times the surrogate is having the same status as like slaves. Thus, the present condition of the surrogate is same as slaves.⁶⁷¹ However, the basic difference between slavery and surrogacy is that surrogacy is purely volitional, intentional acceptance by the surrogate, whereas the slavery is the unvolitional, burdened acceptance.

⁶⁷⁰ France Winddance Twine, 'Outsourcing the Womb,' at p.13, 1st pub. Routledge Taylor and Francis Group, New York London, 2011.

⁶⁷¹ Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p. 18 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 21/10/2013 at 2.30. pm

4.2.6. Surrogacy and Adultery⁶⁷²

Surrogacy arrangement has also challenged as unethical activity, because surrogate carrying someone else's child which is equivalent to adultery. And it is against the Indian culture. If married woman uses the artificial insemination donor sperm (AID) without the consent of husband amounts to adultery, some of them called it as a "technological adultery."⁶⁷³ According to ICMR National Guidelines, 2005 under item 3.16.2., that if the ART used by the married woman with the consent of the husband does not amount to adultery on the part of the wife or the donor, but if it used without consent of the husband can be a ground for divorce or judicial separation.⁶⁷⁴ Anil Malhotra⁶⁷⁵ raised the question that, if the surrogacy arrangement falls foul, will it amount to adultery?⁶⁷⁶ Artificial insemination gives rise to the conception that may not amount to consummation of marriage. In case the husband is impotent, that creates a "serious problem as even though every individual has a right in a marriage to enjoy the sexual act the wife becomes entitled to divorce on the ground of the impotency of her husband. The question also arises as to whether artificial insemination amounts to adultery. In *Oxford v. Oxford*⁶⁷⁷ the wife was acted as a surrogate mother and the child born to her as a result of AID. But the Canadian Court held that, it is a clear case of adultery by the wife, therefore, the court granted divorce to the husband on ground adultery. In India adultery is an offence under section 497 of Indian Penal Code⁶⁷⁸ committed by man against a husband in respect of his wife.

⁶⁷² The surrogacy contract challenged as immoral as it amounts to adultery of the women. Therefore, the issue is whether the surrogacy contract amounts to adultery?

⁶⁷³ Jyotsna A. Gupta, 'New Reproductive Technologies, Women's Health and Autonomy', New Delhi: Sage Publication (2000), at pp. 344, 345

⁶⁷⁴ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, at p.75., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

⁶⁷⁵ Anil Malhotra, Advocate of the Supreme Court of India and the Punjab and Haryana High Court, and also practicing in International surrogacy arrangements.

⁶⁷⁶ Anil Malhotra, Legalizing surrogacy —Boon or bane? July 14, 2010 at 09:47, C.f. <http://indialawyers.wordpress.com/2010/07/14/legalising-surrogacy-%E2%80%94-boon-or-bane/#comments>, visited on 20/10/2012 at 2.30 pm

⁶⁷⁷ (58 O.L.R. 251 (1921))

⁶⁷⁸ K.D. Gaur, "The Indian Penal Code," at p. 799, Fourth Edn. Universal Law Publication Co. Pvt. Ltd. New Delhi, 2009, Section 497 of IPC defines the adultery offence as "whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor. However, in adultery wife is not held guilty for adultery.

To constitute adultery a sexual intercourse is necessary.⁶⁷⁹ The wife is not guilty for the offence of

, it was held by the Supreme Court that section 497 is not *ultra vires* to the Article 14, 15 and 21 of the Constitution of India, that only man not the woman held guilty for adultery.⁶⁸⁰ It is an offence against the sanctity of matrimonial home which is committed by man. It is anti –social, unethical and illegal act. In India adultery is the ground for divorce and judicial separation under the Hindu Marriage Act, 1955, Special Marriage Act, 1954, Parsi Marriage and Divorce Act, 1936 and Indian Divorce Act, 1869 and in Muslim law, there is no explicit reference to adultery but ground available only to the wife under Dissolution of Muslim Marriage Act, 1939.⁶⁸¹

4.2.7. Surrogacy and Human Trafficking

With the hope that the prospective surrogacy legislation will protect the surrogate mother, surrogate child and the commissioning couple from human trafficking and forced surrogacy. In today's world, it gives the shocking about the various surrogacy rackets and exploitation of surrogate women. Due to the newness of the surrogacy issues many of the human rights group and the society either ignorant or remain neutral about the dangers surrogacy like the human trafficking rackets. Unfortunately, the present the Assisted Reproductive Technology Bill, 2014 is lacking the clause of the human trafficking⁶⁸² for surrogacy. The United Nations Development Programme in 2009 itself warned that trafficking of women for commercial surrogacy would eventually develop.⁶⁸³ In October 2011, just two years later '*Baby 101*' surrogacy racket caught by Thai police. Where fourteen Vietnamese women have been rescued

⁶⁷⁹ Munir v. Emperor, (1925), 24 ALJR155

⁶⁸⁰ Yusuf Abdul Aziz v. State of Bombay, 1954, Cr LJ 886 (SC)

⁶⁸¹ Kusum, Family Law Lectures, Family Law I, at p. 58, 2nd edn, 2008, Reprint 2010, LexisNexis Butterworth's Wadhwa, Nagpur,

Section 13 (1) (i) and section 10 respectively provides the adultery as a the ground for divorce and judicial separation under Hindu Marriage Act, 1955, whereas sections 27 (1) (d) and 23 (1) (a) under the Special Marriage Act, 1954, provides the grounds for divorce and judicial separation. In Parsi marriage and Divorce Act, 1936, section 32 (d) and 34 defines the ground for divorce and judicial separation. In Indian Divorce Act, 1869, section 10(1)(i) and section 22 provides the ground for divorce and judicial separation.

⁶⁸² The Assisted Reproductive Technology Bill, 2014 has omitted the significant provisions regarding various offences in its list of offences such as human trafficking, abduction of surrogate mothers, baby selling.

⁶⁸³ Adv. Anil Malhotra, Taming the International Commercial Surrogacy Industry, pub. 23 Oct. 2014, available at <http://www.bmj.com/content/349/bmj.g6334>, visited on 25/12/2014 at 9.30. p

from sexual slavery in the Surrogacy baby trafficking ring in Thailand.⁶⁸⁴ The illegal surrogacy ring, Baby 101, was operational in Thailand, Cambodia, Vietnam and Taiwan, and advertised on their website the costs of surrogacy, i.e., the price of a child, for \$32,000, plus other expenses and the picture of surrogates. It was reported that in Babe 101 racket the “women were forcibly impregnated with other women’s embryos or raped.” Article 7 of the International Criminal Court Statute states that enslavement; forced prostitution and forced pregnancy are the crimes against humanity.⁶⁸⁵

In India, recently *THE HINDU* newspaper has published the “Fertility specialist held on charge of selling newborn, running a surrogacy racket in Bangalor”. He has charged for child trafficking, and kidnapping and sale of newborns. He has also charged for cheating of at least 19 women after promising them that he would give them IVF treatment.⁶⁸⁶ The Constitution of India under article 23 protects the person

⁶⁸⁴ The Life Site, “Fourteen women rescued from ‘eugenics surrogate’ baby trafficking ring in Thailand,” Fri Feb 25, 2011 - 6:37 pm, available at <https://www.lifesitenews.com/news/fourteen-women-rescued-from-eugenics-surrogate-baby-trafficking-ring-in-tha>

Fourteen Vietnamese women have been rescued from sexual slavery in the compound of a surrogate baby trafficking ring in Thailand. Nine of the fourteen women said that they had been lured to the operation with promises of large payments for giving birth as surrogates, while four said that they had been tricked. The illegal company, called “Baby 101”, had confiscated the women’s passports and refused to return them unless they agreed to cooperate as surrogate mothers. The Thai government discovered the ring after some of the women emailed the Vietnamese embassy. “Baby 101”, which describes itself as a “eugenics surrogate” service, displays pictures of its surrogate mothers living in the compound on its website (<http://www.baby-1001.com/eng/about.htm>). On its website, Babe-101 Eugenic Surrogate offers \$5,000 to women seeking to be surrogate mothers and asks whether they have “double-fold” or “single-fold” eyelids because some customers are concerned about how their baby’s eyes would appear. The women were paid 5,000 USD per baby, while clients paid 32,000 USD plus expenses.

⁶⁸⁵ A Paper By The Iona Institute: The Ethical Case Against Surrogate Motherhood:, p. 12, C.f. <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>, visited on 20/11/2014 at 2.30 pm p. 12

⁶⁸⁶ *THE HINDU*, “Fertility specialist held on charge of selling newborn, running surrogacy racket” October 12, 2014 00:20 IST available at <http://www.thehindu.com/news/cities/bangalore/fertility-specialist-held-on-charge-of-selling-newborn-running-surrogacy-racket/article6492156>

A fertility specialist has been arrested on charges of running a surrogacy racket, and kidnap and sale of newborns. Mr. K.T. Gurumurthy was arrested based on the complaint filed by Dhan Bosco, a businessman. Gurumurthy, owner of Srushti Global Trust in Basaveshwar nagar, struck a deal with Dhan Bosco and his late wife, Sarala Devi, to find a woman to be a surrogate mother for their child at a cost of Rs. 3.5 lakh. He collected semen samples from Mr. Bosco in 2008. After about seven months, Gurumurthy informed Bosco that a girl child had been born to the surrogate mother. But he refused to justify the early birth of the child, and he refused to return the money in case the couple did not want to accept the child. So the couple took the child home. In due time, they realized that the child was suffering from some ailments. Depressed over the issue, Sarala passed away. Meanwhile suspecting the paternity of the child, Bosco underwent a DNA test that proved that he was not the biological father. Aggrieved by this, he approached the police authorities and charged with kidnapping and trafficking of the newborn for the purpose of sale, cheating, threatening and criminal intimidation. Gurumurthy had

from traffic in human beings, beggar and other similar form of forced labour.⁶⁸⁷ When India banned the commercial surrogacy to gay couples, thereafter many of the surrogacy agencies started sending Indian surrogates to Nepal. These surrogates were impregnated with eggs from young Ukrainian or South African women, which was fertilized with sperm frozen in Israel. Many of the surrogacy agencies are working in various countries, including Thailand and Mexico. It is very shocking that some of the agencies are even offering for young women to give eggs and to get beach holidays to India or Thailand.⁶⁸⁸ The surrogacy Bill, 2016 provides the punishment with imprisonment of not less than ten year and fine up to ten lakh for running commercial surrogacy in any form or its rackets by organized groups.⁶⁸⁹

4.2.8. Forced Surrogacy⁶⁹⁰

The commercial surrogacy transactions also raised the issue of *forced surrogacy* and manipulation. In a global market the women's bodies sold for the purpose of sex trafficking, but now the terror of these organized crime will shift into surrogacy market and sales of women's reproductive capacity⁶⁹¹ and as we seen cases of human trafficking in Thailand and Bangalore. In India surrogacy market are highly unregulated more than 3000 infertility clinics are running and the surrogacy business reached more than \$445 billion. The surrogate's poor, illiterate are not aware of their legal rights therefore easily exploited. The Indian women are renting their womb to foreigners because of the need of money. Amrita Pande's research shows that 30 out of 41 majority of the foreign commissioning couples, whereas only 11 are the Indian

been arrested in January on charges of cheating at least 19 women after promising them that he would give them IVF treatment.

⁶⁸⁷ M.P. Jain, "Indian Constitutional Law" at p. 1303, Sixth EDN. Reprint 2012, Lexisnexis, Butterworth's Wadhwa, Nagpur. , The Constitution of India under article 23 prohibits the trafficking in human beings, beggar and other similar form of forced labour are prohibited and any contravention of this provision shall be offence punishable in accordance with the law. So it protects the individual not only against the state but also against the private citizens. The detailed study about human trafficking and surrogacy is given in next chapter of the thesis. Therefore the questions are whether under the SITA (Suppression of Immoral Traffic in Women and Girls Act 1956) and PITA (Prevention of Immoral Traffic Act, 1956) the surrogacy trafficking can be included? And even the surrogate can be held liable, if we treat the surrogacy as immoral and illegal act as amount to sale of the child.

⁶⁸⁸ International Institute of Social Studies (ISS), Report on "Global Surrogacy Practices", December 2014, at p. 17 C.f. <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm

⁶⁸⁹ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 13, visited on 21/11/2016 at 3.00 pm.

⁶⁹⁰ Whether the surrogacy practice amounts to new form of slavery?

⁶⁹¹ Supra note 110

couples.⁶⁹² The surrogates are getting compensation between 1 lakh to 4lakh which is more valuable for them as compared to other work. In Sama, research report one of the surrogate stated, it is the *‘Majboori’ (compulsion) makes the person to do anything.*⁶⁹³ Another surrogate namely Meena, became the surrogate mother due to her husband persuaded her to become the surrogate as he needed the money to pay the mortgage for his roadside barber stall. So her acceptance was out of desperation. Therefore, it says that women may be forced to act as a surrogate by her husband or his relatives for the purpose of money. However, in India is any women are forced to give consent for surrogacy under fear, coercion, and fraud amounts to cruelty against women and amounts the domestic violence. Thus, women are protected under section 498A of the Indian Penal Code⁶⁹⁴ and under the Protection of women from Domestic violence Act, 2005.⁶⁹⁵ In order to secure women from forced surrogacy it will be appropriate to include surrogacy by providing a place in I.P.C. as protection of women from physical and mental exploitation by adding a new clause (c) to the explanation of section 498 A; and also in The protection of women from Domestic Violence Act, 2005 “that any person, including her husband or husband’s relatives forcing a woman to opt for surrogacy either commercial or altruistic shall be dealt under the I.P.C., and under the D.V. Act.” The Beijing Declaration and the platform for Action (1995) also accepted the domestic violence is the human right issue. The recent surrogacy Bill, 2016 punishes for the offence of the abetment, if the surrogate

⁶⁹² Amrita Pande, “Wombs in Labor: Transnational Surrogacy in India.” Columbia University Press, New York, 2014, at Appendix C: Descriptive tables, Table AP. 1, Surrogates at Arman Clinic.

⁶⁹³ Sama–Resource Group for Women and Health, Report 2012 on “Birthing A Market: A Study on Commercial Surrogacy,” at p. 56 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

⁶⁹⁴ K.D. Gaur, “The Indian Penal Code,” at p. 807, Fourth Edn. Universal Law Publication Co. Pvt. Ltd. New Delhi, 2009

Section 498 A provides the punishment for cruelty by her husband or relatives of the husband. Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also liable to fine. Explanation.—For the purpose of this section, “cruelty” means—(b) harassment of the woman where such harassment is with a view to *coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.*

⁶⁹⁵ V. R. Chaudhary, Commentary on Protection of Women from Domestic Violence Act, 2005, at p. 144 Premiere Publication Company, Allhabad , 2010. A violence among the members of a family or household; in these case one person dominates the other through use of force or emotional coercion; any person may be victim of such violence but usually fall to prey to such violence. The domestic violence has been made enough to encompass every possibility as it covers all forms of physical, sexual, emotional, economical abuse that can harm, cause injury, endanger to health, safety ,life, limb or well being either mental or physical of the aggrieved person.

woman was forced by her husband or intending couple or any other relatives for providing services of surrogacy.⁶⁹⁶

4.2.9. Third World of Surrogate

Today it is primarily the affluent who can afford to hire a surrogate. As interest in surrogacy growth and the surrogacy business development, many may turn to Third World women to perform for a much smaller fee. It has been already unusual for Americans to look abroad for surrogate mothers. And the possibility of using Third World has already not escaped from surrogacy promoters.⁶⁹⁷ When the supply of surrogates will be more therefore, automatically the fee of the surrogate will be decreased in the Third World.

Imrana Quadeer argues that, no way to put a value on a human baby, but arbitrarily, she says this value has to be the same everywhere in the world, including in the third world where poor women who become surrogates provides cheap labour.⁶⁹⁸

4.2.10. SURROGACY AND FAMILY STRUCTURE OF INDIA⁶⁹⁹

“Earlier Sex without Reproduction and Now Reproduction without Sex”

It is quiet difficult to decide what exactly about surrogacy that disturb the people. Whether fear about the commercialization of childbearing or childrearing or about the exploitation of poor women. But it equally important fear is that surrogacy will attack on the family system. In India, the family system is considered as the religious and longest existing institution. Where the joint family is called as the ideal family and the offspring's are considered as the status of the family. Therefore, the procreation of the child plays vital role in the family institution. Today, however the new reproductive technology has fragmented the process of procreation. Firstly, with the

⁶⁹⁶ Section 39 of the Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 14, Visited on 21/11/2016 at 3.00 pm.

⁶⁹⁷ Maratha A. Field, “Surrogate Motherhood, the Legal and Human Issues,” at p. 32, 1st Edn. Harward Press Paperback Edition, ,London, 1990

⁶⁹⁸ Imrana Qadeer, “The ART of Marketing babies,” C.f. <http://www.issuesinmedicalethics.org/index.php/ijme/article/view/260/449>

⁶⁹⁹ The surrogacy contract has challenged on the ground that it is threatening to the family structure of India. So the question is, whether the surrogacy contracts are threatening to family structure of India?

development of contraceptive technologies it became possible to have sex without the reproduction, later with the development of technologies such as artificial insemination, *in vitro fertilization (IVF)* and surrogacy has made possible to have reproduction without sex.⁷⁰⁰ The Roman Catholic Church has objected to separating sex from procreation. It says it threatens the sanctity of the traditional family unit for a third party to have “any role in donating or gestating the child.”⁷⁰¹ The Kerala Roman Catholic Church has also objected that the assisted reproductive technology Bill will modify society, family structure, and its values. Therefore, it is morally and ethically wrong to play with God and the nature.⁷⁰² However, the church has not explained why it is important that childbearing function cannot be separated from genetic tie. But the church supports the practice of adoption and not surrogacy practice. Besides the church, many religious groups are opposed to the surrogacy due to the threat to the nuclear family. Today still, it is not possible to develop the baby outside the womb.⁷⁰³

The assisted reproductive technology including surrogacy has ethically and socially challenged on the following grounds as it against family system of India.

i. Relinquishment of Baby on Payment:

The surrogate mother handing over her child and getting paid for it does fit easily with current values and the notion of a conventional family. It is said that surrogacy is also destructive to families in more tangible. It means it is harming to surrogates own children. How can a surrogate mother explain her children that she sold her newborn sister or brother? What will be the psychological impact on the surrogate child when he came to know that the commissioning mother has not given birth to him as he purchased from surrogate mother? So, this is ethically and socially not suitable for family culture.

⁷⁰⁰ Jyotsna A. Gupta, ‘New Reproductive Technologies, Women’s Health and Autonomy’, at p. 15, Sage Publication New Delhi: (2000)

⁷⁰¹ Maratha A. Field, “Surrogate Motherhood, The Legal and Human Issues,” at p. 37, 1st Edn. Harward Press Paperback Edition, London, 1990.

⁷⁰² Letter from Varkey Cardinal Vithayathil to Fr. Paul Thelkat (Spokesperson), Malabar, Synod, c.f. <http://www.ernakulamarchdiocese.org/presseng.pdf>

It stated that one cannot have a child without any relation with sex and sex without the relation to procreation. The practice of surrogacy, sperm and ovum banks are going to alter the basic concepts of marriage, blood relation and father and mother relation. Therefore, it should be banned.

⁷⁰³ Supra note 121

ii. IVF Process is Murder:

It is believed that in IVF process is the murder of embryos.⁷⁰⁴ In the process of developing embryo, the doctor collects the numbers of eggs from a woman out of which only one egg is needed for producing the child. The surplus germ cells and embryo may be thrown away or stored in deep freezer for further research. Therefore, the freezing and storing of embryo creates the question of life. Because each fertilized ova represents the life. Hence, it is argued that it should not be created unless the transfer of ova is assured.⁷⁰⁵

iii. Selective Abortion:

Generally, for a woman it is very risky to carry three or four babies at a time, but the doctors normally, transfers more than four embryos in order to achieve success. But when it found that all embryos seem to survive, thereafter the doctors abort the excess of embryos. Therefore, it creates moral issues that whether the doctor should be allowed for this as it takes the life of embryos.

iv. Legitimacy of Embryo Research:

Embryo research can contribute to medical advances in genetic diseases, infertility, cancer, birth defects and other areas. It can help to save other fetuses and people already in existence. But Ethicist fear that such uses of fetuses could create personal and commercial motives for women to conceive and abort; fetuses would become organ farm,⁷⁰⁶ just like 'Baby 101' surrogacy racket.⁷⁰⁷ The Assisted Reproductive Technology, Bill 2014 provides the procedure for embryo storage and research.

v. Consequences of Genetic Embryos Research:

Because of the broad genetic research on embryo, it may give chance to parents to decide which fertilized ova should be transferred and which not. Therefore, there is

⁷⁰⁴ P. Lakshmi, "Surrogacy: The Nine Month Rental Agreement," Indian Journal Of Legal Philosophy ISSN :2347-4963 Volume 2, Issue 2, June, 2014, C.f. <http://www.ijlp.in/ijlp/imageS/IJLP-Volume-2,%20Issue-2,%20June-14.pdf>

⁷⁰⁵ Maratha A. Field, "Surrogate Motherhood, The Legal and Human Issues," at p. 37, 1st Edn. Harward Press Paper back Edition, London, 1990.

⁷⁰⁶ Ibid at 39

⁷⁰⁷ Supra note 109

chance of manipulation that defective offspring's is less favorable than healthy offspring's and also offspring gender will be selected.⁷⁰⁸

vi. Embryo Storage and preservation:

The ART Bill allows storage of the embryo and gamete for further use, but what will happen if the commission couples change their mind for surrogacy arrangement then question of status of embryo arises. Another ethical question is the use of preserved embryo or gamete after the death genetic parents. So such use may create problem in society and may affect the family relationships. Is the frozen embryo person who can inherit if his or her genetic parents die?⁷⁰⁹ Is this ethically correct to treat human miniature as the goods? After the order of the Supreme Court in *Jayashree Wad Case*⁷¹⁰ the import of embryos is prohibited, but before this order embryo was imported as the goods under government notification itself.⁷¹¹

v. Sperms and Eggs Donor within the Prohibited Relationship:

With the help of assisted reproductive technology a person may become parents within the prohibited relationship. For example brother may donate his sperms to his sister for fertilization or grandmother becomes the mother of her grandson or daughter. It is socially and ethically unacceptable, it will destroy the family structure its relationship. Recently in America a little boy born to a woman after his brother donated his sperm to fertilize an egg donated by an American woman.⁷¹² Beside this, the Indian family system has also challenged by the single person, gay, lesbian and transgender rights to become parents with the help of assisted reproductive technology.

708 Supra note 83

It is found that in surrogacy arrangement many of the commissioning couple accepted that sex selection test is conducted by the doctor through the use of PGD technique.

709 Maratha A. Field, "Surrogate Motherhood, The Legal and Human Issues," at p. 42, 1st Edn. Harward Press Paperback Edition, London, 1990. However, the ART Bill, 2014 has allowed the use of stored sperm of died person and recognized the legitimate child of the couple.

710 Jayashree Wad v. Union of India & Ors. W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtntsc.asp>

711 Order of the Supreme court of India in Jayashree Wad v. Union of India on 2nd December 2015, c.f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

⁷¹² P. Lakshmi, "Surrogacy: The Nine Month Rental Agreement," Indian Journal Of Legal Philosophy ISSN :2347-4963 Volume 2, Issue 2, June, 2014, C.f. <http://www.ijlp.in/ijlp/imageS/IJLP-Volume-2,%20Issue-2,%20June-14.pdf>

4.2.11. SURROGATE MOTHERHOOD AND PARENTAL RIGHTS

“To be mothers, women were created and to be fathers, men.

The teacher is ten times venerable than the sub-teacher,

the father is the hundred times more than the teacher

but a mother a thousand times more than a father.”

*Manu, Hindu Law-Giver*⁷¹³

In India there is a tradition of venerating the mother as a goddess and the goddess as mother. But in the modern era, the concept of surrogate motherhood assumed to be great dimensions. It has challenged the social, ethical and legal aspect of the motherhood. The surrogate motherhood has raised various issues of the motherhood aspect, such as who is the natural, legal and real mother of the baby? Therefore, a woman who donates her eggs is the mother or a woman who gives the birth to a child, i.e. surrogate mother is the mother or the commissioning mother is mother or all are mothers of the surrogate child. The Supreme Court of India in the case of *Jayashree Wad v. Union of India & Ors*⁷¹⁴ asked the government to give answers on this issue that, whether in commercial surrogacy the surrogate mother is the only mother of surrogate child? Whether a lady who donates her eggs in connection with a commercial surrogacy can be said to be the mother? Whether both “surrogate mother” and “genetic mother” (who has donated the egg) can both be said to be the mother of the surrogate child?

- **Three Mothers of the Surrogate Child**

In a surrogacy arrangement three mothers can claim parental rights over the child namely,

- i. Surrogate Mother
- ii. Genetic Mother

⁷¹³ Jyotsna A. Gupta, ‘New Reproductive Technologies, Women’s Health and Autonomy’, at p. 95, Sage Publication New Delhi: (2000)

⁷¹⁴ Supra note 130

iii. Social or Commissioning Mother

Traditionally, a woman who gives the birth to the child is called as the mother of the child. According to Barbara Atwell, the word surrogate mother is a misnomer, because the surrogate woman is the substitute for the wife, by the bearing the child to the biological father. Hence, she is not the surrogate mother, but she is the '*Surrogate Wife*'. Therefore, the surrogate is the real, natural, biological mother of the child.⁷¹⁵ In surrogacy transaction possibly five persons can claim parental right over the child. For example Mrs. X is infertile woman and Mrs. Y agreed to donate eggs, thus an embryo transferred to Mrs. Z who agreed to carry baby and hand it over to Mrs. X and her husband after the birth of the baby. Thus, the situation becomes the complex when the surrogate mother and her husband, the egg donor, the commissioning father and the commissioning mother, if all claims right over the child. In surrogacy when donor eggs are used even then the commissioning mother becomes the mother of the child then why not surrogate husband becomes the father of the child.

- **Genetic Nexus and Parental Right**

In commercial surrogacy, it is a very controversial issue that who is the mother of the child? And who is having parental right over the child? For legal claim, whether the weight should be given to genetic material (ovum), gestation, and social upbringing? In Hindu mythology, we found that **Lord Krishna** is born to *Devaki* and brought up by the *Kaushlya*, so these two different women's are also called as the mothers of Lord Krishna. In family relationship, the biological relation has the prime consideration than the socially construed. In *SAMA* report one of the commissioning couple said that we have claimed over the child because we have provided the gametes and genes. But scientifically DNA is also partly responsible for turning human life. In contrast a woman who is gestating the baby it is her baby, because the blood and the cells from which the baby is growing are hers.⁷¹⁶ According to Rothman, in case of contributions to the life of a child just born, the claim of the gestational mother is

⁷¹⁵ Barbara L. Atwell, "Surrogacy and Adoption: A Case of Incompatibility," *COLUMBIA HUMAN RIGHTS OF LAW REVIEW*, VOL.20, p. 1, 1989, available at: <http://ssrn.com/abstract=1512914> Surrogacy and Adoption: visited on 04./03/2015 at 3.30.pm

⁷¹⁶ Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," at p. 15 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

seems to be supreme, than the other claims based on money, marriage, or genetic material is having the lesser weight.⁷¹⁷ However, according to Amrita Pande, since there is no genetic connection of the surrogate to child therefore, the commissioning couple is having the rightful claim over the child. She has also cited the expressions of the surrogate mother that the baby formed through the labour of gestation and of giving birth.⁷¹⁸ In surrogacy it does not seem to be ethical for someone to create a human life with the intention of relinquishing it. The surrogate mother provides her germinal material and carries the baby only upon the assurance that someone else will take responsibility of the child and she will not have that. Thus, the surrogate's motive is for giving birth to the child is to earn money.⁷¹⁹ Therefore, ethically she cannot be called as the mother of the child. The notion of mothering finds no position in case gay couple claiming the child. And also the single parenting, family, they have to perform both role mother and father.⁷²⁰ Therefore, the question is whether non-genetic gestational surrogate is the mother of the child or not? In *Baby Manji Yamada v. Union of India & Ors*⁷²¹ case, a Japanese couple, Dr. Ikufumi and Dr. Yuki Yamada had entered into a surrogacy agreement with Mrs. Pritben Mehata a surrogate mother in Dr. Nayan Patel Infertility Centre in 2007. The embryo was created from the sperm of the Ikufumi Yamada and egg harvested from Indian unanimous Indian donor. The embryo was implanted into the womb of Pritiben Mehta. But unfortunately in June 2008, the Yamada couple divorced due to matrimonial discord and on 25th July 2008 Baby Manji was born to the surrogate mother. Ikufumi wanted to raise the child, but his ex-wife Yuki did not want the baby as she realized that as she was unrelated to the baby biologically, genetically, and even legally. However, the Baby Manji had three mothers the commissioning mother, surrogate mother and egg donor, but none of the surrogate mothers had claimed parental right over the Baby. The genetic father Dr. Ikufumi Yamada, however, had to return Japan due to expiration of his visa. Ultimately, because of the order of the Supreme Court of India, the municipality of Anand (Gujrat) issued the birth certificate to Baby Manji indicating the name of the genetic father.

⁷¹⁷ *Ibid*

⁷¹⁸ Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p. 77 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 21/10/2013 at 2.30. pm

⁷¹⁹ *Ibid*

⁷²⁰ *Supra note 136*

⁷²¹ *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84,

The Gujarat High Court in the case of *Jan Balaz v. Anand Municipality*⁷²² has recognized the surrogate mother as real mother and legal mother of the children. The Court said the gestational mother who has blood relations with the child is more deserving to be called as the natural mother because She has carried the embryo for a full 10 months in her womb, nurtured the babies through the umbilical cord. Therefore, the Court has held that since, the surrogate mother is an Indian national hence, the children are entitled to get Indian citizenship by birth as per section 3 (1) (c) (ii) of the Indian Citizenship Act, 1955 because one of their parents is an Indian Citizen. However, the Government of India challenged this decision in *Union of India v. Jan Balaz Case*⁷²³ which is still pending in the Supreme Court of India.

In the US in *Baby M case*⁷²⁴ Mary Beth Whitehead became the traditional surrogate mother for William Stern and his wife Elizabeth. However, after the birth of a child she changed her mind and wanted to keep her biological daughter. The New Jersey Court on February 1988 held that surrogacy contract is opposed to public policy, therefore, invalid and granted custody to Mr. Stren and visitation right to Mery Whitehead. In March 2004, the Baby M, (Melissa Stren) herself legally terminated parental right of the Mery Beth. However, the California court in *Johnson v. Calvert case*⁷²⁵ had granted the parental rights of the child to the commissioning couple because they were genetic, biological and natural parents of the child and rejected the parental rights of the surrogate mother. Therefore, genetic criteria were decided as a prime criterion for granting parental rights of the child. The traditional pattern of understanding of procreation, that the man as providing ‘the seed’ and women as simply incubating the child and being ‘the soil’ from which the seed can grow.⁷²⁶ In contrast to the Calvert Case the American *College of Obstetricians and Gynecologists (ACOG) and the Warnock Committee Report* in the U.K stated that a woman who carries and gives birth to the baby is the legal mother. The ‘love’, i.e.

⁷²² AIR 2010 Guj.21

⁷²³ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010

⁷²⁴ 109 N.J. 196, 537 A. 2d (1987)

⁷²⁵ *Anna Johnson v. Mark Calvert*, 851 P. 2d 776 (Cal. 1993), It was held that it is the genes gives the children their individual and unique traits and characteristics and help them to form identities. However, the surrogate mother makes no contribution to the physical features, behavior therefore not entitle for parental rights.

⁷²⁶ Bryn Williams Jones, “Commercial Surrogacy and the Redefinition of Motherhood, available at https://www6.miami.edu/ethics/jpsl/archives/papers/comsur_williamsjones.html, Visited on 29/05/2013 at 7.00 pm

motherhood must be considered of equal weight as 'blood' or genetic contribution when assigning parental rights. Therefore, the committee said it is the gestation and not the genetics determines the motherhood. It is said that nine months of labor and the process of giving birth constitute a major investment of a woman's for procreation of the child⁷²⁷ In surrogacy transaction the conflict is not about the who is the mother of the child but it is the about who is having the parental right. *In a surrogacy arrangement there are two biological mother one is genetic other is the gestational mother.* And child could have as many social mothers such as adopted mothers, step-mothers, or foster mothers. According to the Iona Institute's research paper, that the maternal attachment of every child is based solely on the birth of the child. Hence, the birth mother should be presumed to be the legal mother of the child.⁷²⁸ Thus, the definition of motherhood has not been changed, but it's only fragmented. And because of its fragmentation, it may create problem to decide, who the legal mother is. But the basic definition of motherhood remains unchanged. The commercialization aspect of the surrogacy will not change the understanding of motherhood. It means mother remains mother nurturing and loving then whoever she may be whether social or biological mother. The surrogate mother by bearing a child has also participated in aspect of motherhood. Therefore, it is not material whether or not she defined as mothers or not, but still she is the mother of the child.⁷²⁹ However, the researcher would like to conclude the emotional topic of motherhood and its dimension, as it is not the significant to concern about who is the real and legal mother of the child but the real concern is the child's interest. Hence, the Convention on Rights of Child the principle of the best interest of child of should be applied and parental rights and custody of the child should be given to the commissioning couple after due inquiry. The ART, Bill, 2014 and the Surrogacy Bill, 2016 recognized the commissioning couple as the legal parents of the child and the commissioning mother as a legal mother of the child. However, the Israeli country recognized the surrogate mother as a legal mother of the child.

⁷²⁷ *Ibid*

⁷²⁸ A Paper By The Iona Institute: The Ethical Case Against Surrogate Motherhood:, C.f. . <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>, visited on 20/11/2014 at 2.30 pm

⁷²⁹ Supra note 142

4.3. SURROGACY A RAY OF HOPE

*The Parents construct the Child biologically,
While the Child constructs the Parents socially.*⁷³⁰

There is an explosion of the surrogacy arrangements from the last two decades, which makes clear that the commissioning couples are interested in surrogacy arrangements and innumerable women are acting surrogates.

i. Status of Offspring's in Indian Culture:

According to ancient Indian philosophy the biological purpose of life is to transmit once own traits (genes) to the next generation. Therefore, the need of having own biological child was felt for the various reasons, such as:

- a. Succession of the properties left behind by the ancestors.
- b. To continue the lineage of the family.
- c. To clear debt created by the ancestors.⁷³¹
- d. Securing immortality and heaven⁷³²
- e. To secure support in the old age of the parents.

Generally, the Indian society was having the strong desire for children and especially for the son to carry forth the lineage or 'Vansh'. However, the same principle was carried forward up to the 20th century, but today in a few cases the procreation of children of any gender has an importance rather son only.

ii. Childlessness Considered as a Social Stigma

The childless women or women with fertility problems are called as barren women. The lives of childless of women seen as empty. They do not receive proper love, affection from the family members. Under, the Indian society, there is great pressure on women to prove fertility within the few years of the marriage. Most of the childless

⁷³⁰ Surrogacy Laws India, C.f. http://www.surrogacylawsindia.com/index_inner.php?id=%2012&menu_id=1, visited on 24/12/2012, at 9.30 am

⁷³¹ S.A. Kadir, Hindu Succession Act, 1956, at p. 155, 2nd Edn. Eastern Law House Pvt Ltd Co. Kolkata.

⁷³² *Ibid*

women in India face such stigma, social ostracism and fear of abandonment in day to day life. Because of the social stigma attached to them, in most of the cases the childless women end their life, or get divorced or give the consent for the second marriage. The most of divorces or separations are happening due to the childlessness of the women. Therefore, motherhood is mandatory for Indian society and culture. Thus, with the huge advances in the field of medical science so infertility can be treated by using the new assisted reproductive technology such as *in vitro* fertilization (IVF) or intracytoplasmic sperm injection (ICSI), surrogacy *etc.* The surrogacy is the union of science, society, services and person that make it a reality. Surrogacy leads to a win-win situation for both the infertile couple and the surrogate mother.⁷³³ Thus, the surrogacy provides the chance to become the parents of an own genetic child for the single, homosexual, unmarried couples and married infertile couples. Ultimately, surrogacy is the last ray of hope to the childless couple to enjoy the dream of parenthood.⁷³⁴

4.4. COMMERCIAL SURROGACY A NEW OF REPRODUCTIVE LABOUR

Surrogacy is a 'kalpavruksha' (desire- fulfilling tree) for the children of surrogate mother. The country will in coming future get great doctors, engineers, cricketers, soldiers.....etc.

..... A Surrogate Mother⁷³⁵

Surrogacy has become one form of reproductive labour, which helps the surrogates for fulfilling their basic desires of the family. It is normal work just like other work in the market. But the practice of surrogacy has involved the most controversial issues such as, whether surrogacy is the commercial reproductive *labour or contract labour or its service*.⁷³⁶ And whether this reproductive labour is different from other forms of

⁷³³ R. S. Sharma, "Social, Ethical, Medical & Legal Aspects Of Surrogacy: An Indian Scenario," Indian Journal of Medical Research 2014 Nov; 140 (Suppl 1): S13–S16, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/>, visited on 17/12/2014 at 10.00 am

⁷³⁴ Karshan Bhandarke, 'The Last Ray of Hope: Surrogate Mother- The Reality,' Anand Surrogate Trust, 2009

⁷³⁵ *Ibid*

⁷³⁶ The Assisted Reproductive Technology Bill, 2014 has stated under section 2 (zs) that the parties of the surrogacy that is the commissioning couple and surrogate mother are require to enter in to surrogacy agreement for commissioning of the surrogacy and Bill has also used the word surrogacy as service. The Bill has legalized the commercial surrogacy as it allows the payment of compensation to the surrogate for bearing and relinquishing the child. Recently, after the order the Supreme Court in

labour? It is said that surrogacy is a form of commercial or contract labour that involves the purchasing of the '*reproductive labour*' of a third party in order to conceive and bring the baby. This form of labour involves the purchase and sale or rental of the bodily functions of the woman and the child results from labour in exchange for a payment. Surrogacy is a gender specific form of industrial labour. Therefore, some feminist opponents describe the surrogacy as 'industrialization of pregnancy' and as a degradation of women's reproductive labour. Despite of the altruistic motives, it is a form of contract labour which involves the physical risk, pain, possible death, and constant medical procedure.⁷³⁷ Hence, most of the industrial countries had banned the commercial surrogacy. Some of the legal scholar states that the commercial surrogacy or contract pregnancy can be said as a form '*estranged Labour*,' where surrogate loses the custody of the child. They are selling their bodily labour to more economically privileged women. Commercial surrogacy can be understood as a form of stratified reproduction in which poor are renting their womb out or selling their uterus to wealthier women and men.⁷³⁸ Whereas Amrita Pande says the surrogacy arrangement should be understood in context of casual labour market even though from a limited set of choices. So, she is having right to choose work as a surrogate. Therefore, the surrogate should be protected from labour laws and standards. The surrogacy should be valued as a service beyond the need of money.⁷³⁹ Most of the surrogates spend money for fulfilling the needs of their families such as to start a small business for the husband, for the education of the children, medical reason or sometimes building of the house. *The Sakal Marathi newspaper* on 7th July 2013 has published in its article some *expressions of the surrogates regarding the use of the money* received in the surrogacy transaction. One surrogate namely, *Sarika* has used the money for the payment of installments of the house. Because her husband is working in private company and his salary is insufficient to run the home. Therefore, for the urgent payment of the installments hence, she became the surrogate

Jayashree Wad Case (WP. No. 95/2015 pending in Supreme Court of India) the commercial surrogacy is banned in India. But still there is no legislation pertaining to surrogacy.

⁷³⁷ France Winddance Twine, 'Outsourcing the Womb,' at p.15, 1st pub. Rutledge Taylor and Francis Group, New York, London, 2011.

⁷³⁸ Ibid at 16

⁷³⁹ International Institute of Social Studies (ISS), Report on "Global Surrogacy Practices", December 2014, C.f. <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm

mother with the consent of family members. Another, surrogate Laxmi has used the money for the purpose of the Engineering education of her children.⁷⁴⁰

It is found that in the capitalized global market, the opportunities for work are decreased to the socially economically vulnerable women's. However, the new market is opened for their reproductive labour. Hochschild states that the surrogates do the emotional labour of separating themselves from the baby they carry hence; it should be considered and visualized. Thus, Nussbaum said that the occupations relating to women's sexual and reproductive capacity should not stigmatize. Feminist Anderson's said surrogate's alienated labour, is a sacrosanct. It is a natural moral bond between the mother and the foetus, hence it should be respected.⁷⁴¹ Ultimately, it shows that in the capitalized global market new opportunity is opened to the vulnerable women in the form reproductive labour. But it is very necessary that the industrial reproductive labour market required to be carefully regulated without harming anyone. As the researcher would like to 'quote' here the wordings of the surrogate mother (actress Priti Zinta) from the movie, namely '*Chori Chori Chupke Chupke*' that "*abhi tak mai pet ke liye kama rahi thi, lekin ab pet hi muze kamakar de raha hai*" she was quite happy after accepting offer to act as a surrogate. According to Amrita Pande, the surrogacy has become the one kind casual work like the other works. She says the government stand of the ban on the commercial surrogacy does not fit with the logic applied to the other kind of informal market. The government should not prohibit the surrogate voluntary nature of labour.⁷⁴² According to Kiran Moghe⁷⁴³ the work should be 'Decent Work'⁷⁴⁴ as defined by the International Labour Organization [ILO].⁷⁴⁵ He says instead of promoting medical tourism, the government should make policy which will provide the opportunities of standard payable work to

⁷⁴⁰ Sakal, 'Womb on Rents' Sunday Special P. 6, 7th July, 2013, Pune.

⁷⁴¹ Sama-Resource Group for Women and Health, Report 2012 on "Birthing A Market: A Study on Commercial Surrogacy," at p. 22 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

⁷⁴² THE HINDU, Amrita Pande, "Surrogates are workers, not wombs" August 29, 2016 01:20 IST, C.f. <http://www.thehindu.com/opinion/op-ed/surrogates-are-workers-not-wombs/article9043014.ece>, Visited on 30/08/2016 at 9.00 am

⁷⁴³ Secretary, National Janvadi Organization.

⁷⁴⁴ Decent work means the work which guarantees the right to dignity, equality, safety and protects the person from exploitation.

⁷⁴⁵ Maharashtra Times, Pune, "Rights to Enjoy Happiness" September 4, 2016, p. n. 12.

the adult male and female.⁷⁴⁶ But the practicable government failed to provide this type of so women are going in such type of work.

4.5. LEGAL ISSUES IN SURROGACY

The legal aspects of surrogacy are more complicated, diverse and mostly disturbed. In many countries the differed surrogacy laws raises the several problems such as nationality, citizenship, Legal parentage, custody, abandonment of children as well the rights of intending parents and a child born out of surrogacy. The researcher is herewith explaining about the various legal issues pertaining to national and transnational surrogacy. The Hague Conference has done remarkable research work regarding the issues in the cross broader surrogacy and published reports and other documents. It has expressed the concern about the legal status of the child such as legal parentage, citizenship, abandonment and also the exploitation of surrogate women.⁷⁴⁷

4.5.1. Legal Parentage of the Surrogate Child:

In India, at the moment there is no legislation on the legal parentage⁷⁴⁸ of the child born out of surrogacy arrangements. The Registration of the Births and Deaths Act, 1969,⁷⁴⁹ does not contain any provision regarding parentage as results of surrogacy arrangements. The said enactment came into force on 31st May 1969, so surrogacy parentage was not issue that time. Till today, even no legislation or no amendment or addition with regard to surrogacy issues relating to the registration of births and deaths in the India. Therefore, there is a need to amend the Registration of the Births and Deaths Act, 1969, in order to have the entry of the child born out of the surrogacy

⁷⁴⁶ *Ibid*

⁷⁴⁷ Hague Conference on Private International Law, “The Parentage / Surrogacy Project: An Updating Note”, Preliminary Document No 3A of February 2015 *C.f.* http://www.hcch.net/upload/wop/gap2015pd03a_en.pdf, The Conference observed that in many cases of inter-country surrogacy, conflicting laws of different States which have resulted in *children being left with uncertain or unresolved legal parentage, and in some cases of children being left ‘stateless.* Its Permanent Bureau expects the guidance from 77 countries members, how, to move ahead toward a possible convention for regulating issues pertaining to cross-border surrogacy arrangement.

⁷⁴⁸ The legal relationship of parent and child is composed of rights and duties. Parents have natural rights by virtue of being natural guardians of their children. The tern guardianship means “bundle of rights” to be more exact a ‘bundle of powers’ which parent has over his child. It means more parental rights which constitute the parent child relationship.

⁷⁴⁹ The Registration of the Births and Deaths Act, 1969, *C.f.* http://www.pbnrh.m.org/docs/b&d_reg.pdf

arrangement. However, the ICMR guideline, 2005, under Para 3.5.4;⁷⁵⁰ clearly provides that the birth certificate of the children born out of surrogacy arrangement shall be in the name of the genetic parents. Whereas the ART Bill, 2014,⁷⁵¹ provides that birth certificate of surrogate shall bear the name of the commissioning couple as parents. The certified copy of the birth certificate is a public document under section 76 of the Indian Evidence Act, 1872. The birth certificate is admissible in evidence in the case of factum of birth concerned. Thus, this is the legal position as to the parentage of children born out of surrogacy arrangement in the Indian jurisdiction.

In India the following Acts stating the legal parentage of the child.

- The Hindu Minority and Guardianship Act, 1956 (HMGA)
- The Guardians and Wards Act, 1890 (GWA)
- Uncodified Muslim law of custody and Guardianship
- The personal laws of Hindus, Parsis and Christian which laid down the principles relating custody and guardianship of the minor.

The Hindu Minority and Guardians Act, 1956 are applicable to Hindu. The Guardians and Wards Act, 1890 is the secular law for appointment and declaration of guardians.⁷⁵² Thus, there are three of guardian natural guardian, de-facto guardian and

⁷⁵⁰ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, at p.63., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

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 pose 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 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.

⁷⁵¹ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 44 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

Section 60 (10) of the ART Bill, 2014, provides that the birth certificate issued in respect of a baby born through surrogacy shall *bear the name of couple who commissioned the surrogacy, as parents.*

⁷⁵² Kusum, Family Law Lectures, Family Law I, at p. 301, 2nd Edn. 2008, Reprint 2010, LexisNexis Butterworth's, Wadhwa, Nagpur

testamentary Guardian.⁷⁵³ The natural guardian has the legal right to act as a minor's guardian, unless that right is taken by the court under GWA or unless a testamentary. Under the Hindu Minority and Guardianship Act, the father is the natural guardian of the person and property of the legitimate children and after him the guardianship vests in the mother, however in *Githa Hariharan and Another v. Reserve Bank of India*⁷⁵⁴ both the Hindu Minority and Guardianship Act, 1956 (HMGA), the Guardians and Wards Act, 1890 (GWA) was challenged as being violative of Article 14 and 15 of the Constitution of India because the mother is relegated as inferior position. In this case the Supreme Court made that the mother is also natural guardian.⁷⁵⁵ Therefore, now both mother and father of the child are legal parents and have the right to take custody of the child based on the welfare and best interest of the child. The following sections of the Assisted Reproductive Technology Bill, 2014 gives the parental right to the commissioning couple.⁷⁵⁶ Section 60 (4) provides that the surrogate mother is under obligation to relinquish all parental rights over the child or children to the commissioning couple.⁷⁵⁷ And section 59 (3) a donor is also under legal obligation to surrender all parental rights over the baby who may be conceived from his or her gamete (eggs or sperms).⁷⁵⁸ Thus, it is a very clear that the ART Bill, 2014 and the surrogacy Bill, 2016 gives all legal parental rights to the commissioning couple. But the Bill yet to become the law and till passing of the legislation on surrogacy, the parties, the ART clinics and banks are bound by the ICMR Guidelines 2005, which states that the birth certificate of the surrogate child will carry the name of the genetic parents.⁷⁵⁹ And the child born through surrogacy must be adopted by the genetic

⁷⁵³ Ibid at 391, a natural guardian is one who gets the status by virtue of his natural relationship with the minor. In Hindu father is natural guardian during the minority, and after him it is the mother. De-facto guardian is one who looks after the property or person of the minor. And the testamentary guardian is person appointed by the will of the father and mother, who are the natural guardians of a minor.

⁷⁵⁴ *Githa Hariharan and Another v. Reserve Bank of India* AIR1999 SC1149

⁷⁵⁵ Kusum, Family Law Lectures, Family Law I, at p. 303, 2nd Edn. 2008, Reprint 2010, LexisNexis Butterworth's, Wadhwa, Nagpur

⁷⁵⁶ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

⁷⁵⁷ Ibid at 43

⁷⁵⁸ Ibid at 42

⁷⁵⁹ *Supra* note 171

parents (biological) parents unless they establish genetic relationships through (DNA) fingerprinting records that the child is theirs.⁷⁶⁰

Presently, both the ART Bill, 2014, the surrogacy Bill, 2016 and the ICMR Guidelines, 2005 are conflicting with each other on the legal parents of the surrogate child. The question arise that whose name will appear on the birth certificate of the surrogate child, whether the genetic parents or the commissioning parents. Therefore, *the question is if the donor eggs or sperms are used in the surrogacy arrangement, then the donor will be genetic parents.* And it is also said that *the surrogate is also a biological parent of the child, because she provides her blood, germinal material for the development of the embryo.*⁷⁶¹ Thus, the child has the two biological parents. Israeli and California countries recognize the surrogate mother as the legal mother of the child.

The other issues relating to ICMR guidelines that genetic parent are required to adopt the surrogate child unless they prove through the DNA test as the child is theirs. This has created one more complication that the Hindu Adoption and Maintenance Act, 1956, allow the adoption only to the Hindu, whereas the Guardian and Wards Act, 1890 is a secular law which allows the guardianship only and not the adoption. Hence, it is very necessary to have the urgent legislation on surrogacy, which will recognize the commissioning couple as the legal parents of the child for the best interest of the child. In *Baby Manji*⁷⁶² and *Jan Balaz* cases⁷⁶³ the same dispute about the legal parentage were raised.

4.5.2. Custody of Child:

Due to the absence of statutory law on surrogacy, it has become very difficult for claiming legal custody of the child especially for the foreign and non Hindu couple. In a very famous of *Baby M Case*⁷⁶⁴ in which custody of the surrogate child was

⁷⁶⁰ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, at p.68., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011at 11.00. am

⁷⁶¹ *Supra* note 147

⁷⁶² *Infra* 235

⁷⁶³ *Infra* 228

⁷⁶⁴ *Baby M case*, 537 N.J. 396, (1988). Mary Beth Whitehead entered into a contract to be impregnated with the sperm of a man whose wife's health made it unadvisable for her to bear a child. After the

challenged by the surrogate mother. Mary Beth Whitehead a surrogate mother changed her mind to relinquish the baby to the commissioning couple. However, the New Jersey court granted the custody of the child to the commissioning couple and visitation right to Whitehead and declared the surrogacy contract as void and illegal. In India in *Baby Manji Yamada v. Union of India & Ors*⁷⁶⁵ case, a Japanese couple, Dr. Ikufumi and Dr. Yuki Yamada had entered into a surrogacy agreement. But Yamada couple gets divorced due to matrimonial discord. On 25th July 2008 Baby Manji was born to the surrogate mother. Dr. Ikufumi Yamada wanted to raise the baby, but due to the end of the visa, he had to return to Japan, but his ex-wife Yuki did not want the baby as she has not contributed her eggs for the creation of a baby. The Anand Municipality issued birth certificate indicating the name of genetic father. Thereafter, the grandmother of the Baby Manji filed writ petition for taking care of the child. Finally, the Supreme Court granted the custody of the child to the genetic father and grandmother on the ground of best interest of the child and thus, baby Manji left for Japan.

The surrogacy arrangement has raised various issues such as who is entitled to claim for legal custody of the child? What would be the remedy available to the biological parent to obtain exclusive legal custody of the surrogate children? How can the rights of the surrogate mother be waived off completely? How can the rights of ova or sperm donor be restricted? Whether a single person or gay couple can be called as custodial parent of a surrogate baby? Who will claim the custody of the child in case of divorce between the parents?⁷⁶⁶ Who will take care of the child if foreign couple did not come back to India?

In the absence of law to govern surrogacy, the ICMR Guidelines, 2005 under the Para 3.10.1., provides that the surrogate baby required to be adopted by the biological parents (genetic parents). In the earlier period, the foreigners, or non Hindu couples, single parents or gay parents can only claim guardianship of a child under the

birth Whitehead changed her mind as she wanted to keep the child. Eventually the case went to the New Jersey Supreme Court. The court held that the surrogacy contract was invalid because it violated the New Jersey law against exchange relating to obtaining a child and court granted custody of child to the commissioning couple with the visitation right to whitehead.

⁷⁶⁵ Baby Manji Yamada v. Union of India, AIR 2009 SC 84,

⁷⁶⁶ Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, A Law in the Making', Seminar Report on 'Surrogacy bane or Boon. (1st Edn. Universal Law Publication Co.), New Delhi, 2013., P. 164

Guardianship and Wards Act and not the adoption. Today, non- Hindu can adopt the child under the Juvenile Justice Care and Protection Act, 2015 and under the New Guidelines Governing Adoption of Children, 2015 irrespective of any religion. Therefore, they are entitled to claim custody of the surrogate child as a biological parent of the child.⁷⁶⁷ The Assisted Reproductive Technology (Regulation) Bill, 2014 and the Surrogacy Bill, 2016 also provides that the commissioning couple is entitled to claim legal custody of the child because they are recognized as the legal parent of the child.⁷⁶⁸ It means the child born to commissioning couple or ever married woman is considered as the legitimate child of couple and even in case of the married couple got separated or divorced after consented to the ART procedure.⁷⁶⁹ The ART Bill under section 60 (4) provides that the surrogate mother is under obligation to relinquish all parental rights over the child or children to the commissioning couple.⁷⁷⁰ And section 59 (3) a gamete donor is also under legal obligation to surrender all parental rights over the surrogate baby.⁷⁷¹

In the issue of what would be the status of divorced biological parent in respect of custody of the child? Essentially, this question requires the determination in accordance with the agreement between the parties. Presently, however, there is no bar to either of divorced parent claiming custody of the child if the other parent does not claim the same. But if the custody contested it may require the adjudication by the competent court.⁷⁷² The ART Bill, 2014, states that the incase of the married couple gets separated or divorced after consented to the ART procedure still child will be the legitimate child of the couple.⁷⁷³ Therefore, both commissioning father and mother can claim the custody of the child. Presently, if the other parent does not claim

⁷⁶⁷ *Supra note p. 90*

⁷⁶⁸ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 45 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

Section 60 11 (b) The commissioning couple including Overseas Citizen of India, People of Indian Origin, Non Resident Indians and foreigner married to an Indian citizen who have availed of the services of a surrogate shall be legally bound to accept the custody of the child or children irrespective of any abnormality that the child or children may have.

⁷⁶⁹ *Ibid at 51*

⁷⁷⁰ *Ibid at p. 43*

⁷⁷¹ *Ibid at 42*

⁷⁷² Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*', (1st Edn. Universal Law Publication Co.), New Delhi, 2013., P. 24

⁷⁷³ The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 51 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

custody, then either of divorced parents can claim it. However, if the custody of the child is disputed then it may be decided as per the order of the Court.

In a question of whether single or a gay parent can claim custodial parent of the child? In *Baby Manji case*⁷⁷⁴ and *Israeli Gay couple*⁷⁷⁵ the Court granted the custody to the father a single person and to the gay couple. But after the *New Indian Visa Regulation, 2012*⁷⁷⁶ the single person or gay or unmarried couples are prohibited from commissioning the surrogacy in India therefore, they are not entitled to claim custodial parent of the child. Presently, after the order of the Supreme Court on 2nd December 2015 in *Jan Balaz with Jayashree Wad case*⁷⁷⁷ and *as per the latest instructions of the government and the new surrogacy Bill, 2010*⁷⁷⁸ the surrogacy is restricted only to the Indian married infertile couple. Therefore, today single person or unmarried or same sex couples and foreign couples are not allowed to enter into a surrogacy arrangement hence; the question of custody of the child does not arise.

However, in case of dispute about the custody of the child has aroused till passing of the surrogacy law, the commissioning couple can approach to the civil court for declaration of the custody of the child and can enforce the surrogacy agreement under section 9 of Civil Procedure Code, 1908⁷⁷⁹

4.5.3. Nationality and Citizenship of Child:

The Constitution of India provides the single citizenship for the entire country. The provisions regarding the citizenship are contained in the Articles 5 to 11 in part II of the Constitution of India.⁷⁷⁹ The legislation regarding the acquisition and

⁷⁷⁴ AIR 2009 SC 84, JT 2008 (11) SC150

⁷⁷⁵ The Times of India, Mumbai, 18-11-2008.

A single or gay parent can be considered to be the custodial parent of the surrogate children born out of a surrogacy arrangement.

⁷⁷⁶ 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, available at http://www.icmr.nic.in/icmrnews/art/MHA_circular_July%209.pdf visited on 11/12/2012 at 3.30. pm

However, the previous ART Bill, 2008 and 2010 were allowed the single person unmarried and same sex couple for commissioning of surrogacy in India.

⁷⁷⁷ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

⁷⁷⁸ *Infra* p. 123

⁷⁷⁹ M.P. Jain, Indian Constitutional Law, Sixth Edn. Reprint 2012, LexisNexis Butterworth's Wadhwa, at p. 860.

determination citizenship is the Indian Citizenship Act, 1955,⁷⁸⁰ which has been amended by the Citizenship (Amendment) Acts, 1986, 1992, 2003, 2005 and recent Amendment Act, 2015.⁷⁸¹

It has been observed that the Indian national law largely follows the *jus sanguinis* (citizenship by right of blood) as opposed to the *jus soli* (citizenship by right of birth within the territory).

Articles 5 to 11 of the Constitution of India lay down as to who are the citizens of India at the commencement of the Constitution i.e. on 26th January, 1950. The citizens are classified into : i) Citizens by Domicile, ii) Citizens by Migration and iii) Citizens by Registration.

⁷⁸⁰ The Citizenship Act, 1955, C.f. https://en.wikipedia.org/wiki/Indian_nationality_law

i) Section 3 Citizenship by Birth: Any person born in India on or after 26 January 1950, but prior to the commencement of the 1986 Act on 1 July 1987, is a citizen of India by birth. A person born in India on or after 1 July 1987 is a citizen of India if either parent was a citizen of India at the time of the birth. Those born in India on or after 3 December 2004 are considered citizens of India only if both of their parents are citizens of India or if one parent is a citizen of India and the other is not an illegal migrant at the time of their birth.

ii) Section 4 Citizenship by Descent: Persons born outside India on or after 26 January 1950 but before 10 December 1992 are citizens of India by descent if their father was a citizen of India at the time of their birth. Persons born outside India on or after 10 December 1992 are considered citizens of India if either of their parents is a citizen of India at the time of their birth. From 3 December 2004 onwards, persons born outside of India shall not be considered citizens of India unless their birth is registered at an Indian diplomatic mission within one year of the date of birth. In certain circumstances, it is possible to register after one year with the permission of the Central Government. The application for registration of the birth of a child must be made to an Indian diplomatic mission and must be accompanied by an undertaking in writing from the parents of the child that he or she does not hold the passport of another country.

iii) Section 5 Citizenship by Registration: The Central Government may, on an application, register as a citizen of India under section 5 of the Citizenship Act 1955 any person (not being an illegal migrant) if s/he belongs to any of the following categories: a) a person of Indian origin who is ordinarily resident in India for seven years before making application under section 5 (1) (a) (throughout the period of twelve months immediately before making application and for six years in the aggregate in the eight years preceding the 12 months). 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. f) a person of full age and capacity who, or either of his parents, was an 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.

iv) Section 6 Citizenship by Naturalization: Citizenship of India by naturalization can be acquired by a foreigner (not illegal migrant) who has been ordinarily resident in India for 12 years. The applicant must have lived a total of 11 years in the aggregate in the 14 years and must have spent in India the past 12 months preceding the application.

⁷⁸¹ The Citizenship (Amendment) Act, 2015 C.f. <http://indiancitizenshiponline.nic.in/UserGuide/E-gazette.pdf>

The Citizenship (Amendment) Act, 2015 has substituted the word under section 2 (1) (ee), “**Overseas Citizen of India Cardholder**,” which means ‘a person registered as an Overseas Citizen of India Cardholder by the Central Government under section 7A’. The Act also substituted the sections 7A, 7B, 7C and 7D regarding the citizenship of an Overseas Citizen of India Cardholder.

In India, presently, there is no exclusive and separate legislation governing nationality and citizenship⁷⁸² of the child born out of the surrogacy arrangement. Therefore, the question is, whether a surrogate baby born in India acquires the Indian Citizenship?⁷⁸³

In the *Jan Balaz v. Anand Municipality Case*⁷⁸⁴ the question before the Gujrat High Court was whether a child born in India to a surrogate mother, an Indian national, whose biological father is a foreign national, would get citizenship in India, by birth, and for this question even there is no precedent in this country. In this case, petitioner claimed that since babies are born in India, so they are entitled to claim Indian citizenship and passport. Therefore, denial passport of babies are illegal and violation of the Article 21 of the Constitution of India. The Gujarat High Court has held that since, the surrogate mother is an Indian national hence, the children are entitled to get Indian citizenship by birth as per section 3 (1) (c) (ii) of the Indian Citizenship Act, 1955 because one of their parents is an Indian Citizen. Thus, in this case court treated surrogate mother as real mother and legal mother of the children. Therefore, the court directed to Government to release the passport of the minors. However, the Government of India challenged this decision in *Union of India v. Jan Balaz Case*⁷⁸⁵ which is still pending in the Supreme Court of India. The German authorities also refused visas to twin's baby on the ground that German law did not recognize surrogacy as a means of parenthood. Ultimately, Jan Balaz and Susan Lohald went through an inter country adoption process in India. Thus, after the intervention of the Supreme Court of India, the Indian Government on May 26, 2010 granted the exit permits to Germany to the surrogate twins.

⁷⁸² A person can apply for nationality to the country where he has been born. Whereas the citizenship is a legal status, in which an individual has been registered with the government in some country. Nationality is getting through inheritance from his parents or it be called a natural phenomenon. In other words, an individual becomes a citizen of a country only when he is accepted into that country's political framework through legal terms. No one will be able to change his nationality, but one can have different citizenship.

⁷⁸³ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 154

⁷⁸⁴ *AIR 2010 Guj.21*

The German couple had entered into a surrogacy agreement in Anand, Gujrat. The twin baby sons – Nikolas and Leonard were born in 2008 and registered as children born of a foreign couple through the Indian surrogate mother. Jan Balaz moved to the Gujrat High Court for claiming the citizenship and passport of babies since babies are born in India and are citizens of India, Germany would not recognize them as its citizens. Denial of Passports, according to the petitioner, is illegal and violative of Article 21 of the Constitution of India.

⁷⁸⁵ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010

The major problem with the international surrogacy arrangement that many of the countries does not recognize the surrogacy arrangement as legal hence, it does not grant the citizenship and visa to the child, therefore, sometimes the child remains as Stateless. *According to the Article 26 (1) of the UDHR, 1948* clearly provides that the all action concerning the child, whether taken by the public or private social institutions, courts of law or administrative or legislative bodies that the *best interest of the child* shall be a prime consideration. The ART Bill, 2014 bans the foreigners, but allows the OCI, PIO, NRI, and foreigner married to Citizens of India for commissioning surrogacy in India. The ART Bill, 2014 regarding the citizenship of surrogate child states that the commissioning couple are required to produce the letter of their Government regarding entry to the surrogate child in their country.⁷⁸⁶ However, if the child is given to adoption agency, then the child may be granted Indian citizenship.⁷⁸⁷ And the section 61 (7) provides that a the surrogate children of the Overseas Citizen of India, People of Indian Origin and a foreigner married to an Indian citizen shall not be entitled to Indian citizenship, but the child is entitle to claim entitled to claim OCI Citizenship under Section 7A of the Indian Citizenship Act, 1955.⁷⁸⁸

However, presently as per the Indian government instructions issued on 4th November 2015 and the new surrogacy Bill, 2016 has prohibited the surrogacy service to all foreigners from entering the surrogacy agreement in India.

4.5.4. Abandonment of Child:

The recent *Baby Gammy Case* has given a huge shock to the whole world. The Baby Gammy's incident became the eye opener of the various international conventions as the status of the surrogate children is at stake.

The issues raised in the surrogacy arrangement such as, what can surrogate do if the commissioning couple abandoned the child on the ground that it is abnormal of physically/mentally challenged?⁷⁸⁹ And who will take the responsibility of the

⁷⁸⁶ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at 47 <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

⁷⁸⁷ *Ibid* at p. 49

⁷⁸⁸ *Ibid* at 52

⁷⁸⁹ Jayashree Wad Vs. Union of India & others W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

surrogate child? Whether the child will be an orphan? What will happen if the foreign commission does not come back to India?

*The Juvenile Justice (Care and Protection) Act, 2015 under section 2 (1) defines the “abandoned child”*⁷⁹⁰ means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry.

In *Baby Gammy Case*⁷⁹¹ an Australian couple had abandoned their Down syndrome baby with his Thai birth mother taking only his healthy twin sister back to Australia with them. Another case involved a Japanese man has become the father of at least 16 babies by using Thai surrogates in what local Thai media called the "baby factory".⁷⁹² However, it is not clear why this Japanese man chose to have so many children.⁷⁹³

According to the Indian Surrogacy law Centre, the incidence of abandonment of the child also happened in India in 2012. Where, another Australian couple has abandoned a child born through surrogacy because the couple was already having one child before the surrogacy arrangement and they wanted only one child of the opposite sex.⁷⁹⁴ In the *Michigan case*,⁷⁹⁵ a surrogate gave birth to a potentially

⁷⁹⁰ The Juvenile Justice (Care and Protection of Children), Act, 2015, at p.2 available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, Visited on 05/01/2016 at 11.00 am.

⁷⁹¹ In Baby Gammy case the Australian commissioning couple has abandoned the Baby Gammy, who was born with Down's syndrome to a Thai surrogate mother. The Australian commissioning couple David and Wendy Farnell, was hired a woman from Thailand as a surrogate mother. However, one of the twin babies i.e. Baby Gammy was detected with the Down's syndrome. The commissioning parents forced to Pattaramon Chanbua a surrogate mother to abort the abnormal fetus. However, Chanbua refused to abort the child because it was against her Buddhist faith and illegal in Thailand. Therefore, the commissioning parents after the birth of the children left with the other healthy twin sister, Pipah. Later on the case gained media attention and pressure to send home the 7 month old Baby Gammy to Australia. Thereafter, the Australian Government granted citizenship to Baby Gammy. C.f. "Taming the international commercial surrogacy industry", *MJ* 2014; 349 doi: <http://dx.doi.org/10.1136/bmj.g6334> (Published 23 October 2014) Cite this as: *BMJ* 2014;349:g6334 C.f. <https://samawomenshealth.wordpress.com/page/2/b> and also see Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi, 2015, p. 110.

⁷⁹² Reuters, 'Thailand bans surrogacy for foreigners in bid to end 'rent-a-womb' tourism,' BY AUKKARAPON NIYOMYAT, BANGKOK, Thu Feb 19, 2015 11:36 pm EST C.f. <http://www.reuters.com/article/us-thailand-surrogacy-idUSKBN0LO07820150220>, visited on 02/03/2015 at 12.00 pm

⁷⁹³ Amel Ahmed, 'Offshore babies: The murky world of transnational surrogacy,' 11, 2014 9:00 August PM <http://america.aljazeera.com/articles/2014/8/11/offshore-babies-thebusinessoftransnationalsurrogacy.html> visited on at 07/12/2014 at 3.00 pm.

⁷⁹⁴ G. R. Hari, "Indian surrogacy law Centre," Blog dated 10th October 2014, C.f. <http://blog.indiansurrogacylaw.com/australian-couple-have-a-deserted-a-child-born-out-of-surrogacy-in-india-while-taking-the-twin/>, According to the this revelation was made by Australian Chief Justice of the Family Court, Diana Bryant in a family law seminar in Australia this week.

⁷⁹⁵ Jane Doe v. Attorney General, No. 88-819032- CZ (Cir. Ct. for Wayne County, Mich.).

handicapped child, but the biological father refused to take responsibility for the child. Later on it was found that the surrogate was the actual biological father of the child.⁷⁹⁶ According to the Barbara Atwell, a child born with physical or mental handicaps is having the risk of being neglected, abandoned, or abused even sale or black marketing.⁷⁹⁷ The major lacuna in a surrogacy arrangement that the couples fitness was not considered as the prime criteria as like in the adoption procedure.

The Centre for Social Research (CSR) in its research study in the cities of Delhi and Mumbai has reported that the majority (71% out of 100) of the surrogate mothers said that the child born with deformity remains at surrogacy clinic, and the clinic takes the decision of the child.⁷⁹⁸ Another very shocking case of surrogacy reported by the CSR that in India one foreign couple entered into the surrogacy arrangement only for organ transplant for their sick child in their country.⁷⁹⁹ After the study of the above cases the researcher really finds various illegal acts in the surrogacy arrangement. That the pious object to have the child through is moving to the unethical and illegal practice.

In India, there are various provisions which protect the abandoned child and also punish the parents for the abandonment. *The abandonment of the child is a criminal offence in India. Section 317 of the Indian Penal Code, 1860* provides that, if the father and mother has the abandoned the child under 12 years of age who is need of care shall be punishable with imprisonment up to seven years, or with fine or with both.⁸⁰⁰ Thus, the act of the abandonment of the child by the Commissioning Couple clearly falls within the section 317 of the IPC.

⁷⁹⁶ Barbara L. Atwell, "Surrogacy and Adoption: A Case of Incompatibility," COMBIA HUMAN RIGHTS OF LAW REVIEW, VOL.20, 1989, see footnote 192, p. 50, available at: <http://ssrn.com/abstract=1512914> Surrogacy and Adoption: visited on 04./03/2015 at 3.30.pm

⁷⁹⁷ *Ibid*

⁷⁹⁸ Centre for Social Research (CSR), 'Final Report Surrogate Motherhood- Ethical or Commercial', p. 69 available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm

⁷⁹⁹ *Ibid* at p. 12

⁸⁰⁰ K.D. Gaur, "Textbook on Indian Penal Code" 4th Edn. Universal Law Pub New Delhi, 2013, at p. 573.

Section 317: Exposure and abandonment of child under twelve years, by parent or person having care of it. —Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

The Juvenile Justice (Care and Protection) Act, 2015 has made various provisions for the protection of abandoned child⁸⁰¹ such the welfare committee is under obligation that it cannot give an abandoned child in adoption without the due inquiry. The Act, 2015 has included the abandoned as a child in the definition of ‘child in need of care and protection’ and also punishes for cruelty to abandon the child or given in adoption without following the proper procedure. *The National Commission for Protection of Child Rights Act, 2005* protects the abandoned the child from the violation his /her rights and also provides the speedy trial for the offences against the children and violation of the right. The abandoned girl child is also protected under *the Protection of Women from Domestic Violence Act, 2005*.

The ART Bill, 2014 under section 11(b) provides that the commissioning couples are under duty to take the custody of the abnormal child.⁸⁰² The *section 21 (c) (i)* of the Bill, states that the if the couple failed take custody of the child within one month

⁸⁰¹ The Juvenile Justice (Care and Protection of Children), Act, 2015, available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, Visited on 05/01/2016 at 11.00 am.

Section (14) (vi) :“child in need of care and protection” means a child—who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him.

Section 30 (x): it is the function of the welfare committee to ensure that all efforts are made for restoration of abandoned or lost children to their families by following due process. And under sub clause (xi) the committee can declare the orphan, abandoned and surrendered child as legally free for adoption after due inquiry.

Section 36: provides that on production of the abandoned child by the welfare committee if children are below six years of age, who are orphan, surrendered or appear to be abandoned shall be placed in a Specialized Adoption Agency.

Section 38: (1) In case of orphan and abandoned child, the Committee shall make all efforts for tracing the parents or guardians of the child and on completion of such inquiry, if it is established that the child is either an orphan having no one to take care, or abandoned, the Committee shall declare the child legally free for adoption:

Section 56: (1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made there under and the adoption regulations framed by the Authority.

Section 75: Punishment for cruelty to child - Whoever, having the actual charge of, or control over, a child, assaults, abandons, abuses, exposes or willfully neglects the child or causes or procures the child to be assaulted, abandoned, abused, exposed or neglected in a manner likely to cause such child unnecessary mental or physical suffering, shall be punishable with imprisonment for a term which may extend to three years or with fine of one lakh rupees or with both.

Section 80: Punitive measures for adoption without following prescribed procedures: If any person or organization offers or gives or receives, any orphan, abandoned or surrendered child, for the purpose of adoption without following the provisions or procedures as provided in this Act, such person or organization shall be punishable with imprisonment of either description for a term which may extend up to three years, or with fine of one lakh rupees, or with both.

⁸⁰² The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 45 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

Section 11 (b) : The commissioning couple including Overseas Citizen of India, People of Indian Origin, Non Resident Indians and foreigner married to an Indian citizen who have availed of the services of a surrogate shall be legally bound to accept the custody of the child or children irrespective of any abnormality that the child or children may have.

from the birth of the child then the local guardian appointed by the couple is required to hand over the child to the adoption agency.⁸⁰³ However, the Bill does not specifically provides the punishment for the abandonment of child but the Bill under *section 69* provides that if anyone violates the any of the provisions of this Act for which no penalty has been mentioned then it is punishable with imprisonment up to five year or fine up to one lakh or both.⁸⁰⁴ The present the surrogacy Bill, 2016 has made the abandonment of the surrogate children as a criminal offence punishable with the imprisonment of not less than ten years and fine up to ten Lakh rupees.

But still, there is the need of the international intervention in transnational surrogacy arrangement in order to protect the child from abandonment.

4.5.5. Surrogacy and Adoption

The infertile couples or single individuals who are unable to conceive the child themselves can achieve the dream of becoming parents from the two choices i.e. adoption or surrogacy method. However, both of these choices are having own its advantages and disadvantages. Both the adoption and the surrogacy may also have its own social, ethical and legal issues. However, it is a very difficult task to choose between surrogacy and adoption method.

i. Status of Adoption in India

According to the old Hindu edict, the adoption was considered as the sacramental act. The *Rig Veda* mentions, “*No son is he who spring from others*”. Historically, the most of the adoptions occurred within the family itself.

According to the *section 2 (2) of the Juvenile Justice (Care and Protection of children) Act, 2015*⁸⁰⁵ “*adoption*” means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

⁸⁰³ *Ibid* at 47

⁸⁰⁴ *Ibid* at 54

⁸⁰⁵ The Juvenile Justice (Care and Protection of Children), Act, 2015, at p.2 available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, Visited on 05/01/2016 at 11.00 am.

Paton, in his “A Textbook of Jurisprudence” stated that the child in the womb of the mother is not a legal person hence, it is without any rights.⁸⁰⁶ Whereas in India, a child in the womb is treated as already born person, and which can be seen from the sections 312,⁸⁰⁷ 313⁸⁰⁸ and 318⁸⁰⁹ of the Indian Penal Code, provides the punishment to any person who injures the child in the womb. It means the Indian law recognizes the rights of unborn foetus. However, in India as compared to surrogacy procedure, the adoption process is more complicated and lengthy, despite of the 12 million orphaned children’s in India who are in need of parents.⁸¹⁰ For adoptions, the Parliament has enacted the Hindu Adoption and Maintenance Act, 1956, which specifically applies to the Hindu only. Whereas the Indian Guardianship and Wards Act, 1890, which apply to the people belonging to the Muslims, Christian, Parsis or Jews, who wish to adopt a child can only take up the guardianship of the child.

The Supreme Court in *Stephanie Joan Becker v. State and Anr.*,⁸¹¹ case permitted a single 53-year-old lady to adopt a female orphan child aged 10 by relaxing the rigidity of the guidelines of the Central Adoption Resource Authority (CARA). In *Shabnam Hashmi vs. Union of India*,⁸¹² 2014, the Supreme Court upheld the right to adopt as a fundamental right and held that every person, irrespective of the religion he/she professes, is entitled to adopt. The Supreme Court held that the Muslims can adopt a child with full of rights under section 41 of the Juvenile Justice (Care and Protection of children) Act, 2000.

⁸⁰⁶ Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medico legal Issues’, 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 74

⁸⁰⁷ K.D. Gaur, “Textbook on Indian Penal Code” 4th Edn. Universal Law Pub New Delhi, 2013, at p. 559, Section 312 provides for whoever causes of miscarriage is punishable offence imprisonment up to 3 year or fine both.

⁸⁰⁸ *Ibid* at 568, Section 313 of IPC provides that the causing miscarriage without woman’s consent is punishable with the imprisonment up to ten years and fine.

⁸⁰⁹ *Ibid* at p573, section 318 of the IPC provides that the concealment of birth by secret disposal of the dead body is punishable with imprisonment up to two year or with fine or both.

⁸¹⁰ Anil Malhotra, Ranjit Malhotra, ‘Surrogacy in India, *A Law in the Making*’, (1st Edn. Universal Law Publication Co.), New Delhi, 2013. P. 6.

⁸¹¹ (2013) 12 SCC 786

⁸¹² (2014) 4 SCC 1

ii. Inter- Country Adoption:

- iii.** According to the section 2 (34) of the *Juvenile Justice (Care and Protection) Act, 2015* provides that the “*Inter-country adoption*” means⁸¹³ the adoption of a child from India by non-resident Indian or by a person of Indian origin or by a foreigner.⁸¹⁴ In other words, inter-country adoption means where an individual or couple becomes the legal and permanent parents of the child who is the national of a different country. The Central Adoption Resource Authority (CARA) is an autonomous body of the Ministry of Women and Child Welfare Department, Government, having the main functions to promote, facilitate, and regulate the inter-country adoptions⁸¹⁵ of the orphan, abandoned and surrendered children.⁸¹⁶ CARA also carries out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption.⁸¹⁷

iv. Difference Between Surrogacy and Adoption

One of the major advantages of the surrogacy arrangement that it provides the chance for the heterosexual couples as well as the gay couples to have the baby of their own genes, which is however, not possible in adoption. However, the surrogacy arrangement is coupled with the various social, ethical, psychological, emotional and legal issues, such as the exploitation of surrogate mother, chance of development of the emotional attachment of the surrogate with the child, the

⁸¹³ The Juvenile Justice (Care and Protection of Children), Act, 2015, at p. 5 available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, Visited on 05/01/2016 at 11.00 am

⁸¹⁴ Section 2 (12) of the Juvenile Justice (Care and Protection) Act, 2015 defines the “child” means a person who has not completed eighteen years of age.

⁸¹⁵ Supra note 234, Section 68, at p. 30

⁸¹⁶ Section 2 (10) of the Guidelines Governing Adoption of Children, 2015 defines that “child legally free for adoption” means an orphan, abandoned and surrendered child declared free for adoption by the Child Welfare Committee. Guidelines Governing Adoption of Children, 2015, Ministry of Women and Child Development, issued the Notification on 17th July, 2015, p. 66, available at http://cara.nic.in/writereaddata/UploadedFile/NTESCL_635760082361561985_english%20guidelines.pdf visited on 10 / 09/2015 at 3.00 p.m.

⁸¹⁷ The Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption, 1993 has formed in respect of inter-country adoption and came in to force on May 1, 1995. The main objectives of the Convention are i. to establish safeguards to ensure that the inter –country adoptions must be take place to the best interest of child and with his fundamental rights as recognized I international law. ii. to establish a system of co-operation amongst the contracting states to ensure those safeguards are respected and to prevent the abduction, sale, or traffic in children. iii. to establish “ formal international and intergovernmental recognition of inter country adoption” iv. to secure recognition in contracting States of adoptions made in accordance with the convention.

status of the surrogate child in case abandonment. Surrogacy process is also treated immoral act as it amounts to baby selling; it separates marital sex and procreation of the child from personal family relationship. Whereas, the adoption process does not face any ethical, legal and moral issues compared to surrogacy. The total fee for IVF surrogacy process is much higher than as compared to the adoption process. The major difference between the surrogacy and adoption that decision regarding adoption is made by the birth mother on the basis of best for her children. Whereas, in the surrogacy arrangement decision regarding it, made by the commissioning parents. In treatment of infertility of the couple the object is to have the baby for the couple. Whereas, as opposite in adoption, the aim is to have a family for the baby. In adoption, even though the practice is established to ensure the best interest of a child by providing a loving and secure home, but it lacks in upbringing of the child by the adoptive couple.⁸¹⁸ However, such issue does not arise in surrogacy, because of the genetically tie between the commissioning couple and the baby. The surrogacy arrangement starts with the wishes of adults that the commissioning couple, adoption starts with the rights of the child. The surrogacy arrangements condemned not only before the birth, but before the conception because “the conceiving of children for adoption” is contrary to the dignity of the child.⁸¹⁹ In surrogacy transaction the surrogate mother receives payment for her services, whereas the adoptive mother in an adoption may not receive compensation. It is said that, in surrogacy arrangement the child is purchased by the couple after the buying the services of the surrogate. Therefore, a surrogate woman receives the payment which is against the public policy.⁸²⁰ Which may be result in the form of exploitation or even human trafficking? Whereas, in adoption, any kind of payment is made towards the adoption is prohibited. However, it is also said that the traditional surrogacy is the combination of the gamete donation and adoption.⁸²¹

⁸¹⁸ A Paper By The Iona Institute: The Ethical Case Against Surrogate Motherhood; C.f. . <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>, visited on 20/11/2014 at 2.30 pm

⁸¹⁹ *Ibid*

⁸²⁰ *Ibid*

⁸²¹ Rachel Cook and Shelly Day Sclater (eds), “Surrogate Motherhood International Perspective,” p. 123, Hart Publishing, Oxford –Portland Oregon, 2003.

v. Adoption under Surrogacy Arrangement:

In India, in surrogacy arrangement the main issue in relation to the adoption that, whether a child born out of the surrogacy arrangement to foreign nationals or to NRI is required to be adopted by the parents?⁸²² As we discussed in earlier Para in status of adoption that a Hindu person can adopt the child under the Hindu Adoption and Maintenance Act, 1956 and the Muslim, Christian, Parsis and Jews can get the guardianship and not the adoption under the Guardianship and Wards Act, 1890. Therefore, the foreigners or non Hindus couples, single parents or gay parents, they can claim only guardianship of the child under the GWA in respect of children born to out of surrogacy arrangements. In *Israeli Gay couples case*⁸²³ and in *Jan Balaz case*,⁸²⁴ in both the cases the commissioning parents were first required to adopt the child in the getting custody and legal parentage of the child after the long ache legal battle. According to the ICMR National Guidelines, 2005, the child born through the surrogacy arrangement is required to be adopted by the biological parents, unless they establish through genetic (DNA) fingerprinting the child is theirs.⁸²⁵ Thus, in the absence of law, as per the ICMR guidelines, 2005 the surrogate child is required to be adopted, however, in India under the GWA a non Hindu cannot adopt the child. Therefore, it has created too much confusion in surrogacy arrangement, especially in case of the foreign commissioning parents. Thereafter, the New Indian Visa Regulation Policy, 2012 prohibited the foreign same sex couples and single persons from surrogacy arrangement and restricted only to foreign married heterosexual couples. The Assisted reproductive Technology Bill, 2014 has stated the surrogacy option is available only to the infertile Indian married couples and only PIO, CIO, NRI and a person married to

⁸²² Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, A *Law in the Making*', (1st Edn. Universal Law Publication Co.), New Delhi, 2013., P. 7

⁸²³ The Times of India, Mumbai, 18-11-2008, The Gay couple Yonathan and Omer could not in Israel adopt or have a surrogate. Because, in Israeli law does not allow the same –sex couples to adopt or to have surrogate mother. Therefore, they came to India and in Mumbai. Yonathan donated his sperm. They selected a surrogate mother. Baby Evyatar was born. The gay couple took son Evyatar to Israel. Israeli government had required them to do a DNA test to prove the paternity before the baby's passport and other documents were prepared.

⁸²⁴ *Jan Balaz v. Anand Municipality*, AIR 2010 Guj. 21 at 14

⁸²⁵ See Para 3. 10.1. of the Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, at p.68., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

Indian citizen. The Bill has prohibited to the single person, same sex and unmarried heterosexual couples for commissioning surrogacy in India. The Government's latest instructions⁸²⁶ and the present surrogacy Bill, 2016⁸²⁷ have restricted the surrogacy to the Indian married couple only and thus prohibited all foreigners, single person, and unmarried and same sex couples. However, this surrogacy position has created the contradiction and inconsistency with the new Guidelines Governing the Adoption of Children, 2015,⁸²⁸ and the Juvenile Justice (Care and Protection of Children) Act, 2015⁸²⁹ which clearly provides that a court may allow a child to be given in adoption to single person irrespective of marital status and also allows in inter country adoption to the all foreigners irrespective any religion.⁸³⁰

Therefore, according to the Adv. Anil Malhotra the surrogacy law should be in tune with adoption laws.⁸³¹ Barbara Atwell also states that the surrogate agreements should be restructured in order to prevent the violation of adoption statutes.⁸³²

⁸²⁶ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> , visited on 10/11/2015 at 4.00 pm

⁸²⁷ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 2, Visited on 21/11/2016 at 3.00 pm.

⁸²⁸ Guidelines Governing Adoption of Children, 2015, Ministry of Women and Child Development, issued the Notification on 17th July, 2015, p. 68, available at http://cara.nic.in/writereaddata/UploadedFile/NTESCL_635760082361561985_english%20guidelines.pdf visited on 10 / 09/2015 at 3.00 p.m.

⁸²⁹ The Juvenile Justice (Care and Protection of Children), Act, 2015, at p. 27 available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, Visited on 05/01/2016 at 11.00 am. The Juvenile Justice (Care and Protection of Children), Act, 2015 has received the assent of the President on 31st December 2015,. Under Section 56 (3) A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority. Section 56 (4) A single male is not eligible to adopt a girl child. so, now foreigner can also adopt the child in India irrespective of their religion.

⁸³⁰ *Ibid* at p. 28

Section 59 (2) of the Juvenile Justice (Care and Protection) Act, 2015 provides that an eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children. (3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

⁸³¹ THE HINDU, "Ending discrimination in surrogacy laws", Anil Malhotra, May 3, 2014, available <http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece#comments> , visited on 10/02/2015 at 9.30 am

4.5.6. Consummation of Marriage:

A very significant issue is whether the conception of the wife through the Artificial Insemination of Husband (AIH) amounts to consummation of marriage or not? According to the ICMR Guidelines, 2005, para 3.16.3., that the conception of the wife through the Artificial Insemination of Husband (AIH) does not necessarily amounts to consummation of the marriage and the degree of nullity may be still be granted in favour of wife on the ground of the impotency of the husband or his willful refusal to consummate the marriage. However, such degree could be excluded on the grounds of approbation.⁸³³

4.5.7. Legitimacy of the child:

In surrogacy arrangement the significant issue about the child is the whether the child born through out of surrogacy arrangement is the legitimate child of the couple? At present, there is no law in India which can recognize the legitimacy of the surrogate child. However, the ICMR National Guidelines, 2005 in the Para 3.16.1., states that the surrogate child is the legitimate child of the commissioning couple.⁸³⁴ The Law Commission of India in its 228th report has recommended that the surrogate baby should be presumed to be the legitimate child of the commissioning couple as born out of the valid marriage in order to entitle the have legal parentage and succession.

⁸³² Barbara L. Atwell, "Surrogacy and Adoption: A Case of Incompatibility," COMBIA HUMAN RIGHTS OF LAW REVIEW, VOL.20, 1989, p. 4, available at: <http://ssrn.com/abstract=1512914> Surrogacy and Adoption: visited on 04./03/2015 at 3.30.pm

According to Babara Atwell, in adoption process the State tries to provide a suitable home for the adoptive children whose biological parents are unable or unwilling to care for them. Because, it is permanently severs the legal ties between a child and his or her biological parents. The State aim is to protect the interests of all parties that the child, the biological parents, and the adoptive parents. It also tries to prevent children from being treated as chattel.

⁸³³ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, at p.75 ., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011at 11.00.am

⁸³⁴ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, at p. 74., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011at 11.00.am

Para 3.16.1 Legitimacy of the child born through ART: "A child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance. Sperm/oocyte donors shall have no parental right or duties in relation to the child and their anonymity shall be protected except in regard to what is mentioned under item 3.12.3."

⁸³⁵ The ART Bill, 2008, and 2010 were also recognized the single person, gay couple and unmarried legal parent of the child. *Israeli Gay couple case*⁸³⁶ is the example of recognition of the legitimacy of the child of the gay couple in India.

The Gujarat High Court in the case of *Jan Balaz v. Anand Municipality*⁸³⁷ has observed that the legitimacy of the surrogacy baby is the live issue. The Court said, ‘*Can we brand them as illegitimate babies disowned by the world.*’ In this case the couple was required to adopt the child born through surrogacy. The German law did not recognize the surrogacy arrangement therefore, not accepted the surrogacy baby as legitimate baby of the couple and rejected the visa of babies. Ultimately, because of the intervention of the Supreme Court, the couple adopted the children through inter country adoption and left to Germany with surrogacy babies.⁸³⁸

Section 112 of the Indian Evidence Act, 1860 states the presumption about the legitimacy of a child born during the continuance of marriage.⁸³⁹

Therefore, the question arises whether the surrogate child can be presumed to be legitimate child of the commissioning couple under section 112 of the Indian Evidence Act, 1860? However, *the Gujarat court in Jan Balaz case*⁸⁴⁰ said, “under the Indian Evidence Act, no presumption can drawn about the legitimacy of the child born out of surrogacy mother, is the legitimate child of the commissioning couple, so as to have a legal right to parental support, inheritance, and other privileges of the child born to couple through sexual intercourse.” *The court also said only the remedy is the proper legislation drawing presumption of legitimacy of the surrogate child.*

It is also said that a presumption about the legitimacy can only be displaced by a strong preponderance of evidence and not merely by balance of probabilities as the law has to live in favour of an innocent child from being bastardized. It is settled legal

⁸³⁵ Law Commission of India Report No. 228th, at P. 26, available at lawcommissionofindia.nic.in/reports/report228.pdf. as visited on 15th May 2011 on 1400 hrs

⁸³⁶ The Times of India, Mumbai, 18-11-2008,

⁸³⁷ *Jan Balaz v. Anand Municipality*, AIR 2010 Guj. 21 at 14

⁸³⁸ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010

⁸³⁹ Batuk Lal, “The Law of Evidence”, 19th Edn. Central Law Publication Allhabad, Reprint, 2013, at P. 446.

⁸⁴⁰ AIR 2010 Guj.21

proposition that proof of non-access between the parties to marriage, during the relevant period is the only way to rebut that presumption.⁸⁴¹

According to the researcher if under the section 112 of the Indian Evidence Act, 1860 presumption cannot be drawn about the legitimacy of the child born out of the surrogacy of the commissioning couple. Then, there is need of amendment in the Indian Evidence Act in order to entry of the surrogate baby to declare the surrogate child as a legitimate of the commissioning parents. The ART Bill, 2014, under section 61 (1)⁸⁴² and the surrogacy Bill, 2016 recognizes that the surrogate child as a legitimate child of the commissioning couple.

However, the ART Bill, 2014 and latest surrogacy Bill, 2016 have not recognized the single person, unmarried couple or homosexual couples as the commissioning couple; therefore, the question is if the child born to these people will be the illegitimate child. They will not be entitled to claim parental rights and legitimacy over the surrogate child

According to Barbara Atwell, the child born through the use of Artificial Insemination Donation (AID) is deemed to be naturally conceived legitimate child of the husband and wife with both consented to use of A.I.D. Therefore, Barbara says a child born through surrogacy should be considered as the legitimate child of the surrogate and her husband, rather than the legal child of the biological father.⁸⁴³

⁸⁴¹ Mohabbat Ali Khan v. Muhammad Ibrahim Khan & Ors., AIR 1929 PC 135; Chilukuri Venkateshvarlu v. Chilukuri Venkatanarayana, AIR 1954 SC 176; Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati, AIR 1965 SC 364; Perumal Nadar (Dead) by Lrs. v. Ponnustuami Nadar (Minor), AIR 1971 SC 2352; Amarjit Kaur v. Harbhajan Singh & Anr., (2003) 10 SCC 228; Sobha Hymavathi Devi v. Setti Gangadhara Swamy & Ors., AIR 2005 SC 800; Shri Banarasi Dass v. Teeku Dutta (Mrs.) & Anr., (2005) 4 SCC 449. y

⁸⁴² The Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 51, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm. The Bill also recognizes a child born to an ever married woman through the use of assisted reproductive technology is the legitimate child of the woman.⁸⁴² If the married couple separates or gets divorced after both parties consented to the assisted reproductive technology treatment, but before the child or children are born, the child or children as a legitimate child of the couple. It also provides that if a child born to an ever married woman, artificially inseminated with the stored sperm of her dead husband is the legitimate child of the couple.

⁸⁴³ Barbara L. Atwell, "Surrogacy and Adoption: A Case of Incompatibility," at p. 39, see foot note., COMBIA HUMAN RIGHTS OF LAW REVIEW, VOL.20, 1989, available at: <http://ssrn.com/abstract=1512914> Surrogacy and Adoption: visited on 04./03/2015 at 3.30.pm

4.6. SURROGACY AND CONSUMER PROTECTION ACT, 1986

Another aspect of surrogacy that, it is alleged that surrogacy contract is the baby selling contract, it amounts to the sale of the child by the surrogate to the commissioning couple. But if we treat surrogacy as a service and the service provider are the surrogate and the ART/surrogacy clinics. So the issue is whether the surrogacy clinics and Banks can be held responsible under the Consumer Protection Act, 1986 for giving inferior service of surrogacy?⁸⁴⁴

The Supreme Court of India in the *Indian Medical Association v. VP Shanta and Others*⁸⁴⁵ has given the landmark judgment that services rendered to patient is defined as service under section 2 (1) (o) of the Consumer Act, 1986 and medical practitioner is subject to disciplinary control of MCI Act. The Consumer Protection Act also covers the surrogacy cases against doctors who have conducted ART or in *vitro fertilization* (IVF) procedure and have been negligent in providing services, such as a failure to provide basic amenities in health care of the patients or resulting in serious health complications or death or violation of medical ethics. But for lodging complaint there is a limitation period of 2 years, especially if it is for compensation under the Consumer Protection Act, 1986.

4.7. SURROGACY AND THE INDIAN CONTRACT ACT, 1872

4.7.1. Nature of Surrogacy Agreement

The law aims at the creation and protection of legal rights so as to ensure order, peace and security in the common-wealth, and the guarantee of some degree of uniformity in the conduct of human affairs. In this sense, Sir Frederick Pollock says what kind of uniformity that the law aims at?⁸⁴⁶ The law of contracts may be described as the endeavor of public authority....to establish positive sanction for the expectation of

⁸⁴⁴ Section 20 of the Medical Council of India (MCI) Act, 1956 provides for the standards for professional misconduct and etiquette and a code of ethics for medical practitioner. In India, consumer services are governed by the Consumer Protection Act, 1986. The Act covers the cases of negligence against the doctors apart from those covered by the Indian Penal Code and Criminal Procedure Code. On the other side if we assume that surrogacy as a sale of a product by the surrogate. Therefore, the surrogate is a seller, the commissioning couple is consumer and the child is the product. So in such situation does the surrogate can be held liable under the consumer protection Act, 1986 for inferior product or for a change of mind?

⁸⁴⁵ 1995 SCC (6) 651, 1996 AIR 550

⁸⁴⁶ Pollock all contracts. P1: Source T.S. Venkatesa Iyer, the law of contracts, p.2, fifth edition, 1990.

good faith which has grown up in the mutual dealing of men.⁸⁴⁷ The jurist concept of contract consists of two constituent elements, viz., obligation and agreement.⁸⁴⁸

As talking about the nature of surrogacy agreement, it is nothing an arrangement between the surrogate mother and the childless couple in which the surrogate has to carry pregnancy with the intention to relinquishment of the child after the birth to the commissioning couple. In surrogacy arrangement, the help of donor gametes (sperms or eggs) may be taken if commissioning couple is unable to produce the gametes. And in transnational surrogacy the commissioning parents enter into a surrogacy arrangement across international borders, with a woman located in another country. However, the Surrogacy agreement has challenged by both the society and the law, in terms of its recognition and regulation. The primary difficulty lies in the surrogacy arrangement while recognizing its exact nature. Some called, it is an industry, and some say it is a service or a contract for a particular purpose. According to the Centre for Social Research (CSR) that, the surrogates lose all control over their bodies when they enter into the surrogacy agreement with a clinic and the majority of the surrogates are completely illiterate or educated up to the primary level. Generally, the most of surrogacy agreements are in the English language only. Therefore, they do not understand the terms, contents and procedure of the surrogacy arrangement.⁸⁴⁹ It is also found that more than 85% of the contracts were found to be signed around the second trimester of the pregnancy.⁸⁵⁰ Hence, after the conception of pregnancy the surrogate is relied upon the mercy of the clinic and the commissioning couple. It is also revealed by the CSR that the surrogacy contract is always biased in favor of the financially secure male. Therefore, the freedom of the surrogate mother is merely a fantasy. The majority of the surrogate mothers do not received any copy of the contract. The agreement is signed between the surrogate mother (including her

⁸⁴⁷ T.S. Venkatesa Iyer, *The Law Of Contracts*, p.2, fifth edition, 1990.

⁸⁴⁸ *Ibid* at p.3.

⁸⁴⁹ Centre for Social Research (CSR), Report of the National Conference on Surrogacy, “A Policy Dialogue on Issues around Surrogacy in India” held on 22nd to 23rd September 2014 in Delhi, *C.f* https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZo_XQwY3VvcW8/view However, the Assisted Reproductive Technology Bill, 2014 has made the provision under section 47 (5) that all *consent forms and agreements signed by all the parties seeking ART services including surrogacy shall be in local language* also so that all the parties, including surrogate mother and the gamete donor can understand the contents of the consent forms and agreements.

⁸⁵⁰ Centre for Social Research (CSR), ‘Final Report Surrogate Motherhood- Ethical or Commercial’, at p. 60, available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm

husband), the commissioning parents and the fertility physicians, and nowhere any of the government authorities are parties of the agreement.⁸⁵¹ According to SAMA, the surrogate does not receive any legal aid or counsel before entering into surrogacy agreement and lawyers always make the agreement in favor of the commissioning couple with the object to protect and safeguard the interest of the couple.⁸⁵² Thus, the surrogate mothers is not only physically, but also emotionally exploited. The consent of the surrogate husband is more important for the signing of surrogacy agreement, thus, the surrogates freedom to make a contract is illusory. However, this condition also excludes the single, divorced, widowed women and even married women who wished to enter into the surrogacy agreement without the consent of the husband. Thus, in order to avoid exploitation of the surrogate regarding the terms and conditions of the agreement before the conception it must be approved by the Court.

Besides the above reality of surrogacy agreement, it has also challenged on some serious issues some argue that the surrogacy agreement is unethical, immoral practice; it is against the public policy.

4.7.2. Surrogacy and Contractual Issues

In the absence of any codified law to govern surrogacy, the ICMR National Guidelines, 2005 are applicable to surrogacy arrangement. But these guidelines are not enforceable in the Court, as it does not possess the statutory recognition. According to the Law Commission of India in its 228th report, 2009⁸⁵³ that the surrogacy arrangement will be continue to be governed by the contract amongst the parties.⁸⁵⁴ Thus, the surrogacy agreement is bound by the provisions of the Indian

851 Centre for Social Research (CSR), 'Surrogate Motherhood- Ethical or Commercial', p. 9 available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, visited on 21/10/2013 at 2.30. pm

852 Sama–Resource Group for Women and Health, Report 2012 on “ Birthing A Market: A Study on Commercial Surrogacy,” at p. 90 C.f. http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf visited on 23/10/2013 at 11. 00 am

However, the Assisted Reproductive Technology Bill, 2014 has made provision for legal assistance to a surrogate mother by the ART bank in case of dispute arise during period of surrogacy agreement. The section 60 (28) provides that the *assisted reproductive technology bank shall act as a legal representative and mental health counsellor of the surrogate mother* and on behalf of her, the assisted reproductive technology bank shall *fight any legal case*, if arises, during the course of surrogacy agreement free of cost.

⁸⁵³ Law Commission of India Report No. 228th, at P. 24, available at lawcommissionofindia.nic.in/reports/report228.pdf. as visited on 15th May 2011 on 1400 hrs.

⁸⁵⁴ C.f. <http://lawcommissionofindia.nic.in/reports/report228.pdf>, at p. 25 visited on 22/01/2011, at 4.15. pm.

Contract Act. However, the present Surrogacy Bill, 2016 does not talk about the surrogacy agreement between the parties of the surrogacy.

Till today, however, in India the practice of surrogacy is neither legal nor expressly prohibited by law;⁸⁵⁵ hence the status of the surrogacy agreement has become the controversial on various contractual issues such as whether the surrogacy agreement is illegal in India? Is the contract itself valid? Whether surrogate should be paid for surrogacy transaction?⁸⁵⁶ Whether commercial surrogacy is immoral and is opposed to public policy and therefore void u/s 23 of the Indian Contract Act. Whether the surrogacy agreement can be enforceable under section 10 of the Indian Contract Act, 1872?⁸⁵⁷ What will happen if any one of the party breaches the contract? And what is the remedy available to the aggrieved party in case of breach of the contract? Whether consent given by the surrogate woman is valid before the birth of the child for the relinquishment? The problem with the surrogacy agreement is that despite of the absence of any statutes or legal position regarding the surrogacy transactions, the surrogacy agreements are extensively the entered into in some part of India. Secondly, the subject matter of the surrogacy contract i.e. surrogate child is a human being and as such cannot be the subject matter or object of contract. Questions may also arise regarding the validity, of such contracts with or without the consent of the husband as under the Contract Act only a major i.e. who is 18 years of age as per the provisions of the Indian Majority Act, 1875, is competent to enter into a contract. In India, in spite of several statutory provisions the marriages of the children are solemnized before attaining the majority. There is no provision declaring a child born by a girl before she attained majority as illegitimate or illegal. Therefore, the question may arise as to whether the minor girl or parents or husband on her behalf can enter into the contract of surrogacy or artificial insemination. Section 112 of The Indian Evidence Act, 1872 provides for a presumption of a child being legitimate, and such a presumption can only be displaced by a strong preponderance of evidence and not merely by balance of probabilities as the law has to live in favour of an innocent child

⁸⁵⁵ Jan Balaz vs. Anand Municipality, AIR 2010 Guj 21 at 14

⁸⁵⁶ Dr. G. A. Solanki, "Birth Orders, Baby Farms, and Surrogate Motherhood- A Womb for Rent," GRA; Global Research Analysis International: Vol II Issue 5. October 2012, C.f. http://worldwidejournals.com/gra/file.php?val=October_2012_1350412513_d4107_36.pdf

⁸⁵⁷ *Jayashree Wad v. Union of India & others*, W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

from being bastardized.⁸⁵⁸ It is settled legal proposition that proof of non-access between the parties to marriage during the relevant period is the only way to rebut that presumption⁸⁵⁹.

The researcher in this para is discussing about contractual issues of the surrogacy agreement in relation with the Indian Contract Act, 1872. The Indian Contract Act, 1872 does not contain any provisions for the entering into any surrogacy agreement. However, when the provisions do not apply to the surrogacy contract, the principles of English would apply. The Supreme Court held in *Bhagwan Das Goverdhan Das Kedia v. Giridhari Lal Purushotam Das and Co.*⁸⁶⁰

ALL CONTRACTS ARE AGREEMENTS BUT

ALL AGREEMENTS ARE NOT CONTRACTS

An agreement enforceable by law is called as the contract.⁸⁶¹ It means the agreement must be enforceable under the law in for in order to become contracted. Therefore, it is said that all contracts are the agreements, but all agreements are not contracts. Thus, for the enforceability of the agreement under the law, the agreement must satisfy all the conditions of section 10 of the Indian Contract Act, 1872.⁸⁶²

Section 10 of the Indian Contract Act, 1872 Provides that:

“All agreements are contracts if they are made by the free consent of the parties competent to contract, for lawful consideration and with a lawful object and are not hereby expressly declared to be void.”⁸⁶³

Thus, in the context of any surrogacy agreement which is arrived at by the free consent of the parties who are competent to contract and who have entered into the

⁸⁵⁸ Hon’ble Dr. Justice Balbir Singh Chauhan, “ Women, Law and Morality” at p. 23, Bharati Law Review, Vol. I-Issue 3 Jan – Mar, 2013

⁸⁵⁹ Mohabbat Ali Khan v. Muhammad Ibrahim Khan & Ors., AIR 1929 PC 135; Chilukuri Venkateshvarlu v. Chilukuri Venkatanarayana, AIR 1954 SC 176; Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati, AIR 1965 SC 364; Perumal Nadar (Dead) by Lrs. v. Ponnustami Nadar (Minor), AIR 1971 SC 2352; Amarjit Kaur v. Harbhajan Singh & Anr., (2003) 10 SCC 228; Sobha Hymavathi Devi v. Setti Gangadhara Swamy & Ors., AIR 2005 SC 800; Shri Banarasi Dass v. Teeku Dutta (Mrs.) & Anr., (2005) 4 SCC 449.

⁸⁶⁰ AIR 1996 SC543

⁸⁶¹ Section 2 (h) of the Indian Contract Act, 1872 provides the definition of contract.

⁸⁶² R.K. Bangia, Contract –I, Allahabad Law Agency, Sixth Edn. Reprint, 2012, at P. 3

⁸⁶³ *Ibid*

agreement for lawful consideration and also with the lawful object which is not expressly declared to be void would be a contract. The surrogacy arrangement is also covered by the Indian Contract Act because parties enter into surrogacy agreement. In other words, when surrogacy agreement fulfills all the ingredients of the Indian Contract Act, there cannot be any hesitation in recognizing the surrogate contracts as valid contracts by the courts. It is settled law of the Supreme Court of India in *Bihar State Electricity Board Patna v. M/S. Green Rubber Industries*,⁸⁶⁴ that a person who signs the document containing terms (standard form) is normally bound by them even though he has not read them and even though he is ignorant of the precise legal effect. At the same time the Supreme Court of India also held in *Nuclear Power Corporation v. Gajraj Singh and Another*⁸⁶⁵ that the enforceability of the contract do not depend upon the intention of the party to create legal relationship which is created by the contract between the parties.

According to the Indian Contract, 1872, for legality and validity of the agreement it should have both lawful consideration and lawful object. Under section 23 of the Act, 1872⁸⁶⁶ the consideration and object is said to be unlawful, when it is immoral and against public policy.⁸⁶⁷ Hence, for valid contract the lawful consideration and lawful object is necessary. It means an agreement should not be immoral and against public Policy. However, it is alleged that the surrogacy agreement is immoral and against public policy, hence it is void agreement. Because a woman who bears the child for the commissioning couple and agree to relinquish all parental rights of the surrogate child for payment or consideration is void, because it is in contravention of statutory enactments, since the contract involves bartering of human lives and also, infringes public policy.

⁸⁶⁴ AIR 1990 SC699

⁸⁶⁵ AIR 1995 C 1606

⁸⁶⁶ R.K. Bangia, Contract –I, Allahabad Law Agency, Sixth Edn. Reprint, 2012, at p. 189, section 23 of the Indian Contract Act 1872 states that what consideration and objects are lawful, and what not. It means the consideration or object of an agreement is lawful, unless, it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

⁸⁶⁷ *Ibid*

The researcher in following Para is discussing about whether the consideration and the object in surrogacy agreement are unlawful? And whether it is against public policy?

1. Consideration in Surrogacy Contract:

According to Anson “consideration is necessary for formation of every simple contract.” A promise without the consideration is not actionable in English law.⁸⁶⁸ Lord Denning says “consideration is the cardinal necessity of the formation of a contract.”⁸⁶⁹

Under the Indian Contract Act, the lawful consideration and lawful object is the essential ingredient of the valid contract and the courts should not regard it as immoral and against the public policy.⁸⁷⁰ The surrogacy agreement, however, entered with the stranger which led to payment of money for carrying the child through ones womb. That is the third party reproduction of child. But when the payment is involved, it is alleged that it amounts to sale of child,⁸⁷¹ leasing of the womb, exploitation of woman luring for money⁸⁷² and making woman as a machine for the procreation of children etc., therefore, in such cases the surrogacy contract would be illegal and unenforceable.

The most significant criteria for validity of the contract are the agreement without the consideration is void and unenforceable. Therefore, in both ways the surrogate contract cannot be said to be void, since the consideration in any type of contract is an essential element. According to the general rule of the contract that an agreement without the consideration is void i.e. as per the *latin* maxim “***Ex Nudo Pacto Non Oritur Actio.***”⁸⁷³ Therefore, in surrogacy contract the consideration is an essential element. However, some restrictions on consideration are desirable to avoid the exploitation by all the parties to the contract.

⁸⁶⁸ S.K. Kapoor, “Contract-I and specific Relief Act” 12th Edn. Central Law Agency, 2010, at p.70

⁸⁶⁹ *Ibid*

⁸⁷⁰ *Supra* note p239

⁸⁷¹ *Supra* note p. 44

⁸⁷² *Supra* note p. 20

⁸⁷³ “*Ex nudo pacto non oritur actio*” is a Latin phrase. It means ‘no right of action arises from a contract entered into without consideration.’ A cause of action cannot be based upon a mere promise or bare agreement, without a legal consideration. It states that a right of action does not arise from a naked or nude contract.

2. Surrogacy Contract opposed to Public Policy

The consideration or object of the agreement is unlawful if “the court regards it as immoral or opposed to the public policy.”⁸⁷⁴ Therefore, it is very necessary to discuss the ground of immorality and public policy separately.

i. What is Immoral?⁸⁷⁵

What is immoral at a material time depends upon the facts and circumstances of the case and prevailing standards of the morality in the society. Some acts are regarded as immoral since time immemorial and may continue to be regarded as such. Thus, if the landlord gives his lodging to a prostitute on rent to enable her carry on her profession, he cannot recover the rent. In *Rajat Kumar Rath v. Government of India & Another*⁸⁷⁶ held that under section 23, the contracts immoral and opposed to public policy are void and not illegal. However, the Chief Baron said in the landmark case *Pearce v. Brooks*⁸⁷⁷ that it is settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it’s going to be used for the immoral purpose, cannot recover the price or thing so supplied. He also said there can be no distinction between immoral and illegal purpose. Therefore, according to the *Latin maxim* “*Ex turpi causa non oritur actio*” no cause of action arises out of illegal or immoral act, hence the plaintiff has no legal remedy for his own immoral or illegal act.⁸⁷⁸

In *Gherulal Parekh v. Mahadeodas Maiya*⁸⁷⁹ Subha Rao, J., said that the settlement in consideration of concubinage, contracts of sale or hire of things to be used for a brothel or by the prostitute use for the same purposes, agreements to marriage for consideration or contract facilitating divorce are void agreements on the ground that the object is immoral.

The surrogacy agreement is the new assisted reproductive technology. Therefore, it is very difficult to treat the surrogacy agreement is as immoral or illegal on the ground

⁸⁷⁴ Section 23 of the Indian Contract Act, 1872

⁸⁷⁵ *Supra* note p. 11

⁸⁷⁶ AIR 2000 Ori.32/34

⁸⁷⁷ (1866) LR 1 Ex. Ch. 213, 217, 218

⁸⁷⁸ S.K. Kapoor, “Contract-I and Specific Relief Act” 12th Edn. Central Law Agency, 2010, at p.107

⁸⁷⁹ (1959) 2SCR 342 at PP. 371-75

of sale or leasing of a womb or equivalent to prostitution or purchase of the parental right of the surrogate by the commissioning couple. Many of the commissioning couples and surrogates are entering into surrogacy agreement. This means the moral principles are changing from time to time depending upon the facts of the case. Today, society is in need of surrogacy arrangement for avoiding the stigma of childlessness. The researcher has already given the detailed study in Para of the relation amongst surrogacy, law and morality.⁸⁸⁰

ii) Opposed to Public Policy:

The term opposed to public policy is very vague, uncertain and covers a wide range of topics. Therefore, it is not capable of any precise definition. Public policy means the policy of law at the stated time. An act which is injurious to the interest of the society is against public policy.⁸⁸¹ In England, an agreement which tends to be injurious to the public or against the public good is void at common law as being contrary to public policy.⁸⁸²

Definition of Public Policy

The Major Law Lexicon⁸⁸³ defines the “Public Policy” as: “The policy of the law; the policy in relation to the administration of the law and practically synonymous with public good or public welfare.”

The Words and Phrases Legally Defined,⁸⁸⁴ defines public policy to mean: “The ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest, public policy is not, however, fixed and stable.”

Public policy is “a principle of judicial legislation or interpretation founded on the current needs of the society.”⁸⁸⁵

⁸⁸⁰ *Supra* note P. 11

⁸⁸¹ R.K. Bangia, Contract –I, Allahabad Law Agency, Sixth Edn. Reprint, 2012, at P. 207

⁸⁸² Halsbury’s Laws of England, 3rd Edn. Vol. 8, Para 223 at p. 130

⁸⁸³ P. Ramanathaaiyar, The Major Law Lexicon 5526 (4th Ed., 2010).

⁸⁸⁴ David Hay, Words And Phrases Legally Defined 694 (Vol. 2, 4th Ed., 2005).

⁸⁸⁵ 42 Harvard Law Review 76, See Public Policy in English Common Law

According to Clarke E. Cohen, “the term public policy always refers to the actions of Government and intentions that determine those actions”⁸⁸⁶

Burrough, J., said in *Richardson v. Mellish*,⁸⁸⁷ that, “Public Policy is a very unruly horse and once you get astride it, you never know where it will carry you”

The Supreme Court of India in ***Gherulal v. Mhadeodas***⁸⁸⁸ observed that the Public policy is an elusive concept. It is ‘untrustworthy guide’, ‘variable quality’, unruly horse. The primary duty of the court is to enforce a promise which the parties have made and to uphold the sanctity of contract which forms the basis of society.

It means, on one hand person’s right of contractual freedom should be maintained. On the other hand, if the contract is against the public policy, law must not allow that to be enforced. It is for the courts to expound the concept of public policy. The concept of freedom of contract has been considered to great significance; therefore it would be unjust if the courts are given freedom to interfere with the contracts of their own notion of public policy.⁸⁸⁹ It is stated that the task of a Judge is “to expound and not to expand” the law.⁸⁹⁰

The courts do play great role in interpreting, whether the agreement is in consonance with the recognized public policy or not? Thus, the decision of the court would depend upon the recognized notions of the interest of the community at a particular time. Notions could vary from country to country and from time to time.⁸⁹¹ With the changing times the public policy demanded due protection of the weaker party, if the parties have unequal bargaining power. So in surrogacy agreement the surrogate should be protected as a weaker party of the agreement.

Public policy is a basic set of policies forming the foundation of the public laws, especially such policy not yet formally enunciated.⁸⁹² Public policy term used to describe the laws, decisions, regulations, etc. of a Governmental body. In other

⁸⁸⁶ *Ibid*

⁸⁸⁷ (1831) Bing. 229.

⁸⁸⁸ AIR 1959 SC 781 at P. 795

⁸⁸⁹ *Ibid*

⁸⁹⁰ *Fender v. John Mildmay*, (1938) A.C 1 at P. 23

⁸⁹¹ *Supra* note 254

⁸⁹² The term Public policy always refers to the actions of the Government and the intentions that determine those actions. Clerk E. Cohern Harvard Law Review, 76, See Public Policy in English Common Law.

words, one can understand that public policy is a set of principles laid down by the government (sovereign) for the purpose regulating the action of men and communities to achieve good for the entire community or policy or for public welfare. Thus, any act considered being harmful to the welfare of community, society of the state is always held to be against the public policy and said acts are enforceable.

The '**Doctrine of Public Policy**' is based on the *Latin* maxim "***Ex Turpi Causa Non Oritur Actio***" which means: "*an agreement which opposes public policy would be void and of no effect*"⁸⁹³

"Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

However, the Supreme Court in ***Gherulal Parekh v. Mahadeodas Maiya***,⁸⁹⁴ has observed, "though the heads of public policy are not closed and though theoretically, it may be permissible to evolve a new head under exceptional circumstances of a changing world. However, it is advisable in the interest of the stability of society, not to make any attempt to discover new heads in these days." *J., Chinnappa Reddy* has observed in ***Ramchand Hirachand v. Askar Nawaz Jang and others***⁸⁹⁵ that in modern progressive society with fast changing social values and concepts, it becomes more imperative to evolve the new heads of public policy, whenever necessary to meet the demands of the new situation. Madan, J., of the Supreme Court has also observed in ***Central Inland Water Transport Corporation v. Brojo Nath Ganguly***,⁸⁹⁶ *that the principles governing public policy must be capable on proper occasion of the expansion or modification.* He said the concept of public policy is uncertain. Therefore, any matter which is harmful or injurious to the public good, public welfare or public interest can be said to be opposed to public policy.

⁸⁹³ *Supra* note 254 at p. 208

⁸⁹⁴ AIR 1959 SC781 at P. 795.

⁸⁹⁵ AIR 1976 AP 112 at p. 117.

⁸⁹⁶ AIR 1986 SC 1571 at p. 1612.

Recently, the Supreme Court in case of *Indian Financial Association of Seventh Day Adventures v. M.A. Unneerikutty*,⁸⁹⁷ has elaborated the public policy in following words:

“The term ‘public policy’ has an entirely different and more extensive meaning of the policy of the law. It is the principle of judicial legislation or interpretation founded on the current needs of the community.”

Section 23 of the Indian Contract Act has used the word “opposed to public policy” but the Indian Contract Act does not define the expression “public policy” or “opposed to public policy” or “against the Public policy”. From the very nature the term “public policy” or “opposed public policy” are incapable of precise definition. The public policy, however, is not the policy of a particular government. It specifically expresses the matter which more concern with the public good and public interest. Thus, the concept of what is public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time, society to society and generation to generation. As new concept takes place of the old, the government and the court must also change their mind and change the public policy according to the need and necessity of the society.

When we look at the subject of surrogacy, it may not be entire public or entire society as a whole is going to involve in it, but only small sections of the community is involved that is childless or infertile couples. Thus, it is estimated that 15 per cent couples around the world are infertile.⁸⁹⁸ The Hague conference on Private International Law, 2014, has reported that, in 2010, it is that estimated 48.5 million couples worldwide were said to be infertile.⁸⁹⁹ India has an estimated 19-20 million infertile couples, according to the World Health Organization (WHO).⁹⁰⁰ Therefore, public policy may not be for the entire community or society of the state, but for the good given society, that the childless couple.

⁸⁹⁷ (2006), 6 SCC 351.

⁸⁹⁸ The Assisted Reproductive Technologies (Regulation) Bill-2010, at p. 1 available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf.

⁸⁹⁹ Hague Conference on Private International Law, “The Desirability And Feasibility Of Further Work on The Parentage / Surrogacy Project”, April 2014 at p. 8 available at https://assets.hcch.net/upload/wop/gap2014pd03b_en.pdf visited on 23/12,2014

⁹⁰⁰ Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medico legal Issues’, 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 5

The law grows with the growth of the society. The public policy must be changed with the change of the society and the law. When everything changes with the change of the society from time to time, the public policy and law must change according to the test of the society. Otherwise law and public policy will not be followed by the society and given community and implementation of law and public policy will be uncertain. Finally, rendering justice, fair play, equity and natural justice cannot meet the true spirit by the Courts. Ultimately, justice will be defeated. Hence, the surrogacy as a new reproductive technology developed by the science for the public good and public welfare and it also bring the economy of the government. As reported by the HINDUSTAN TIMES that, India has become an international hub for commercial surrogacy and had business an annual worth of at least \$445 million (Rs 2,900cr).⁹⁰¹ The reproductive technology developed by the science for those who wish to have their own genetic children. In other ways the surrogacy brings harmony in the family life of those with infertility problems and saves the breakage of the family life of millions of couples who are childless in the world. Hence, the progress of science has to be honoured by all the societies, including India. Thereby public policy on surrogacy program is required to be evolved by the society and the law.

According to the section 23 (4) of the Indian Contract Act provides that the, an agreement opposed to the public policy is void and unlawful. But after the study of the concept of public policy and act of surrogacy the researcher has found that the surrogacy agreement entered by the surrogate mother and the commissioning couple for procreation of genetic children for the infertile parents is not at all, harmful to the individual or society or State. Therefore, the agreement entered by the surrogate mother with commissioning couple is not at all against the public policy or opposed to public policy. Thus, the surrogacy program is for the public good and sacred act which helps the childless couple to have their own genetic child.

If we the surrogacy from the Indian context, and in the absence of law and precedents on the subject of surrogacy, utilizing the new reproductive technology in begetting own biological or genetic children may not be viewed as against the public policy or law because the reproductive technology is one way or the other way for the good of

901 HINDUSTAN TIMES, 'Govt bans import of human embryos for commercial surrogacy', New Delhi, Oct 28, 2015 16:29 IST, *c.f* <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

the society, particularly, for betterment of barren couple. It also saves the family life of the couple from getting divorced or breakage due to the childlessness. Even surrogate mothers carrying the child through her womb will be replaced by the artificial wombs or incubators. A government or a sovereign authority cannot stop the progress of science. Public policy also supports the promotion of the family unit.

However, when we look at the other side of the surrogacy contract, it is found that the surrogacy agreement itself has challenged on a number of reasons which make it as against the public policy. The researcher has already discussed the various issues regarding the surrogacy agreement in earlier Para's. However, it is argued that, surrogacy agreement destroying the family structure, because the surrogate intentionally enters the agreement for money and later abandoning the child and it also destroying the family unit. It also stated that it violates public policy against the financial needy women. It makes the women as professional baby makers. The surrogacy contracts had made the dangerous distinction between wealthy class and poor class, where wealthy people employ the poor women as a breeding class to produce babies for the upper class. Another reason the child bearing is sacred and personal but surrogacy agreements have made it as commercial. Since the surrogacy agreement is deemed to be violate the public policy, hence should be declared as void and unenforceable. It is also said that when a contract violates public policy, it need not declare the entire contract is void but may refuse to enforce only a portion of the contract.⁹⁰²

The supreme court of New Jersey in ***Re Baby M case***⁹⁰³ held that the surrogacy agreement is against the public policy and it did not take into account the child's best interest and awarded custody to the commissioning couple and visiting rights to surrogate.

Differently from the supreme court of New Jersey, the Kentucky Supreme Court in ***Surrogate Parenting Associates, Inc. v. Commonwealth ex rel. Armstrong***⁹⁰⁴ held that the surrogacy agreement did not violate the doctrine of public policy. The court

⁹⁰² Barbara L. Atwell, "Surrogacy and Adoption: A Case of Incompatibility," COMBIA HUMAN RIGHTS OF LAW REVIEW, VOL.20, 1989, available at: <http://ssrn.com/abstract=1512914> Surrogacy and Adoption: visited on 04./03/2015 at 3.30.pm

⁹⁰³ 109 N.J. 396, 537 A 2d 1227

⁹⁰⁴ 704 S.W.2d 209 (Ky. 1986).

recognized that the surrogacy agreement promotes the family unit, rather than tends to its destruction and also noted that the best interest of the child would always be paramount over the parties of the contractual commitments.

The researcher after the study of the concept, definition and case laws of public policy, that public policy is the relative term which changes from society to society and generation to generation. The surrogacy agreement must be interpreted in the light of the provisions of Indian Contract Act, 1872. However, just because of the surrogacy contract involves a human being as a subject matter of contract, it must not be held to be invalid. It is the need of the hour and the demand of the society. Therefore, it should not be prohibited and treated as opposed to the public policy. Thus, it is the responsibility of the court to identify the real issue as to whether the surrogacy contract in fact violates the public policy or not. The relevancy of the public policy as defined by the Supreme Court in *State of Rajasthan v. Basant Nehra*⁹⁰⁵ which reads as under:

“Public Policy connotes some matter which concerns the public good and the public interest.” Therefore, the concept of public policy itself is not static, but it’s capable of changing with the time.”

Therefore, today the society has been acknowledged, and demanding the surrogacy arrangement as a last rays of hope to fulfill the dream of parenthood their own genetic child. It is also stated that, the term ‘public policy’ under Section 23 of Indian Contract Act, 1872, may not be applicable to the surrogacy because of two reasons: **first**, Public policy is not defined anywhere specifically and is a relative term; **Second**, surrogacy, being need of the hour and demand of the society, is hard to define and hence, it is uncertain if the prohibition of public policy also encompasses a surrogacy transaction.⁹⁰⁶ However, the surrogacy contract may be detrimental to surrogate, and even to the well being of the surrogate child, therefore, the legislature is under duty to protect the interest of surrogate and surrogate child by recognizing their legal and natural rights in the statute.

⁹⁰⁵ (2005) 12 SCC 77

⁹⁰⁶ Apoorva Mishra, “Surrogacy Transaction A Perspective On The Constitutional and Contractual Aspects”, 3(1)NLUJ Law Review 134 (2015), Cf. <http://www.nlujodhpur.ac.in/downloads/lawreview/7.pdf>

Today, the position of surrogacy law seems to be uncertain. And at presently, there is no statutory law or precedent. Hence, it is unclear whether the surrogacy arrangement can be termed as a contract or not? But it is significantly noted that the judiciary of India, including the Supreme Court has accepted the concept of surrogacy to be legal by giving due regard to the surrogacy agreements.⁹⁰⁷ Recently, the Supreme Court of India in *Jayashree Wad v. Union of India & Ors*⁹⁰⁸ has framed the issue that whether the surrogacy agreement is opposed public policy, whether it is enforceable under section of the Indian Act, 1872. The Court also ordered on 2nd December 2015, regarding the prohibition of the commercial surrogacy arrangement and restrict to Indian married infertile couple only.⁹⁰⁹ Another difficulty has been created by the definition of surrogacy agreement about the content of the agreement. The section 2 (zs) of the Assisted Reproductive Technology (Regulation), Bill, 2014 defines the surrogacy agreement as follows:

“Surrogacy agreement” means an agreement between the commissioning couple and the surrogate for providing the services of ART.

This definition has created the problems about the contents such as what terms and conditions has to be drafted, the requisition of meeting of minds i.e. ‘*consensus ad idem*’ of the parties, common points of the agreement of parties, what steps and what compliances are to be taken of what should be the format of such a draft, what kind of breach may occur in case of the surrogacy contract and relief to the party in case of breach, what should be damages paid to the aggrieved party.⁹¹⁰ Therefore, all necessary things are required to be kept in mind while drafting a surrogacy contract. Hence, the surrogacy agreements have to be drafted with great care and caution, since there are several factors surrounding surrogacy, which are sensitive such as

- i. The subject matter of the contract is a human being.
- ii. The object of the contract is to a conceive the pregnancy by artificial ways of reproduction, which was not yet known the society at large;

⁹⁰⁷ *Baby Manji Yamada v. Union of India & Anr.*, AIR 2009 SC84. The Supreme Court has observed since there is no legislative law of surrogacy in India. It means surrogacy is legal in India.

⁹⁰⁸ *Jayashree Wad v. Union of India & Ors.* W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

⁹⁰⁹ *Union Of India & Anr v. Jan Balaz & Ors.* (Pending in Civil Appeal No(s). 8714/2010 , With W.P.(C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

⁹¹⁰ Supra note 278

- iii. Regarding the payment monetary compensation to surrogate mother and its mode.
- iv. The identity and privacy of the surrogate mother.
- v. The rights of the parties before, during and after the contract including surrogate child.
- vi. Risk attached to the life/body of the surrogate mother.
- vii. About the legal status of the child.⁹¹¹

Ultimately, the public policy means which are related to the public good and public interest. It is not a static concept, but changing from time to time. Today the society's need of the hour demands the surrogacy as a new reproductive technology is a better option to childless or infertile couple. According to the Bentham principle "*greatest happiness of the greatest number of people*" should be achieved by doctrine of public policy in the interest of infertile couple. However, presently the concern is the how to enforce the surrogacy agreement since there is no statutory law on surrogacy in India.

4.8 Enforceability of Surrogacy Agreement under CPC, 1908

The most crucial question in surrogacy arrangement is the enforceability of the surrogacy contract and damages for breach of contract. Whether the contract entered by the commissioning couple and the surrogate mother for carrying the child is valid or not? If we think it is not valid then, how it required to be dealt. And if it found to be valid, how it can be enforced in court of law for breach of the terms entered therein?

There is no uniform law on surrogacy in this world, especially in those countries practicing surrogacy. Hence, the enforceability of the surrogacy contract is remains as a complicated issue before the courts throughout the world. The U.S. Court in *Soos v. Superior Court Country of Maricopa*⁹¹², have questioned the validity of surrogacy contract, held these contracts are unenforceable as it amounts to baby selling which is illegal and against public policy.

⁹¹¹ Supra note 278

⁹¹² 879 p. 2d 1356 (Ariz. App. Div. 1994)

The most controversial question of the surrogacy arrangement that whether the agreement is still enforceable, if the surrogate mother refuses to hand over the baby to the commissioning couple.⁹¹³

In India, in the absence of any codified law to govern surrogacy, the ICMR National Guidelines, 2005 are applicable to surrogacy arrangement. But due to the non-statutory status, they are not justifiable and enforceable in the Courts. According to the Law Commission of India in its 228th report, 2009⁹¹⁴ that the surrogacy arrangement will be continue to be governed by the contract amongst the parties and suggested to make surrogacy for regulating ART Clinics as well as protection of the rights of the parties of surrogacy.⁹¹⁵ The government has prepared a new draft of ART Bill, 2014 as well as Surrogacy Bill, 2016 however; the Bill is not yet passed, so, till today no law available in India.

The question of the enforceability of the surrogacy contract remains questionable, unless the legal disputes likely to develop therein. The surrogacy contract is nothing less than any other contract. When it is a contract, there is every possibility of developing disputes,⁹¹⁶ which inevitably requires the legal interpretation and proper adjudication. What is required for a valid contract is the promisor and promise. The promisor makes the proposal and promise accepts the proposal with the intention to create the legal relationship between them. In surrogacy agreement also the commissioning couple makes the proposal to surrogate to act as surrogate mother and she accepts it. The said proposal and acceptance should be entered by the competent parties. Competent person is one who is of age majority, according to law (i.e. Indian Majority Act, 1875)⁹¹⁷ and who should be sound mind and not disqualified by the law

⁹¹³The *Baby M Case* (537 N.J. 396, 1988) was the first case to be decided on issue of enforceability of surrogacy contract. In this court held that the surrogacy agreement is opposed to the public policy hence, it is not enforceable. However, for the best interest of the child the court granted the custody of the child to the commissioning couple and visitation right to surrogate mother Mary Whitehead.

⁹¹⁴ Law Commission of India Report No. 228th, at P. 24, available at lawcommissionofindia.nic.in/reports/report228.pdf, as visited on 15th May 2011 on 1400 hrs

⁹¹⁵ C.f. <http://lawcommissionofindia.nic.in/reports/report228.pdf>, at p. 25 visited on 22/01/2011, at 4.15. pm.

⁹¹⁶ In *Baby Manji case* the issue of Nationality and in *Jan Balaz case* the issue of the custody of child was raised. Whereas in Israeli Gay couples case the legal parentage and Citizenship were challenged.

⁹¹⁷ Section 3 of the Indian Majority Act, 1875 prescribe the age of majority as 18 years in case of having natural parents and under section 4 if guardian is appointed by the court i.e. not having natural parents then age of majority is 21 years. Hence, if any person who have not attended the age of majority i.e. 18 or 21 as case may be are incompetent to enter into contract.

from contracting (Section 11 of the Indian Contract Act) and said consent of the proposal and acceptance to be with free will (Section 14 of I.C.A.). It envisages that consent should not be taken under coercion, undue influence, fraud, misrepresentation and mistake. Finally, the agreement should be made with the lawful object and consideration (Section 23 of I.C.A) and it should not be declared as void by the law (Section 24 of I.C.A). Thus, when the commissioning couple and the surrogate mother fulfill the essential ingredients of section 10 of the Indian Contract Act,⁹¹⁸ then the surrogacy contract is considered to be a valid contract, since as per the prevalent law in India the surrogacy procedure is legal in India, however, today the commercial surrogacy is not legal.⁹¹⁹ Thus, till the passing of the law on surrogacy, the ordinary civil law of land would be applicable for the enforceability of the surrogacy arrangement.⁹²⁰ Section 9 of the CPC, 1908 gives power to the Courts to entertain all Civil Suits unless they expressly and impliedly barred.⁹²¹ The section 9 of the Civil Procedure Code, 1908 provides as follows:

“The Courts shall (subject to the provisions herein contained) have jurisdiction to try all Suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.”⁹²²

⁹¹⁸ Section 10 of the Indian Contract Act 1872 provides that, “All agreements are contracts if they are made by the free consent of the parties competent to contract, for lawful consideration and with a lawful object and are not hereby expressly declared to be void.”

⁹¹⁹ However, after the order of the Supreme Court in *Jayashree Wad* case the commercial surrogacy arrangement is prohibited in India and same instructions letter are issued by Government of India on 4th November 2015. Therefore, today the commercial surrogacy arrangement is prohibited. Therefore, the question of whether to legalize or not to legalize the commercial surrogacy in India will clear after passing surrogacy law by the legislature. C.f. <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> visited on 10/11/2015 at 9.30.pm

⁹²⁰ The Code of Civil Procedure, 1908, is an Act made by the Parliament for the entire territorial jurisdiction of India as federal/central law to consolidate and amend the laws relating to the procedure of the courts of civil judiciary.

⁹²¹ Anil Malhotra, Ranjit Malhotra, ‘Surrogacy in India, *A Law in the Making*’, (1st Edn. Universal Law Publication Co.), New Delhi, 2013., P. 47

⁹²² C. K. Takwani, ‘Civil Procedure’, Sixth Edn., Eastern Book Company, Lucknow, 2014 at p. 49 However, the section 9 -A is inserted after the amendment for its application to the State of Maharashtra, Section “9-A provides that, where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue.- (1) Notwithstanding anything contained in this Code or any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be

Two Conditions:

A Civil Court has jurisdiction to try a suit if two conditions are fulfilled:

- i. The suit must be of a civil nature; and
- ii. The cognizance of such suit should not have been expressly or impliedly barred.⁹²³

Who may decide?

It was well-settled that a Civil Court has inherent power to decide its own jurisdiction.⁹²⁴

Presumption as to Jurisdiction:

A Civil court's jurisdiction to entertain a suit is barred or not, it is always every presumption should be made in favour of the jurisdiction of the civil court.⁹²⁵

Burden of proof:

It is for the party who seeks to oust the jurisdiction of the Civil Court to establish it.⁹²⁶ According to the full bench of the Calcutta High Court in **Hirday Nath v. Ram Chandra**⁹²⁷ that the jurisdiction means the power to hear and determine the case and to adjudicate and exercise any judicial power in relation to it. It means the authority of the court to decide the litigated matter before it. Supreme Court while interpreting the section 9 of the Code of Civil Procedure in **E. Achutan Nair v. P. Narayanan Nair**⁹²⁸ has held in this regard hereunder:

“In India, the question whether a suit is cognizable by a Civil Court is to be decided with the reference to section 9 of the Civil Procedure Code. If the suit is of the civil nature, the court will have jurisdiction to try the suit unless it is either expressly or impliedly barred.”

heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit. [Vide Maharashtra Act No. 65 of 1977, sec. 3 (w.e.f. 19-12-1977)].

⁹²³ *Ibid* at P. 50

⁹²⁴ *Bhatia Coop. Housing. Society Ltd. v. D. C. Patel*, AIR 1953 SC 16 at p. 19

⁹²⁵ C. K. Takwani, 'Civil Procedure', Sixth Edn., Eastern Book Company, Lucknow, 2014 at p. 54

⁹²⁶ *Ibid* at 55

⁹²⁷ AIR 1921 cal. 34

⁹²⁸ AIR 1987 SC2137

The Supreme Court further in another case *P.M.A. Metropolitan v. M.M. Marthoma*⁹²⁹ has held that “the expansive nature of the section is demonstrated by the use of phraseology both the positive and negative. The earlier part opens the door widely and later debars the entry to only those which are expressly and impliedly barred. It means no court can refuse to entertain matter a suit if it is of civil nature because of the use of word shall and expression of “all suits of civil nature.” Hence, the word ‘civil nature’ is wider than the ‘civil proceedings’. The section would, therefore, be available in every case where the dispute has the characteristic of affecting one’s rights which are not only civil but of a civil nature.

It has become very clear now that after the study of section 9 of the CPC and case laws that the surrogacy agreement which is a valid contract under the Indian law and can be the subject of settlement through the Court of competent civil jurisdiction by a civil suit and there would be no bar to maintainability of such civil suit. Thus, the surrogacy agreement which satisfies the ingredients of the section 10 of the Indian Contract Act, 1872 would be contracts which are enforceable in a civil court since cognizance of civil suit would neither expressly or impliedly barred.⁹³⁰ Therefore, every surrogacy agreement has to be tested upon the touchstone of the essential ingredients of the section 10 of the ICA to confirm whether such agreement is valid under the Indian law for the enforcement in Indian Court of law. Thus, the validity and enforceability of any surrogacy agreement can be achieved by preferring civil suit under section 9 of the code of civil procedure by seeking appropriate relief such as declaration and injunction may be prayed. However, it is very important and necessary that the both parties should take legal counseling before entering into surrogacy agreement.

4.9 CONCLUSION

Basically, the surrogacy arrangement is a very complex by its nature, as it involves several issues like social, ethical, commercial, psychological, medical and legal. Therefore, there are various conflicting interests and which has the unreadable effect on the Family.’ Presently, in India ‘*No Law and No Precedent*’ is available for solving

⁹²⁹ AIR 1995 SC 288

⁹³⁰ Anil Malhotra, Ranjit Malhotra, ‘Surrogacy in India’, ‘*A Law in the Making*’, (1st Edn. Universal Law Publication Co.), New Delhi, 2013., P. 49

these conflicting interests. The absence of a law is the main reason for flourishing of surrogacy in India. Therefore, now the burden is on the judiciary to develop and explore the law on surrogacy.

However, it is said that if the surrogacy arrangement is prohibited in India, prominently, there will be two consequences, *firstly*, the surrogacy business will go to underground and black marketing will start and therefore, the surrogates rights will not going to be protected. *Secondly*, the surrogacy business will shift to another country. We have already seen instances after the imposing restrictions by the New Visa Regulation, 2012 to 'Gay Couples' and allowed only to 'married heterosexual couples', which shifted the surrogacy business from India to Thailand and Nepal. Hence, the restrictive laws will not stop the people from demanding and having the genetic child.

Therefore, the danger of prohibition of surrogacy would discriminately affect especially on middle class people.⁹³¹ Because the wealthy people will go to other countries and the poor people will not afford the surrogacy due to its high cost. Amrita Pande says, who will going to support the prohibition of the surrogacy in India, a poor surrogate woman who is in need of money or the commissioning couple who wants their genetic child, or the doctors of benefitting from it, or the Government whose health policy also includes the medical tourism India⁹³² which gives the huge revenue to it.

It is suggested by Amrita Pande⁹³³ and Adv. Anil Malhotra⁹³⁴ that the surrogacy is a global issue; hence, instead of national law, it should be regulated through international law.

⁹³¹ After the prohibition of surrogacy in India the middle class family will have to go for other countries or to turn black market. Hence, according to Jennifer Burr the social stigma or legal and ethical issues are not the legitimate reason for prohibition of surrogacy. In surrogacy the significant concern about the best interest of the child. Therefore, the rights of the child will be protected only after once we legalize the surrogacy. Aristides N. Hatzis, "Just the Oven": A Law & Economics approach to Gestational Surrogacy Contracts" C.f. https://www.researchgate.net/publication/228261279_Just_the_Oven_A_Law_Economics_Approach_to_Gestational_Surrogacy_Contracts, visited on 25/05/2012 at 11.00 am

⁹³² Centre for Social Research (CSR), 'Final Report Surrogate Motherhood- Ethical or Commercial', available at <https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf>, visited on 12/05/14 at 12.25 pm

⁹³³ Amrita Pande, "Global Reproductive Inequalities, Neo-Eugenics and Commercial Surrogacy in India" Uploaded by Pande on 14th January 2016, C.f.

The lawmakers have to give a right based legal framework in surrogacy legislation. Therefore, there is need of strong public health system. The World Health Organization (WHO) has recognized the infertility as a disease, hence, it should be covered under the National Public Health System., and however, presently the infertility treatment is under the private sphere. Therefore, it is strongly recommended that the surrogacy service should be made available in the National Public Health Scheme and also to provide ART services including surrogacy in government hospitals as it should not be remain a monopoly of the private hospitals. A welfare State is under obligation not only to provide the right to access of assisted reproductive technology including surrogacy, but it is also a duty to provide health care service. However, the State has failed to protect the surrogate. As like India, Israel country has also recognized the commercial surrogacy. But the Israel has established a comprehensive regulation system for the protection of surrogate mother and the commissioning couple. It is recommended that India should adopt “pro-natalist” society. It means State gives the importance on the bearing of children. As like Israel, India has to provide National Health Insurance Law a basic package which will cover all infertility treatments such as *in vitro* fertilization (IVF), surrogacy etc., to married and single women for up to two births. But presently, only one in ten citizens of India has any form of health insurance.⁹³⁵

As talking about the moral and ethical issues, the commercial aspect of surrogacy has been challenged as immoral and unethical practice. It is said that surrogacy is against public policy, as it amounts to commodification of women’s body, sale of child, it is similar to prostitution and slavery. It is also said that the practice of surrogacy will destroy a family structure of the society, as the conception of a child is a natural process and not the assisted or artificial. Surrogacy also leads to the exploitation of women. And the relinquishment of the baby by the surrogate mother is unethical, immoral. Therefore, the practice of surrogacy should be banned. However, the

https://www.academia.edu/20248380/Global_reproductive_inequalities_Neo-Eugenics_and_Commercial_Surrogacy_in_India, visited on 20/02/2016 at 11.00 am

⁹³⁴Centre for Social Research (CSR), Report of the National Conference on Surrogacy, “A Policy Dialogue on Issues around Surrogacy in India” held on 22nd to 23rd September 2014 in Delhi, C.f https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

⁹³⁵ However, the Indian government has indicated that it will increase its spending on public health from 1 percent of its GDP to 3 percent by 2010.

question is whether a commercial surrogacy can be banned on ethical issues? According to Bentham theory of utilitarianism i.e., the greatest happiness of the greatest number of people, a person is free to act as per his own wish provided his act does not harm others. Jeremy Bentham's ethical system is based on the happiness of larger number of persons, i.e., the greatest happiness for the greatest number of people. Thus, he developed a '*calculus of happiness*' in order to calculate for any action or law what the consequences in terms of pleasure or pain would be. According to John Stuart Mill, there are higher and lower pleasures and society should prefer the higher ones. For this purpose, he introduced the harm principle. He has widely accepted principle of liberal neutrality, that the State must remain neutral towards competing moral standards.⁹³⁶

In order to regulate the commercial surrogacy the State is required to balance the legal and ethical issues. The State has to balance the issues like payment of compensation to surrogate mother, protection to all parties of surrogacy agreement and protection of the best interest of the child.

It is significant to note that different countries have responded differently towards the surrogacy due to the different moral and ethical terms. It is universally accepted that morality changes from time to time and from place to place. It is not rational, but it does reflect the will of society and therefore, it can be changed only by the will of the society. The morality is often taken to prohibit unnatural activities, but it must be concerned with promoting people living together in peace and harmony, not causing harm to others, and helping them. Therefore, public morality must give recognition to surrogacy option because today the society demands the surrogacy, which creates opportunity for barren mothers to enjoy the motherhood.

Finally, it may not be possible to provide answers to all social, moral and ethical issues which arises out of the surrogacy. But the legal solutions required to be given. Hence, there is the need of the hour to have comprehensive, stringent and regulatory

⁹³⁶ According to him, a power can be rightfully exercised over any member of a civilized community, against his will, for preventing harm to others. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right over himself, over his own body and mind. Ultimately, the individual is sovereign.

legislation on surrogacy in order to protect the rights of the surrogate mother, the commissioning parents and the child born out of surrogacy. Thus, the active legislation will provide correct use of assisted reproductive technology including surrogacy. Therefore, today it is a need to adopt a pragmatic approach by the State.

CHAPTER -V
INTERNATIONAL CONVENTIONS, CONSTITUTION OF INDIA AND
JUDICIAL APPROACH TOWARDS SURROGACY

5. INTRODUCTION

HUMAN RIGHTS are the rights which are possessed by all human beings irrespective of their race, caste, nationality, sex, language, etc. simply because they are human beings. According to Fawcett, “Human rights are sometimes called as fundamental rights or basic rights or natural rights.”⁹³⁷ It is the “immutable laws of nature”⁹³⁸ i.e. rights given to human beings by the nature. It is said that the human rights are not gifts of the Constitution or Legislation. Hence, these basic or fundamental rights cannot be taken away by any legislature or any act of government and which are often set out in a Constitution. Any civilized country must recognize them.

Human rights are nothing but interests of individuals protected by the rules of right either by moral or legal rules.⁹³⁹ Hence, it demands for a decent, civilized life in which the inherent dignity of each human being is well respected and protected. And the protector of the HUMAN RIGHTS in a country is the judiciary. Human rights are also described as the *Magna Carta* of mankind. The first documented use of the expression of “human rights” found in the charter of the United Nations.⁹⁴⁰ The first concrete steps taken by the United Nations General Assembly by adopting the Universal Declaration of Human Rights in 10th December 1948. It was, however, felt that a declaration is not enough, so the United Nations drafted two separate Covenants in the year 1966 viz., the International Covenant on Civil and Political Rights and

⁹³⁷ Dr. S. K. Kapoor, ‘International Law & Human Rights,’ (Central Law Agency, Allahabad, 16th Edn. 2012), at p. 56

⁹³⁸ R. N. Trivedi, (ed)., ‘The world of All Human Rights,’ ‘Soli Sorabjee,’ *A Festschrift*, (Universal Law Publication, New Delhi, 2010 Edn.), at p. xvii

⁹³⁹ P.J. Fitzgerald, “Salmond on Jurisprudence,” (Universal Law Publication, New Delhi, Twelfth Edn, 2014), p. 217

⁹⁴⁰ It was adopted after the second World War at San Francisco on 25-06-1945. The preamble of the chapter declared its object “to reaffirm faith in fundamental human rights”

International Covenant on Economic, Social and Cultural Rights to be signed, ratified and acted upon by the members States.

In India, core of Human Rights is protected and promoted through the Fundamental Rights and Directive Principles of State Policy protected in Parts III and IV of the Constitution as well as the Protection Human Rights Act, 1993. Section 2 (d) of the Protection of Human Rights Act, 1993, defines 'Human Rights' as:

“The right relating to life, liberty, equality and dignity of the individual, guaranteed by the Constitution or embodied in the International Covenants, enforceable by the Courts in India.”⁹⁴¹

All individuals have reproductive rights and the Constitution guaranteed this right to every person irrespective of his/her gender or his/her nationality. These guarantees are found in the oldest and most accepted human rights instruments, as well as more recently adopted international and regional treaties. A series of documents adopted at United Nations Conferences, most notably the 1994 ***International Conference on Population and Development (ICPD)***, have explicitly linked governments' duties under international treaties to their obligations to uphold reproductive rights of the individuals.⁹⁴²

Article 16 (1) of the Universal Declaration of Human Rights 1948 says, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and start a family”.

However, there is no international human rights instrument which specifically states about the surrogacy right. In India a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India.

Now, if reproductive right gets constitutional umbrella, hence the surrogacy which allows an infertile couple to exercise that right also gets the same constitutional

⁹⁴¹ R. N. Trivedi, (ed)., 'The world of All Human Rights,' 'Soli Sorabjee,' *A Festschrift*, (Universal Law Publication, New Delhi, 2010 Edn.), at p.67

⁹⁴² United Nations Human Rights And The Danish Institute for Human Rights, “Reproductive Rights are Human Rights,” A Handbook For National Human Rights Institutions, 2014, C.f. <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>, visited on 24/05/2015 at 3.00 pm.

protection. Thus, the Judiciary in India has acknowledged the reproductive right of humans as a basic right in *B. K. Parthasarathi v. Government of Andhra Pradesh*,⁹⁴³

Interestingly, from the last two decades the surrogacy arrangement has increased tremendously, but it has raised various issues such as social justice, exploitation, and human rights abuses. Presently, there is no international and national regulation for surrogacy arrangement. Recently, the Hague Conference Permanent Bureau has conducted significant work on the private international law issues surrounding the status of children, and especially on the issue of cross-border surrogacy.

Researcher under this chapter is discussing about the various international Conventions pertaining to surrogacy rights, especially rights for the protection surrogate and the surrogate child, the Constitutional status of the surrogacy in India and judicial attitude towards it.

5.1. SURROGACY AND INTERNATIONAL CONVENTIONS

5.1.1. Reproductive Rights

In today's scientific and technological world, there is no any single international human rights instrument which specifically states about the surrogacy right.

Article 1 of the Charter of the United Nations, sets its purpose, "to achieve international cooperation...., to promote and encourage the respect for human rights and for fundamental freedoms of all."⁹⁴⁴ Therefore, the question arises, whether surrogacy can be claimed as a human right? All individuals have the right to become parents, which is the basic, natural human right. Reproductive rights refer to a diversity of civil, political, economic, social and cultural rights affecting the sexual and reproductive life of individuals and couples.⁹⁴⁵

There are various documents of the United Nations, which provides the State's duties under international treaties to uphold reproductive rights of the individuals.

⁹⁴³ *B. K. Parthasarathi v. Government of Andhra Pradesh* 2000 (1) ALD 199, 1999 (5) ALT 715.

⁹⁴⁴ Charter I, Article 1 Purposes and Principles of the United Nations, C.f. <http://www.un.org/en/sections/un-charter/chapter-i/>, visited on 10/10/2013 at 2.00.pm

⁹⁴⁵ Center For Reproductive Rights, "Reproductive Rights are Human Rights 2009" C.f. http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/rrarehr_final.pdf, Visited On 24/11.2013at 6.00 pm

1. Universal Declaration of Human Rights (UDHR), 1948:

Article 16 (1) of the Universal Declaration of Human Rights 1948 says, that “men and women of full age without any limitation due to race, nationality or religion, have the right to marry and start a family.”⁹⁴⁶

The meaning of the word “to start the family” is the nothing but reproductive right of the individuals. Thus, the child’s origin may be through natural conception or adoption or surrogacy arrangement. But, the Declaration has excluded Transgender right to become parents and restricted only to the men and women.

Now a contemporary society has challenged the 58 years old drafting of the UDHR, the manner in which a family life is created and also reproductive rights.⁹⁴⁷

2. International Covenant on Civil and Political Rights, 1966

Article 23 of the International Covenant on Civil and Political Rights, 1966 provides that the right of men and women of marriageable age to marry and to found a family.⁹⁴⁸

3. International Covenant on Economic, Social and Cultural Rights, 1966

Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966, recognizes that the family is the “natural and fundamental group unit of society”, hence it should be protected.⁹⁴⁹

⁹⁴⁶ Article 16(1) of the Universal Declaration of Human Rights, 1948, C.f. <http://www.un.org/en/universal-declaration-human-rights/>, visited on 30/12/2013 at 3.00 p.m.

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, as a common standard of achievements for all peoples and all nations. For the first time, the fundamental human rights to be universally protected.

⁹⁴⁷ Nicole F. Bromfield, ‘Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations’, published online 1st July 2014, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 12/11/2014 at 10.30. pm

⁹⁴⁸ United Nations Human Rights, “The International Covenant on Civil and Political Rights 1966” C. f. <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, visited on 25/02/2015 at 1.00.p.m.

⁹⁴⁹ United Nations Human Rights, “International Covenant on Economic, Social and Cultural Rights, 1966” C. f., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, Visited on 25/02/2015 at 2.00.p.m. Article 23 of the International Covenant on Civil and Political Rights, 1966 also states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The same right i.e. right to marry and found a family is also protected by the Article 17 of the *American Convention on Human Right* (ACHR), Article 12 of the *European Convention on*

4. Teheran Conference on Human Rights in 1968

The reproductive rights are rather new in the international law. This fundamental right for the first time appeared in the **Teheran Conference on Human Rights in 1968**, which has recognized the “rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights.”⁹⁵⁰

5. International Conference on Population and Development (ICPD) 1994

In 1994 the International Conference on Population and Development (ICPD) i.e. **(Cairo Conference)** has specifically expressed about the reproductive rights of the individuals under its Para 7.3.⁹⁵¹ The object of the conference was to support couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice.

The ICPD recognized the reproductive rights include both “the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health.”⁹⁵² However, the question is whether it includes the right of person who cannot become parents

Human Rights (ECHR), 1950 (ECHR), and Article 18 of the *African Charter on the Rights and Welfare of the Child*.

⁹⁵⁰ Barbara Stark, “Transnational Surrogacy and International Human Rights Law,” C.f. http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2118077, Visited on 26/10/2015 at 5.30. p.m.

⁹⁵¹ United Nations Population Information Network, Report of the ICPD, 1.12, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), available at <http://www.un.org/popin/icpd/conference/offeng/poa.html>, Visited on 13/10/2013 at 3.45.p.m. As per the Paragraph 7.3 of the ICPD Programme of Action: Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights document documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.”

CEDAW: An important international instrument is the Convention on the Elimination of All Forms of Discrimination against Women which obligates the states parties to ensure “access to health care services, including those related to family planning” and mentions appropriate services in connection with pregnancy and the right to decide on the number and spacing of children (Articles 12 and 16). Article 23 of the Convention on the Rights of Persons with Disabilities is the first comprehensive international human rights instrument which clearly declares the reproductive rights as a human right.

⁹⁵² *Supra Note 11*

naturally, whether for medical reasons or because they are single or live in same sex relationships?⁹⁵³

6. Beijing Conference 1995:

In 1995 the Fourth World Conference on Women in Beijing has supported the reproductive rights. It has declared the human rights of women also include the right to control over her body. She is free to decide the matters relating to her body including reproductive health, violence and discrimination.⁹⁵⁴

Thus, in the international human rights instruments the reproductive rights are broadly recognized as rights. However, at the Cairo Conference, the surrogacy arrangement was not the agenda, hence it neither supported nor rejected. As talking about the surrogacy, as stated at the **Cairo conference in Para 7.16** that “the aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice”⁹⁵⁵ It means, debatably Cairo conference supports the surrogacy.

5.1.2. Reproductive Rights of Women

A women’s lives, liberty and security, health, autonomy, privacy, equality and non-discrimination and education cannot be protected without ensuring that women can determine when, how and whether to bear children, control their bodies and reproductive health information and services. Just as women’s human rights cannot be realized without promoting women’s reproductive rights.⁹⁵⁶ Thus, it is very clear that the reproductive rights are playing very significant role in the life of the women.

⁹⁵³United Nations Human Rights and Danish Institute for Human Rights, “Reproductive Rights are Human Rights,” A Handbook For National Human Rights Institutions, 2014, at 33 C.f. <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>, visited on 24/05/2015 at 3.00 pm.

⁹⁵⁴United Nations, “Report of the Fourth World Conference on Women,” Beijing, China, Sept. 4, 1995, 96, U.N. Doc. A/Conf.177/20/Rev.1 (1996), available at <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> , Visited on 14/12/2013 at 2.00 p.m.

⁹⁵⁵United Nations Population Information Network, *Report of the ICPD*, 1.12, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), available at <http://www.un.org/popin/icpd/conference/offeng/poa.html>, Visited on 13/10/2013 at 3.45.p.m.

⁹⁵⁶Center For Reproductive Rights, “Reproductive Rights are Human Rights” ‘2009’ C.f. http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/rrarehr_final.pdf, Visited On 24/11.2013at 6.00 pm

There are two major legal, human instruments which clearly states about the reproductive rights of the women.

1. The Convention on the Rights of Persons with Disabilities (Disability Rights Convention) 2006:

It is the first comprehensive international human rights instrument which specifically recognized the reproductive right as a human right of women under Article 23.

2. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa) 2003:

Article 14 of the regional level protocol expressly states those women's reproductive rights as human rights. It also declares that women's right to control their fertility and right to decide whether to have children and the number and spacing of children. It also guarantees right to reproductive health of the women⁹⁵⁷

3. Convention on the Elimination of All Forms of Discrimination against Women⁹⁵⁸ (CEDAW), 1979:

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women has defined its purpose to prevent "discrimination against women" in all its forms and manifestations.⁹⁵⁹

Besides the civil rights issues of the women, the convention also confirms the reproductive rights of women.

⁹⁵⁷ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa, 2003, C.f. http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf, Visited on 05/02/ 2015 at 2.00 pm.,

⁹⁵⁸ The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly on 18 December 1979. It is often described as an international Bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

⁹⁵⁹ United Nation, "*The convention on the Elimination of All Forms of Discrimination against Women* " 'CEDAW', 1979, C.f. <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, Visited on 24/10/15 2 9.37 am, The term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 4 of the Convention states that the “role of women in procreation should not be a basis for discrimination.” The convention directly confirms the ‘rights of maternity’ and the States have “to adopt special measures with the aim to protect the maternity without any discrimination.” It means the Article 4 of the convention confirms the reproductive rights of the women which also includes the right to gestate. However, Article 5 of the Convention⁹⁶⁰ recognizes the maternity as social function and not the commercial function. Hence, it is difficult to settle with commercial surrogacy, where the commissioning parents and surrogates remain strangers.⁹⁶¹ Article 11.1. (c) Provides that the women’s right to free choice of profession and employment and State should not make any discrimination in the area of employment.⁹⁶² However, it is not clear whether rights of women engaged in the work of “Occupation of Maternity” for giving service to others.⁹⁶³ When CEDAW law passed that time, even the concept of surrogacy was not in the existence. Under Article 11.2 the State has to prevent any discrimination on the ground of maternity and ensure the women’s effective right work.⁹⁶⁴

In surrogacy practice a woman’s right to choose and also right to participate in surrogacy arrangement is consistent with CEDAW. Thus, the surrogacy has challenged the concept of right to work and control over the reproduction. In Article 12 the State has to ensure the access to health care services, and also ensures the appropriate services in connection with pregnancy, confinement in the post-natal period, and adequate nutrition during pregnancy and lactation.⁹⁶⁵ Thus, this article protects the right to health of the surrogate. Lastly, Article 16 of the CEDAW provides that the State has to eliminate discrimination against women in all matters relating to marriage and family relations and right to decide freely and responsibly on the number and spacing of their children. It is also to be reflected that right to found a

⁹⁶⁰ CEDAW, *supra* note 24, art. 5

Article 6 of the CEDAW provides that the States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

⁹⁶¹ *Supra* Note 14

⁹⁶² CEDAW, *supra* note 24, art. 11.1.(c).

⁹⁶³ Nicole F. Bromfield, ‘Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations, published online 1st July 2014, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 12/11/2014 at 10.30. pm

⁹⁶⁴ CEDAW, *supra* note 24, art. 11.2

⁹⁶⁵ CEDAW, *supra* note 24, art. 16

Article 25.2. of the *Universal Declaration of Human Rights* states that the childhood and the motherhood are entitled to special care and assistance.

family may include right to conceive, gestate and to deliver a child. Article 16 clearly gives reproductive right to women, whether she is the commissioning mother or surrogate mother.

According to **the International Institute of Social Studies (ISS)** that CEDAW prohibits the discrimination against the women, but not allowing a woman to act as a surrogate is also discriminatory. While some say commercial surrogacy is totally discriminatory exploitative and coercive to the surrogates.⁹⁶⁶ So it should not be allowed.

4. The UN International Research and Training Institute for the Advancement of Women (UN-INSTRAW)⁹⁶⁷ is also working to improve the lives of women throughout the world for ensuring the rights, needs and development of women.

5. The United Nations Population Fund (UNFPA) and the World Health Organization (WHO) also supports the reproductive rights of the women.

6. The Eleventh International Conference of the International Coordinating Committee (ICC) of National Institutions 2012⁹⁶⁸ has focused on human rights of women and girls and under Para 25 protected, promoted and recognized the reproductive rights without any discrimination.

7. YOGYAKARTA PRINCIPLES

A Yogyakarta Principles on the application of human rights law in relation to sexual orientation and gender identity has supported the reproductive rights are the human rights.

⁹⁶⁶ International Institute of Social Studies (ISS), Report on “Global Surrogacy Practices”, December 2014, C.f. <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm

⁹⁶⁷ The United Nations International Research and Training Institute for the Advancement of Women (UN-INSTRAW), C.f. <http://www.unfoundation.org/how-to-help/donate/instraw.html>, Visited on 24/10/15 at 11 pm.

⁹⁶⁸ United Nations Human Rights And The Danish Institute for Human Rights, “Reproductive Rights are Human Rights,” A Handbook For National Human Rights Institutions, 2014, at 33 C.f. <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>, visited on 24/05/2015 at 3.00 pm.

According to the Centre for Reproductive Rights the following twelve essential human rights comprises in the reproductive rights.⁹⁶⁹

- i. The Right to Life
- ii. Right to Liberty and Security of Person
- iii. The Right to Health, Including Sexual and Reproductive Health
- iv. The Right to Decide the Number and Spacing of Children
- v. The Right to Consent to Marriage and to Equality in Marriage
- vi. The Right to Privacy
- vii. The Right to Equality and Non-Discrimination
- viii. The Right to be Free from Practices that Harm Women and Girls
- ix. The Right to not be Subjected to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment
- x. The Right to be Free from Sexual and Gender-Based Violence
- xi. The Right to Access Sexual and Reproductive Health Education and Family Planning Information
- xii. The Right to Enjoy the Benefits of Scientific Progress

Especially, the twelve reproductive rights, i.e. the right to enjoy the benefits of the scientific progress. Today, the scientific technology has made it possible for everyone to become the parents of the child through the use of the assisted reproductive technology. Surrogacy a method of assisted reproductive technology is the new scientific and technological investigation, which fulfills dream of all individuals⁹⁷⁰ to become the parents of the own genetic child. Therefore, the surrogacy method is the right to enjoy the benefits of the scientific progress.

The right to enjoy the benefits of scientific progress guaranteed by the various international human right instruments such as Article 27(1) of the Universal declaration of Human Rights states that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific

⁹⁶⁹ Center For Reproductive Rights, “Reproductive Rights are Human Rights 2009” C.f. http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/rrarehr_final.pdf, Visited On 24/11.2013at 6.00 pm

⁹⁷⁰ All individual includes heterosexual married couple, single men and women, same sex couples and Transgender.

advancement and its benefits.” Article 15 (1) of the United Nations International Covenant on Economic, Social, and Cultural Rights has also recognized the right of all individuals to enjoy the benefits of scientific progress and its applications.”⁹⁷¹ Besides the above mentioned documents, other various regional treaties and international conferences recognizes right to enjoy the benefits of scientific progress.⁹⁷²

The right to procreate is the natural, inalienable right of any individual person. Hence, it should not depend on gender, family, or the sexuality of the person. One of the fundamental principles of the modern bioethics i.e. the Universal Declaration on Bioethics and Human Rights, 2005 is the interests and welfare of the individual should have priority over the sole interest of science or society. However, refusing the right of the childless people to become parents through surrogacy is nothing but refusing to treat them equally, which clearly amounts to selective discrimination of the people.⁹⁷³

Unfortunately, till today no international human rights instruments specifically talking about the practice of surrogacy as a human right. But when, the reproductive rights are recognized as human rights then surrogacy is the one of the shades of the reproductive rights, therefore, it automatically becomes the human right of the every individual.

In India, the human rights of women are protected by the National Commission for Women Act, 1990 and for their redressal of the grievances the government has established the National Commission for Women (NCW). Apart from the above enactment, the government has also enacted the Protection of Human Rights Act,

⁹⁷¹ Supra note 33

⁹⁷² Article 7 of the *United Nations International Covenant on Civil and Political Rights* states that, “No one shall be subjected without his [sic] free consent to medical or scientific experimentation.” A regional *Protocol of San Salvador* under Article 14(1) and the Vienna Declaration in Paragraph 11 declares the same right.

⁹⁷³ K. Svitnev, ‘Legal control of surrogacy – International perspectives’, http://www.jurconsult.ru/publications/ethical_dilemmas/13_Legal%20control%20of%20surrogacy%20-%20international%20perspectives.pdf, p. 155 visited on 24/09/2014 at 11.00 pm, Just because something is wrong with surrogate children in their new families, the peoples are desperately deprived form of their right to the reproduction and use of reproductive technologies. In such case it is the job of society and social services to take care of them. Therefore, it is said that it is not an appropriate reason to deny reproductive rights

1994⁹⁷⁴ for the protection of human rights of people and established Human Right Commissions at National, State and District level.

5.1.3. Rights of Surrogate Child and International Conventions:

There are multiple international human rights instruments which have extensively recognized the rights of the child. Every child is protected under international human rights conventions, whether a born out of surrogacy or not. The object to the need of special care and assistance to the child, as stated in the *Geneva Declaration of the Rights of the Child, 1924* and *Declaration of the Rights of the Child, 1959*.

Article 25 (2) of the Universal Declaration of Human Rights, 1948, provides that “motherhood and childhood are entitled to special care and assistance, whether born in and out of wedlock shall enjoy the same protection.”⁹⁷⁵

Article 24 of the International Covenant on Civil and Political Rights, 1966 and Article 10.3 of the International Covenant on Economic, Social and Cultural Rights, 1966 as well as various regional statutes and other relevant international instrument states about the special measures of protection and assistance should have been taken by the State for the welfare of children.

5.1.3.1. United Nations Convention on the Rights of Child (UNCRC), 1989

The most notable convention for the protection of the rights of the child is the United Nations Convention on the Rights of Child (UNCRC), 1989.⁹⁷⁶ This convention is the

⁹⁷⁴ Dr. S. K. Kapoor, ‘International Law & Human Rights,’ (Central Law Agency, Allahabad, 16th Edn. 2012) , at p. 77, Other laws for protecting human rights of the people, the Government of India has enacted the Protection of Civil Rights Act, 1955, and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995

⁹⁷⁵ M.P. Tandon, “International Law and Human Rights,” Allahabad Law Agency, Faridabad, (Sixteenth Edn. 2005, Reprint 2007,) , at p. 223

⁹⁷⁶ The Convention on the Rights of Child is adopted by General Assembly of the United Nations through its *resolution 44/25 of 20 November, 1989* and which came into force 2 September 1990. Presently, **194 countries** have signed up to the UNCRC, and only two countries in the world still remained to ratify it. The *United Nations Convention on the Rights of the Child (UNCRC)* is a legally-binding international agreement. It provides the *civil, political, economic, social and cultural rights* of every child, regardless of their race, religion or abilities. It consists of **54 articles** that set out children’s rights and also states how the governments should work together for making it **available to all the children**.

universally agreed and ratified human rights instruments. According to the convention the child means “every human being below the age of eighteen years of age.”⁹⁷⁷

The several rights of the child under the CRC are linked with the surrogacy. Article 2 of the CRC states that, the “rights of every child should be respected and ensured without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race,..... including birth or other status of the child.”⁹⁷⁸ Originally, the article 2 was indented to protect an illegitimate child but expansive application can be drawn which suggests the protection to the child born out of surrogacy.⁹⁷⁹

5.1.3.2. Principle of Best Interests of the Child

The CRC convention on the rights of the child is mainly based on the principle of the best interest of the child. Article 3 (1) of the CRC states that “in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁹⁸⁰ In India, section 2 (9) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and Para 2 (5) of the Guidelines Governing Adoption of Children, 2015 defines the best interest of the child.⁹⁸¹ However, it is found that, hardly any Courts apply the best interest of the child test in surrogacy cases.⁹⁸² In *Johnson v. Calvert*⁹⁸³ the California Court applied the best interest of the child test and granted the custody of the child to the commission parents i.e. Calvert Couple and rejected the claim of surrogate mother. In India, the Supreme Court in applied the best interest of the child and granted custody of the child to the commissioning parents.

⁹⁷⁷ Article 1 of the UN Convention on the Rights of the Child, 1989, C.f. <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, visited on 19/02/2015 at 2.00 pm.

The word “ten” is replaced with the word “eighteen” by the amendment, which came into force on 18 November 2002.

⁹⁷⁸ Ibid at Article 2 (1), Article 16 (a) of the CEDAW also confirms the same rights and responsibilities as a parent, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.

⁹⁷⁹ Barbara Stark, “Transnational Surrogacy and International Human Rights Law,” C.f. http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2118077, Visited on 26/10/2015 at 5.30. p.m.

⁹⁸⁰ UNCRC Supra note 42 at art. 3

⁹⁸¹ Section 2 (9) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and Para 2 (5) of the Guidelines Governing Adoption of Children, 2015, defines the “best interest of child” means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

⁹⁸² CARLA SPIVACK, “National Report: The Law of Surrogate Motherhood in the United States” Oklahoma City University School of Law, January 2010, C.f. http://works.bepress.com/carla_spivack/15, visited on 23/04/2014 at 11.00. pm

⁹⁸³ 5 Cal. 4th 84 (1993).

Article 6 states that the child's right to identify, name, and family relationships. Article 7 (1) of the CRC provides that, the child should be registered instantly after birth. From the birth he has the right to carry the name, nationality of the parents, right to get the information about *Baby Manji case*,⁹⁸⁴ and *Jan Balaz Case*⁹⁸⁵ parents and the protection and care from his or her parents.⁹⁸⁶ This provision, however, has raised two main difficulties in the case of incorporation of national law. If the law says, a birth woman is the mother of the child, and then the position of the baby is unclear. So the child born out of surrogacy cannot acquire the nationality of the commissioning parents as a result a child may be in an uncertain situation.⁹⁸⁷ Therefore, a domestic law should declare that, the commissioning parent is the legal parents of the child as well as before entering into surrogacy contract, the commissioning couples have to prove that, the child will be granted citizenship in the State where her intending parents live. In India, a proposed ART Bill on the same issues is pending before the Parliament. Article 8 (1) also gives the right to know the information about their conception, gamete donor (i.e., their genetic parents), and a surrogate mother and preserve his identity, including nationality, name and family relations and be cared for by their parents.⁹⁸⁸ Thus, Article 7 and 8 are very significant articles from the point of view of surrogacy, it gives guaranteed rights to the child such as the right to be registered immediately after a birth, right to know, right to acquire the nationality, right not to be Stateless,⁹⁸⁹ right to be cared by the parents. Article 9 (1) states that, "a child shall not be separated from his or her parents as against their will." Article 24 (1) provides that the state has to recognize the right of the child to enjoy of the highest standard of health and Article 24 (2) (e) provides the

⁹⁸⁴ *Baby Manji Yamada v. Union of India & Anr.*, AIR 2009 SC84, *Baby M case* (537 A.2d 1227)

⁹⁸⁵ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010)

⁹⁸⁶ UNCRC Supra note 42 at art. 7 (1) & *CEDAW Article 9* states about the nationality of the children, it provides that "States Parties shall grant women equal rights with men with respect to the nationality of their children"

⁹⁸⁷ Barbara Stark, "Transnational Surrogacy and International Human Rights Law," C.f. http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2118077, Visited on 26/10/2015 at 5.30. p.m.

⁹⁸⁸ International Institute of Social Studies (ISS), Report on "Global Surrogacy Practices", December 2014, C.f. <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm, *Article 8* (1) provides that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

⁹⁸⁹ In Jan Balaz case, children were remained as stateless due to non recognition of surrogacy by Germany.

guaranteed right of the child to have breastfed.⁹⁹⁰ Article 35 of the CRC requires that the, States Parties to take ‘all appropriate national, bilateral and multilateral measures to prevent the...sale of or traffic in children for any purpose or in any form.’⁹⁹¹

The Committee on the Rights of Child in its 3rd and 4th Periodic Reports of India 2014, in para 57 (d) has stated its concern that, the Commercial use of surrogacy is not the properly regulated, is widespread, leading to the sale of children and the violation of children’s rights.⁹⁹²

Therefore, the committee in Para 58 (d) recommended that the Government of India has to ensure the Assisted Reproductive Technology (Regulation) Bill, 2013, or other subsequent legislation contain provisions which define, regulate and monitor surrogacy arrangements and criminalizes the sale of children for the purpose of illegal adoption, including the misuse of surrogacy.⁹⁹³ Thus, the present Surrogacy Bill, 2016 prescribe the various types of punishments for protecting the rights of surrogate child.⁹⁹⁴

Thus, the various provisions of the Convention on the Rights of Child provide the guaranteed rights of the every child irrespective of the child are born out of surrogacy or natural conception or adoption. After the study of the CRC, it is clear that, the CRC has protected the surrogate child under its umbrella.

⁹⁹⁰ UNCRC Supra note 42 at art. 24 (1) & (2) (e). In surrogacy arrangement however, after the birth of the child, the surrogate are not allowed to breastfeed the child, in order to avoid chance of emotional attachment of surrogate with the child. But it adversely affects on the health of child and the surrogate too and also violate right to breastfeeding of the child guaranteed by the CRC.

⁹⁹¹ Ibid at art. 35, the surrogacy arrangement however, alleged that amounts to the sale of child or trafficking because the surrogate mother takes the payment for the birth of the child. However, another view is that, the surrogacy arrangements is not the baby – selling, because a contract between the surrogate, the surrogate agency, and the commissioning parents existed before the conception of the child and a service was contracted between the parties and not the child.

⁹⁹² Committee on the Rights of the Child, “Concluding observations on the combined (CRC/ 3rd and 4th Periodic Reports of India” 2014, at p. 12 C.f. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIND%2fCO%2f3-4&Lang=en, visited on 11/06/2015 at 12.10 pm

⁹⁹³ *Ibid*

⁹⁹⁴ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 14, visited on 21/11/2016 at 3.00 pm.

5.1.3.3. Hague Convention on Protection of Children and Co-operation in Respect to Inter country Adoption (HCIA), 1993

The Hague Convention on Protection of Children and Co-operation in Respect to Inter country Adoption (HCIA), 1993 has mainly focused on the principle of the best interest of the child. It has also discussed the prohibition of child-selling, trafficking and abduction of the children and declared it as the crimes of the child.⁹⁹⁵

Because of the increasing problems of the global surrogacy, the Permanent Bureau of the Hague Conference has undertaken the research project on international surrogacy arrangement. The Report of The Hague conference has discussed the various issues of the child born out of surrogacy such as the issue of the legal parentage of the child, the different countries establishes the different legal parentage of the child, which result in uncertainty of the legal parentage of the child. Therefore, the issues such as 'limping legal status' of the child, child's nationality, inheritance, maintenance and the parental responsibility of the child has raised.⁹⁹⁶ It has also stated the child's right to know his or her genetic origin, the Physical and psychological health⁹⁹⁷ of children born out of international surrogacy arrangement.⁹⁹⁸ However, till date the decision regarding whether a convention related to inter-country surrogacy will be drafted or not, has not been reached out.

5.1.3.4. Indian Scenario towards the Protection of Surrogate Child:

The Indian Council of Medical Research, National Guidelines, 2005, in Para 3.12 provides several rights of the child born out of the ART procedure.⁹⁹⁹ In Para 3.12.1.,

⁹⁹⁵ Nicole F. Bromfield, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations, published online 1st July 2014, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 12/11/2014 at 10.30. pm

⁹⁹⁶ Hague Conference on Private International law, 'A permanent Beaurio Report on,' "A Study Of Legal Parentage And The Issues Arising From International Surrogacy Arrangements," Prel. Doc. No 3 C (The Study), March 2014, C.f. http://www.hcch.net/upload/wop/gap2014pd03c_en.pdf, visited on 21/05/2015 at 9.30. pm.

⁹⁹⁷ *Ibid*

⁹⁹⁸ It is stated by the conference that, in international surrogacy arrangement the increased risk of multiple and pre-term births of the children for example, premature, multiple birth babies dying in India.

⁹⁹⁹ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, para 3.12.1., at p.70., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

states that, “a child born out of ART is presumed to be legitimate child of the couple. Therefore, the child is entitled to a legal right to parental support, inheritance, and all other privileges of a child born to the couple through sexual intercourse.”¹⁰⁰⁰

A draft of the Assisted Reproductive Technology Bill, 2014, under section 61 provides the determination status of the child. The Bill also declares the child born out of ART procedure is the legitimate child of the couple.¹⁰⁰¹

Under section 62 (1) of the ART Bill, 2014 states that the surrogate child is having right to know the information about the donors and surrogates.¹⁰⁰² The new Surrogacy Bill, 2016 has also provided the punishment with the imprisonment of not less than 10 year and fine upto 10 lakh rupees for abandonment and exploitation of the children by any person.¹⁰⁰³

Besides the above surrogacy laws, there are also special statues which protect the rights of the child. The Orphanages and Other Charitable Homes (supervision and Control) Act, 1960, it provides for the supervision and control of the orphanage and

¹⁰⁰⁰ *Ibid*,

3.12.2 Children born through the use of donor gametes, and their “adopted” parents shall have a right to available medical or genetic information about the genetic parents that may be relevant to the child’s health.

3.12.3 Children born through the use of donor gametes shall not have any right whatsoever to know the identity (such as name, address, parentage, etc.) of their genetic parent(s). A child, thus born will, however, be provided all other information (including that mentioned in about the donor as and when desired by the child, when the child becomes an adult. While the couple will not be obliged to provide the above “other” information to the child on their own, no deliberate attempt will be made by the couple or others concerned to hide this information from the child as and when asked for by the child.

3.12.4 In the case of a divorce during the gestation period, if the offspring is of a donor programme – be it sperm or ova – the law of the land as pertaining to a normal conception would apply.

¹⁰⁰¹ The Assisted Reproductive Technology (Regulation) Bill, 2014, Section 61 (1), at p. 51, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm. It also states that a child born to an ever married woman through the use of assisted reproductive technology shall be the legitimate child or children of the woman¹⁰⁰¹ and even in case of couple gets separated or divorced after consented for ART treatment still then child is legitimate of the couple.¹⁰⁰¹ The birth certificate of the child or children born through the surrogacy shall contain the names of the commissioning couple.

¹⁰⁰² *Ibid* at 52, section 62 (1) A child or children may, upon reaching the age of eighteen, ask for any information, excluding personal identification, relating to the donor or surrogate. Section 62 (2) provides that, the legal guardian of a minor child or children may apply for any information, excluding personal identification, about his or her genetic parents or surrogate when required, and to the extent necessary, for the welfare of the child. Section 62 (3) states that the personal identification of the donor or surrogate may be released only in cases of life threatening medical conditions which require physical testing or samples of the donor or parents or surrogate: Provided that such personal identification shall not be released without the prior informed consent of the donor or parents or surrogate.

¹⁰⁰³ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 14, Visited on 21/11/2016 at 3.00 pm.

homes for children. The Medical Termination of Pregnancy Act, 1971 stipulates when pregnancies may be terminated by a registered medical practitioner. The Apprentice Act, 1961 permits above fourteen years age of the child to undergo apprenticeship and the Child Labour (Prohibition and Regulation) Act, 1986 prohibits the employment of children below 14 years of age. The pledging of children is prohibited by the Children (Pledging of Labour) Act, 1933. The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, supply and Distribution) Act, 1992 is made with the view to protect and promote breastfeeding. The Pre-Conception & Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994, provides for the use of prenatal diagnostic techniques and for prevention of misuse of such techniques for the prenatal sex determination leading to female foeticide. The Juvenile (Justice Care and Protection of Children) Act, 2000, This Act deals with the law relating juvenile in need of care and protection and Juvenile in conflict with the law.

Apart from the above mentioned special legislations regarding the child, there are various provisions of the general law such as the Code of Civil Procedure 1908, The Code of the Criminal Procedure 1973 provides the special procedures for civil and criminal proceedings in case minor is engaged matters. The Indian Evidence Act, 1872 provides the competency of the child witness (section 112). The several criminal laws give special protection to children, such as the Indian Penal Code, 1860 provides special offences of the child and special punishment for it, for example causing of miscarriage to the unborn child (IPC Secs. 312-318), Marital rape if a girl child is below fifteen years of age (sections 375-376), and enhanced punishment if rape by the public servant (Secs. 376 (a) (b) (c) & (d)). The Immoral Traffic (Prevention) Act, 1956 tries to curb trafficking of young person both boys and girls. There is also provision regarding children in the Cable Television Network (Regulation) Act, 1995 & the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988. The various personal laws also protect the rights of the child Such as Hindu Marriage Act, 1955, The Hindu succession Act, 1956, the Hindu Adoption and Maintenance Act, 1955, The Indian Succession Act, 1925. In case of marriage, maintenance, custody, guardianship, succession and inheritance is governed by the Muslim Personal law. Section 125 of Cr. P.C., provides the maintenance to the minor

child. There are various labour laws also protects the minor child. The Indian Contract Act, 1872, the Indian Partnership Act, 1932, and the Indian Trust Act, 1882 deals with the civil and commercial rights and liabilities of the minors. Besides the above laws, the Constitution of Indian has made a golden box of provisions for the protection of the rights of the child.

A very important legislation for protecting the rights of the child is **the National Commission for Protection of Child Rights Act, 2005**. This Act provides for the constitution of the National Commission and State Commission for the protection of the rights of the child and children's court for providing speedy trial of offences against children regarding violation of child rights.

5.2. SURROGACY AND CONSTITUTION OF INDIA

Right to Reproduction- A Constitutional Right.....

All individuals have reproductive rights and the Indian Constitution guaranteed this right to every person irrespective of any gender or nationality. These guarantees are found in the oldest and most accepted human rights instruments, as well as more recently adopted international and regional treaties. A series of documents adopted at United Nations Conferences, most notably the 1994 International Conference on Population and Development (ICPD), have explicitly linked governments' duties under international treaties to their obligations to uphold reproductive rights of the individuals.¹⁰⁰⁴ The Universal Declaration of Human Rights, 1948 under Article 16 (1) says, that "men and women of full age without any limitation due to race, nationality or religion, have the right to marry and start a family."¹⁰⁰⁵ Thus, the right to marry, found family, procreate children or become pregnant is the natural right of the human beings. It is legal and fundamental right of the every individual.

The Indian Constitution did not directly deal with the right to procreation, but it can be derived from the Article 19 and 21 of the fundamental rights, i.e. freedom of

¹⁰⁰⁴ Supra note 15,

Paragraph 7 (3) of the ICPD Programme of Action states, "Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents.

¹⁰⁰⁵ Supra note 10

speech and expression and personal liberty respectively, which may include women's right to conceive a child and bear and give birth. When one accepts, that right to procreate is to be construed as a fundamental right, would imply that the couples who are unable to procreate their biological children in the normal course of their married life, is entitled to seek recourse to the assisted reproductive technology or the surrogacy arrangement as a right under the fundamental rights. Since the surrogacy is the new concept being developed worldwide, the Constitutional Law has not been applied by the Indian courts to deal with the surrogacy till today. Therefore, the answer goes without any hesitation, that the motherhood, whether it is natural or artificial is to be accepted and protected under the Constitution of India.

The Supreme Court in *P. Rathinam v. Union of India*,¹⁰⁰⁶ has given the significant interpretation with respect to Article 21 of the Constitution, which is to be understood wider than mere 'animal existence,' and includes all aspects of life which make it worth living. As a negative right of freedom from State interference, Article 21 has a positive content about the quality of life and 'the right to carry on such functions and activities as to constitute the bare minimum expression of the human self.'¹⁰⁰⁷

Therefore, the right to procreation of children through ART or surrogacy can be derived from the Article 19 (1) (a) and Article 21 of the Constitution. Article 19 deals with the protection of certain rights regarding freedom of speech, etc. sub clause (a) of clause (1) of the Article 19 gives all citizens the right to freedom of speech and expression. However, the Constitution also confers the powers on the State to impose reasonable restrictions on the rights confirmed under section 19 (1) (a) in the interest of sovereignty and integrity of India.¹⁰⁰⁸

The Hon'ble Supreme Court of India, in its series of judgments described the fundamental rights are as paramount. In the Case of *A. K. Gopalan v. State of Madras (1950)*,¹⁰⁰⁹ the Supreme Court described the fundamental rights as sacrosanct and interpreted the words "procedure established by law in Article 21 by giving the wider meaning of the expression." Further, in *State of Madras v. Chapakam Dorairajan*

¹⁰⁰⁶ *P. Rathinam v. Union of India*, (1994) 3 SCC 394.

¹⁰⁰⁷ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746; *C.E.R.C. v. Union of India*, AIR 1995 SC

¹⁰⁰⁸ Inserted by the Constitution (Sixteenth Amendment) Act, 1963.

¹⁰⁰⁹ AIR 1950 SC27

(1951) called it as the right sought by the people.¹⁰¹⁰ In *M.S.M. Sharma v. Shri Krishna Sinha* (1960)¹⁰¹¹ it is described as inalienable and inviolable. Lastly, in *Ujjam Bai v. State of U.P.* (1963)¹⁰¹² it is viewed as transcendental. Therefore, “Rights are those conditions of social life without which no man can see to be himself at his best.” According to the P.B. Gajendragadkar, defines a fundamental right as “a legally enforceable right governing relations between the State and the individual.” Hence, fundamental rights have been rightly regarded as the soul of the Constitution.

5.2.1. Right to Privacy and Reproductive Rights

A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both State and private organizations to intrude on that autonomy.... Privacy as a key value which underpins human dignity and other key values such as freedom of association and freedom of speech... Privacy is a basic human right and reasonable expectation of every person.¹⁰¹³

Privacy is a fundamental human right recognized in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and many other international and regional treaties.¹⁰¹⁴ According to the Louis Brandeis, “the privacy is the most cherished freedom in a democracy, and it should be reflected in the Constitution.”¹⁰¹⁵ The right to privacy “in one sense, all human rights are aspects of the right to privacy.”¹⁰¹⁶

¹⁰¹⁰ AIR 1951SC 226

¹⁰¹¹ 1960 AIR 1186

¹⁰¹² 1963 SCR (1) 778

¹⁰¹³ “The Australian Privacy Charter,” Published by the Australian Privacy Charter Group, Law School, University of New South Wales, Sydney 1994, see R. N. Trivedi, (ed)., ‘The world of All Human Rights,’ ‘Soli Sorabjee,’ *A Festschrift*, (Universal Law Publication, New Delhi, 2010 Edn.), at p.24

¹⁰¹⁴ Article 17 of the International Covenant on Civil and Political Rights, “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation”. Similar provisions are contained in the Convention on the Rights of Persons with Disabilities, Article 8 of the ECHR and Article 11 of the ACHR. Article 16 of the Convention on the Rights of the Child guarantees the freedom of the child from “arbitrary or unlawful interference with his or her privacy, family, home or correspondence”. Article 22 (1) of the Disability Rights Convention, Paragraph 106 (f) of Beijing Platform for Action guarantees the same right and Paragraph 7.45 of ICPD Programme of Action provides that the [Reproductive and sexual health] services must safeguard the rights of adolescents to privacy....

¹⁰¹⁵ Louis Brandeis, “The Right to Privacy”, Harvard Law Review, 4, 1890, pp.190-223

¹⁰¹⁶ Volio, Fernando, “Legal Personality, Privacy and the Family” in Henkin (ed.). The International Bill of Rights, New York: Colombia University Press, 1981.

The reproductive right has been recognized as a part of Article 21 of the Constitution. Article 21 of the Constitution of India envisages that,

“No person shall be deprived of his life and personal liberty except according to procedure established by law.”

The Supreme Court in the case of **R. Rajgopal v. State of Tamil Nadu**¹⁰¹⁷ held that the right to life includes the ‘right to privacy’. A citizen has a right to safeguard not only his own privacy, but also of his family, marriage, procreation, motherhood, child bearing and education among other matters.

As so far as the Article 21 of the Indian Constitution is concerned, it has many facets, the Indian courts have by their liberal construction of the provisions, have added new dimensions to it over the years and stretched to accommodate the desire for the motherhood under “RIGHT TO PRIVACY”. The said right to privacy include the right to procreation (natural or artificial) being the basic feature of the Constitution. The right to bear a child is the woman’s constitutionally protected rights. It is the liberty of thoughts and expression.

In the 21st Century, the Indian courts brought to the light the concept of privacy in **Govind v. State of M.P.**¹⁰¹⁸ under Article 21 of the Indian Constitution and applied in various rights. Nearly every Country in the world recognized the right to privacy explicitly in their Constitution. The right to privacy is one of the un enumerated rights guaranteed to the citizens of India.¹⁰¹⁹ The freedom of Speech and expression under Article 19 (1) (a) has been recognized to include a person right to privacy.¹⁰²⁰ The Supreme Court of India specifically recognized the right to privacy as a fundamental right under Article 21, in a famously known case of **Maneka Gandhi v. Union of India**¹⁰²¹ and ruled that the procedure established by law means, just, fair and reasonable procedure.

Taking into consideration of the importance of right to privacy, the National Commission, to review the working of the Constitution in its report has recommended

¹⁰¹⁷ (1994)6 SCC

¹⁰¹⁸ AIR 1975 SC 1978

¹⁰¹⁹ Unnikrishnan J.P. v. State of A.P., AIR 1993SC 2178

¹⁰²⁰ Peoples Union for Civil Liberties v. U.O.I, AIR 1997 SC 568

¹⁰²¹ AIR 1978 SC 597

the inclusion of a new Article namely Article 21-B as 'RIGHT TO PRIVACY' under the Constitution of India.¹⁰²² Therefore, by applying liberal interpretation to right to privacy, the Indian Courts included the right to procreation i.e. 'reproductive autonomy' in the right to privacy.

Thus, the Indian Judiciary has also recognized the reproductive right of humans as a basic right. The Andhra Pradesh High Court in **B. K. Parthasarathi v. Government of Andhra Pradesh**,¹⁰²³ declared the reproductive rights as a fundamental right and upheld "the right of reproductive autonomy" of an individual as an aspect of his "right to privacy" and agreed with the decision of the US Supreme Court in **Jack T. Skinner v. State of Oklahoma**,¹⁰²⁴ which characterized the right to reproduce as "one of the basic civil rights of man." Once, the concept of privacy is extended to matters of procreation, State's interference or boundaries on the procreation amount to a direct encroachment on one's privacy. Therefore, even in **Javed v. State of Haryana**,¹⁰²⁵ though the Supreme Court upheld the two living child norm to debar a person from contesting a Panchayati Raj election, it refrained from stating that the right to procreation is not a basic human right.¹⁰²⁶

In **Suchita Srivastava v. Chandigarh Administration**¹⁰²⁷ the Supreme Court said that, "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial privacy, dignity and "Bodily integrity should be respected. Reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, the provision of the MTP Act 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

¹⁰²² Report of the National Commission to Review the working of the Constitution, Volume I, Universal Law publishing Company, 2002 Ed. P. 62

¹⁰²³ *B.K. Parthasarathi v. Government of Andhra Pradesh*, AIR 2000 AP 156

¹⁰²⁴ 316 US 535

¹⁰²⁵ *Javed v. State of Haryana*, (2003) 8 SCC 369

¹⁰²⁶ Law Commission of India, "228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a Surrogacy," (Aug, 2009), available at <http://lawcommissionofindia.nic.in/reports/report228.pdf> at 1.9, visited on 15/05/2011 on 14.00 pm.

¹⁰²⁷ *Suchita Srivastava v. Chandigarh Administration*, 2009 SCC 1p.14

The surrogacy is widely protected under the right to privacy in the Article 19 and 21 of the Indian Constitution. It is not only the Indian Courts but also the American Supreme Court recognized right to privacy as a fundamental right. In one of the noted U.S. Case **Elsenstad v. Baird** ¹⁰²⁸ the Court stated that, “if the right to privacy means anything, it is the right of the individual, married or single, to free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget the child.” In **Roe v. Wade**,¹⁰²⁹ the American Supreme Court had decided that every woman has a right to take a decision how her body is to be used and therefore, it is said that a woman has a right to enter into the contract of commercial surrogacy.

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

Therefore, the right to procreate, that is to bear or beget the children, is widely considered as one of the rights implied by the constitution. It is grounded on both individual liberty and the integrity of the family unit and is viewed as a fundamental right, which is essential to the notion of liberty of justice. But the surrogacy transaction is not specifically recognized by law.¹⁰³⁰ Therefore, in such situation it is the positive obligation of the State under 21 to recognize method like surrogacy, so that persons who are unable to procreate child on their own, can legitimately exercise their right to ‘reproductive choices.’¹⁰³¹

The Supreme Court in **Mr. ‘X’ v. Hospital ‘Z’**¹⁰³² observed that, when there is clashes between two fundamental rights, then the right, which would advance the public morality or public interest would alone be enforced through the process of court. In **Govind v. State of Madhya Pradesh**,¹⁰³³ the court said that, the right to privacy itself is a fundamental right must be subjected to the restriction on the basis of compelling public interest.

¹⁰²⁸ 405 U.S. 438, 453-54 (1972)

¹⁰²⁹ 410 U.S. 113 (1973)

¹⁰³⁰ *Jan Balaz vs. Anand Municipality*, AIR 2010 Guj 21 at 14

¹⁰³¹ *B.K. Parthasarathi v. Government of Andhra Pradesh*, AIR 2000 AP 156

¹⁰³² *Mr. ‘X’ v. Hospital ‘Z’* (1998) 8 SCC 296 (310), in the said case the Right to privacy and Right to health both are the fundamental rights under Article 21 of the Constitution of India were clashed with each other.

¹⁰³³ (1975) 2 SCC 148 (156)

The American Court, however, in *Gariswold v. Connecticut*¹⁰³⁴ (1965) held that married couples have the right to be free from State interference in their decision to a pain and use of contraceptive, basing upon the decision of the marital privacy, a sphere of personal interest largely immune from State regulation.

When we look at the surrogacy arrangement, the provisions under the contract do not fall within the reasonable restrictions laid down under Article 19 (1) (a). Moreover, it is a freedom of a person to express or opt for surrogacy. It is equal liberty of a person to bear a child through ART or become a surrogate for others. At the same time the dignity of the woman cannot be lowered by becoming a surrogate to help others to create their own family. Hence, the State cannot restrict this right. If any restriction on this right is imposed by the State, the Courts will definitely protect reproductive right without any hesitation.

When one looks at the surrogacy in its constitutional perspective, it gives the individual an exclusive right to take his or her own decision whether to bear children artificially or through a non coital method. In case of infringement of these rights, more particularly those guaranteed under Part-III of the Constitution of India, the individual is provided with the remedies under Article 32 and also under Article 226 for enforcement of such rights.¹⁰³⁵ Article 21, further confers positive rights to life and liberty. The word 'life' in Article 21 means a 'life of dignity' and 'not just a mere animal survival.' The Apex Court in *Chandra Mohan v. State of U. P.*¹⁰³⁶, said that the words of the constitution cannot be construed in a narrow or pedantic sense. It is being living an organic document, is the law, not only for the present but in the future. Therefore, a broad and liberal spirit to be inspired. The Supreme Court further held in *Nalla Thampi v. U.O.I.*,¹⁰³⁷ and declared that the right to life includes the final grace of human civilization, virtually rendered this Fundamental Right a repository of various rights.

¹⁰³⁴ 381 U.S. 479 (1965)

¹⁰³⁵ Article 32. Remedies for enforcement of rights conferred by this Part i.e. III, Article 226, Power of the High Court to issue certain writs. M. P. Jain Indian Constitutional Law, Justice Ruma Pal, Samaraditya Pal, Sixth Edn. Reprint 2012, LexisNexis Butterworths, Wadhwa, Nagpur.

¹⁰³⁶ AIR 1966 SC 1987

¹⁰³⁷ AIR 1985 SC 1138

The Chennai High Court in the case of *K. Kalaiselvi v. Chennai Port Trust*¹⁰³⁸ recognized the maternity leave to a woman employee working in the Chennai Port Trust, where she gets the child through the surrogacy arrangement as parent of the surrogate baby. The Kerala High Court in this case *P. Geetha V. The Kerala Livestock Development Board Ltd*¹⁰³⁹ granted the post maternity to petitioner a woman who is a biological mother of the child born through surrogacy. The Bombay High Court in *Dr. Mrs. Hema Vijay Menon v. State of Maharashtra & Ors.*,¹⁰⁴⁰ held that the right to life includes right to motherhood and also right of every child to full development. The refusal to grant maternity leave to a mother who begets the child through surrogacy procedure is arbitrary, discriminatory and violative of Arts. 14 and 21 of the Constitution of India. Thus, a mother is entitled to maternity leave who has begotten a child through surrogacy.

The Supreme Court in *Baby Manji v. U.O.I.*,¹⁰⁴¹ as well as in *U.O.I. v. Jan Balaz with Jayashree Wad v. U.O.I.*,¹⁰⁴² refrained from stating anything about the surrogacy right under the Constitution of India, it may due to the absence of statutory law of surrogacy. But the Court even failed to give guidelines for regulating the surrogacy arrangement as like given in the case of *D. K. Basu v. State of West Bengal*,¹⁰⁴³ where the court laid down clear cut guidelines relating to the law of arrest and in *Vishakha v. State of Rajasthan & others case*,¹⁰⁴⁴ there was no for the prohibition of sexual harassment of women in the working place, the court made the law.

Recently, in the case of *Jayashree Wad v. Union of India & Ors, with Union of India Anr. v. Jan Balaz & Ors*¹⁰⁴⁵ issues raised that, whether commercial surrogacy is inconsistent with the dignity of Indian womanhood and therefore violative of Article

¹⁰³⁸ *Kalaiselvi v. Chennai Port Trust*, W.P.No.8188 of 2012, C. f. <https://indiankanoon.org/doc/28691523/>

¹⁰³⁹ *Geetha v. The Kerala Livestock Development Board Ltd*, W.P. (C) No. 20680 of 2014, C.f. http://judis.nic.in/judis_kerala/content.asp

¹⁰⁴⁰ AIR 2015 BOMBAY 231

¹⁰⁴¹ *Baby Manji Yamada v. Union of India & Anr.*, AIR 2009 SC84

¹⁰⁴² *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹⁰⁴³ AIR 1997 SC 610

¹⁰⁴⁴ AIR 1997 SC 3011

¹⁰⁴⁵ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

21 of the Constitution? The petitioner argued that, the commercial surrogacy contract is illegal, unethical and against public policy of India as violative of fundamental rights guaranteed to the Indian women under Article 21 of the Constitution of India. Therefore, it is very necessary in the public interest to stop the entry of all foreign couples including individuals under Section 3 of Foreigner Act, 1946 from entering into a surrogacy arrangement in order to protect the rights of the womanhood as guaranteed under article 21 of the Constitution of India. Accordingly, the Government of India issued the notification¹⁰⁴⁶ and the Supreme Court of India passed an order¹⁰⁴⁷ regarding the prohibition of Commercial surrogacy in India, prohibition of import of the human embryo and a ban on all foreign nationals from entering into a surrogacy arrangement in India and thus, the matter is sustained for further order till the passing of the ART Bill, 2016¹⁰⁴⁸ by the Parliament. Therefore, presently only the Indian married infertile couple can enter into a surrogacy arrangement in India.

5.2.2. Reasonable Restrictions and Fundamental Rights:

The fundamental rights are not the absolute rights. The Constitution of India itself provides for the reasonable restrictions in the exercising these rights by its citizen in the interest of sovereignty and integrity of the State. Sub Clause (2) to (6) of the Article 19 imposes restrictions on the citizens of India, while exercising the freedoms guaranteed under sub Clause (a) to (g) of the clause 1 of Article 19. Therefore, a State may impose reasonable restrictions on the surrogacy issue, such as:

- Infertility criteria of the couple for opting surrogacy arrangement.
- Medical Condition of woman for becoming a surrogate
- Age of surrogate mother
- Number of times volunteering for surrogacy
- Payment (Compensation) to surrogate

¹⁰⁴⁶ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015’, issued by the Department of Health Research, Government of India, on 4th November, 2015, p. 3 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm

¹⁰⁴⁷ *UNION OF INDIA & ANR V. JAN BALAZ & ORS.* (Pending in Civil Appeal No(s). 8714/2010 WITH *JAYASHREE WAD V. UNION OF INDIAN & OTHERS* W.P. (C) No. 95/2015, C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹⁰⁴⁸ The ART Bill, 2016 is not yet published by the Government on public domain. However, before passing of the ART Bill, 2016, the Government introduced the Surrogacy Bill, 2016 in Lok Sabha on 21st November, 2016

- Conditions for opting surrogacy by Foreign persons or single person, unmarried couples, Gay, Lesbian, Bio- sexual or transgender (LGBT)
- Confidentiality of information about surrogate and donor etc.,

The Supreme Court of India in *Peoples Union of Civil Liberties v. U.O.I.*,¹⁰⁴⁹ held that the right to freedom of Speech and expression under Article 19 (1) (a) means the right to express one's conviction and opinion freely by word of mouth, writing, printing, picture or in any other manner, thus recognizing person's right to privacy. Therefore, the expressions made by the parties and the contracts entered by them for surrogacy will be within the ambit of personal liberty and right to privacy.

Ultimately, the protection of surrogacy contract is the part of right to privacy. And the right to privacy includes the right to make marital and procreative choices and it also encompasses the right to hire a surrogate mother to conceive a child.

Therefore, the surrogacy arrangements "deserve Constitutional protection because of the private relationships and procreative intention of the parties, the woman's control over her own body, and the right of genetic parents to association with their child."¹⁰⁵⁰

Further, Article 19 (1) (g) of the Constitution of India gives the right to all citizens the "Right to practice any profession or to carry on any occupation, trade or business." Thus, this Article protects the right of the doctor who practices in ART for procreating children through the surrogate mother. In this context the reasonable restrictions are highly important to restrict the exploitation of poor surrogate woman by the doctors, intermediaries or fertility centers, which are practicing in ART and surrogacy. But when such a practice or profession transform into business or becomes an immoral activity, the State shall extend its iron hand to curb such practice. Then, it must be absolutely prohibited or may be restricted and regulated. And the same time the State cannot impose the absolute restrictions on the practice of surrogacy or ART Procedure.¹⁰⁵¹

¹⁰⁴⁹ AIR 1997 SC 568

¹⁰⁵⁰ National Report: "The Law of Surrogate Motherhood in the United States", January 2010, Oklahoma City University School of Law, Available at: http://works.bepress.com/carla_spivack/15

¹⁰⁵¹ *Hari shanker v. Deputy Commissioner*, AIR 1974 SC 1121

But with respect to the modern reproductive techniques, the protection of health or morals, the prevention of crime or the protection of the rights and freedoms of others (in particular to the child) the state may restrict right to privacy. Those restrictions, however, be provided by law and are necessary in a democratic society, i.e. it should be accepted by the tolerant and pluralistic society.

One of the primary objects of the marriage is the procreation of children. Unfortunately, due to the biological or medical reasons few families are cursed with childlessness. This kind of inequality among the childless couples made them equal by the advancement of science through the use of the assisted reproductive technology or the surrogacy. But, if it is denied by the State or the society, the childless couple will never become equal with those couples who have their own biological children. Therefore, the right to equality or equality before law guaranteed under Article 14 of the Constitution of India does not give the absolute meaning of equality among human beings to whom it is physically not possible to have their own genetic child without use of surrogacy.

5.2.3. Right to Parent of Single person and Unmarried Couple:

To take the recourse of assisted reproductive technology including surrogacy for procreation of children is considered as the reproductive rights of the single man and woman as guaranteed by the Constitution of India¹⁰⁵² and the several international human rights instruments.¹⁰⁵³ If any single man and woman are restricted for the use of ART or surrogacy services, it amounts to discrimination.

Article 15 (1) of the Constitution of India envisages that the “State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”¹⁰⁵⁴ The expression of ‘discrimination’ according to ‘Oxford dictionary,’ means “to make an adverse distinction with regard to”, “to distinguish unfavorable from others.” The discrimination involves an element unfavorable bias and it is in that sense that the expression has to be understood in this context. If such

¹⁰⁵² Article 21 of the constitution of India guarantees reproductive right to every individual including single man and woman.

¹⁰⁵³ *Supra note p. 6*

¹⁰⁵⁴ M.P. Jain, “Indian Constitutional Law “at p. 1303, Sixth EDN. Reprint 2012, LexisNexis, Butterworth’s Wadhwa, Nagpur, at p.987

bias is disclosed and is based on any of the grounds mentioned in Article 15, the law will struck down as being violative of the Constitutional provisions, unless it is saved by Article 15 (3) or (4).¹⁰⁵⁵

A woman can become a single parent by going to a sperm bank and undergoing artificial insemination process. For a man, however, has to take help of two women, one is the egg donor and second is, to serve as a surrogate mother. But here main concern is, if the single parenting is allowed how our society treats the babies born out of wedlock, the morality, ethics and the psychology of our society will accept this. The question however is, Can Indian society absorbs this type of parenting?

In India, however, already seen the case of a single man became the father of the surrogate child. India's first case of a surrogate child conceived for a single father, a 46 year old Chartered accountant namely, Amit Banerjee (Kolkatta) used his sperm to be fertilized with the egg of a donor woman, after developing it artificially, the embryo was placed in the womb of the other woman i.e., surrogate woman. After the delivery of the child the surrogate handed over the child to Mr. Banerjee. Thus, Mr. Banerjee became the first single surrogate father in India.¹⁰⁵⁶

The Indian Council of Medical Research, National Guidelines, 2005 does not provide any legal bar to the use of ART or surrogacy by a single man or woman for becoming a parent of the child.¹⁰⁵⁷ Thereafter, the draft Assisted Reproductive Technology (Regulation) Bill 2008,¹⁰⁵⁸ and the draft Assisted Reproductive Technology

¹⁰⁵⁵ V.N. Shukla, "Constitution of India," 9th Edn. 1994, Eastern Law Book Co, Lucknow, p. 71, Article 15 of the Indian Constitution states the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Article 15 (3) Nothing in this article shall prevent the State from making any special provision for women and children. Article 15 (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

¹⁰⁵⁶ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi, 2015, p. 141

¹⁰⁵⁷ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, para , 3.5.2. at p.62., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

¹⁰⁵⁸ Section 32 (1) of the Assisted Reproductive Technologies (Regulation) Bill-2010, C.f. http://www.prsindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf visited on 25/10/2010 at 3.00 pm at p. 25.

(Regulation) 2010,¹⁰⁵⁹ also states that ART, in India would be available to all persons including single persons and unmarried couples. Thereafter, the New Visa Regulation, July 9, 2012 restricted the single, unmarried foreign nationals for commissioning surrogacy in India. However, the said guidelines, 2012 challenged in **Sudan National Shihabeldin Case**,¹⁰⁶⁰ in Punjab and Haryana High Court on the ground of violation of the right to life and personal liberty under Article 21 of the Constitution of India. That surrogacy cannot be denied to single foreign nationals. It is the unreasonable and unjust classification treats equals unequally, which violates the equality before the law and equal protection of laws under Article 14 of the Constitution. He contended that, imposing a ban on surrogacy by foreign single persons or foreign unmarried couples amounts to an unreasonable, unjust and arbitrary classification, which has no nexus with the object wants to achieve by the government. However, the High Court passed an order relying upon the reply of the Central Government that the guidelines issued in July 2012 under the Foreigner Act, regarding regulation of surrogacy will prevail over any other similar guideline issued earlier.

The recent draft of the Surrogacy Bill, 2016 provided that, only the Indian infertile married couples can avail the service of altruistic surrogacy and prohibited the single persons and unmarried couples from surrogacy arrangement.¹⁰⁶¹

The National Commission for women (NCW) has suggested that, the Bill should be allowed single, divorcee and widow women to become a surrogate mother.¹⁰⁶² The New Guidelines Governing Adoption of Children, 2015¹⁰⁶³ and the Juvenile Justice

¹⁰⁵⁹ Section 32(1) of the Assisted Reproductive Technologies (Regulation) Bill-2010, available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf. at p. 25

¹⁰⁶⁰ The Indian Express, "Sudan national moves HC against surrogacy norms," Updated: April 9, 2014 3:24 pm, C.f. <http://indianexpress.com/article/india/india-others/sudan-national-moves-hc-against-surrogacy-norms/>

A Sudan National Shihabeldin bachelor came to India in 2013 to become a single parent through surrogacy. However, he was not allowed to do so because of the New Visa Regulation Guidelines issued on July 9, 2012, by the Ministry of Home Affairs (MHA) restricting single foreign nationals and unmarried couples from coming to India for purposes of surrogacy on medical visas.

¹⁰⁶¹ Section 58 (1) of the Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 41, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

¹⁰⁶² THE TIMES OF INDIA, Foreigners may be Barred from Commissioning Surrogacy in India, Sushmi Dey, TNN | Oct 16, 2015, 08.52PM IST, available at <http://timesofindia.indiatimes.com/india/Foreigners-may-be-barred-from-commissioning-surrogacy-in-India/articleshow/49418285.cms>, visited on 24/10/2015 at 2.00 p.m.

¹⁰⁶³ Guidelines Governing Adoption of Children, 2015, of 5 (c) provide the single female is eligible to adopt a child of any gender, issued by Ministry of Women and Child Development on 17th July, 2015, p. 68, available at

(Care and Protection of Children), Act, 2015¹⁰⁶⁴ which allows the single parents as well as foreigners to adopt the child. The Supreme Court in *Stephanie Joan Becker v. State and Anr.*,¹⁰⁶⁵ case permitted a single 53-year-old lady to adopt a female orphan child aged 10 by relaxing the rigidity of the guidelines of the Central Adoption Resource Authority (CARA). The Supreme Court in *Lakshmi Kant Pandey v. Union of India*¹⁰⁶⁶ has given the high watermark decision for the development of the law relating to adoption and inter-country adoptions and laid down the guidelines for protecting the interest of the child.

In today's situation, the ART Bill, 2014 has made discrimination in the access of surrogacy to the single persons and which also came into contradiction with the new adoption rules of 2015 and Juvenile Justice (Care and Protection) Act, 2015 which allows single persons to adopt the child irrespective any nationality. Thus, on the one side government allowing the single parenting through adoption and on the other side, it rejects the right to become a single parent by the use of ART or surrogacy service, it is nothing but clear discrimination as prohibited under Article 14 and 15 of the Constitution of India.

According to the Report of the Ethics Committee of American Society for Reproductive Medicine (ASRM), that the ART services should be equally available to single persons without regard to marital/partner status or sexual orientation.¹⁰⁶⁷

Every Individual has the reproductive right to enjoy the benefits of scientific progress and technology,¹⁰⁶⁸ which is also recognized as a right by the Article 15 (1) of the United Nations International Covenant on Economic, Social, and Cultural Rights.

http://cara.nic.in/writereaddata/UploadedFile/NTESCL_635760082361561985_english%20guidelines.pdf visited on 10 / 09/2015 at 3.00 p.m.

¹⁰⁶⁴ The Juvenile Justice (Care and Protection of Children), Act, 2015, available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, Visited on 05/01/2016 at 11.00 am. The Juvenile Justice (Care and Protection of Children), Act, 2015 has received the assent of the President on 31st December 2015, it allows adoption to the single and divorcee person and also permit the inter country adoption, so, now foreigner can also adopt the child in India irrespective of their religion.

¹⁰⁶⁵ (2013) 12 SCC 786

¹⁰⁶⁶ (1984) 2 SCC 244

¹⁰⁶⁷ The Ethics Committee of the American Society for Reproductive Medicine on 'Access to fertility treatment by gays, lesbians, and unmarried persons: a committee opinion, December 2013, C.f. https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/fertility_gaylesunmarried.pdf, visited on 11/05/2014 at 4. p.m.

¹⁰⁶⁸ *Supra* note 33

It is found that, we are still making the law on the basis old emotional and cultural concept of family, consisting of father, mother, grandfather, grandmother, but in today's modern and scientific world the lifestyle of the person has changed tremendously, many women are staying alone and wants to enjoy motherhood through the surrogacy. Therefore, the lawmakers should consider this fact while framing the law on surrogacy. If the law fails to recognize the rights of the persons, it will have bad impact on the society, as a chance to go surrogacy underground.¹⁰⁶⁹

Thus, the advantage of Article 21 of the Constitution of India is available to all persons, which guarantees the right to life and personal liberty of the person without any discrimination. The right to privacy as a part of the right to life and personal liberty includes the reproductive rights, i.e. the right to bear a child or become a parent of the child by the use of surrogacy. Therefore, according to the researcher the reproductive rights should be equally made available to the single man and woman in interest of justice.

5.2.4. Right to Parent of Homosexual Couple and Transgender Person:

The practice of surrogacy has suffered from various legal, moral and social complexities, but still it can't stop the people from becoming a parent of the child. For Lesbian and Gay couples, a surrogacy is the best option to become parents of their genetically related child. There are several international human rights instruments which give the guarantee to every individual person of the right to become a parent of the child¹⁰⁷⁰

In India, the reproductive rights are guaranteed by the Article 21 'Right to Life and Personal Liberty' of the Constitution of India. The right to bear the child or right to become a parent of the child is included under the right to privacy. The reproductive rights equally available to all persons without any discrimination as protected by the Article 14 of the Constitution of India and under Article 15 of the Constitution, that "the State is prohibited from making any discrimination on grounds of religion, race, caste, sex, place of birth or any of them."¹⁰⁷¹ Article 19 (1) (a) of the Constitution gives the freedom of speech and expression to the citizen of India. Thus, the

¹⁰⁶⁹ Maharashtra Times, Pune, "Rights to Enjoy Happiness" September 4, 2016, p. n. 12.

¹⁰⁷⁰ Supra note 15, ICPD Para.7.3

¹⁰⁷¹ Supra note at 113

reproductive rights of the individual are protected without discrimination by the Constitution of India as well as judiciary through its various pronouncements. Therefore, the question is, whether the Lesbian, Gay Couples, Bio-sexual and transgender [LGBT] persons are having the right to access of assisted reproductive technology including surrogacy without the discrimination of the gender identity¹⁰⁷² and sexual orientation.¹⁰⁷³ Whether they are entitled to claim the right to parent? The researcher herewith is discussing about the position of the right to parent of the LGBT persons in the various countries and in India.

The South Africa Court in the case of *Minister of Home Affairs v. Fourie*¹⁰⁷⁴ said the expanding the benefit of marriage to the same sex partners is basically a matter of equality. The European Union has also recognized the equal rights of same-sex couples.¹⁰⁷⁵ The European Court of Human Rights, while interpreting the European Convention on Human Rights said to the contracting nations, the need of family rights of same-sex couples.¹⁰⁷⁶ The General Assembly of the Organization of American States (OAS) along with its members, approved the Resolution on Human Rights, Sexual Orientation, and Gender Identity¹⁰⁷⁷ and also given major importance to the 'Yogyakarta Principles'¹⁰⁷⁸ In North America and Canada, the Civil Marriage Act,

¹⁰⁷² Gender Identity means: Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. It refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

¹⁰⁷³ **Sexual orientation refers** to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexual, bisexuals, heterosexuals, asexual etc

¹⁰⁷⁴ Minister of Home Affairs v. Fourie, 2005 (1) SA 19 (CC) at 37 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2005/19.html>, (a right to same-sex marriage found in the South African Constitution)

¹⁰⁷⁵ Katharina Boel-Woelki, *The Legal recognition of Same-Sex Relationships within the European Union*, 82 TUL. L. REV. 1949, 1951 (2008).

¹⁰⁷⁶ Barbara Stark, "Transnational Surrogacy and International Human Rights Law," C.f. http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2118077, Visited on 26/10/2015 at 5.30. p.m.

¹⁰⁷⁷ *Ibid*

¹⁰⁷⁸ The *Yogyakarta Principles* applied to the International Human Rights Law in relation to Sexual Orientation and Gender Identity. It is a set of principles relating to sexual orientation and gender identity. The object is to apply international human rights law standards to undertake the abuse of the human rights of lesbian, gay, bisexual and transgender (LGBT) people, and intersex people. The right to universal enjoyment of human rights. It means all human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

2005 allows the same-sex marriage. The California Court in the case of *Perry v. Schwarzenegger*¹⁰⁷⁹ strikes down California's scheme which prohibited the same-sex marriage.

Recently, the United Nations General Assembly, on 12th December, 2008 confirmed the international human rights protections apply to sexual orientation and gender identity. It is also stated that even though homosexuality is a crime in many countries, but still there is inclination towards recognizing the rights of same-sex couples.¹⁰⁸⁰

In India, the Indian Council of Medical Research, National Guidelines, 2005 does not provide any legal bar to the use of ART or surrogacy by any couple, however, the child born through surrogacy require to be adopted by genetic (biological) parents¹⁰⁸¹ and is presumed to the legitimate child of the couple.¹⁰⁸² Thus, according to ICMR guidelines any couple may include gay and lesbian couples too.

The draft of the Assisted Reproductive Technology (Regulation) Bill 2008,¹⁰⁸³ and the draft of the Assisted Reproductive Technology (Regulation) 2010,¹⁰⁸⁴ states that the ART in India would be available to all persons, including single persons, married or unmarried couples, gay or lesbian couples. Accordingly the ART Bills, 2008 and 2010 were clearly allowed the use of surrogacy service to the lesbian, Gay couples, married or unmarried couples and foreign nationals because of the use of the word 'all persons'.

As a result, in the year 2008 in *Israeli Gay Couple's case*,¹⁰⁸⁵ the gay couple Yonathan and Omer became the parents of surrogate child in India. In Israel, gay couple could not adopt or enter into surrogacy arrangement. In this case the baby Evyatar born to the gay couple's through surrogacy in Mumbai, where Yonathan was

¹⁰⁷⁹ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (2010).

¹⁰⁸⁰ *Supra* Note 132

¹⁰⁸¹ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, para , 3.10.1. . at p.68., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

¹⁰⁸² *Ibid* at Para 3.12.1 at p. 70

¹⁰⁸³ Section 32 (1) of the Assisted Reproductive Technologies (Regulation) Bill-2010, C.f. http://www.prsindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf visited on 25/10/2010 at 3.00 pm at p. 25.

¹⁰⁸⁴ Section 32 (1) of the Assisted Reproductive Technologies (Regulation) Bill-2010, available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf. at p. 25

¹⁰⁸⁵ The Times of India, Mumbai, 18-11-2008

the sperm donor. However, for taking a surrogate child to Israel, they required to do a DNA test to prove their paternity.

Thereafter, many foreign homosexual couples became the parents of the surrogate children in India. It means the ART Bill, 2008 and 2010 were clearly recognized the gay couples rights to become a parent through the surrogacy arrangement.

Thereafter, on 2 July 2009, the Delhi High Court in its landmark judgment in *Naz Foundation v. Government of National Capital Territory of Delhi [NCT]*¹⁰⁸⁶ held that the treating consensual sex between homosexual adults as a crime is the violation of fundamental rights of an individual protected by the Indian Constitution under Article 21 the right to life and personal liberty, under Article 14 the right to equality before a law and under Article 15 prohibits the discrimination on the basis of sex. Thus, the repealing of section 377 of Indian Penal Code, (IPC), 1860 and legalized the sexual intercourse of homosexual consenting adults in India.

But after the verdict of Delhi High Court evoked mixed reactions among the all sections of the society in India, as earlier, India had allowed the foreign singles, Gay and lesbian couple's use of the method of ART for producing babies via surrogates.

Hence, for making surrogacy provision more severe, the Ministry passed the New Indian Visa Regulation Guidelines, on July 9, 2012¹⁰⁸⁷ which prohibited the foreign same sex couples and single persons from surrogacy arrangement and restricted only to foreign married heterosexual couples. The Visa Regulation, 2012 reflected the attitude of the government as a discriminatory towards the foreign homosexual community. Moreover, India has ratified the Universal Declaration of Human Rights,

¹⁰⁸⁶ *Naz Foundation v. Government of National Capital Territory of Delhi*, WP (C) No.7455/2001, Decided on 2nd July, 2009, C.f. <https://indiankanoon.org/doc/100472805/>

In this case the court said that the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21 of the Constitution, and the section 377 of IPC criminalization of consensual gay sex violated these rights. The Court also held that Section 377 offends the guarantee of equality enshrined in Article 14 of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class. Hence, the court held, it is not a valid ground for classification under Article 14. Article 15 of the Constitution forbids discrimination based on certain characteristics, including sex. The word "sex" includes not only biological sex but also sexual orientation, and therefore discrimination on the ground of sexual orientation is not permissible under Article 15.

¹⁰⁸⁷ New Indian Visa Regulations, dated 9 July 2012, available at http://www.icmr.nic.in/icmrnews/art/MHA_circular_July%209.pdf, p.1, visited on 11/12/2012 at 3.30. pm

1948 and promised to protect the human rights of individuals which extends beyond the boundaries of the India

After that, the decision of the Delhi High Court in Naz Foundation case was challenged in the Supreme Court of India in *Suresh Kumar Koushal and another v. NAZ Foundation and others*¹⁰⁸⁸ wherein the Court held that the Section 377 of IPC, 1860 does not violate the Article 14, 15 and 21 of the Constitution of India. It is merely a identifies certain acts which, if committed would constitute the offence and it does not criminalize the particular group of people or identity or orientation. Hence, it does not a sound basis for declaring the said section is *ultra vires* to the Constitutional provisions.

After this case, it becomes clear that the non recognition of the relationship of Indian gay and lesbian couples will lead to a conclusive fact they are not eligible for surrogacy or adoption. Thus, this judgment has great impact on surrogacy issues considering the fact, in 2013 a ban imposed on foreign gay and lesbian couples as well as singles to adopt the surrogacy as a means of procreation.

But it is very significant to consider that, the 10th revision of the International Statistical **Classification of Diseases (ICD-10) of the World Health Organization (WHO) and the Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association**, globally accepted that **homosexuality is not a mental disorder but a normal and natural variant of human sexuality**.¹⁰⁸⁹

Meanwhile, the Apex Court of India on April 15, 2014 in the case of *National Legal Services Authority v. Union of India and Ors*,¹⁰⁹⁰ recognized the transgender as the third gender. The Court said the discrimination based on gender identity or sexual orientation violates the Constitutional guarantees of equality, privacy and dignity.

¹⁰⁸⁸ *Suresh Kumar Koushal and another v. NAZ Foundation and others*, (2014) 1 SCC 1, In this Case Mr. Kushal the appellant contended if the declaration of the Delhi Court upheld then the same would pose as detrimental to India's social and structural fabric and harm the institution of marriage. Therefore, the Supreme Court said the section 377 of IPC merely identifies certain acts which if committed would constitute the offence and it does not criminalize the particular group of people or identity or orientation. The Apex Court left it to the legislature to consider the desirability of deleting or amending the said provision.

¹⁰⁸⁹ The Hindu, 'Five-judge Constitution Bench to take a call on Section 377', New Delhi, February 2, 2016, C.f. <http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece>

¹⁰⁹⁰ *National Legal Services Authority v. Union of India and ors*, C.f. <http://supremecourtfindia.nic.in/outtoday/wc40012.pdf>

The recent Transgender Persons (Protection of Rights) Bill, 2016¹⁰⁹¹ has been made with the aim to protect the rights of the transgender person and prohibits the discrimination against them. Section 16 of the Bill, 2016 also includes the provision of grant of medical care facility so it may ART facility to them.

The Supreme Court of Nepal in the case of *Sunil Babu Pant & Ors. v. Nepal Government*,¹⁰⁹² held that, the homosexuals and third gender people are also human beings. Hence, they are entitled to all fundamental rights given by the Part III of the Constitution and the State should recognize their fundamental rights. The Supreme Court of Pakistan in *Dr. Mohammad Aslam Khaki & Anr. v. Senior Superintendent of Police (Operation) Rawalpindi & Ors*¹⁰⁹³ held that the third gender is entitled to all rights given by the Constitution to its citizen including the right to life and dignity without any discrimination.

According to the Ethics Committee of the American Society for Reproductive Medicine (ASRM) that, it is the ethical duty to provide the access of the assisted reproductive technology services to the single individuals, unmarried heterosexual couples, gay and lesbian couples¹⁰⁹⁴ and to transgender people.¹⁰⁹⁵ The Ethics Committee also said that they should not be discriminated on the basis of parent's marital/partner status, gender identity or sexual orientation.

In India, according to the Indian Psychiatric Society [IPS] and the World Psychiatric Society [WPS] does not consider the homosexuality as disease of persons, hence the homosexual parents should not be treated as diseased parents. It is a true fact that the child can be born out of homosexual relationship, does it mean that they don't have a right to become parents of the child? And the law which prohibits surrogacy as a

¹⁰⁹¹ The Transgender Persons (Protection Of Rights) Bill, 2016 has been introduced in Lok Sabha on 02/08/2016. C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/210_2016_LS_Eng.pdf

¹⁰⁹² Ibid, *Sunil Babu Pant & Ors. v. Nepal Government* (Writ Petition No.917 of 2007) decided on 21st December, 2007,, C.f. <http://supremecourtfindia.nic.in/outtoday/wc40012.pdf> ,

¹⁰⁹³ *Dr. Mohammad Aslam Khaki & Anr. v. Senior Superintendent of Police (Operation) Rawalpindi & Ors* (Constitution Petition No.43 of 2009), decided on 22nd March, 2011, C.f. <http://supremecourtfindia.nic.in/outtoday/wc40012.pdf>

¹⁰⁹⁴ Supra note 127,

¹⁰⁹⁵ The Ethics Committee of the American Society for Reproductive Medicine on, "Access to fertility services by transgender persons: an Ethics Committee opinion" November, 2015, C.f. https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/Access_to_care_for_transgender_persons.pdf, Visited on 22/10/15 at 5.30pm

reproductive right is clearly violates the Article 14 and 21 of the Constitution of India.¹⁰⁹⁶

According to Dr B.S. Chavan,¹⁰⁹⁷ that the family togetherness, means having a father, mother and brother, sister, is important for the upbringing of any child and this type of family environment cannot be provided by gay or lesbian couples or single individual person. He also said, the children born to such couples or individuals may lack confidence. This is not in the interest of children and will also have a negative impact on society.¹⁰⁹⁸ However, according to the American Psychological Association¹⁰⁹⁹ that, there is no scientific evidence that parenting effectiveness is related to parental sexual orientation. Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.

The New draft of the Assisted Reproductive Technology (Regulation) Bill, 2014, published on 30th September, 2015, restricted the commissioning of surrogacy to the all married infertile couples only. Thus, this Bill prohibited the single person, unmarried couple and gay and lesbian couples from the entering into surrogacy arrangement.¹¹⁰⁰

Presently, according to the recent notification issued on 4th November 2015 by the Ministry of Health and Family Welfare Department, that only an Indian infertile married couples are allowed to avail the service of surrogacy in India.¹¹⁰¹ Therefore, now all foreign couples (including gay, lesbian or single persons, unmarried or married heterosexual couples) are not allowed to obtain service surrogacy in Indian ART clinic.

¹⁰⁹⁶ Maharashtra Times, Pune, "Rights to Enjoy Happiness" September 4, 2016, p. n. 12.

¹⁰⁹⁷ Dr B.S. Chavan, Head, Psychiatry Department, Govt. Medical College Hospital, Chandigarh.

¹⁰⁹⁸ Anil Malhotra, Legalizing surrogacy —Boon or bane? July 14, 2010 at 09:47, *C.f.* <http://indialawyers.wordpress.com/2010/07/14/legalising-surrogacy-%E2%80%94boon-or-bane/#comments>, visited on 20/10/2012 at 2.30 pm.

¹⁰⁹⁹ Supra note 127

¹¹⁰⁰ Section 58 (1) of the Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 41, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

¹¹⁰¹ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm., This notification is issued after submission of affidavit by the Union of India in the case of Jayashree Wad v. Union of India & Ors. W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), *C.f.* <http://courtnic.nic.in/courtncisc.asp>

Recently, on February 2, 2016 in the Curative petition *Naz Foundation v. Suresh Kumar Koushal & Ors*,¹¹⁰² the Supreme Court of India referred a batch of curative petitions against Section 377 of the Indian Penal Code, 1860 which penalizes consensual sexual acts of Lesbian, Gay, Bisexual and Transgender (LGBT) adults in private, to a five-judge Constitution Bench for in-depth hearing. It is also observed by the three judge bench that the threat imposed by the provision amounts to denial of the rights to privacy and dignity which results in a gross miscarriage of justice.

Thus, this curative petition has given the hope for recognition of the fundamental rights, including the right to access of the assisted reproductive technology services including surrogacy right to the gay, lesbian bio-sexual and transgender persons without the discrimination on gender identity and sexual orientation.

It is also very clear that, the right to take benefit of scientific progress and technology is the reproductive right of every individual and which is also guaranteed by the Article 15 of the International Covenant on Economic, Social and Cultural Rights and several other international human rights conventions. Therefore, the right to have the access of the assisted reproductive technology is the right of the every individual person.

As observed by the Supreme Court of India in *National Human Rights Commission v. State of Arunachal Pradesh*¹¹⁰³ that, “We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights of the citizens. Every person is entitled to equality before the law and equal protection of the laws.

Therefore, as a researcher would like to say that there is a need of recognition of all fundamental rights, including the access of assisted reproductive technology rights to every individual without any kind of discrimination, then only there will be justice seen to be done towards the single person, gay, lesbian, transgender person, because all are equal before the law, therefore, equal protection should be granted to them, as the right to equality is the basic structure of the our Constitution.

¹¹⁰² The Hindu, ‘Five-judge Constitution Bench to take a call on Section 377’, New Delhi, February 2, 2016, C.f. <http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece>

¹¹⁰³ AIR 1996 SC 1234

5.2.5. Rights of Foreign Nationals:

Right to become parents of the child is natural, fundamental human right possessed by the every individual irrespective of their race, caste, nationality, sex, language, etc. This right is guaranteed by the several international human rights instruments,¹¹⁰⁴ Article 21 right to life and personal liberty of the Constitution of India and approved by the judiciary through its various judgments. Article 14 of the Constitution of India states about the equality before law and equal protection of law and Article 15 of the Constitution prohibits the discrimination on the basis of sex.

Recently, in India there is a huge debate on the issue, whether to allow the service of surrogacy to foreign nationals in India or not? In surrogacy transaction, it is found that the surrogate women's position is socially and economically vulnerable, and this advantage is taken by the upper class people especially foreign peoples. It is said that, the Indian women are renting their womb to foreigners because of the need of money. The surrogates are poor, illiterate are not aware of their legal rights therefore, they are physically and economically exploited by the foreign nationals. According to Amrita Pande's research conducted in Arman Clinic, India, shows that 30 out of 41 couples were the foreign nationals and only 11 couples were the Indian.¹¹⁰⁵ The Confederation of Indian Industry (CII) has reported in 2012 that the, every year 10,000 foreign couples visit to India for surrogacy arrangement and this industry generates the business of \$2 billion a year.¹¹⁰⁶ As per the Dr. Mishra¹¹⁰⁷ around 48 to 50 percent commissioning parents are coming from western countries, remaining are the Non-Resident Indians (NRIs) and local peoples.¹¹⁰⁸ Recently, Dr. Nayana Patel's Infertility Clinic has reached milestone birth of the '**1000th Surrogacy Baby**' at her clinic¹¹⁰⁹ and majority couples were the foreigners. The practice of surrogacy has been already challenged on various social, ethical and legal issues. It is termed as unethical

¹¹⁰⁴ *Supra note 10*

¹¹⁰⁵ Amrita Pande, "Wombs in Labor: Transnational Surrogacy in India." Columbia University Press, New York, 2014, at Appendix C: Descriptive tables, Table AP. 1, Surrogates at Arman Clinic in India.

¹¹⁰⁶ THE HINDUSTAN TIMES, 'Commercial surrogacy: The half mothers of Anand,' Namita Kohli, Hindustan Times, <http://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html>, Visited on 10/11/2015 at 2.30 pm

¹¹⁰⁷ Dr. Manasi Mishra - Head, Research Division, Centre for Social Research.

¹¹⁰⁸ Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f. https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

¹¹⁰⁹ P. C. Vinod Kumar, The Weekend Leader, Vol. 6, Issue 42., 19th Oct., 2015, available at <http://www.theweekendleader.com/Success/2280/joy-to-couples.html> visited on 20/10/2015 at 2.00 pm

practice which violates the dignity of the womanhood under article 21 of the Constitution of India. In transnational surrogacy arrangement the issue of abandonment of the child has become frequent and serious. The recent abandonment of the *Baby Gammy Case* has given a huge shock to the whole world. The question is, what can surrogate do if the commissioning couple abandoned the child on the ground that it is abnormal of physically/mentally challenged?¹¹¹⁰ In transnational surrogacy arrangement the problems of legal parentage, custody, nationality and citizenship of the children were challenged in the cases of *Israeli Gay Couple Case*,¹¹¹¹ *Baby Manji Case*,¹¹¹² and in *Jan Balaz case*.¹¹¹³

The right to enter into surrogacy arrangement by the foreign nationals in India was confirmed by the Indian Council of Medical Research National Guidelines, 2005¹¹¹⁴ and also by the draft of the Assisted Reproductive Technology Regulation Bills, 2008,¹¹¹⁵ 2010¹¹¹⁶ and 2013.¹¹¹⁷ Thereafter, the Indian Visa Regulation Policy, 2012 prohibited the foreign single person, Gay Couples and unmarried couples from entering into a surrogacy arrangement and were allowed only to the heterosexual married couple on medical Visa.

After that on 30th September, 2015 the Indian Government issued the new draft of the Assisted Reproductive Technology Bill, 2014 which have permitted the service of surrogacy in India to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs), and a Foreigner married to an Indian citizen¹¹¹⁸ However, according to the Adv. Anurag Chawla,¹¹¹⁹ that, the Bill has created

¹¹¹⁰ Jayashree Wad Vs. Union of India & others W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

¹¹¹¹ The Times of India, Mumbai, 18-11-2008

¹¹¹² *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84

¹¹¹³ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010

¹¹¹⁴ *Supra* note 139

¹¹¹⁵ *Supra* note 141

¹¹¹⁶ *Supra* note 142

¹¹¹⁷ *Supra* note 143

¹¹¹⁸ The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 44 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

In case of an Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and a foreigner married to an Indian citizen, for commissioning surrogacy in India shall be married and the marriage should have sustained at least for two years and also submit a certificate conveying that the woman is unable to conceive their own child and the certificate shall be attested by the appropriate government authority of that country.

¹¹¹⁹ Advocate at Delhi

discrimination between two groups of foreign couples by allowing access of surrogacy to OCI, PIO or NRI, and a foreigner married to an Indian citizen and banning other foreigners. If the object of the Bill is to prohibit unethical practices of surrogacy, then, how it will stop by banning one group of people.¹¹²⁰

Recently, in the case of *Jayashree Wad v. Union of India & Ors, with Jan Balaz Case*¹¹²¹ the petitioner argued that, the commercial surrogacy contract is illegal, unethical and against public policy of India as violative of fundamental rights guaranteed to the Indian women under Article 21 of the Constitution of India. Therefore, it is very necessary in the public interest to stop the entry of all foreign couples including individuals under Section 3 of Foreigner Act, 1946 from entering into a surrogacy arrangement in order to protect the rights of the womanhood as guaranteed under article 21 of the Constitution of India. The trade in human embryo under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 is unethical, void and *ultra vires* to the article 21 of the Constitution of India. Accordingly, the Government of India issued the notification¹¹²² and the Supreme Court of India passed an order¹¹²³ regarding the prohibition of Commercial surrogacy in India, prohibition of import of the human embryo and a ban on all foreign nationals from entering into a surrogacy arrangement in India and thus, the matter is sustained for further order till the passing of the ART Bill, 2016¹¹²⁴ by the Parliament. However, the recent Surrogacy Bill, 2016 allowed only an Indian infertile married couple to enter into a surrogacy arrangement and banned all foreigners, including OCI, PIO, NRI and Foreigner married to Indian Citizen.

1120 THE HINDUSTAN TIMES, 'Commercial surrogacy: The half mothers of Anand,' Namita Kohli, Hindustan Times, <http://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html>, Visited on 10/11/2015 at 2.30 pm. Because the Section 60 (31) of the ART Bill, 2014 provides that, "the minimum compensation to be paid to a surrogate mother by an Overseas Citizen of India, People of Indian Origin Cardholder, Non Resident Indians and foreigner married to an Indian citizen shall be different than the amount to be paid by an Indian commissioning couple."

¹¹²¹ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹¹²² Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, p. 3 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm

¹¹²³ *UNION OF INDIA & ANR V. JAN BALAZ & ORS.* (Pending in Civil Appeal No(s). 8714/2010 WITH *JAYASHREE WAD V. UNION OF INDIAN & OTHERS* W.P. (C) No. 95/2015, C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹¹²⁴ The ART Bill, 2016 is not yet published by the Government on public domain.

After the study of all facts regarding right to enter into the surrogacy arrangement by the foreign nationals. It is very significant to note that, reproductive right, i.e. right to become parents of child included in the right to privacy as guaranteed by the Constitution of India under Article 21 of the right to life and personal liberty and this right is available to all persons irrespective any nationality. It means it is applicable to citizens as well as noncitizens. The right to parent is recognized by the several human rights conventions where India was also a party for it.¹¹²⁵ Therefore, it is the duty of the State to follow the rules of international law. In *Sudan National Shihabeldin Case*,¹¹²⁶ It was argued that banning to foreign nationals from entering into surrogacy arrangement is the violation of the right to life and personal liberty under Article 21 of the Constitution of India. It is the unreasonable and unjust classification treats equals unequally, which violates the equality before the law and equal protection of laws under Article 14 of the Constitution. It was contended that imposing a ban on surrogacy by the foreign single persons or foreign unmarried couples amounts to an unreasonable, unjust and arbitrary classification, which has no nexus to the object sought to be achieved.

Therefore, according to researcher the government of India has to consider the rights of foreign nationals for availing surrogacy service to them as it may impact badly on the image of India in the world. And simultaneously, it is also necessary to regulate the surrogacy strictly by enacting concrete surrogacy law in order to protect the surrogate from exploitation and also protect the rights of surrogate child.

¹¹²⁵Article 16 (1) of the *Universal Declaration of Human Rights 1948* says, that “men and women of full age without any limitation due to race, nationality or religion, have the right to marry and start a family.”Article 23 of the *International Covenant on Civil and Political Rights, 1966* provides that the right of men and women of marriageable age to marry and to found a family. Article 10 of the *International Covenant on Economic, Social and Cultural Rights, 1966*, recognizes that the family is the “natural and fundamental group unit of society”, hence it should be protected.

¹¹²⁶ The Indian Express, “Sudan national moves HC against surrogacy norms,” Updated: April 9, 2014 3:24 pm, C.f. <http://indianexpress.com/article/india/india-others/sudan-national-moves-hc-against-surrogacy-norms/>

A Sudan national Shihabeldin bachelor came to India in 2013 to become a single parent through surrogacy. However, he was not allowed to do so because of the New Visa Regulation Guidelines issued on July 9, 2012, by the Ministry of Home Affairs (MHA) restricting single foreign nationals and unmarried couples from coming to India for purposes of surrogacy on medical visas.

5.2.6. Surrogacy, Human Trafficking and Indian Constitutional Law:

Article 23 (1) of the Constitution of India prohibits the ‘traffic in human beings’ and also declares any contravention of this provision shall be an offence punishable in accordance with law. The object of this provision is to prohibit the unsocial practices in the society. Thus, it tries to protect the individual not only against the State but also against the private individual.

The expression ‘traffic in human beings’ commonly known as slavery, implies buying and selling of human beings as if they are chattels and such practice is Constitutionally abolished. Traffic in women for immoral purposes also covered by this expression.¹¹²⁷ The practice of commercial surrogacy has been challenged as immoral because it amounts to commodification of women’s body, in which the surrogate mothers are selling their bodies and their babies. It is even alleged that the doctors who are practicing in surrogacy area, are selling the babies to the commissioning couple, therefore, they should be charged with the offence of human trafficking.

Thus, there are several questions raised by the surrogacy arrangement, whether the commercial surrogacy is the sale of the child?¹¹²⁸ And whether the sale of child amounts to the human trafficking?¹¹²⁹ And whether it amounts to offence under Transplantation of Human Organs Act, 1994?¹¹³⁰ Whether the import of human embryo amounts to human trafficking?

However, it is said that surrogacy does not amount to the sale of the child, because embryo belong to its parents and not the surrogate. In surrogacy transaction the surrogate selling her labour, her gestational services like any other services in the employment. Hence, it does not amount to baby selling and human trafficking. In today’s surrogacy world, however, various surrogacy rackets and the exploitation of surrogate women are occurring. The United Nations Development Programme in 2009 itself warned that trafficking of women for commercial surrogacy would

¹¹²⁷ M.P. Jain, “Indian Constitutional Law” at p. 1303, Sixth EDN. Reprint 2012, LexisNexis, Butterworth’s Wadhwa, Nagpur, at p. 1304

¹¹²⁸ See chapter IV, *commercial surrogacy and sale of the child*

¹¹²⁹ Ibid

¹¹³⁰ Ibid at p. 50, The Transplantation of Human Organs Act, 1994, prohibits the sale, loaning, and commercialization of the trade of human organ.

eventually develop.¹¹³¹ In October 2011, just two years later *'Baby 101'* surrogacy racket caught by Thai police, where fourteen Vietnamese women have been rescued from sexual slavery in the Surrogacy baby trafficking ring in Thailand.¹¹³² In India, a fertility specialist charged of selling of newborn baby and running the surrogacy racket in Bangalore.¹¹³³ Unfortunately, the present the Assisted Reproductive Technology (Regulation) Bill, 2014 is lacking the clause of the human trafficking¹¹³⁴

The Constitution of India prohibits the human trafficking with the object to curb unsocial practices in society, but the concept of surrogacy is new to this world and it is a debatable issue whether commercial surrogacy amounts to baby selling or not, but the illegal surrogacy rackets should be prohibited by making stringent punishment and making special provision in the Draft of ART Bill, 2014 for the prohibition of the human trafficking in a surrogacy arrangement. The new Surrogacy Bill, 2016 has made provision of the surrogacy rackets for the purpose of selling, purchasing and trading human embryos and gametes punishable not less than 10 year and fine up to 10 lakh rupees.¹¹³⁵

Recently in *Jayashree Wad v. Union of India & Ors*,¹¹³⁶ it was declared that the human embryo is human life in miniature form and permitting trade in the same amounts to trafficking in human beings and the same is prohibited by law. The

¹¹³¹ Adv. Anil Malhotra, Taming the International Commercial Surrogacy Industry, pub. 23 Oct. 2014, available at <http://www.bmj.com/content/349/bmj.g6334>, visited on 25/12/2014 at 9.30. pm

¹¹³² The Life Site, "Fourteen women rescued from 'eugenics surrogate' baby trafficking ring in Thailand," Fri Feb 25, 2011 - 6:37 pm, available at <https://www.lifesitenews.com/news/fourteen-women-rescued-from-eugenics-surrogate-baby-trafficking-ring-in-tha>

¹¹³³ THE HINDU, "Fertility specialist held on charge of selling newborn, running surrogacy racket" October 12, 2014 00:20 IST available at <http://www.thehindu.com/news/cities/bangalore/fertility-specialist-held-on-charge-of-selling-newborn-running-surrogacy-racket/article6492156>

¹¹³⁴ The Assisted Reproductive Technology Bill, 2014 has omitted the significant provisions regarding various offences in its list of offences such as human trafficking, abduction of surrogate mothers, baby selling.

¹¹³⁵ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 14, Visited on 21/11/2016 at 3.00 pm. Section 14 (1) (e) states that the sell human embryo or gametes for the purpose of surrogacy and run an agency, a racket or an organisation for selling, purchasing or trading in human embryos or gametes for the purpose of surrogacy.

¹¹³⁶ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of India & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>, According to the Notification No. 52 (RE-2013) / 2009-2014 dated 02.12.2013 issued by the Ministry of Commerce and Industry under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 were permitting the trade in human embryo. Thereafter, the order of the Supreme Court of India, the Government removed the said notification and prohibited the import of human embryo.

foreign couples or individuals directly or through IVF centers import such embryo is amounting to trafficking in human beings. Therefore, it is challenged as unethical, unconstitutional practice under Article 21 of the Constitution of India. After the order of the Supreme Court against the government, accordingly the Government of India issued the notification on 4th November 2015 for the prohibition of import of the embryo except for research purpose. Thus, today import of the human embryo is also amounts to human trafficking.

5.3. JUDICIAL APPROACH TOWARDS SURROGACY

5.3.1. Indian Judiciary towards Surrogacy:

The protector of HUMAN RIGHTS in a country is the judiciary.....

The surrogacy arrangement is signified as a last medical ‘solution’ to the problem of infertility, but it has most often identified as a ‘social, ethical and legal problem.’ Therefore, it is the great task in the hands of the judiciary to solve the problems of the surrogacy and balance the rights of parties of the surrogacy. Basically, there are three major cases relating to surrogacy, which are challenged before the judiciary of India.

CHART NO. 13 THREE MAJOR SURROGACY CASES IN INDIA



1. *Baby Manji Yamada v. Union of India & Anr.,*¹¹³⁷

A Japanese couple, Dr. Ikufumi and Dr. Yuki Yamada had entered into a surrogacy agreement with Mrs. Pritben Mehata a surrogate mother in Dr. Nayana Patel Infertility Centre in 2007. The embryo was created from the sperm of the Ikufumi Yamada and egg harvested from Indian unanimous Indian donor. The embryo was implanted into the womb of Prtibhen Mehta. But unfortunately in June 2008, the Yamada couple divorced due to matrimonial discord and on 25th July 2008 Baby Manji was born to the surrogate mother. Dr. Ikufumi Yamada wanted to raise the child, but his ex-wife Yuki did not want the baby as she realized that she is unrelated

¹¹³⁷ *Baby Manji Yamada v. Union of India & Anr.* AIR 2009 SC 84

A Satya, a Jaipur-based social justice and child welfare organization filed a habeas corpus writ petition in the Rajasthan High Court and claimed that Manji was a victim of a “child-trafficking racket” organized by Dr. Patel through her for the profit infertility clinic.

to the baby biologically, genetically, and even legally. The anonymous egg donor (the genetic mother) had neither rights, nor responsibilities towards the baby. The responsibility of the surrogate mother had ended when the baby was born. However, the Baby Manji had three mothers the commissioning mother, surrogate mother and egg donor, but none of the mothers had claimed parental right over the Baby. Baby Manji was moved to Arya Hospital in Jaipur, Rajasthan, once her health had improved because it was unclear who would receive custody.

Dr. Ikufumi Yamada wanted to take the baby to Japan. However, the Japanese Embassy refused to grant Manji a Japanese passport or visa. Because the Japanese Civil Code didn't recognize the surrogate children. In this case, the woman who birthed Manji was Indian, not Japanese, which meant Manji was not entitled to a Japanese passport. Dr. Ikufumi Yamada a genetic father of the baby was required to adopt the child, but again 120 years old law the Guardians and Wards Act, 1890 does not allow single men to adopt a baby but gives the guardianship only. Dr. Yamada approached for Indian passport for Manji, however, it required a birth Certificate before issuing it. And as per Indian law, a birth certificate requires the names of both mother and father. Akanksha Infertility Clinic certified that Dr. Ikufumi Yamada is Manji's genetic father, but the vital records registrar was uncertain which mother should appear on the document. Therefore, the Municipal Council of Anand refused to grant Manji's birth certificate. The Passport authority also refused to issue a passport. Mr. Yamada filed an appeal to the Indian government to issue documents for Manji and claimed the records made clear that Dr. Yamada is the father of the Baby Manji and Manji had the right to live with her Japanese family and should receive Japanese nationality. Thereafter the Anand Municipality issued a birth certificate to Manji Yamada stating only her father's name.

Meanwhile, Manji's paternal grandmother, Emiko Yamada, had traveled to India to care for Manji in the hospital because her son Dr. Ikufumi Yamada had returned to Japan upon the expiration of his visa. After getting the birth certificate of baby Manji a grandmother Emiko Yamada filed writ petition in Rajasthan High Court. The certain directions given by a division Bench of the Rajasthan High Court relating to the production/custody of a child Manji Yamada were challenged by Emiko Yamada in this case. Thus, the baby Manji case has raised the issues of legal parentage,

nationality and custody of the surrogate child. The Supreme Court of India directed that the National Commission for Protection of Child Rights is the appropriate authority to deal with the issue of the Child. The Supreme Court held that the Dr. Ikufumi Yamada, is the genetic father of the child so, given custodial rights of the child and directed the Government to deal with matter, thereafter, the Regional Passport Office, Rajasthan issued a certificate of identity as part of a transit document and not the passport to Manaji Yamada as she returned with her grandmother. The identity certificate did not contain nationality, mother's name or religion of the baby.

Thus, in this case the Court recognized surrogacy agreement as valid in India because the Court neither said the surrogacy contract is invalid nor declared it is valid under the Indian Contract law. The Court granted the custody of the child to the single parent Dr. Ikufumi Yamada. But the Apex Court in the absence of law, abstained from giving any guidelines for the validity of the surrogacy arrangement.

2. *Jan Balaz v. Anand Municipality*¹¹³⁸

The question before the Gujarat High Court was whether a child born in India to a surrogate mother, an Indian national, whose biological father is a foreign national, would get citizenship in India, by birth? And for this question even there is no precedent in this country.

¹¹³⁸ *AIR 2010 Guj.21*

The petitioner Jan Balaz and his wife Susanne Anna Lohle were the German nationals. Due to biological reasons, the wife of the petitioner was not in a position to conceive a child and even not in a position to reproduce ova (eggs). Therefore, through a scientific process the petitioner's sperm was fertilized with the donor's ova and the fertilized embryo was implanted to the uterus of the surrogate mother. The twin baby sons – Nikolas and Leonard were born in 2008 to Indian surrogate mother. In this case the German couple had entered into a surrogacy agreement in Anand, Gujarat. The twin and registered as children born of a foreign couple through the Indian surrogate mother. Jan Balaz moved to the Gujarat High Court for claiming the citizenship and passport of babies since babies are born in India and are citizens of India, Germany would not recognize them as its citizens. Denial of Passports of the babies is illegal and violative of Article 21 of the Constitution of India.

In this case the Court said a lot of legal, moral and ethical issues arise out of the surrogacy arrangement, but which have no precedents in this country. However, the primary concern is the rights of two newborn innocent babies than the rights of the biological parents, surrogate mother, or the donor of the ova. The Gujarat High Court raised various issues such as, Is the ova donor is the real mother or the gestational surrogate? Are the babies motherless, can we brand them as legal orphans or Stateless babies? The legitimacy of the babies is also a live issue. Can we brand them as illegitimate babies? The Court said there are so many ethical and legal questions have come up for consideration in this case, but there are no clear answers in this country.

In this case, petitioner claimed that since babies are born in India, so they are entitled to claim Indian citizenship and passport. Therefore, denial of the passport of babies is illegal and violative of the Article 21 of the Constitution of India.

The Gujarat High Court has held that since, the surrogate mother is an Indian national hence, the children are entitled to get Indian citizenship by birth as per section 3 (1) (c) (ii) of the Indian Citizenship Act, 1955 because one of their parents is an Indian Citizen. The Court considered the California Supreme Court decision in **Johnson v. Calvert**,¹¹³⁹ and in U.S Court decision in **Buzzanca v. Buzzanca**¹¹⁴⁰ where the commissioning parents were recognized as the natural parents of the child. The New Jersey Supreme Court, in **Re Baby Mellissa case**¹¹⁴¹ gave custody to the natural father of the child and visitation rights to the surrogate mother but denied the rights of the adopted mother.

In the absence of any legislation to the contrary, the Court recognized the gestational surrogate as the natural mother of the children, as a view established in Japan.¹¹⁴² The Court said a gestational mother who has blood relations with the child is more deserving to be called as the natural mother because she has carried the embryo for a full 10 months in her womb, nurtured the babies through the umbilical cord.

Therefore, the Court directed to Government to release the passport of the minors. However, the Government of India challenged this decision in **Union of India v. Jan Balaz Case**¹¹⁴³ which is still pending in the Supreme Court of India. The German authorities also refused visas to twin's baby on the ground that German law did not recognize surrogacy as a means of parenthood. Ultimately, Jan Balaz and Susan Lohald went through an inter country adoption process under the aegis of CARA (Central Adoption Resource Authority). Thus, after the intervention of the Supreme

¹¹³⁹ (1993) 5 CAL 484

The California Supreme Court held that gestational surrogate has no parental rights to a child born to her since a gestational surrogacy contract is legal and enforceable. The intended mother is the natural mother under the Californian law.

¹¹⁴⁰ 61 CAL. Appl. 4th 1410 (1998), The U.S. Court held that when a married couple uses non-genetically related embryo and sperm implanted into a surrogate intended to procreate a child, they are lawful parents of the child.

¹¹⁴¹ 537 A.2d 1227 (NJ.02/03/1988)

¹¹⁴² According to the Civil Code of Japan, a mother who gives the birth to the Child is the natural mother of the child.

¹¹⁴³ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010)

Court of India, the Indian Government on May 26, 2010 granted the exit permits to Germany to the surrogate twins.

After the detailed study of this case, it is found that due to the absence of the precedent and the surrogacy legislation in India, the Court faced the difficulties in deciding the matter of the surrogacy. Still the Gujarat High Court recognized the surrogate mother as a natural mother and granted the Indian citizenship to the child of German couple. The surrogacy arrangement involves the lot of social, ethical and legal issues and the major problem is with the international surrogacy arrangement that many of the countries do not recognize the surrogacy arrangement as legal hence; it does not grant the citizenship and visa to the child, therefore, sometimes the child remains as Stateless. However, in this case the Gujarat High Court tried to protect the 'best interest of the child' as guaranteed by the United Nations Convention on Rights of Child [UNCRC] and also other international human rights conventions.¹¹⁴⁴ Therefore, now there is an urgent need for either of the precedent or the stringent legislation on surrogacy which will tackle the problem of surrogacy.

3. ***Jayashree Wad v. Union of India & Ors with Union of India Anr. v. Jan Balaz & Ors***¹¹⁴⁵

The Petitioner¹¹⁴⁶ has filed the writ petition, under Article 32 of the Constitution of India to issue a writ in the nature of writ/directions/mandamus to declare that: i) The commercial surrogacy contracts are opposed to public policy, unethical and the violative of Indian Womanhood under Article 21 of the Constitution of India as amounting to exploitation of the surrogate woman. ii) To prohibit all the doctors, hospitals and other institutions from aiding and assisting in commercial surrogacy. iii) To prohibit entry of foreigners for surrogacy. iv) The Notification No. 52 (RE-2013) /

¹¹⁴⁴ According to the Article 26 (1) of the Universal Declaration of Human Rights, 1948 clearly provides that the all action concerning the child, whether taken by the public or private social institutions, courts of law or administrative or legislative bodies that the *best interest of the child* shall be a prime consideration

¹¹⁴⁵ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

The Supreme Court has connected both the cases.

¹¹⁴⁶ Jayashree Wad is a practicing Advocate-on-Record of the Supreme Court of India.

2009-2014 dated 02.12.2013¹¹⁴⁷ issued by the Ministry of Commerce and Industry under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 regarding the import of the human embryo is void and *ultra vires* under said Act, 1992. The import of human embryo amounts the human trafficking because human embryo is not the goods, but a human being in miniature form.

On 14th October 2015, a bench of *Justices Ranjan Gogoi and N. V. Ramana* has suggested the ban on commercial surrogacy and import on human embryos,¹¹⁴⁸ the Court framed the fourteen issues on the commercial surrogacy¹¹⁴⁹ and issued notice to the Central government to file response on it.¹¹⁵⁰

Accordingly, the Government of India instead of filing a response to the issues of the cases has submitted the affidavit in the Supreme Court and on 4th November 2015

¹¹⁴⁷ Notification No.52 (RE – 2013)/2009-2014, ‘Policy for import of Human Embryo’, issued on 2nd December, 2013 by the Ministry of Commerce & Industry, Department of Commerce, New Delhi, available at <http://dgft.gov.in/Exim/2000/NOT/NOT13/not5213.htm>

¹¹⁴⁸ THE TIMES OF INDIA, ‘SC Suggests Ban on Commercial Surrogacy,’ Amit Anand Choudhary, TNN | Oct 15, 2015, 02.55AM IST, C.f. <http://timesofindia.indiatimes.com/india/SC-suggests-ban-on-commercial-surrogacy/articleshow/49365734.cms>

¹¹⁴⁹ http://courtnic.nic.in/supremecourt/casestatus_new/querycheck_conn.asp,
Issues framed by the Supreme Court in both cases such as: 1. Whether in commercial surrogacy the surrogate mother is the only mother of surrogate child? 2. Whether a lady who donates her egg in connection with a commercial surrogacy can be said to be the mother? 3. Whether both “surrogate mother” and “genetic mother” (who has donated the egg) can both be said to be the mother of the surrogate child. 4. Whether commercial surrogacy involved the sale of the child in view of the fact that the surrogate mother relinquishes her parental rights for money? 5. Whether commercial surrogacy amounts to renting of a womb? 6. Whether commercial surrogacy is immoral and is opposed to public policy and therefore void u/s 23 of the Contract Act. 7. Whether commercial surrogacy as practiced in India amounts to economic and psychological exploitation of surrogate mother? 8. Whether commercial surrogacy is inconsistent with the dignity of Indian womanhood and therefore violative of Article 21 of the Constitution? 9. Whether commercial surrogacy involves trafficking in human beings as it involves the sale of a surrogate child, the relinquishment of the surrogate's parental rights for money and involves rent of womb thus violating Article 23 of the Constitution. 10. Whether commercial surrogacy should be prohibited? 11. Whether import of human embryo amounts to commoditization of human life and thus violates article 21? Whether the notification dated 2.12.2013 of the GOI issued under S.5 of the Foreign Trade (Development & Regulation) Act is violative of Articles 21 & 23? 13. Whether human rights of a surrogate child born out of commercial surrogate are violated and as such child would face psychological & emotional problems. 14. The legal system does not seem to have answers to the following questions: (a) What happens if the surrogate dies during the child birth? (b) What can surrogate do if commissioning couple refuses to take a child on the ground that it is abnormal of physically/mentally challenged. (c) Case when surrogate refuses to hand over the child. (d) Remuneration of surrogate. (e) Who will bear the medical bills if surrogate falls ill. (f) What happens to unused eggs or embryos and who supervises their fate. (g) Should surrogacy arrangements be disclosed to the child. If so, when?”

¹¹⁵⁰ India TV News, New Delhi, “SC issues notice to Govt. on PIL seeking ban on commercialization of surrogacy” 15/10/2015, C.f. <http://www.indiatvnews.com/news/india/sc-notice-to-govt-on-pil-seeking-ban-on-commercial-surrogacy-48018.html?asd>, Visited on 25/10/2015

published the notification regarding the commissioning of surrogacy in India¹¹⁵¹ and the Supreme Court has passed the order on 2nd December 2015¹¹⁵² of the same. As per the notification of the Ministry of Health and Family Welfare, Government of India, and the order of the Supreme Court, in India the Commercial surrogacy and the import of human embryo have been prohibited. It has also banned the entry of all foreign nationals from entering into a surrogacy arrangement in India.

However, the notification issued by the government regarding the commissioning of surrogacy in India came into conflict with the Section 60 (11) (a) to (c) of the Assisted Reproductive Technology (Regulation) Bill, 2014¹¹⁵³ which permits the commissioning of surrogacy to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen.

According to the latest hearing of the Court on 27th April, 2016, the Solicitor General Shri. Ranjit Kumar on behalf of the Union of India said that the Assisted Reproductive Technology (Regulation) Bill, 2016" has been finalized for being placed before the Parliament. He also said that as far as a disharmony of the section 60 (11) (a) to (c) of the ART Bill, 2014 with the clause 2 (ii) of the Notification issued on 4th November 2015 by the Government has to be reconciled with the New Assisted Reproductive Technology Bill, 2016. The Supreme Court said that all the matters regarding the petition will be heard after the Bill becomes an Act of Parliament with or without modification.¹¹⁵⁴

Therefore, presently, only an Indian citizen can enter into a surrogacy arrangement in India.

¹¹⁵¹ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Ministry of Health and Family Welfare, Government of India, on 4th November, 2015, p. 3 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm

¹¹⁵² C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹¹⁵³ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

The Ministry of Health and Family Welfare, has published the notification regarding commissioning of surrogacy on 4th November 2015 and the ART Bill, 2014 is published on 30th September 2015 and invited the comments and suggestions of the public in general and stakeholders within 45 days from the date of publication of Bill, 2014. Therefore, said notification come into conflict with the ART Bill, 2014.

¹¹⁵⁴ C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

In both the cases the Court finds the difficulties of deciding the matter because of the absence of law on surrogacy. However, the Court has to give the guidelines on surrogacy and can make the law as made in the cases of *D. K. Basu v. State of West Bengal*,¹¹⁵⁵ and in *Vishakha v. State of Rajasthan & Ors.*¹¹⁵⁶ But the Court sustained the matter till the enactment of ART Bill, 2016.

5.3.2. GLOBAL JUDICIAL APPROACH TOWARDS SURROGACY

The USA Supreme Court in the case of *Jack T Skinner v. State of Oklahoma*¹¹⁵⁷ characterized the 'right to reproduce' as "one of the basic civil rights of man".

1. LEGAL ISSUES IN AMERICA

1. *Baby M Case*¹¹⁵⁸

The first surrogacy agreement took place in the State of USA in the Baby M case (1964). Mary Beth Whitehead became a traditional surrogate mother for William Stern and his wife, Elizabeth. However, after the birth of a female child, she changed her mind and wanted to keep her biological daughter because she was the egg donor. The New Jersey Superior Court validated the contract of surrogacy between the parties and passed a verdict of custody of Baby M to Sterns, the intended parents in the "best interest of the child," whereas Mary Beth (the surrogate) received only visitation rights. In *Re-Baby M case* the New Jersey Supreme Court on February 3, 1988, held that the 'surrogacy contract' was opposed to public policy and therefore invalid. But the *obiter dicta* confirmed the rights of custody to Sterns and gave only visitation rights to Mary. In March 2004, Baby M (Melissa Stern) herself legally terminated the parental rights of Mary Beth.

2. *Jaycee B. v. Superior Court*¹¹⁵⁹

¹¹⁵⁵ AIR 1997 SC 610

¹¹⁵⁶ AIR 1997 SC 3011

¹¹⁵⁷ 316 US 535 (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi, 2015, p. 115)

¹¹⁵⁸ 537 A.2d 1227 (Law Commission of India, "228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a Surrogacy," (Aug, 2009), available at <http://lawcommissionofindia.nic.in/reports/report228.pdf> at p. 12, visited on 15/05/2011 on 14.00 pm.)

¹¹⁵⁹ 42 Cal.App.4Th 718 (1996) (Law Commission of India, "228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a

A child was born to a surrogate mother using sperm and eggs from anonymous donors because the infertile couple was unable to create their own embryo. One month prior to the birth of the baby Jaycee the intended parents John and Luanne separated and John sought to rescind his obligations under the surrogacy contract so as to avoid having to pay child support for Jaycee. Finally, after the three years Court battle, the Californian Court granted transitory custody of Jaycee to Luanne and Court ordered John to pay maintenance.

3. *Angelia G Robinson v. Donald Robinson Hollingsworth*¹¹⁶⁰

In this case Angelia, the sister of Donald, acted as a surrogate for her brother Donald and his gay partner Sean. The Gay couple used the ovum of an anonymous donor and the sperm of Sean. On December 23, 2009 the New Jersey judge recognized the rights of the gestational mother as the child's legal mother even though she was not genetically related to them. Thereafter, in 2011 awarded full custody of the child to the biological father, Mr. Sean, with visitation rights to the surrogate mother considering the children's best interests.¹¹⁶¹

4. *AHW and PW v. GHB and Ors.*¹¹⁶²

In this case issue was whether a Court may issue a pre-birth order directing a delivering physician to list the man and woman (Petitioners) who provided the embryo carried by a surrogate (Defendant) as the legal parents on a child's birth certificate? The Attorney General's office stated that as per New Jersey statutes and directions of the New Jersey Courts in the case of *Baby M*, if defendant GHB chooses to surrender the infant, GHB was required to certify the same and then the original

Surrogacy,” (Aug, 2009), available at <http://lawcommissionofindia.nic.in/reports/report228.pdf> at p. 13, visited on 15/05/2011 on 14.00 pm.)

¹¹⁶⁰ The New York Times, “New Jersey Judge Calls Surrogate Legal Mother of Twins” by Stephanie Saul, DEC. 30, 2009, *C.f.* http://www.nytimes.com/2009/12/31/us/31surrogate.html?_r=0

¹¹⁶¹ Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medico legal Issues’, 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi, 2015, p. 116

¹¹⁶² 339 N. J. Super. 495, 772 A.2d 948, <http://caselaw.findlaw.com/nj-superior-court/1121664.html>
G.H.B., hereinafter “Gina,” is the unmarried sister of plaintiff A.H.W., “Andrea,” and the sister-in-law of P.W., “Peter.” The biological parents, Andrea and Peter, entered into a gestational surrogacy contract with Gina. Gina, without financial compensation, agreed to have the embryos implanted into her uterus that were created from the sperm of her brother-in-law, Peter, and the ova of her sister, Andrea. Plaintiffs filed a complaint seeking a pre-birth order establishing them as the legal mother and father of unborn Baby A, and placing their names on the on the child's birth certificate.

birth certificate will list AHW and PW. If she changes her mind after the baby is born, at least her right to litigate for parental rights remains intact.

5. *Re-Parentage of TJS*¹¹⁶³

On October 24, 2012, the six judges of the New Jersey Supreme Court said that the Uniform Parentage Act, in resting maternity on biology or genetics, the child who is genetically the child of the anonymous ovum donor and biologically the child of AF, who gave birth to the child. Therefore, the Court denied the intended mother to place her name instead that of the surrogate mother on the birth certificate of the baby. The intended mother would require to adopt the baby born to the surrogate in order to be a legal mother.

6. *Anna Johnson v. Mark Calvert*¹¹⁶⁴

A surrogate Anna Johnson had entered into a contract with the genetic parents, Mark Calvert and his wife Crispina for gestating a fertilized egg of the couple implanted in the surrogate. However, before the child was born, in July 1990, Anna sent the genetic couple a letter demanding the balance of the payments due to her or else she would refuse to give up the child. This led to a lawsuit in August 1990 by Mark and Crispina for the affirmation of the legal parents of the unborn baby. The surrogate Anna also filed a case for declaring herself as a mother of the Baby. The child was born on September, 19, 1990.

On May 20, 1993 the California Court declared that, Mark and Crispina both are as a baby's legal, genetic parents and the surrogate Anna has no parental claim over the

¹¹⁶³

54A.3d

263

(2012),C.f.

<http://www.leagle.com/decision/In%20NJCO%2020121024367/IN%20RE%20T.J.S.>

In this case the plaintiffs TJS and ALS are a married couple entered into a surrogacy contract with AF surrogate. The TJS donated sperm to fertilize the ovum of an anonymous donor and the embryo was implanted into the uterus of AF a surrogate who subsequently gave birth to a child in July 2009. Just prior to and in expectancy of the child's birth, the plaintiffs sought an order from the Superior Court to direct that the child's birth certificate identify ALS as the child's mother. A few days later, the trial Court entered the order in the form that plaintiffs had requested. However, after a birth certificate that complied with the court's order was issued, a motion seeking to have the court vacate its order was filed by the Department of Health and Human Services, Bureau of Vital Statistics. The trial Court granted the Department's application and vacated the order that had been entered prior to the child's birth based on Parentage Act. The judgment of the Court was challenged in the New Jersey Supreme Court.

¹¹⁶⁴ 5 Cal.4th 84, 851 P.2d 776, (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 118)

surrogate Baby. The Court held that the surrogacy contract is legally hence enforceable against claims of Anna's.

7. *TMH v. DMT Case*¹¹⁶⁵

In this case, the issue involved the parental rights of a lesbian couple. One of the lesbian couple TMH's eggs was fertilized and the embryo was implanted in DMT who gave birth to the child on January 4, 2004. The lesbian couple TMH and DMT lived together for approximately two and a half years. However, the couple separated in 2006. TMH sued DMT in case DMT through her attorney argued that as per Florida Statute F.S. 742.14 TMH as an egg donor had waived and lost her rights as a parent. The Fifth District Court of Appeal held that Section 742.14, Florida Statutes (2008) did not apply to TMH's case. The court in this case gave a significant finding that the right to procreate and parent a child is a fundamental, constitutionally protected right. Thus, the court ruled that both TMH and DMT had constitutionally protected rights as parents. However, DMT Challenged the decision in the Supreme Court in *DMT v. TMH Case*¹¹⁶⁶, in this case the court held that TMH's right as a parent is constitutionally protected. TMH had signed this form as birth mother's partner and not as an individual providing the egg for a couple.

8. *Surrogacy Parenting Associates v. Commonwealth of Kentucky Case*¹¹⁶⁷

The suit alleged that SPA's surrogate parenting procedure is in violation of the Kentucky statutes which prohibits the sale, purchase or procurement for sale or purchase of "any child for the purpose of adoption. It also prohibits the filing a petition for voluntary termination of parental rights "prior to five (5) days after the birth of a child. The Supreme Court in this case held that surrogate parenting does not violate statutes as such services are not to be considered as a sale or purchase of the child, but as a service for a fee which is pre-determined.

9. *In Re: Marriage of John A Buzzanca v. Luanne H. Buzzanca*¹¹⁶⁸

¹¹⁶⁵ 79 So. 3d 787, (Fla. Dist. Ct. App. 2011), decided on December 23rd, 2011, (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 119)

¹¹⁶⁶ 79 So. 3d 787, (Fla. Dist. Ct. App. 2011).

¹¹⁶⁷ 704 S.W.2d 209 (Ky. 1986) C.f. http://ky.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19860206_0040273.KY.htm/qx

A case highlights how changing times have changed the outlook towards parenting. Baby Jaycee was born because Luanne and John Buzzanca agreed to have an embryo genetically unrelated to either of them implanted in a surrogate. This implantation was successful but unfortunately the couple split up leading to the issue as to who could be called as the legal parents of the baby. The Court held that even though the commissioning parents were not biologically related to the infant, they were still her legal parents.

10. *Lamaritata v. Lucas*¹¹⁶⁹

In this case the Court of Appeal of Florida on August 16, 2002, held that a person who gives sperm for a woman to conceive a child by artificial insemination is not a parent and has no parental rights over the child. Thus, the sperm donor has no legal rights.

11. *S.N.V. v. N.M.V. & B. V.*¹¹⁷⁰

In the Colorado Court of Appeals, it is stated that SNV was conceived through sexual intercourse between the Plaintiff and the respondent (NMV). However, NMV and his wife argued that birth mother was a mere surrogate. The Court held that the NMV's wife is entitled to claim as a legal motherhood under presumptions in the Colorado Uniform Parentage Act. Because she was married to the husband at the time of SNV's conception and birth, and accepted SNV into her home and has held him out to her family and community as her own child.

¹¹⁶⁸ 61 CAL. Appl. 4th 1410 (1998), *C.f.* http://ky.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19860206_0040273.KY.htm/qx

¹¹⁶⁹ 823 So. 2d 316 (Fla. 2d DCA 2002), *C.f.* <http://archive.law.fsu.edu/library/flsupct/sc12-261/sc12-261AAARTA.pdf>

¹¹⁷⁰ Colorado Court Of Appeals No. 10CA1302, Adams County District Court Nos. 09DR2343 & 09JV2609 *C.* *f.* https://www.courts.state.co.us/Courts/Court_Of_Appeals/Opinion/2011/10CA1302.pdf, In this case two women claimed to be the mother of the same child. One of the women is the biological mother, while the other claims to be a legal mother under the presumptions set forth in the Colorado Uniform Parentage Act (UPA).

12. *Robert Nolan v. Kristen Labree*¹¹⁷¹

The case relates to a child genetically related to Robert Nolan and his wife, Celia Nolan but was born to the surrogate mother, Kristen Labree. In this case the District Court refused to declare the maternity of Celia Nolan over the child born to the surrogate. A birth certificate issued to Nolans listed Kristen Labree as the mother of the child. However, the Maine Supreme Judicial Court has vacated the District Court ruling and held that Nolans can obtain a new birth certificate listing them as the sole parents of their son.

13. *Kehoe Twins' Case*¹¹⁷²

Amy Kehoe and Scott Kehoe a married couple entered into a surrogacy agreement with Ms Baker. The twins Ethan and Bridge were delivered on July 28, 2009. But a month later the children were removed by court order from the couples, because of Amy Kehoe had paranoid schizophrenia and her psychiatrist described the diagnosis as a 'psychotic disorder. Amy admitted of being arrested on charges of using cocaine. Although the psychiatrist gave a written evidence that Amy would be a good mother as her condition had been fully controlled for eight years and she had no current symptoms. The surrogate mother Ms. Baker took legal steps to recover the twins. In this case the Michigan Court held that surrogacy contracts are unenforceable and the surrogate mother was deemed to be the twin's legal mother at birth and the court ordered their return to her.

After study of the legal issues in the America State, it is found that due to different States there are varied decisions on parental rights. Generally, for the interest of the child the commissioning parents are recognized as parents. But in many cases surrogate mothers a birth mother is also recognized as a legal mother due to the Uniform Parentage Act.

2. LEGAL ISSUES IN UNITED KINGDOM

1171 2012 ME 61, 52 A.3d 923, (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 121)

1172 Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 123

1. *R and S v. T Case*¹¹⁷³

A High Court Judge has granted parental orders to a British couple of their surrogate twins born in Ukraine.¹¹⁷⁴ The twins were created by using the sperms of the British man along with the anonymous egg donor. As per the laws in Ukraine, legal parents are the biological parents. But in the UK, the surrogate mother is regarded in law as the twin's mother, even though she has no genetic link with the child. The problem started when they tried to leave the country along with the twins, even the United Kingdom (UK) authorities regarded the Ukrainian surrogate as the legal mother of the children, despite the fact that the names of the British couple were entered as parents on the birth certificate. Therefore, the children born of the surrogate had no legal parents and they had no entitlement to citizenship anywhere in the world.

2. *Miss. N's Case*¹¹⁷⁵

In this case Miss. N had agreed to be surrogate for the couple Mr. W and Mrs. W. The surrogate refused to give up the baby for several reasons she came to know from Mrs. W that her husband was controlling and violent towards her and had once tried to strangle her with a car seat belt. A baby girl was born to the Miss. N (identified as T by the court) who decided to keep the baby. The court also ruled in favor of the surrogate by allowing her to keep the child, stating that the surrogate mother had a legal right to keep the child.

3. *Re-G Case*¹¹⁷⁶

Baby M was conceived by Mrs. J (a British surrogate mother), who entered into a noncommercial surrogacy arrangement with a married couple, Mr. and Mrs. G who were Turkish natives. Baby M was conceived using the sperm from Mr. G and an egg

¹¹⁷³ [2015] EWFC 22 (Fam), *C.f.* www.familylaw.co.uk/news_and_comment/r-v-s-t-2015-ewfc-22#judgment

¹¹⁷⁴ <http://www.marilynstowe.co.uk/2015/03/16/twins-born-to-surrogacy-in-ukraine/>

¹¹⁷⁵ <http://www.dailymail.co.uk/news/article-1356176/Surrogate-mother-wins-case-baby-giving-birth.html>

The husband Mr. W had a teenage daughter from his previous relationship and wife Mrs. W had three children from a previous marriage. The couple wanted to have a child, but the wife was unable to do so as she had undergone a cancer treatment. The child was conceived using a crude technique to inseminate the surrogate with Mr W's sperm. The surrogate Miss N was paid £4500. In Britain, the judges consider the best interest of the child.

¹¹⁷⁶ [2007] EWHC 2814 (Fam), *C.f.* <http://www.familylawweek.co.uk/site.aspx?i=ed984>

from Mrs. J. Shortly before the birth the commissioning parents came to England and rented a Flat in the locality. Baby M was born in the month of September 29, 2006. Her birth was registered at the local District Registry and Mrs. J was named as the mother and Mr. G as the father. Two days later Mr. and Mrs. G filed an application for a parental order under Section 30 of HFEA, 1990 with an incorrect assertion that they were domiciled in the United Kingdom. Apart from this, Mrs. J, the surrogate mother, remained married to her estranged husband; PJ raised the possibility of him to be considered by the English Court as the legal parent of the surrogate Baby.

Justice McFarlane rejected the claim of parental order to the commissioning parents as they were domiciled in Turkey and not in the UK. However, the Court allowed an application under inter -country adoption as per the terms of the Convention on Protection of Children and Cooperation in respect of Inter-country Adoption concluded at the Hague on 29th May 1993.

4. *Re X and Y case*¹¹⁷⁷

In this case on October 27, 2011 the Courts granted the parental orders to applicants Mr. and Mrs. A., under Section 54 (1) of the Human Fertilization and Embryology Act, 2008 of two children X (boy) and Y (girl) born in India through Indian surrogate mothers. The Court said the payments are not at disproportionate, and it is plainly in the interests of these two children that they should be brought up by Mr. and Mrs. A as their parents.

5. *D and L Case*¹¹⁷⁸

This case relates to parental orders of twin surrogate children D and L in which the First Applicant is a British citizen. In order to obtain a parental order under the HFEA 2008, they would have to prove that the surrogate mother had given her consent, which could only be given at least six weeks after the birth. However, in this case the surrogate could not be found to consent to the parental orders. The court retrospectively authorized the payment of the sum of \$29,000 paid by the applicants for the arrangement of the birth of the twins and being satisfied that no other money

¹¹⁷⁷ [2011]EWHC 3147(Fam). Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 125

¹¹⁷⁸ [2012] EWHC 2631 (Fam).

or benefit has been given or received by the applicants. It was ordered that there be parental orders that the children D and L shall be treated as the children of the Applicants.

5. LEGAL ISSUES IN AUSTRALIA

***Kirkman Sisters Case*¹¹⁷⁹**

The case of the Kirkman sisters (1988) is popularly known as 'My sister's Baby' in which Linda Kirkman agreed to gestate the genetic child of her older sister, Maggie. This was the First IVF case of Australia. After the birth of the baby girl, Alice, was given to Maggie. This information was flashed in the Australian community.

3. LEGAL ISSUE IN FRANCE

***Mennesson v. France and Labassee v. France*¹¹⁸⁰**

This case the France's Court held that children born to a surrogate are not French. It confirmed that France legally banned surrogacy and any such children born *via* surrogacy will not be given French citizenship. Sylvie Mennesson her husband entered into the surrogacy contract in California in 2000. The High Court of France ruled that the girls cannot be listed in France's civil registry. Therefore, the two couples appealed to The European Court of Human Rights Court. The European Court of Human Rights gave a verdict in favor of the intended commissioning parents. On June 27, 2014 France decided to legally recognize children born to surrogates.

4. LEGAL ISSUE IN PAKISTAN

***Farooq Siddiqui and his wife Yasmin v. Farzana Naheed*¹¹⁸¹**

¹¹⁷⁹ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 128 Presently, in Australia the commercial surrogacy is illegal and surrogate contract is unenforceable and any payment for to the surrogate is banned by the law.

¹¹⁸⁰ Mennesson v. France (application no. 65192/11C) and Labassee v. France (application no. 65941/11) the applications are not yet finalized. C.f. hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4804617...

The European Court of Human Rights held that there had been a violation of the European Convention on Human Rights, in particular the children's right to respect to private life. but there is no violation of the right of the children or intended parents to respect of family life.

It is the first noted surrogacy case in Pakistan. Farzana Naheed gave birth to a baby girl Fatima in February 2005. Farzana, a Pakistani woman claimed that she was the wedded wife of Farooq Siddiqui, the Pakistani American. But Farooq Siddiqui alleged that Ms. Farzana Naheed acted as a surrogate mother for him. However, he failed to prove his contention that Ms. Farzana Naheed had acted as a surrogate mother after being paid one million rupees. In this the Court granted the custody of the daughter to the Farzana Nasheed after a seven-year-long legal battle from 2005-2012. Later on Farooq Siddiqui, approached in the Supreme Court of Pakistan with the request to recover his seven-year-old daughter, Fatima, from the custody of her 'surrogate mother' Farzana Naheed.¹¹⁸²

Researcher in this Para found that based on the legal issues that arose from surrogacy practices in countries around the world, different judgments were given. In the *Baby M case*¹¹⁸³ the court passed a verdict of custody of Baby M to the intended parents in the "*best interest of the child*" as the 'surrogacy contract' was opposed to public policy. In the *Re-Parentage of TJS case*¹¹⁸⁴, the New Jersey Supreme Court denied the intended mother to place her name on a birth certificate of the baby instead of the surrogate mother. In the *Johnson v. Calvert case*¹¹⁸⁵, the baby born out of the gestational surrogacy arrangements was to remain in the custody of his genetic parents as decided by the Court. The surrogate woman is regarded as the mother of the child in the UK. In Australia commercial surrogacy is illegal and regulations have been formed, sparked by the case of the *Kirkman sisters*¹¹⁸⁶. In the *TMI v. DMT*¹¹⁸⁷

¹¹⁸¹ DAWN, "Surrogate mother wins long drawn child custody battle"Malik Asad — Published Nov. 28, 2012 12:20am, C.f. <http://www.dawn.com/news/767309/surrogate-mother-wins-long-drawn-child-custody-battle-2>

The Rawalpindi Bench of the Lahore High Court stated that there was no law on surrogacy in Pakistan. There was no proof that the sperm that fertilized the egg had originated from Siddiqui. The custody of the child was given to Farzana while dismissing Farooq Siddiqui's petition seeking custody of the child. Since Farooq denied that he was wedded to Farzana. Pakistan does not have a law-making framework that regulates surrogacy and a surrogacy arrangement is not recognized because then the legitimacy of procreation outside a marriage contract will be questioned as Zina (Adultery). Same is an offence as per Pakistan Penal Code, 1860. The court relies on the Guardian and Wards Act, 1890 to award custody of the child irrespective of surrogacy agreement.

¹¹⁸² The Express TRIBUNE, "Wife or surrogate mother?: Apex court takes up unusual child custody battle," By Azam Khan Published: October 21, 2012, C.f. <http://tribune.com.pk/story/454670/wife-or-surrogate-mother-apex-court-takes-up-unusual-child-custody-battle>

¹¹⁸³ 537 A.2d 1227 (NJ.02/03/1988).

¹¹⁸⁴ (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medicolegal Issues'New Delhi : Jaypee Brothers Medical Publishers Pvt Ltd, 1st Edn., 2015, p. 91)

¹¹⁸⁵ 851 P. 2d 776 (Cal. 1993).

¹¹⁸⁶ (1988) C.f. https://www.health.wa.gov.au/chiefmedicalofficer/docs/2014_04_24FINRRAGE.pdf

case the court gave the verdict that the right to procreate and parent of the child is a fundamental, constitutionally protected right even for the lesbian couple. The Baby Gammy case severely rocked Thailand when an unhealthy offspring was abandoned, leading to the decision to form new legislation in context to surrogacy. Similarly, in Pakistan surrogacy is not recognized and amounts to adultery.

Recently, in the international press, it was reported that the famous television Star, Sofia Vergara, is fighting a court battle with ex-fiancée for the custody of frozen embryos. As reported in *The Tribune* recently, a Chinese team has been successful in editing human embryos and changing the genomes of embryos. Thus, the surrogacy has made a huge impact all over the globe.

5.4. CONCLUSION:

After writing this chapter, I really feel it is golden chapter of the entire thesis as it donates the oxygen to the survival of surrogacy. In this chapter, we discussed the human rights which are owned by all human beings irrespective of their race, caste, nationality, sex, language, etc. simply because they are human beings. The reproductive right is the natural human right of the every individual which required to be recognized through the law by the Parliament of India.

Presently, there is no any international human right convention, which specifically talks about the surrogacy. However, there are so many international human rights instruments which are clearly provided the reproductive rights such as *Article 16 of the Universal Declaration of Human Rights*, *Para 7.3 of the International Conference on Population and Development (ICPD)*. Thus, the reproductive rights are recognized as basic natural human rights by various human rights instruments. Therefore, reproductive rights also include surrogacy as a right to procreate with the help of science and technology.

At international level CEDAW gives the protection to women from all kinds of discrimination, it also protects the reproductive rights of women. With the view to

¹¹⁸⁷ 79 So. 3d 787, (Fla. Dist. Ct. App. 2011).

protect the '*best interest of the every child*' the Convention on Rights of Children (CRC) is enacted by the United Nations.

In India, the reproductive right is protected by the Indian Constitution under Article 21 right to life and personal liberty. The Constitution also guarantees the right to equality under Article 14 and prohibits the discrimination on the grounds of religion, race, caste, sex, place of birth or any of them. The Indian judiciary has also recognized the 'right to reproductive autonomy' as an aspect of the right to privacy in ***B. K. Parthasarathi v. Government of Andhra Pradesh*** (AIR 2000 AP 156). The Supreme Court of India in ***Javed v. State of Haryana*** ((2003) 8 SCC 369) has refrained from stating that the right to procreation is not a basic human right. The Law Commission of India in its 228 Report on surrogacy, 2009 agreed that if the Constitution of India under 21 guarantees reproductive rights of the individual, then the surrogacy, which provides the chance to infertile couples to become parents should also to be the protected by the Constitution of India.

But the surrogacy arrangement involves the several social, ethical and legal issues. Basically, it is challenged as unethical practice as amounting to commodification, exploitation of women. In this Chapter, the researcher has studied the different legal issues of the surrogacy involved in the various cases around the world and judiciary by its pronouncements has tried to solve these problems. Mostly in international surrogacy arrangement, the problems of citizenship, parental rights, custody of the child arise. Therefore, according to researcher surrogacy is an international level problem; hence it has also to be solved at international level by enacting international surrogacy law.

Besides this, the reproductive rights of the single persons should be protected. The reproductive right of the gay, lesbian couple should also be protected without the discrimination on the ground of gender identity or sexual orientation. Recently, the Supreme Court of India has opened the curative petitions in the ***Naz Foundation case*** in order avoid a miscarriage of justice with them. As same sex couples rights are protected by the international human rights instruments and the Constitution of India under Article 21 and it also guarantees the reproductive rights of every individual.

Finally, today there is imperative need of surrogacy law, the Supreme Court of India has sustained the matter of surrogacy in ***Jayashree Wad case*** as it involves the various complicated issues which need to be solved through legislation. However, in the absence law the Supreme Court of India may give the surrogacy regulation guidelines just as given in the ***Vishakha's Case***.

Therefore, in order to protect the interest of the parties and for regulation of the surrogacy arrangement, the Parliament has to enact the law of assisted reproductive technology as early as. ***As surrogacy is the last ray of hope, of becoming parents of their own genetic child.***

CHAPTER –VI

6. CONCLUSION AND SUGGESTIONS

6.1. CONCLUSION

The right to procreate is the fundamental, natural human right of every person. It is guaranteed by the several international human rights instruments¹¹⁸⁸ as well as the Constitution of India under Article 21 right to life and personal liberty.¹¹⁸⁹ Every person has a right to marry and create a family.

It is said by many authors that: “*The Parents construct the Child biologically, while the Child constructs the Parents socially.*” But, the desire to have family remains unfulfilled because of the infertility. The *World Health Organization (WHO)* has declared the infertility as a disease and reported that, India has an estimated 19-20 million infertile couples.¹¹⁹⁰

Procreation is a part of life and every person is entitled to procreate one’s own biological child. The assisted reproductive technology (ART)¹¹⁹¹ and surrogacy¹¹⁹² is the new scientific and technological development, providing the chance for the infertile couples to become parents of the child of their own flesh and blood. Hence, it is very important to understand, the need of surrogacy from the Indian perspective. According to the ancient Indian philosophy the biological purpose of life is to transmit one’s own genes to the next generation. Therefore, the Indian society is having the strong desire to procreation of the children and it is one of the main reasons of the getting marriage. In Indian patriarchal society, there is huge pressure on women to prove fertility within the few years of the marriage. In day to day life, the childless women face the problems of social stigma and fear of desertion. Because of this reason, in most of the cases the childless woman ends her life, or get divorced or gives the consent to her husband for the second marriage. The most of divorces or separations are happening due to the infertility of the men or women. Apart from this

¹¹⁸⁸ *Supra* at p. 272

¹¹⁸⁹ *Supra* at p. 288

¹¹⁹⁰ *Supra* at p. 22

¹¹⁹⁰ *Supra* at p. 288

¹¹⁹¹ *Supra* at p.28

¹¹⁹² *Supra* at p. 40

reason, the early menopause¹¹⁹³ due to current hectic lifestyle and late marriages in urban area is also contributed much more for the infertility of the couple. The society has much to gain from surrogacy technology rather than to lose. Therefore, according to researcher the legalization of surrogacy practice is very necessary for protecting the family life of the couple from its breakdown.

But, the practice of surrogacy is a very complex in its nature, as it involves several issues like social, ethical, commercial, psychological, medical and legal. Therefore, there are various conflicting interests. The surrogacy arrangement has challenged as immoral, unethical and ant-social practice. It is said that the surrogacy is against the public policy,¹¹⁹⁴ as it amounts to the exploitation of the surrogate women,¹¹⁹⁵ commodification of women's body, sale of the child.¹¹⁹⁶ It is also argued that the practice of surrogacy will destroy a family structure of the Indian society,¹¹⁹⁷ as the conception of a child is a natural process and not the assisted or artificial. Hence, it is said that the practice of surrogacy should be prohibited in India.

The researcher agreed that the ethical and moral values are relevant in social life. But, the immorality or unethical practice is not the relevant criteria for prohibition of surrogacy. According to Jeremy Bentham's theory of utilitarian¹¹⁹⁸ based on the principle of the greatest happiness for the greatest number of people. A person is free to act as per his own wish, provided his act should not harm to others. Bentham says the ethical system is based on the happiness of larger number of persons. According to John Stuart Mill,¹¹⁹⁹ who introduced the harm principle, said there are higher and lower pleasures and the society prefer the higher ones. Mill says the State must be neutral towards challenging moral values. It is universally acknowledged that morality changes from time to time and from place to place. What is immoral today may be moral tomorrow or *vice versa*. It is not rational, but the larger acceptance of

¹¹⁹³ The Hindu, "Indian Women Facing Early Menopause: Survey, New Delhi 27, 2016," *C.f.*, <http://www.thehindu.com/sci-tech/health/indian-women-facing-early-menopause-survey/article8776103.ece> Visited on 28/06/2016, Nearly 4 per cent of Indian women experience signs of menopause between 29 and 34 years of age, says a recent survey conducted by the Institute for Social and Economic Change (ISEC). The figure goes up to 8 per cent in the case of women between 35 and 39 years of age.

¹¹⁹⁴ *Supra* at p.253

¹¹⁹⁵ *Supra* at p. 181

¹¹⁹⁶ *Supra* at p. 199

¹¹⁹⁷ *Supra* at p.210

¹¹⁹⁸ *Supra* at p.172

¹¹⁹⁹ *Supra* at p. 172

surrogacy arrangement shows the will of society and therefore, it can be changed only by the will of the society. Therefore, the public morality has to give approval to surrogacy option as today's society demands the surrogacy. However, it may not be possible for the researcher to provide answers to all social, moral and ethical issues which arises out of the surrogacy. But the legal solutions required to be given through the proper legislation.

Presently, in India '*No Law and No Precedent*' is available for solving the issues of social, moral and legal and its conflicting several interests. The Hon'ble Supreme Court of India has sustained the matters of *Jayashree Wad Case with Jan Balaz case*¹²⁰⁰ as the surrogacy involves the various complicated issues which need to be solved through legislation. Thus, after the study of surrogacy, it is found that the absence of a law is the main reason for flourishing of surrogacy business in India and the exploitation of the surrogate mother. The government had published the drafts of Assisted Reproductive (Regulation) Technology Bills, 2008,¹²⁰¹ 2010,¹²⁰² and 2014¹²⁰³ but these draft Bills were found to be inadequate for present condition hence suffered from various criticisms.

On 4th November 2015, the government issued the notification,¹²⁰⁴ for prohibition of the commercial and ban on all foreigners for commissioning of surrogacy in India. Thus presently, according to this notification only heterosexual Indian infertile married couples are allowed to take the service of surrogacy in India.

According to the recent special Surrogacy (Regulation) Bill, 2016¹²⁰⁵ introduced on 21st November, 2016 in the Lok Sabha has recognized the altruistic surrogacy and prohibited the commercial surrogacy (i.e. Payment of compensation to the surrogate women) in India. According to the researcher, the government just puts the blanket ban on commercial surrogacy, instead of properly regulating it; hence it does not seem to be democratic and Constitutional. According to the researcher word 'compensatory surrogacy' is more suitable than the word 'commercial surrogacy' as it looks to be

¹²⁰⁰ *Supra* at p. 321 (Pending in Supreme Court of India Civil writ petition 95/2015 c.f. <http://courtnic.nic.in/courtnicsc.asp>)

¹²⁰¹ *Supra* note at 102

¹²⁰² *Supra* at p.109

¹²⁰³ *Supra* at p. 118

¹²⁰⁴ *Supra* at p.131

¹²⁰⁵ *Supra* at p.134

offensive. The researcher is of the opinion that, if the compensatory surrogacy is prohibited in India, then there will be various consequences such as, firstly the surrogacy business will go to underground and black marketing will start. Secondly, the surrogacy business will shift to another country. The Indian rich couple will travel to another country for surrogacy arrangement. Thirdly, it will dishonor the surrogacy profession, and therefore, the surrogate's rights will not be protected. The Indian government already knows the consequences of banning the surrogacy to the foreign homosexuals through the Indian Visa Regulation, 2012.¹²⁰⁶ Therefore, the government instead of focusing on small amount compensation paid to the surrogate, it should focus on the huge amount of surrogacy fee charged by the surrogacy clinics. The researcher has also found that the need of money is the main reason for becoming surrogate mother and the majority of the surrogates are happy as it helps to educate their children, establishment of their business and it also provides the financial supports to their families.¹²⁰⁷ A ban on commercial surrogacy is a clear rejection of the voluntary nature of labour to surrogate as said by the Amrita Pande,¹²⁰⁸ hence, researcher says before banning the surrogacy in India the government should provide any other alternative work to the surrogate women. Therefore, the present Bill founds to be hazardous to the livelihood of the surrogate.

The Surrogacy Bill, 2016 has allowed only the close relatives of the intending couple to act as a surrogate, which is nothing but a clear violation of the right to privacy and confidentiality of the surrogate and the intending couple. Besides this, hardly any women from the close relatives form the Indian cultural family system will be ready to act as a surrogate for intending couple and there may be many of the couples who may not have the close relatives. Hence, according to researcher the altruistic surrogacy restricted to the close relatives of the intending couple has to be removed as it limits the scope of the surrogacy. The Bill allows the commissioning of surrogacy only to Indian heterosexual married couple with the condition of completion of minimum five year infertility period of marriage of the intending couple, which is found to be unfair and unreasonable in the cases of late marriages, early menopause in

¹²⁰⁶ *Supra* at p.115

¹²⁰⁷ *Supra* at p. 221

¹²⁰⁸ *Supra* at p.220

women or women without the uterus. Therefore, such condition is required to be changed.

The Bill is not in harmony with the Constitution of India, as it excludes the single person, live-in couples, homosexuals, foreigners and Indian heterosexual married couples who have not completed five years of their marriage for entering into a surrogacy arrangement. Therefore, it clearly amounts to discrimination on the basis of nationality, marital status, age and sexuality as a violation of Article 14 and 21 of the Constitution of India.¹²⁰⁹ Therefore, according to the researcher the reproductive rights of the single persons¹²¹⁰ and foreigners¹²¹¹ have to be protected without any discrimination. At present, in India the law allows the adoption to the single person and inter country adoption to the foreigners,¹²¹² but the commissioning of the surrogacy is prohibited for them. Therefore, it does not look to be reasonable classification. The researcher is of the opinion that, the reproductive rights of the homosexuals,¹²¹³ i.e. gay and lesbian couples have to be protected without the discrimination on the ground of sexual orientation and the rejection of these rights may constitute the deeper insult of them. The right to enjoy the benefit of science and technological progress is also one of the reproductive rights of the every individual.¹²¹⁴ On the other hand, there is uncertainty about the acceptance of reproductive right of the homosexual couples by the Indian socio- cultural society. However, in order to avoid the miscarriage of justice to the homosexual peoples the curative petitions are pending before the Supreme Court of India in *Naz Foundation case*.¹²¹⁵

Mostly in the transnational surrogacy arrangement involves the problems of citizenship,¹²¹⁶ parental rights,¹²¹⁷ custody,¹²¹⁸ and abandonment of the child.¹²¹⁹ Therefore, according to researcher the surrogacy has also become an international

¹²⁰⁹ *Supra* at p.288

¹²¹⁰ *Supra* at p.298

¹²¹¹ *Supra* at p. 310

¹²¹² *Supra* at p. 238

¹²¹³ *Supra* at p. 302

¹²¹⁴ *Supra* at P. 279

¹²¹⁵ *Supra* at p. 306, February 2, 2016, (C.f. <http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece>)

¹²¹⁶ *Supra* at p.229

¹²¹⁷ *Supra* at p.223

¹²¹⁸ *Supra* at p. 226

¹²¹⁹ *Supra* at p. 232

level problem; hence it is also required to be solved at international level and national level by enacting international and national surrogacy law.

The researcher suggests that the government instead of recognizing purely altruistic or commercial surrogacy, it should recognize the combination of the both types of surrogacy suitable to the Indian social, economical, psychological and cultural status of the society that is '*ALTRUISTIC CUM COMPENSATORY SURROGACY*' OR '*GRATUITOUS CUM COMPENSATORY SURROGACY*.' In this type of surrogacy the intending couple may be provided the facility of choosing one option out of two options, firstly the couple may take the service of the surrogate from their close relatives with or without payment of compensation or secondly, they may take the service of surrogate from the registered ART Bank with payment standardized amount of compensation to the surrogate. In both the options of surrogacy the intending should be made liable for the payment of medical bills and insurance coverage to the surrogate and the child. Thus, through the surrogacy the infertile couple receives the child, and the surrogate receives the compensation, so it may be called as a win-win situation for both the infertile couple and the surrogate. And for preventing the exploitation of the surrogate, the law should recognize their rights and protect their interest. According to the researcher the surrogacy procedure is incomplete without following the ART procedure, therefore the government before passing the Surrogacy Bill, 2016 is required to pass the ART Regulation Bill, 2014.

Thus, India should adopt the “pro- natalist” society, where the State gives importance to the bearing of the children. Today, infertility treatment is available only in private hospitals only for rich couples. Therefore, the researcher strongly recommends that the surrogacy service should be made available in the National Public Health Scheme. As like Israel,¹²²⁰ India has to provide National Health Insurance Law, which will include package of all infertility treatments such as *in vitro* fertilization (IVF) surrogacy etc., to married and single women for up to two births or the State should provide subsidies to poor couples to have access to this service.

Thus, the research study reveals that, the surrogate women voluntarily enter into a surrogacy agreement with specific intention to bear the child for another person and to

¹²²⁰ *Supra* at p. 161

get the compensation out of it as well as to help the childless couple to fulfill their dream of parenthood. Besides this, it is also a question of the reproductive autonomy of every woman as she has the right to control over her body and the right to use her body as she like.

However, apart from the ethical, moral and socio-legal issues, the surrogacy also involves the medical, psychological, emotional and economic issues which required the scientific investigation in an interdisciplinary approach. The certain unfair practices such as surrogacy scam, human trafficking are attached with the surrogacy, which need to be prevented and regulated through the proper legislation on surrogacy. In surrogacy arrangement, it is very necessary to protect the interest of the surrogate women, the surrogate child and the intending couple as it is also a matter of the human rights issue.

Presently, in the absence of surrogacy law India, the notification issued by the government on 4th November 2015 regarding instruction of commissioning of surrogacy in India and the Indian Council of Medical Research, National Guidelines, 2005¹²²¹ is applicable to the surrogacy Clinics; however the ICMR guidelines, 2005 are only recommendatory and not mandatory in nature. Therefore, they are not sufficient to regulate the surrogacy arrangement and for protection of interest of the surrogate and the surrogate child. The mushroom growth of the ART and surrogacy centers in India shows the increasing demands of ART and surrogacy services by the society. Thus, today's society demands the surrogacy services. Therefore, the legalization of surrogacy is necessary for the protection of the reproductive liberty of all individuals and giving social justice to them.

Hence, there is the need of the hour to have comprehensive and stringent legislation on surrogacy for the regulation, control and ethical practice of surrogacy and the protection of the rights of the surrogate women, and best interest of the child. Thus, the dynamic legislation will provide accurate use of surrogacy by surrogacy clinics and will prevent misuse of it. Therefore, today there is a need to adopt a pragmatic approach towards surrogacy arrangement with the aim to give social justice. Social justice means to interpret the spirit of the Constitution enshrined in the Preamble.

¹²²¹ Supra at p. 99

Ultimately, the object of law is to establish the welfare of the society as the society whose members enjoys welfare and happiness is called as a just society.

6.2. SUGGESTIONS

1. Urgent Need of Surrogacy Legislation:

There is an urgent need of a special surrogacy legislation in order to regulate and monitor the surrogacy clinics. It is also necessary to prevent the misuse of the assisted reproductive technology and for the ethical practice of it. The surrogacy arrangement is very a complex in nature, as it involves various issues such as moral, ethical, social, medical, psychological, economical and legal which need to be solved through proper legislation for protecting the rights of the parties of the surrogacy and especially the rights of the child and prevention of exploitation of the surrogate women and the protection of the dignity of the surrogate women.

2. ICMR National Guidelines, 2005 Only Recommendatory and Not Statutory or Mandatory:

The National Guidelines of Indian Council of Medical Research, 2005¹²²² for regulation and supervision of the ART services are only recommendatory and not statutory or mandatory in nature, therefore these guidelines are frequently violated by the ART/surrogacy clinics hence, it is very necessary to have direct and specific legislation on surrogacy which will clearly define the duties and liabilities of the ART/Surrogacy clinics.

3. Need of Precedent to the Country of India:

In the absence of statutory law, it is the need that the surrogacy regulation guidelines may be given by the Supreme Court of India as such given in the *D. K. Basu v. State of West Bengal*¹²²³, and in *Vishakha v. State of Rajasthan cases*.¹²²⁴ However, the Supreme Court of India has sustained the matter of surrogacy in *Jan Balaz case with*

¹²²³ AIR 1997 SC 610

¹²²⁴ AIR 1997 SC 3011

*Jayashree Wad case*¹²²⁵ because of the various complicated issues involved in the surrogacy arrangement which need to be expressed by the proper legislation.

4. To Legalize and Regulate But Don't Ban Compensatory Surrogacy:

The procreation is the fundamental, natural human right of every individual guaranteed by the Constitution of India and various international human instruments. However, it is challenged as an immoral or unethical service, hence it needs to be settled through the proper surrogacy legislation. And if the practice of surrogacy is prohibited surrogacy business will go underground and the black market will start. The Indian rich couple will travel to another country for surrogacy arrangement. As a result of prohibition, the surrogate's rights will not be protected. The present Surrogacy Bill, 2016 just put the blanket ban on the commercial surrogacy instead of regulating it which does not seem to be democratic and constitutional. Hence, it's recommended by the researcher that the surrogacy practice should be properly legalized, regulated and monitored instead of banning it as today's society demands the ART and Surrogacy services.

5. Necessity to Pass the ART (Regulation) Bill, 2014 Before Passing of the Surrogacy (Regulation) Bill, 2016:

For conducting the surrogacy procedure, it is very essential to follow the ART procedure such as IVF procedure or other ART treatments. However, the present Surrogacy Bill, 2016 does not content the provisions regarding the ART, hence it is very necessary, before passing of the Surrogacy Bill, 2016 the government have to pass the ART Bill, 2014 after removing the provisions of the surrogacy practice.

6. Need of International Surrogacy Law:

In the transnational surrogacy arrangement the problems of citizenship, legal parentage, custody, and abandonment of the child etc., are involved. There is serious concern about the problem of exploitation of surrogate women. It is the need to clear and express protection of surrogacy as a reproductive right, because the surrogacy is the fundamental and human right of every individual. According to researcher cross

¹²²⁵ W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India),
C.f. <http://courtnic.nic.in/courtnicsc.asp>

broader surrogacy has become an international level problem; therefore it is also required to be solved at international level by enacting international surrogacy laws with a view to have uniformity of law.

7. Recognize ‘Altruistic Cum Compensatory’ or ‘Gratuitous Cum Compensatory’

Surrogacy:

The recent Surrogacy Bill, 2016 has legalized the altruistic surrogacy and prohibited the compensatory surrogacy. But the researcher suggests to the government that instead of recognizing purely altruistic or commercial surrogacy, it should recognize **altruistic cum compensatory or gratuitous cum compensatory surrogacy**, the combination of the both types of surrogacy suitable to the Indian social, economical, psychological and cultural status of the society. According to the researcher, in this type of surrogacy the intending couple may be provided with the facility of choosing one option out of two options, firstly the couple may take the service of the surrogate from their close relatives with or without payment of compensation or secondly, they may take the service of surrogate from the registered ART Bank with payment fixed standardized amount of compensation to the surrogate. In both the options of surrogacy the intending couple should be made liable for the payment of medical bills and insurance coverage to the surrogate and the child. Thus, through the surrogacy the infertile couple receives the child, and the surrogate receives the compensation, so it may a win-win situation for both the infertile couple and the surrogate.

8. Need to Remove the Condition Restricted to Close Relatives of Intending Couple as Allowed to act as a Surrogate Mother:

The Surrogacy Bill, 2016 has allowed only the close relatives of the intending couple to act as a surrogate, which is nothing but a clear violation of the right to privacy and confidentiality of the surrogate and the intending couple guaranteed under the Article 21 of the Constitution of India. Besides this, there is also doubt that whether women from the close relatives of the Indian cultural family system will be ready to act as a surrogate for intending couple and even there may be majority of the couples who may not have the close relatives, then the question arise who will act as a surrogate for them. And it is also a question, whether women from the close relatives will be ready to act as surrogate without the compensation by losing their earnings during the

gestational period. Therefore, according to researcher the altruistic surrogacy restricted to the close relatives of the intending couple is not justifiable, so it need to be removed as it limits the scope of the surrogacy and in many countries such as the UK, Australia, South Africa has legalized altruistic surrogacy but it is not restricted to the relatives.

9. Define the term of Close Relatives of Intending Couple:

The Bill, 2016 has not defined the term of close relatives who are eligible to become surrogate mothers for the intending couple. Therefore, it is very necessary that the Bill should describe the close relatives who are allowed to become a surrogate mother for the intending couple.

10. Need to Change the Unfair and Unreasonable Condition of Completion of Minimum Five Year Infertility Period of Marriage for availing the Surrogacy Service:

As per the Surrogacy Bill, 2016 the couple has to be completed minimum five year infertility period of marriage for availing the service of surrogacy, however, this provision found to be unfair and unreasonable in the cases of late marriages, early menopause in women¹²²⁶ and a married woman without the uterus. Thus, in such cases by imposing conditions to prove five year infertility period is clearly an injustice towards these couples. Hence it need to be changed in the surrogacy law.

11. Alter the Definition of Infertility:

According to the Surrogacy Bill, 2016 the infertility means the inability to conceive after five year unprotected coitus, but the said definition infertility comes into conflict with the definition of the *WHO*, and the previous ART Bills, 2010 and 2014 and with the medical terms as it says the period of infertility of one year only. Therefore, this provision excludes the couples who have not completed five year period of their marriage. Hence, the definition of infertility is required to be altered by the

¹²²⁶ The Hindu, "Indian Women Facing Early Menopause: Survey, New Delhi 27, 2016," *C.f.*, <http://www.thehindu.com/sci-tech/health/indian-women-facing-early-menopause-survey/article8776103.ece> Visited on 28/06/2016, Nearly 4 per cent of Indian women experience signs of menopause between 29 and 34 years of age, says a recent survey conducted by the Institute for Social and Economic Change (ISEC). The figure goes up to 8 per cent in the case of women between 35 and 39 years of age.

government in order to take the benefit of surrogacy service by the majority of the couples.

In addition to this, the Bill has made a condition that the couple firstly has to prove the infertility issue before entering into a surrogacy arrangement, but there may be couples who may be suffering from the mental, physical, or emotional reasons, so they may be incapable to have children. Hence, according to researcher the couples who suffered from these reasons should allow the chance of surrogacy.

12. Allow Service of Surrogacy for the Infertile Couple who needs the Second Child:

The Surrogacy Bill, 2016 prohibits the surrogacy to the couples who have the surviving natural or adopted child. But here the government has shown harsh attitude towards the people who in need of second child through the surrogacy as because there may be cases where the second pregnancy or delivery of the women may not be possible due to medical reasons. Today, no Indian law prohibits the people to have a second child except the new Surrogacy Bill, 2016. Hence, the law should allow the service of surrogacy to the couple for the second child.

13. Prescribe the Limitation Period for the issue of ‘Certificate of Essentiality’ and ‘Certificate of Eligibility’ by the Appropriate Authority:

The Bill, 2016 has not prescribed the time period within which the appropriate authority has required to give the certificate of essentiality to the intending couple and certificate of eligibility to the surrogate mother for initiation of the surrogacy procedure in the registered surrogacy clinic. Hence, in the Surrogacy Bill, 2016 it is very necessary to mention the limitation period within which the appropriate authority is required to issue these certificates to the intending couple and the surrogate.

14. Provision for Review or Appeal of the Application of the Intending Couple:

The Bill, 2016 has failed to make the provision for a review or appeal procedure, if the application for the certificate of essentiality or eligibility of the intended couple or the surrogate mother respectively is rejected by the appropriate authority. Hence, there should be provision for the review or appeal in the surrogacy law.

15. The Surrogacy Bill, 2016 has to be in Harmony with the Constitution of India:

The Bill, 2016 is not in harmony with the Constitution of India, as it excludes the single person, live-in couples, homosexuals, foreigners, including the NRI, OCI, PIO, and foreigners married to Indian Citizens and the Indian heterosexual married couples who have not completed five years of their marriage for entering into a surrogacy arrangement. Therefore, it clearly amounts to discrimination on the basis of nationality, marital status, age and sexuality as a violation of Articles 14, 15 and 21 of the Constitution of India. The NRI, OCI, PIO, and foreigners married to Indian Citizens are the citizens of India. Therefore, the surrogacy law should allow the service of surrogacy for them.

16. To Allow Access of Surrogacy to All Foreign Couples:

The Surrogacy Bill, 2016 has allowed the access of surrogacy only to the infertile Indian married heterosexual Couples and prohibited all foreigners. But, it is very necessary to reconsider this provision as India is a signatory to most of the International Human Rights Conventions which guarantees the reproductive rights to all individuals. As it is found that the absence of law is the main reason for regulation of surrogacy and the exploitation of surrogate women and not the foreigners. The ICMR National Guidelines, 2005 and the ART Bill, 2008, 2010 were allowed the surrogacy to all foreigners. The Center for Social Research (CSR) in its national conference Report, 2014 has also recommended for the same. And it is significant to note that in 2002 the government itself has officially legalized and promoted the medical tourism in India. Therefore, it is suggested that as like inter-country adoption is allowed to all foreigners, the service of surrogacy has to be allowed to all foreigners without any discrimination on the ground of nationality after the fulfilling the necessary conditions.

17. To Provide Surrogacy Service to Single Individual, Unmarried Heterosexual Couples, and Homosexuals:

According to researcher the reproductive rights of the single persons, unmarried heterosexual couples, homosexual couples, i.e. gay, lesbian (LGBT) has to be protected without the discrimination. The New adoption Policy, 2015 and the Juvenile Justice (Care and Protection) Act, 2015 allows the adoption to single persons;

however, the surrogacy service is prohibited to them. Many researches have proved that the single person is also good parent of the child.¹²²⁷ And the right to enjoy the benefit of science and technological progress is the reproductive right of the every individual. Therefore, the researcher is of the opinion that, the reproductive rights of the homosexuals, i.e. gay, lesbian, couple has to be protected without the discrimination on the ground of sexual orientation. Thus, in order to avoid the miscarriage of justice to the homosexual peoples the curative petitions are entertained by the Supreme Court of India in *Naz Foundation case*.¹²²⁸ Therefore, it is an ethical duty to treat persons with equal respect for the purpose of availing the service of surrogacy to single individual, unmarried heterosexual couples, gay and lesbian couple. Hence, the surrogacy law should not recognize orthodox moral, ethical principles by allowing the surrogacy option only to heterosexual married couples.

18. To Provide Access of ART Services to Transgender Person:

It is suggested by the researcher that ART services should be provided to the transgender person without the discrimination on gender identity or sexual orientation. The Supreme Court of India in the case of *National Legal Services Authority v. Union of India*¹²²⁹ recognized the transgender as the third gender. According to the recent Report of the *Ethics Committee of American Society for Reproductive Medicine (ASRM)*, published on 25th Sept. 2015 by also suggested the ART services to transgender people. And for the protection of the rights of transgender person the Transgender (Protection of Rights) Bill, 2016 is pending before the Lok Sabha.

19. Payment of Compensation to Surrogate Women:

The surrogacy law apart from the medical expenses of the delivery of the child and other expenses, the surrogate woman has to be paid the fixed standard amount of compensation for bearing of the child. The payment has to be transferred directly into the bank account of the surrogate women. There should be three installments of

¹²²⁷ A Cambridge study reflects that children of single mothers by choice are better well adjusted to the world than children of divorced parents. *C.f.* Avni Shrivastav, "Barren Surrogacy Bill prescribes the ideal "Parivar," September 1, 2016, *C.f.* <http://www.livelaw.in/barren-surrogacy-bill-prescribes-ideal-parivar/>, Visited on 02/09/2016, at 9.00 pm.

¹²²⁸ (2014) 1 SCC

¹²²⁹ (<http://supremecourtfindia.nic.in/outtoday/wc40012.pdf>)

payment to the surrogate; first two have to be paid before the delivery of the child and third after the delivery. The surrogate has to be paid full compensation even in miscarriage of the child. There should be a double payment in case of twins are born to a surrogate. In case of the death of the surrogate after conception of the child the payment has to be paid to the surrogate family members or a nominee of the surrogate.

20. Surrogacy Law should not be a hazardous to the livelihood of the Surrogate:

The researcher has also found that the need of money is the main reason for becoming surrogate mother by the poor women and the majority of the surrogates are happy as it helps to educate their children, establishment of their business and it also provides the financial supports to their families. The social and economical status of the Indian surrogate is different from the surrogates of the US. So, the Indian surrogate women will not bear the child just as making gifts of the child to the couple. In addition to this, the prohibition of compensatory surrogacy is a clear rejection of the voluntary nature of labour to surrogate as said by the Amrita Pande, hence the researcher says before banning the surrogacy in India the government should provide any other alternative work to the surrogate women or allow them to act as a surrogate on the payment of compensation.

21. No Punishment to Surrogate, Intending Couple and the Surrogacy Clinics for entering into Compensatory Surrogacy:

The surrogacy law should not provide the punishment to the surrogate, intending couple and the surrogacy clinics for entering into the compensatory surrogacy service.

22. Insurance Coverage for Surrogate Women and Surrogate Child:

The surrogate women and the surrogate child have to be properly insured. The surrogate women have to be protected by insuring her life and any health complications which may remain rest of her life due to the pregnancy. The surrogate child has to be insured in case of any abnormality or disability of the child. But the present Surrogacy Bill, 2016 does not provide the provision about the insurance of the surrogate child in case of any abnormality or disability.

23. Compensation for Growth of Child in Case of Death of intending Couple:

There should be provision in surrogacy law for the growth of the child in case of death of the intending couple; however the Bill, 2016 is silent on it.

24. Appointment of the local guardian for taking of the Child if the Couple failed to take Custody of the child:

The present Surrogacy Bill, 2016 has provided the punishment of minimum ten year and fine up to ten lakh rupees to the intending couple, if they failed to take custody of the child or abandoned the child. But, despite of the provision of punishment in the Bill, if the couple failed to take custody of the child, hence in such cases the researcher suggests that there should be provision for the appointment of the local guardian for taking care of the child.

25. Protect the Reproductive Autonomy of Surrogate Mother

The Surrogacy Bill, 2016 has to be in consonance with the Article 21 of the Indian Constitution, which guarantees the right to reproductive autonomy under right to personal liberty to the surrogate woman. It means the surrogate has the right to control over her body and right to use her body as she like. And it is also the right of the intending couple. Therefore, every person has the right to have children born either naturally or through surrogacy or through adoption and the State does not possess any right to decide the mode of parenthood.

26. Provision of Surrogacy Agreement between the Parties of Surrogacy:

For initiating the surrogacy procedure in the surrogacy clinics, the Surrogacy Bill, 2016 required only the certificate of essentiality of intending couple and certificate of eligibility of the surrogate women from the appropriate authority. But, the present Surrogacy Bill, 2016 is silent on the provision of the surrogacy agreement between the surrogate mother and intending couple. Hence, in order to bind the parties, there should be the provision of the surrogacy agreement in the surrogacy law.

27. Fix the Number of Embryo transfer in to the Womb of Surrogate:

To achieve a more successful rate, the doctors generally transfer as many embryos in the womb of the surrogate mother which results in the multiple pregnancies. Thereafter, a doctor conducts the foetal reduction test which is very harmful to the health of the surrogate mother and child. According to researcher, law should allow maximum three embryo transfer into the womb of a surrogate. However, the Surrogacy Bill, 2016 does not prescribe the provision for the same.

28. To Limit the Minimum Number of Embryo Cycles transfer in the Womb of Surrogate:

The Surrogacy law has to specify how many times the surrogate is allowed to transfer of embryos in her life time till achieving of the one successful live birth. So, it is recommended that to law should fix the maximum three numbers of cycles for the transfer of embryos into the womb of the surrogate whether it is successful or not. However, the present Surrogacy Bill, 2016 is silent on it.

29. Medical Test of the Surrogate/ Surrogate Husband, gamete donor and Intending Couple:

In surrogacy law, there should be provision for the medical test of surrogate, her husband, gamete donor and intending couple for various diseases especially sexually transferable diseases such as HIV/AIDS. During the gestation period there may be chance of unprotected sex between surrogate and her husband. Hence, for the protection of the surrogate child the medical test of surrogate, her husband and the intending couple is necessary. But the Surrogacy Bill, 2016 requires the medical fitness certificate of the surrogate only.

30. Medical, Legal and Psychological Counseling to Parties before initiation of surrogacy Procedure:

It is suggested by the researcher that the surrogate and the intending couple have to be given the medical, legal and psychological counseling before initiation of the surrogacy procedure; especially free counseling to surrogate women. The Surrogacy Bill, 2016 states about the written informed consent of the surrogate in her language.

31. State to Provide Free Legal Assistance to Surrogate by State:

Generally, the surrogates are poor and illiterate women so unable to protect their interest in case of any issues or disputes arise out of the surrogacy arrangement. Hence, it is very necessary for protection interest of surrogate or for defending any case in the Court of law, the surrogate women should be provided with the impartial free legal assistance by the State. The Surrogacy Bill, 2016 restricted only to the close relatives, so the Bill is silent on the same provision. But according to researcher, law should provide free legal aid to the surrogate.

32. Protection of Best Interest of the Child:

All the provisions regarding the surrogate child under the surrogacy law have to be taken for the protection of the best interest of the child, as stated by the Convention on the Rights of Child (CRC).

33. Protection of Intending Couple from Extortion and Blackmailing by the ART/Surrogacy Clinics, Banks, Surrogate and Intermediaries:

There are chances that the surrogacy clinics, surrogate women and intermediaries may commit the offence of extortion or may blackmail to the intending couple for the purpose of money. So it is recommended that the intending couple should be protected from extortion or blackmailing by making penal provisions in surrogacy law.

34. Protection of Surrogate from Exploitation:

In surrogacy agreement the most vulnerable member is the surrogate women; therefore they are easily exploited by the intending couple, surrogacy clinics and intermediaries. Therefore, it is suggested that the provisions of the surrogacy law should be made with a view to protect surrogate women from physical, economical, psychological, medical and legal exploitation.

35. Reconsider the Draft of the Surrogacy Bill, 2016:

It is recommended that the draft of the Surrogacy (Regulation) Bill, 2016 is required to be reconsidered before it becomes the law of the Land.

36. Law should recognize the intending Parents as Legal Parents of Child:

For claiming the parental rights over the child and for avoiding any dispute over it, the law itself declares the intending parents as the legal parents of the child.

37. Recognize the Surrogate Child as a Legitimate and natural Child of intending Parents:

The surrogate child should be considered as legitimate and natural of the child of the intending couple for all purposes such as maintenance, succession and inheritance of the property of the intending couple and even in case couple gets separated or divorced after initiation of surrogacy procedure. In case of ever married women used the stored sperm of her dead husband still the child has to be considered as the legitimate child of the couple and the Bill, 2016 should allow ever married women, the use of stored sperm of her dead husband for the purpose of surrogacy.

38. Make Compulsory DNA Test:

There should be a provision in the surrogacy law about a compulsory DNA test of the child with the object to know a genetic link with intending parents. Otherwise the surrogacy clinics should make liable for all consequences which may arise thereafter. It is also a duty of the surrogacy clinics not to mix semen's of two individuals for the success rate of pregnancy.

39. At least One person of the intending Couple should be a Donor:

In a surrogacy arrangement there should be provision in law that one of the party of the intending couple should be a donor of the gamete in order to have a genetic link with the child.

40. Prohibition to Take Service of Two Surrogates at Same Time by Intending Couple:

The Commissioning Couple should be prohibited from entering surrogacy arrangements with two surrogate women at the same time for having the child.

41. Allow Only Indian Women as Surrogate:

Only Indian women should be allowed to act as a Surrogate in India and not foreigner women.

42. Relinquishment of All Parental Rights over Child to the Intending Couple by the Surrogate Women:

It is suggested that there should be a provision in the surrogacy law about the relinquishment of all parental rights over the surrogate baby to the intending couple.

43. To Declare Intending Mother as a Legal Mother of Surrogate Baby:

It is suggested by the researcher that the law should recognize the intending mother as a legal mother of the surrogate baby for avoiding claims of the three mothers i.e. surrogate woman, egg donor or intending mother.

44. Provisions for Offences of Human Trafficking, Abduction of Surrogate Women or Sale or Abandonment of the Surrogate Child, Surrogacy Scam:

The offences of human trafficking and abduction of surrogate women, abandonment and sale of child as well as big surrogacy scam are occurring. Therefore, it is recommended that it should be regulated, prevented, and punished by making severe penal provisions in the surrogacy law.

45. Inclusion of Infertility Treatment and Surrogacy Service in National Public Health Scheme:

Today, infertility treatment, including surrogacy arrangement is available only in private ART/surrogacy hospitals for the rich couples. The lower middle and poor class people are not in a position to get the access of these services. Therefore, the researcher strongly recommends that the infertility treatment and surrogacy services should be made available in the National Public Health Scheme.

46. To provide ART/Surrogacy Services in Government Hospitals for infertile Poor people:

According to International Conference on Population and Development (ICPD), 1994 Availability, Acceptability and Quality are three essential elements of the right to reproductive health; hence every State must ensure this reproductive health facility to

the indigenous people. As it should not remain as a monopoly of wealthy people but it should be reached to infertile poor people as well.

47. To Provide Infertility Treatment in National Health Insurance Law:

As like Israel, India has to provide National Health Insurance Law, which will include package of all infertility treatments such as *in vitro* fertilization (IVF), surrogacy etc., to married and single women for up to two births.

48. To Provide Subsidies to Poor Couples by the State for Infertility treatment and surrogacy Arrangement:

The State of Israel has legalized the commercial surrogacy and very properly regulated it. Therefore, it is recommended that as like Israel State, the India has to provide subsidies to poor couples to get access of the ART/ surrogacy services.

49. Protection and Jurisdiction of National Commission of Women (NCW) to Surrogate Women:

It is recommended that any aggrieved surrogate woman or her family members should get the right to raise immediate jurisdiction and protection of the National Commission of Women or State Commission.

50. Recording of Video Graphic Consent of Surrogate Women:

It is suggested that in order to examine the free informed consent of the surrogate, there should be video graphic recording of consent by the surrogacy clinics and banks.

51. Establishment of Separate Authority for Protection of Rights of Surrogate Women and Surrogate Children:

For the protection of rights of surrogate women and the best interest of the surrogate child, it is very necessary to establish separate authority in surrogacy law as like Central Adoption Resource Authority (CARA).

52. Post Pregnancy Intensive Care of Surrogate women:

There should be provision for the post pregnancy intensive care of the surrogate women and during the 3 months the medical checkups of the reproductive organs of the surrogate.

53. Right to Breastfeed:

It is right of surrogate women to breastfeed the surrogate child and it is also the right of the surrogate children. However, it is found that surrogates are not allowed to breastfeed the children due to fear of emotional attachment with children, though, it is against a *State's own breastfeeding policy* and also against the Article of *Convention of the Rights of Child (CRC)*. But such prohibition adversely affects the health of the surrogate mother and child. Therefore, it is recommended that the surrogate should be allowed to breastfeed the child.

54. Termination of Pregnancy:

The termination of pregnancy of the surrogate women should be regulated by the Medical Termination of Pregnancy Act, 1971

55. Prohibition of Sex Selection:

In surrogacy arrangement, the majority of chances that the sex selection test is conducted in surrogacy clinics India. Therefore, it is suggested that it should be regulated by the Pre- Conception and Post Natal Diagnosis Techniques Act, 1994. The sex selection test has to be prohibited to the Indian citizen outside the India if the parties enter into surrogacy arrangement. However, the Bill, 2016 does not prescribe the specific provision for it.

56. Prohibition of Commissioning of Surrogacy for Reason of Maintaining Beauty and Career:

It is suggested that the commissioning of surrogacy should not be allowed to the couple for the purpose of the maintaining of beauty and career but infertility should be reason for commissioning of surrogacy.

57. Prohibition of Selection of Surrogate on the Basis of Good Looking, Fairy Skin and Upper Caste:

Most of the research report observed that, the intending couple selects the surrogate women on the basis of good looking, fair skin and upper caste. Therefore, such type of selection of surrogate should be prohibited by law.

58. Grant of Maternity / Paternity Leave to Commissioning Mother and Father:

The Indian Judiciary has acknowledged the maternity and paternity leave to the commissioning couple for taking care of the surrogate baby. Hence, it is suggested that it should also get the statutory recognition, however the Bill, 2016 about the same provision is pending before the Parliament which has recognized only maternity leave to the commissioning women.

59. Provision for Place of Stay During Pregnancy of Surrogate Women:

The Surrogacy Bill, 2016 is silent on the provision of place of stay of the surrogate women during the pregnancy. Hence, it is required to be cleared by the law about the place of stay of the surrogate during pregnancy.

60. Provision of Crèches for Surrogate Children:

Generally, the surrogates are required to stay at surrogacy hostels/ shelter homes during the pregnancy, but which badly affects on the surrogates own children for getting the love and affection of the mother. Hence, it is very necessary to make provision of the crèches for the surrogate children and the other provisions care of surrogates own children by the husband and his family members.

61. Assessment of Intending Couple:

It is very necessary to have an assessment of the intending couple for the welfare of the children and in order to avoid the risk of significant harm or neglect to the children. The appropriate authority before the issue of the certificate of essentiality are required to take into consideration following guidelines before commencing any treatment of surrogacy to the intending couple.

- i. The ability of the 'intending couple to take care of children.
- ii. Any previous criminal record or conviction relating to harming children (like in Baby Gammy's case, the father of baby Gammy was previously

convicted for child abuse), violence against any child or any serious dispute in the family environment.

- iii. Any past or present mental or physical condition which states the legal inability to take care of the child throughout childhood.
- iv. Whether the intending couple is abuse of drug or alcohol.

62. To Develop Centralize Online ART Data Collection System:

Today, in India no centralize data of ART/surrogacy Clinics are available as like US country. So, it is very necessary to develop centralize online data collection system, where all ART surrogacy clinics and banks will fill the ART/surrogacy data online, thus we can get accurate data of all ART/surrogacy clinics and banks. The surrogacy Bill, 2016 has not provided any provision for the same, which was mentioned in the draft of the ART Bill, 2014 where National Registry was established for collection of centralized data base.

63. Protection of Life of Surrogate over the Unborn Child:

In surrogacy law, there should be provision for the protection of the life of the surrogate women should be protected over the life of the surrogate baby, during the delivery time if it is in danger situation.

64. Name of intending Parents on Birth Certificate of Child:

The birth certificate of the surrogate child is required to bear the name of the commissioning couple as 'parents' and not the name of the gamete donor or surrogate mother.

65. Mandatory on Intending Couple to the Accept the Custody of an abnormal or disabled baby:

The commissioning couple should be made legally responsible for accepting the custody of the abnormal or disabled surrogate baby. However, the custody of the child should not be granted to the surrogate women. It is also bound by the commissioning couple to maintain the child adequately and properly. If the couple fails to take custody of the child they should punished severely as per the provision of the Surrogacy Bill, 2016.

66. Requisition of Permanent Address and Identity Proof of Surrogate:

A woman who agreed to act as surrogate has to provide details about the permanent address and identity proof.

67. To Keep Information Confidential about Surrogate Women and Gamete Donor:

There should be provision for keeping surrogate and gamete donor's information confidential by the surrogacy clinics and banks. However, in altruistic surrogacy the information about the surrogate will not remain as confidential.

68. Right of Children to know Information about Donor and Surrogate Except personal Identification:

The surrogate child after attending 18 years of age should provide right to ask information about surrogate and donor except personal identification of them. However, the personal identification may be disclosed if life threatening medical condition of the child has arisen.

69. Prohibition of Surrogate Women as Oocyte Donor:

In order to avoid the legal and biological claim over the child by the surrogate mother, the surrogate should be prohibited from acting as an oocyte donor for same intending couples.

70. To Allow Only Once to Act as Surrogate Women in her Life Time:

For the protection of the health of the surrogate women, she should be allowed to act as a surrogate only once in her life.

71. Registration of Surrogacy Agreement Between Parties of Surrogacy:

It is suggested that till enactment of the Surrogacy law the parties of the surrogacy be allowed to enter into the surrogacy agreement after proper registration of it.

72. Surrogacy Agreement in Local Language of Surrogate and Copy of Agreement to Surrogate Women:

Most of the time the surrogacy agreements are in English language only. So surrogate just sign the agreement decided by the clinics and the commissioning couple in their

favoured. Therefore, it is suggested to make provision of surrogacy agreement in the local language of the surrogate and she should get the copy of the same.

73. Code of Ethics for Lawyers Practice in ART Services:

In surrogacy arrangement the legal counseling is playing a very significant role, so it is advisable to Bar Council of India to prepare a Code of ethics to attorneys/ lawyers as like a Code of Ethics for the *American Academy of Assisted Reproductive Technology Attorney's (AAARTA)* for regulating their practice in ART and surrogacy services while drafting and Counseling to the parties of the surrogacy arrangement.

74. Provision for Stem Cell Research:

Many laboratories are currently developing techniques of assisted conception which are largely artificial which includes creation of sperm cells and oocytes through substantial manipulation of stem cells. It means the creation of 'artificial gametes' through stem cells. However, the present Draft of ART Bill, 2014 is lacking for such provisions; therefore, it is recommended that there should be provision for stem cell research.

75. Enforceability of Surrogacy Agreement Under Section 9 of C.P.C.1908:

In the absence of the statutory surrogacy law, the surrogacy agreement which satisfies all the conditions of validity of the agreement under section 10 of the Indian Contract Act 1872, may be enforceable under section 9 of the Civil Procedure Code, 1908 by filing civil suit in Civil Court for any issues relating to surrogacy agreement and for a declaration/ injunction for grant of any relief.

76. Cognizance of the Offence:

The Surrogacy Bill, 2016 empowers the appropriate authority, or any officer of the government to make a complaint to the Court. The Bill, 2016 also gives the power to make a complaint to any person or social organization after giving fifteen days notice to the appropriate authority. However, under the Bill, 2016 the Court does not possess any power to take *suo motu* action against the surrogacy offences. Therefore, it is suggested that the surrogacy law should empowers the courts to take *suo motu* action against the surrogacy offences.

77. Need for ‘Surrogacy Fast Tract Court’:

The Surrogacy Bill, 2016 has given power to entertain matters relating to surrogacy to the Metropolitan Magistrate and Judicial Magistrate First Class Court (JMFC) and recognized the surrogacy offences under Bill, 2016 as cognizable, non bailable and non compoundable. But, there is need of establishment of the special ‘*Surrogacy Fast Tract Courts*’ at National, State and District level for the following reasons:

- i. The surrogacy practice is very complicated in nature as it involves various social, ethical, economical, psychological and legal issues which need to be properly adjudicated by the Court.
- ii. For giving pre-approval order of surrogacy agreement and the enforceability of the surrogacy agreement.
- iii. Various provisions of the Surrogacy Bill, 2016 states about the complaints, rights and duties of the parties of surrogacy agreement and offences and penalties which have very serious consequences, hence it needs to be solved by the Surrogacy Fast Track Court.
- iv. For giving speedy and fair justice to the parties of the surrogacy arrangement.
- v. For protection of rights of the surrogate mother and the surrogate child.

78. SUGGESTIONS FOR AMENDMENTS IN EXISTING LAWS

1. Section 23 A in the Indian Contract Act, 1872:

The Indian Contract Act, 1872 may be amended by including the surrogacy contracts after the Section 23, as section 23 A. i.e., “all surrogacy contracts fulfilling the contractual ingredients shall be deemed as contracts for all purposes.”

2. The Registration of the Births and Deaths Act, 1969:

It is very necessary that the Registration of Birth and Death Registration Act, 1969 is required to amend in order to have the entry of birth of the surrogate child and the name of the intending parents as the legal parents on the birth certificate of the surrogate child

3. Amendment in Section 112 of Indian Evidence Act, 1872:

For Presumption of Legitimacy of the surrogate child of the intending couple, the Law of Evidence Act, 1872 need to be amended.

4. Amendment in Hindu Succession Act, 1956, and Indian Succession Act, 1925:

To amend the Hindu succession Act, 1956 and the Indian Succession Act, 1925 to recognize the surrogate child as natural and legitimate child to facilitate to succeed the property of the commissioning parents, “as Class I heirs.”

5. Amendment in India Penal Code, 1860:

The Indian Penal Code, 1860 has to be amended as follows:

i. Section 374 A: After section 374 to add section 374 A:

“Whoever unlawfully compels, exploit, lure of money any woman to consent for surrogacy against her will and her family will shall be punished with imprisonment of either description for a term which may extend to one year or with fine or with both”

ii. Section 317A:

After section 317 to add section 317 A for the offence of **Abandonment of Surrogate Child.**

“Whoever, being the commissioning parents (Mother or Father) of the child, leave/ abandon such child with the surrogate mother or with the hospital and fail to complete the legal formalities by taking over the child, shall be punishable with imprisonment of description for a term which may extend to seven years or with fine or with both.”

iii. Section 498 A (c):

By following section 498-A add section 498 (c) **Surrogacy Cruelty**

“Whoever, being a husband or his relatives of the husband of a woman forcing or compelling a woman to opt or render herself for surrogacy” (either Commercial or Altruistic surrogacy).

6. Amendment in Protection of Women From Domestic Violence Act, 2005

i. To add Section 3 (e):

Any person, including husband or relatives of the husband of a woman or her relatives forcing or compelling a woman to opt or render herself for surrogacy” (either Commercial or Altruistic surrogacy)

ii. Protection to Abandoned Girl Child:

An abandoned girl child should allow filing petition of the domestic violence against the intending father under the Protection Women from Domestic Violence Act, 2005.

7. Amendment in the Guidelines Governing Adoption of Children, 2015:

The surrogate children have to be included in the Guidelines governing the adoption procedure of orphan, abandoned and surrendered children in the country. The guidelines included only an orphan, abandoned and surrendered children and not the surrogate children.

8. The Maternity Benefit Act, 1961:

The Maternity benefit Act, 1961 need to be amended for giving benefits to the intending couple for taking care of the child. Therefore, the Section 4 A has to be added after Section 4 i.e. employment of women prohibited during certain periods and Section 5 C has to be added after section 5 B i.e. payment of maternity benefit in certain cases.

Recently, the government has accepted the suggestions and introduced the Maternity Benefit (Amendment) Bill, 2016 which has granted the 12 weeks of maternity leave to the commissioning mother who uses her egg for the creation of embryo under section 5 (3) (B) (4).¹²³⁰ The researcher, however, further suggests, the amendment in the Bill, 2016 that the maternity leave should be granted to the intending mother who does not

¹²³⁰ The Maternity Benefit Amendment Bill, 2016, introduced in the Rajya sabha on August 11, 2016 by the Minister of Labour and Employment, C.f. <http://www.prsindia.org/uploads/media/Maternity%20Benefit/Maternity%20Benefit%20Bill,%202016.pdf>

use her egg, but uses the donor egg for creation of an embryo, as the aim of the provision is to take care of the baby by the commissioning mother.

9. Amendment in the Registration Act, 1908:

For making compulsory registration of the surrogacy contract within the meaning of Section 17, “adding surrogacy agreements to sub clause (b) of the section 17”

10. Amendment in the Family Court Act, 1984:

The surrogacy Bill, 2016 has given power to entertain matters regarding surrogacy to Metropolitan Court or JMFC Court. But it suggested by the researcher that either Special Surrogacy Fast Track Court may be established or also empower the Family Court to entertain the surrogacy matter. Hence, to amend the Family Court Act, 1984 and provide the place to facilitate surrogacy agreement within the jurisdiction of the Family Court to deal with surrogacy cases, after explanation of (g) of section 7 as (h) a petition or proceedings in relation to the surrogacy arrangement for pre authorization and to deliver the child after giving birth to commissioning parents.”

11. Amendment in the Transgender Persons (Protection of Rights) Bill, 2016:

It is suggested that the transgender Bill, 2016 has to be amended in order to make the special and clear provision for providing the ART Services to the transgender person.

6.3. FURTHER RESEARCH

This research work is mainly focused on the study of social, ethical and legal issues of surrogacy in India as well as the current available laws on surrogacy in the world and in India along with the study of judicial approach. This study also lined the way for legal framework for Indian law on surrogacy. But this research study is having some limitations, which giving scope for further research on various topics related to surrogacy such as:

1. Apart from the social, ethical and legal issues, the practice of surrogacy also involved the commercial, psychological, medical, economical, and emotional issues, which required the interdisciplinary and multidisciplinary research in such areas.
2. It is very clear that the reproductive rights are human rights should be made available to every individual without any discrimination. However, no data available regarding the rearing of children by the homosexual couples, transgender persons and psychological impact on the life of the children born out of such relationship. Therefore, there is a need for more research in such area.
3. Presently, there is no data available on the psychological impact on surrogate mother in relation to the child during the pregnancy or at the time of relinquishment of the child to commissioning couple. Therefore, it is very necessary to study the psychological impact on the surrogate women due to entering into surrogacy arrangement.
4. Finally, an accurate empirical research is wanted on the long-term impact of transnational surrogacy arrangements on those who are involved in surrogacy triangle i.e. surrogates, commissioning parents, and children.