

**SURROGACY UNDER INDIAN LEGAL SYSTEM:
LEGAL AND HUMAN RIGHTS CONCERNS**

**THESIS SUBMITTED TO
COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY
FOR THE AWARD OF THE DEGREE OF**

**DOCTOR OF PHILOSOPHY
IN
THE FACULTY OF LAW**

**BY
ANEESH V. PILLAI**

**UNDER THE SUPERVISION OF
Dr. V. S. SEBASTIAN
DEAN AND FORMER
DIRECTOR
SCHOOL OF LEGAL STUDIES, CUSAT**



**SCHOOL OF LEGAL STUDIES
COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY
KOCHI, KERALA - 682 022
JUNE 2013**

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JUNE 2013

DECLARATION

I hereby declare that the thesis entitled, “**Surrogacy under Indian Legal System: Legal and Human Rights Concerns**” for the award of the Degree of **Doctor of Philosophy in Law** is the record of bonafide research work carried out by me under the guidance and supervision of **Dr. V. S. Sebastian**, Dean and Former Director, School of Legal Studies, Cochin University of Science and Technology, Kerala. I further declare that this thesis or any part of this thesis did not form part of any dissertation and has not been submitted by me in any other University/Institution for any Degree, Diploma, Associateship, or any other title or recognition.

.

Kochi
28.06.2013

Aneesh V. Pillai
(Research Scholar)



**School of Legal Studies
Cochin University of Science and Technology
Kochi – 682 022, Kerala, India**

Dr. V. S. SEBASTIAN
Dean & Former Director

CERTIFICATE

This is to certify that this thesis entitled, “**Surrogacy under Indian Legal System: Legal and Human Rights Concerns**” submitted by **Shri. Aneesh V. Pillai**, for the award of Degree of **Doctor of Philosophy in Law** is the record of bonafide research work carried out by him as part-time research scholar of School of Legal Studies, Cochin University of Science & Technology, under my guidance and supervision from 07.06.2010. No part of this thesis has been submitted to any University for the award of any Degree or Diploma, whatsoever.

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This is to certify that the important research findings included in the thesis entitled, **“Surrogacy under Indian Legal System: Legal and Human Rights Concerns”** have been presented in a research seminar at School of Legal Studies, Cochin University of Science and Technology on **3rd January, 2013**.

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Kochi
04. 01. 2013



**School of Legal Studies
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Kochi – 682 022, Kerala, India**

Dr. V. S. SEBASTIAN
Dean & Former Director

CERTIFICATE

This is to certify that this thesis entitled, “**Surrogacy under Indian Legal System: Legal and Human Rights Concerns**” submitted by **Shri. Aneesh V. Pillai**, for the award of the Degree of **Doctor of Philosophy in Law** is the record of bonafide research work carried out by him as part-time research scholar of School of Legal Studies, Cochin University of Science & Technology, under my guidance and supervision from 07.06.2010. All the relevant corrections and modifications suggested by the audience during the Pre-Synopsis Seminar and recommended by the Doctoral Committee have been incorporated by **Shri. Aneesh V. Pillai** in this thesis.

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PREFACE

The advancements in medical science and technology have proved to be a boon to mankind. At the same time they have raised numerous challenges before the legal systems of the world. One such advancement is that of assisted human reproductive technologies and particularly surrogacy, which have given a new meaning to the concept of procreation. These technologies have made it possible for individuals to beget a genetically related child with the help of a third party and without sexual intercourse. Among all the assisted human reproductive technologies, the practice of surrogacy, in which women agree to have their bodies used to undergo a pregnancy and give birth to a baby for another, has raised various legal and human right controversies and diverse legal responses all over the world. India has particularly become a top destination for individuals who wish to beget a child through surrogacy and hence it is imperative for the Indian government to address the challenges posed by surrogacy. This study is an attempt to examine the need and importance of surrogacy practices and the conflicting legal and human rights issues raised by surrogacy in contemporary times. It also examines the adequacy of existing legal framework in India and attempts to provide pragmatic solutions for regulating surrogacy and protecting the interests of various stakeholders involved in surrogacy.

In this humble effort to explore the different legal and human rights dimensions of surrogacy, various persons have helped me with their guidance, blessings and encouragement and it is my solemn duty to acknowledge their valuable contributions.

At the very outset, I would like to express my sincere gratitude to my supervisor and guide Dr. V. S. Sebastian, Dean & Former Director, School of Legal Studies, Cochin University of Science and Technology, Kerala. His rich experience and keen interest in research helped me to understand the complex issues involved in surrogacy. He not only showed me the right path in doing this research but also gave me all the liberties for developing the ideas for the successful completion of this research. In spite of his hectic schedule as Director of School of Legal Studies, he

took extra-ordinary efforts to correct the draft chapters of this research, which I can never forget. Above all, words can never express my gratitude for his love, affection, care, encouragement and moral support throughout my life in CUSAT as a student and as a researcher.

I am deeply indebted to my teacher Dr. D. Rajeev, Former Director, School of Legal Studies, for his constant encouragement and support right from the beginning to the completion of this research. His expertise in research methodology and zeal for perfection in editing and reviewing research articles inspired me to do my best and helped me in the framing of issues, headings and sub headings and footnoting for this research work.

The credit for generating interest in human right issues goes to my teacher Dr. N. S. Soman, Director, School of Legal Studies, who not only equipped me with the knowledge in Human Rights Laws but also taught me to examine and analyze the multi-faceted dimensions of human rights issues in a right perspective.

I am extremely grateful to Prof. (Dr.) A. M. Varkey, Former Director and Dean, School of Legal Studies and Dr. P.S. Seema, Assistant Professor for their valuable suggestions in improving this research work at various stages. I am also grateful to Prof. (Dr.) V. D. Sebastian, Former Dean, Faculty of Law, CUSAT and currently Adjunct Professor, KITT Law School, Bhubaneswar, Odisha; Prof. (Dr.) P. Leelakrishnan, Former Dean, Faculty of Law, CUSAT; Prof. (Dr.) G. Sadashivan Nair, Former Director, School of Legal Studies; Dr. N. S Gopalakrishnan, Director, Inter University Centre for Intellectual Property Rights Studies, CUSAT and Prof. M. Marcus, Formerly Professor of Law, Government Law College, Ernakulam for their encouragement and blessings.

I am obliged to Prof. (Dr.) Sukhpal Singh, Vice-Chancellor, Hidayatullah National Law University, Raipur, Chhattisgarh for allowing me to take leave from my routine work at the Hidayatullah National Law University, for the successful completion of the course work and other related procedures.

I would like to thank Dr. Nilamani Das, Formerly Assistant Professor (Law), HNLU and Dr. D. Anand Mennapula, Regional Deputy Director, IGNOU, Vishakhapatnam, Andhra Pradesh for their encouragement to start this research work. I would also like to thank all my colleagues in HNLU, especially Dr. Uttam Panda, Assistant Professor (Sociology); Dr. Y. Pappa Rao, Assistant Professor (Law) and Mr. Azim B. Pathan, Faculty of Law, HNLU for their encouragement and cooperation.

This thesis would not have been possible without the support of Dr. Kaumudhi Challa, Assistant Professor, HNLU who showed great concern and interest in guiding me at every stage of this research. I am deeply obliged to her for her inspiring and excellent guidance, valuable suggestions, ceaseless encouragement and intellectual support. I record my deep sense of gratitude to her for all the efforts she has put in and the moral support extended for the successful completion of this thesis. I also wish to express my deep sense of gratitude to her father and brothers for their encouragement and blessings.

I express my sincere thanks to Mrs. Anita O. S., Research Scholar, SLS; Mrs. Preetha S., Assistant Professor, Indian Maritime University, Chennai; Mrs. Gifty Williams, Assistant Professor, Government Law College, Ernakulam and Mrs. Arathi Ashok, Research Scholar, IUCIPRS, CUSAT for their help and encouragement in completing this work. For this research work I collected materials from various libraries mainly from the School of Legal Studies, Central Library of CUSAT and Hidayatullah National Law University, Raipur. I express my sincere gratitude to the library staff of all these libraries.

I have received valuable help and assistance from my friends and well wishers for the completion of this work at various stages and I express my sincere thanks to everyone. I also thank Shri. Ramesh Nathani & Shri. Vikram Nathani, Anand Photo Copier & Computers, Ghadi Chowk, Raipur, Chhattisgarh for printing and binding this work beautifully.

I am indebted to all my teachers who have taught me from the very first day of my learning and led me from the darkness of ignorance to the light of knowledge and only because of their encouragement and blessings I have been able to gain knowledge and pursue a teaching career.

It is with great pleasure and immense gratitude that I mention the lovely cooperation rendered by my parents and other family members who have showered their love on me and toiled hard for bringing me up to this level. They have not only provided me the necessary facilities but also are my source of strength, inspiration and encouragement. This research work has been possible only because of their constant support, blessings and prayers.

Finally, I humbly pay my obeisance to the God Almighty for all his blessings and giving me strength, health and wisdom to complete this research work. During this research work my father passed away. I dedicate this work with great reverence and love to my beloved father, Late Shri. R. Vijayan Pillai.

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LIST OF ABBREVIATIONS

A. J. I. L. (Supp.)	-	American Journal of International Law (Supplement).
A. U. L. R.	-	Auckland University Law Review.
A.I.R.	-	All India Reporter.
A.J.P.T.R.	-	American Journal of Pharm Tech Research.
A.L.T.	-	Andhra Law Times.
AI	-	Artificial Insemination.
Alb. L.J. Sci. & Tech.	-	Albany Law Journal of Science and Technology.
Ariz. Ct. App.	-	Arizona Court of Appeal.
ART	-	Assisted Human Reproductive Technologies.
Bom.	-	Bombay.
Br. J. Soc. Work	-	British Journal of Social Work.
C.U.L.R.	-	Cochin University of Law Review.
Cal.	-	California/ Calcutta.
Cal. Ct. App.	-	California Court of Appeal.
Cal. Rptr.	-	California Reporter.
Case W. Res. L. Rev.	-	Case Western Reserve Law Review.
CEDAW	-	Convention for Elimination of All Forms of Discrimination Against Women.
Chi. - Kent L. Rev.	-	Chicago-Kent Law Review.
Clev. St. L. Rev.	-	Cleveland State Law Review.
Colum. Hum. Rts. L. Rev.	-	Columbia Human Rights Law Review.
com.	-	Communication.
CSR	-	Centre for Social Research.
Ct. of Com.	-	Court of Common.
D.L.R.	-	Dominion Law Reports.
D.L.T.	-	Delhi Law Times.

Denv. U. L. Rev.	-	Denver University Law Review.
DePaul J. Health Care L.	-	DePaul Journal of Health Care Law.
Doc.	-	Documents.
Duke J. Gender L. & Pol'y	-	Duke Journal of Gender Law & Policy.
E.W.C.A.	-	England & Wales Court of Appeal.
E.W.C.A. Civ.	-	England & Wales Court of Appeal Civil.
Eur. J. Women's Stud.	-	European Journal of Women's Studies.
F.L.R.	-	Family Law Reporter.
Ga. St. U. L. Rev.	-	Georgia State University Law Review.
Guj.	-	Gujarat.
H.C.A.	-	High Court of Australia.
Harv. Hum. Rts. J.	-	Harvard Human Rights Journal.
Harv. J. L. & Pub. Pol'y	-	Harvard Journal of Law and Public Policy.
http	-	Hypertext Transfer Protocol.
I.N.D.L.H.C.	-	In Delhi High Court.
ICCPR	-	International Covenant on Civil and Political Rights.
ICESCR	-	International Covenant on Economic, Social and Cultural Rights.
ICMR	-	Indian Council for Medical Research.
ICPD	-	International Conference on Population and Development.
IE	-	Implantation of Embryo.
IVF	-	In-Vitro Fertilization.
J. Am. Acad. Orthop. Surg.-	-	Journal of the American Academy of Orthopaedic Surgeons.
J. Contemp. Health L. & Pol'y	-	Journal of Contemporary Health Law and Policy.
J. Health Care L. & Pol'y	-	Journal of Health Care Law & Policy.
J. I. L. I.	-	Journal of Indian Law Institute.
J. Perinat. Educ.	-	Journal of Perinatal Education.
K.B.	-	Kings Bench.
Kant.	-	Karnataka.

Ltd.	-	Limited.
Mass.	-	Massachusetts.
Mich. App.	-	Michigan Appeal.
Minn. J. Int'l L.	-	Minnesota Journal of International Law.
Misc.	-	Miscellaneous.
Mur. U. E. J. L.	-	Murdoch University Electronic Journal of Law.
N. C. L. J.	-	National Capital Law Journal.
N.C. L. Rev.	-	North Carolina Law Review.
N.J.Super.Ch.	-	New Jersey Superior Chancery.
N.M. L. Rev.	-	New Mexico Law Review.
N.Z.F.L.R.	-	New Zealand Family Law Reports.
Ohio N.U. L. Rev.	-	Ohio Northern University Law Review.
org.	-	Organization.
pdf.	-	Portable Document Format.
Phil. & Pub. Aff.	-	Philosophy and Public Affairs.
Pvt.	-	Private.
Q.B.	-	Queen's Bench.
R.I.	-	Rhode Island.
S. Cal. Rev. L. & Women's Stud.	-	South California Review of Law and Women's Studies.
S.C.	-	Supreme Court.
S.C.C.	-	Supreme Court Cases.
S.C.R	-	Supreme Court Reports.
S.W.	-	South Western.
Tenn.	-	Tennessee.
Tex. Hisp. J.L. & Pol'y	-	Texas Hispanic Journal of Law & Policy.
U. Dayton L. Rev.	-	University of Dayton Law Review.
U. Rich. L. Rev.	-	University of Richmond Law Review.
U. Tor. L. J.	-	University of Toronto Law Journal.
U.C. Davis L. Rev.	-	University of California Davis Law Review.
U.C.L. Juris. Rev.	-	University College of London Jurists Review.

U.C.L.A. J.L. & Tech.	-	University of California, Los Angeles Journal of Law and Technology.
U.K.	-	United Kingdom.
U.M.K.C. L. Rev.	-	University of Missouri - Kansas City Law Review.
U.N.S.W. Law Journal	-	University of New South Wales Law Journal.
U.S.A.	-	United States of America.
U.S.F. L. Rev.	-	University of South Florida Law Review.
UDHR	-	Universal Declaration on Human Rights.
UN	-	United Nations.
Vand. J. Transnat'l L.	-	Vanderbilt Journal of Transnational Law.
Vt. L. Rev.	-	Vermont Law Review.
W.L. R.	-	Wales Law Reports.
Wash. & Lee L. Rev.	-	Washington and Lee Law Review.
Wash. Post	-	Washington Post.
West. Indian Med. J.	-	West Indian Medical Journal.
Whittier J. Child. & Fam. Advoc.	-	Whittier Journal of Child & Family Advocacy.
Wis. J. Fam. L.	-	Wisconsin Journal of Family Law.
Wis. Women's L. J.	-	Wisconsin Women's Law Journal.
www	-	World Wide Web.

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CHAPTER -I

INTRODUCTION

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INTRODUCTION

'He is my son'; 'No he is mine'. After hearing both the ladies, the King delivered his judgment. 'Divide the living child into two, and give half to one and half to the other'¹.

This was the decision given by the wise King Solomon in order to identify who is the real mother of the child, in a case where two women were fighting with each other for claiming rights over a child. On hearing the King's decision, the real mother started crying and requested the King not to cut the child but give it to the other woman. The King however gave the child to the woman who requested him not to cut the child as she was the real mother. Though this is a story to highlight King Solomon's wisdom, such disputes are not rare and in fact, have become a reality in modern times. The scientific developments in the field of human reproduction have made it possible for a child to have two or three mothers or fathers. Today the King is replaced by the Courts. An important question which arises today is whether the courts can decide a dispute over a child in the same manner as King Solomon? King Solomon had only 2 claimants for the child whose fate he was called upon to decide. In present times, several people may raise claims over a child and resolving such disputes is not only a herculean task before the courts but also poses a legal and human rights challenge. Such disputes are emerging due to the increasing use of assisted human reproductive technologies. These technologies have developed as a result of various experiments and research carried out by biologists and medical experts in order to find a solution for childlessness. The problem of childlessness is a matter of great concern due to the fact that it has a severe impact on the life of couples.

¹ See, Adam Marshall, "Choices for a Child: An Ethical and Legal Analysis of a Failed Surrogate Birth Contract", 30 *U. Rich. L. Rev.* 275 (1996).

1.1 Childlessness and its Impacts

Every human being has an innate desire to have a natural offspring. The reasons are many, to love and to be loved, for performing the religious rituals at funeral pyre, for carrying the tradition of a family, to preserve a particular community and so on. The significance and need of a child is also emphasized in almost all the religions of the world. Begetting and giving birth to a child is essential not only for fulfilling the personal aspirations of the individuals but also for continuation of the society. This desire is accomplished by the act of procreation which is a natural process by which the married couple can have their own offspring. Traditional reproduction is an unambiguous three dimensional phenomenon involving natural mother, natural father and natural child sharing amongst them the entire natural biological process, without intervention from any other external agencies except for minimal medical expertise². A child is seen to be a natural product of the procreative act of its parents³. For most couples, the procreation of a child is one of the simplest tasks. Melissa Williams, the renowned Political Scientist, commented that “Reproduction of child, after all is the oldest production known to humankind, a process that is programmed into the biological fiber of our beings and defines our very survival”⁴. However, unfortunately a large number of people due to various reasons are unable to fulfill this very biological process fruitfully and beget a child. The major reason for childlessness is infertility which may be either medical or social.

Medical infertility is usually defined as the inability to achieve pregnancy after a year or two of trying to conceive a child through regular sexual intercourse⁵. In the past few decades a new type of infertility termed as social infertility has emerged. It means the inability of individuals to have a child due to the various social

² See, V. Rajalakshmi, “Reproductive Technology vs. Women”, 1 *Supreme Court Journal*, 48 (1991), at p.49.

³ See, Sarah Franklin, “Postmodern Procreation: A Cultural Account of Assisted Reproduction”, in Faye D. Ginsburg & Rayna Rapp (eds.) *Conceiving the New World Order: The Global Politics of Reproduction*, California University Press, California (2005), p.336.

⁴ Debora L. Spar, *The Baby Business*, Harvard Law School Press, Harvard, U.K. (2006), p.1.

⁵ Marcia Inhorn, Frank Van Balen, *Infertility Around the Globe: New Thinking on Childlessness, Gender, and Reproductive Technologies*, University of California Press, London, U.S.A. (2002), p.12.

circumstances in their life⁶. For example, single individuals, widowed and divorced, may be fertile but are unable to have a child unless and until they marry. Likewise, the homosexual couples cannot have a child due to the fact that for begetting a child a sexual union between man and woman is required⁷. Further, aged individuals⁸, disabled as well as those individuals who have undergone voluntary sterilization can also be termed as social infertiles.

Childlessness either due to medical or social infertility, can be a devastating experience that causes enormous amount of emotional pain. It can have a grave impact on every aspect of an individual's life affecting his/her self-esteem and relationship with others. It is well-known that in many couples childlessness due to infertility causes serious strain in their interpersonal relationships, and often leads to personal distress and periods of existential crisis. One of the important challenges faced by a childless couple is learning how to manage the childlessness with oneself, with the partner and with the society. Couples often feel frustrated, angry or guilty after such a diagnosis. Women may feel unfeminine and men may feel powerless and un-masculine. In some cases the inability to have children is one of the main causes for divorce⁹. The treatment for medical infertility also involves stress, because some treatments may be painful, and there may be fear that the treatment will not work. Further, the side effects of the medications, and the necessity of going through procedures several times, can test a couple's patience and create a strain on their relationship. Thus childlessness has a serious impact on the couples and individuals who wish to beget a child and are unable to do so due to various reasons. The need for a child and the impact of childlessness has been recognized since ancient times and mankind has strived to find a solution for overcoming childlessness.

⁶ See generally, Camelia Soo, "Babies for the Socially Infertile: How Conceivable is it?", 12 *The New Zealand Medical Student Journal* 27 (2010).

⁷ *Ibid.*

⁸ See generally, Dr. Nicholas Tonti Filippini, "Reproductive Technology Outcomes in Australia: Analyzing the Data", 1 *Bioethics Research Notes* 15, March (2003).

⁹ K. Svitnev, "Legal Control of Surrogacy – International Perspectives", in Joseph G. Schenker (ed.), *Ethical Dilemmas in Assisted Reproductive Technologies*, Walter de Gruyter GmbH & Co., Germany (2011), p.149.

1.2 Measures for Overcoming Childlessness

The general belief in most of the ancient societies was that childlessness occurs due to curse of God and therefore the childless couples would be asked to undertake various rituals and prayers as well as offerings to appease the God¹⁰. In certain religions the practice of marrying another woman was followed while some permitted begetting a child with the help of a male relative. But these methods never provided the desired level of satisfaction to the couples and therefore found unsatisfactory.

With the growth of society and legal systems the method of adoption was developed to enable childless couples to have a child. Adoption provided an opportunity to have a child and fulfill the desire of an individual to raise a child; however it failed to fulfill the natural innate desire of individuals to have a child genetically related to them. The desire to beget a genetically related child led to various experiments and research in the field of human reproduction and resulted in development of various techniques.

1.3 Assisted Human Reproductive Technologies (ART)

The technological advancements in the field of human reproduction and medical science helped to develop various methods such as Artificial Insemination, In-vitro Fertilization, Surrogacy, etc¹¹, for assisting a couple to beget a genetically related child. These technologies are collectively known as Assisted Human Reproductive Technologies or Artificial Human Reproductive Technologies¹². These technologies have helped couples and individuals to overcome obstacles to reproduction arising from infertility, medical complications, and threat of harm to mother or child, personal choice, biological limitations of same-sex couples, death of

¹⁰ Tzvi C. Marx, *Disability in Jewish Law*, Routledge Publishers, London, (2002), p.62; Lawrence Boadt, *Reading the Old Testament: An Introduction*, Paulist Press, U.S.A. (1984), p.152.

¹¹ See, John A. Robertson, "Assisted Reproductive Technology and the Family, 47 *Hastings Law Journal*, 911 (1995-1996).

¹² Lars Noah, "Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation", 55 *Florida Law Review*, 603 (2003), at p.608.

a partner, and the risk of transmission of genetic diseases to the child¹³. The procedures involved in these most widely used methods of ART are as follows:

1.3.1 Artificial Insemination (AI)

Artificial Insemination is a method by which the woman is impregnated with semen from either her husband¹⁴ or from a donor¹⁵ or in extreme cases a mixture of semen from her husband and the donor¹⁶. This method is considered as the simplest form of ART and can be accomplished with a syringe¹⁷.

1.3.2 In-Vitro Fertilization (IVF)

IVF is a technique by which the male and female gametes (sperm and egg) are fertilized outside the female body. It involves hormonal monitoring and stimulation of the woman producing ova, harvesting the ova and mixing them with sperm in a Petri dish containing a culture medium. Then after approximately three days, one or more developed embryo is transferred back to the woman who seeks the treatment¹⁸.

1.3.3 Surrogacy

It is an arrangement by which a woman agrees to become pregnant by AI or through implantation of embryo and then carry the child for full term and after birth of child relinquishes all her parental right over the child and hand it over to another couple or individual¹⁹.

These techniques offer the advantage to couples or individuals to beget a genetically related child. However AI and IVF are techniques mainly assisting medically infertile couples to beget a child. But in case where the wife is unable to

¹³ See, Charles P. Kindregan, Jr., "Thinking About the Law of Assisted Reproductive Technology", 27 *Wis. J. Fam. L.* 123 (2007).

¹⁴ Popularly known as Homologous Artificial Insemination (AIH).

¹⁵ Popularly known as Heterologous Artificial Insemination (appropriately dubbed AID, the acronym for Artificial Insemination Donor).

¹⁶ Popularly known as 'Confused' or 'Combined' Artificial Insemination (CAI).

¹⁷ Walter Wadlington, "Artificial Conception: The Challenge for Family Law", 69 *Virginia Law Review*, April, 465 (1983), at p.469.

¹⁸ Lyria Bennett Moses, "Understanding Legal Responses to Technological Change: The Example of In-Vitro Fertilization", 6 *Minn. J.L. Sci. & Tech.* 505 (2004-2005), at p.510.

¹⁹ See generally, Jonathan Herring, *Medical Law and Ethics*, Oxford University Press, U.K. (4th edn. - 2012), p.384.

carry the child for a full term due to any medical or other reasons then surrogacy is the best option for such couples. Surrogacy can be opted not only by medically infertile couples but also by socially infertile couples and individuals²⁰. This is because in surrogacy, the individuals who wish to have a child are required only to contribute genetic material and the process of carrying the foetus to full term in the womb and delivering the child is performed by another woman known as surrogate woman²¹. Thus surrogacy can be used by medically infertile couples in whom AI and IVF are not successful. So also, it can be used by socially infertile couples/ individuals who are unable to have a child through AI or IVF or who may wish to beget a child without undergoing the natural procreation process. Therefore, surrogacy is emerging as the attractive and convenient option for begetting a child.

1.4 Surrogacy: Why and How?

Surrogacy is generally defined as an arrangement in which the surrogate or birth mother agrees to bear a child and permanently hand over the responsibility for the rearing of that child to another person or couple, referred to as the intending parents²². In most of the surrogacy arrangements the intended parents contribute the genetic material and the child is carried by the surrogate²³. In certain cases the surrogate woman may contribute the genetic material²⁴ and in very rare situations both the egg and sperm may be taken from donors and the resultant embryo is implanted in the surrogate²⁵.

²⁰ *Supra* n. 6.

²¹ See, Kirsty Stevens, and Emma Dally, *Surrogate Mother: One Woman's Story*, Futura Publications, London (1986), p.3; Cindy Jaquith, *Surrogate Motherhood, Women's Rights, & the Working Class*, Pathfinder Press, U.S.A. (1988), p.12.

²² Catherine Brown, "The Queensland Investigation into the Decriminalization of Altruistic Surrogacy", 29 (2) *Queensland Lawyer*, 78-83 (2008).

²³ Such type of surrogacy arrangements are known as Gestational Surrogacy or Full Surrogacy. See, Peter R.Brinsden, "Gestational Surrogacy", *Human Reproduction Update*, Vol.9, No.5, 483 (2003).

²⁴ Such type of surrogacy arrangements known as Traditional Surrogacy or Partial Surrogacy. See generally, Paula M. Barbaruolo, "The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions", 3 *Alb. L.J. Sci. & Tech.* 39 (1993), at p.41.

²⁵ See, Andrew Bainham & Martin Richards, *What is a Parent?: A Socio-Legal Analysis*, Hart Publishing, Oxford, U.K. (1999), p.125.

Surrogacy arrangements can be formal on the basis of a contract or can be informal based on mere understanding between the parties. Further, surrogacy arrangements can be altruistic or commercial. An altruistic surrogacy is one in which the birth mother does not receive any financial or material gain from the arrangement. In contrast, commercial surrogacy is where the birth mother receives a fee or some other monetary gain in return for acting as the surrogate and may also involve the presence of a broker who receives a fee for arranging the surrogacy²⁶.

Surrogacy though not in the present form has been practiced since ancient times and instances of surrogacy can be found throughout history where a family member or servant may have stepped in for a woman who could not become pregnant²⁷. The advancements in technology have made this method more popular and convenient for the parties. Surrogacy has not only brought with it relief for the infertile married couple, but also provided an opportunity for a wider group of socially infertile people to beget a child²⁸. Earlier, childless couples alone sought the help of surrogacy, that too during the prime child bearing years. But now single and even post menopausal women who want to have children seek the help of this method²⁹. In the past, surrogacy arrangements were generally confined to kith and kin of close relatives, family, or friends, usually as an altruistic deed. But, with the introduction of financial arrangements in the process, surrogacy has extended its network beyond family, community, state, and even across the country³⁰. Surrogacy is also gaining popularity because of its use in recent times by various celebrities like Deidre Hall and Joan

²⁶ *Supra* n.22.

²⁷ See, Jennifer Aimee Sandoval, "Labor Pains: An Exploration of the Complex Roles of Identity, the Body, and Policy in Surrogacy Discourses in India", Dissertation submitted in partial fulfillment of the requirements for the Degree of Doctor of Philosophy Communication, The University of New Mexico, Albuquerque, New Mexico, July, (2010), pp.4-5.

²⁸ See, Lisa Fong, "Balancing Rights and Interests in Access to Infertility Treatment", *A.U. L.R.* 9 (4), 1181-1207 (2003).

²⁹ Marsha Garrison, "Law Making for Baby Making: An Interpretative Approach to Legal Parentage", 113 *Harvard Law Review* 837 (2000), at p.838.

³⁰ See, Centre for Social Research (CSR), *Surrogate Motherhood- Ethical or Commercial*, p.3, report released in the year 2012. Available at <www.womenleadership.in/Csr/SurrogacyReport.pdf> Visited on 10.8.2012.

Lunden, Michael Jackson, Angela Bassett, Kelsey Grammer³¹, Amir Khan³², etc. However the increased use of surrogacy has generated a great controversy regarding its legality due to the involvement of various human rights and legal issues. The practice of surrogacy has also been questioned on ethical, moral and social grounds.

Surrogacy has also been criticized on the ground that, it violates the human rights and dignity of surrogate women³³ and it would lead to commodification of women³⁴, exploitation³⁵, prostitution³⁶ and slavery³⁷. Further, it is said that surrogacy would have an adverse impact on the rights of the child and lead to baby selling³⁸, sex selection³⁹ and creation of designer babies⁴⁰. However, the proponents of surrogacy argue that right to procreation is a basic human right and it includes the right to procreate with the help of another⁴¹. So also every individual has the right to benefit from the developments in science and technology⁴². Further, every woman has a right

³¹ Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self*, University of California Press, California (2010), p.298; Cara Birrittieri, *What Every Woman Should Know About Fertility and Her Biological Clock*, The Carrier Press, Inc., U.S.A. (2005), p.144.

³² Bharati Dubey & Malathy Iyer, "Aamir Khan, Kiran get a Son Through IVF, Surrogacy", *The Times of India*, Dec. 6, 2011; Shara Ashraf & Navdeep Kaur Marwah, "Aamir Khan Flooded with Queries on IVF Surrogacy", *Hindustan Times*, December 06, 2011.

³³ Judith Hendrick, *Law and Ethics in Nursing and Health Care*, Stanly Thomes Ltd., U.K. (2000), p.157.

³⁴ Pamela Laufer-Ukeles, "Approaching Surrogate Motherhood: Reconsidering Difference", 26 *Vt. L. Rev.* 407 (2001-2002), at p.417.

³⁵ Sara K. Alexander, "Who is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature", 38 *Georgia Law Review*, 395 (2003-2004), at p.400.

³⁶ See, Kathryn Venturatos Lorio, "Alternative Means of Reproduction: Virgin Territory for Legislation", 44 *Louisiana Law Review*, 1641 (1984), at p.1657; Erika Hessenthaler, "Gestational Surrogacy: Legal Implications of Reproductive Technology", 21 *N.C.Cent.L.J.* 169 (1995), at p.177.

³⁷ See, Ayesha Hasan, "Surrogacy: Enhancement or Restriction of a Woman's Autonomy?" 6 *U.C.L. Juris. Rev.* 101-122 (1999), at p.115.

³⁸ See, Martha A. Field, "Surrogacy Contracts-Gestational and Traditional: The Argument for Non-Enforcement", 31 *Washburn Law Journal*, 1(1991-1992), at p.7; Richard A. Posner, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", 5 *J. Contemp. Health L. & Pol'y* 21 (1989).

³⁹ See, E. Scott Sills and Gianpiero D. Palermo, "Preimplantation Genetic Diagnosis for Elective Sex Selection, the IVF Market Economy, and the Child—Another Long Day's Journey into Night?", 19(9) *Journal of Assisted Reproduction and Genetics*, 433-437 (2002); Joseph G. Schenker, "Gender Selection: Cultural and Religious Perspectives", 19(9) *Journal of Assisted Reproduction and Genetics*, 400 - 410 (2002).

⁴⁰ Sheila McLean, *First Do No Harm: Law, Ethics and Healthcare*, Ashgate Publishing Ltd., London (2006), pp.399-400.

⁴¹ See *infra*, Chapter II.

⁴² See *infra*, Chapters III & IV.

to reproductive autonomy which includes the right to act as a surrogate for another⁴³. Therefore, any restriction on the practice of surrogacy would violate the basic human rights of intended parents as well as the surrogate woman⁴⁴.

The various human rights issues and legal controversies surrounding surrogacy have come up for discussion in numerous cases before the courts in different countries⁴⁵. The issues relating to surrogacy have received the attention of various Commissions and Professional Societies all over the world. For example, in Great Britain the Warnock Committee⁴⁶; in Canada the Ontario Law Reform Commission⁴⁷; in Victoria⁴⁸ the Waller Committee⁴⁹; in New South Wales⁵⁰ the Law Reform

⁴³ See *infra*, Chapter V.

⁴⁴ Helen Holmes & Joan Helmich, *Issues in Reproductive Technology: An Anthology*, New York University Press, New York (2004), p.322; Melissa Lane, "Ethical Issues in Surrogacy Arrangements", in Rachel Cook, Shelley Day Sclater, & Felicity Kaganas (eds.), *Surrogate Motherhood: International Perspectives*, Hart Publishing, Oxford and Portland (2003), p.125; Has Sook Kim, "Legal Issues Regarding Children of Assisted Conception in Korea", in John Eekelaar, *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century*, Martinus Nijhoff Publication, Netherlands, (1993), p.139.

⁴⁵ For example, In *The Re C (A Minor) (Ward Surrogacy) (Baby Cotton Case)*, 1985 FLR 846, the legality of surrogacy agreement was discussed and the court held that the agreement was void on the grounds of public policy. However subsequently it gave the visitation rights to the child's biological father; In *the Matter of Baby M*, 537 A.2d 109 N.J.396 (1988), the Court held that the surrogacy agreement itself was void, but nevertheless awarded custody of the surrogate child to the commissioning couple. In the case of *Johnson v. Calvert*, (1993) 851 P 2d 776 (Cal), it was argued that surrogacy involves exploitation of surrogate women. The Court rejected this argument and gave the custody of the surrogate child to the intended parents. In the case of *Jaycee B. v. The Superior Court of Orange County*, 42 Cal.App.4th 718 (1996), 49 Cal. Rptr.2d 694, the intended father refused to accept any obligation for maintaining the surrogate child. The Court held that, though the child was born through surrogacy, since the intended father had agreed for such an arrangement, he would be liable for the maintenance of such child; In *Soos v. Superior Court of the State of Arizona*, 182 Ariz. 470(1994); 897 p.2d 1356(Ariz. Ct. App.1994), the Court discussed dispute regarding the custody of surrogate child by the intended parents; *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (Supreme Court of California). In this case, the Court discussed a custody dispute between an egg donor and a gestational mother who were part of a lesbian relationship; In *Re Mark*, [2003] Fam CA 822, the issue of parentage of a surrogate child born to a gay couple was discussed by the Court.

⁴⁶ Alec Samuels, "Warnock Committee: Human Fertilisation and Embryology", 51 *Medico- Legal Journal*, 174 (1983).

⁴⁷ Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, 1985, Available at <http://archive.org/stream/reportonhumanart01onta_djvu.txt> Visited on 10.7.2012.

⁴⁸ Victoria is a state in the south-east of Australia.

⁴⁹ Committee to Consider the Social, Ethical, and Legal Issues Arising from In-Vitro Fertilization (Chairman: Louis Waller), *Report on the Disposition of Embryos Produced by In-Vitro Fertilisation*, Melbourne, 1984.

⁵⁰ New South Wales is a state in the east of Australia.

Commission⁵¹; in Spain the Congress of Deputies' Special Commission⁵², in West Germany the Benda Commission⁵³, in the Netherlands the Dutch Health Council⁵⁴, as well as in the United States the American Fertility Society and Office of Technology Assessment⁵⁵, etc⁵⁶.

The approach of various countries towards surrogacy also differs depending upon their social, economic, cultural, religious and political views. As a result, the law relating to surrogacy all over the world also differs. Hence there is no consensus among the countries who have adopted specific legislations or legal provisions to deal with surrogacy. For example, some countries like South Africa, India, Georgia (Country), Russia, Ukraine, Armenia, Iran, Bahrain, New Zealand, Lebanon, Saudi Arabia⁵⁷, etc. and some of the states in USA⁵⁸, allow both commercial and altruistic surrogacy. In other countries like Canada, Hungary, Hong Kong, United Kingdom, Greece, Denmark, Netherlands, Belgium, Philippines, Queensland⁵⁹, New South Wales⁶⁰, Western Australia⁶¹, etc. and some of the states in USA⁶², only altruistic surrogacy is allowed. In some countries like Austria, Germany, Sweden, Norway, Switzerland, Italy, Iceland, Japan, Spain, Vietnam and some of the states in USA⁶³,

⁵¹ See, Sue A. Meinke, "Surrogate Motherhood: Ethical and Legal Issues", p.3. Available at <<http://bioethics.georgetown.edu/publications/scopenotes/sn6.pdf>> Visited on 10.8.2012.

⁵² *Id.* at p.3.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ See, Solomon Davis, "Surrogacy Laws", Available at <<http://www.surrogatemarketer.com/data/>> Visited on 20.8.2012.

⁵⁸ The States such as Maryland, Ohio, Oklahoma, Illinois, Utah, Arkansas, Florida, New Hampshire, Nevada, Texas, and Virginia.

⁵⁹ Queensland is the second-largest and third - most populous state, situated in the northeast of Australia.

⁶⁰ New South Wales is a state in the east of Australia.

⁶¹ Western Australia is a state occupying the entire western third of Australia.

⁶² The states such as New York, Washington, and North Dakota. For more detailed discussion about legal position in US States, Magdalena Gugucheva, *Surrogacy in America*, Council for Responsible Genetics, Cambridge, p.29. Available at www.councilforresponsiblegenetics.org/.../kavevej0a1m.pdf > Visited on 20.8.2012.

⁶³ The states such as West Virginia, New Jersey, Arizona, Kentucky, Michigan, Nebraska, Indiana, District of Columbia, and Tennessee. For more detailed discussion about legal position in US States, see, Theresa M. Erickson, *Surrogacy and Embryo, Sperm, & Egg Donation: What Were You Thinking*, Universe Publication, Bloomington, (2010), pp. 70-71.

all forms of surrogacy are prohibited⁶⁴. Due to this varying approach towards surrogacy and strict regulations in certain countries, the couples or individuals who wish to beget a child through surrogacy prefer to travel across countries and avail such services from a country which either does not have a legal prohibition or has the minimum restriction for surrogacy⁶⁵. Thus the concept of procreative tourism has emerged and is becoming very popular.

India is rapidly developing as a major destination for surrogacy practices. This is due to the fact that, India offers such services with modern technologies and medical expertise⁶⁶ at low-cost⁶⁷, along with a permissive regulatory climate. Further, the easy availability of surrogate women at low cost compared to other countries has also contributed to the country's rise in popularity as a top destination for individuals/couples seeking surrogacy services⁶⁸. The Law Commission of India in its report stated that, the usual fee for surrogacy arrangements is around \$25,000 to \$30,000 in India which is around 1/3rd of that in developed countries like the USA⁶⁹. According to a study report given by Centre for Social Research (CSR)⁷⁰, New Delhi in the year 2012⁷¹, the fees for surrogates are estimated to range from \$2,500 to \$7,000 and the total costs for surrogacy arrangements can be anything between \$10,000 and \$35,000. Therefore it is considered less than what the intended parents

⁶⁴ For more discussion on legal position of surrogacy in various countries, see, Henk ten Have, Eric M. Meslin, and Ruth Chadwick, *The SAGE Handbook of Health Care Ethics*, SAGE Publications Ltd., U.S.A. (2011), p. 169.

⁶⁵ See generally, Trevor Alli, "Surrogate Arrangements: Market of Living Laboratories", pp.18-19, Available at <[http://www.vpmthane.org/Publications\(sample\)/Bio-Ethics/Trevor%20Allis.pdf](http://www.vpmthane.org/Publications(sample)/Bio-Ethics/Trevor%20Allis.pdf)> Visited on 10.8.2012.

⁶⁶ See generally, Dr. Suman Kumar Dawn & Swati Pal, "Medical Tourism in India: Issues, Opportunities and Designing Strategies for Growth and Development", *ZENITH - International Journal of Multidisciplinary Research*, Vol.1, Issue 3, 185, July (2011).

⁶⁷ See, Usha Rengachary Smerdon, "The Baby Market: Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India", 39 *Cumberland Law Review*, No.1, 15 (2008-2009), at p.32.

⁶⁸ Catherine London, "Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts", 18 *Cardozo Journal of Law & Gender*, 391 (2012), p. 396.

⁶⁹ Law Commission of India, "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy", Report No. 228, August 2009, at p.11.

⁷⁰ Centre for Social Research is a non-profit, non-governmental organisation based in New Delhi founded in 1983. See for more the official website of CSR <<http://www.csrindia.org>> Visited on 10.8.2012.

⁷¹ *Supra* n.30.

will have to pay in the United States, where rates fluctuate between \$59,000 and \$80,000⁷². Thus the strongest incentive for foreigners to travel to India is most likely to be the relatively low costs involved in the process. This has made India a preferred destination for foreign couples who look for a cost-effective treatment for infertility and thus a whole branch of medical tourism has flourished on the surrogacy practice⁷³.

As a result, the surrogacy business is well-established in India, with an estimated annual turnover of half a billion dollars⁷⁴. The exact figures are not available and hard to verify. However, according to one estimate, India's reproductive tourism industry is estimated to be approximately 400 million US dollars a year⁷⁵. As per the CSR Report, the volume of surrogacy industry is estimated to be around \$ 500 million and the numbers of cases of surrogacy are increasing rapidly⁷⁶. However, the extent of surrogacy practice in India is not known exactly, but from the above two reports it is clear that, the surrogacy industry is ranging from 400-500 million US dollars a year⁷⁷. In India, the places like Anand, Surat, Jamnagar, Bhopal and Indore have become the major centers for surrogacy practices. Large number of couples are travelling to these places not only from India but also from western countries and also from other countries like Sri Lanka, Pakistan, Bangladesh, Thailand and Singapore to fulfill their desire for a child⁷⁸. It is estimated that there are more than 600 fertility clinics established in both rural and urban areas spread almost all states of India. However, the state of Gujarat is particularly popular, especially among westerners⁷⁹.

⁷² *Ibid.*

⁷³ *Supra* n.69.

⁷⁴ See, The draft made by Permanent Bureau of Hague Conference on Private International Law established by the World Organization for Cross-Border Co-Operation in Civil and Commercial Matters, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, Preliminary Document No. 11, March, 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, p.7. Available at <www.hcch.net/upload/wop/genaf2011pd11e.pdf> Visited on 20.8.2012.

⁷⁵ *Ibid.*

⁷⁶ *Supra* n.30.

⁷⁷ For more details on estimates of surrogacy turn over, see, Shyantani Das Gupta & Shamita Das Gupta, "Motherhood Jeopardised: Reproductive Technologies in Indian Communities", in Jane Maree Maher, *The Global Politics of Motherhood: Transformation and Fragmentation*, Routledge, U.S.A. (2010), p.138.

⁷⁸ *Supra* n.30 at p.6.

⁷⁹ *Id.* at p.23.

In fact, India in general and the state of Gujarat in particular is rapidly becoming the center for Child Process Outsourcing (CPO). Despite this growing prominence of the Indian surrogacy industry in recent years, it is strange but true that the surrogacy practices in India remain largely unregulated. This lacuna in the legal system creates a myriad of problems not only for the intended parents, surrogate woman and surrogate child but also poses new challenges before courts and government.

1.5 Legal Response to Surrogacy in India

The first reported surrogacy in India, took place in 1994 in Chennai⁸⁰. In 1997, an Indian woman acted as a surrogate for money and this is considered as the first reported instance of commercial surrogacy in India⁸¹. During the past one decade the number of children born through surrogacy in India has increased enormously⁸². It is pertinent to point out that the first case of commercial surrogacy in India that occurred in 1997 generated a huge debate on the legality of surrogacy practices. In this case, Nirmala the surrogate woman agreed to act as a surrogate for a couple from Chandigarh due to reasons of financial necessity⁸³. This incident received a lot of public attention and generated various debates on the issues surrounding surrogacy practices. However the response of the legal system to the issue of surrogacy has been

⁸⁰ Geeta Padmanabhan, "Hope in the Test Tube", *The Hindu*, Jan. 19, 2006.

⁸¹ Sandhya Srinivasan, "Surrogacy Comes Out of the Closet", *Sunday Times of India*, July 6, 1997.

⁸² *Supra* n.30 at p.23.

⁸³ Nirmala's husband who was a rickshaw puller was bedridden due to paralysis and Nirmala had to work as a maid for supporting her family and for the treatment of her husband. The couple in whose home she was working as maid did not have any children and the doctor advised them to avail the option of surrogacy to beget a child. Hence, they requested Nirmala to act as a surrogate and she agreed with the objective of getting money for medical treatment of her husband. Nirmala was to have sexual intercourse with the intended father, conceive a child and after it was born, hand over legal rights to the couple. But this act was criticized and due to the fear that she will be prosecuted under Immoral Traffic Act, 1956, Nirmala approached Mr. Navjit Singh Brar, a lawyer in Chandigarh. Brar filed a petition in the District and Sessions Court of Chandigarh praying that the child born to Nirmala and an unidentified partner be declared as a legitimate child and since there was her husband's consent, it should not be considered as adultery. The Court gave the decision in favour of Nirmala and also requested the State Government to take appropriate measures to deal with such situations. (As per the telephonic interview done by researcher with Mr. Navjit Singh Brar, the lawyer who appeared for Mrs. Nirmala). Also See, Pritam Singh, *Text Book of Sex Education*, Bright Publishers, New Delhi (2008), p.206; Aditya Bharadwaj, "The Other Mother: Supplementary Wombs and the Surrogate State in India", in Stefan Beck, Maren Klotz & Michi Knecht (eds.), *Reproductive Technologies as Global Form: Ethnographies of Knowledge, Practices, and Transnational Encounters*, Campus Verlag GmbH, Germany (2012), p. 151.

very slow. However, the Indian Council for Medical Research⁸⁴ came up with certain guidelines.

In 2000, the ICMR adopted *Ethical Guidelines for Biomedical Research on Human Participants*, in which they prescribed certain guidelines to deal with ART in general⁸⁵. It is pertinent to mention here that, in most of the books, articles and websites, various authors have stated that commercial surrogacy was legalized in India in 2002⁸⁶. However, it is found that, in 2002 there was neither legislative action, nor any official declaration by Government, nor any judicial decision legalizing commercial surrogacy. Instead, only a *Draft Guideline for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics in India* was submitted by ICMR to the Ministry of Health, Union of India⁸⁷ and it appears that this step was interpreted as legalization of commercial surrogacy. These 2002 Guidelines were further updated and adopted by ICMR in 2005⁸⁸. These guidelines contain provisions specifically dealing with the surrogacy practices in India. At present this ICMR guideline is the only regulatory framework available in India to deal with surrogacy practices. However this guideline is not binding and its adoption and application is only voluntary and more over it is silent on various issues raised by surrogacy practices. Further, though the Indian Government has formulated ‘*The Assisted Reproductive Technology (Regulation) Bill and Rules, 2008*, it has not been officially enacted as an Act.

⁸⁴ Hereinafter referred to as ICMR.

⁸⁵ See, Indian Council of Medical Research, *Ethical Guidelines for Biomedical Research on Human Participants*, New Delhi (2006), p.viii, Available at <[http://icmr.nic.in/ethical_guidelines .pdf](http://icmr.nic.in/ethical_guidelines.pdf)> Visited on 10.7.2012.

⁸⁶ John Connell, *Medical Tourism*, CAB International, U.K., (2011), p.142; Wendy Chavkin & JaneMaree Maher, *The Global Politics of Motherhood: Transformation and Fragmentation*, Routledge, New York (2010), p.137; Stephanie Watson & Kathy Stolle, *Medical Tourism*, ABC – CLIO Publishers, U.S.A, (2012), p.135; Andrea O’ Reilly, *Encyclopedia of Motherhood*, Volume 1, Sage Publications, Inc, U.S.A. (2010), p.1185; Babu Sarkar, “Commercial Surrogacy: Is it Morally and Ethically Acceptable in India?”, *Practical Laywer*, (2011) December, p.11; Cara Luckey, “Commercial Surrogacy: Is Regulation Necessary to Manage the Industry?” *Wisconsin Journal of Law, Gender & Society*, Vol. 26:2, 213 (2011), at p.226.

⁸⁷ See, Erica Davis, “The Rise of Gestational Surrogacy and the Pressing Need for International Regulation”, 21 *Minn. J. Int’l L.* 120 (2012), at p.126.

⁸⁸ See for full text, <http://www.prsindia.org/uploads/media/vikas_doc/docs/124150008-DraftART Bill.pdf> Visited on 10.7.2012.

The vulnerability of Indian legal system to deal with issues related to surrogacy came to limelight in *Baby Manji*⁸⁹ case as well as *Jan Balaz*⁹⁰ case. The *Baby Manji*'s episode exposed the real picture of the possible threats of surrogacy. In this case a Japanese couple sought the help of surrogacy and an Indian surrogate mother to give birth to a child. However during the time of pregnancy the Japanese couple divorced and the intended mother refused to take the child. Fortunately, the father and the grandmother of the child were willing to take care of that child and a possible confusion could therefore get averted⁹¹. The important questions that arose from this incident was that, if the father and grandmother had also refused to accept the child then what would have been the fate of that surrogate child and the surrogate mother? And in such circumstances, can the intended parents be made liable for such refusal to accept the child?

In *Jan Balaz v. Anand Municipality & Others*⁹², a German father filed a case against the passport authority for the refusal of passport to his child born out of surrogacy. In India for taking a passport in the name of a child, the name of the mother is an essential condition. However as the child was born out of a surrogacy arrangement the father was unable to mention the name of the mother of the child. As a result the passport authority refused to grant the passport. A division bench of Gujarat High Court declared that a child born in India by surrogacy to an Indian mother is an Indian citizen and hence directed the passport authorities to issue the passport. The court expressed its concern over the threats posed by the assisted reproductive technologies in the following words:

“...a comprehensive legislation dealing with all these issues is very imminent to meet the present situation created by the reproductive science and technology which have no clear answers in the existing legal system in this country⁹³... views expressed by us, we hope, in the present fact settings, will pave

⁸⁹ A.I.R. 2009 S.C. 84.

⁹⁰ *Jan Balaz v. Anand Municipality & Others*, A.I.R. 2010 Guj. 21.

⁹¹ *Baby Manji Yamda v. Union of India & Another*, A.I.R. 2009 S.C. 84.

⁹² A.I.R. 2010 Guj. 21.

⁹³ *Id.* para 19 at p.26.

the way for a sound and secure legislation to deal with a situation created by the reproductive science and technology...⁹⁴”.

Though these are the obvious examples of the threats involved in surrogacy practices, there are no specific legal provisions to deal with this issue in India. The Law Commission of India in its 228th report submitted on 5th of August, 2009 has made recommendations for a Legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy⁹⁵. In 2010, *The Assisted Reproductive Technology (Regulation) Bill, 2010* was prepared by a group of experts from ICMR and the Ministry of Health and Family Welfare⁹⁶. This Draft Bill is under consideration by the Indian Government⁹⁷. Thus at present in India, there is no specific legal framework to deal with surrogacy practices. The absence of law dealing with the legal and human right issues involved in surrogacy practices creates uncertainty and unnecessary hurdles to the intended parents, surrogate mother, surrogate child and other stakeholders involved in it. This uncertainty raises numerous questions which remain unanswered. For example, the questions like, whether surrogacy practice is legal in India? Whether commercial surrogacy is permissible? Whether there is a right to be a surrogate and if so who can be a surrogate? What are the rights and duties of a surrogate? Who will be liable if the surrogate suffers harm? Is there any right to access to surrogacy and if so who can be intended parents? Whether single individuals, gays and lesbians are entitled to use surrogacy? What are the rights and duties of intended parents? Whether a surrogacy contract is a valid contract in India? Whether surrogacy amounts to commodification of motherhood and child, prostitution, baby selling, exploitation of woman and slavery? What are the remedies available for a breach of surrogacy contract? Whether

⁹⁴ *Ibid.*

⁹⁵ See for the full text <<http://lawcommissionofindia.nic.in/reports/report228.pdf>> Visited on 12.07.2012.

⁹⁶ See for the full text <<http://www.nr.no/contentfile/file/1.7558871Surrogati%20i%20India.pdf>> Visited on 12.7.2012.

⁹⁷ Sapna Raheem, “Freedom of Trade and Commerce and Reproductive Markets in India: Assisted Reproductive Technology Bill, 2010 and its Challenges”, 1(1) *Int'l Jour. Cont. Laws* (2012) (Online Journal). Available at <http://www.ijcl.co.in/uploads/8/7/5/1/8751632/ijcl_vol.1_1.pdf> Visited on 10.8.2012.

a surrogate child is legitimate and who are the parents of the child? If the intended parents refuse to accept the child what will be the fate of the child? Whether a surrogate child born to an Indian mother is an Indian national? All these are very pertinent questions which need to be addressed urgently. It is to be noted that, these questions have come up for discussion in numerous cases before the courts in various countries where surrogacy is practiced⁹⁸.

Some of the questions like nationality of child born to an Indian surrogate⁹⁹, and custody of the child has already come up for consideration before Indian courts¹⁰⁰. However the important questions regarding the legality of surrogacy including commercial surrogacy and validity of surrogacy contract has not been directly an issue before any Indian Court till now.

In the two landmark cases i.e. *Baby Manji*¹⁰¹ and *Jan Balaz*¹⁰², the Court did not invalidate the surrogacy practice and surrogacy contract, and in fact tried to solve the main issues. Therefore, the necessary inference that can be drawn is that, such practices and contracts are valid in India.

Further, the *ICMR Guidelines* and the *Draft ART Bill* also consider surrogacy and surrogacy contracts as valid. Considering the fact that, there is no specific legislation in India to deal with surrogacy as well as the increased use of surrogacy arrangements in the country, the above mentioned questions can arise at any time before the Indian judiciary and can pose legal and human rights challenges to the legal system. Therefore there is an urgent need to examine the issue of surrogacy in general and the various questions raised by it in particular to find a solution to the complex issues involved.

⁹⁸ *Supra* n.45.

⁹⁹ *Supra* n.90.

¹⁰⁰ *Supra* n.91.

¹⁰¹ *Ibid.*

¹⁰² *Supra* n. 90.

1.6 Objectives of the Study

The main objectives of this study are as follows:

1. To highlight the need and importance of Artificial Human Reproductive Technologies in general and surrogacy arrangements in particular.
2. To identify the legal and human right issues relating to the intended parents, surrogate woman and surrogate child in India.
3. To examine the legality of surrogacy contracts and the various legal and human rights controversies relating to surrogacy contracts.
4. To evaluate the effectiveness of existing legal system for the regulation of surrogacy practices in India.
5. To suggest modifications in the existing laws, if required and to propose a model law for the regulation of surrogacy practices in India.

1.7 Outline of the Chapters

This thesis is divided into eight chapters. The First Chapter is the present Introduction chapter, which provides a basic outline regarding this work. It highlights the need and significance of a detailed study on surrogacy practices in India. The basis of every surrogacy arrangement is derived from the desire and right of an individual to beget a child. Thus the Second Chapter highlights the need and importance of a child and discusses the national and international perspectives of right to procreation of an individual. Further, it identifies the various barriers to enjoyment of such right and the various measures available to overcome it. Among the various measures available to overcome childlessness, the practice of surrogacy is considered as the most controversial and widely practiced method in India.

Third Chapter discusses the concept, meaning, origin and development of surrogacy. It examines the various legal, human rights, moral and ethical issues related to surrogacy practices in India and the measures taken by the Indian Government for regulating surrogacy. The various issues related to surrogacy

practices in India can be classified into four major heads, i.e. issues related to intended parents, surrogate woman, surrogacy contracts and surrogate child.

Chapter Four identifies the various legal and human right issues concerning the intended parents in a surrogacy arrangement. It tries to answer the important questions such as whether there is a right to be an intended parent, what are the eligibility criteria to be fulfilled by an intended parent, and whether the single individual, gays and lesbians can also claim the right to be intended parents. Further this chapter also examines the rights and responsibilities of intended parents. Chapter Five identifies the various legal and human right concerns related to surrogate women. This chapter examines the important questions such as whether a woman has a right to be a surrogate, who can be a surrogate and what are the rights and duties of a surrogate woman.

The next Chapter deals with the conflicting legal and human rights issues relating to surrogacy contracts. It examines in detail the various arguments against the legality of surrogacy contracts and tries to answer the question whether surrogacy contracts are valid or invalid in India. It also discusses the various circumstances in which a surrogacy contract can be broken and the remedies available in case of breach.

The main objective and purpose of every surrogacy arrangement is to beget a child. Thus Chapter Seven discusses the various legal and human rights concerns related to surrogate child. This chapter examines the questions such as legitimacy of surrogate child, parentage, fate of surrogate child in case of refusal to accept it by the intended parents and other rights of the surrogate child.

The Eighth Chapter concludes the study by submitting that, surrogacy arrangements should be allowed in India so as to protect the right to beget a child and to fulfill the desire of couples/individuals to have a child genetically related to them. However such practices shall be properly regulated to avoid any misuse of such practices and harm to the various stake holders involved in surrogacy. This chapter

also gives various suggestions for dealing with the legal and human rights issues raised by surrogacy as well as for its proper regulation so as to protect the rights and interests of the stakeholders involved in surrogacy. It also suggests the various modifications required in the existing legal framework for the effective regulation of surrogacy in India.

CHAPTER -II

**RIGHT TO PROCREATION:
INTERNATIONAL AND
NATIONAL PERSPECTIVES**

CHAPTER II

RIGHT TO PROCREATION: INTERNATIONAL AND NATIONAL PERSPECTIVES

“If children were brought into the world by an act of pure reason alone, would the human race continue to exist?”

...Arthur Schopenhauer¹.

The above question highlights the fact that children are brought into this world not purely based on reason alone but rather because of their need and significance. Children are considered necessary not for some ulterior motive and gain but are desired for achieving fulfillment and love in life. Children are the most beautiful gift of God and considered as a sacred treasure to mankind. They are the footsteps to the future of the present generation. When children are born into this world, various ceremonies are held to celebrate the joyous occasion and welcome them into this world. Gifts are given and offerings are made to God to express one's thanks for the beautiful gift of life. It is considered that the birth of children makes the marriage of a man and woman more meaningful and secure. In fact, giving birth to a child establishes the real status of women in society and is also a proof of the virility of a man². However, children born to a lawfully wedded couple only receive legitimacy from society. The institution of marriage gives conjugal rights to the couple in the family and social legitimacy to their relationship which results in the procreation of children. Since pre-historic times the function of giving birth and bearing of children has been assigned to the institution of family through marriage.

¹ Quoted from, William J. Locke, *The Morals of Marcus Ordeyne*, The Echo Library, Middlesex, U.K. (2009), p.18.

² Mary Keath, “The Role of Children in Family and Society in the Middle East: Cases from Cairo and Syria” in Dr. Abdelrahim Salih (ed.), *Arabic 920 Cultures of the Middle East*, (2005), p.3, Available at <http://www.howardcc.edu/academics/academic_divisions/english/instructional/pdf/The_Role_of_Children.pdf> Visited on 10.3.2011.

In almost all civilizations, the marriage serves as the basic institution for reproduction, bearing and raising of children³. Procreation of children is the primary biological function of a marriage and it is the family which ensures the continuity of human race. The assumption is that conjugal relations should lead to the birth of children and if it is not done, the continuity of society would cease to exist⁴.

The reasons for the desire to have a child are many, viz. to love and to be loved by it, to educate and convey personal ideals and values, to get a sense of fulfillment and to contribute a part of oneself to the future generation⁵. This significance of children in a marriage and for a family is emphasized and elaborated in various religious scriptures and texts. Thus the procreation of children is an inbuilt element of marriage and family and this concept is accepted universally all over the world. With the emergence and development of the concept of human rights, this basic need of a human being to have children has been recognized as fundamental human right and incorporated as right to procreation. The modern human rights documents also recognize the significance of children and emphasize on the protection of right to procreation as a basic human right. This chapter highlights the need and importance of a child in the society in general and for the family and individual in particular from a religious, cultural, social, economic and legal perspective. It also elucidates the recognition of the need for a child as a basic human right and its incorporation as right to procreation at international and national level. Further it identifies infertility as the major barrier which prevents an individual from enjoying the right to procreation and the various measures available to overcome such barriers.

2.1 Children and the Religions

Children are the flowers in the garden of life. They bring cheer and joy into the family. Their innocent pranks and sweet smile spreads happiness. They are the future of the world and give hope to the society for a better tomorrow. They are considered

³ See generally, Minz, "Family", in Dr. Draper (ed.), *World Book Multimedia Encyclopedia*, World Book, Inc, Chicago (2002).

⁴ S. L. Joshi and P.C. Jain, *Rural Sociology*, Rawat Publication, Jaipur (2002), pp.188-193.

⁵ Indu S. Nair, "Rights of the Child: Challenges for Law in the New Era of Technology", [2003] C.U.L.R. 101.

as a means through which the parents fulfill their dreams and aspirations. The desire and need to have a child has been recognized since the dawn of human life on earth. The importance of having children has been emphasized since time immemorial in all cultures and all societies of the world. All the major religions of the world also highlight this importance and need of a child.

2.1.1 Children in Hindu Religious Philosophy

Hindu religion is one of the oldest religions in the world and the prominent religion in India. Various scriptures and texts of the Hindu religion explicitly mention the significance and need of a child for the parents, society and family. Hindus believe that children are gifts from God and are products of the previous Karma of an individual. It is presumed that children are related to an individual in their past lives or are their close friends. According to *Manu*, a man recreates himself through his own children. Since Hinduism firmly believes in rebirth, it views the life of an individual from a wider perspective as a part of a great cosmic cycle that encompasses not just the present life but many other lives that preceded it as well as that may succeed it. Therefore, Hindus have the belief that their relationship repeat themselves and that their life is intricately connected with many others who share the same destiny⁶.

The desire for a child and particularly a male child is highlighted in almost all the scriptures. The *Vedas* and the ancient writers like *Yajnavalkya* and *Manu* refer to various methods for begetting a child and specially a male child. Most of these methods were very popular and practiced in ancient India and also permitted by the ancient laws. It is pertinent to point out here that these methods considered not only the begetting of a child in a conjugal relationship but also obtaining a child through non-conjugal relationships and other means. Some of these methods can be considered as the precursors of the modern artificial human reproductive technologies. For example *Aurasa* was said to be a legitimate child begotten by man

⁶ Eric Blyth & Ruth Landau, *Faith and Fertility: Attitudes Towards Reproductive Practices in Different Religions from Ancient to Modern*, Jessica Kingsly Publications, U.S.A. (2009), p.112.

with his own lawfully wedded wife. *Kshetraja* meant a son by another man appointed by husband. *Gudhaja* was a son by another unknown man, brought forth by wife secretly i.e. unknown adultery⁷.

To have a son was considered a must for every Hindu. Begetting a son was one of the three debts that a Hindu was required to discharge in this world. In fact, a son is called as a '*Putra*' because the son delivers his father from hell called '*Put*'. This concept is reflected in the *Baudhayana Sutra*, which proclaims that, "through a son he conquers the worlds, through a grandson he obtains immortality, but through his son's grandson he ascends to the (highest) heaven"⁸. A son is generally preferred because he ensures the continuity of the family and its traditions. According to *Gautama Sutras*, "if a person does not have male children, he may ask his daughter to raise a son for him". The Vedas declare, "endless are the worlds for those who have sons, there is no place for the man who is destitute of male offspring"⁹. The ancient scriptures thus emphasize on the need and importance of a child particularly a male child. With the passage of time however these ancient scriptures have been misquoted and mis- interpreted as giving importance to only male child. It is pertinent to point out here that the ancient scriptures highlighted the need for a male child because of religious necessities and cultural traditions. At the same time they also emphasized the importance and need for female child. This is reflected in the words of *Yajnavalkya*, "because continuity of the family in this world and the attainment of the heaven in the next are through sons, son's son and son's grandson, therefore women should be loved and protected"¹⁰. This clearly recognizes the significant role of women in the procreation of a child. Hence, orthodox Hindus do not approve childlessness and consider it to be very inauspicious. Newly married couples have to face various questions from the society and family if they are unable to give birth to children within a reasonable time after the marriage. Childlessness causes great pain

⁷ Nigam, M., Nigam, R., Chaturvedi, R., & Jain, A., "Ethical and Legal Aspects of Artificial Reproductive Techniques Including Surrogacy", in *Anil Aggrawal's Internet Journal of Forensic Medicine and Toxicology*, Vol. 12, No. 1 (January - June 2011).

⁸ Paras Diwan, *Modern Hindu Law*, Allahabad Law Agency, Allahabad (16th edn.-2005), p.222.

⁹ Ramabai Sarasvati, *The High-Caste Hindu Woman*, Fleming H. Revell Co., New York (1901), p.97.

¹⁰ Dr. U. P. D. Kesai, *Modern Hindu Law*, Central Law Publications, Allahabad (4th edn.- 2004), p.167.

and hardship to the married couples in Hindu families and women particularly have to face various problems like prohibition of participation in certain religious rituals¹¹.

2.1.2 Child in Christianity

Christian religion has given utmost importance to children and considers them as symbol of God. It is believed that one day Jesus took a young child on His lap and said, “Whoever humbles himself like this child is the greatest in the kingdom of Heaven. And whoever welcomes a little child like this in My name welcomes Me”¹². This reveals the high value which God has given to a child. The First Commandment given to man was to have children. After the flood, God blessed Noah and his sons and said unto them, “Be fruitful and multiply and replenish the earth¹³”. Psalm says, “As arrows are in the hand of a mighty man, so are children of the youth. Happy is the man that hath his quiver full of them”. Thus, Christianity also recognizes the need and importance of children. In the *New Testament*, St. Paul advocated people remaining single during the persecution that would come to the church, but did not make being single or not having children a requirement¹⁴. Similar to other cultures, religions and social classes, Christianity also recognizes the desire for a genetic heir as an instinctive and cognitive desire of an individual. At the same time it also accepts the fact that some men may not be able to have children due to various reasons and hence mentions different methods for bringing forth a child. For example, in the *Bible*, in a case where a married man dies without having children, his brother or nearest relative has an obligation to marry the widow and the oldest son is named after the deceased. If the brother - in - law refuses to marry the woman he is obliged to go through a humiliating public ceremony because of his unwillingness to establish his brother’s heirloom¹⁵. In fact, King David is the grandson of Ovad, son of Ruth,

¹¹ See <<http://www.hinduwebsite.com>> Visited on 10.3.2011.

¹² *Matthew* 18:5. Quoted in Muriel Larson, “The Importance of a Child”, *Mennonite Brethren Herald*, Volume 40, No. 12 (2001).

¹³ *Genesis* 9:1. See, Lester L. Grabbe, Mark G. Brett, *Genesis: Procreation and Politics of Identity*, Routledge, U.S.A. (2000), p.44.

¹⁴ See <<http://www.minuteswithmessiah.com>> Visited on 10.3.2011.

¹⁵ See for more discussion, Paula Abrams, “The Tradition of Reproduction”, 37 *Arizona Law Review*, No.2 (1995), at p.453.

who was born according to this law¹⁶. Three thousand years ago, this was the nearest possible way to have a ‘genetic heir’. In present times modern artificial human reproductive technologies can help an individual to have a nearest possible ‘genetic heir’.

2.1.3 Child in Islamic Religion

As per the Islamic teachings, children are a gift and a blessing from Allah the almighty. Some of the gifts that Allah has bestowed upon mankind are mentioned in the following verse, “And Allah has made for you spouses of your own kind and has made for you, from your wives, sons and grandsons, and has bestowed upon you good provisions”. Allah also said, “Wealth and children are the adornment of the life of this world”¹⁷. Begetting children is considered to be of utmost importance and fundamental to the existence of community in Islam and therefore it forbids the acts of celibacy, monasticism and castration. This view is clear from the wordings of the Prophet, when he told those companions who were considering ascetic forms of life, “I pray and I sleep; I fast and I break my fast; and I marry women. Whoever turns away from my way of life is not from me”¹⁸. Thus, the Prophet not only encouraged marriage but he also encouraged marrying those women who are child-bearing. He stated, “Marry the loving, child-bearing women for I shall have the largest numbers among the prophets on the day of Resurrection”¹⁹.

Islam does not distinguish between male and female child and in fact both male and female child are considered as the greatest and most beneficial blessings of God. The Quran says that, “God has made for you mates and companions of your own nature, and made for you, out of them, sons and daughters and grandchildren, and

¹⁶ A. Benschushan and Joseph G. Schenker, “The Right to an Heir in the Era of Assisted Reproduction”, *Human Reproduction*, Vol.13, No.5, 1407–1410 (1998), at p.1407.

¹⁷ Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur’an*, Vol 5, M.S.A. Publications Limited, United Kingdom (2nd edn.- 2009), p.406.

¹⁸ Badr Azimabadi, *Prophetic Way of Treatment*, Adam Publishers, New Delhi (2009), p.111.

¹⁹ Ergun Mehmet Caner, *Voices Behind the Veil: The World of Islam Through the Eyes of Women*, Kregel Publications, Inc., U.S.A. (2003), p.162.

provided for you sustenance of the best”²⁰. The Prophet said that, “Worthy offspring are a bunch of sweet-smelling flowers which God has distributed amongst his servants. Worthy children are a bunch of sweet-smelling flowers from the Heavenly flowers”²¹. The position of offspring is so important in life that Abraham requested for children from God in his old age and his prayer was answered²². Thus in Islam a child is a great blessing, a source of goodness, nobleness and benefit in this world.

The major religions of the world thus emphasize on the need and significance of having a child. However it is necessary to mention here that significance and need of a child is not only due to religious beliefs but is also due to various interrelated and interdependent factors. It encompasses various aspects of human life such as social, religious, economic, personal and legal necessities. In addition to the religious motives, the following are the other major driving forces for begetting a child:

(i) Social Motive

A family is the fundamental and basic unit of a society and crucial for the existence and continuance of the society²³. Such continuation of the society is possible only if the family grows and develops and new families are formed through the birth of children.

(ii) Family Motive

Every family has the desire to continue its name and legacy. Children are considered as the only means to continue and carry forward the name and legacy of the family. They are also the inheritors of the family property, assets and traditions. In fact a family is considered to be complete only when children are born to a couple and it is through these children that the family further grows and develops.

²⁰ Ms. Lisa Zaynab Morgan & Dr. Ali Periravi, (Translators), *Husayn Ansariyan, The Islamic Family Structure*, Ansariyan Publications, Iran (2000), p.190.

²¹ *Ibid.*

²² *Id.* at p.189.

²³ *The Universal Declaration of Human Rights*, 1948, Article 16 (3). It provides that: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

(iii) Personal Motive

The couples begetting the child get the joy and personal satisfaction. For men it is a proof of their manhood and virility and for women it is a symbol of their womanhood and a means to gain their place in the family and society. Children offer security to the parents in their old age²⁴ and fulfill their dreams.

(iv) Legal Motive

Children inherit the rights and liabilities of their parents²⁵. The property rights are often an issue of the inheritance by the children of their ancestral property. In the absence of a legitimate child, the law relating to inheritance of property is very complex and contentious. Hence every individual desires to have a natural offspring so that his property can be passed safely to his child.

In addition to the above mentioned reasons, the need and significance of a child also arises due to the fact that children are a means to fulfill the biological need and instincts of a human being. Begetting a child fulfills the paternal and maternal instincts and feelings of the men and women respectively. This desire to have a child is considered so important and fundamental that it is enshrined as a basic human right of an individual and recognized as the right to procreation in the international human rights documents.

2.2 Procreation

Procreation is fundamental to the existence and continuation of any species. It is a natural desire and biological instinct of every creature to reproduce and to have an offspring. Among human beings not only the natural and biological instincts play a major role, but there are also strong psychological and social needs to have children. The social concepts of love, family, community and mortality strengthen the

²⁴ See, Section 125 of Criminal Procedure Code, 1973, which provides the obligation to provide maintenance to his parents. Similar provisions are also there in The Hindu Adoptions and Maintenance Act, 1956, The Muslim Women (Protection of Rights on Divorce) Act, 1986, etc.

²⁵ See, Indian Succession Act, 1925, Hindu Succession Act, 1956, etc.

biological drive for genetic procreation²⁶. The importance of procreation as a whole derives from the genetic, biological, and social experiences that comprise it. Thus reproduction is a basic instinct that supplies societies with enough members who maintain and perpetuate the social order and who provide services for others. It also satisfies an individual's natural drive for sex and his or her continuity with nature and future generations. Reproduction fulfills cultural norms and individual goals about a good life, and many consider it the most important thing a person does with his or her life²⁷.

The beginning of family formation may be either marriage or parenthood or both. The positive element of the right to family planning and right to establish family is related to individuals and couples right to decide to have a child, i.e. it implicitly guarantees a right to procreate²⁸. The procreative right has a negative as well as a positive dimension. The narrow procreative right, which is a negative or "first generation" right, is linked to a bundle of fundamental negative rights regarding bodily integrity. The broader procreative right which is positive or "second generation" right, is linked to economic and social rights (or entitlements) like rights to reproductive education and actual means to choose family size²⁹. Claims of procreative freedom logically extend to every aspect of reproduction ranging from conception, gestation and labor, and childrearing³⁰.

2.3 Right to Procreation: Meaning and Content

Procreation means a biological process by which women gives birth to a child. The *Webster's Dictionary* defines the term 'procreate' as "to produce (young); beget (offspring)". To beget means, "To be the father of, to produce; cause." According to

²⁶ Chantelle Washenfelder, "Regulating a Revolution: The Extent of Reproductive Rights in Canada", 44 *Health Law Review*, Volume 12, No. 2, 44 (2004).

²⁷ John A. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth", 69 *Virginia Law Review*, 405 - 414 (1983), at p.405.

²⁸ Maja Kirilova Erikson, *Reproductive Freedom*, Martinus Nijhoff, Kluwer International, Hague (2000), p.188.

²⁹ Carter J. Dillard, "Rethinking the Procreative Right", 10 *Yale Human Rights and Development Law Journal*, (2007), p.1.

³⁰ *Supra* n. 27 at p. 409.

Black's Law Dictionary procreation means the 'generation of children'³¹. These definitions are equally vague, and do not explicitly reflect a contemplation of whether, or to what degree, a genetic link is required. According to Bruce L. Wilder, the term procreation includes, "deliberate actions by an individual, which lead to birth of a child, whom that individual intends to raise as his/her child from the time of birth to maturity, and to be legally bound as the child's parent, even when the genetic material was obtained by that individual from a source outside his/her body"³². The developments in modern medical science, has coined a new definition to procreation, which says, 'procreation is a reproductive process by which a person creates offspring who may or may not have genetic or biological ties to the intended parent or parents'³³. This expansive definition captures a full range of reproductive activity from coital reproduction to the sale of gametes to in-vitro fertilization and surrogacy arrangements. This definition says something new that the other definitions do not. *Firstly*, it identifies procreation as a process. *Secondly*, it makes no pronouncements about how that process is initiated, how many people it may involve, or the body in which the future child is created. *Thirdly*, it announces that this process ends in the creation of offspring, but makes no statement about whether that offspring is in the form of an embryo, foetus or child. *Fourthly*, the definition does not require a genetic or biological link between the offspring and the person who gives birth because that presupposes a certain avenue of child creation and birth, which excludes the multiple ways in which children can be created and brought into the world. Thus this definition serves to recognize human artificial reproductive technologies, in its many forms and in its component parts, as a type of reproduction for which constitutional protection is warranted³⁴.

Procreative rights are rights relating to reproduction and reproductive health

³¹ Kimberly Mutcherson, "Feel Like Making Babies? Mapping the Borders of the Right to Procreate in a Post-Coital World", p.6, available at <http://www.gwu.edu/~philosop/news_events/.../BrownBag-Mutcherson.pdf> Visited on 10.3.2011.

³² Bruce L. Wilder, "Assisted Reproduction Technology: Trends and Suggestions for the Developing Law", *Journal of the American Academy of Matrimonial Lawyers*, 177 (2002), p.186.

³³ See generally, Sandra Alters, *Biology: Understanding Life*, Jones and Bartlett Publishers, Inc. Canada, (3rd edn.-2000), p.504; J. Edwards, *Technologies of Procreation: Kinship in the Age of Assisted Conception*, Routledge, New York (2nd edn. -1999), p.210.

³⁴ *Supra* n.31.

and include access to sexual and reproductive healthcare and autonomy in sexual and reproductive decision-making. These rights are human rights and are universal, indivisible, and undeniable. These rights are founded upon principles of human dignity and equality, and have been enshrined in international human rights documents. Reproductive rights embrace a bundle of core human rights, including the right to health, the right to be free from discrimination, the right to privacy, the right not to be subjected to torture or ill-treatment, the right to determine the number and spacing of one's children, and the right to be free from sexual violence.

The *United Nations Programme of Action of the International Conference on Population and Development*, 1995 states that, 'reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents'³⁵. Reproductive rights also include the right to the highest standards of sexual and reproductive healthcare³⁶.

Reproductive rights may include some or all of the following rights such as: the right to legal or safe abortion, the right to control one's reproductive functions, the right to quality reproductive healthcare, and the right to education and access in order to make reproductive choices free from coercion, discrimination, and violence. These rights may also be understood to include education about contraception and sexually transmitted infections, and freedom from coerced sterilization and contraception, protection from gender-based practices such as female genital cutting (FGC) and male genital mutilation (MGM)³⁷. Though there are numerous references regarding

³⁵ P.K. Das, *Protection of Women from Domestic Violence*, Universal Law Publishing Co. Pvt. Ltd., New Delhi (4th edn. -2011), p.280.

³⁶ See, UN, *Yearbook of the United Nations*, Volume 54, UN Publications, U.S.A. (2002), p.1098.

³⁷ See <http://en.wikibooks.org/wiki/Cultural_Anthropology/Hman_Rights> Visited on 20.8.2012.

the term ‘reproductive rights’, it has not yet been defined by any international human rights instruments. However, Art. 23 (1) (b) of the *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006*³⁸ entails the right to reproductive health and education. At the regional level, Art. 14 of *Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003*³⁹ expressly articulates women’s reproductive rights as human rights.

Nonetheless, the content and scope of reproductive rights remains controversial. There are two views on this matter. Scholars supporting the narrow view affirm that reproductive rights rest only on the recognition of reproductive choice, and argue that binding reproductive rights are limited to Art. 16 (1) (e) of *Convention on the Elimination of all forms of Discrimination against Women, 1979*⁴⁰ which safeguards the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, as well as to attain the highest standard of sexual and reproductive health.

This relatively restricted view on reproductive rights includes as its core elements: the right to found a family⁴¹; the right to decide, freely and responsibly, the number and spacing of one’s children⁴²; the right to access to family planning information and education⁴³; and the right to access to family planning methods and services⁴⁴. Supporters of this narrow view do not exclude the possibility of other

³⁸ The text was adopted by the United Nations General Assembly on 13 December 2006, and opened for signature on 30 March 2007. Following ratification by the 20th party, it came into force on 3 May 2008.

³⁹ Adopted by the African Union on 11 July 2003, available at <<http://www.achpr.org>> Visited on 6.5.2010.

⁴⁰ Hereinafter referred to as CEDAW and adopted by the UN General Assembly on 18 December 1979. Full text available at <<http://www.un.org>> Visited on 6.5.2010.

⁴¹ See, CEDAW, Art.16; International Covenant on Civil and Political Rights, 1966 (hereinafter referred to as ICCPR), Art. 32.

⁴² Art. 16 CEDAW, Art. 24 Convention of the Rights of the Child, 1989(hereinafter referred to as CRC), Art. 17 ICCPR, and Art. 12 ICESCR.

⁴³ Art. 16 CEDAW, Art. 13 CRC, Art. 19 ICCPR, and Art. 13 International Covenant on Economic, Social and Cultural Rights, 1966 (hereinafter referred to as ICESCR) .

⁴⁴ Art. 16 CEDAW, Art. 24 CRC, and Art. 12 ICESCR.

rights to be related to reproductive freedom or choice, insofar as the violation of that particular right affects reproduction. However, from this perspective, these general human rights are not constitutive *per se* of reproductive rights.

Regarding the second and wider view, reproductive rights ‘embrace certain human rights that are already recognized in national laws, international human rights documents, and other relevant UN consensus documents based on the recognition of reproductive choice in Art. 16 of CEDAW. Scholars and organizations supporting this view identify 12 rights within this group⁴⁵, viz. the right to life⁴⁶, the right to health⁴⁷, the right to personal freedom, security, and integrity⁴⁸, the right to be free of sexual and gender violence⁴⁹, the right to privacy⁵⁰, the right to equality and non-discrimination⁵¹, the right to consent to marriage and equality in marriage⁵², the right to employment and social security⁵³ including the right to legal protection of maternity⁵⁴, the right to work in an environment free of sexual harassment⁵⁵, the right to non-discrimination on the grounds of pregnancy both in and out of the workplace⁵⁶, the right to education and information⁵⁷, the right to be free from practices that harm women and girls⁵⁸, and the right to benefit from scientific progress⁵⁹. Thus in short, right to reproduction means the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of

⁴⁵ Julia Gebhard and Diana Trimino, “Reproductive Rights, International Regulation”, *Maxplanck Encyclopedia of International Law*, available at <<http://www.mpepil.com>> Visited on 10.3.2011.

⁴⁶ Article 3 of *Universal Declaration on Human Rights*, 1948 (hereinafter referred to as UDHR), Art. 6 (1) ICCPR, and Art. 6 (1) (2) CRC.

⁴⁷ Art. 25 of UDHR, Arts. 10 (2), 12 (1), and (2) ICESCR, Arts. 12 (1) (2), 14 (2) CEDAW, and Art. 24 (1) (2) CRC.

⁴⁸ Arts. 3 and 5 UDHR, Arts. 7, 9 (1) ICCPR, and 37 (a) CRC.

⁴⁹ Arts. 5 and 6 CEDAW and Arts. 19 (1) and 34 CRC.

⁵⁰ Art. 17 (1) (2) ICCPR and Art. 16 (1) (2) CRC.

⁵¹ Art. 2 UDHR, Art. 2 (1) ICCPR, Art. 2 (2) ICESCR, Arts. 1, 3, 11 (2) CEDAW, and Art. 2 (1), (2) & (5) CRC.

⁵² Art. 16 (1) (2) UDHR, Art. 23 (2) (3) (4) ICCPR, Art. 10 (1) ICESCR, and Art. 16 (1) (2) CEDAW.

⁵³ Art. 23 UDHR, Arts. 6 & 9 ICESCR.

⁵⁴ Art. 10 ICESCR, Art. 11 CEDAW.

⁵⁵ Art. 11 CEDAW.

⁵⁶ Art. 11 (2) CEDAW.

⁵⁷ Art. 10 CEDAW.

⁵⁸ Arts. 2 (f) and 5 (a) CEDAW, Art. 24 (3) CRC.

⁵⁹ Art. 27 (1) UDHR, Art. 7 ICCPR, and Art. 15 ICESCR.

sexual and reproductive health. In addition, it also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. The right to use appropriate health care services so that women can enjoy safe pregnancy and delivery and couples can have the best opportunities to have healthy children is also included.

2.4 Right to Procreation *vis-a-vis* International Law

Human rights are vital to individual's existence. They are the fundamental and inalienable rights, prerequisite to life as human beings⁶⁰. Human rights are moral, social, and political rights that concern respect and dignity associated with our lives as individuals and has their origin in natural law and in contemporary moral values⁶¹. The inclusion of human rights law as part of international law is a relatively recent development. However, it is universally accepted that the way a sovereign treats individuals - both its own citizens and aliens - is a matter of international concern⁶². The international community has established several instruments detailing the inalienable human rights. The various means to achieve or avoid procreation are viewed as integral to concepts of human dignity, personal identity and community.

The significance of reproductive rights is evident in its entrenchment in international law under four broad health-related categories, viz. (i) the right to found a family (ii) the right to decide the number and spacing of children (iii) the right to family planning information and services and (iv) the right to benefit from scientific advancement. The bundle of human rights provided in international law in various human right documents suggests the existence of a right to procreation and reproductive health⁶³.

⁶⁰ See, Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts*, Cambridge University Press, U.K. (2006).

⁶¹ See also, Berta E. Hernández-Truyol, "Building Bridges v - Cubans Without Borders: Mujeres Unidas Por Su Historia", *55 Florida Law Review*, 225 (2003), p. 245.

⁶² Berta E. Hernandez-Truyol, "To Bear or Not to Bear: Reproductive Freedom as an International Human Right", *37 Brooklyn Journal of International Law*, 309 (1991), at pp.321 – 325.

⁶³ *Supra* n.26.

The *United Nations Charter*, the *Universal Declaration of Human Rights* and other international agreements provide the framework for analyzing reproductive freedom as an international human right. The Charter reaffirms, “the faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standards of life in larger freedom and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to employ international machinery for the promotion of the economic and social advancement of all people”⁶⁴. The Charter imposes a solemn duty on United Nations to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” and it pledges to its member states to ensure these rights and freedoms. This reference to duty of member states is wide enough to cover a duty to ensure reproductive freedom to an individual especially a woman. Inspired by the Charter, the United Nations General Assembly has adopted a code of human rights comprising of both civil and political rights and social, economic and cultural rights in 1948, i.e. *Universal Declaration of Human Rights*. This Declaration is the mine from which other conventions as well as national constitutions protecting the human rights have been and are being quarried⁶⁵.

The Declaration proclaims that the recognition of inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 16 of UDHR states that, “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family”. Family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. This right lays the foundation for the reproductive rights in UDHR. Article 12 which ensures the right to privacy and non-interference by others to every individual can be interpreted to include the individual’s rights to determine the number and spacing of their

⁶⁴ See for full text of United Nations Charter <<http://www.un.org/en/documents/charter/preamble.html>> Visited on 10.3.2011.

⁶⁵ J.E.S. Fawcett, *The Law of Nations*, Basic Books, Inc., New York (1968), p.158.

children⁶⁶. Further, the rights such as right to information⁶⁷, health⁶⁸ and education⁶⁹ can also be interpreted to give protection to the rights to family-planning information and services. The right to benefit from advancements of science⁷⁰ can be considered as the repository for the use of modern scientific technologies for the enjoyment of reproductive rights⁷¹. Though, the Declaration is a legally non-binding instrument, it has gained considerable authority as a general guide to the content of fundamental rights and freedoms as understood by members of the United Nations⁷². It is treated as important in providing a connecting link between different concepts of human rights in different parts of the world⁷³. The impact of UDHR can be seen in various international documents adopted by the UN and its Specialized Agencies as well as Regional Human Rights instruments also⁷⁴.

2.4.1 The International Covenant on Civil and Political Rights, 1966

The first binding international human right document is the *International Covenant on Civil and Political Rights*⁷⁵. The state parties to the Covenant have recognized that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic,

⁶⁶ See, *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3rd Sess., Supp. No.13, UN Doc A/810 (1948) 71 [UDHR]; Athena Liu, *Artificial Reproduction and Reproductive Rights*, Aldershot, Dartmouth Publishing Company, London (1991), p.27.

⁶⁷ See, UDHR, Art.19.

⁶⁸ *Id.* Art. 25.

⁶⁹ *Id.* Art. 26.

⁷⁰ See, Article 27, which says that: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.

⁷¹ See, Center for Reproductive Rights, “Women of the World: Laws & Policies Affecting their Reproductive Lives - South Asia”, Center for Reproductive Rights (CRR) (2004), p.103, available at < http://www.reproductiverights.org/pdf/pdf_wowsa_india.pdf> Visited on 10.3.2011.

⁷² See, G.S. Bajwa, *Human Rights in India: Implementation and Violation*, Anmol Publications, New Delhi (1995).

⁷³ Sir Humphrey (ed.), *J. L. Brierly, The Law of Nations*, Clarendon Press, U.K. (6th edn.-1963), p.294.

⁷⁴ The provisions of UDHR have influenced various national constitutions enacted after the adoption of the Declaration. For example, the Constitutions of Burundi, Cameroon, Chad, Democratic Republic of Congo, Dhaomey, Guniea, Mali, etc. and See generally, S. K. Kapoor, *International Law and Human Rights*, Central Law Agency, Allahabad (14th edn.-2002), pp.775-76.

⁷⁵ Hereinafter referred to as ICCPR. The text was adopted by the United Nations General Assembly on December 16, 1966, and came in force from March 23, 1976.

social and cultural right⁷⁶. Thus in keeping view of the obligations under the *Charter of the United Nations* to promote universal respect for and observance of, human rights and fundamental freedoms, the state parties have agreed, “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status⁷⁷”.

Like the UDHR, in ICCPR also there is no express provision regarding the right to reproduction. But the provisions relating to right to family and privacy are considered as the foundation for reproductive rights in ICCPR. Article 23 of the ICCPR provides protection for the right to found a family. The Human Rights Committee, the adjudicative body for the enforcement of ICCPR, states that Art. 23 should be interpreted not only to protect the right to cohabit and procreate, but also as a codification of national obligations to enact non-discriminatory family-planning policies⁷⁸. The Covenant provides that no person shall be subjected to illegal or arbitrary interference into their right to privacy⁷⁹. This right can be interpreted as protecting family autonomy and the right to decide on the number and spacing of children. Further, Article 19(2) can be interpreted as protecting the rights to family planning information under the rubric of the freedoms of expression and information. The interpretation of Article 23 provided by the Human Rights Committee confirms a positive right to non-discriminatory access to reproductive technologies. Thus, the ICCPR over and above the UDHR provisions highlights the importance of personal autonomy and access to reproductive information⁸⁰.

The Human Rights Committee in *K.L. v. Peru*⁸¹ held that, refusal to abort pregnancy in a circumstance that threatened a woman’s health and had no chance of

⁷⁶ See, Preamble to ICCPR.

⁷⁷ See, Article 2 (1).

⁷⁸ See, Laura Shanner, “The Right to Procreate: When Rights Claims Have Gone Wrong”, 40 *Mc Gill Law Journal*, 823 (1995).

⁷⁹ See, ICCPR, Art. 17.

⁸⁰ *Supra* n.26.

⁸¹ *K. L. v. Peru*, Comm. No 1153/2003, paras. 2.1-2.6, UN Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005).

survival will violate the right to privacy under the Covenant. Forcing her to carry such pregnancy to a term constituted a cruel, inhuman and degrading treatment. Though there is no specific discussion on reproductive right in this case, indeed this case is an example of using this Covenant for giving effect to civil and political rights in cases where violation of reproductive rights are involved.

2.4.2 The International Covenant on Economic, Social and Cultural Rights, 1966⁸²

The state parties to this Covenant undertake to take steps, individually or through international economic and technical assistance and co-operation, to the maximum of its available resources for achieving progressively the full realization of the rights recognized in the present Covenant. The state parties are also required to guarantee that the rights recognized in this Covenant will be exercised without any discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of the individuals in question⁸³.

The Covenant recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health⁸⁴. This right includes the right to treatment for maternal and infant mortality and the promotion of children's health within the rights to medical treatment for illness⁸⁵. According to Pecker, the right to decide the number and spacing of children and the right to access family-planning services has been found to exist in this right⁸⁶. Further, the right to education and personal development⁸⁷ mentioned in this Covenant can be interpreted to include one of the element of reproductive right i.e. right to information relating to family planning, access to technologies and other relevant information's related to reproduction. This Covenant also confers a right to enjoy the benefits of scientific

⁸² Hereinafter referred to as ICESCR. It was adopted by UN General Assembly on 16th December, 1966 and entered into force on 3 January, 1976.

⁸³ *Id.* Art. 2.

⁸⁴ See, Art. 12.

⁸⁵ See, Art. 12 (2).

⁸⁶ See, Corinne A.A. Packer, "The Right to Reproductive Choice", Abo Arkademi University Institute for Human Rights Publication, Finland (1996), p. 38.

⁸⁷ See, Art. 13.

progress and its application to everyone⁸⁸. This right is having a significant impact over reproductive rights, because with the help of this right an individual can take recourse to modern scientific technologies for reproduction.

2.4.3 Convention on the Elimination of All Forms of Discrimination against Women⁸⁹

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

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

The Committee on the Elimination of All Forms of Discrimination against Women has made it very clear in its General Recommendation No. 24⁹⁰ that Article 12 must be interpreted broadly. The Committee recommended that policies related to reproductive issues should be undertaken from “the perspective of women's need” or, as it has been developed in the literature, adopting a “women-centered approach”. This is the very central notion in the way reproductive rights are approached today. Under CEDAW, it is the States responsibility to prove that they have done everything they could to ensure “access to the range of services which are related to family

⁸⁸ See, Art. 15.

⁸⁹ Hereinafter referred to as CEDAW.

⁹⁰ CEDAW/C/1999/I/WG.II/WP.2/Rev.1.

planning, in particular, and to sexual and reproductive health in general⁹¹”. On a more broad level, the Committee recognized that women’s health – including reproductive rights – was central to the promotion of women’s well-being. Article 12 offers clear and strong protection of women’s reproductive rights through the recognition of their right to health care.

2.4.4 Reproductive Rights and International Conferences

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

The position was endorsed a year later at the 1975 Women’s Conference – that ‘officially’ launched the women’s rights movement – was much more clearly women-oriented. It used the notion of bodily integrity and control as a reference point to interpret the right to decide on the number and spacing of children. In 1984 in

⁹¹ *Id.* para. 23.

Mexico, circumstances had changed again since the previous conference on world population. The US made a complete U-turn from their population growth control position following the appearance of a powerful 'right-life' movement. While contraception, abortion and birth control techniques were suddenly rejected by the US, it also consecrated reproductive rights as individual rights⁹².

The explicit reference to reproductive rights is conspicuously absent in major international human rights instruments, such as the Universal Declaration for Human Rights and the International Covenant on Economic, Social and Cultural Rights. The Convention on the Elimination of Discrimination against Women and other international conferences only provides for fragmented recognition of reproductive rights by singling out issues of family planning and maternal health. Against this background, the pronouncements at subsequent three international conferences in the 1990's have been said to mark milestones in the recognition of reproductive health rights⁹³.

The first of these conferences, viz. the International Conference on Human Rights held in Vienna, Austria, in 1993, while reiterating on the universality, interdependence and interrelatedness of human rights, reaffirmed that the rights of women are an inalienable, integral and indivisible part of human rights. The conference among other things emphasized that human rights entailed a woman's right to self determination and equality, and freedom from violence and exploitation. The conference also emphasized the need for women to enjoy the highest standard of health throughout their life span. This set the ground for more self-determination oriented pronouncements which were made at the 1994 International Conference on Population and Development⁹⁴ and the 1995 Fourth World Conference of Women held in Beijing⁹⁵.

⁹² Centre for the Study of Global Ethics, "Background Report on Women's Reproductive Rights", p.6, available at <info.worldbank.org> Visited on 10.3.2011.

⁹³ Grace Tikambenji Malera, "Women, Reproductive Rights and HIV/AIDS: The Value of the African Charter Protocol", p.128, available at <http://www.agenda.org.za/dmdocuments> Visited on 10.3.2011.

⁹⁴ Hereinafter referred to as the ICPD Conference.

⁹⁵ Hereinafter referred to as the Beijing conference.

The ICPD conference extended women's reproductive rights from merely serving the goals of population control to the respect for the rights of women as autonomous individuals with the capacity to decide on matters pertaining to their sexuality within their social, economic and political contexts. Remarkably, the Beijing Conference re-emphasized a holistic approach in defining reproductive rights. It underscored the point that issues of reproductive health should not be viewed in isolation from the underlying social, economic and other conditions⁹⁶.

2.4.5 The Convention on the Rights of Persons with Disabilities, 2006⁹⁷

This Convention is the first comprehensive international human rights instrument that specifically recognized the right to reproductive and sexual health as a human right. This Convention under Article 23 declares that, "States parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

- a. The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;
- b. Persons with disabilities, including children, retain their fertility on an equal basis with others".

2.5 Right to Procreation and Regional Human Rights Instruments

At the regional level, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa⁹⁸ expressly articulates women's reproductive rights as human rights, and explicitly guarantees a woman's right to

⁹⁶ *Id.* p.129-30.

⁹⁷ Hereinafter referred to as Disability Rights Convention. The text was adopted by the United Nations General Assembly on 13th December 2006 and opened for signature on 30 March 2007.

⁹⁸ Hereinafter referred to as Protocol on the Rights of Women in Africa. This protocol was adopted by the African Union on 11th July 2003 at its second summit in Maputo, Mozambique.

control her fertility. It also provides a detailed guarantee of women's right to reproductive health and family planning services. The Protocol affirms women's right to reproductive choice and autonomy, and clarifies the duty of African states in relation to women's sexual and reproductive health⁹⁹.

Under the Inter-American system of human rights protection, the basic reproductive rights such as right to found a family¹⁰⁰, the right to decide the number and spacing of one's children¹⁰¹, the right to access to family planning information and education¹⁰², and the right to access to family planning methods and services¹⁰³ are specifically recognized. The European system of human rights protection also expressly recognizes various facets of reproductive rights such as the right to marry and to found a family¹⁰⁴, the right to privacy¹⁰⁵, and the right to access to information and education regarding family planning and reproductive health¹⁰⁶.

Further, the UN Millennium Development Goals¹⁰⁷ adopted in 2000, discussed the issue of right to procreation and the governments agreed that addressing women's reproductive health was the key to promoting development. At the 2005 World Summit¹⁰⁸, leaders from around the world made an explicit commitment to achieving universal access to reproductive health by 2015. As there is close alignment between the MDGs and the human rights framework, the MDG agenda provides yet another vehicle for advancing women's reproductive rights¹⁰⁹. From the above discussion, it

⁹⁹ See, Article 14 which provides that, States parties shall ensure that, "the right to health of women, including sexual and reproductive health is respected and promoted. This includes: the right to control their fertility; and the right to decide whether to have children, the number of children and the spacing of children; also the right to choose any method of contraception".

¹⁰⁰ See, *American Convention on Human Rights* (hereinafter referred to as ACHR), Art.17; Art.15 of Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights and Art. VI of American Declaration of the Rights and Duties of Man, 1948.

¹⁰¹ See, ACHR, Art.11; Art.10 Protocol of San Salvador, and Art. XI American Declaration

¹⁰² See, ACHR, Art.13; Art.10 Protocol of San Salvador and Art. XI American Declaration

¹⁰³ See, Art. 10 Protocol of San Salvador and Art. XI American Declaration

¹⁰⁴ See, ECHR, Art.12.

¹⁰⁵ *Id.* Art.8.

¹⁰⁶ *Id.* Art.10; Also see, *supra* n.62 at pp.321 – 325.

¹⁰⁷ Hereinafter referred to as MDGs.

¹⁰⁸ It was a follow-up summit meeting to the United Nation's Millennium Summit, 2000, Representatives (including many leaders) of the then 191 (now 193)member states met in New York City.

¹⁰⁹ See, <<http://www.reproductiverights.org/>> Visited on 4.2.2010.

can be concluded that right to procreation is an internationally as well as regionally protected human right.

2.6 Right to Procreation and National Laws

The right to reproductive freedom is recognized and protected in virtually every corner of the world. Domestic and international tribunals have increasingly found that the right to privacy includes such a right. For example, in *Annapurna Rana v. Ambika Rajya Laxmi Rana and others*,¹¹⁰ the Nepal Supreme Court held that women's right to control over their own body is a part of fundamental right to privacy. Guarantee of fundamental rights to freedom of speech and information are extra advantages in protecting reproductive rights and which can be invoked to protect the right of all persons to access to full information on the benefits, risks and effectiveness of all methods of fertility regulation, in order that any decision they take on such matters are made with full, free and informed consent¹¹¹.

In United States, the Supreme Court recognized the fundamental right to procreate nearly sixty years ago. The Court took the first step towards affording constitutional protection to the right in its 1942 decision, in *Skinner v. Oklahoma*¹¹². In *Skinner*, the Court identified the right to procreate as "one of the basic civil rights of man" and invalidated a state statute requiring the sterilization of habitual offenders as an unconstitutional infringement on that right. The Court explained that, because "marriage and procreation are fundamental to the very existence and survival of the race," forced sterilization of criminal offenders violates the Equal Protection Clause of the Fourteenth Amendment. Additionally, the Court required strict scrutiny of governmental attempts to impose involuntary sterilization¹¹³. In 1965, the Court gave further protection to the right to control one's reproductive choices in *Griswold v.*

¹¹⁰ *Annapurna Rana v. Ambika Rajya Laxmi Rana and others*, *Nepal Kanoon Patrika (N.K.P.)* 2055 (1998), Vol. 8, p. 476.

¹¹¹ See for more analysis of reproductive rights in Nepal, Raju Prasad Chagai, "Judicial Response to Reproductive Rights Experience of Public Interest Litigation in Nepal", *Journal of Health Studies*, I, 3 (2008), at p.27.

¹¹² 316 U.S. 535 (1942).

¹¹³ *Skinner v. Oklahoma*, 316 U.S. 535 (1942), at p.541.

*Connecticut*¹¹⁴. *Griswold* established the fundamental right to privacy for married couples and stands as the first of a series of contraceptive cases that built upon *Skinner* to firmly establish procreation as a fundamental right. Further, in *Eisenstadt v. Baird*¹¹⁵, the Court noted that, for privacy to have any meaning, it must extend to individuals. Writing for the majority, Justice Brennan stated that “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”. The final case establishing the fundamental right to procreate is *Carey v. Population Services International, Inc*¹¹⁶. In *Carey*, the Court followed the reasoning of *Eisenstadt* and expanded the right to contraceptive access and information to minors. The Court stated, “The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices regarding family and procreative autonomy/control¹¹⁷”.

In United Kingdom, the Human Rights Act, 1998 is the law which provides the legal framework for human rights. This Act incorporates European Convention for the Protection of Human Rights, 1950 into UK¹¹⁸. It has adopted three major Articles such as Articles 8¹¹⁹, 12¹²⁰ and 14¹²¹ from ECHR which are the foundation for

¹¹⁴ 381 U.S. 479 (1965).

¹¹⁵ 405 U.S. 438 (1972).

¹¹⁶ 431 U.S. 678 (1977).

¹¹⁷ See generally, Devon A. Corneal, “Limiting the Right to Procreate: State v. Oakley and the need for Strict Scrutiny of Probation Conditions”, 33 *Seton Hall Law Review*, 447 (2003).

¹¹⁸ See, the Human Rights Act, 1998, S.1.

¹¹⁹ Article 8 - Right to Respect for Private and Family Life: “Everyone has the right to respect for his private and family life, his home and his correspondence.” “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

¹²⁰ Article 12 - Right to Marry and Found a Family: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

¹²¹ Article 14 - Prohibition of Discrimination: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

reproductive rights in European Union¹²². A close analysis of all these provisions in the Act suggest that there is a statutory right to reproduction and the state should not place unreasonable restrictions on people who wish to have children¹²³. In Canada, the right to reproduction is protected under the Canadian Charter of Rights and Freedoms¹²⁴. Sections 7¹²⁵ and 15¹²⁶ are wide enough to cover the various reproductive rights which are recognized under the international human rights law. The interpretations given by Canadian courts to these Sections in various cases established a right to reproduction and procreative autonomy in Canada¹²⁷. This right to procreation that has been recognized and developed at international level as well domestic level finds much support in the Indian Constitution.

The Constitution of India described as the conscience of the Nation and the cornerstone of the legal and judicial system came into effect on January 26, 1950¹²⁸. The Constitution doesn't provide any explicit provision for 'reproductive rights'. But it has wide scope for the materialization of this type of rights. Many Constitutional provisions can be invoked for this purpose. To begin with, the preamble comprises paramount objectives of the Constitution as to secure social, economic and political justice through protection of basic human rights¹²⁹. It can be meant in a way that

¹²² See for more, House of Commons Science and Technology Committee, "Human Reproductive Technologies and the Law", Fifth Report of Session, 2004–05, Volume I, 14, March, (2005).

¹²³ See, the Human Rights Act, 1998, S. 6(1).

¹²⁴ First part of the Canadian Constitution Act, 1982.

¹²⁵ Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

¹²⁶ Section 15(1) of the Charter provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

¹²⁷ See, *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; *Winnipeg Child and Family Services v. G.(D.F.)*, [1997] 3 S.C.R. 925; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Korn v. Potter*, (1996), 134 D.L.R. (4th) 437 (B.C.S.C.); *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219.

¹²⁸ P. D. Mathew, *Constitution of India*, Indian Social Institute, New Delhi, (2004), p.xxx.

¹²⁹ See, The Constitution of India, 1949, Preamble. It provides that, "We the people of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic, Republic and to secure to all its citizens - justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation".

reproductive rights are also integral parts of the basic human rights and without their protection and promotion the paramount goal of social justice cannot be secured¹³⁰.

The Fundamental Rights which are mentioned in Part III of the Constitution form the basis for incorporating a globally recognized reproductive rights framework into the Indian context. The key provisions for these purposes include, right to equality before the law and equal protection of the laws; prohibition of discrimination on the grounds of sex; protection of life and personal liberty - which the Court has interpreted to include the rights to human dignity, health, and privacy; and prohibition of trafficking in human beings¹³¹. While interpreting these provisions the Courts have repeatedly stated that right to life “does not connote mere animal existence or continued drudgery through life”, but rather, implies “a right to live with human dignity” and “all that goes along with it, namely, the bare necessities of life”¹³².

The Judiciary in India has recognized the reproductive right of individuals as a basic right. In *B. K. Parthasarthi v. Government of Andhra Pradesh*¹³³, the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as an aspect of his “right to privacy” and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*¹³⁴, which characterized the right to reproduce as “one of the basic civil rights of man”. The argument for the contention that right to procreation is recognized in India is further strengthened due to the fact that, the Indian judiciary has abstained from stating that the right to procreation is not a basic human right. In *Javed v. State of Haryana*¹³⁵, though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati

¹³⁰ *Supra* n. 111 at p. 25.

¹³¹ See, The Constitution of India, 1949, Articles 14, 15, 21 and 23.

¹³² *Consumer Education and Research Centre v. Union of India*, (1995) 1 S.C.R. 626, para. 24; *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 2 S.C.R. 516, para. 8; See also, Avani Mehta Sood, “Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India”, Center for Reproductive Rights, available at <<http://www.reproductiverights.org>> Visited on 10.3.2011.

¹³³ 2000 (1) A.L.D. 199 and 1999 (5) A.L.T. 715.

¹³⁴ 316 U.S. 535 (1942).

¹³⁵ A.I.R. 2003 S.C. 3057.

Raj election, it has not negated the contention that there is a right to procreation in India¹³⁶.

Article 21 also guarantees fundamental right to privacy that could be invoked to protect the right of individuals to reproductive health care information¹³⁷, education and services to a degree of privacy, and to confidentiality with regard to personal information given to service providers¹³⁸. Recently, the Supreme Court of India in *Suchita Srivastava & Another v. Chandigarh Administration*¹³⁹ has declared that, a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreation. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected¹⁴⁰. In this case, the Court struck down the decision of the High Court to terminate the pregnancy of a mentally retarded woman against her will.

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

2.7 Barriers to Right to Procreation and Parenthood

Parenthood is undeniably one of the most cherished goals in adulthood, and most people have life plans that include children¹⁴¹. Parenthood is a role which people

¹³⁶ Law Commission of India, "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy", Report No. 228, August, (2009), p.12.

¹³⁷ See generally, Rachel Rebouche, "The Limits of Reproductive Rights in Improving Women's Health", *Alabama Law Review*, Vol.63 (1), 16 (2011).

¹³⁸ *Supra* n. 111 at p.23.

¹³⁹ (2009) 9 S.C.C. 1.

¹⁴⁰ *Id.* at para.11 and 15.

¹⁴¹ Jacky Boivin¹, Laura Bunting¹, John A. Collins and Karl G. Nygren, "International Estimates of Infertility Prevalence and Treatment-Seeking: Potential Need and Demand for Infertility Medical Care", *Human Reproduction*, 22 (6), 1506 -1512 (2007).

take it for granted and that they will one day assume is a vision deeply rooted in every culture and continually reinforced by social norms. Moreover, the biological link between parents and children is again taken for granted. Women are raised to see themselves as child-bearers; men to see themselves as generators/supporters of procreation. Such socialization has led to pervasive cultural themes: a woman must produce a child to give full resonance to her identity as a woman; a man must be able to produce a child to prove his virility and masculinity. A child must be raised by the biological parents to achieve the success and identity that comes from a genetic heritage¹⁴². There are many reasons for the importance given to biological children in society. It is assumed that the desire to have children is normal and parenthood is part of the natural order of things. People also want children because it is almost like a biological need, as they want to see a part of themselves in their child¹⁴³.

Birth and death are the most basic of human events and reproduction transcends the boundaries of individual lives to signal the survival and continuation of the family and the species. Fertility is revered in almost all cultures and the ability to reproduce is perceived as a milestone in adult development. Reproduction frequently stands as the marker of adulthood; consequently men and women typically experience both internal and external pressures to have children. However some individuals may not be able to have children due to the problem of infertility. The infertility may be due to various medical or social reasons and it acts as a major barrier for exercising the right to procreation. Since the ability to reproduce is usually taken for granted, the realization of infertility problems, comes as a shock and has been labeled as a crisis in life¹⁴⁴.

¹⁴² Mindy Schulman Roman, "Rethinking Revocation: Adoption from a New Perspective", 23 *Hofstra Law Review*, 733 (1995).

¹⁴³ Anjali Widge, "Socio-Cultural Attitudes Towards Infertility and Assisted Reproduction in India", in Effy Vayena, Patrick J. Rowe and P. David Griffin (eds.), *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction" held at WHO Headquarters in Geneva, Switzerland, 17–21 September (2001), pp.64-66.

¹⁴⁴ Carol Bliss, "The Social Construction of Infertility by Minority Women", Doctoral Dissertation, available at <<http://www.gerrystahl.net/personal/family/dissertation.pdf>> Visited on 10.3.2011.

2.7.1 Infertility: Meaning and Definition

Infertility is a disease of the reproductive system which affects both men and women with almost equal frequency. It is a global phenomenon which affects some percentage of every human population. It is estimated that an average of 10 per cent of the global women population of reproductive age is unable to get pregnant or carry a pregnancy to term¹⁴⁵. While there is no universal definition of infertility, a couple is generally considered clinically infertile when pregnancy has not occurred after at least twelve months of regular sexual relationship without the use of contraceptives¹⁴⁶. A common definition of infertility is that, a couple has failed to conceive after 12 months of unprotected sexual intercourse or have suffered three or more miscarriages or still births¹⁴⁷. However, the WHO suggests that there should be two years of unprotected sexual intercourse without conception before an infertility diagnosis is made¹⁴⁸. To constitute a problem, such inability to produce a child must have continued over a certain length of time. It has been estimated that 63 per cent of normally fertile women having unprotected sexual intercourse with a fertile partner will conceive within six months, and 80 per cent will conceive by the end of one year¹⁴⁹. Infertility has been described as the active but frustrated desire for a biologically related child¹⁵⁰. Thus infertility means the inability to generate a pregnancy among people who wish to bear children. The problem may be short term, long term, or permanent. The infertility may lie primarily or solely with the male (such as a low sperm count) or with the female (such as failure to ovulate). In some

¹⁴⁵ See for more, Fidler A., Bernstein J., “Infertility: From a Personal to a Public Health Problem”, 114 *Public Health Reports*, 494-511 (1999) and Vayena E., Rowe P., Peterson H., “Assisted Reproductive Technology in Developing Countries: Why Should We Care?” *Fertil Steril.* 78 (1), 13-15 (2002).

¹⁴⁶ Emily McDonald Evens, “A Global Perspective on Infertility: An Under Recognized Public Health Issue”, *Carolina Papers*, University Center for International Studies the University of North Carolina at Chapel Hill, No. 18, 5 (2004).

¹⁴⁷ Emily Jackson, *Regulating Reproduction Law, Technology and Autonomy*, London School of Economics, Hart Publishing, Oxford – Portland Oregon, U.K. (2001), p.162.

¹⁴⁸ Jonathan Herring, *Medical Law and Ethics*, Oxford University Press, U.K. (2006), p.281.

¹⁴⁹ Gillian Douglas, *Law, Fertility and Reproduction*, Sweet and Maxwell, London (1991), p.104.

¹⁵⁰ Karen Throsby, *When IVF Fails Feminism, Infertility and the Negotiation of Normality*, Palgrave Macmillan, Australia, (2004), p.15.

cases, both parties have a fertility problem. In some cases, the cause of the infertility cannot be determined, despite extensive testing¹⁵¹.

Infertility includes: infecundity - meaning inability to conceive or impregnate; and pregnancy wastage - meaning failure to carry pregnancy to its term because of spontaneous abortion and still-birth. Infertility includes primary infertility, where a couple has never achieved conception, and secondary infertility, where at least one conception has occurred but the couple is currently unable to achieve pregnancy¹⁵². Based on the reasons for causing infertility in individuals, infertility can be classified into two broad categories:

i) *Medical Infertility*

It refers the inability/failure of a couple to have a child even after one year or two years of regular sexual intercourse without any contraceptives, due to biological reasons. There are various biological and medical reasons for this type of infertility such as Diabetes Mellitus, Thyroid disorders, Adrenal disease, Kallmann syndrome, Hypopituitarism, etc¹⁵³.

ii) *Social Infertility*

It refers to the inability of individuals to have a child due to various social factors in their life¹⁵⁴. For example, lesbians, gays, divorced individuals, widowed person and single individuals. It is pertinent to point out here that the individuals belonging to this category may be fertile but because of their situation and way of life and social circumstances they are unable to have a child. For having a child there has to be a sexual relationship between a healthy man and a healthy woman. But in a

¹⁵¹ Christine Adamec and Laurie C. Miller, *The Encyclopedia of Adoption*, Info Base Publishing, New York, (3rd ed. – 2007), p.152.

¹⁵² See B. Dickens, "Reproduction Law and Medical Consent" 35 *U. Tor. L. J.* 255 (1985).

¹⁵³ See, "Infertility", available at <<http://www.en.wikipedia.org/wiki/Infertility>> Visited on 12.3.2011; "Reasons for Infertility", available at <<http://www.reasonsforinfertility.net/>> Visited on 12.3.2011; "Reasons for Infertility in Men and Women", available at <<http://www.buzzle.com/articles/>> Visited on 12.3.2011.

¹⁵³ See for more, Martyn Stafford-Bell, "Social Infertility", *Sexual Function and Sexuality*, Vol.8, No.3, (2006), p.25, available at <<http://www.ranzcog.edu.au/publications/>> Visited on 12.3.2011.

¹⁵⁴ *Ibid.*

lesbian relation which involves only same sex relationship in females, naturally they alone cannot have a child. Similar is the case of gays which involves only males. Likewise, the divorced individuals, widowed persons and single individuals cannot have a child unless they marry.

There can be yet another classification termed as forced infertility so as to include those individuals who are fertile but are forced to remain childless due to certain other reasons. For example, people who are disabled may not marry and remain single and thus are deprived of a child or even if married, in certain cases they may not be able to have a child due to their physical disability. The most unfortunate category of people is those who lose their child, in an age, in which they are unable to beget another child. For example, if a couple lose their only child or all their children in an accident or due to some disease, they are deprived of having a child because they may have undergone either tubectomy¹⁵⁵ or vasectomy¹⁵⁶ or may be above the childbearing age.

2.7.2 Infertility and its Impacts

For many couples, infertility is felt like a multi-pronged assault on their partnership, an attack on their sexual relationship, their plans, their dreams, their time and their finances. Infertility is always a ‘couple problem’, and while frequently both people have a diagnosis, in most instances only one among the couple may have an identified problem. Furthermore, many couples have difficulty in divulging their infertility. Women, in particular, complain that their mates appear emotionally unaffected by it, that they often seem to withdraw when their wives express sorrowful, angry, or jealous feelings. Although most marriages survive infertility and many are strengthened by it; the experience is certainly one that puts even resilient relationships to the test.

Both men and women suffer greatly from infertility, but the emotional impact of this crisis is very severe on women wearing away at their sense of femininity. Even

¹⁵⁵ Tubectomy is a surgical procedure for permanent contraception to prevent future pregnancies in women.

¹⁵⁶ Vasectomy is a surgical procedure for male sterilization and/or permanent birth control.

if it is the husband who has been diagnosed with infertility problem, the woman is the ultimate sufferer. Majority of women irrespective of their social and professional status have a natural desire for motherhood and thus the inability to bear a child threatens their very object in life¹⁵⁷. The impact of infertility on male may not be seen apparently but nevertheless it is also having very serious repercussions on them. An infertile male may feel a sense of guilt and shame for not having a child. For some men it may be a blow to their ego and they may consider it as an impaired masculinity. In most of the cases of male infertility, the women are held responsible by the family members and have to suffer mental torture and harassment.

In reality, infertility is much more than just a medical diagnosis. Infertility is a stigma. For men, infertility is an assault on their manhood. For women infertility is equated with barrenness and viewed as a curse. Since the interpretation of the term infertility is socially constructed, the meaning of infertility has changed with the passage of time and changes in society¹⁵⁸. Throughout the world, infertility – the inability to have desired children – is stigmatized and viewed by fertile and infertile alike as a failure to achieve important cultural goals.

The concern with fertility is so intimately involved with other cultural institutions, interpretations and treatments. The social consequences of infertility will vary from one society to another society and from culture to culture¹⁵⁹. For example, according to the Abrahamic faith traditions which includes the religions of Judaism and Christianity, it is believed that ‘it is God who ‘opens’ a woman’s womb permitting her to conceive’¹⁶⁰. So infertility in these religions is considered as a gift of God, and must be accepted by the couples with utmost calmness and faith. It is also believed that infertility is the result of past sins and hence the man and woman must

¹⁵⁷ See, R. Mander, *Men and Maternity*, Routledge, New York (2004), p.147; Mary-Clai Mason, *Male Infertility: Men Talking*, Routledge, New York, (1993), pp.72-74; Marcia Claire Inhorn, *Reconceiving the Second Sex: Men, Masculinity, and Reproduction*, Berghahn Books, New York (2009), pp.90-91.

¹⁵⁸ *Supra* n. 144.

¹⁵⁹ Lorraine Culley, Nicky Hudson and Floor van Rooij, *Marginalized Reproduction Ethnicity, Infertility and Reproductive Technologies*, Earthscan Publishers, U.K. (2009), p.iv.

¹⁶⁰ *Genesis* 29:31; 30:22. Also see, Rela M. Geffen, *Celebration and Renewal: Rites of Passage in Judaism*, Jewish Publications Society, Philadelphia, U.S.A. (1993), p.25.

accept it¹⁶¹. This belief is also accepted in the Islamic religion which accepts absolute sovereignty of God, as is clearly expressed in the Quran, viz.

‘God creates what He pleases; He grants to whom He pleases, females; and He grants to whom He pleases, males; He gives them in pairs, males and females; and He makes whom he pleases, barren; verily He is knowing, powerful¹⁶²’.

In Hinduism and Buddhism, all the important events and circumstances occurring in life including fertility or infertility, are considered as the outcome of ‘karmic’ cycle. Infertility is interpreted as the result of misdeeds such as mistreating or aborting children in a previous incarnation¹⁶³. This inference is applied to both partners in an infertile couple even if the immediate cause of their infertility clearly lies with a single partner. This is because the marriage between the spouses is not thought to be a matter of chance but is considered as guided by ‘karmic cycle’ itself. Similar to the Abrahamic traditions, in these religions also infertility is viewed as a judgment or penalty for wrong-doing. At the same time Hinduism and Buddhism also have a different perspective towards infertility which is experienced as another type of crisis and a barrier in the path of liberation of a person, by the followers of these religious traditions. It is considered that the longing for children by the individuals is one of the desires which keeps them trapped in the cycle of birth and death. In order to advance towards the real human goal, the truly pious person would seek to overcome that longing for children through the use of the spiritual disciplines of meditation, ritual and pilgrimage¹⁶⁴. Thus, the procreation of child is essential in all the religions so as to prove to the world that they are not sinners in their past life or punished by God. In other words, the religious and cultural traditions make it a compulsion for individuals to have a child. This need is so compelling that the

¹⁶¹ See for more discussion, Paula Abrams, “The Tradition of Reproduction”, 37 *Arizona Law Review*, No.2, (1995), at p.453.

¹⁶² See, Daud Rahbar, *God of Justice: A Study in the Ethical Doctrine of the Quran*, E. J. Brill, Leiden, Netherlands (1960), p.303.

¹⁶³ See, Sewpaul, “Culture, Religion and Infertility: A South African Perspective”. 29 *Br. J. Soc. Work*, 741-754 (1999).

¹⁶⁴ Andrew Dutney, “Religion, Infertility and Assisted Reproductive Technology”, *Best Practice & Research Clinical Obstetrics and Gynaecology*, Vol. 21, No. 1, 169-180 (2007), at pp.173-74.

individuals who are not able to beget a child would try to adopt various means and methods to get a child. In the absence of a child such couples would also face social exclusion or withdraw themselves from the society.

The responses of the society and people towards an infertile couple may range from social stigma and blame, to social isolation and alienation¹⁶⁵. In some communities, infertile people are ostracized as they are perceived to be unlucky or the source of evil, or they become the object of public humiliation and shame¹⁶⁶. In other communities infertile men and women are often denied proper death rites¹⁶⁷. For women in developing countries, infertility may occasion life-threatening physical as well as psychological violence. Childless women are generally blamed for their infertility, despite the fact that men contribute to at least half of the cases of infertility around the world. In developing countries, especially, motherhood is often the only way for women to enhance their status within the family and community. In Asia, being childless has more negative social, cultural and emotional repercussions for women than, perhaps, any other non life-threatening condition¹⁶⁸. Thus infertility causes great hardship and difficulties to the infertile men and women. The overall impacts of infertility can be grouped into the following three broad categories:

a) Psychological Impacts

Infertility gives rise to feelings of depression among the individuals. It gives rise to reactions such as hopelessness, despair, feelings of failure and reduced self-

¹⁶⁵ See Generally, Brennan D. Peterson, *Examining the Congruence Between Couple's Perceived Infertility-Related Stress and its Relationship to Depression and Marital Adjustment in Infertile Men and Women*, Thesis proposal submitted to the Faculty of the Virginia Polytechnic Institute and State University in partial fulfillment of the requirements for the degree of Master of Science in Human Development, (2000), available at <<http://scholar.lib.vt.edu/theses/available/etd-10132000-12080048/unrestricted/finalthesis2.pdf>> Visited on 20.8.2012.

¹⁶⁶ See, Kebede Deribe, Alemayehu Anberbir, *et. al.*, "Infertility: Perceived Causes and Experiences in Rural Southwest Ethiopia", *Ethiopia J. Health Sci.*, Vol.17(2) (2007), available at <www.ejhs.ju.edu.et/journal/2007> Visited on 20.8.2012.

¹⁶⁷ See generally, Nicole J. Wiersema, Anouck J Drukker, *et. al.*, "Consequences of Infertility in Developing Countries: Results of a Questionnaire and Interview Survey in the South of Vietnam", *Journal of Translational Medicine*, Vol.4, 54 (2006).

¹⁶⁸ Abdallah S. Daar, Zara Merali, "Infertility and Social Suffering: The Case of ART in Developing Countries", in Effy Vayena, Patrick J. Rowe and P. David Griffin (eds.), *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on Medical, Ethical and Social Aspects of Assisted Reproduction held at WHO Headquarters in Geneva, Switzerland 17–21 September (2001), p.17.

esteem, lowered life satisfaction, frustration, grief, fear, guilt, helplessness, reduced job performance, and marital duress¹⁶⁹. The levels of anxiety and depression tend to be higher in individuals diagnosed with infertility and in some studies higher in women than in men. Historically, idiopathic infertility, a state in which no medical cause can be diagnosed, was strongly associated with psychological dysfunction. More recently, however, research suggests that there are very few differences between couples with a medical diagnosis and those where no medical cause can be found. Infertility alters an individual's perception of his/ her self, of his/her concept of identity. As a result of the strong link between femininity and motherhood, women may experience an identity crisis as there is a conflict between their ideal sense of self as a woman who can become a mother and their real self as being infertile¹⁷⁰.

b) Social Impacts

The inability to have children can be one of the greatest challenges that a person or couple will ever face in their social life. It can place tremendous stress on a couple's relationship with one another and with their family and friends. It causes loss of social status, social stigma, social isolation and alienation, and community ostracism. All of these changes can make people feel emotionally distant and force them to cut themselves off from friends and family. They look for ways to avoid attending social gatherings and family events, fearing that they will be subjected to discussions about pregnancy, children, or infertility. Socializing with friends and family who have children or who are pregnant is a special challenge for them¹⁷¹.

c) Legal Impacts

The problem of infertility as seen above is a very sensitive and emotional issue affecting the couples. But it also has legal dimensions. A major concern of a childless couple is regarding the transfer and safety of their wealth and property. It is to be

¹⁶⁹ Jacqueline Tomlins, *The Infertility Handbook: A Guide to Making Babies*, Allen & Unwin, New South Wales, Australia (2003), pp.238-39.

¹⁷⁰ See for more, Petra Thorn, "Understanding Infertility: Psychological and Social Considerations from a Counseling Perspective", *International Journal of Fertility and Sterility*, Vol 3, No 2, 48-51 (2009).

¹⁷¹ Sharon N. Covington, & L. Hammer Burns, *Infertility Counseling: A Comprehensive Handbook for Clinicians*, Cambridge University Press, U.K. (2006), p.411.

noted that in the absence of a legitimate son or daughter, claims may be made by the nearest relatives resulting in property disputes and legal battles. The succession of property in most of the personal laws is very complicated and difficult¹⁷². Similarly, the issue of maintenance of the elder persons is also a matter of great concern in the absence of a son or daughter¹⁷³.

Infertility and childlessness is thus a major problem which affects not only the life of the individual but also threatens the very bond of marriage and family in the society. In addition to causing physical and mental suffering to the couples especially the women, it also creates various social and legal problems in the society. Thus, infertility interferes with one of the most fundamental and highly prized human activities and thus presents a major life challenge to those who desire to have children¹⁷⁴. Hence, there is a need to find an appropriate solution to solve this problem of infertility and childlessness by all means.

2.8 Measures to Overcome Infertility and Childlessness

Since ancient times, mankind has always searched for finding solutions to overcome the problem of infertility. Childlessness was considered to be a curse or a judgment passed by the God on the couple. Therefore, various measures were undertaken to please the Gods and Goddess by people and many of these practices are still prevalent in India. For example, fasting¹⁷⁵, visiting temple, making offering to God¹⁷⁶, doing penance, giving alms to poor people, wearing charms, gems, and amulets¹⁷⁷, etc.

In primitive societies and subsequent successive civilizations, the aspiration for a child have been gradually transformed into rights and obligations, embodied and

¹⁷² See, Indian Succession Act, 1925; Hindu Succession Act, 1956, etc.

¹⁷³ See, The Hindu Adoption and Maintenance Act, 1956; Indian Criminal Procedure Code, 1973.

¹⁷⁴ *Supra* n. 145.

¹⁷⁵ See, "Fasting – Religious (webpage)", available at <<http://www.hinduism.co.za/fasting.html>> Visited on 20.9.2012.

¹⁷⁶ For example, *Santhana Gopla Homa* is a particular pooja for overcoming childlessness offered by most of the people in Lord Vishnu Temples in India.

¹⁷⁷ See, Jim Chew, "Cheerfully Childless: Finding Fulfilment with No Kids", *Impact* (Magazine), Vol. 29, No. 4, available at <http://www.impact.com.sg/V4/AA/29_4.php> Visited on 20.9.2012.

protected by customary, religious and later on legal rules¹⁷⁸. Most of the ancient societies have been aware of the problem of some women failing to conceive either on account of inability of husband to perform copulation or normal coitus or on account of physical or psychological inhibitions of either party about sex. Also recognizing the need and importance of an offspring in a family and the natural desire for a child, the ancient societies had provided various measures to overcome childlessness. For example, the ancient Hindu society developed the method of ‘*Niyoga*’, in order to fulfill the desire of the couple to have an offspring. The institution of *niyoga* provided and approved the method by which the sperm, somehow or other, could reach inside the woman so that the ovum could be fertilized. This was how the ‘*Ksetraja*’¹⁷⁹ son was begotten. The *niyoga* was practiced when a man was impotent or had an incurable disease or dead, and the family in accordance with its *swadharma*, authorized the husband’s brother or other *sapinda* to beget a son in his wife. This was done strictly by appointment of the family and was practiced with many restrictions. Thus, for the practice of *niyoga*, two conditions were essential, a) the husband must be impotent, diseased (in the sense of incapable of performing sexual intercourse) or dead; and b) the wife or widow must be authorized either by the husband during his life time or after his death, by the members of his family. The sole purpose of *niyoga* was the begetting of a son, and therefore, onerous conditions were imposed so that the institution was not misused¹⁸⁰.

In Biblical tradition procreation was given utmost importance and in case a man died childless, his brother was required to go to his widow and conceive a child to carry on the deceased brother’s line and in case of refusal to perform this duty he would be publicly humiliated¹⁸¹. The *Genesis*¹⁸² mentions the incident of Er and

¹⁷⁸ Maja Kirilova Erickson, *Reproductive Freedom*, Martinus Nijhoff Publication, Netherlands (2000), p.166.

¹⁷⁹ D. P. Dubey, *Rays and Ways of Indian Culture*, M. D. Publications Pvt. Ltd., New Delhi (1996), p.69.

¹⁸⁰ Paras Diwan, “Technological Niyoga and Nirodh and Social Engineering Through Law”, 22 J.I.L.I. 445 (1980), at p. 449.

¹⁸¹ See, Robert Brom, “Birth Control”, available at <http://www.catholic.com/tracts/birth-control> Visited on 20.8.2012.

¹⁸² The Book of *Genesis* is the first book of the Hebrew *Bible* and the Christian Old Testament.

Onan¹⁸³, in which, when God slew Er for his wickedness, Er's father Judah ordered his second son, Onan, to go to Er's widow and perform the duty of brother in-law to her¹⁸⁴. When Onan instead spilled his semen on the ground, God slew him also for not performing the duty¹⁸⁵. Thus in biblical tradition the instances of use of alternative methods of begetting a child can be seen. The Jewish tradition also dictates that a man can marry his brother's widow if the brother dies childless. To do less would be to allow the brother's genes to go un-transmitted, surely condemning him to true death¹⁸⁶.

In ancient Mohammedan societies, childlessness was considered as a punishment given by *Allah* and hence the couples would perform various prayers, undergo fasting and give offerings. In cases of childlessness due to male infertility the religious texts prescribed various prayers and rituals to be performed by the couple and also allowed medical treatments. However in case of childlessness due to female infertility, the husbands had the option to go for remarriage for obtaining and ensuring a child.

Thus it can be seen that even in the ancient societies the quest for overcoming childlessness and begetting a child was very much prevalent and various measures were followed. It is necessary to point out here that with the passage of time and development of civilization, most of these ancient methods and traditions have also undergone a radical change. This is due to the development and growth of the societies and the legal systems as well as advancements in the medical field.

The growth and progress of the society and formation of state led to the development of legal system and establishment of legal institutions. This in turn led

¹⁸³ See, Nihil Obstat, *The New American Bible*, Oxford University Press, London (2010), p.281.

¹⁸⁴ *Genesis* 19:30-36. See also, Hillel I. Millgram, *Four Biblical Heroines and the Case for Female Authorship: An Analysis of the Women Ruth, Esther, and Genesis 38*, Mc Farland & Co., Inc, North Carolina (2008), p.79.

¹⁸⁵ The biblical penalty for not giving your brother's widow children was public humiliation, not death (Deut. 25:7-10). But Onan received death as punishment for his crime as he violated natural law by spilling the semen on the floor with the intention of not giving offspring to his brother.

¹⁸⁶ A. Alta Charo, "And Makes Three or Four, or Five, or Six: Redefining the Family After the Repro-tech Revolution", *Wisconsin Women's Law Journal*, Vol. 7:1(1992-93), at p.5.

to the evolution of various legal mechanisms and legal tools to regulate human conduct in the society in consonance with moral and ethical norms; and also to cater to the different needs of the individuals and the society. Though the ancient traditions and customs underwent a change with the passage of time, the importance and need for a child in a family remains undisputable and is an accepted fact in almost all societies around the world. The legal systems in most countries of the world also recognize this significance of a child for a family and hence have evolved certain mechanisms for helping childless couples or individuals to have a child. It is said that law is not for law alone but law is an instrument of social control. It originates and functions in a society, and for the society. Law and society are indivisible and are interlinked. The aim of law is to regulate human behavior in the society. The recognition of the significance and need of child for a family by the legal systems therefore led to the development of mechanism of Adoption as an alternative measure having a legal basis for those couples unable to have children.

2.8.1 Adoption

Adoption is the act of lawfully assuming the parental rights and responsibilities of another person, usually a child under the age of 18 years. A legal adoption imposes the same rights and responsibilities on adoptive parents as are imposed on and assumed by a parent when the child is naturally born in the family. Adoption therefore is the lawful transfer of parental obligations and rights. It grants social, emotional, and legal family membership to the person who is adopted¹⁸⁷. Adoption is not a new phenomenon, but it was practiced even in ancient societies. It is not solely a practice of the 20th Century but is a very old and constantly evolving institution. Societies have formally sanctioned the adoption of children, or closely similar arrangements, for more than 4,000 years, since the *Babylonian Code of Hammurabi* in 2285 B.C.—and probably before recorded history¹⁸⁸. Adoption is also mentioned in the *Hindu Laws of Manu*, written around 200 B.C. Perhaps the earliest known adoption is mentioned in the *Bible*, which describes the adoption of Moses by the

¹⁸⁷ Christine A. Adamec & Laurie C. Miller, M.D., *The Encyclopaedia of Adoption*, InfoBase Publishing, New York (3rd edn. - 2007), p.13.

¹⁸⁸ *Id.* at p.xxii.

Pharaoh's daughter. The ancient Romans supported and codified adoption in their laws; in fact, Julius Caesar continued his dynasty by adopting his nephew Octavian, who became Augustus Caesar. The ancient Greeks, Egyptians, Assyrians, Germans, Japanese, and many other societies all practiced some form of adoption¹⁸⁹.

Adoption offered many advantages to the childless couples. It satisfied religious requirements in some cases; for example, in the Hindu tradition an adopted son could perform the religious and cultural obligations and thus the mechanism helped to give some satisfaction to the childless couples. Similarly, in Shinto religion the significance of ancestral worship and the performance of certain religious rituals gave rise to institution of adoption. Adopted individuals could still carry on the family lineage and rituals when the family did not have biological children¹⁹⁰. In early Rome and in other ancient cultures adoption served a primarily religious function associated with ensuring a legitimate male heir to carry out sacred obligations¹⁹¹.

The institution of adoption has been greatly influenced by the changes in the society. How adoption was and how it is now perceived in society; how it is now actually practiced, depends on a myriad of factors: social, economic, and political conditions. The societal attitudes towards orphans and deprived children, out-of-wedlock births, minimum standards of parenting, views on parental rights and children's rights, views on the importance of property and inheritance, as well as other issues in the social order have greatly shaped the institution of adoption¹⁹². Thus every country has developed its own adoption laws¹⁹³. It is pertinent to mention here that the mechanism of adoption as a measure to overcome childlessness has helped many couples and individuals to fulfill their desire to have a child. At the same time this mechanism has its own inherent weaknesses and flaws.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Stephen B. Presser, "The Historical Background of the American Law of Adoption", 11 *Journal of Family Law*, 443 (1971).

¹⁹² *Supra* n.187 at p.xxii.

¹⁹³ For example, The Hindu Adoptions and Maintenance Act, 1956 (India); The Children and Adoption Act 2006(UK); The Adoption Act, 1996 (Victoria), etc.

Weakness of Adoption

The issue of adoption is a very sensitive and emotionally charged issue which an infertile couple faces. Adoption can never fulfill the innate desire of an individual to have a genetic connection to a child or to have a child resembling them, unless and until the couples are adopting a child from their own family circle. Many couples look forward to having children that resemble themselves and their families and think of children as a way of passing on positive family traits, as well as the family name¹⁹⁴. The blood ties between parent and child have almost mythological significance in every culture. They represent both the act of procreation and the physical reflection of the parent's body in the body of the child.

The importance of genetic ties is confirmed by research suggesting that many psychological attributes may also be influenced by genetic heritage, although environmental conditions may also influence. The emotional significance of the biological link is also enshrined in religious traditions. For example, Judaism believes that an individual lives on through his children and the memories which the children have about their parents continue the existence of the parents. This significance of the genetic connection between parent and child undoubtedly makes infertility a painful experience. While adoption may satisfy one's desire to nurture a child, adoption cannot satisfy the yearning to create the child and to watch it develop as a version of oneself¹⁹⁵. Thus, though adoption provided solace to the childless couples it could not satisfy the natural desire to have a genetically related child. This urge for a biological child has tempted mankind to find out newer methods and search for alternatives for begetting a biological child.

Medical science has always tried to search for alternatives and treatments to help the infertile couples to beget a biologically related child so as to fulfill their natural desires. The advancements in medical science and technology have also led to developments and discoveries in the treatment of infertility. These developments

¹⁹⁴ Joan Liebmann-Smith, Jacqueline Nardi Egan and John J. Stangel, *The Unofficial Guide to Getting Pregnant*, Wiley Publishing, Inc., New Jersey (2006), p.247.

¹⁹⁵ *Supra* n.187.

offer various solutions to the childless couples and enable them to have children genetically related at least to one of them. These advancements, or procedures, can be grouped generally under the heading ‘assisted human reproductive technologies’.

2.8.2 Assisted Human Reproductive Technologies

Assisted Human Reproductive Technology¹⁹⁶ is a term used to mention advanced and innovative medical interventions that help people realize their dream of giving birth to a child. It refers to the body of medical and scientific knowledge which when applied enables the creation of a child who could not have been born without the intervention and application of that technology¹⁹⁷. The *American Black’s Law Dictionary* defines, “assisted reproductive technology” as using any medical means to aid in human reproduction, especially by means of laboratory procedures¹⁹⁸.

Kindregan and Mc Brien defines ART, “as any technology that is employed to conceive a child by means other than sexual intercourse”¹⁹⁹. *Centers for Disease Control and Prevention* in the United States says that assisted reproductive technology includes all fertility treatments in which both eggs and sperm are handled. This generally involves the surgical removal of a woman’s eggs from the ovaries, combining them with the man’s sperm in the laboratory, and subsequently returning the resulting embryo to the woman’s body or giving them to a surrogate woman²⁰⁰. In some cases, embryos are frozen rather than implanted²⁰¹. Section 2 (c) of the Draft Assisted Reproductive Technology (Regulation) Bill, 2010 in India defines the ART as:

¹⁹⁶ Hereinafter referred to as ART.

¹⁹⁷ See, Family Law Council, *Creating Children – A Uniform Approach to the Law and Practice of Reproductive Technology in Australia*, Paper No. 333(1985), available at <http://www.heinonlinebackup.com>> Visited on 12.4.2011.

¹⁹⁸ Winatta Saengsook, “A Critical and Comparative Study of Parentage through Assisted Human Reproductive Technology in the Legal Systems of the UK, the USA and Thailand”, *International Journal of Arts and Sciences*, 3(15): 623-632 (2010).

¹⁹⁹ See, Andrea Messmer, “Assisted Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science”, *Journal of Health & Biomedical Law*, Vol. III, No. 1, 203 -216 (2007).

²⁰⁰ See for more *supra* n.187.

²⁰¹ This method is popularly known as ‘Cryopreservation’. See, Ri-Cheng Chian, Patrick Quinn, *Fertility Cryopreservation*, Cambridge University Press, United Kingdom (2010), p.213.

“assisted reproductive technology, with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo in the reproductive tract”.

ART is thus a general term used to refer methods employed to achieve pregnancy by artificial or partially artificial means. It is a technique which is routinely used presently for the treatment of infertility. It includes a range of techniques for manipulating eggs and sperms in order to overcome infertility. It encompasses drug treatments to stimulate ovulation; surgical methods for removing eggs and for re-implanting embryos; in-vitro and in-vivo fertilization; *ex-utero* and *in-utero* fetal surgery; as well as laboratory regimes for freezing and screening sperm and embryos, and micro manipulating and cloning embryos²⁰².

2.8.3. Types of Assisted Human Reproductive Technologies

Assisted Reproductive Technology gives hope to couples who have been trying unsuccessfully since years to conceive and beget a child. It offers various solutions suitable to the needs and defects of those who are unable to procreate naturally. ART encompasses a wide variety of ways to conceive a child, including artificial insemination, in-vitro fertilization and surrogacy, etc. It also encompasses both old and new forms of assisted conception.

Artificial Insemination is widely considered as the oldest form of ART, while Gamete Intrafallopian Transfer (GIFT) and Zygote Intrafallopian Transfer (ZIFT) are considered as the newest forms of ART²⁰³. There are six types of assisted reproductive technology treatments for infertility. Each of these methods may be implemented using donated eggs or a surrogate mother. The major types of ART methods are as follows:

²⁰² Jesusa R. Lapuz, “Assisted Reproductive Technology and Its Legal Innuendos: A Challenge for a Statutorily Renovation”, available at <http://ustlawreview.com/pdf/vol.LIII/ART_and_its_Legal_Innuendos.pdf> Visited on 10.4.2011.

²⁰³ *Supra* n.199 at p.207.

i) Artificial Insemination

It is one of the oldest and most common forms of alternative procreation. Artificial insemination means the injection by instrument of semen into the women's reproductive tract for the purpose of procreation²⁰⁴. Insemination in literary terms means "the act of sowing (of seeds in the ground or figuratively, of germs in the body or ideas in the mind, etc)". However, in the context of ART a more relevant meaning of the term would mean, "the introduction of semen into the genital tract of a female". Hence, in broader terms, one can say that insemination can happen naturally as well as artificially. Natural insemination will, obviously, occur with the help of sexual intercourse. Artificial Insemination, on the other hand, is a process that does not involve sexual intercourse²⁰⁵. It means introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means. According to *Britannica Concise Encyclopedia*, artificial insemination is the, "Introduction of semen into a female's vagina or cervix by means other than sexual intercourse"²⁰⁶. So artificial insemination in its simplest form requires the donation of sperm from a man (usually obtained by his masturbation into a container) and the mechanical injection of it into the vagina of the woman²⁰⁷.

Traditionally, couples have been using artificial insemination, the oldest and simplest of the various techniques available to infertile individuals, when the male suffers from low sperm count, low sperm motility or premature ejaculation. Semen concentrated under laboratory conditions, is then inseminated into the women with a needle-less syringe at a favorable time in her cycle. Although husbands served as

²⁰⁴ Katheryn Venturatos Loria, "Alternative Means of Reproduction: Virgin Territory for Legislation", 44 *Louisiana Law Review*, 1642 (1983-1984), at p.1643.

²⁰⁵ See, Rashida Khilawala, "Human Artificial Insemination", available <<http://www.buzzle.com/articles/>> Visited on 30.10.2009.

²⁰⁶ See, *Britannica Encyclopedia*, *Britannica Concise Encyclopedia*, (2002), p.109. Available at <<http://www.answers.com/liabrary>> Visited on 30.10.2009.

²⁰⁷ Ved Kumari, "Fertility Revolution and Changing Concept of Family and Identity", XXV *Delhi Law Review*, 103, (2003), at p.109.

sperm providers in early artificial inseminations, AI today often involves third-party sperm donors and is increasingly used by single women²⁰⁸.

In modern times artificial insemination can be practiced in three ways: Firstly, Artificial Insemination by Husband (AIH) or Homologous Artificial Insemination, in which a married woman is impregnated with the semen of her husband when normal copulation fails because of various medical reasons. Thus any child conceived and born through this method is biological offspring of both the woman and her husband. Secondly, Artificial Insemination by Donor (AID) or Heterologous Artificial Insemination, in which a woman is impregnated with semen from a man who is not her husband in a simple procedure that can be accomplished with a syringe. Thirdly, Confused or Combined Artificial Insemination which is not as popular as the first two methods. In this method a married woman is inseminated with a mixture of her husband's and a donor's sperm²⁰⁹.

ii) In-vitro Fertilization

Though not as old as artificial insemination, in-vitro fertilization²¹⁰ is also a well-established assisted reproductive technology. In-vitro Fertilization first caught the public eye in 1978 with the birth of Test Tube baby Louise Brown²¹¹. Since the first child conceived through IVF was born in England, the process has gained widespread popularity. IVF relies more heavily upon science and laboratories as compared to artificial insemination²¹². In-vitro fertilization was the first “out-of-womb” conception technique perfected by reproduction scientists²¹³. In-vitro fertilization is so named because the fertilization actually takes place *in-vitro*

²⁰⁸ See, Anonymous, “Developments- Medical Technology and the Law”, 103 *Harvard Law Review* 1522 (1990), at p.1532.

²⁰⁹ Pedro, “Artificial Reproductive Technique, Fertility Regulations: The Challenges of Contemporary Family Law”, 34 *A.J.I.L.* (Supp.) 125 (1948), at p.126; See generally, Kusum, “Artificial Insemination and Law”, 19 (3) *J.I.L.I.* 283 (1977).

²¹⁰ Hereinafter referred to as IVF.

²¹¹ Reed, “Scientists Praise British Birth as Triumph”, *New York Times*, July 27, 1978.

²¹² Andre P. Rose, “Reproductive Misconception: Why Cloning is Not Just Another Assisted Reproductive Technology”, 48 *Duke Law Journal* 1133 (1999), at p.1138.

²¹³ See for more, Gregory A. Triber, “Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts”, 23 *Seton Hall Legislative Journal*, 109 (1998-1999).

(literally, “in the glass”), usually in a laboratory test tube or Petri dish.

The first step in IVF is the collection, or harvesting of healthy ova from the woman’s ovaries. For this, egg production is stimulated through the use of fertility drugs, which cause the woman to produce a higher-than-normal number of eggs and also allow a certain amount of control over the timing of ovulation to facilitate the optimal scheduling of the retrieval procedure. The second step in IVF is the fertilization of the successfully retrieved eggs with the man’s sperm in a Petri dish. In some cases, particularly those in which sperm motility is a factor, doctors may use a more invasive technique called micro–injection, injecting the sperm directly into the eggs in order to facilitate fertilization²¹⁴. In the event of successful fertilization, the embryo is implanted into a woman’s uterus, with the hope that pregnancy will result²¹⁵. The IVF procedure is sought by couples who wish to have a child but cannot reproduce successfully by means of sexual intercourse. The problem may stem from a number of reasons, such as low sperm motility, failure to produce ova (eggs), physical damage to the fallopian tubes or uterus, or when a woman has blocked fallopian tubes or when the sperm and ovum are unable to fuse in the reproductive tract²¹⁶. In order to overcome these obstacles, it is necessary to fertilize the ova outside the woman’s body and subsequently implant the resulting embryo in her uterus²¹⁷.

iii) Surrogacy

Surrogacy is yet another alternative for those who cannot procreate in the traditional manner or choose not to procreate in the traditional manner. Surrogacy involves a woman acting as a surrogate or as an incubator for bearing a child for another person or couple. A surrogate woman conceives by using an egg from another woman or by using her own donated egg and the sperm of a donor. Typically the

²¹⁴ See for more, Jennifer Hodges, “Thursdays Child: Litigation Over Possession of Cryo-preserved Embryos as a Call for Legislation”, 40 *Santa Clara Law Review* 260 (1999-2000), at p.261.

²¹⁵ Lany I. Palmer, “The Legal Significance of Gestation”, 20 *Cornell Law Forum* (Faculty ed.) 9 (1993-1994), at p.11.

²¹⁶ Gordon Macpherson (ed.), *Blacks Medical Dictionary*, A & C Black Publishers, United Kingdom (40th edn.- 2002), p.332.

²¹⁷ *Supra* n.214 at p.260.

surrogate is acting for a married couple but it is not limited to them and may include gay and lesbian couples or single men or women²¹⁸. The surrogate mother agrees to be artificially inseminated and to carry the resulting foetus to birth and then relinquish to the intended parents all rights and obligations over the child. Generally, the sperm is that of a married man whose wife is infertile. This procedure is somewhat analogous to artificial insemination donor in that the resulting child will be the biological offspring of one member of the infertile couple. The concept of surrogate motherhood is not new and has been practiced since ancient times. The *Bible* records that Sarah, unable to bear a child, directed Abraham to her hand- maiden, Hagar, who later bore Abraham his son Ishmael²¹⁹. The practice of surrogacy has developed with the passage of time and in the present century it has become the most popular form of ART.

iv) Gamete Intra-Fallopian Transfer

The most recently developed non-coital reproductive method is Gamete Intra-fallopian Transfer²²⁰. It involves directly injecting an unfertilized mixture of sperm and egg into the fallopian tubes of an infertile woman²²¹. In this procedure, a physician administers human reproductive hormones to the woman and, just prior to ovulation, removes the eggs. Unlike IVF, however, the sperm and egg are not incubated together but are placed into a small catheter for transfer. The physician, through a laparoscopic incision, completes this procedure by inserting the tip of the catheter into the fallopian tube and gently discharges its contents²²².

v) Zygote Intra-Fallopian Transfer

Zygote Intra-Fallopian Transfer²²³ is a combination of IVF and GIFT. Zygote Intrafallopian transfer works like in-vitro fertilization; however, the embryos are

²¹⁸ *Supra* n. 207 at p. 111.

²¹⁹ *Supra* n. 204 at pp.1653-54.

²²⁰ Hereinafter referred to as GIFT.

²²¹ See, Asch, Balmacaan, Ellsworth & Wong, "Preliminary Experiences with Gamete Intra-Fallopian Transfer (GIFT)", 45 *Fertility & Sterility* 366-370 (1986).

²²² Warren A. Kaplan, "Foetal Research Statutes, Procreative Rights, and the 'New Biology': Living in the Interstices of the Law", 21 *Suffolk University Law Review*, 723 (1987).

²²³ Hereinafter referred to as ZIFT.

transferred to the woman's fallopian tubes instead of her uterus²²⁴. The sperm and eggs are combined in the lab. Once fertilization takes place, they are placed in the woman's fallopian tubes, where they will hopefully travel to the uterus²²⁵. ZIFT has the highest success rate of all of the ART procedures. It has a live birth rate of about 29% per cycle²²⁶.

vi) Reproductive Cloning

Ian Wilmut, Keith Campell and Others startled the world when they announced in February 1997 that they had cloned a lamb using a cell nucleus taken from an adult ewe's udder²²⁷. They also startled a generation of researchers who believed it to be impossible to create whole new organisms from single adult cells²²⁸. The accepted wisdom had been that cells from adult animals could not be reprogrammed to make a whole new body²²⁹. Since the announcement of the birth of the first sheep cloned from an adult cell in February 1997, there has been intense speculation about the possibility of human cloning²³⁰. Cloning though successful in higher mammals has not yet developed into a reproductive alternative in human beings. However it may become possible in the near future. Reproduction in human beings is possible in normal situation by the fertilization of eggs and sperms. But in cloning, embryo is formed by the removal of the nucleus of an egg cell and replacing it by the nucleus of a somatic cell²³¹. The United States Presidents Commission on Bioethics defined cloning as, "the asexual production of a new human organism that is, all stages of development, genetically virtually identical to a currently existing or previously

²²⁴ See, "Types of Assisted Reproductive Technologies", available at <<http://www.livestrong.com/article/>> Visited on 14.4.2011.

²²⁵ See for more, Nicole Rank, "Barriers for Access to Assisted Reproductive Technologies by Lesbian Women: The Search for Parity Within the Healthcare System", 10 *Hous. J. Health L & Pol'y* 115-46 (2009), at p.120.

²²⁶ See, Janey Lewis, "Types of Assisted Reproductive Technologies", available at <<http://www.ehow.com>> Visited on 14.4.2011.

²²⁷ See, Ian Wilmut, *et al.*, "Viable Offspring Derived from Foetal and Adult Mammalian Cells", 385 *Nature* 810-813 (1997).

²²⁸ See for more discussion on Cloning, Michael Lupton, "Human Cloning- The Law's Response", 9 *Bond Law Review*, 123 (1997).

²²⁹ *Ibid.*

²³⁰ Emily Jackson, *Regulating Reproduction Law, Technology and Autonomy*, London School of Economics, Hart Publishing, U.K. (2001), p.168.

²³¹ *Supra* n. 5 at p. 124.

existing human being. It would be accomplished by introducing the nuclear material of a human somatic cell (donor) into an oocyte (egg) whose own nucleus has been removed or inactivated, yielding a product that has a human genetic constitution virtually identical to the donor of the somatic cell²³². This process can be of two types, reproductive cloning and therapeutic cloning²³³. Though the process is same, in reproductive cloning the aim is to produce a child and the cloned embryo is transplanted into the womb to develop²³⁴.

Over the past several decades, millions of people have used new reproductive technologies in their quest for biologically related children. Although reproduction traditionally has been regarded as an aspect of marriage, single persons and gays and lesbians also have interests in having and rearing offspring even if they are not married or are not attracted to persons of the opposite sex²³⁵. This increased use of ART has given rise to an important legal and human right question, i.e. whether the right to procreation includes the right to procreate with the help of ART's.

2. 9 Right to Procreation and ART

Right to procreation is recognized universally as a fundamental human right. This right is guaranteed by various international, regional and national human rights instruments as well as by many constitutions in the world. The fact that right to procreation is recognized and accepted all over the world as a basic human right, gives rise to the question whether this right includes the right to use ART. The answer to this question however, depends upon the interpretation of the scope of right to procreation guaranteed by various human right documents as well as the approach of various legal systems in the world. It is pertinent to point out here that all these

²³² See, *Report of the United States Presidents Commission on Bioethics*, (2002), available at <<http://www.bioethics.gov/>> Visited on 6.7.2010.

²³³ Reproductive cloning is for the purpose of creating a life and therapeutic cloning is for medical or research purposes. In therapeutic cloning there is no intent to produce a child. The cloned embryo is created in order to produce cells that will be transplanted into someone who suffers from some kind of disability or condition. The cloned embryo may also be created for research purposes.

²³⁴ *Supra* n.148 at pp.290-91.

²³⁵ The Ethics Committee of the American Society for Reproductive Medicine American Society for Reproductive Medicine, "Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons", *Fertility and Sterility*, Vol. 92, No. 4 (2009).

documents, however do not directly provide a right to procreation, but rather the right to procreation is made an important facet of right to marry and found family, right to privacy, right to health and right to life²³⁶.

Procreation is a natural biological process and generally takes place without any technological intervention and only requires minimum medical assistance. But in case of infertile and socially infertile couples, the process of procreation to beget a child would not occur without the intervention of science and technology. For such category of people it is reasonable that the advancements in medical science are to be utilized for their benefit and therefore they must be allowed to use ART. John A. Roberts, argues that,

“if coital reproduction is protected, then we might reasonably expect the courts to protect the right of infertile persons to use non-coital means of reproduction such as artificial insemination (AI), in-vitro fertilization (IVF), and related techniques so as to combine their gametes for the purpose of begetting a child. Infertile couples who use these techniques are trying to achieve the same goal of having and rearing offspring that fertile couples achieve through coitus. Therefore there is no valid reason not to grant them the same presumptive freedom to achieve that goal which fertile persons have. The use of such techniques may however be subject to certain limitations if use of those techniques affects the best interests of other individuals, child and society²³⁷”.

Thus right to procreation includes a right to use ART. This gives rise to another closely related and important question regarding who is having the duty to provide ART and related services. An important point to be noted in the context of rights and

²³⁶ *Supra* n.78.

²³⁷ John A. Robertson, “Gay and Lesbian Access to Assisted Reproductive Technology”, 323 *Case Western Reserve Law Review*, Vol. 55:2 (2004), p.328.

duties is that they are two aspects of the same thing or two sides of the same coin²³⁸. The traditional writers observe that every legal system is made up of both rights and duties and that the two are reciprocal and interdependent. Rights are essentially those interests which have been legally recognized and protected²³⁹. According to Roscoe Pound, legal rights are essentially interests recognized and administered by law. It may mean the legally recognized and delimited human wants, demands or some conceptions by which the recognized interests are given from in order to be secured by a legal order²⁴⁰. Every right implies the active or passive forbearance by others of the wishes of the party having the right. The forbearance on the part of others is called a duty²⁴¹. Thus every right or duty involves a *vinculum juris* or a bond of legal obligation by which two or more persons are bound together. There can be no duty unless there is someone to whom it is due. Likewise there can be no right unless there is someone from whom it is claimed²⁴². According to Hohfeldian analysis of right and duty relationship, there is no right without a co-relative duty²⁴³. Rights are expressions of our dignity and shared humanity. When an individual asserts a right, it creates a corresponding duty not to interfere with his right and possibly to assist him in certain ways for the effective enjoyment of those rights²⁴⁴. This implies that if there is a right to procreation there is also a corresponding duty on part of the state, individuals and society to facilitate its enjoyment. This duty simply means that the state or other individuals and society must not interfere in the reasonable exercise of right to procreation. Rather the state is under an obligation to provide all medical facilities for the protection and reasonable exercise of this right.

Another point to be noted here is that rights are of two types: positive and negative. Right to procreation is a positive right obligating others to support a person's attempts to become a parent. In this context the doctors have a major role to

²³⁸ Prof. S. N. Dhyani, *Jurisprudence and Indian Legal Theory*, Central Law Agency, Allahabad (4th edn.-2002), p.234.

²³⁹ A. K. Koul, *A Textbook of Jurisprudence*, Satyam Law International, New Delhi (2009), p.315.

²⁴⁰ Roscoe Pound, *Jurisprudence*, Law Exchange Ltd., New Jersey, U.S.A., Vol.VI (2000), pp.80-81.

²⁴¹ T. W. Holland, *The Elements of Jurisprudence*, Clarendon Press, U.K. (1924), p.124.

²⁴² V. D. Mahajan, *Jurisprudence and Legal Theory*, EBC, Lucknow, (5th edn.- 1987), p.296.

²⁴³ See for more, David Campbell & Philip Aneurin Thomas (eds.), *Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Ashgate Publications, United Kingdom (2001).

²⁴⁴ Feinberg J. "The Nature and Value of Rights". 4 *Journal of Value Inquiry*, 243-257 (1970).

play in supporting the attempts of childless couples/individuals to become a parent²⁴⁵. When a patient is trying unsuccessfully to conceive a child, then certainly the physician who is treating the patient has a duty to provide the best possible treatment for infertility²⁴⁶.

The right to use ART is also justified on the grounds of reproductive autonomy of an individual²⁴⁷. Reproductive autonomy includes within its ambit all ideas relating to reproduction such as whether or not to have children, when to have children, where, how, and with whom to have children. These decisions are profoundly important and intimate for individuals. In fact for most people reproductive decisions are central to how they wish to live their lives. The state should therefore, as far as possible, assist couples who need treatment or help to have children. The state is under an obligation to provide treatment for those suffering from infertility. The right to use ART in fact is a part of reproductive autonomy which is essential for the exercise of right to procreation. However this right does not mean right to a child but it means right to use ART and right to access to facilities so that one can try and have a child²⁴⁸. It includes the freedom to manipulate egg, sperm, or embryo to achieve the desired offspring, similar to the freedom to impede implantation or abort a foetus with undesirable characteristics²⁴⁹. It must be emphasized here that procreative rights are not absolute and therefore reasonable restrictions can be imposed for the welfare of the child and in the interests of the society. This right can be restricted and regulated to secure the due recognition of the rights and freedoms of others, to meet the just requirements of morality, public order and general welfare in a democratic society²⁵⁰.

²⁴⁵ ACOG Committee Opinion, "Sterilization of Women, Including those with Mental Disabilities", 110 *Obstetrics & Gynecology* (1) 217-220 (2007).

²⁴⁶ Andrew M. Courtwright and Mia Wechsler Doron, "Is Restricting Access to Assisted Reproductive Technology an Infringement of Reproductive Rights?", *Virtual Mentor*, Vol. 9, No. 9, 635-640 (September, 2007).

²⁴⁷ See, Onora O' Neill, *Autonomy and Trust in Bioethics*, Cambridge University Press, United Kingdom (2002), p.57.

²⁴⁸ *Supra* n. 148 at p. 284.

²⁴⁹ See for more, John J. Coughlin, "Making Babies: The New Science and Ethics of Conception", 21 *Harvard Civil Rights-Civil Liberties Law Review*, 742 (1986).

²⁵⁰ John Finnis, *Natural Law and Natural Rights*, Clarendon Law Series, Clarendon Press, Oxford (1980), p.213.

So, individuals and couples are not free to alter genetic material in a way that would cause serious harm to the offspring as well as to the society²⁵¹.

Right to reproduction was held as one of the basic civil rights of man by the US Supreme Court in *Skinner v. State of Oklahoma*²⁵². The Court held that right to reproduce would be protected as a fundamental human right. In India, the High Court of Andhra Pradesh in the case of *B.K. Parthasarathi v. Government of Andhra Pradesh*²⁵³ established a right to reproductive autonomy under Article 21 of the Indian Constitution. Recently, the Hon'ble Supreme Court of India in *Suchita Srivastava & another v. Chandigarh Administration*²⁵⁴ has declared that, the word personal liberty under Article 21 of the Constitution of India also includes within its ambit a woman's right to take reproductive decisions. Thus it can be seen that, the judicial trends are also inclined towards the protection of reproductive autonomy and use of ART.

From the above discussion it can be seen that the right to procreation includes within its ambit right to procreate with the help of ART. Different countries have also adopted their own legislations to suit to their need for regulating the use and access of ART. For example, in the United States, though there is no federal legislation dealing with access to ART, more than 33 states have adopted their own statutes to regulate the use of and access to ART²⁵⁵. Only one state in US i.e. New Hampshire has explicitly restricted access to ART²⁵⁶.

In Canada, the *Assisted Human Reproduction Act*, 2004 explicitly recognizes the right to use ART by all sections of society. However reasonable restrictions can

²⁵¹ See for more *supra* n. 247.

²⁵² 316 U.S. 535 (1942).

²⁵³ 1999 (5) A.L.T. 715.

²⁵⁴ (2009) 9 S.C.C. 1.

²⁵⁵ Susan B. Apel, "Access to Assisted Reproductive Technologies", April, 2007, available at <http://www.works.bepress.com/susan_apel/1> Visited on 13.3.2011.

²⁵⁶ Under New Hampshire law, in-vitro fertilization and pre-embryo transfer are available only to a woman who is aged 21 years or more, and who has been medically evaluated and received counselling. In the remaining jurisdictions, none of the relevant statutes expressly prohibits access to ART by single women. See N.H. Rev. Stat. Ann. § 168-b: 13, See for more "Surrogacy: In-vitro Fertilization and Pre-embryo Transfer", available at <<http://www.gencourt.state.nh.us/rsa/html/XII/168-B/168-B-13.htm>> Visited on 13.3.2011.

be imposed on this right for the welfare of the resulting child²⁵⁷. In United Kingdom, utmost importance is given to the welfare of the child who may be born as a result of the treatment as well as need of that child for a father. The *Human Fertilization and Embryology Act*, 1990 specifically provides that, “A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth²⁵⁸. It reflects the traditional view that family comprises of father, mother and the child and it is better for the child to be born in such family.

In Australia, majority of the states adhere to ethical guidelines given by the National Health and Medical Research Council (NHMRC) and the Fertility Society of Australia. In Western Australia, the *Human Reproductive Technology Act*, 1991 contains various provisions regarding access to ART. The Act however emphasizes that ART procedures are carried out only after proper assessment and counseling of the persons and only for the benefit of persons eligible under the Act²⁵⁹. More importantly, the welfare of the child to be born as a result of the procedure is to be taken into account²⁶⁰. In South Australia, the *Reproductive Technology (Clinical Practices) Act*, 1988, specifically states that ART procedures may be provided by the licensees only for the benefit of married couples in circumstances where the husband or wife or both appeared to be infertile or there appears to be a risk of transmission of genetic defect to a child if conceived naturally²⁶¹.

In India, there is no direct and specific legislation dealing with ART. The *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India*, adopted by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences, India in 2005 is the only guideline available for

²⁵⁷ See, The Assisted Human Reproduction Act, 2004 (Canada), S. 2(a) & 2 (e).

²⁵⁸ See, The Human Fertilization and Embryology Act, 1990, S. 13(5).

²⁵⁹ See, The Human Reproductive Technology Act 1991 (WA), S. 4.

²⁶⁰ *Ibid.*

²⁶¹ For more comparative analysis of Domestic Legislations, See, John Seymour and Ms. Sonia Magri, “ART, Surrogacy and Legal Parentage: A Comparative Legislative Review”, *Victorian Law Reform Commission*, (August, 2004), pp.3-26.

regulating ART practices in the country²⁶². Recently the Draft ART (Regulation) Bill, 2008 was replaced by a draft of the Assisted Reproductive Technologies (Regulation) Bill, 2010 prepared by ICMR and submitted to Government of India. This Bill is still under the consideration of parliament. Both the ICMR Guidelines and the Draft ART Bill allow the use of ART by an individual for begetting a child.

It is to be noted that the specific legislations enacted by different countries to regulate ART's are not uniform in all the countries because they are made as per the social, cultural, religious, economic and political approach of that country. It is submitted that, in the contemporary world where the traditional norms of family and parenting is undergoing a drastic change and emphasis is given more to individual liberty and freedom, the right to use ART and access to ART must not be prohibited. At the same time, the right to use ART can be regulated in order to protect the best interests and welfare of child, as well as for preventing any harm to the individuals and to the society. Though ART offers an attractive option to infertile couples or any other individuals who wish to have a child, it also raises various legal and human rights issues which need to be addressed.

2.10 Conclusion

From the above discussion it can be concluded that there is a fundamental basic human right to procreation. The right to procreation is one of the most important and basic rights of human beings because the desire for a child is very strong and innate in them as compared to other living creatures. The significance of a child for the family and for the society originates not only due to the biological need and desire of human beings but is also due to the various religious and cultural traditions that they follow. Almost all religions of the world emphasize the need and importance of a child for the family and the ancient scriptures are replete with instances which highlight the significance of a child.

In countries where the national legislations do not expressly mention the right to procreation, it can be implied from the basic human rights to life, liberty, privacy,

²⁶² Available at <http://www.icmr.nic.in/art/Prilim_Pages.pdf> Visited on 13.3.2011.

bodily integrity and security. It can be said that right to procreation is not an isolated single right but is a bundle of rights composed of eight basic rights which are the constituent elements of right to reproduction without which the right to reproduction is meaningless. These eight constituent elements are: (i) the right to marry and found a family; (ii) the right to decide the number and spacing of children and to have the information to do so; (iii) the right to modify conditions that discriminate against women; (iv) the right to be free from sexual assault and exploitation; (v) the right to privacy; (vi) the right to life, liberty and security; (vii) the right to enjoy scientific progress and to consent to experimentation; (viii) and the right to be free from gender discrimination.

However, due to the various reasons leading to infertility, individuals are unable to enjoy this very natural right to have a child. This involuntary childlessness is a barrier to the enjoyment of right to procreation and it has a very significant impact on individuals in their personal, familial as well as social life. To solve the problem of infertility and childlessness, various societies practiced different methods. It is to be noted that medical technology has come to the aid of such childless couples/individuals and various methods have been developed to overcome childlessness and to help them to have a child. These methods are collectively known as Assisted Human Reproductive Technologies, i.e. ART's. Among all the methods of ART, surrogacy is the most controversial due to its special nature and involvement of not only the individuals who wish to have a child but also other individuals in the procreation process. It requires a woman to act as surrogate and carry the baby for full term and after its birth to hand over the baby to the parents who initiate the process²⁶³. However, surrogacy raises various contentious issues relating to the stakeholders involved in surrogacy. Hence there is a need to examine the practice of surrogacy from a legal and human rights perspective. The next chapter focuses on surrogacy and the various issues surrounding it.

²⁶³ Ruth Macklin, *Surrogates and Other Mothers: the Debates over Assisted Reproduction*, Temple University Press, Philadelphia (1994), p.53.

CHAPTER -III
SURROGACY: LEGAL, ETHICAL
AND MORAL ISSUES

CHAPTER III

SURROGACY: LEGAL, ETHICAL AND MORAL ISSUES

*“When nature lets you down, surrogacy steps in and resumes
the process to bring you the gift of parenthood”*

...Anonymous

3.1 Introduction

Infertility among married couples is a major problem affecting not only their marital life but also their social life. The assisted reproductive technologies have come to the help of such infertile couples. Until recently, they had only two options either to adopt a child or to remain childless. However, with the advent of the new reproductive technologies, infertile couples now have the advantage of selecting from a number of options, including artificial insemination, in-vitro fertilization, and surrogacy. Thus human procreation can be accomplished through a variety of reproductive technologies that do not involve sexual intercourse. Of these new technologies, surrogacy is arguably the most controversial.

In surrogacy, a woman is artificially inseminated with a man’s sperm. The woman not only bears his child in her womb but later on after the birth of the child also hands over that child to the man and his wife to be brought up as their child. In this method, the egg and sperm are united in a culture dish, where the egg is fertilized and the resulting embryo is implanted in the woman’s uterus¹. Surrogate parenting is a scientific extension of the natural ability to reproduce. Surrogacy has become an attractive alternative for young couples to overcome the problems of adopting children and thereby to reduce high infertility rates². Nevertheless, during the past

¹ See, Judith Lynn Bick Rice, “The Need For Statutes Regulating Artificial Insemination By Donors”, *Ohio State Law Journal*, 1055 (1985).

² See, Steven M. Recht, “‘M’ is for Money: Baby M and the Surrogate Motherhood Controversy” 37

fifteen years, the practice of surrogacy has gained respect as an attractive reproductive alternative for infertile couples who wish to conceive a child biologically related to at least one of them³. Due to its various advantages when compared to adoption as well as other reproductive technologies, the practice of surrogacy has gained wide recognition all over the world and particularly in India. Developments in the procedures such as artificial insemination and in-vitro fertilization have made surrogacy a viable alternative means of reproduction in infertile couples⁴. Like any other technological advancement, surrogacy also has its own pros and cons which need to be addressed. This chapter elucidates the concept and meaning of surrogacy and traces the history and development of surrogacy from ancient to modern period. It highlights the advantages of surrogacy over other forms of ART. Further it identifies the various legal and ethical debates surrounding surrogacy and also examines the response of foreign countries. It also discusses the position of surrogacy in India and the legal framework for its regulation.

3.2 Surrogacy: Meaning and Definition

Surrogacy is an important method of assisted human procreation for those who cannot, or choose not, to procreate in the traditional manner⁵. Surrogacy, one of the most dramatic of the new reproductive technologies, is an arrangement by which a woman agrees to be impregnated by assisted conception, carries the resulting foetus, and relinquishes all parental rights of the child at birth⁶. This method of ART is like a boon to those married women who are unable to conceive due to various physical, genetic and medical reasons.

A woman at times may not be able to carry her own genetic offspring. For example, a woman might be unable to ovulate or carry a pregnancy, if she has lost her

American University Law Review, 1013 (Spring 1988).

³ Helena Ragone, *Surrogate Motherhood: Conception in the Heart*, West View Press, U.S.A. (1994), p.13.

⁴ Lisa L. Behm, "Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States", 2 *DePaul J. of Health Care L.* 557 (Spring 1999).

⁵ Kathryn Venturatos Lorio, "Alternative Means of Reproduction: Virgin Territory for Legislation", 44 *Louisiana Law Review*, 1641 (1984), at p.1655.

⁶ Katherine B. Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?", 68 *Indiana Law Journal*, 205 (1992).

womb and ovaries because of cancer or if she may have never been born with them. Similarly, a woman might be able to ovulate but unable to carry a pregnancy because of high blood pressure or risky skin diseases. By using a surrogate, such women could still raise a child that is their partner's biological child⁷. Further, a woman who cannot retain the conceived foetus due to a history of spontaneous abortion may demand her partner to go in for this arrangement to fulfill her dream of having a biological child. Also women suffering from life threatening diseases like kidney diseases or multiple sclerosis may also opt for this method⁸. Likewise, in this commercial and materialistic world it is not surprising that cases have been reported in which figure conscious women have opted for this method with the desire of maintaining their beauty and hence have allowed some other woman to bear a child for them⁹. Career may also be cited as a reason encouraging the husband to go in for a surrogate arrangement¹⁰.

Surrogacy is traditionally defined as the procedure whereby a couple contracts with a woman (known as the surrogate) to conceive a child for them, carry it to term, and then relinquish to the couple all her parental rights¹¹. The word 'surrogate' has its origin from a Latin word '*surrogatus*', meaning a substitute, that is, a person appointed to act in the place of another. Hence a surrogate mother is a woman who carries a child on behalf of another woman, either from her own ovum or from the implantation in her womb of a fertilized egg from another woman.

Black's Law Dictionary defines surrogacy as an "agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband. She agrees to conceive a child, carry the child to term and after the birth, assign her

⁷ Jonathan Herring, *Medical Law and Ethics*, Oxford University Press, United Kingdom (2006), p.271.

⁸ See, L. Haberfield, "Surrogate Motherhood in Victoria: What now for Altruistic Surrogacy?", Monash University, Australia, 37 (1988), available at <www.heiononline.org/> Visited on 10.5. 2011.

⁹ For example, Hollywood celebrities such as Deidre Hall and Joan Lunden, Michael Jackson, Angela Bassett, and Kelsey Grammer. See Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self*, University of California Press, California (2010), p.298; Cara Birrittieri, *What Every Woman Should Know About Fertility and Her Biological Clock*, The Carrier Press, Inc., U.S.A. (2005), p.144.

¹⁰ Sidharacharyulu, "Surrogacy: Legal Implications", 3 *N. C. L. J.* 60 (1998), at p.61.

¹¹ Christine L. Kerian, "Surrogacy: A Last Resort Alternative for Infertile Women or Commodification of Women's Bodies and Children?" 12 *Wisconsin Women's Law Journal*, 113 (1997), at p.115.

parental rights to the biological father and his wife¹²”. This definition, however, refers only to one of the forms of surrogacy arrangements, namely, artificial insemination surrogacy (also known as traditional surrogacy)¹³. The *Encyclopedia Britannica* defines ‘surrogate motherhood’ as the practice in which a woman bears a child for a couple who are unable to produce children in the usual way. *Warnock Commission Report* defines surrogacy, as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth¹⁴. Another standard definition of ‘surrogacy’ is offered by the *American Law Reports* in the following manner:

“...a contractual undertaking whereby the surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural or biological father, to bear and deliver it to the natural or biological father, and to terminate all of her parental rights subsequent to the child’s birth”¹⁵.

The *New South Wales Law Reform Commission* has also defined surrogacy as ...an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer custody of the child at or shortly after birth¹⁶.

Thus a “surrogate” is “a person appointed to act in the place of another”. The word “mother”, when used as a verb, includes the meaning “to give birth to”. Thus, a “surrogate mother” is a woman appointed to give birth to a child in the place of

¹² Bryan A. Garner (ed.), *Black’s Law Dictionary*, West -Thomson Reuters, U.S.A. (6th ed.- 1990), p.1445.

¹³ *Supra* n. 4.

¹⁴ See, *The Report of the Committee of Inquiry into Human Fertilization and Embryology*, 1984 (U.K.) , para 8.1, available at <<https://www.ethicshare.org/node/751750>> Visited on 10.5.2011.

¹⁵ See, “Surrogacy: Is it Your Right?”, available at <www.iskarasmith.blogspot.com> visited on 10.5.2011.

¹⁶ See, New South Wales Law Reform Commission, *Artificial Conception - Discussion Paper 3: Surrogate Motherhood*, Sydney (1988), p 6. A similar definition is presented in National Bioethics Consultative Committee, *Surrogacy: Report 1*, Australia (1990), p. 3, available at <www.catalogue.nla.gov.au/Record/2622475> Visited on 5.6.2011.

another¹⁷ or a woman who is artificially inseminated and will carry the resulting child to term and then will relinquish the child to the biological father and his wife¹⁸. However, the term also applies to the technique of fertilizing an ovum either in another women's womb or in a test tube, and then transplanting the embryo into the womb of the surrogate who will carry it to term¹⁹. Thus surrogacy is the practice whereby a woman carries a child for another with the intention that the child should be handed over after its birth either voluntarily or for a fee. This carrying of a child may take different forms.

A woman who cannot bear a child for herself may commission another woman to carry a child for her. Such a woman who asks for another to carry the pregnancy for her is called '*Commissioning Mother*', and the woman who agrees to bear the child in her womb is called the '*Carrying Mother*'. The commissioning mother may provide the egg, so she is called the '*Genetic Mother*' also. The genetic father is the husband of the commissioning mother or in some cases may be an anonymous donor²⁰.

It is to be noted here that, surrogate motherhood is not a treatment for the historical problem of infertility, but it is a means for procuring a child who is genetically related to at least one of the parents of a childless couple²¹. This technology can be used by any of the following category of individuals such as married fertile couples, infertile couples, single, gays, lesbians, widowed, divorced and post-menopausal women. Though the use of surrogacy as a method for procuring a biological child has become more prevalent and widely accepted in the recent decades, it is to be noted that this method is not a twenty first century innovation, but it was also known even in the ancient times.

¹⁷ Hutton Brown, Miriam Dent, *et. al*, "Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth", 39 *Vanderbilt Law Review*, 597 (1986), at p.633.

¹⁸ Mimi Yoon, "The Uniform Status of Children of Assisted Conception Act: Does it Protect the Best Interests of the Child in a Surrogate Arrangement", 16 *American Journal of Law and Medicine* 525 (1990), at p.529.

¹⁹ Walter Wadlington, "Artificial Conception: The Challenge for Family Law" 69 *Virginia Law Review*, 465 (1983), at p.475.

²⁰ *Supra* n.10.

²¹ *Ibid*.

3.2.1 Origin and Development of Surrogacy

The concept of surrogacy has come into lime light, since the case of Elizabeth Kane in 1980. This technology focuses on fulfilling the desire and dream of individuals to have their own biological child with the help of another individual by using scientific advancements. This scientific procedure encompasses long standing concerns of human society to have an offspring to continue their legacy, name, family and property. The origin and development of surrogacy can be traced to the ancient cultures, religions, and developments all over the world which have shaped the attitude of the generations towards surrogacy and its human rights implications.

The practice of surrogate motherhood has had a long history and it was accepted in many ancient cultures. For example, the ancient Babylonian Legal *Code of Hammurabi* (18th century BC) recognized the practice of surrogacy and actually laid down detailed guidelines specifying when it would be permitted. The *Old Testament* suggests that surrogacy was accepted in early Jewish society as a legitimate way by which infertile couples could have children and create a family of their own. The National Bioethics Consultative Committee (NBCC) Report described the traditional Torres Strait Islander²² surrogacy practice of a woman or couple having a child for another woman or couple²³. Other societies such as the Kgatla people of Bechuanaland in Southern Africa and some traditional Hawaiian groups undertook similar practices. In these communities surrogate motherhood is seen as an act of friendship and generosity²⁴. However, in European cultures, though surrogacy was undoubtedly being practiced in the past, it had never been formally recognized by the society or the law. Thus surrogacy was known in almost all the ancient cultures all over the world. The origin and roots of surrogacy can be traced to the major religions

²² *Torres Strait Islanders* are the indigenous people of the Torres Strait Islands, part of Queensland, Australia.

²³ P. Ban, *The Application of the QLD Adoption Act 1964-1988 to the Traditional Adoption Practice of Torres Strait Islanders*, Master of Social Work Thesis, University of Melbourne, (1988), p.72, quoted in National Bioethics Consultative Committee, *Surrogacy: Report 1*, Australia (1990), p 38. available at <www.catalogue.nla.gov.au/Record/2622475> Visited on 5.6.2011.

²⁴ Glenda Emmerson, “Surrogacy: Born For Another”, *Research Bulletin*, No 8/96, Queensland Parliamentary Library, Publications and Resources Section, Brisbane, (September 1996).

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

3.2.2 Surrogacy in Mythology

Surrogacy is not so new as far as “new” reproductive technologies are concerned, and it is often noted that the practice dates back to Biblical times. The *Old Testament* offers the example of Abraham’s infertile wife, Sarah, who “commissions” her maid Hagar to bear her a child by persuading Abraham to sleep with her²⁵. Similarly, Rachel, the barren wife of Jacob, commissions her maid Bilhah to have a child by convincing Jacob to sleep with her²⁶. The class distinctions between the commissioning and surrogate women in these stories reflect modern day practices. These two stories are few of the earliest examples of surrogacy practices.

In Indian mythology there are various references to the practices which are similar to modern surrogacy. For example, in the *Bhagvata Purana*, there is a reference to the birth of Balaram, which suggests the practice of surrogate motherhood. Kamsa, the wicked king of Mathura, had imprisoned his sister Devaki and her husband Vasudeva because a prophecy had informed him that their child would be his killer. Every time Devaki delivered a child, he smashed its head on the floor. In this way he killed six children. When the seventh child was conceived, the Gods intervened. They summoned the Goddess Yogamaya and with her help they transferred the foetus from the womb of Devaki to the womb of Rohini (Vasudeva’s other wife who lived with her sister Yashoda across the river Yamuna, in the village of cowherds at Gokul)²⁷. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kamsa that the child was

²⁵ See *Genesis* 16.

²⁶ See *Genesis* 30:1-8; See, Angie Godwin McEwen, Note, “So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy”, 32 *Vand. J. Transnat’l L.* 271 (1999), at pp.274-75.

²⁷ Dr. Devdutt Pattanaik, “Infertility, Artificial Insemination & Surrogate Mother in Hindu Mythology” in Rachel Blatt (ed.), *Wombs For Rent? Gestational Surrogacy and the New Intimacies of the Global Market*, Submitted in partial fulfillment of the requirements for a Bachelor of Arts with Honors in Anthropology Brown University, (April 2009).

born dead²⁸. Thus the child conceived in the womb of Devaki was incubated in and delivered through another womb i.e. of Rohini²⁹. It is to be noted here that the present modern day developments in surrogacy allow transfer of foetus which is developed in the test tube to the womb of a women. But the above incidence in Indian mythology refers to a type of surrogacy in which the developed foetus was transferred from one womb to another womb. It reflects the level and extent of science and medical knowledge of ancient Indians.

Another popular story is that which is related to the birth of Kartikeya also called as Subramanya Swamy. Lord Kartikeya is the Commander of the army of the Gods³⁰ and he is also considered as the God of fertility by tradition³¹. He is the son of Lord Shiva, the father of universe and Goddess Parvati, the mother of universe. It is said that at the request of Gods for a person for the post of their army commander, Shiva gives a bija to be implanted in Mother Ganga³². In the modern times the bija can be considered as the genetic material of the father and because it is implanted in the river Goddess Ganga, she can be considered as a surrogate. However after sometime it becomes unbearable for the surrogate mother Ganga to carry the embryo³³. She makes a miscarriage. Then the God of fire Agni keeps the embryo on Saravana (A kind of grass believed to have the potential of nectar) and which may be considered as modern day incubator. The Sapta matrakas who can be considered as the nurses or care takers fed the child. Thus the God Kartikeya is born³⁴. This incidence can also be considered as a form of surrogacy in which initially the womb of a woman is used for conception of the foetus and later on the foetus is developed in incubator due to the inability of the surrogate mother to carry the foetus to the full term. At the same time this incidence also points out the various problems which may

²⁸ Raghav Sharma, "An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India", (working paper, on file with Nat'l Law Univ., Jodhpur), available at <<http://ssrn.com/abstract=997923>> Visited on 10.5.2011.

²⁹ *Supra* n.27.

³⁰ Bharadvaja Sarma, *Vyasa's Mahabharatam*, Academic Publishers, Kolkata (2008), p.299.

³¹ Basavaraj Naikar, *Indian English Literature*, Atlantic Publishers and Dsitributers, New Delhi (2003), p.23.

³² Dr. B. R. Kishore, *Lord Shiva*, Diamond Pocket Books Pvt. Ltd., New Delhi (2001), p.23.

³³ See, "Murugan", available at <<http://en.wikipedia.org/wiki/Murugan>> Visited on 20.9.2012.

³⁴ *Ibid*.

arise during a surrogacy procedure like inability of surrogate mother to carry foetus to full term, or a situation where surrogate mother wants to terminate her pregnancy before the full term. Thus the ancient Indian mythology offers a solution to the present day conflicts which may arise between the surrogate mother and commissioning parents.

Another well known story is that of the birth of Kauravas. According to the *Mahabharata*, Queen Gandhari (the wife of King Dhritarashtra) suffered a miscarriage. The embryo was split into one hundred pieces by the sages (doctors of the day) and implanted in one hundred Kumbhas and subsequently hundred children were born. Some of the historians argue that these Kumbhas are equivalent to the present day anonymous surrogate women³⁵. Thus it can be said that the glimpses of modern developments in surrogacy can be traced to the ancient mythology.

3.2.3 Development of Modern Surrogacy

The history of modern surrogacy methods can be traced back to 1899. It is to be noted that the various practices, customs and traditions followed by different communities all over the world have had a great impact on the development of surrogacy as a form of Assisted Human Conception. The practices followed by American Indians³⁶ can be considered as the beginning point of modern surrogacy methods. If a woman of American Indian tribe was found to be infertile, she would be sent to the medicine man. If even after his treatment, the woman was not able to conceive, the chief of the tribe had the power to grant liberty to her husband to take another woman and to have a child with that woman. Likewise, in recent European history, especially in Spain, it was common for the kings to take in several women for begetting a male child³⁷. Modern historians may criticize this practice as adultery or

³⁵ Nigam, M., Nigam, R., Chaturvedi, R., and Jain, A., "Ethical and Legal Aspects of Artificial Reproductive Techniques including Surrogacy", in *Anil Aggrawal's Internet Journal of Forensic Medicine and Toxicology*, Vol. 12, No. 1 (January - June 2011); See also, Dr. Mrs. Pratibha Ganesh Chavan, "Psychological and Legal Aspects of Surrogate Motherhood", available at <www.allindiareporter.in> Visited on 10.5.2011.

³⁶ *American Indian* may refer to, *Native Americans* in the United States or Indigenous people of the America.

³⁷ See, Ashley Kate, "History of Surrogate Motherhood", available at <<http://ezinearticles.com/2458369>> Visited on 10.5.2011.

polygamy, but it is to be noted that this practice was followed only for begetting a biological child and some similarity can be drawn with modern surrogacy³⁸. It can be seen that in these practices there is no use of technology.

The development of science and technology in the medical field gave rise to the modern surrogacy methods, which involves integration of science and technology with natural process of human conception. The successful birth of Louise Brown with the help of in-vitro fertilization in 1978 in England confirmed the thinking of the scientists and medical experts that a woman other than the genetic mother could be used to carry the foetus and deliver it³⁹.

In 1979, Dr. Richard Levin, gave suggestion to an infertile couple to use a woman as a donor as well as to carry the resulting foetus and deliver the child. Dr. Richard Levin examined in detail the pros and cons of the issue as well as the various social, ethical, religious and legal issues. As a result, the couple reached an agreement with a woman to act as a donor and surrogate mother. The surrogate mother was artificially inseminated in the early 1980's and she conceived within the first month. She gave birth to a baby boy after nine months and handed over the baby to the couple. The right of the surrogate mother as a legal guardian was terminated and guardianship was handed over to the biological father through a legal process⁴⁰. The pseudonym of the surrogate woman involved in this case was Elizabeth Kane, who agreed to give birth as a traditional surrogate mother for a financial compensation of \$10,000⁴¹. This type of surrogacy arrangement is now popularly known as commercial surrogacy. Thus this case is considered to be the world's first case of planned surrogacy.

³⁸ For example it is similar to present day traditional surrogacy. Traditional surrogacy means that, the surrogate mother contributes genetic material to the resulting child and gives birth to it as her own child.

³⁹ For more details about the birth of Louise Brown, See, "Surrogate Motherhood", available at <<http://www.mother-surrogate.net/eng/>> Visited on 10.5.2011.

⁴⁰ Ivory, "The History of Surrogacy", available at <surrogatemother.com> Visited on 10.5.2011; Also See, "Surrogacy", available at <<http://researchkathy.blogspot.com>> Visited on 10.5.2011.

⁴¹ See, "The History of Surrogacy", available at <www.fertilityproregistry.com> Visited on 10.5.2011.

In 1983, a menopausal woman at Monash University in Melbourne, Australia became the first woman to give birth to a baby by using donated eggs. It is to be noted that though this case is not a surrogate pregnancy, it is however a remarkable event which made the practice of gestational surrogacy possible. The year 1986 can be considered as a milestone in the history of surrogacy. In 1986 the world's first gestational surrogate pregnancy took place in USA. In this case the surrogate mother carried the biological child of a woman who had undergone an hysterectomy⁴² and therefore was unable to carry a child. The identities of the couple and that of the surrogate mother were not disclosed. However Noel Keane, the lawyer who represented the couple said that surrogate mother was a 23 year old girl and she received \$10,000 for her service⁴³.

The use of surrogacy as a procedure for procuring a biological child slowly gained acceptance. Generally, surrogacy practices were carried out in secret. However, the *Baby M Case*⁴⁴, due to its peculiar nature brought surrogacy within the knowledge of public. In this case Mary Beth Whitehead gave birth to Melissa Stern as a traditional surrogate mother in 1986. However after the birth of the child, Mary Beth changed her mind and instead of handing over the child to the intended parents, she decided to keep the baby herself. As a result there was a two year legal battle with Melissa's biological father, Bill Stern, and intended mother, Betsy Stern, over custody. Finally, the Sterns were successful in getting custody of the child and Mary Beth was given a right of visitation⁴⁵. This highly publicized case highlights the various conflicting legal and human rights issues involved in surrogacy and the need for a legal frame work for its regulation and control.

Along with the further developments in the field of surrogacy, there has been unprecedented increase in instances of application of surrogacy for procuring a biological child. One such instance is that of Teresa Anderson, a 54 year old woman

⁴² *Hysterectomy* is a surgery to remove a woman's uterus or womb. See for more, "Hysterectomy Fact Sheet", available at <www.womenshealth.gov>Publications> Visited on 10.5.2011.

⁴³ See, "Surrogate has Baby Conceived in Laboratory", available at <<http://www.nytimes.com/1986/04/17/html>> Visited on 10.5.2011.

⁴⁴ *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

⁴⁵ *Ibid.*

who gave birth to five boys as a gestational surrogate mother in 2005 for a couple she had met online. In August 2007, 58 year old Ann Stopler gave birth to her twin granddaughters. Her daughter, Caryn Chomsky, was unable to conceive due to cervical cancer. Another incidence is that of 56 year old Jaci Dalenberg who became the oldest woman ever to give birth to triplets in 2008. She acted as a gestational surrogate mother for her daughter Kim, and delivered her own grandchildren. One of the landmark events in the history of surrogacy is that of a surrogate woman who gave birth to her own grandchild at the age of 61 years. This event took place in Japan in 2008⁴⁶.

In India, the first gestational surrogacy took place in 1994 in Chennai⁴⁷. In 1997, the first commercial surrogacy was reported in India. A woman from Chandigarh agreed to carry a child for 50,000 rupees in order to obtain medical treatment for her paralyzed husband⁴⁸. Further in 1999, an Indian newspaper reported the story of a village woman in Gujarat who served as a surrogate for a German couple⁴⁹. It is estimated that, in India, the number of births through surrogacy has doubled between 2003-2006⁵⁰, and estimates range from 100-290 each year⁵¹ to as many as 3,000 in the last decade⁵².

⁴⁶ See, "History of Surrogacy", available at <www.information-on-surrogacy.com> Visited on 10.5.2011.

⁴⁷ See, Geeta Padmanabhan, "Hope in the Test Tube", *The Hindu*, January 19, 2006, available at <<http://www.thehindu.com/thehindu/mp/2006/01/19/stories/2006011900540200.htm>> Visited on 10.5.2011.

⁴⁸ Sandhya Srinivasan, "Surrogacy Comes Out of the Closet", *Sunday Times of India*, July, 6, 1997, at p.1.

⁴⁹ Jyotsna Agnihotri Gupta, "Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies", 13 *Eur. J. Women's Stud.* 23 (2006), at p.30.

⁵⁰ Sudha Ramachandran, "India's New Outsourcing Business – Wombs", *Asia Times Online*, June 16, 2006, available at <http://www.atimes.com/atimes/south_asia/hf16df03.html> Visited on 10.5.2011.

⁵¹ See, Kritivas Mukherjee, "Rent-a-Womb in India Fuels Surrogate Motherhood Debate", *Reuters*, Feb. 12, 2007, available at <www.reuters.com/article/latestCrisis/idUSDEL298735>; See also, Alifiya Khan, "Surrogacy is Soaring in India", *Hindustan Times*, Sept. 18, 2008, available at <http://www.hindustantimes.com/StoryPage/>> Visited on 10.5.2011.

⁵² See for more, Neeta Lal, "A Labour of Love", *Khaleej Times*, Feb. 29, 2008, available at <<http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/weekend/2008/Febr>> Visited on 10.5.2011.

3.3 Types of Surrogacy

Surrogacy is considered as a very sensitive and emotional issue which has far reaching impact on all the parties involved in it. Due to the delicate nature of surrogacy, it is vitally important that in order to be a successful procedure, all the parties are comfortable and confident with one another. There are various arrangements which are possible in surrogacy depending upon the suitability and convenience of the parties. This has given rise to various forms of surrogacy. Each surrogacy arrangement is unique, and the parties have the choice to select from several types of surrogacy, the one that is best and convenient to them⁵³.

Surrogacy can be classified into different types on the basis of the type of agreement entered into, financial transactions and relationships involved and on the basis of the use of genetic material. One of the basic classifications of surrogacy is based on the nature of the agreement entered into by the parties. Thus surrogacy can be classified as formal or informal surrogacy. *Formal surrogacy* arrangements are those in which the nature and terms of the agreement between the surrogate and the commissioning couple are clearly specified, and are generally in writing. These arrangements are otherwise described as ‘contractual surrogacy’. This term denotes the potential legal enforceability of such agreements by a court of law. *Informal surrogacy* arrangements are ‘non-contractual’ and lack the legal requirements of an enforceable contract, in that they are often vague and uncertain. In practice, they are generally difficult to detect and control⁵⁴.

Surrogacy can again be classified into two types i.e. *commercial surrogacy* and *altruistic surrogacy* depending upon the financial transactions and relationships involved between the surrogate mother and commissioning parents. *Commercial surrogacy* refers to arrangements which include payment of money or other benefits to the surrogate mother and, in some cases, her agents. *Altruistic surrogacy* refers to less formal arrangements between friends and relatives which involve no financial

⁵³ Faith Merino, *Adoption and Surrogate Pregnancy*, Infobase Publishing, U.S.A. (2010), p.20.

⁵⁴ See, Jody S. Kraus & Robert E. Scott, “Contract Design and the Structure of Contractual Intent”, 84 *New York University Law Review*, 1023 (2009).

reward for the surrogate mother. However, the distinction between *commercial* and *altruistic* surrogacy can be blurred because *altruistic* surrogacy may still involve payment of medical and ‘out of pocket’ expenses. According to Meggitt, every woman involved in surrogacy is motivated by altruism, although some are paid⁵⁵. Further, it is argued that money alone is insufficient to motivate a woman to become a mother in a surrogacy arrangement, and paid surrogacy just “perverts woman’s altruism”. The procedure of surrogacy involves the use of genetic material of the intended father or mother or surrogate mother and hence depending upon such use the surrogacy can be classified into two main types such as Traditional and Gestational Surrogacy.

3.3.1 Traditional Surrogacy or Partial Surrogacy

Traditional surrogacy is the most widely used method of surrogate pregnancy, as well as the most historically prevalent. Before the era of assisted reproductive technology and IVF, traditional surrogacy was the only form of surrogacy available. However this method was used in the ancient cultures and communities without the application of technology. The husband of the infertile woman would have access to another woman and after the birth of the child, the woman would hand over the child to the husband and his wife. The modern science and technology has made it possible for procuring a biological child with the help of another woman without sexual intercourse. In this process the woman is artificially inseminated with the semen of the husband of the ‘genetic couple’. Because it is her own egg that is being fertilized, the surrogate mother is genetically related to the foetus that she conceives. Therefore, any resulting child is genetically related to the male partner of the ‘commissioning couple’ but not the female partner⁵⁶. Thus it is also known as *partial surrogacy* or

⁵⁵ Meggitt, “Lessons to be Learnt in Parallels Between Adoption and Surrogacy”, *Policy Issues Forum*, (1991), p. 12, available at <210.8.42.131/documents/explore/ResearchPublications/.pdf> Visited on 10.5.2011.

⁵⁶ Peter Brinsden, “Clinical Aspects of IVF Surrogacy”, in Rachel Cook, Shelley Day Sclater & Felicity Kaganas, (eds.), *Surrogate Motherhood: International Perspectives*, Hart Publishing, U.K. (2003), p.101.

natural surrogacy, as the surrogate mother contributes genetic material to the resulting child and gives birth to it as her own child⁵⁷.

Typically, insemination is performed by a doctor within a clinical setting, although some centers may perform it in the surrogate's homes based on the belief that the surrogate's comfort level should be respected. During this time, the surrogate mother agrees to refrain from sexual intercourse with any man, including her husband if she is married, from the point of signing the contract until a pregnancy is confirmed and the entire process which can take up to an year. Since the surrogate mother will be the genetic mother of the child conceived, traditional surrogacy presents a unique opportunity for contracting couples to choose the genetic heritage of their child—an opportunity that is not afforded to adoptive parents. Often, this means contracting couples can specify phenotypic characteristics that they desire in a surrogate mother and can screen for undesirable traits, such as a genetic history of mental illness or disease. Many couples also look for a surrogate that resembles either of them⁵⁸.

When a surrogate is selected, she will be medically evaluated and tested for HIV as well as other venereal diseases. In some cases, the surrogate's husband is also tested for such diseases. When the surrogate has met contractual requirements for physical and mental fitness, she will be inseminated when fertile. Traditional surrogacy or partial surrogacy, though complicated by ethical uncertainty over the relationship between biological relatedness and kinship bonds, remains the most popular form of surrogacy in the world due to its high success rates and its low fees⁵⁹.

3.3.2 Gestational Surrogacy or Total Surrogacy

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

⁵⁷ *Supra* n.24.

⁵⁸ *Supra* n.53 at p.17.

⁵⁹ *Id.* at pp.17-18.

by the process of *in vitro* fertilization (IVF). These embryos are subsequently transferred to a woman who has agreed to act as a host for these embryos. In this case, the ‘surrogate host’ is therefore genetically unrelated to any child that may be born as a result of this arrangement⁶⁰. Thus it is also known as *total surrogacy* or *full surrogacy* because the foreign genetic material is implanted into a woman who gestates the child for another couple who are the genetic parents⁶¹.

In most cases, the contracting couple supplies the ova and sperm, which means the child conceived will be biologically related to them. However, in the event that one or both members of the contracting couple do not have viable gametes, the process may require donor eggs or sperm. Thus, in a gestational surrogacy, minimum three adults⁶², in some cases four⁶³ and in extreme cases five adults⁶⁴ may be involved in the conception of a child⁶⁵. Due to the lower success rates and the number of individuals involved, gestational surrogacy is often more expensive than traditional surrogacy. In an interview, Helena Ragone⁶⁶, a Director of one surrogacy center, referred to gestational surrogacy and IVF procedures as a “rip-off that simply prolongs the couple’s infertility while charging them outrageous sums of money per attempt⁶⁷”. According to the U.S. Department of Health and Human Services (HHS), in 2004⁶⁸ the success rate per cycle at the average fertility clinic was 33.7 percent, by using non-frozen, non-donor eggs and embryos⁶⁹.

It is to be noted that there are only two major forms of surrogacy all over the world, i.e. Traditional Surrogacy and Gestational Surrogacy. Both these forms of surrogacy have their own merits and demerits due to the differences in the procedure

⁶⁰ *Supra* n.56.

⁶¹ *Supra* n.24.

⁶² i.e. Surrogate, Intended Father and Intended Mother.

⁶³ i.e. Surrogate, Intended Father and Intended Mother, Egg or Sperm Donor.

⁶⁴ i.e. Surrogate, Intended Father and Intended Mother, Egg and Sperm Donor.

⁶⁵ *Supra* n. 53 at p.18.

⁶⁶ An Anthropologist and the author of *Surrogate Motherhood: Conception in the Heart*, Westview Press, U.S.A. (1994).

⁶⁷ *Id.* at p. 33.

⁶⁸ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, “Assisted Reproduction Technology Success Rates: National Summary and Fertility Clinic Reports”, (2004), available at <<http://ftp.cdc.gov/pub/Publications/art/2004ART508.pdf>> Visited on 6.8.2010.

⁶⁹ *Supra* n. 53 at pp.18-19.

involved and the expenses incurred. Regarding the acceptability of these two forms of surrogacy there are divergent opinions all over the world. In some countries, such as India, traditional surrogacy is considered highly a taboo, while in others, such as China, traditional surrogacy is the only legal surrogacy arrangement⁷⁰. In certain countries like Israel and Ukraine, both the forms of surrogacy are allowed⁷¹. Depending upon the type of surrogacy used, the methods of surrogate parenting may also differ.

3.4 Methods of Surrogate Parenting

There are mainly three methods of surrogate parenting. The first method is the artificial insemination method which is the traditional method and includes three steps. In the first step, the surrogate mother is artificially inseminated with the biological father's sperm. In the second step, the surrogate mother carries the foetus in her uterus for nine months and gives birth to the child. Lastly, the surrogate mother terminates all parental rights over the child and gives it to the biological or adopting father for his custody or adoption. This procedure is commonly known as traditional surrogacy⁷². This method is normally used in cases where the wife is infertile and the husband is fertile.

The second method of surrogate parenting is in-vitro fertilization. It involves the following five steps. Firstly, a fertile couple desiring a child gives an egg and semen to a doctor. Secondly, the doctor fertilizes the egg with the sperm in that semen through in-vitro fertilization. Thirdly, the fertilized egg is implanted in the surrogate mother's uterus. Fourthly, the surrogate mother carries the foetus in her uterus for nine months and gives birth to the child. Lastly, the surrogate mother terminates all parental rights over the child and gives it to the couple who donated the egg and semen. This method is used when the wife has an abnormality in her reproductive organs that prevents her egg from being fertilized by her husband's

⁷⁰ *Id.* at pp.17-18.

⁷¹ Svitnev K., "Legal Control of Surrogacy – International Perspectives", in Joseph G. Schenker, *Ethical Dilemmas in Assisted Reproductive Technologies*, Walter de Gruyter GmbH & Co., Berlin (2011), p.162.

⁷² See for more, Katharina Boele-Woelki, *Perspectives for the Unification and Harmonization of Family Law in Europe*, Intersentia, Oxford, U.K. (2003), p.414.

sperm or when the wife is unable to carry a child to term because she has an abnormality in her uterus. If the wife is able to conceive, but unable to carry the gestating foetus, the embryo transfer methods allow transfer of the naturally fertilized egg from the biological mother's womb to the surrogate mother's womb. This method is known as gestational surrogacy⁷³.

The third method of surrogate parenting is a modification of the in-vitro fertilization method and known as donor surrogacy, which involves five steps. The first four steps are identical to that of in-vitro fertilization method. The fifth step, however, differs. Instead of giving the child to the couple who donated the semen and egg, the surrogate mother gives the child to adoptive parents who are not biologically related to the child. There have been no reported incidents of the use of this method, but the method could be utilized in a situation in which both the husband and wife are infertile but wish to have a child with specific traits⁷⁴.

Although the above-mentioned three methods of surrogate parenting involve different medical techniques, and although the biological relationship of the couple receiving custody of the child may vary depending upon the method used, the legal consequences of contracting to perform each method are surprisingly similar. The methods are treated very much the same because most countries presume that the woman who gives birth to a child is the natural, biological mother of the child⁷⁵. Thus, depending on the infertility problem involved, either Artificial Insemination or IVF may be used in a surrogacy situation⁷⁶.

For surrogacy to be successful, three conditions are to be satisfied. Firstly, the parties to the surrogacy process must be able to arrange for the conception and birth of a child. Secondly, before actually doing so, the parties must reach an agreement defining what their respective rights and duties will be, both before and after the child

⁷³ Lewis Vaughn, *Bioethics: Principles, Issues, and Cases*, Oxford University Press, U.K. (2012), pp.355-57.

⁷⁴ Timothy F. Murphy, "Selecting the Traits of Children Prior to Birth", *Virtual Mentor*, Vol.14, No.2, 158-161 (February 2012).

⁷⁵ *Supra* n.17.

⁷⁶ *Supra* n.6.

is born. Thirdly, the parties must have some means by which they can enforce these rights and duties so as to ensure performance.

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

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

If the surrogate woman is successful in conceiving a child and carrying it to term, the contracting husband will, upon birth, acknowledge his legal paternity of the child. The surrogate then relinquishes all her parental rights over the child, after which the couple pays her. The contracting husband, as the legal father, obtains custody of the child, and the wife as stepmother, may initiate an adoption action in order to declare herself as the child's legal mother⁷⁷.

In practice, a surrogate mother typically receives a fee or honorarium from the sperm donor for her services. Ordinarily, the donor also pays for all the expenses of the procedure. There can be many variations in the terms of surrogate parenting agreements (the enforceability of which have been discussed in Chapter VI), but they center on a promise that the surrogate-mother will relinquish the child to the

⁷⁷ Thomas S. Bradley, "Prohibiting Payments to Surrogate Mothers: Lovers Labour Lost and the Constitutional Right of Privacy", 20 *J. Marshall L. Rev.* 715 (1986-1987), at p.718.

biological father or mother immediately after birth, renouncing all rights over the child and/or consenting to adoption. Other common provisions provide for genetic screening, medical and psychiatric evaluation, cooperation with medical directions during pregnancy, submission to amniocentesis if medically appropriate, or abstention from alcohol or other possible teratogens during pregnancy. Some persons or organizations providing surrogate mother intermediary services prefer to use married women who have had at least one healthy child. Such a requirement necessitates additional contractual provisions ensuring that the surrogate's husband will relinquish any rights he may have in the child and that adequate blood testing will be performed to confirm that the sperm donor is the biological father⁷⁸.

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

3.5 Surrogacy vs. Other forms of ART

Procreation as discussed earlier is a fundamental human drive. The image of happy parents holding a healthy baby pervades the human mind and the society⁷⁹. Hence the greatest motivation to use surrogacy is that it will help a couple to have a genetically related child. Thus a surrogacy arrangement is a boon to childless couples as it gives them the greatest gift of life, i.e. a child. It is pertinent to point out here that the impact of childlessness on married couples is very grave. Surrogacy thus provides an opportunity to such couples to beget a child and gives them satisfaction and happiness. The major benefits of surrogacy when compared to other forms of ART can be classified as follows:

⁷⁸ *Supra* n.19 at p.467.

⁷⁹ Michelle Sargent, "Regulating Egg Donation: A Comparative Analysis of Reproductive Technologies in the United States and United Kingdom", *Michigan Journal of Public Affairs*, Vol. 4, 1 (2007).

i) Genetic Link

The most important benefit of surrogacy is that it helps the couple to beget a child genetically related to at least one of the parent. Thus it helps to fulfill the natural instinct and desire to have a biological child. The urge to procreate, usually involves a desire to transmit one's own genetic heritage to the child and to participate in gestation and parturition⁸⁰. Thus it offers greater advantage to childless couples as compared to the traditional option of adoption.

ii) Prevention of Hereditary Diseases

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

iii) To Overcome Medical Risks

Surrogacy is the only option available to couples who are fertile but unable to beget a child due to risk factors involved in pregnancy. It is to be noted that some pregnancies involve high risks due to medical problems of the mother and could pose serious complications of premature births leading to deformities in the child or sometimes, such pregnancies may cause danger either to the life of the mother or child, or both⁸¹. So also in case of women suffering from AIDS, conceiving a child may be risky and is also dangerous to the future child.⁸² In these circumstances surrogacy is the best option available for the couple to beget a child. Likewise, it is

⁸⁰ John A. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth", 69 *Virginia Law Review*, 3, 405 (1983).

⁸¹ See, Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues*, Harvard University Press, U.S.A. (1990), p.31.

⁸² See generally, Lawrence O. Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements", 16 *L. Med. & Health Care* 7-17 (1988), at p.9.

also the best option in case of a woman having a disability such that it is difficult to carry a child or in cases where woman is suffering from allergic reactions⁸³. Surrogacy also offers hope to those couples who have crossed their age of natural conception⁸⁴ and those who have undergone tubectomy⁸⁵ or vasectomy⁸⁶.

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

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

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

Surrogacy can be used for begetting a child by those couples and individuals who are fertile and able to carry a child, but are unwilling to do so due to various reasons. The reasons can be their life style, career prospects, and profession⁸⁷.

(vi) To avoid problems related to infertility treatments

Surrogacy is not a treatment for infertility but it is an arrangement for begetting a child. Hence it can avoid the physical and mental sufferings caused to infertile couples due to the prolonged and sometimes unsuccessful infertility treatments.

⁸³ *Ibid.*

⁸⁴ Peter R. Brinsden, "Surrogacy" in Peter R. Brinsden (ed.), *Textbook of In - Vitro Fertilization and Assisted Reproduction*, Taylor & Francis Publication, U. K. (3rd edn. – 2005), p.394.

⁸⁵ *Tubectomy* is surgical procedure for permanent contraception to prevent future pregnancies in women.

⁸⁶ *Vasectomy* is a surgical procedure for male sterilization and/or birth control.

⁸⁷ M. Humphrey, *Families with a Difference: Varieties of Surrogate Parenthood*, Routledge, U.S.A. (1988), p.157.

Thus the method of surrogacy offers new ways for infertile and other individuals/couples to become parents. It facilitates the pursuit of biological parenthood and in many cases where couples/individuals have opted for surrogacy, it has brought enormous joy into their lives by helping them to beget a child which they never thought that they would have. It might be thought that such a miraculous procedure which creates new life and produces such happiness would be accepted by all without any objections. But it is not so. The practice of surrogacy is criticized and objected on various legal, ethical and social issues that pose severe challenges to the legal systems⁸⁸.

3.6 Surrogacy: Legal and Ethical Debates

Surrogacy has proved to be a boon for infertile couples. At the same time the increasing use of this technology has also led to various controversies and conflicting legal issues. These conflicts have at times erupted into a fierce debate over the legality of surrogacy. A discussion on this debate is necessary in order to understand the arguments underlying surrogacy. Further, since the controversy surrounding surrogacy, has been brought to limelight by the leading surrogacy cases all over the world as well as arguments made by legal scholars and commentators, such a discussion is important in determining how surrogacy should be dealt with by the legal systems in different countries in future⁸⁹. Most of the criticisms against surrogacy are based on various ethical, moral, religious and legal grounds. Admittedly, the influence of ethics, morality and religious practices cannot be ruled out in a legal discussion, as the ethics and morality have played an important role in shaping the societies attitude towards legal issues as well as the foundation of most of the legal systems of the world.

The moral, ethical and religious objections to surrogacy are based on the premise that life is a creation of God and human beings should not attempt to play God by interfering in the natural processes. Another serious objection in this regard is

⁸⁸ Anonymous, “Developments –Medical Technology and the Law”, 103 *Harvard Law Review* 1519 (1990), at p.1556.

⁸⁹ *Supra* n.11 at pp.119-120.

the fact that surrogacy procedure involves repeated trials which use either male or female genetic material or the human embryo. The wastage of human embryo is criticized as similar to murder, because according to some scholars human life begins at fertilization.

The major legal objection to surrogacy strikes at the very root of the procedure of surrogacy which is due to the need and requirement of a woman to act as a surrogate. Various scholars have criticized surrogate motherhood, as it presents intolerable risks to women, including physical risks, psychological risks, and symbolic risks such as objectification and commodification. Carl Schneider points out that “some surrogate mothers will become sick or even die”⁹⁰. Some commentators assert that the chances that the surrogate will be psychologically harmed by the process are very high, analogizing it to the psychological harms felt by birth mothers giving children up for adoption. Some surrogates do regret their decision to bear a child for another couple, as is evidenced by their decision to try to keep the child⁹¹.

Further many critics of surrogacy have focused on the notion that these arrangements reduce women to the value of their wombs. Such a warning was given by both the *Royal Commission* and the *Quebec Council for the Status of Women in Canada*, which suggested that reproductive technologies risk fragmenting the reproductive process and alienating women from their own reproductive capacities⁹². This is because the procedure of surrogacy separates motherhood as gestational, genetic and intended motherhood. Moreover, once a woman has agreed to be a surrogate mother, she has to follow all the terms and conditions of the contract during the entire process and more importantly she has to relinquish all her rights over the child after its birth. It is claimed that the entire process of reproduction is an inherent part of a women’s existence and that transferring a child to someone else upon its

⁹⁰ See Carl E. Schneider, “Surrogate Motherhood from the Perspective of Family Law”, 13 *Harv. L.J & Pub. Pol’y*, 125 (1990), at p. 125.

⁹¹ See, Scott B. Rae, “Parental Rights and the Definition of Motherhood in Surrogate Motherhood”, 3 *S. Cal. Rev. L & Women’s Stud.* 219 (1994), at p.242.

⁹² Rakhi Ruparelia, “Giving Away the ‘Gift of Life’: Surrogacy and the Canadian Assisted Human Reproduction Act”, 23 *Canadian Journal of Family Law*, 11 (2007), at p.26.

birth is unnatural and psychologically damaging⁹³.

The symbolic harm posed by surrogacy to society is that surrogacy may be characterized as baby selling, a practice that is totally against a civilized society. Some scholars argue that surrogacy treats children as commodities that can be bought or sold for a price. Others contend that surrogacy should be prohibited for the same reasons that the sale of organs for transplantation is prohibited⁹⁴. It is also argued that agreeing to participate in a surrogacy process is equivalent to prostitution⁹⁵ or adultery⁹⁶ or slavery⁹⁷. Further it is argued that surrogacy will degrade the inherent human dignity of a woman.

A similar argument has been made that surrogacy should be banned because of the potential physical, psychological, and symbolic risks to the resulting children. It has been asserted that a surrogate, who will be carrying a child, that she will not later rear, will lie about her health or will not take proper care during pregnancy because she will not care about the subsequent condition of the child. In addition to the risks that the surrogate mother herself may present to the child, commentators arguing against surrogacy also allege that the child may be harmed by parents who may not have undergone previous screening with respect to their suitability for parenting⁹⁸. Another major criticism which cannot be ruled out is that a surrogate child may suffer great psychological harm when the child comes to know about its parentage or origin⁹⁹. The critics also point out that the symbolic risk to the child due to surrogacy

⁹³ *Ibid.*

⁹⁴ *Supra* n.6 at p.213.

⁹⁵ See for more, Jean M. Sera, "Surrogacy and Prostitution: A Comparative Analysis", *Journal of Gender, Social Policy & the Law*, Vol. 5, Issue 2, 315 (2011).

⁹⁶ Michelle Ford, "The Best of Barry: Barry Student Article: Gestational Surrogacy is not Adultery: Fighting Against Religious Opposition to Procreate", 10 *Barry Law Review*, 81(2008).

⁹⁷ See for more, M. R. Patterson, "Surrogacy and Slavery: The Problematics of Consent in Baby M, Romance of the Republic, and Puddanhead Wilson", *American Literary History*, Vol. 8, No. 3, 449-470 (Autumn 1996).

⁹⁸ Lori B. Andrews, "Surrogate Motherhood: The Challenge for Feminists", 16 *Law Medicine & Health Care* 72 (1988), pp.80-81.

⁹⁹ See, Katherine O' Donovan, "Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights", *International Journal Law Policy Family* 21(2): 137-159 (2007).

is that it may lead to commodification of child¹⁰⁰ and selection of child with certain desirable traits¹⁰¹.

It is argued further that currently the biggest risk to children in the surrogacy context comes not from the actions of either set of parents but from the uncertain status of the law. In cases where surrogacy procedures or contracts are banned, it can cause the resulting children to be stigmatized as the product of a criminal act. In cases where surrogate contracts are non-enforceable, it can lead to the child being subjected to years of litigation to determine who will be considered to be his or her legal parents¹⁰².

In spite of all the arguments and criticisms against surrogacy, it cannot be denied that it offers a ray of hope to such individuals who have exhausted all possible means of begetting a child. Thus surrogacy can be considered as one of the best available means for alleviating both medical and social infertility¹⁰³, thereby meeting the needs of individuals who wish to have a biological child¹⁰⁴.

The supporters of surrogacy argue that that “if the right of individuals to procreate naturally by sexual intercourse is a protected right, then begetting a child with the help of assisted human reproductive technologies including surrogacy should also be protected”¹⁰⁵. These supporters argue that the “liberty interests protected by the Constitution do not change definition because of the presence or absence of reproductive technology”¹⁰⁶. The supporters of surrogacy also distinguish surrogacy from baby selling¹⁰⁷ and adoption on the basis that a surrogacy contract is entered before conception and the contracting father or contracting mother or both are often

¹⁰⁰ See for more, Anton van Niekerk and Liezl van Zyl, “The Ethics of Surrogacy: Women’s Reproductive Labour, 21 *Journal of Medical Ethics*, 345-349 (1995).

¹⁰¹ See for more, John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technology*, Princeton University Press, U.S.A. (1996).

¹⁰² Lori B. Andrews, “Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood”, 81 *Virginia Law Review*, 2343 (November 1995), p. 2359.

¹⁰³ *Supra* Chapter II.

¹⁰⁴ *Supra* n. 80 at pp. 418-419.

¹⁰⁵ Eric A. Gordon, “The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology”, 6 *St. Thomas Law Review*, 191 (1993), at p.200.

¹⁰⁶ *Supra* n.11 at p.121.

¹⁰⁷ Comment, “Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements”, 90 *Dickinson Law Review* 227 (1985), at p.253.

genetically related to the child¹⁰⁸.

Thus surrogacy is one of the hotly contested technological advancement in present times having a grave impact over the basic human rights. The various contentious and conflicting issues raised by surrogacy pose a daunting challenge to the courts as well as to the legislatures and policy makers. The manner in which these conflicts will be answered would have a profound effect on the way in which the society would view the relationship between parent and child. It would ultimately have far-reaching consequences on the reality of the relationship between parents and children of the future and the power of the state to regulate that relationship.

3.7 Surrogacy and the Legal Responses in Foreign Countries

The debate generated by surrogacy and the various moral, ethical, religious and legal issues raised by it have led to the view that there should be some policy or guidelines for its control and regulation. However there is no consensus of opinion among the countries of the world with respect to the legal measures to be adopted for the control and regulation of surrogacy. Different countries have adopted different guidelines and legislations as per their social, economic, cultural, and religious needs and legal requirements¹⁰⁹.

As an initial response to the regulation of surrogacy, various countries appointed committees for identifying the multiple issues raised by surrogacy. For example, the Warnock Committee in United Kingdom¹¹⁰, the Aloni Commission in

¹⁰⁸ Irma S. Russell, "Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising From Surrogacy Contracts", 27 *Journal of Family Law*, 596 (1988 /1989).

¹⁰⁹ Surrogacy contracts are entirely prohibited in countries such as Austria, Egypt, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, and Switzerland. The countries such as Canada, Denmark, Hong Kong, and Great Britain have national laws banning commercial surrogacy. But the countries like Ukraine and India are providing very favorable conditions for commissioning couples that permit and encourage surrogacy. For a helpful graphic depiction of the States' approach to surrogacy. See, Susan Markens, *Surrogate Motherhood*, University of California, California (2007), pp. 28-29, table 2.

¹¹⁰ This Committee was appointed in United Kingdom in 1982 to inquire into the technologies of in-vitro fertilisation (IVF) and embryology.

Israel¹¹¹, the Ministerial Committee on Assisted Reproductive Technology in New Zealand¹¹², and the Law Commission of India¹¹³ have considered the pros and cons of surrogacy. The legal disputes that emerged because of the surrogacy practices in countries all over the world have led to the adoption of laws and regulations for the control and management of surrogacy in various countries.

3.7.1 Israel

Israel is the first country to adopt a specific legislation for regulation of surrogacy. The Surrogate Motherhood Agreements Law, 1996 was enacted in Israel on the basis of the recommendations given by the Aloni Commission¹¹⁴. Thus Israel is a pioneer in regulating and facilitating commercial surrogacy agreements. The Surrogate Motherhood Agreements Law allows only for gestational surrogate arrangements, thereby implicitly forbidding traditional surrogacy. In addition, according to the Surrogate Motherhood Agreements Law, the sperm must be from the intended father.

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

¹¹¹ It was appointed in 1994 to investigate the legal, social, ethical, and religious issues implicated in the use of reproductive technology, and it concluded that there should be no interference in the right of access of these technologies.

¹¹² It was appointed in 1994 to advice about the practice of Assisted Human Reproduction in New Zealand.

¹¹³ In 2009, the Law Commission of India examined the need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy in india.

¹¹⁴ See, Israel Ministry of Justice, *Report of The Public-Professional Commission in The Matter of In Vitro Fertilization*, July, (1994).

from the Welfare Officer, the court determines that doing so would endanger the child's welfare. The intended parents are the "default" parents and, in the absence of extraordinary circumstances, they will be given custody of the child upon its birth and full rights of parentage shortly thereafter¹¹⁵.

3.7.2 Canada

In Canada, the Assisted Human Reproduction Act was adopted in 2004. However, it does not explicitly regulate who may or may not enter into a surrogacy arrangement. It forbids the payment of consideration to a woman to be a surrogate mother¹¹⁶. This is consistent with the principle, set out in Section 2(f) that 'trade in the reproductive capabilities of women and the exploitation of women for commercial purposes raises health and ethical concerns that justify their prohibition'. In addition, the Act forbids the payment to another person to arrange the services of a surrogate mother¹¹⁷. A surrogate mother may be reimbursed for expenditure incurred in relation to her surrogacy if a receipt is provided. She may also be reimbursed for loss of work related income incurred during her pregnancy provided certain conditions are fulfilled. It is an offence to counsel or induce a female believed to be less than 21 years of age to become a surrogate or to perform any medical procedure to assist such a person to become a surrogate¹¹⁸.

3.7.3 United Kingdom

In the United Kingdom, the law on surrogacy is found in the Surrogacy Arrangements Act, 1985¹¹⁹ and the Human Fertilization and Embryology Act, 1990¹²⁰. The Surrogacy Arrangements Act applies to surrogacy arrangements whether or not they are lawful and whether or not they are enforceable¹²¹. No surrogacy

¹¹⁵ Pamela Laufer-Ukeles, "Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis", 9 *Duke Journal of Gender Law and Policy*, 91 (Summer 2002), at p.98.

¹¹⁶ See, The Assisted Human Reproduction Act, 2004 (Canada), S. 6(1).

¹¹⁷ *Id.* S. 6(2).

¹¹⁸ *Id.* S. 6(4).

¹¹⁹ Hereinafter referred to as SA Act.

¹²⁰ Hereinafter referred to as HFE Act.

¹²¹ See, The Surrogacy Arrangements Act, 1985 (UK) S. 1(9).

arrangement is enforceable by or against any of the persons making it¹²². The Act defines ‘surrogate mother’ as a woman who carries a child under an arrangement which was made before she became pregnant; and this arrangement is made with a view that the child would be handed over to another person or persons who will (so far as practicable) exercise parental rights¹²³. Section 2 (1) deals with the subject of payment. It states that no person shall on a commercial basis initiate or take part in any negotiations with a view to making a surrogacy arrangement. A person does an act on a commercial basis if any payment is, or is to be, received. The prohibition does not, however, apply to the potential surrogate mother or to an intended parent. The Act reinforces this by stating that ‘payment’ does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother¹²⁴.

Although the Act does not make explicit what kind of ‘payment’ may be made to a surrogate or prospective surrogate mother, some regulation does occur, since any payment received by her will be assessed when parental or adoption orders are sought¹²⁵. The subject of parentage is dealt with in the HFE Act. Section 27 provides that the woman, who is carrying or has carried a child as a result of placing in her womb an embryo, or sperm and eggs, is to be treated as the mother of the child. If the woman is married and her husband consented to the procedure, and the embryo was not brought about with his sperm, he is treated as the father of the child¹²⁶. If the woman is not married, but she has accessed treatment services jointly with a man and his sperm was not used, the man is treated as the father of the child¹²⁷. Section 30 of the HFE Act creates a procedure by which the commissioning parents will be treated as the parents of the child. A court may make a parental order in their favor¹²⁸. In

¹²² *Id.* S. 1A.

¹²³ *Id.* S. 1(2).

¹²⁴ *Id.* S. 2(2), (3).

¹²⁵ See, the Human Fertilisation and Embryology Act, 1990 (UK), S.30, which states that no money (other than expenses approved by the court) must have been paid.

¹²⁶ *Id.* S. 28(1).

¹²⁷ *Id.* S. 28(3).

¹²⁸ Generally the court may do so only if the following conditions are satisfied: the commissioning couple are married; the gametes of the husband or the wife, or both, were used to bring about the; creation of the embryo; the application to the court is made within six months of the birth of the child; at the time of the application the child’s home is with the husband and the wife; at the time of the making of the order both the husband and wife have attained the age of 18; and the court is satisfied

situations where the Act does not apply (for example, when the commissioning couple are not married, or when neither of them is genetically related to the child), it appears that the commissioning couple would have to adopt the child under the Adoption and Children Act, 2002 (UK)¹²⁹.

3.7.4 New Zealand

New Zealand has passed legislation in this area in 2004, i.e. the Human Assisted Reproductive Technology Act. Prior to 2004 there was no legislation on surrogacy. However there was a ban on surrogacy by the clinics because the ethics committee had refused to approve the practice of IVF surrogacy involving altruistic embryo transfer to a relative or friend. The Ministerial Committee in its 1994 report criticized this decision¹³⁰. This led to the shift in policy of ethics committee and finally ten years later the Parliament enacted the law allowing surrogacy.

Section 14 of the 2004 Act declares negatively that a “surrogacy arrangement is not in itself illegal” but then states that it is not enforceable. In this Act, a “surrogacy arrangement” is one where “a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy¹³¹”. This definition is not restricted to surrogacy using assisted means but also includes arrangements that rely on natural intercourse and probably includes the Maori practice of “whangai¹³²” where there is an understanding that a child will be handed over to another member of the family. This becomes rather more important when the remaining provisions are noted. No one, including the surrogate mother, commissioning couple and an intermediary arranging a surrogacy, may give or receive valuable consideration. The Act expressly stipulates that any reasonable and necessary expenses for professional services, including legal advice, are not caught by the ban on valuable consideration.

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

¹²⁹ *Ibid.*

¹³⁰ See, Department of Justice, *Assisted Human Reproduction Navigating Our Future Report of the Ministerial Committee on Assisted Reproductive Technologies*, Wellington (1994), pp.112-114.

¹³¹ See, The Human Assisted Reproductive Technology Act, 2004, S. 5.

¹³² It is an ancient practice similar to adoption. See, *Keelan v. Peach* [2002] NZFLR 481.

Thus the Act in New Zealand allows not-for-profit surrogacy only. Whangai and do-it-yourself arrangements that do not involve cash transactions for profit are legal. Surrogacy through a regular clinic with the usual costs associated with the procedures is also legal. Anyone, including the surrogate mother, who steps outside these boundaries, may have committed an offence¹³³.

3,7.5 Unite States of America

In United States, there is no federal law on surrogacy. But many states have enacted laws dealing with surrogacy. There are great variations in the approaches adopted by different states. Some state Acts have provisions prohibiting surrogacy contracts or declaring them void or unenforceable¹³⁴. Others have expressly authorized and regulate surrogacy agreements¹³⁵. Altruistic, but not commercial, arrangements may be permitted. Not all states distinguish between traditional and gestational surrogacy. In states where there is no relevant legislation, there may be case law on certain aspects of surrogacy, especially on the question of parentage¹³⁶. Thus, state laws on surrogacy are hardly uniform. In an effort to provide such uniformity, the American Bar Association has drafted the American Bar Association Model Act Governing Assisted Reproductive Technology¹³⁷. Article 7 of this Act addresses gestational surrogacy, providing various approaches to the conditions for the enforceability of gestational agreements. Meanwhile, Article 8 permits reimbursement of expenses to the surrogate and payment of reasonable compensation. Further, Article 8 of the Uniform Parentage Act, 2000 addresses gestational agreements, their validation by court hearing of, and parentage issues.

¹³³ See, Bill Atkin, *Regulation of Assisted Human Reproduction: The Recent New Zealand Model in Comparison with Other Systems*, Victoria University of Wellington, New Zealand, p.18, available at <<http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Atkin.pdf>> Visited on 13.6.2011.

¹³⁴ See, the Statutes of States such as Arizona, the District of Columbia, Indiana, Louisiana, Michigan, Nebraska, New York, North Dakota, and Utah.

¹³⁵ See, the Statutes of States such as Florida, Nevada, New Hampshire, and Virginia, for example, have statutorily permitted the enforceability of surrogacy contracts, but not the payment to surrogates.

¹³⁶ See, Margaret Ryznar, "International Commercial Surrogacy and Its Parties", 43 *John Marshall Law Review*, 1009 (2010).

¹³⁷ See, American Bar Association, *American Bar Association Model Act Governing Assisted Reproductive Technology* (2008), available at <<http://www.abanet.org/family/committees/artmodelact.pdf>> Visited on 10.5.2011.

3.8 Surrogacy in India and the Legal Response

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

The Law Commission of India in its report points out that the surrogacy costs in India is about \$25000 to \$30000 which is around 1/3rd of the costs in developed countries like United States of America¹³⁸. The Centre for Social Research (CSR)¹³⁹, New Delhi in its study report given in the year 2012¹⁴⁰, identifies that the fees for surrogates in India ranges from \$2,500 to \$7,000 and the total costs for surrogacy arrangements can be anything between \$10,000 and \$35,000. Therefore, it is a lot less than what intended parents pay in the United States, where rates fluctuate between \$59,000 and \$80,000¹⁴¹. Another statistics shows that, a surrogacy arrangement, including IVF, costs about \$11,000 (approximately Rs. 5,00,000) in India, while in the United States of America, surrogacy alone, excluding ART charges, costs \$15,000 (Rs 6,75,000). Likewise in United Kingdom, an IVF cycle costs about £7,000 (Rs. 5,

¹³⁸ Law Commission of India, “Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”, Report No. 228, (August 2009), p.11.

¹³⁹ Centre for Social Research is a non-profit, non-governmental organization established in the year 1983 in New Delhi. See for more, the official website of CSR <<http://www.csrindia.org>> Visited on 10.8.2012.

¹⁴⁰ See, Centre for Social Research (CSR), *Surrogate Motherhood- Ethical or Commercial*, p.3. Report released in the year 2012, available at <www.womenleadership.in/Csr/SurrogacyReport.pdf> Visited on 10.8.2012.

¹⁴¹ *Ibid.*

00,000 approx.) and surrogacy costs about £10,000 (Rs. 7, 00,000 approx.)¹⁴². The cost of gestational surrogacy in Canada is approximately \$29,600 - \$68,500 and the cost of traditional surrogacy is approximately \$19,600 - \$ 68,500¹⁴³. In Russia the minimum cost for surrogacy arrangement is about \$35,000¹⁴⁴.

Thus it can be seen that, the cost of surrogacy arrangements in India is very low when compared to other countries. Further, the regulations that deal with surrogacy are also minimal¹⁴⁵ and there are no restrictions with respect to who can be the intended parents. As a result, the unmarried, divorced, aged, gays and lesbians who may be prohibited in their country to use surrogacy can come to India and fulfill their dream of begetting a child. Thus the strongest incentive for foreigners to travel to India is most likely to be the relatively low costs involved in the process coupled with the limited legal regulations.

In addition to the above mentioned reasons, there are many other reasons also due to which the foreign couples or individuals come to India for availing the benefits of surrogacy. Some of the key reasons are that India offers the advantages of well qualified and experienced doctors, world class private health care providers, English speaking doctors and staffs to facilitate such process, and more importantly easy access to surrogate women¹⁴⁶. Moreover the Indians show a great commitment in handing over the new born to their intended parents immediately after birth and till now no dispute is reported regarding refusal of surrogate to hand over the baby to the

¹⁴² See, Widge A., "Socio-Cultural Attitudes Towards Infertility and Assisted Reproduction in India", in Vayenna E., Rowe P.J., & Griffin P.D. (eds.), *Current Practices and Controversies in Assisted Reproduction*, World Health Organization, Geneva (2002), pp.60-74; Sarojini *et al.*, "Globalization of Birth Markets: A Case Study of Assisted Reproductive Technologies in India", *7 Globalization and Health*, 27 (2011), at p.31.

¹⁴³ See, "Surrogacy in Canada" (Webpage), available at <<http://www.surrogacy.ca/services/cost-of-surrogacy.html>> Visited on 20.9.2012.

¹⁴⁴ See, "Russia – Low Cost Surrogacy Programme", available at <<http://www.ivfcostworldwide.com/russia-low-cost-surrogacy-program.html>> Visited on 20.9.2012.

¹⁴⁵ Swami M. *et al.*, "Surrogate Mother: A Legal Aspect", *A. J. P. T. R.* 2(3), 137, (2012), p.146.

¹⁴⁶ Sama - Resource Group for Women and Health, *Unravelling the Fertility Industry: Challenges and Strategies for Movement Building International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies*, SAMA, New Delhi (2010), p.47.

intended parents¹⁴⁷. So also when compared to foreign women the Indian women have a more methodical lifestyle and most of them do not indulge in drinking, smoking, use of drugs and narcotics. Further, the cost of living in India is economical¹⁴⁸ and the foreign couples or individuals who come to India can also enjoy visiting world famous tourist destinations¹⁴⁹ and then go back with the baby once the surrogacy arrangement is over. Lastly, the success rates of surrogacy in India are also considered as very high¹⁵⁰.

Due to all the above said reasons, India has become a favorable destination for foreign couples who look for a cost-effective surrogacy arrangement and a whole branch of medical tourism has flourished on the surrogacy practice¹⁵¹. As a result, the surrogacy business is well-established in India, with an estimated annual turnover of half a billion dollars¹⁵². The exact figures are not available and hard to verify. However, according to one estimate, India's reproductive tourism business is estimated to be approximately 400 million US dollars a year¹⁵³. As per the CSR Report, the volume of surrogacy industry is estimated to be around \$500 million and the number of cases of surrogacy is increasing rapidly¹⁵⁴. Thus the true extent of surrogacy practice in India is not known, but from the above two reports it is clear that, the surrogacy industry is fetching revenue from 400-500 million US dollars a year¹⁵⁵.

¹⁴⁷ Dr. Kiran Rai, "Law for Surrogacy: Need of the 21st Century", *International Journal of Research in Commerce, Economics & Management*, Vol.1, No. 1, 151, (2011).

¹⁴⁸ Apoorv Dwivedi, "Surrogate Mothers and Legal Complexity", available at <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1612712> Visited on 20.8.2012.

¹⁴⁹ *Ibid.*

¹⁵⁰ George Palattiyil, *et al.*, "Globalization and Cross-Border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work", *International Social Work*, 53 (5) 686 (2010), at p.689.

¹⁵¹ *Supra* n.138 at p.11.

¹⁵² See, The draft made by Permanent Bureau of Hague Conference on Private International Law established by the World Organization for Cross-Border Co-Operation in Civil and Commercial Matters, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, Preliminary Document No. 11, (March 2011) for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, p.7.

¹⁵³ *Ibid.*

¹⁵⁴ *Supra* n.140 at p. 23.

¹⁵⁵ For more details on estimates of surrogacy turn-over in India, see, Shyantani Das Gupta & Shamita Das Gupta, "Motherhood Jeopardised: Reproductive Technologies in Indian Communities", in Jane

The places like Anand, Surat, Jamnagar, Bhopal and Indore have become the major centers for surrogacy practices. A large number of couples are travelling to these places not only from India but also from western countries and from other countries like Sri Lanka, Pakistan, Bangladesh, Thailand and Singapore to fulfill their desire for a child¹⁵⁶. It is estimated that there are more than 600 fertility clinics established in both rural and urban areas spread over in almost all states of India. However, the state of Gujarat is particularly popular, especially among westerners¹⁵⁷. In fact India in general and the state of Gujarat in particular is rapidly becoming the center for Child Process Outsourcing (CPO)¹⁵⁸.

In India, though surrogacy is gaining popularity and is rapidly developing as an industry, the Government has been very slow in responding to the changing situations. In the absence of a legislative action, the Indian Council for Medical Research¹⁵⁹ has come up with certain ethical guidelines for regulating assisted human reproductive technologies in general and it also includes guidelines for surrogacy practices. In 2000, the ICMR adopted *Ethical Guidelines for Biomedical Research on Human Participants*, in which they prescribed certain guidelines to deal with ART in

Maree Maher, *The Global Politics of Motherhood: Transformation and Fragmentation*, Routledge, U.S.A. (2010), p.138.

¹⁵⁶ *Supra* n.140 at p.6.

¹⁵⁷ *Ibid.*

¹⁵⁸ See generally, J. Brad Reich & Dawn Swink, "Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyber-Procreation Era", 14 *J. Health Care L. & Pol'y*, 241 (2011); Sharmila Rudrappa, "Making India the 'Mother Destination': Outsourcing Labor to Indian Surrogates", in Christine L. Williams & Kirsten Dellinger (eds.), *Gender and Sexuality in the Workplace (Research in the Sociology of Work, Volume 20)*, Emerald Group Publishing Ltd., United Kingdom (2010), pp.253-285; Amy Gold, "Surrogacy in India: The Latest Outsourcing Industry", available at <<http://blogcritics.org/culture/article/surrogacy-in-india-thlatest-sourcing/>> Visited on 20.9.2012.

¹⁵⁹ Hereinafter referred to as ICMR. The Indian Council of Medical Research, New Delhi, is the apex body in India for the formulation, coordination and promotion of biomedical research, and is one of the oldest research bodies in the world. This was established in the year 1911 by the Government of India under the title Indian Research Fund Association (IRFA) with the specific objective of sponsoring and coordinating medical research in the country. After independence, several important changes were made in the organization and the activities of the IRFA. It was re-designated in 1949 as the Indian Council of Medical Research. See for more, the official website of ICMR, available at <http://www.icmr.nic.in/About_Us/About_ICMR.html> Visited on 20.8.2012.

general¹⁶⁰. So also in the same year, “Statement of Specific Principles for Assisted Reproductive Technologies, 2000” was released by ICMR¹⁶¹.

Further in 2002, the ICMR submitted a Draft *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics, 2002* to the Ministry of Health and Family Welfare¹⁶². It is pertinent to point out that, this step of ICMR has been interpreted by many authors as a step of legalization of commercial surrogacy in India¹⁶³. However, this Draft was not officially adopted by the Government of India in 2002, nor it was a legislative step and hence it cannot be considered as a step of legalization of surrogacy in India. In fact, this draft was later modified and adopted by the ICMR officially in 2005 after consultation with the National Academy of Medical Sciences, practitioners of ART, and the Ministry of Health and Family Welfare¹⁶⁴.

3.8.1 ICMR Guidelines, 2005 and Surrogacy

The ICMR Guidelines, 2005 was adopted with the main objective to provide ethical guidelines for regulating ART clinics in India. However, these guidelines also contain certain provisions for dealing with surrogacy. The guidelines defines surrogacy as an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and

¹⁶⁰ See, Indian Council of Medical Research, *Ethical Guidelines for Biomedical Research on Human Participants*, New Delhi (2006), p.viii, available at <http://icmr.nic.in/ethical_guidelines.pdf> Visited on 10.7.2012.

¹⁶¹ Usha Rengachary Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India”, 39 *Cumberland Law Review*, No.1, 15 (2008-2009), at pp.35-36.

¹⁶² See, Erica Davis, “The Rise of Gestational Surrogacy and the Pressing Need for International Regulation”, 21 *Minn. J. Int’l L.* 120 (2012), at p.126; Mrs. Adhilakshmi Logamurthy, “Legalizing Surrogacy in India”, available at <http://tnfwl.com/p/news_letter/Legalizing_Surrogacy_in_India.pdf> Visited on 15.9.2012; Kari Points, “Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji”, available at <<http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf>> Visited on 10.7.2012.

¹⁶³ John Connell, *Medical Tourism*, CAB International, U. K. (2011), p.142; Wendy Chavkin & JaneMaree Maher, *The Global Politics of Motherhood: Transformation and Fragmentation*, Routledge, New York (2010), p.137; Stephanie Watson & Kathy Stolle, *Medical Tourism*, ABC-CLIO, U.S.A. (2012), p.135; Babu Sarkar, “Commercial Surrogacy: Is it Morally and Ethically Acceptable in India?”, *Practical Lawyer*, (December 2011), S-11; Cara Luckey, “Commercial Surrogacy: Is Regulation Necessary to Manage the Industry?” *Wisconsin Journal of Law, Gender & Society*, Vol. 26:2, 213 (2011), at p.226.

¹⁶⁴ *Supra* n.161 at p.31.

hand over the child to the genetic parents for whom she is acting as a surrogate¹⁶⁵. It states that, surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term¹⁶⁶. ART used for married woman with the consent of the husband does not amount to adultery on part of the wife or the donor. However ART without the husband's consent can be a ground for divorce or judicial separation¹⁶⁷.

The guidelines state certain conditions to be followed by a surrogate mother such as, a surrogate mother should not be over 45 years of age¹⁶⁸ and no woman may act as a surrogate more than thrice in her lifetime¹⁶⁹. Before accepting a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full-term pregnancy¹⁷⁰. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate¹⁷¹. However, an oocyte donor cannot act as a surrogate mother for the couple to whom the oocyte is being donated¹⁷². It further mandates that, a surrogate mother must register as a patient and as a surrogate in her own name and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use/register in the name of the person for whom she is carrying the child, in order to avoid any legal issues, particularly in the untoward event of maternal death¹⁷³. There must be informed consent by the surrogate and it must be witnessed by one who is not associated with the clinic¹⁷⁴.

The guidelines also consider the interests of surrogate mother and state that, "all the expenses of the surrogate mother during the period of pregnancy and post-

¹⁶⁵ ICMR Guidelines, R.1.2.33.

¹⁶⁶ *Id.* R.3.10.2.

¹⁶⁷ *Id.* R.3.16.2.

¹⁶⁸ *Id.* R.3.10.5.

¹⁶⁹ *Id.* R.3.10.8.

¹⁷⁰ *Id.* R.3.10.5.

¹⁷¹ *Id.* R.3.10.6.

¹⁷² *Id.* R.3.5.4.

¹⁷³ *Id.* R.3.5.4.

¹⁷⁴ *Id.* R.3.5.22.

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 mother¹⁷⁵. Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect¹⁷⁶.

The guidelines also tries to protect the interests of the child and thus prohibits sex selection at any stage after fertilization, or abortion of foetus of any particular sex, except to avoid the risk of transmission of a genetic abnormality assessed through genetic testing of biological parents or through pre-implantation genetic diagnosis (PGD)¹⁷⁷. The ART clinics are also prohibited from making an offer to provide a couple with a child of the desired sex¹⁷⁸. Further it mandates that, advertisements regarding surrogacy should not be made by the ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, rests with the couple, or a semen bank¹⁷⁹. The guidelines also stipulate that, the birth certificate of surrogate child shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother¹⁸⁰. A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs¹⁸¹. 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 apply¹⁸². Most importantly, the guidelines states that, a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with

¹⁷⁵ *Id.* R.3.5.4.

¹⁷⁶ *Id.* R.3.10.3.

¹⁷⁷ *Id.* R.3.5.9.

¹⁷⁸ *Id.* R.3.5.10.

¹⁷⁹ *Id.* R.3.10.4.

¹⁸⁰ *Id.* R.3.5.4.

¹⁸¹ *Id.* R.3.10.1.

¹⁸² *Id.* R.3.12.4.

consent of both spouses, and with all the attendant rights of parentage, and inheritance¹⁸³.

The guidelines are a positive step towards the regulation of surrogacy in India and contain provisions for protecting the interests of surrogate woman as well as the child. However, there are many drawbacks in these guidelines. As per the definition of surrogacy provided in these guidelines only gestational surrogacy can be practiced in India. Moreover, the woman can act as a surrogate only for the genetic parents. Thus the guidelines are unclear about the situation where one of the intended parents was not able to contribute the genetic material. The question arises whether they can take the help of a donor? This question is also relevant, when the gays, lesbians and single individuals want to use surrogacy for begetting a child. Further, the restriction that only gestational surrogacy can be practiced, would create hardship for the intended parents as they would have to search for egg donor also in case the female partner of intended parents is unable to provide the genetic material. The guidelines also stipulate that, the surrogacy can be availed normally by patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term. So the guidelines are impliedly prohibiting the use of surrogacy by married fertile couples. Further, the gay couples and single men can use surrogacy as it is physically/medically impossible to them to carry a child. However it is unclear regarding the issue whether a lesbian couple/ single woman can have access to surrogacy.

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

¹⁸³ *Id.* R.3.16.1.

material and if only one of them had contributed, then, certificate will carry the name of such partner and the donor.

The guidelines are silent regarding the important issues like, the minimum age for acting as a surrogate woman, the previous pregnancies, and number of children. It merely mentions that a woman can act only thrice as a surrogate. This means that a woman in her life time may undergo five or more than five pregnancies, i.e. two or more children from her marriage and acting as a surrogate thrice. Such pregnancies may cause harm to the health of the woman. Moreover, the guidelines are also silent regarding the liability issues in case of any harm caused to surrogate mother as a result of surrogate pregnancy. Likewise the guidelines do not address the situations of refusal by intended parents to accept the child after the birth.

Certain provisions in the guidelines are also conflicting with one another. On one hand the guidelines mention that there would be no bar to the use of ART by a single woman who wishes to have a child, and no ART clinic may refuse to offer its services to the above said persons, provided other criteria mentioned in this document are satisfied. The child thus born will have all the legal rights on the woman or the man. Thus a fertile as well as infertile single woman can have access to surrogacy. On the other hand, the guidelines states that, surrogacy should be allowed only to those individuals who are physically/medically unable to carry a child¹⁸⁴. So also, the guidelines state that, a third party donor of sperm or oocyte must be informed that the offspring will not know his/her identity¹⁸⁵. However, at the same time, as per the guidelines the genetic parents name is to be mentioned in the certificate. So it is not possible to ensure the anonymity of donor.

The ICMR guidelines thus suffer from the above mentioned defects. Further, these guidelines are non-binding and voluntary in nature and hence some of the authors argue that the ART clinics often do not adhere to these directives and thereby

¹⁸⁴ *Id.* R.3.10.2.

¹⁸⁵ *Id.* R.3.5.1.

potentially compromise on the safety of surrogates¹⁸⁶. Thus though the ICMR guidelines aim towards regulation of ART practices including surrogacy, they are not adequate to protect the interests and rights of all the stakeholders involved in surrogacy.

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

3.8.2 The Report of Law Commission of India

The Law Commission of India after a detailed discussion submitted its report to the Government of India in August 2009. This report is titled as “Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”¹⁸⁷. The Law Commission has observed:

“the legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment

¹⁸⁶ See, Catherine London, “Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts”, 18 *Cardozo Journal of Law & Gender*, 391 (2012).

¹⁸⁷ This report was submitted to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice A.R. Lakshmanan, Chairman, Law Commission of India, on the 5th day of August, 2009, as the Law Commission Report No. 228.

of social ends and purposes which surrogacy can serve would be irrational. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones”¹⁸⁸.

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

1. Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.
2. A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
4. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is

¹⁸⁸ *Supra* n.138 at pp.6-7.

resorted to if biological (natural) parents and adoptive parents are different.

5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

7. Right to privacy of donor as well as surrogate mother should be protected.

8. Sex-selective surrogacy should be prohibited.

9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act, 1971 only¹⁸⁹.

The Law Commission thus recommended that active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto¹⁹⁰. Similar concern has been raised by Indian Judiciary in the case of *Jan Balaz v. Anand Municipality*¹⁹¹.

The Gujarat High Court stated that, “the legislature has to address lot of issues like rights of the children born out of the surrogate mother; rights and duties of the donor and the surrogate; and various other legal, moral and ethical issues”¹⁹². The Court referred to the guidelines issued by ICMR as well as the ART (Regulation) Bill, 2008 and observed that, “there is an extreme urgency to adopt a legislation answering all the issues raised by surrogacy”¹⁹³. Considering the pressing need for a legal framework, a draft bill was prepared by a 12 member committee including experts from ICMR, Ministry of Health and Family Welfare and specialists in the field of ART and was presented before the winter session of Parliament in 2010. However this Bill has not been yet officially enacted as legislation.

¹⁸⁹ *Id.* at pp.25-27.

¹⁹⁰ *Id.* at p.7.

¹⁹¹ A.I.R. 2009 Guj. 21.

¹⁹² *Id.* at p.26, para.19.

¹⁹³ *Id.* at p. 27.

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

The Bill was made for providing a national framework for the accreditations, regulation and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto¹⁹⁴. The Bill defines surrogacy as, “an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate”¹⁹⁵. The Bill provides for the establishment of a National Advisory Board¹⁹⁶ and State Boards¹⁹⁷ for exercising the jurisdiction and powers and to discharge the functions and duties conferred or imposed on the Boards by or under this Act.

The Bill legalizes the surrogacy practices in India by stating that, both the couple/ individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable¹⁹⁸. The Bill provides that, subject to the provisions of this Act and the rules and regulations made there under, assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples¹⁹⁹. Thus regardless of being fertile or infertile the couple or individual can avail surrogacy in India. They can obtain the service of a surrogate through an ART bank²⁰⁰, which may advertise to seek surrogacy. But no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy²⁰¹. However, the Bill prohibits ART clinics from advertising to seek surrogacy for its clients²⁰².

¹⁹⁴ See, The Assisted Reproductive Technology (Regulation) Bill, 2010, Statement of Objects and Reasons.

¹⁹⁵ See, The Assisted Reproductive Technology (Regulation) Bill, 2010, S. 2(aa).

¹⁹⁶ *Id.* S.3 & 5.

¹⁹⁷ *Id.* S. 6 & 8.

¹⁹⁸ *Id.* S. 34 (1).

¹⁹⁹ *Id.* S. 32(1).

²⁰⁰ *Id.* S. 34(7).

²⁰¹ *Id.* S. 34(7)

²⁰² *Id.* S. 34(7).

The Bill provides the criteria for acting as a surrogate and states that, no woman of less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act²⁰³. It also states that, no woman shall act as a surrogate for more than five successful live births in her life, including her own children²⁰⁴. Only Indian citizens shall have a right to act as a surrogate, and no ART bank/ART clinics shall receive or send an Indian for surrogacy abroad²⁰⁵. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual²⁰⁶. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate²⁰⁷. Further, any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months²⁰⁸.

The Bill lays down certain duties for the surrogate mother. It provides that, a surrogate mother shall, in respect of all medical treatments or procedures in relation to the concerned child, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate mother, and provide the name or names and addresses of the person or persons, as the case may be, for whom she is acting as a surrogate²⁰⁹. In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as a surrogate²¹⁰. A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy²¹¹. Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act that would harm the foetus during pregnancy and the child after birth, until the time the child is handed over to the designated

²⁰³ *Id.* S. 34(5).

²⁰⁴ *Id.* S. 34(5).

²⁰⁵ *Id.* S. 34(22)

²⁰⁶ *Id.* S. 34(18)

²⁰⁷ *Ibid.*

²⁰⁸ *Id.* S. 34 (6)

²⁰⁹ *Id.* S. 34(8).

²¹⁰ *Id.* S. 34(16).

²¹¹ *Id.* S. 34(13).

person(s)²¹². Most importantly, the Bill states that, a surrogate mother shall relinquish all parental rights over the child²¹³.

The Bill also provides various rights to a surrogate mother. All information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction²¹⁴. The surrogate mother can receive the agreed amount as compensation for acting as a surrogate as per the surrogacy agreement from the couple or individuals seeking such service²¹⁵. Further, the Bill states that, a surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them²¹⁶.

The Bill also lays down certain rights and duties for the intended parents. The couples/ individuals who avail the service are entitled to receive a birth certificate for the baby born through surrogacy mentioning that such couples/individuals are the parents²¹⁷. The parents of a minor surrogate child have the right to access information about the donor, other than the name, identity or address of the donor, or the surrogate mother, when and to the extent necessary for the welfare of the child²¹⁸. It is the duty of persons who avails such surrogacy services to bear all expenses of the surrogate pregnancy. This expense includes those related to such pregnancy achieved in furtherance of ART as well as during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice to the biological parent or parents²¹⁹. The expenses also include insurance for the surrogate mother and the child until the child is handed over to them or any other person as per the agreement and till the surrogate mother is free of all health

²¹² *Id.* S. 34(23).

²¹³ *Id.* S. 34(4).

²¹⁴ *Id.* S. 34(12).

²¹⁵ *Id.* S. 34(3).

²¹⁶ *Id.* S. 34(17).

²¹⁷ *Id.* S. 34(10).

²¹⁸ *Id.* S. 32(3).

²¹⁹ *Id.* S. 34(2).

complications arising out of surrogacy²²⁰. Most importantly, the Bill mandates that the person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act²²¹. Further, the Bill states that, if the intended parents are a non-resident Indian, they should appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy, till the child/ children are delivered to the foreigner or foreign couple or the local guardian²²².

The ART Bill, 2010 contains numerous provisions for the protection of interests and welfare of the surrogate child. To avoid any misuse of ART techniques, the Bill provides that, the Pre-implantation Genetic Diagnosis shall be used only to screen the embryo for known, pre-existing, heritable or genetic diseases or as specified by the Registration Authority²²³. It prohibits any sex selection and makes such activities as criminal offence²²⁴. Regarding the status of the child, the Bill states that, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse²²⁵. A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties²²⁶. In case of a single woman the child will be the legitimate child of the woman, and in case of a single man the child will be the legitimate child of the man²²⁷. The Bill further states that, in case a married or unmarried couple gets divorced or separates, as the case may be, after both parties consented to the assisted reproductive technology treatment

²²⁰ *Id.* S. 34(24).

²²¹ *Id.* S. S. 34(11).

²²² *Id.* S. 34(19).

²²³ *Id.* S. 24.

²²⁴ *Id.* S. 25.

²²⁵ *Id.* S. 35(1).

²²⁶ *Id.* S. 35(2).

²²⁷ *Id.* S. 35(3).

but before the child is born, the child shall be the legitimate child of the couple²²⁸. A child born as a consequence of a foreigner or a foreign couple seeking surrogacy, in India, shall not be an Indian citizen²²⁹.

The child's right to know his origin is also protected under the Bill. It states that, a child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother²³⁰. However, personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother. But these personal identifications can be disclosed with the prior informed consent of the genetic parent or parents or surrogate mother²³¹.

It is relevant to point out here that, the ART Bill, 2010 is based on the 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India' issued by the ICMR in 2005. The Bill, attempts to regulate the process of surrogacy and answer some of the issues raised by surrogacy practices. However, the Bill fails to address certain complex issues relating to surrogacy and thus suffers from various draw backs. The Bill legalizes commercial surrogacy and declares that such agreements are legal and enforceable. It is to be noted that the Law Commission of India has also recommended the legalization of surrogacy arrangements but has also stated that such arrangements should not be for commercial purpose²³². Thus this provision of the Bill is contradictory to the recommendations made by the Law Commission of India.

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

²²⁸ *Id.* S. 35(4).

²²⁹ *Id.* S. 35 (8).

²³⁰ *Id.* S. 36 (1).

²³¹ *Id.* S. 36 (3).

²³² *Supra* n. 138 at p.25.

adjudication in problems arising out of surrogacy agreements²³³. The absence of such a designated Court or judicial forum, would create difficulties to the parties in case of any dispute arising out of a surrogacy agreement because the parties may be from different parts of India as well as from various foreign countries.

The ART Bill, similar to the ICMR guidelines allows only gestational surrogacy arrangements. However, the prohibition of traditional surrogacy causes hardships to persons who wish to have a child through surrogacy as they need to arrange for an egg donor if the female partner is unable to contribute her egg. Moreover, compared to gestational surrogacy, traditional surrogacy is more easy, safe and successful method. A potential surrogate as per the Bill should be below 35 years of age while the ICMR guidelines states the maximum age limit as 45 years. Thus there is a conflict between the ART Bill proposed by the legislature and ICMR guidelines framed by the medical experts. Further, the Bill proposes that surrogate woman can have maximum five pregnancies including her own. However it does not specify the maximum number of ART cycles she can undergo. It is necessary to mention that the number of live births is not equivalent to the number of ART cycles because the success rate of ART procedures is low and the surrogate may be required to undergo numerous ART cycles²³⁴. Such repeated ART procedures may adversely affect the health of the surrogate which the Bill does not address adequately²³⁵. Most importantly, the Bill does not mention the circumstances in which a surrogate woman can abort her surrogate pregnancy.

The ART Bill mandates that, the persons who initiate surrogacy for begetting a child should accept the child after its birth and any refusal would amount to an offence. However the deterrent effect of this provision is reduced in case of foreign couple / individuals who avail surrogacy service because the Bill mentions that in

²³³ See, Anil Malhotra & Ranjit Malhotra, "All Aboard for the Fertility Express", *Commonwealth Law Bulletin*, Vol.38, No. 1, 31-41, (2012), at p.40.

²³⁴ See, Imrana Qadeer, "The ART of Marketing Babies", *Indian Journal of Medical Ethics*, Vol IX, No. 3, (2012), available <<http://www.issuesinmedicalethics.org/184ar209.html>> Visited on 20.9.2012.

²³⁵ See, Nivedita Menon, "The Regulation of Surrogacy in India – Questions and Concerns", SAMA, New Delhi, available at <<http://kafila.org/2012/01/10/the-regulation-of-surrogacy-in-india-questions-and-concerns-sama/>> Visited on 20.9.2012.

case of refusal by the intended parents to accept the child, the local guardian appointed by such couple will be responsible to accept the child²³⁶. Thus the real culprits, i.e. the person who initiated the surrogacy can absolve themselves from liability by simply refusing to accept the child. Moreover, though there is an offence of refusal to accept, the implementation of punishment would be difficult in such cases as the persons are in foreign countries. Thus a major lacuna in the Bill is that, though majority of persons availing surrogacy in India are from foreign countries the Bill does not contain any provision to compel the persons to stay back in India upto the birth of the child²³⁷. The Bill however is an earnest attempt towards regulating surrogacy arrangements in India. But, due to the various drawbacks as discussed above, the Bill is inadequate to deal effectively with the whole issues surrounding the surrogacy practices in India and to protect the interests of various stakeholders. In this context it is relevant to mention here that, in 2012 an application was filed under Right to Information Act, 2005 seeking clarification from Government of India about the status of ART Bill, 2008 by Mr. Hari G. Ramasubramanian, Founder of India's First Fertility Law Firm, viz. Indian Surrogacy Law Centre (ISLC)²³⁸. Reply was given by the Legislative Department, Ministry of Law and Justice on 19th July, 2012 wherein it stated that a new proposal to enact legislation titled "Assisted Reproductive Technology (Regulation), 2012" had been received from the Department of Health and Family Research, Ministry of Health and Family Welfare²³⁹. Thus at present in India, in the absence of a specific legislation the ICMR Guidelines, 2005 are the only available regulatory framework for dealing with surrogacy.

²³⁶ Sarojini N. B. & Aastha Sharma, "The Draft ART (Regulation) Bill: In Whose Interest?", *Indian Journal of Medical Ethics*, Vol. VI, No.1, 36, (2009).

²³⁷ *Supra* n.234.

²³⁸ Indian Surrogacy Law Centre (ISLC) is based in Tamil Nadu. It deals with surrogacy related issues and facilitates contractual relationships between the surrogates and intended parents, providing surrogates for intended parents and providing legal assistance to the parties to the surrogacy agreement.

²³⁹ See, Hari G. Ramasubramanian, "Assisted Reproductive Technology (Regulation) Bill pending with the Legislative Department", available at <<http://indiansurrogacylaw.com/assisted-reproductive-technology-regulation-billpending-legislative-department-ministry-law-justice/>> Visited on 20.9. 2012.

3.9 Conclusion

The method of surrogacy for procuring a biologically related child is widely being used all over the world and particularly in India. Surrogacy has been appreciated as well as criticized. It has been described as “*gift of love*” or “*gift of life*” as well as termed as “*rent a womb*” depending on the particular viewpoint adopted towards it. Regardless of its benefits, surrogacy has also generated considerable legal, moral and ethical debate²⁴⁰. Due to the uncertainty prevailing over the various issues surrounding surrogacy, it is considered as a legal and ethical mine-field²⁴¹.

In more recent years, surrogate pregnancy has ignited a maelstrom of controversy in which scholars, politicians, judges, scientists, and religious authorities debate the definition of family and kinship. Like adoption, surrogate pregnancy is not an isolated phenomenon but rather it overlaps with a myriad of other social issues, such as wealth distribution, race and color-blindness, gender equality, and children’s rights, all of which come into play when defining family bonds and relationships²⁴².

Surrogacy raises various legal issues such as those relating to 1) the surrogate mothers; 2) women generally (by spillover effects of surrogacy; 3) the children born out of the transaction; 4) the siblings who see or later hear of the transfer of the child; 5) the hiring parents; 6) children available for adoption who might be adopted but for surrogacy transactions²⁴³; 7) other parties involved or keenly interested in the transaction, such as grandparents and other relatives, brokers, lawyers and counselors²⁴⁴.

²⁴⁰ A. Stuhmcke, “Surrogate Motherhood: The Legal Position in Australia”, *Journal of Law and Medicine*, 2(2), 116 -124 (November 1994), at p.117.

²⁴¹ See for more discussion, “ACT Opens Way for Surrogate Births”, *Courier Mail* (The *Courier-Mail* is a daily newspaper published in Brisbane, Australia), Mar. 5, 1996, p 3, available at <www.couriermail.com.au/> Visited on 5.7.2011.

²⁴² *Supra* n.53 at p.16.

²⁴³ Richard A. Posner, “The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood”, *5 J. Contemp. Health L. & Pol’y* 21 (1989), at p.24.

²⁴⁴ See, Michael H. Shapiro, “How (Not) to Think About Surrogacy and Other Reproductive Innovations”, *28 U.S.F. L. Rev.* 647 (1993-1994).

In the absence of a specific legislation, it is very difficult to resolve these issues. It is necessary to address these issues urgently because of the fact that India is fast becoming a hot-spot destination for surrogacy. Moreover, there are no reliable statistics on how many surrogacies have been arranged in India²⁴⁵. The demand for surrogacy is expected to grow due to the increasing awareness created by major media outlets like *New York Times* and *Oprah* which spotlight towns such as Gujarat, where more than fifty surrogate women are pregnant with children destined for international locales²⁴⁶. The episodes of *Nirmala* and *Baby Manji* brought to light the lacuna in the Indian legal system to deal with surrogacy. In the first case a woman named Nirmala sought permission from the Chandigarh High Court for renting her womb, for raising money to treat her paralyzed husband²⁴⁷. The case of “*Baby Manji*”, is a highly publicized custody dispute involving a Japanese father and a child conceived by an Indian surrogate mother²⁴⁸. The biological father faced legal complications when he divorced the child’s intended mother, but was not permitted, as a single man, to adopt the child under Indian law²⁴⁹. The case drew attention worldwide and resulted in a ruling by the Supreme Court of India upholding the commercial surrogacy agreement. These types of controversies and disputes generated by surrogacy make it appropriate to ask whether the current legal system in India is adequate to deal with the complicated legal and ethical questions raised by surrogacy arrangements. Thus India’s minimal regulation of surrogacy agreements raises a bundle of concerns from both legal and ethical standpoints. These concerns can be categorized under four major heads. The first three concerns are clustered around the key participants in the transaction such as: the intended parents (commissioning parents), the surrogate mother, and the surrogate child and the fourth

²⁴⁵ See, Amelia Gentleman, “India Nurtures Business of Surrogate Motherhood”, *N.Y. Times*, Mar. 10 (2008), available at < <http://www.nytimes.com/2008/03/10/world/asia/surrogate.html>> Visited on 5.7.2011.

²⁴⁶ *Ibid.*

²⁴⁷ *Supra* n.10.

²⁴⁸ *Baby Manji Yamda v. Union of India & Another*, A.I.R. 2009 S.C. 84. Also see, Harmeet Shah Singh, “Japanese Girl Born to Indian Surrogate Arrives Home”, *CNN*, Nov. 2 (2008), available at < <http://www.cnn.com/2008/WORLD/asiapcf/11/02/india.baby/index.html>> Visited on 5.7.2011.

²⁴⁹ See, “Reproductive Alternatives Blog”, available at <<http://reproductive-alternatives.com/>> Visited on 5.7.2011.

concern is clustered around the legality of the surrogate contracts. These concerns have been examined in detail in the subsequent chapters.

CHAPTER -IV
INTENDED PARENTS AND THE
LEGAL CONCERNS

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INTENDED PARENTS AND THE LEGAL CONCERNS

“A baby will make love stronger, days shorter, nights longer, bankroll smaller, home happier, clothes shabbier, the past forgotten, and the future worth living for”

...Anonymous¹.

4.1 Introduction

Traditionally, the concept of a family is that of a mother, father and one or more children. The natural expectation of majority of people is that they would marry and establish a family of their own. The desire to raise genetically related children is one of the most fundamental instincts of men and women. However, this aspiration gets frustrated as number of individuals suffer from infertility² and are unable to conceive their own offspring unaided. This is one of the most disappointing events in the life of many of the married couple's when they are told that they are unable to procreate their own offspring. These married couples must then decide whether to forgo parenthood altogether or resort to alternative methods for child rearing³. The statistical data on infertility shows that many couples experience infertility problems in the world. It is estimated that approximately eight to ten percentages of couples worldwide, (i.e. about fifty to eighty million people) experience infertility⁴. The figures may vary but it is a fact that infertility is a serious problem affecting a large number of couples. The reason for this defect may be genetic or caused by an

¹ See, <<http://www.theparentsite.com/parenting/quotes.asp> > Visited on 10.3.2012.

² John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton University Press, New Jersey, U.S.A. (1994), pp. 97-100.

³ See for more, R. Snoeden, G Mitchell & E. Snowden, *Artificial Reproduction: A Social Investigation*, G. Allen and Unwin Publishing Co., London (1983), pp.86-89.

⁴ See, Charis Thompson, *Making Parents: The Ontological Choreography of Reproductive Technologies*, Massachusetts Institute of Technology, U.S.A. (2005), p.2; Wilhelm Kirch, *Encyclopedia of Public Health*, Volume 1: A – H & Volume 2: I – Z, Springer Science Business Media, LLC, U.S.A. (2008), p.780.

accident or otherwise stem from a myriad of causes in either the male or female partner⁵. The reproductive services have emerged so as to medically assist those who are unable to conceive “naturally”⁶.

In modern times, the surrogacy practices have developed as a method of medical treatment for infertility⁷. The recent developments in medical science and technology encourage the use of surrogacy for those who have fertility complications and for those who cannot conceive children of their own⁸. Thus surrogacy is emerging as an attractive solution for those who desire to procreate a child having genetic relationship with at least one parent. Further in recent times, not only the married heterosexual couples, but also unmarried individuals as well as gay couples and lesbian couples are opting for parenthood. For single parents as well as gay and lesbian couples, surrogacy is a good option. Thus this technological advancement is a boon to both infertile couples as well as those individuals who wish to have a child. However this practice of surrogacy may give rise to various legal complications and consequently the very objective of the intended parents in selecting surrogacy practice is likely to be defeated. One of the most common legal complications is when the surrogate mother changes her mind and refuses to hand over the child to the intended parents and relinquish her parental rights.

In the case of *Baby M*⁹, for example, which is the first popular surrogacy case in the world, the court had to deal with the complicated issue of protection of the interests of surrogate mother and child as well as the intended parents. In this case, Mary Beth Whitehead and William Stern agreed that, Whitehead would bear a child conceived from the genetic material of both William Stern and Mary Beth. Whitehead promised to relinquish her maternal rights for ten thousand dollars. However, she later changed her mind and refused to relinquish the child. Therefore, William Stern

⁵ Keith J. Hey, “Assisted Conception and Surrogacy - Unfinished Business”, 26 *John Marshall Law Review*, 775 (Summer 1993), at p.777.

⁶ Anita Stuhmcke, “Lesbian Access to In-Vitro Fertilization” 7 *Australian Gay and Lesbian Law Journal*, 15 (1997), at p.16.

⁷ Adiva Sifris, “Dismantling Discriminatory Barriers: Access to Assisted Reproductive Services for Single Women and Lesbian Couples” 30 *Monash University Law Review*, 2, 229 (2004), at p.237.

⁸ *Supra* n. 2 at pp. 97-100.

⁹ 537 A.2d 1227 (N.J. 1988).

sought enforcement of the surrogacy agreement. The Superior Court, Chancery Division, Bergen County, held that the agreement was enforceable and ordered that Whitehead's parental rights be terminated¹⁰. The New Jersey Supreme Court reversed this finding, concluding that the surrogacy agreement was unenforceable because it was in conflict with the law and public policy of the State of New Jersey¹¹. However, the U.S Supreme Court affirmed the lower court's decision of awarding custody to William Stern and allowing visitation right to Whitehead¹². Thus this case brings to light certain problems faced by the intended parents and the legal complications they may face even after fulfilling their part of the terms and conditions of surrogacy agreement. It is to be mentioned that in the *Baby M* case the surrogate mother has been given visitation rights which is against the interest of the intended parents. Thus in many of the surrogacy cases, it is seen that whenever a legal or medical issue arises, the major concern is focused on the surrogate mother and the child and the intended parents are not given much importance. It is to be noted that the root of every surrogacy process is the desire of intended parents to beget a child and the surrogacy process is initiated by the intended parents. Thus, the intended parents are important in surrogacy arrangements and their rights and interests need to be addressed. Thus this chapter attempts to analyse the various legal issues relating to intended parents.

4.2 Intended Parents: Meaning and Definition

The feeling of exhilaration and anticipation of giving birth to a child felt by expectant parents is incomparable. The love and joy which the parents feel for a child yet to be born is one of the greatest feelings. Almost every human being including not only the married couples but also the single individuals yearn to experience this great feeling of parenthood. However due to various medical and social reasons many couples and individuals are unable to fulfill their wish to have a child and face disappointment which can have a devastating effect on their life. Over the last 25

¹⁰ *In re Baby M.*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987).

¹¹ 537 A.2d at 1246-47.

¹² *Id.* at p. 1259.

years, the use of surrogacy to overcome involuntary childlessness in infertile heterosexual couples, single women, and lesbian and gay couples has progressed at a momentous pace. Surrogacy is an arrangement in which a woman agrees to bear a child for intended couple/parents¹³.

The intended parents are the couples or in some cases, individuals who wish to beget a child with the help of the surrogate and bring up the child after his or her birth¹⁴. The intended parents are also known as commissioning parents¹⁵. Intended parents are thus the infertile couples or individuals who intend to have a child through the process of surrogacy¹⁶. They are the couples or individuals who enter into a surrogacy agreement with the surrogate mother with the intention to become legal parents or legal parent of the child born to the surrogate. Depending upon the type of surrogacy, the intended parents may both be genetically related to the child (i.e. full surrogacy), or only one of them may be genetically related to the child (i.e. partial surrogacy)¹⁷. In very rare cases, neither of them may be genetically related to the child. The intended parents may sometimes use donor eggs and/or sperms, which can result in as many as five individuals contributing to the creation of the child¹⁸. The woman for whom the child is to be carried is the ‘intended mother’ and she may also be the genetic mother if she provides the egg. The genetic father may be the husband or partner of the intended mother, or even of the carrying (surrogate) mother; or he may be an anonymous donor¹⁹. The intended parent may also be a single man or

¹³ Hugh V. McLachlan and J. Kim Swales, “Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts”, 91 *Law and Contemporary Problems*, Vol. 72:9 (Summer 2009), at p.91.

¹⁴ See generally, Dr. Rebecca Gibbs, “Surrogacy: Medical, Ethical and Legal Issues to be Considered”, North East Essex PCT, (January 2008), available at <http://www.northeastsex.nhs.uk/public_29_01_2008/surrogacy-policy.pdf> Visited on 10.3.2012.

¹⁵ John Dwight Ingram, “Surrogate Gestator: A New and Honorable Profession”, 76 *Marq. L. Rev.* 675 (1993), at p.677.

¹⁶ See for more, “Successful Surrogacy and Intended Parenting” (web page), available at <<http://www.surrogacymumbai.wordpress.com>> Visited on 10.3.2012.

¹⁷ *Supra*, Chapter III.

¹⁸ Krista Sirola, “Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania”, 14 *Journal of Gender, Social Policy & the Law*, 131 (2006), at p.134.

¹⁹ Department of Health, *Brazier Report on Surrogacy*, Department of Health Press Office, London (1998), available at <www.dh.gov.uk> Visited on 10.3.2012.

woman wishing to have his/her own biological child²⁰. There are various situations due to which a couple or an individual may be forced to choose surrogacy for begetting a child and thus become an intended parent. They are as follows:

(i) Infertility: Inability to conceive due to physical problems/diseases or infertility which is not amenable to treatment.

(ii) Medical Conditions: Physical problems that make it impossible for a woman to carry a pregnancy to viability or pregnancy that is life threatening²¹.

(iii) Genetic Problems: Presence of genetic diseases with significant risk of genetic abnormalities. The only method of avoiding this risk would be surrogacy using a donor egg or sperm.

(iv) Lifestyle Factors: Female intending parents who are unwilling to undergo pregnancy because of career or any other reason. There are examples of many successful business women²², actresses²³, athletes and models opting for surrogacy due to career pressure, or for avoiding the pain of childbirth and the prospect of

²⁰ See <www.wikipedia.org> Visited on 10.3.2012.

²¹ See for example, conditions like after hysterectomy for cancer, congenital absence of the uterus, Hysterectomy for postpartum hemorrhage, repeated failure of in-vitro fertilization treatment, recurrent abortion, Hysterectomy for menorrhagia, severe medical conditions incompatible with pregnancy. See, Brinsden P.R., *et al.*, "Treatment by In-Vitro Fertilization with Surrogacy: Experience of one British Centre", *British Medical Journal*, Vol. 320, 924 - 929 (2000). Also see the case of Mrs. Kiran Rao, a filmmaker and wife of the popular actor Mr. Aamir Khan who had their first son through surrogacy. It was reported that due to physical conditions Mrs. Kiran Rao was unable to have normal pregnancy. The baby was born on December 1, 2011. See <<http://articles.timesofindia.indiatimes.com/2011-12-06/>> Visited on 10.3.2012.

²² For Example, a famous businesswoman Olga Slutsker (the President of a chain of Wealth and Recreation Centers World Class) hired an American lady Lucy who became the surrogate mother for her son Misha. See, Konstantin Svitnev, "Surrogacy in Russia and in the World", available at <www.jurconsult.ru> Visited on 10.3.2012.

²³ For example, Aussie actress Nicole Kidman and husband Keith Urban have announced that their new baby, Faith Margret Kidman Urban, was born to a surrogate mother on December 28, 2010 in Nashville. See <<http://www.theaustralian.com.au/news/gallery-e6frg6n6-1225990282006?page=1>> Visited on 10.3.2012; Also Pop singer Ricky Martin's twin boys Valentino and Matteo were born via surrogate mother in August 2008. See, <<http://celebritybabyscoop.com/2010/05/11/celebrity-babies-born-via-surrogate-mothers>> Visited on 10.3.2012.

stretch marks²⁴.

(v) *Single Parent or Homosexual Couples:* Surrogacy can be a choice to beget a child for a single parent or a parent in case of homosexual couples²⁵.

The intended parent/parents are those who initiate surrogacy due to the above said reasons. However they may face many legal issues and complications which need to be addressed adequately in order to regulate surrogacy practices.

4.3 Intended Parents and the Legal Issues

In a surrogacy arrangement the intended parents may face various legal issues. For example, in certain cases, the question may arise whether the intended parents have the right to use the surrogacy arrangement for begetting a child. Secondly, as the intended parents are those who contemplate procreation through surrogacy, they may want to exercise control over the child's characteristics and activities of surrogate mother during the pregnancy. Hence questions may arise whether they have a right to control surrogacy practices and if so to what extent? Further, it may be considered that the intended parents are the stronger party and they are not in need of protection²⁶. However, it is to be noted that though the intended parent/parents may be socio-economically stronger than the surrogate mother, they are often more vulnerable emotionally. This is because they might have undergone tremendous mental suffering due to infertility and repeated failures to beget a child and hence regard surrogacy as their last hope for a biological parenthood. Therefore, if there is any violation of the terms and conditions of surrogacy agreements by the surrogate mother, the hopes of the intended parents will be seriously affected²⁷. Hence it is essential to examine the right of couples and individuals to use surrogacy to beget a

²⁴ See, Margaret Ryznar, "International Commercial Surrogacy and its Parties, 43 *John Marshall Law Review*, 1009 (2009-2010), at p.1028.

²⁵ Editorial, "Surrogate Motherhood: The Uptrend Continues", Ministry of Woman and Child Development, Government of India, Newsletter *Sampark*, Volume 4, Issue 4, (2008), at p.4.

²⁶ Shalev C., "Halakha and Patriarchal Motherhood—An Anatomy of the New Israeli Surrogacy Law", 32 *Israel Law Review*, 51 (1998), at p.71.

²⁷ See for more, Rhona Schuz, "Surrogacy in Israel: An Analysis of the Law in Practice", in Rachel Cook, Shelley Day Sclater & Felicity Kaganas (eds.), *Surrogate Motherhood: International Perspectives*, Hart Publishing, U. K. (2003), p.35.

child and their rights and duties as intended parents in relation to surrogacy for the better regulation of surrogacy practices. The significant issues relating to intended parents are as follows:

4.4 Right to be an Intended Parent

Reproduction is a natural instinct of all human beings and the foundation for the growth of human communities and societies. It also satisfies an individual's natural drive for sex and his or her continuity with nature and future generations. It fulfills cultural norms and individual goals about a good or fulfilled life, and is in fact considered as the most important part of a person's life. Procreation is a complex activity and its importance as a whole derives from the genetic, biological, and social experiences and needs associated with it²⁸. Natural procreation is an established basic fundamental right of every individual²⁹. However, in case of intended parents the right to procreate with the help of a surrogate mother is a highly debatable issue and there are diverse opinions in this regard.

The supporters of surrogacy, for example, in the United States argue that “if the right to procreate through traditional, coital method is a protected right, then procreation through surrogacy or other medically available options should also be protected³⁰”. They argue that the, “liberty interests protected by the US Constitution do not change definition because of the presence or absence of reproductive technology”. Moreover, they view surrogacy as a form of conception that is equally legitimate to the traditional form and hence protected under the US Constitution³¹. This argument is based on the fact that the US Supreme Court has recognized the right of access to artificial contraceptive devices³². According to the supporters, when compared to such use of artificial contraceptive devices, the surrogacy procedure is

²⁸ John A. Robertson, “Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth”, 69 *Virginia Law Review*, 405 (1983), p.409.

²⁹ *Supra*, Chapter II.

³⁰ Eric A. Gordon, “The Aftermath of *Johnson v. Calvert*: Surrogacy Law Reflects a More Liberal View of Reproductive Technology”, 6 *St. Thomas Law Review*, 191(1993), at p.200.

³¹ See for more, L. Gostin, “A Civil Liberties Analysis of Surrogacy Arrangements”, *Law, Medicine & Health Care*, 16, 7-17 (1988).

³² See, *Griswold v. Connecticut*, 381 U.S. 479 (1965) & *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

less artificial and more equal to traditional form of reproduction”³³. Thus, under the Due Process Clause, the fundamental right to “bear or beget a child” includes “access to any means of procreation including surrogacy”³⁴.

Further, the supporters argue that under the Equal Protection Clause of the Fourteenth Amendment of US Constitution, the artificial insemination through donor sperm as a means of dealing with male infertility is recognized and hence this necessitates the recognition of surrogacy as a remedy for female infertility³⁵. They assert that, “to deny protection to surrogacy while allowing it for Artificial Insemination by Donor would discriminate against infertile women and would be a violation of the Equal Protection Clause of the Fourteenth Amendment. In addition, protecting the right of fertile couples to bear and beget children, while denying infertile couples the same right, results in discrimination”³⁶. Under this reasoning, the practice of surrogacy is protected by the Constitution and may only be restricted upon a demonstration of a compelling state interest³⁷.

The Indian Constitution contains similar provisions as that of US Constitution concerning Equality Clause. The Indian Judiciary has also approved the various decisions given by the US courts with respect to the use of contraceptives and reproductive rights³⁸. Most recently in *Baby Manji Case*³⁹ the Indian Supreme Court has approved surrogacy as an alternative means for human reproduction.

The critics of surrogacy argue that non-coital means of reproduction i.e.

³³ Christine L. Kerian, “Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?” 12 *Wis. Women's L.J.* 113 (1997), at p.121.

³⁴ *Id.* at p.122.

³⁵ Barbara L. Keller, “Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?”, 49 *Louisiana Law Review*, 143 (1988), at p.179.

³⁶ Scott B. Rae, *The Ethics of Commercial Surrogate Motherhood: Brave New Families?*, Praeger Publishing, Santa Barbara, California (1994), p.18.

³⁷ John A. Robertson, “Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction”, in Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy*, Indiana University Press, U.S.A. (1990), pp.25-26.

³⁸ *Supra*, Chapter II.

³⁹ See, *Baby Manji Yamada v. Union of India*, A.I.R. 2009 S.C. 84; *Jan Balaz v. Anand Municipality and Ors*, A.I.R. 2010 Guj. 21.

surrogacy are beyond the scope of Constitutional protection⁴⁰. They contend that “bringing a third party (the surrogate) into the procreative relationship cannot be justified on a theory of marital intimacy, and such an arrangement in fact puts huge strain upon the traditional notions of parenthood and family⁴¹. Further, the critics argue that if surrogacy is given a Constitutional protection, it would lead to commercialization and exploitation of surrogate mother. Thus, opponents of surrogacy argue that the prohibition of surrogacy arrangements is justified by a compelling state interest in preventing “child bartering”⁴².

Though there are diverse opinions regarding the existence of a right to use surrogacy and be an intended parent, there is no doubt that there is a right to procreation⁴³. The only conflict is that whether right to procreation can be exercised by the intended parents through a surrogate? To answer this question, one has to understand the expansive interpretation given to various human rights especially those rights which are related to human reproduction.

In this expanding era of human rights jurisprudence, one can trace the foundation of right to use surrogacy and be an intended parent to the following human rights such as: Right to Personal Liberty, Right to Procreation, Right to Found a Family and Decide on the Number and Spacing of Children, Right to Privacy and Right to Enjoy Benefits of Scientific and Technological Progress.

4.4.1 As Part of Right to Personal Liberty

The right to personal liberty is a bundle of complex human rights from which a variety of other basic human rights can be traced. During the past few decades, the right to personal liberty has been interpreted by courts in a wide and liberal manner to

⁴⁰ See, Shari O’ Brien, “Commercial Conceptions: A Breeding Ground for Surrogacy”, 65 *N.C. L. Rev.* 127 (1986), at p.152.

⁴¹ *Supra* n. 35 at p. 176.

⁴² Lisa L. Behm, “Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States”, 2 *DePaul J. Health Care L.* 557 (1997-1999), at p.566.

⁴³ *Supra*, Chapter II.

include numerous rights such as procreative rights⁴⁴ and sexual autonomy⁴⁵ as well as various other rights⁴⁶ which are essential for improving the quality of life and making it more meaningful. The right to reproduction and the right to make reproductive choices are increasingly seen as a vital component of individual or personal autonomy. According to some authors, the reproductive choices are a profound form of self-expression and an exercise of individual autonomy that goes far beyond mere assent to or dissent from other's proposals⁴⁷.

As per Ronald Dworkin, one of the greatest supporters of procreative autonomy, it is 'a right of people to control their own role in procreation unless the state has compelling reasons for denying them that control'⁴⁸. According to him the right of procreative autonomy is based on the belief in individual human dignity and that people have the moral right and the moral responsibility to confront the most fundamental questions about the meaning and value of their own lives for themselves. The principle of procreative autonomy, in a broad sense, is embedded in any genuinely democratic culture⁴⁹. In this line of thinking, reproductive or procreative autonomy is on par with the freedom of thought and conscience, and of equal importance. If our reproductive decisions express our deepest sense of who and what we are, then the way is seemingly open for arguing that reproductive autonomy must be more than a right to accept or refuse reproductive treatments and technologies others offer, and that it must include a right to self-determination and self-expression in reproductive matters. Reproductive freedom, looked at in this way, is often taken to include not only a right to choose abortion, but also a right to choose what is befitting to them among new reproductive technologies, and as showing that neither choice

⁴⁴ *Supra* n.32.

⁴⁵ See, *Suchita Srivastava & Another v. Chandigarh Administration*, (2009) 9 S.C.C. 1.

⁴⁶ For Example, Right to Privacy: *R. Rajagopal v. State of Tamil Nadu*, A.I.R. 1995 S.C. 264; Right to Health: *Calcutta Electric Supply Corporation Ltd. v. Subash Chandra Bose*, A.I.R. 1992 S.C. 573,585; Right to Medical Care: *Parmanand Katara v. Union of India and others*, A.I.R.1989 S.C. 2039; etc.

⁴⁷ For example see, Clare Murray, "Children Raised in Assisted Human Reproduction Families: The Evidence", in Dani Singer and Myra Hunter (eds.), *Assisted Human Reproduction: Psychological and Ethical Dilemmas*, Whurr Publishers Ltd., London (2003), pp. 99-127; Edward M. Taylor, "Procreative Liberty and Selecting for Disability: Section 14(4) Human Fertilization and Embryology Act 2008", 2 *King's Student Law Review*, 71(2010), at p.80.

⁴⁸ Ronald Dworkin, *Life's Dominion*, Harper Collins Publishers, London (1993), p.148.

⁴⁹ *Id.*, at pp.166-167.

should be subject to state prohibition or regulation unless there are clear harms to be prevented⁵⁰.

According to John Harris, the right of ‘procreative autonomy’ would need to encompass the right to reproduce with the genes we choose and to which we have legitimate access, or to reproduce in ways that express our reproductive choices and our vision of the sort of people we think it right to create⁵¹. Thus the procreative autonomy or liberty protected under right to personal liberty of an individual includes the “fundamental right” to “decide whether or not to have offspring and to control the use of one’s reproductive capacity”⁵². This freedom is particularly significant in the field of procreation because of “the great importance to individuals of having biological offspring - personal meaning in one’s life, connection with the future generations and the pleasures of child rearing”⁵³. As reproductive decision-making frequently turns on the expected child-rearing experiences that reproduction will bring, procreative liberty allows couples “to obtain and act on information about a prospective child’s health and make-up in deciding whether or not to reproduce”⁵⁴.

Therefore it cannot be denied that reproduction indeed matters to people; it is indeed a part of life in which they express their deepest beliefs. Reproduction aims to bring a third party – a child – into existence. The misfortune of the infertile is that this cannot be readily achieved: that is why they seek assistance of others in reproduction. Hence in order to help such couples and individuals, the right to personal liberty and procreative autonomy must be given an expansive interpretation so as to also include the right to procreate with the help of another i.e. a surrogate. Thus it can be said that the right to personal liberty includes right to use surrogacy for begetting a child and be a intended parent. At the same time, it is necessary to mention here that this right

⁵⁰ Onora O’ Neill, *Autonomy and Trust in Bioethics*, Cambridge University Press, U.K. (2002), p.56.

⁵¹ See, John Harris “Rights and Reproductive Choice” in John Harris and Soren Holm (eds.), *The Future of Human Reproduction: Choice and Regulation*, Oxford University Press, U.K. (1998), p.34.

⁵² Ann MacLean Massie, “Regulating Choice: A Constitutional Law Response to Professor John A. Robertson’s Children of Choice”, 52 *Wash. & Lee L. Rev.* 135 (1995), at p.136.

⁵³ Catherine Y. Read, Robert C. Green and Michael A. Smyer, *Biotechnology and the Future*, John Hopkins University Press, U.S.A. (2008), p.249; Also see, *supra* n.2 at pp.152-53.

⁵⁴ John A. Robertson, “Ethics and the Future of Pre-implantation Genetic Diagnosis”, *Ethics, Law and Moral Philosophy of Reproductive Biomedicine*, Vol. 1, No. 1, 96 (March 2005), p.99.

is not an unlimited right and does not apply in situations where the use of the reproductive technology would cause “substantial harm to the tangible interests of others”. It must also be noted that procreative liberty only acts as a legal principle, to guide the regulation of reproductive technology and is not a moral principle. Hence for curtailing the right to procreative liberty, it would be necessary for any democratic society to demonstrate that it has a compelling reason for denying individual citizens control over their own reproductive choices and decisions⁵⁵.

4.4.2 As Part of Right to Procreation

Every individual has a right to procreate⁵⁶. This right is not only confined to married couples but it is also guaranteed to all individuals. Though there is no case which directly and specifically addresses the issue of right to access to surrogacy, it can be reasonably argued that the right to procreation must include the right to access to all available means in exercise of that right. Therefore, as a logical corollary, the right to procreation must also include the right to procreate with the help of a surrogate.

Ann MacLean Massie, a noted writer argues that right to procreate must have access to all available means to exercise that right, including whatever non-coital reproductive techniques might exist. According to her, whatever technique might be used for procreation, the same values are at stake; whether the conception of the desired child has been accomplished through artificial insemination, in a Petri dish or even in the body of a woman other than the rearing mother who has agreed to be inseminated with the father’s sperm and thereafter relinquish her parental rights. She further argues that the definition of the right which is protected as right to procreation does not change simply because of the presence or absence of scientific technology as the means for realization of that right. The author further asserts that if one has a right to procreate coitally, then one also has the right to reproduce non-coitally. If it is reproduction that is protected, then the means of reproduction are also protected. The

⁵⁵ *Supra* n.51 at p.36.

⁵⁶ *Supra*, Chapter II.

value and interests underlying the creation of family are the same by whatever means obtained⁵⁷.

A similar view has been expressed by various authors⁵⁸ that the claim of right to reproduction includes the right to use surrogacy and presumes that procreation includes all methods of becoming pregnant, whether through “natural” coital means, or with technological assistance⁵⁹. The Indian legal system has also specifically recognized surrogacy as a means of reproduction⁶⁰ and hence right to reproduction includes right to use surrogacy and be an intended parent as a basic human right. The legal systems of different countries have also recognized this right through various legislations adopted for the regulation of assisted human reproduction⁶¹ and specifically for the regulation of surrogacy⁶².

4.4.3 As Part of Right to Found a Family and Decide on the Number and Spacing of Children

The scope of the right to found a family is clearly established under the international human rights law as well as through regional human rights instruments.

⁵⁷ See, Ann MacLean Massie, “Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act”, 18 *Hastings Constitutional Law Quarterly*, 487 (Spring 1991).

⁵⁸ See for example, John A. Robertson, “Gay and Lesbian Rights to Procreate and Access to Assisted Reproductive Technology”, Be Press Legal Series, Paper 207, (2004), available at <<http://law.bepress.com/expresso/eps/207/>> Visited on 10.3.2012; Bonnie Steinbock, “Reproductive Rights and Responsibilities”, *The Hastings Center Report*, Vol. 24, 15 (1994); Ann MacLean Massie, “Regulating Choice: A Constitutional Law Response to Professor John A. Robertson’s Children of Choice”, 52 *Wash. & Lee L. Rev.* 135 (1995); Kerian, Christian L., “Surrogacy: A Last Resort Alternative for Infertile Woman or a Commodification of Woman’s Bodies and Children”, 12 *Wis. Women’s L. J.* 113 (1997); and Glenda Labadie-Jackson, “The Reproductive Rights of Latinas and Commercial Surrogacy Contracts”, 14 *Tex. Hisp. J.L. & Pol’y* 49 (2008); etc.

⁵⁹ Sonia M. Suter, “The ‘Repugnance’ Lens of Gonzales V. Carhart and other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies”, 76 *George Washington Law Review*, 1514 (September 2008).

⁶⁰ *Baby Manji Yamada v. Union of India*, A.I.R. 2009 S.C. 84; *Jan Balaz v. Anand Municipality and Ors*, A.I.R. 2010 Guj. 21.

⁶¹ For example, Human Fertilization and Embryology Act, 2000 (UK); Uniform Parentage Act, 2000 (USA); Assisted Reproductive Treatment Act, 2008, (Victoria); Reproductive Medicine Act, 1992 (Austria); and Children’s Act, 2005 (South Africa); etc.

⁶² For example, Surrogacy Act, 2010 (New South Wales); Surrogacy Act, 2010 (Queensland); Surrogacy Arrangements Act, 1985 (UK); Florida Statute 742.14; and New Hampshire Statute RSA §§ 168-B:1 to -B:32; etc.

For example, Article 16 of *Universal Declaration of Human Rights*, 1948⁶³ states, that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. Article 23(2) of the *International Covenant on Civil and Political Rights*, 1966⁶⁴ protects the right to found a family and states that, “the right of men and women of marriageable age to marry and to found a family shall be recognized”. So also Article 12 of the *European Convention on Human Rights*, 1950⁶⁵, states that: “men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right”. It is pertinent to mention here that though the right to found a family is not recognized as an absolute right at the international and regional levels, it is at the same time a right which implies a fairly unrestricted possibility to found a family with which the state practically cannot interfere. In the case of infertile couples and other individuals who wish to found a family, this right cannot be fulfilled unless and until the help of technological advancements in medical science and or the help of a surrogate is made available. If any attempt is made to restrict the right to use technological advancements or the right to use a surrogate it would amount to a negation of right to found a family guaranteed under these international and regional human rights instruments.

The argument that right to found a family also includes the right to use a surrogate is further supported by the fact that majority of international human rights instruments have included the right to decide on the number and spacing of children as part of right to found a family. In fact, the right to plan one’s family has been defined in international instruments as the right to determine “freely and responsibly” the number and spacing of one’s children and to have the information and means necessary to do so. This principle has also been affirmed in numerous consensus documents adopted at UN Conferences throughout the last three decades. For example, the World Population Plan of Action, 1974⁶⁶, states that:

⁶³ Hereinafter referred to as UDHR.

⁶⁴ Hereinafter referred to as ICCPR.

⁶⁵ Hereinafter referred to as ECHR.

⁶⁶ The World Population Plan of Action was adopted by consensus of the 137 countries represented at the United Nations World Population Conference at Bucharest, August 1974.

“All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information and means to do so; the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibilities towards the community⁶⁷”.

The Proclamation of Tehran, UN Conference on Human Rights, 1968, mentions that:

“The protection of the family and of the child remains the concern of the international community. Parents have a basic human right to determine freely and responsibly the number and spacing of their children⁶⁸”.

Further this principle has been given a legal force in *Convention on the Elimination of All forms of Discrimination against Women*, 1979⁶⁹. Article 16(e) of CEDAW emphasizes that:

“State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.

Thus the right to found a family also includes clearly the right to decide on the number and spacing of children. It is pertinent to mention here that the right to plan one’s family gives rise to a governmental duty to ensure that men and women have

⁶⁷ See, The World Population Plan of Action, 1974, Art. 14 (f).

⁶⁸ Paragraph 16. See, “The Right to Decide Whether or When to Have Children”, available at <www.ippf.org/en/resources> Visited on 10.3.2012.

⁶⁹ Hereinafter referred to as CEDAW.

equal access to a full range of contraceptive choices, as well as reproductive health information and services⁷⁰. Hence it can be argued that if use of contraceptives is allowed for deciding the number and spacing of children; the use of surrogacy for begetting children by infertile couples and other individuals should also be allowed. If interference of technology in reproductive rights is justified for controlling the number and spacing of children in fertile couples; there is no reason to restrict the use of surrogacy for procreation by infertile couples and other individuals with the help of a surrogate.

4.4.4 As Part of Right to Privacy

The right to privacy of an individual as a basic human right is articulated in a myriad of international human rights instruments⁷¹. In most of these human rights instruments, the right to privacy is expressed in general terms and, in essence, simply means that individuals have a human right to privacy or private life. It is generally accepted that the notion of privacy is broad in scope and encompasses within its meaning various other facets which are essential for the realization and enjoyment of this right⁷². For example, sexual autonomy⁷³, right against police surveillance⁷⁴, and right against telephone tapping⁷⁵, etc.

An analysis of foreign legal systems as well as domestic law of India reveals that the human right to privacy is very closely linked to and in fact an essential component of family life including the right to make reproductive choices. In the landmark case of *Eisenstadt v. Baird*⁷⁶ Justice Brennan has defined the right of privacy to include the right “to be free from unwarranted governmental intrusion into

⁷⁰ See, *Using Legal Advocacy to Advance Reproductive Rights*, p.16, Fida Kenya Legal Advocacy Document, available at < www.fidakenya.org/wp-content/uploads/2011/03/GG_Part-I.pdf > Visited on 13.3.2012.

⁷¹ See, Article 12 of the UDHR, 1948; Article 12 of the ICCPR, 1966; Article 16 and 40 of the *Convention on the Rights of Child*, 1989, Article 4 of the *African Charter on Human Rights and Peoples Rights*, 1981; Article 22 of the *Convention on the Rights of Persons with Disabilities*, 2006; and Article 8 of the *European Convention on Human Rights*, 1950.

⁷² Berta E. Hernandez, “To Bear or Not to Bear: Reproductive Freedom as an International Human Right”, 37 *Brooklyn Journal of International Law* 309 (1991), at p.329.

⁷³ See, *Re-Ratanmala*, A.I.R. 1962 Mad. 31; *State of Maharashtra v. Madhukar Narian*, A.I.R. 1991 S.C. 207.

⁷⁴ See, *Gobind v. State of M.P.*, A.I.R. 175 S.C. 1375.

⁷⁵ See, *PUCL v. Union of India*, A.I.R. 1997 S.C. 392.

⁷⁶ 405 U.S. 438 (1972).

matters so fundamentally affecting a person as the decision whether to bear or beget a child”⁷⁷. Thus decisions made by individuals about their own body particularly those that affect reproductive capacity come within the domain of private decision-making and are therefore protected from interference by the right to privacy.

In *Doe v. Kelley*⁷⁸, the Michigan Court of Appeals held that a father had a fundamental privacy right to bear or beget a child through surrogacy⁷⁹. Thus it can be reasonably argued that the notion of right to privacy encompasses all possible aspects of the decision ‘whether to bear or beget a child’. However, this right is not an absolute right and reasonable restrictions can be imposed. This view regarding right to privacy has been accepted by majority of the countries all over the world⁸⁰ including India⁸¹.

4.4.5 As Part of Right to Enjoy Benefits of Scientific and Technological Progress

The scientific and technological developments have an enormous impact on the daily lives of people. In the past few decades, the advancements in science and technology have greatly helped to improve the quality of life of the people and also helped them to enjoy the various human rights in a better manner. In fact enjoyment of benefits of scientific and technological progress and its application is recognized as a human right and is included in the *Universal Declaration of Human Rights*⁸² and the *International Covenant on Economic, Social and Cultural Rights*⁸³, etc⁸⁴.

One of the blessings of the modern day advancements in medical science and technology is the development of Assisted Human Reproductive Technologies

⁷⁷ *Id.* at p.453 (1971).

⁷⁸ 106 Mich. App. 169, 307 N.W.2d 438 (1981).

⁷⁹ *Id.* at p.1033.

⁸⁰ See for more, Jennifer Foster and Barbara Slater, “Privacy and Assisted Human Reproduction: A Discussion Paper”, 56 *Health Law Review*, Volume 11, Number 1, 56 (2002).

⁸¹ *Supra* n.45.

⁸² See, the UDHR, Art. 27.

⁸³ See, the ICESCR, Art. 15.

⁸⁴ See, “The Right to Enjoy the Benefits of Scientific Progress and its Applications” A Speech by Yvonne Donders, Deputy Director of the Amsterdam Center for International Law on the Occasion of Human Rights Day in Paris, published on 10.12.2007, available at < <http://unesdoc.unesco.org/images/0015/001586/158691e.pdf>> Visited on 10.2.2012.

including surrogacy. These technologies are helpful to infertile couples as well as any other individuals who wish to beget children. Since there is a right which allows an individual to enjoy the benefits of scientific and technological progress, undoubtedly individuals can take the benefit of these technologies for begetting a child. Hence it can be reasonably argued that surrogacy which is a gift of scientific technology can also be used by an individual for begetting a child. Thus the right to be an intended parent and to use the benefits of surrogacy can no doubt be justified on the grounds of right to enjoy the benefits of scientific and technological progress⁸⁵.

4.5 Criteria for being an Intended Parent

The issue of who can be the intended parent or intended parents is a highly controversial one. In the past few years an increasing number of couples as well as other individuals are opting for surrogacy for begetting a child and this has generated a serious debate among academicians, jurists, law makers and judges. It is pertinent to note that each and every individual is having a human right to procreation and right to procreate with the help of surrogate. One of the prominent view is that surrogacy is more suitable choice for infertile couples who intend to beget a child⁸⁶. However, in the present era it is not only the infertile married couples but also single individuals, gay couples and lesbian couples who are also seeking the help of surrogacy for begetting a child. The increasing use of surrogacy by these single individuals, gay couples and lesbian couples raises various complicated legal and human rights issues. Restricting the availability of surrogacy to certain groups or classes of potential parties may have some advantages, but at the same time, gives rise to constitutional challenges which cannot be ignored. Hence it is necessary to determine the criteria for deciding who can be an intended parent.

It is pertinent to point out that, in countries like UK and US which have framed legislations for regulating surrogacy have not dealt adequately with the issue of who can be an intended parent. In UK, the laws dealing with surrogacy are the Surrogacy

⁸⁵ See generally, Rebecca J. Cook, "Human Rights and Reproductive Self-Determination", 44 *American University Law Review*, 975 (April 1995), at p.1004.

⁸⁶ See, N. Keane & D. Breo, *The Surrogate Mother*, Everest House, New York (1981), pp.217-43.

Arrangements Act, 1985 and Human Fertilization and Embryology Act, 2000. However these two legislations are unclear regarding the criteria for being an intended parent⁸⁷. In USA, there is no Federal Law dealing with surrogacy. The Uniform Parentage Act, 2000 can be used to deal with some aspects of surrogacy and it provides that surrogacy can be used only by married couples⁸⁸. However, the Act is silent about the issue whether the couples have to be fertile or infertile and whether it includes same sex couples. Therefore, in order to understand clearly the law relating to the criteria for being an intended parent, it is necessary to examine the legal frameworks available in other countries specifying the eligibility criteria for them.

4.5.1 *Married Couples*

Many married couples whose parental aspirations have been frustrated due to infertility suffer enormous personal anguish and even marital conflict⁸⁹. For such couples who desire to have children but are unable to have it in the traditional way, the method of surrogacy should be made available. The method of surrogacy provides a solution to such infertile couples who wish to have a child that is genetically linked to them⁹⁰.

Most of the countries that have enacted legislations for the regulation of Assisted Human Reproduction and Surrogacy have approved the use of surrogacy by infertile married heterosexual couples⁹¹. For example, in USA, the Uniform Parentage Act, 2000 states that, the intended parents must be married, and both spouses must be parties to the gestational agreement⁹². The various State statutes in USA have

⁸⁷ Jonathan Hearing, *Medical Law & Ethics*, Oxford University Press (2006), pp.305-306.

⁸⁸ See, The Uniform Parentage Act, 2000, S. 801 (3) (b).

⁸⁹ *Supra* n.40.

⁹⁰ See, Susan A. Ferguson, "Surrogacy Contracts in the 1990's: The Controversy and Debate Continues", 33 *Duquesne Law Review*, 903 (1995), at p.904.

⁹¹ The Reproductive Medicine Act, 1992 in Austria provides that: Assisted reproductive technologies are exclusively permissible for married couples or cohabitants which needs to be notarially certified (Section 2.1); The Order 67th of the Russian Federation Ministry for Health (Reg. No. 4452 24.04.03 RF Justice Ministry) states that gestational surrogacy is an option for officially married couples and single women; Florida Statute 742.14; New Hampshire statute RSA §§ 168-B:1 to -B:32 deal with surrogacy and related topics.

⁹² See, The Uniform Parentage Act, 2000, S. 801 (3) (b).

restricted this only to infertile couples. The Statute of Texas⁹³ states that the intended parents must be married to each other and the intended mother must be unable to carry a pregnancy to full term and give birth without unreasonable risk to her physical or mental health or to the health of the child. The Statute of Florida⁹⁴ in US also provides that the intended couple shall enter into a contract with a gestational surrogate only when, within reasonable medical certainty as determined by a physician (1) The intended mother cannot physically gestate a pregnancy to term; (2) The gestation will cause a risk to the physical health of the intended mother; or (3) The gestation will cause a risk to the health of the foetus. The Assisted Reproductive Treatment Act, 2008, in Victoria⁹⁵ states that an intended parent must be infertile or unable to carry a baby or give birth, or there is a likely medical risk to the mother or baby if pregnancy is carried out.

In India, the proposed Assisted Reproductive Technology Bill, 2010 favors the use of surrogacy by married infertile couples. It provides that, no assisted reproductive technology clinic shall consider conception by surrogacy for patients for whom it would normally be possible to carry a baby to term⁹⁶. It has also been stated that where it is determined that unsafe or undesirable medical implications from such conception may arise, the use of surrogacy may be permitted⁹⁷. Thus it can be seen that most of the countries have restricted the access to surrogacy only to infertile couples and to fertile couples only in cases where the pregnancy would give rise to medical complications and cause risk to the life of the mother or child.

Now a day's even fertile couples are also opting for surrogacy due to various reasons like career and life style⁹⁸. One of the famous examples is that of Michael Jackson who declared that he had hired a traditional surrogate mother to deliver his

⁹³ See, Tex. Fam. Code §§ 160.751 to 160.763 (2007); Also see Gregory E. Stern, "Legal Status of Surrogacy in Texas", available at <<http://www.surrogacy.com/legals/article/txlaw.html>> Visited on 10.3.2012.

⁹⁴ See, Florida Statute 742.14.

⁹⁵ Victoria is a state in Australia, in the south-east of the country.

⁹⁶ See, Assisted Reproductive Technology (Regulation) Bill, 2010 (India), S. 20(10).

⁹⁷ *Id.* S. 20(10).

⁹⁸ *Supra* n. 22, 23 & 24.

third child Prince Michael II⁹⁹. This gives rise to a legal question that whether fertile couples should be allowed to use surrogacy and be an intended parent. It is relevant to mention here that though various countries limit the access to surrogacy only to infertile couples, there are various other countries that allow use of surrogacy even by married fertile couples¹⁰⁰. For example, the South African Children's Act, 2005 provides that, no surrogate motherhood agreement is valid unless, (a) the agreement is in writing and is signed by all the parties thereto; (b) the agreement is entered into in the Republic; (c) at least one of the intended parents, or where the intended parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic; (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and (e) the agreement is confirmed by the High Court within whose area of jurisdiction the intended parent or parents are domiciled or habitually resident¹⁰¹. Thus the South African Children's Act, 2005 mentions only the term intended parent and does not limit it to only infertile couples.

The ART Bill, 2010 in India states that assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples¹⁰². Thus the ART Bill, 2010 does not restrict the use of surrogacy by couples whether fertile or infertile. On the other hand, the Indian Council of Medical Research Guidelines, 2005¹⁰³ states that surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term¹⁰⁴. It is to be noted that the ART Bill, 2010 is still pending before the Parliament and the ICMR Guidelines are voluntary guidelines and therefore do not have binding force. Thus the domestic law in India is unclear regarding the eligibility of married fertile couples to use surrogacy. It is submitted that married fertile couples should also be allowed to use surrogacy

⁹⁹ *Supra* n.22.

¹⁰⁰ See, The Uniform Parentage Act, 2000, (USA) S. 801.

¹⁰¹ See, The South African Children's Act, 2005, S.292.

¹⁰² See, The ART Bill, 2010, S. 32.

¹⁰³ Hereinafter referred to as ICMR Guidelines.

¹⁰⁴ See, The ICMR Guidelines, R. 3.10.2.

and be intended parents. However they should be allowed only if both the partners consent to such an arrangement and at least one of them contributes the genetic material for the child.

4.5.2 Same Sex Couples

Today the concept of family is undergoing a revolutionary change and we are faced with the emergence of different kind of families. One of the new emerging kinds of family is the ‘homo-nuclear’ family¹⁰⁵. This family differs from the traditional ‘nuclear family’ in that the parents are of the same sex rather than the opposite sex. Such a family comprises of gay and lesbian couples together with their children¹⁰⁶. The motivations for the gay and lesbian couples for wishing to bear and raise a biological child are similar to those of heterosexual couples. Many intend to have children in order to form a family unit¹⁰⁷. For some of them having a child with a partner is a “common project” and a way of demonstrating love and commitment¹⁰⁸. Further, the desire to have a child may be motivated because of his/her family, legal or personal expectations¹⁰⁹. As the gay and lesbian couples do not engage in heterosexual relationships, they must take the help of a surrogate for fulfilling their desire to have a genetically related child. It is pointed out that because men cannot biologically bear a child, the only way for a gay couple to have a genetic child is by using a “surrogate mother¹¹⁰”. In the case of lesbian couples, since they may have the biological ability to bear children, they may themselves conceive the child through other methods of ART like Artificial Insemination. In some cases, if they do not wish to conceive and give birth to the child by themselves, they may take the help of a surrogate mother.

¹⁰⁵ This term is coined from the judgment of Guest J in *Re Patrick* (2002) 28 Fam .L.R. 579, 650.

¹⁰⁶ *Supra* n.7 at p.232.

¹⁰⁷ See, Note, “Reproductive Technology and the Procreation of the Married”, 98 *Harv. L. Rev.* 669 (1985), at p.679.

¹⁰⁸ See for more, Y. Engelert, “Artificial Insemination of Single Women with Donor Semen”, 9 *Human Reproduction*, 1969 (1994).

¹⁰⁹ *Supra* Chapter II.

¹¹⁰ See for more, Marla J. Hollandsworth, “Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom”, 3 *American University Journal of Gender, Social Policy & Law*, 183 (1995), at p.199.

There are diverse legal views among the countries regarding the use of surrogacy by same sex couples. There are certain legal systems which have restricted the use of surrogacy only to a married fertile or infertile heterosexual couples and thus indirectly have prohibited the use of surrogacy by same sex couples¹¹¹. However there are other countries which have specifically mentioned the use of surrogacy by same sex couples. For example, the Surrogacy Act, 2010 of New South Wales, provides that there must be a medical or social need for surrogacy arrangement and the court must be satisfied that there is such a need. One of the medical or social need mentioned under the Act for a surrogacy arrangement is that, if there are two intending parents under the surrogacy arrangement i.e. two men or two eligible woman¹¹², they can opt for surrogacy. Thus there is no restriction on same sex couples to be an intended parent.

The Surrogacy Act, 2010 of Queensland, also states that, if there are 2 intended parents under the surrogacy arrangement - there is a medical or social need for the surrogacy arrangement if the intended parents are: two men; or two eligible women¹¹³. Thus it allows a gay or lesbian couple to be intended parents. Further, in *R.R. v. M. H.*¹¹⁴, the Supreme Judicial Court of Massachusetts held that the factor, “the father’s wife be incapable of bearing a child without endangering her health” should not be narrowly interpreted. The Court recognized the acceptability of the use

¹¹¹ For Example, the South African Children’s Act, 2005; Florida Statute 742.14; and the Texas Statute, Tex. Fam. Code §§ 160.751 to .763 (2007); etc.

¹¹² Section 30 provides that, medical or social need for surrogacy arrangement must be demonstrated (1) The Court must be satisfied that there is a medical or social need for the surrogacy arrangement. (2) There is a medical or social need for a surrogacy arrangement if: (a) there is only one intended parent under the surrogacy arrangement and the intended parent is a man or an eligible woman, or (b) there are 2 intended parents under the surrogacy arrangement and the intended parents are: (i) a man and an eligible woman, or (ii) 2 men, or (iii) 2 eligible women. (3) An eligible woman is a woman who: (a) is unable to conceive a child on medical grounds, or (b) is likely to be unable, on medical grounds, to carry a pregnancy or to give birth, or (c) is unlikely to survive a pregnancy or birth, or is likely to have her health significantly affected by a pregnancy or birth, or (d) if she were to conceive a child: (i) is likely to conceive a child affected by a genetic condition or disorder, the cause of which is attributable to the woman, or (ii) is likely to conceive a child who is unlikely to survive the pregnancy or birth, or whose health would be significantly affected by the pregnancy or birth. (4) This precondition does not apply to a pre-commencement surrogacy arrangement

¹¹³ The Surrogacy Act, 2010, (Queensland), S. 14(b).

¹¹⁴ Massachusetts, 689 N.E.2d; 790, 426 Mass. 501 (Mass. 1998).

of surrogacy to create non-traditional (i.e. gays and lesbian) families or to create a traditional family where the father's wife is simply unable to carry her egg to term.

In India, the ART Bill, 2010 provides that surrogacy can be made available to a married couple or an unmarried couple¹¹⁵. It is to be noted here that the Act defines the term 'couple' as meaning two persons living together and having a sexual relationship that is legal in India¹¹⁶. After the decision in *Naz Foundation v. Government of NCT, Delhi and Others*¹¹⁷, the gay and lesbian sexual relationships are no more illegal in India. Therefore the term couple can be interpreted to include gay or lesbian couples also. This means that gay or lesbian couples can also be intended parents as per the ART Bill, 2010.

The use of surrogacy by same sex couples raises various arguments in favour as well as against it. The main arguments in favour of such a use by same sex couples is that they are also human beings and thus like any other human being are entitled to have the same human rights including the right to procreate with the help of a surrogate¹¹⁸. Further, it is argued that parenting ability is unrelated to the sexual orientation of the parents¹¹⁹.

The argument against the use of surrogacy by same-sex couple is that, the child will be deprived of his right to natural family and parenting because of the fact that, either father or mother are absent in homo-nuclear families. Further, there is greater prevalence of depression, promiscuity, domestic violence, and suicide among homosexuals which might affect the normal development of children. However, the scientific research has shown that lesbian and gay parents are as fit and capable as heterosexual parents¹²⁰ and that there is no relationship between the parents' sexual

¹¹⁵ See, The ART Bill, 2010, S.32.

¹¹⁶ *Id.* S. 2(h).

¹¹⁷ 160 (2009) D.L.T. 277.

¹¹⁸ See for more analysis, John A. Robertson, "Gay and Lesbian Access to Assisted Reproductive Technology", 55 *Case Western Reserve Law Review*, 323 (2004), at p.324.

¹¹⁹ See, Charlotte Patterson, "Adolescents with Same-Sex Parents: Findings from the National Longitudinal Study of Adolescent Health", in Brodzinsky, D. Pertman A. & Kunz D.(eds.), *Lesbian and Gay Adoption: A New American Reality*, Oxford University Press, New York (2007), p.2.

¹²⁰ Mike Allen & Nancy Burrell, "Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research", 32 *Journal of Homosexuality*, 2, 19-35 (1997).

orientation and any measure of a child's emotional, psychosocial, and behavioral adjustment¹²¹.

It can be said that such couples should also be given the right to be an intended parent and use surrogacy as they are also entitled to have all the human rights including right to procreation. However, such a right should not be absolute and therefore reasonable restrictions may be imposed on grounds of best interest and welfare of the child. One of the major problems that arise in case of same sex couples is that, their relations may not be long-lasting and they may break up the relations at any time. If they discontinue their relations after entering into a surrogacy arrangement and prior to birth of the child or after the birth of the child it will give rise to legal complications. The main question is who is entitled to have the custody and responsibility of the child? Hence it is necessary to put reasonable restrictions on the right of the same sex couples to be intended parents. One of the conditions may be that, one of the partners in same sex couples should contribute the genetic material for their child. In case of any dispute relating to the custody and responsibility of the child, it can be decided on the basis of genetic relationship and ideally, preference can be given to the genetically related member of the same sex couples.

4.5.3 Single Individuals

Recently, surrogacy is also being used by single parents i.e. a single unmarried man or an unmarried woman for begetting a biologically related child¹²². The reasons for an unmarried man or woman to seek a surrogate are usually the same as that of a male/female couple¹²³. Right to procreation is an individual right based on right to life and personal liberty. An individual's right to life and personal liberty includes various

¹²¹ Ian H. Fraser, T. A. Fish & T. M. Mackenzie, "Reactions to Child Custody Decisions Involving Homosexual and Heterosexual Parents", 27(1) *Canadian Journal of Behavioral Science*, 2-63 (Jan 1995).

¹²² For example, Olga Slutsker: A famous business woman from Russia hired an American Surrogate Lucy for her son Misha, Reported by Konstantin Svitnev. See *supra* n.22.

¹²³ See for more, Holly J. Harlow, "Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor", 6 *S. Cal. Rev. L. & Women's Stud.* 173 (1996), at p.183.

facets such as, the right to privacy¹²⁴, the right to be free from sexual and gender violence¹²⁵, the right to consent to marriage and equality in marriage¹²⁶, the right to benefit from scientific progress¹²⁷, right to procreative autonomy and right to procreate with the help of surrogate. Thus a question arises whether a single individual i.e. an unmarried man or woman should be allowed to be an intended parent. There are many enactments supporting the right of single individuals to be an intended parent. For example, the Children's Act, 2006 of South Africa lays down various conditions for a surrogate motherhood agreement to be valid. One of the conditions is, at least one of the intended parents, or where the *intended parent is a single person*, that person, is at the time of entering into the agreement domiciled in the Republic¹²⁸. This means that a single individual either male or female is recognized as an intended parent under the law. Further the Surrogacy Act, 2010 of New South Wales¹²⁹, and the Surrogacy Act, 2010 of Queensland¹³⁰, also provides that a single individual can be an intended parent.

The Indian ART Bill, 2010 defines an Intended parents/couples/individuals, as meaning parents, couples or individuals, respectively, who approach an ART Clinic or ART bank for availing a service that the ART Clinic or the ART bank is authorized to provide¹³¹. Thus the definition of intended parent itself suggests that a single individual can be an intended parent. Further section 32 states that assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples. So also the ICMR Guidelines provides that there would be no bar to the use of ART by single women who wishes to have a

¹²⁴ See, The ICCPR, 1966, Art.17 (1) & (2); The Convention on the Rights of Child, 1989, Art.16 (1) & (2).

¹²⁵ See, The CEDAW, Art. 5 & 6; The CRC, Art.19 (1) & 34.

¹²⁶ See, The UDHR, Art.16 (1) & (2); The ICCPR, Art. 23 (2), (3) & (4); The ICESCR, Art.10 (1); and The CEDAW, Art.16 (1) & (2).

¹²⁷ See, The UDHR, Art.27 (1); The ICCPR, Art.7; and The ICESCR, Art.15.

¹²⁸ See, The South African Children's Act, 2006, S. 292.

¹²⁹ See, Section 25 (1) of the New South Wales, Surrogacy Act, 2010 which provides that, 'the surrogacy arrangement must be an arrangement under which: (a) there are two intended parents who, at the time of entering into the arrangement, are a couple, or (b) there is only one intended parent.

¹³⁰ This Act allows surrogacy only in those situations where there is a social or medical need. Section 14(1) (a) states there is a social or medical need for the surrogacy arrangement if there is one intended parent and if the intended parent is a man or an eligible woman.

¹³¹ See, the ART Bill, 2010, S. 2 (g).

child, and no ART clinic may refuse to offer its services to the above, provided other criteria mentioned in the guidelines are satisfied. The child thus born will have all the legal rights on the woman or the man¹³². Further, it provides that surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term¹³³. Thus a single man or a single woman can be an intended parent provided it is physically or medically impossible or undesirable for them to carry a baby to a term. It is pertinent to point out here that, for single individuals it is impossible to beget a child without the help of a technology. Thus the ART Bill, 2010 and ICMR Guidelines recognize the right of a single individual to be an intended parent. However, this right may be allowed only if the single individual contributes his /her genetic material.

4.5.4 Aged Couples/ Individuals and Disabled

An important issue which arises with respect to access to surrogacy is whether aged couples or an aged individual can be an intended parent. Most of the legislations dealing with surrogacy have mentioned about the minimum age for an intended parent¹³⁴ but they are silent on the issue of a maximum age. It is important to determine the maximum age up to which a couple or an individual can use surrogacy for begetting a child. This is because a very aged individual or couple may not be able to take care of the child. It is opined that the maximum age upto which an individual can claim the right to be an intended parent must be fixed as 50 years. If any individual above 50 years of age is interested to be an intended parent, it can be allowed if there is a nominee who is young and will take care of the child in the absence or inability of the intended parents. This nominee can be any person and will

¹³² See, the ICMR Guidelines, R. 3.5.2.

¹³³ See, ICMR Guidelines, R. 3.10.2.

¹³⁴ For example, Surrogacy Act, 2008 of West Australia Section 19 says that at least one of the commissioning parents should be of 25 years or above age; Florida Statute 742.14, provides that the surrogacy contract will only be enforceable if the 'commissioning couple' (the intending parents of the child) be over the age of 18; New Hampshire Statute RSA §§ 168-B:1 to -B:32 states that all parties to the surrogate contract must be at least 21 years old; Surrogacy Act 2010 of New South Wales states that, each intended parent must have been at least 18 years old when he or she entered into the surrogacy arrangement (S.28); *ICMR Guidelines* in India provides that, normally, no ART procedure shall be used on a woman below 20 years (R. 3.14.1); etc.

be responsible for taking care of the surrogate child till the child attains the age of majority.

Similarly, the disabled individual's right to be an intended parent should be considered on the basis of the best interest and welfare of child. It is pertinent to state that none of the legislations have addressed this issue. However, the *Convention on the Rights of Persons with Disabilities, 2006* (Disability Rights Convention)¹³⁵ recognizes the right to procreation under Article 23¹³⁶. Thus disabled individuals also have an equal right to procreation and to be an intended parent. There shall not be any discrimination to a disabled person to act as intended parents, if the disability is of such a nature that it would not affect the upbringing and care of the child. However, in severe cases of disability, the right to be an intended parent should be restricted. Likewise, in cases where the disability is because of genetic reasons, the intended parent should not be allowed to contribute the genetic material and be a genetic parent. An appropriate authority shall be entrusted to evaluate the application of a disabled person to act as an intended parent.

4.5.5 Prisoners

A prisoner is a person who is serving a sentence in jail and undergoing imprisonment based on a judicial decision. As a necessary consequence, a prisoner cannot claim liberty like an ordinary citizen. There are many cases where the courts have held that a prisoner's right to personal liberty can be restricted on reasonable grounds. In *Mellor v. Secretary of State for the Home Department*¹³⁷, the Court of Appeal upheld a judgment by Forbes J. dismissing an application from a prisoner who was seeking access to artificial insemination. Mellor claimed that the refusal to allow him access to Artificial Insemination facilities was a breach of his right to respect for

¹³⁵ The text was adopted by the United Nations General Assembly on 13 December 2006 and opened for signature on 30 March 2007.

¹³⁶ Article 23 provides that, "States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that: a) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided; b) Persons with disabilities, including children, retain their fertility on an equal basis with others".

¹³⁷ *R (Mellor) v. Secretary of State for the Home Department*, [2001] 3 W.L.R. 533.

private and family life under Article 8 of the ECHR and his right to marry and found a family under Article 12. The Court rejected Mellor's claim, holding the view that one of the purposes of imprisonment was to punish the criminal by depriving him of certain rights and pleasures which he could only enjoy at liberty, including the enjoyment of family life, the exercise of conjugal rights and the right to found a family. In *Dickson*¹³⁸, the application by a prisoner for the use of Artificial Insemination facilities for begetting a child was rejected¹³⁹. A prisoner may request for the use of surrogacy and being an intended parent. However, the purpose of the imprisonment is to put a restriction on personal liberty of the prisoner and thus in such a situation the right to be an intended parent can be restricted. Further it can be restricted on the ground of public policy that begetting a child and founding a family in such circumstances while being in prison would have an adverse impact on the child.

From the above analysis, the following class of persons if they are between the age of 22 -50 years can be considered eligible for being an intended parent:

- (i) A married hetero-sexual infertile;
- (ii) A married hetero-sexual fertile couple, if both agrees for the same and at least one of them contributing genetic material for the child;
- (iii) Same sex couples, but one of the partner of such couple shall contribute genetic material;
- (iv) Single individuals;
- (v) The aged couple or individual can be allowed to use surrogacy and become an intended parent only up to the age of 50 years and if they wish to have a child after 50 years they can be allowed only if they appoint a sufficiently young nominee for taking care and responsibility of the child in situation of their inability or absence.

¹³⁸ *Lorraine Dickson v. Premier Prison Service Ltd., Secretary of State for the Home Department* [2004] E.W.C.A. Civ. 1477.

¹³⁹ Sarah L. Dunn, "The Art of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners Right to Procreate", 70 *Fordham Law Review*, 2561 (2002).

- (vi) A disabled person can also be allowed, if the disability is such that it does not affect the capability of the disabled person to take care of the child.

4.6 Rights and Duties of Intended Parents

Surrogacy practices are generally based on an agreement between the surrogate and intended parents. For the successful completion of such a surrogacy agreement, both the parties involved in such an agreement shall have certain rights and duties. It is necessary that these rights and duties are clearly laid down through legislation dealing with the regulation of surrogacy. Also, the parties involved in the surrogacy arrangement, should have been made aware of their rights and duties prior to the signing of such an agreement, in order to avoid any dispute at a later stage. Though many countries of the world have enacted legislations, none of them has given serious concern about the rights of intended parents. The intended parents are those who initiate the whole surrogacy process with great hope and aspirations for begetting a child. Any dispute which arises during or after the surrogacy procedure may adversely affect the interests of intended parents and the entire object of such an agreement may be frustrated. Hence it is necessary to consider the issue of their rights and duties as it is an essential condition for the success of the surrogacy process.

4.7 Rights of Intended Parents

Different legislations enacted all over the world have not mentioned expressly the rights and duties of intended parents. An analysis of the provisions and various case laws reveals that the intended parents have the following rights:

4.7.1 Right to Select a Surrogate Mother

The right of intended parents to select a surrogate mother can be justified on the grounds that the intended parents have right to procreate with the help of another, i.e. a surrogate. Hence, if there is a right of access to surrogacy, then the intended parents should also have the right to select the surrogate woman of their choice for fulfilling their right to procreate. The very object of a surrogacy arrangement is to beget a

child. Thus it is a very sensitive and emotional issue that who should give birth to that child. Normally the intended parents would want to select a surrogate woman who is physically and mentally able and free from any hereditary and other diseases. However there may be situations where an intended parent also will have to consider factors like age, color, body structure, family background, food habits, previous experience of pregnancy, medical history, and religious affiliation of the prospective surrogate. In cases where the surrogate mother is also contributing the genetic material, the child to be born will naturally inherit the characteristics of the surrogate mother. Even in cases where surrogate mother is not contributing genetic material for the child, the intended parents may consider all these factors because the surrogate woman will have to carry the child in her womb for nine months. Thus it is essential that, the intended parent shall be given the right to select surrogate mother of their own choice. The intended parents should also have the right to information regarding the medical history of the prospective surrogate.

However this right to select surrogate mother is not an absolute right and it can be restricted by the State on reasonable grounds of public interest. For example, the intended parents are not entitled to select a woman who is below 25 years and above 45 years of age, a prisoner woman, a woman who had already acted as a surrogate for 3 times, a woman relative who comes within the prohibited degrees of relationship and woman who is not physically or mentally fit for giving birth to a child¹⁴⁰, etc.

4.7.2 Right to Impose Restrictions upon Surrogate Mother

The purpose of availing the services of a surrogate mother is to beget a healthy child. For this reason the surrogate mother is bound to follow various duties during the initiation of surrogacy and the subsequent pregnancy, so that baby is born without any complications. Thus, the intended parents have a right to impose restrictions upon the behavior and activities of surrogate mother during the period of surrogacy pregnancy. It is to be pointed out that, in surrogacy agreements, there are only two parties, i.e. surrogate and the intended parents. In some cases the medical practitioner

¹⁴⁰ See *infra* Chapter V.

or the concerned clinic may also be a party. So in cases where the medical practitioner or the clinic is a party to the agreement, the right to impose restrictions shall be given to those medical practitioners or clinics. In cases where the medical practitioner or clinic is not a party to the agreement, the right to impose restrictions shall be given to the intended parents. However, the intended parents shall exercise this right only as per the direction of the concerned medical practitioner. At the same time it is to be noted that only such restrictions can be imposed which are not unreasonable and are necessary for the normal development of the foetus¹⁴¹.

4.7.3 Right to Information and Visit Surrogate Mother During Pregnancy

The intended parents may be interested to know the status regarding development of the foetus and the health of the surrogate mother. Thus the concerned medical practitioner and the clinic are bound to provide necessary information to the intended parents. So also, they are to be given the right to visit the surrogate mother during the pregnancy. However, the right to visit shall not be detrimental to the interests of the surrogate mother and can be restricted such that it does not cause inconvenience to the surrogate mother.

4.7.4 Right to Custody and Parentage of Child

The fundamental objective of surrogacy is to fulfill the desire of intended parents to have a child and raise the child as their own. Therefore the intended parents have the right to custody and parentage of the child soon after it is born. In some cases it is seen that the surrogate may change her mind and refuse to hand over the child to the intended parents. Hence, it is necessary to state clearly the right of intended parents to the custody and parentage of the surrogate child. An analysis of legislations of many countries shows that parentage is given to the intended parents and in some countries the intended parents have to adopt or apply to an authority for obtaining right for parentage. For example, the South African law states that, (a) any

¹⁴¹ Donald Evans & Neil Pickering, *Creating the Child: The Ethics, Law, and Practice of Assisted Procreation*, Kluwer Law International Publication, U.S. A. (1996), p.162.

child born to a surrogate mother in accordance with the agreement is for all purposes the child of the intended parent or parents from the moment of the birth of the child concerned; and (b) the surrogate mother is obliged to hand the child over to the intended parent or parents as soon as it is reasonably possible after the birth; (c) the surrogate mother or her husband, partner or relatives has no rights of parenthood or care of the child; (d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties¹⁴². The Surrogacy Act, 2010 of New South Wales provides that the Court may, on application under this Part, make a parentage order in relation to a child of a surrogacy arrangement. The purpose of a parentage order is to transfer the parentage of a child of a surrogacy arrangement¹⁴³.

In United States of America, the Uniform Parentage Act, 2000 states that, the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and the intended parents become the parents of the child¹⁴⁴. In Ukraine the surrogates do not have any parental rights over the child¹⁴⁵. The Victoria, Assisted Reproductive Treatment Act, 2008, provides that, the intended parents of a child born under a surrogacy arrangement may apply to the court for a substitute parentage order if (a) the child was conceived as a result of a procedure carried out in Victoria; and (b) the intended parents live in Victoria at the time of making the application. An application for a substitute parentage order must be made (a) not less than 28 days, and not more than 6 months after the birth of the child; or (b) at another time with leave of the court. Before the court hears the application, the intended parents must file a certified copy of the child's birth certificate (if available) with the court. If the court decides to make a substitute parentage order, it is presumed that the intended parents will be named in the order as the child's legal parents¹⁴⁶.

¹⁴² See, The South African Children's Act, 2005, S.297 (1).

¹⁴³ See, The New South Wales, Surrogacy Act, 2010, S.12 (1) & (2).

¹⁴⁴ See, The Uniform Parentage Act, 2000, S. 801 (2) & (3).

¹⁴⁵ See, The Family Code of Ukraine, 2004, Art.123.

¹⁴⁶ See, The Assisted Reproductive Treatment Act, 2008(Victoria), S. 147(20) & (21).

In India the proposed ART Bill, 2010 states that a surrogate mother shall relinquish all parental rights over the child¹⁴⁷. It also states that, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse¹⁴⁸.

The ICMR Guidelines in India also provides that, a child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses¹⁴⁹. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to couples through sexual intercourse¹⁵⁰. It further states that a child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs¹⁵¹. Thus it can be seen that in India intended parents have the right to custody and parentage of the surrogate child.

The above analysis shows that there are different approaches with respect to custody and parentage of the child. The basic reason for availing the benefit of surrogacy by the intended parents is to beget a child. If after undergoing all the hardships of arranging a surrogacy process, the intended parents are not able to get the custody and parentage of the child, it will cause mental pain as well as injustice to such parents. Hence, in the interest of the intended parents and child, it is necessary that a uniform approach is adopted and the intended parents be given the right to custody and parentage of the child. It can be made mandatory that every surrogate mother shall hand over the child within 72 hours of the birth of such child¹⁵² and the intended parent/parents should be treated as the legal parent/parents of the child.

¹⁴⁷ See, The ART Bill, 2010, S.34 (4).

¹⁴⁸ *Id.* S.35 (1).

¹⁴⁹ See, The ICMR Guidelines, R.3.12.1.

¹⁵⁰ *Id.* R. 3.12.1.

¹⁵¹ *Id.* R. 3.10.1.

¹⁵² See *infra* Chapter V.

4.7.5 Right to Maternity and Paternity Leave for Intended Parents

In India, every working woman is entitled to get maternity leave with wages for a period of 12 weeks (six weeks preceding and six weeks after the delivery). This right is protected under the Maternity Benefit Act, 1961 as well as The Employees State Insurance Act, 1948 (ESI Act). The maternity leave can be availed in cases of normal pregnancy, miscarriage, medical termination of pregnancy, tubectomy operation and illness arising out of pregnancy. Both the Maternity Benefit Act as well as ESI Act only mentions pregnancy or pregnancy related circumstances as condition for maternity leave. The object of this maternity leave is to ensure that the new-born baby will get adequate maternal care from the mother. In cases of surrogacy immediately after birth of the surrogate child, the child is handed over to the intended parent/parents. Therefore the intended parent, if she is a working woman, shall be given maternity leave so that she can take care of the surrogate child. There are instances in some countries where the intended mothers have claimed maternity leave and the same has been rejected by the employer¹⁵³.

It is submitted that the intended mother shall be given maternity leave. It is to be noted that in many jurisdictions provisions exist to grant maternity leave in case of adoption¹⁵⁴. The Indian Government has through its Order¹⁵⁵ dated 11th September, 2008 extended the maternity leave for adoptive mothers also. As per the Order, adoptive mothers with fewer than two surviving children are entitled to a Child Adoption Leave (CAL) on adoption of a child up to one year of age. Thus if the maternity leave can be given in case of an adoption, the same can also be granted in case of a surrogacy. Thus an intended mother can also claim a right to maternity leave. Likewise right of the father to have a paternity leave has also been approved in

¹⁵³ See, “New York Mom of Twins Born through Surrogate Sues Employer for Denying Maternity Leave”, available at <www.abcnews.go.com> Visited on 12.3.2012.

¹⁵⁴ For example, the Family and Medical Leave Act, 1993 (USA); and the Employment Relations Act, 1999(UK).

¹⁵⁵ Circular No.13018/2/2008-Esstt.(L) issued by Ministry of Personal, Public Grievances and Pensions, Government of India, full text available at <[www.circulars.nic.in/.../CircularPortal/D2/.../13018_2_2008-Esstt.\(L\)-1.pdf](http://www.circulars.nic.in/.../CircularPortal/D2/.../13018_2_2008-Esstt.(L)-1.pdf)> Visited on 12.3.2012.

various jurisdictions¹⁵⁶. The Indian Government through an Order¹⁵⁷ dated 20th August, 2009 extended the paternity leave for adoptive father also. It provides that a male Government servant (including an apprentice) with less than two surviving children, on valid adoption of a child below the age of one year, may be sanctioned Paternity Leave for a period of 15 days within a period of six months from the date of valid adoption¹⁵⁸. Thus the intended parent/parents can claim a right to maternity and paternity leave as the case may be.

4.8 Duties of Intended Parents

A duty is something that someone is expected or required to do or forbear from doing something for any number of reasons, including moral or legal obligations¹⁵⁹. Usually in every legal system along with rights the individuals also have certain duties. These duties are essential for the protection of rights of other individuals as well as for the realization of the individuals own rights. Thus, the intended parents who have entered into an agreement with surrogate mother for begetting a child also have certain duties which they are expected to do or forbear from doing for the successful completion of surrogacy. Though the duties of intended parents are very important, they are not adequately dealt by the various legislations dealing with surrogacy all over the world.

The issue of duties of intended parents has been dealt in great detail by the proposed ART Bill, 2010 and ICMR Guidelines¹⁶⁰ in India. However, a closer analysis of various legislations would show that, the following can be considered as the duties of intended parents. Fulfillment of these duties is very essential for the protection of interests of various stake holders involved in surrogacy.

¹⁵⁶ *Supra* n.154.

¹⁵⁷ See, Circular No.11019/27/2008-AIS-11I issued by Ministry of Personal, Public Grievances and Pensions, Government of India.

¹⁵⁸ See the full text of Circular No. No.11019/27/2008-AIS-11I, available at <[http://circulars.nic.in/WriteReadData/CircularPortal/D2/D02ser/11019_27_2008-\(AIS-III\).pdf](http://circulars.nic.in/WriteReadData/CircularPortal/D2/D02ser/11019_27_2008-(AIS-III).pdf)> Visited on 12.3.2012.

¹⁵⁹ Shewanda Pugh, "What is the Meaning of Duties?", available at <<http://www.ehow.com/.html>> Visited on 12.3.2012.

¹⁶⁰ See Ss. 32 & 34 of the ART Bill, 2010 and Rule 3.10 & 3.16 of the ICMR Guidelines.

4.8.1 To Refrain from Sex Selection and Improvement of Non-Medical Characteristics

One of the major criticisms against surrogacy is that, it may be used to produce children of desired sex and with desired characteristics, i.e. surrogacy may be used for the creation of designer babies. It is also criticized that the developments in reproductive technologies may be used for advancing Eugenics¹⁶¹. The technology of surrogacy has developed in response to the problem of infertility and the basic objective is to fulfill the individuals desire to beget a child. Any use of surrogacy for the creation of a designer baby would give rise to serious ethical, social, moral, religious and legal issues and also come into conflict with the interests of surrogate child, surrogate mother as well as the society¹⁶². Hence ART cannot be allowed to be misused. Though the individuals have a right to use surrogacy, they do not have the right to misuse the technology for begetting a child with preferred qualities. Thus, it is the duty of intended parents as well as the medical practitioners involved in surrogacy to refrain from selection of sex and modification of non-medical characteristics.

The legislations of various countries have incorporated provisions which expressly prohibit sex selection and improvement of non-medical characteristics while availing the benefit of surrogacy. For example, the Belgian Law on Research on Embryos in Vitro, 2003 provides that it is forbidden to conduct treatment for

¹⁶¹Eugenics is a branch of genetics dealing with the measures to select/change/improve/discard a genotype/phenotype of an offspring in order to improve the line. It means 'well born' or 'good birth' and can be divided into negative and positive eugenics. Negative Eugenics means preventing the births of children, with characteristics (genotypes/phenotypes) viewed as unhealthy or undesirable or preventing child bearing by 'undesirable' individuals. Positive Eugenics means producing genetically enhanced children, giving them genetic characteristics (genotypes) they ordinarily would not be born with, and encouraging desirable individuals to bear more children. Further the negative and positive eugenic measures can be triggered by Individuals (termed as personal Eugenics) or measures can be forced in different degrees onto the individual (termed as social Eugenics). See <<http://www.bioethicsanddisability.org/Eugenics.html>>, Visited on 12.3.2012.

¹⁶² See for more, McGhee T.K., "Designer Babies: What are the Ethical and Moral Issues?" *West Indian Med. J.* 52(2):170-4 (2003); Sonia M. Suter, "A Brave New World of Designer Babies?" *Berkeley Technology Law Journal*, Vol. 22:897 (2007); Guido Pennings and Guido de Wert, "Evolving Ethics in Medically Assisted Reproduction, *Human Reproduction Update*, Vol.9, No.4, 397-404 (2003); John A. Robertson, "Procreative Liberty and Harm to Offspring in Assisted Reproduction", *American Journal of Law & Medicine*, 30, 7-40 (2004) and Rachael Caffrey, "Ethical Issues of Reproductive Technologies: Designer Babies, Sex Selection and Donor Babies, available at <<http://www.qub.ac.uk/methics/CafferyR2008.pdf>> Visited on 12.3.2012.

eugenic purposes, i.e. directed at the selection or enhancement of non-pathological characteristics of the human species¹⁶³. It is also forbidden to conduct treatment directed at sex selection, except when selection is performed to prevent sex linked diseases¹⁶⁴. This legislation casts a duty on the medical practitioner to refrain from such type of practices. It is submitted that, because in surrogacy arrangement one of the main stake-holders are the intended parents, the same duty should be extended to the intended parents also so that the issue of designer babies and eugenics can be avoided. Further, the Portuguese Law on Assisted Reproductive Technologies, 2006 also states that ART cannot be used to obtain improvement of non-medical characteristics of the offspring, including sex selection¹⁶⁵.

4.8.2 To Pay the Agreed Sum

The surrogacy agreement is an agreement between the intended parent or parents and a surrogate woman. The surrogate woman agrees to undergo the various medical procedures and carry the child in her womb for nine months and then hand over the child to the intended parent or parents. Thus the woman by agreeing to act as a surrogate is actually doing a great service to the intended parents. The woman is spending nine months of her life for begetting a child for another individual and that too with the condition that she relinquishes all her parental rights over the child after its birth and hand it over to the intended parents. Therefore, it is the duty of the intended parents to pay all the necessary medical expenses required during the initiation of surrogacy procedure as well as during the pregnancy and childbirth. The terms and conditions relating to the amount to be paid and the mode of payment should be determined in consultation with the clinic or the medical practitioner. In case of commercial surrogacy the intended parents should pay the amount as per the terms and conditions of the surrogacy agreement. Further, it should be made mandatory that the intended parents or parent should make the payment of reasonable expenses for a medical insurance policy for the surrogate. The object of this medical

¹⁶³ See, The Belgian Law on Research on Embryos in Vitro, 2003, Art.5(4).

¹⁶⁴ *Id.* Art. 5 (5).

¹⁶⁵ See, The Portuguese Law on Assisted Reproductive Technologies, 2006, S.2.

insurance policy is to protect the surrogate woman in case of any harm or injury during the surrogacy procedure or during the subsequent pregnancy and delivery.

The proposed ART Bill, 2010 in India states that, all expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice and till the child is ready to be delivered as per medical advice to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy¹⁶⁶. It further states that subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate¹⁶⁷. It also states that the intended parents shall ensure that the surrogate mother and the child she delivers are appropriately insured until the time the child is handed over to the intended parents or any other person as per the agreement and till the surrogate mother is free of all health complications arising out of surrogacy¹⁶⁸. The ICMR Guidelines also contains similar provisions¹⁶⁹.

4.8.3 To Accept the Child after Birth

One of the most important duties of the intended parents or parent is to accept the responsibility for the surrogate child after its birth in every circumstance. There are instances that the surrogate has given birth to triplets or quadruplets¹⁷⁰. So also it is to be noted that the process of conception and pregnancy and delivery of child are biological processes and depend on various factors. In surrogacy, the genetic material is mixed outside the human body and the resultant embryo/foetus is subsequently

¹⁶⁶ See, The ART Bill, 2010, S.34 (2).

¹⁶⁷ *Id.* S. 34(3).

¹⁶⁸ *Id.* S. 34(24).

¹⁶⁹ See, Rule 3.5.4 of the ICMR Guidelines, which states that, “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”.

¹⁷⁰ In 1987 a South African mother bore *triplets* for her daughter. See, Barbara Smith, *The Reader's Companion to U.S. Women's History*, Houghton Mifflin Harcourt, U.S.A. (1999), p.513; See also, Sheila McLean, & John Kenyon Mason, *Legal and Ethical Aspects of Healthcare*, Cambridge University Press, U. K. (2003), p.113.

implanted in the womb of the surrogate woman. Thereafter the development of the foetus, the various stages of pregnancy and delivery of the child by the surrogate are same as that of the pregnancy and delivery of child conceived through sexual intercourse. Thus similar to a normal pregnancy, in surrogacy pregnancy also there are chances of defective birth and are in fact more due to the various medical procedures involved in it. In such circumstances, the intended parents cannot deny the responsibility to accept the children as they have initiated the surrogacy procedure. Therefore, the intended parents have the duty to accept the multiple babies born to the surrogate as well as to accept the surrogate child even if the child is born with defects.

4.8.4 To Maintain Surrogate Child as Natural Child

Every surrogate child is considered as a legitimate child of the intended parent/parents and therefore, has all the rights available to the children born through normal sexual intercourse. Thus it is the duty of intended parents to take care and maintain the surrogate child as their natural child and provide it with all the rights and privileges available to a natural born child. The ICMR Guidelines in India provide that, a child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges similar to a child born to couple through normal sexual intercourse¹⁷¹.

4.8.5 To Appoint Local Guardian

Currently, India is considered as a major destination for surrogacy by foreign couples and individuals. Majority of the surrogacy procedures being performed are for the benefit of foreigners. In such cases, some of the problems which may arise are that, the intended parents may not be available in the country to take care of the surrogate during and after the pregnancy; or the intended parents after entering into agreement with the surrogate may change their mind or they may separate or there may be death of the intended parent/parents. In such situations the serious question

¹⁷¹ See, The ICMR Guidelines, R.3.12.1.

which arises is who will take care of the surrogate woman and surrogate child? The case of *Baby Manji*¹⁷² is an eye opener in this context. In this case, the intended parents legally dissolved their marital relationship during the surrogate pregnancy and refused to accept the child after its birth. The court had to intervene and the child was handed over to the mother of one of the intended parents as she claimed the right over the child¹⁷³. In a situation where the intended parents as well as the relatives of intended parents refuse to accept the child, the interests and welfare of the child is at stake. Therefore, it is necessary to address the issue of who will be made responsible for taking care of surrogate woman and the child in case where the intended parents are from foreign countries.

A country like India, which is rapidly becoming the surrogacy capital of the world, needs to address this issue very seriously. The Indian ART Bill, 2010 deals with this issue to some extent. It provides that a foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy, till the child / children are delivered to the foreigner or foreign couple or the local guardian. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally obliged to take delivery of the child. During the transition period, the local guardian shall be responsible for the well-being of the child. However, the local guardian is free to handover the child to an adoption agency, if the intended parents/parent or their legal representative fails to claim the child within one month of the birth of the child¹⁷⁴. In case of adoption or the legal guardian having to bring up the child, the child will be given Indian citizenship¹⁷⁵. The provision of appointing a local guardian by the intended parent is a step forward in ensuring the protection of the interests of the child as well as the surrogate mother.

¹⁷² *Baby Manji Yamada v. Union of India*, A.I.R. 2009 S.C. 84.

¹⁷³ *Ibid.*

¹⁷⁴ See, The ART Bill, 2010, S.34 (19).

¹⁷⁵ *Ibid.*

However, the provision that the local guardian is free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one month of the birth of the child is a step backward. This is because it gives option to intended parents to abandon the surrogate child and the local guardian can also absolve from responsibility of the child by handing over the child to an adoption agency.

This provision should be modified and it should be made mandatory for the local guardian to accept the custody of the child and keep the child for six months. If even after six months the intended parents fail to accept the custody of child, the local guardian can give the child for adoption or to an orphanage. The failure on the part of intended parents to accept the child shall be considered as an offence. Further, in such cases the intended parents should also be made liable to pay maintenance of the child till adoption or upto the age of majority. Any default in payment of maintenance by the intended parents shall also be considered as an offence. In such a case where intended parents are unwilling to pay maintenance, the local guardian shall be made responsible for the maintenance of the child. This would put a check on the misuse of surrogacy and abandonment of the surrogate child by the intended parent/parents and also protect the interests of the surrogate child. Thus the appointment of the local guardian should be made mandatory for foreign/NRI intended parent/parents.

4.9 Conclusion

The developments in medical science and assisted reproductive technologies are increasingly being used for begetting a child not only by infertile married couples but also by other fertile couples, single individuals, gays, lesbians and even same-sex couples. This gives rise to the need to examine the extent and scope of right to use surrogacy and the right to be intended parents/parent.

The right to be an intended parent stems from the inherent desire of an individual to beget and rear a biologically related child. The desire of an individual to beget a child is recognized by almost all legal systems as a fundamental basic human

right and is enshrined as the right to procreation. Though the right to be an intended parent is not yet established as an independent human right, nonetheless it is also a legally protected interest under various other human rights such as Right to Personal Liberty, Right to Procreation, Right to Found a Family and Decide on the Number and Spacing of Children, Right to Privacy and Right to Enjoy Benefits of Scientific and Technological Progress. Thus it can be said that every individual can claim a right to be an intended parent.

The exercise of the right to be an intended parent however gives rise to various legal issues and hence necessitates the interference of State in the exercise of this right. The right to be an intended parent is thus not an absolute right and it can be claimed only by those individuals who satisfy the criteria for being an intended parent as identified in this Chapter. Moreover, like any other human right, this right also can be restricted on the grounds of compelling public interest including the protection of the rights of the various stakeholders involved in the surrogacy.

Every surrogacy is the result of the intended parent's desires to have a child. The success of any surrogacy arrangement depends greatly on the extent to which the rights and duties of the intended parents are fulfilled. The various rights of the intended parents identified are right to select surrogate mother; right to impose restrictions upon surrogate mother; right to information and visit surrogate mother during pregnancy; right to custody and parentage of child; and right to maternity and paternity leave for intended parents. So also the intended parents are bound to fulfill their duties towards the surrogate woman and surrogate child such as, to refrain from sex selection and improvement of non-medical characteristics; to pay the agreed sum; to accept the child after the birth; to maintain surrogate child as a natural child; and to appoint local guardian. For the success of surrogacy arrangement these rights and duties of intended parents must fulfilled.

The surrogacy arrangements are initiated by the intended parents due to their desire to beget a genetically related child. However, in order to make it a reality it

requires the assistance of a woman who agrees to act as a surrogate. The next chapter deals with various issues related to surrogate woman and addresses the important conflicting issues related to surrogate woman.

CHAPTER -V
LEGAL AND HUMAN RIGHTS
CONCERNS OF SURROGATE
MOTHER

CHAPTER V

LEGAL AND HUMAN RIGHTS CONCERNS OF SURROGATE MOTHER

*“I wanted to do the ultimate thing for somebody,
to give them the ultimate gift.
Nobody can beat that, nobody can do anything nicer for them”*

...Anonymous Surrogate¹.

5.1 Introduction

In this modern age of medical advancements, infertile couples have a variety of options which can give them a child that they have been dreaming for. The option of having a surrogate woman impregnated with their genetic material often appears to be an attractive alternative for infertile couples who wish to have a child that is genetically linked to them². As society and reproductive technology have advanced, the concept of surrogacy has become more widely recognized³. This is because the position and role of women in the society has been and continues to be primarily defined by the biological fact that only the female of the species can become pregnant. Although both men and women participate in human reproduction, the tasks of bearing and raising children are commonly considered as women’s job⁴. Moreover, it is the desire of every woman to bear a child and have a family. Thus there is a growing demand for assisted reproductive technology and specifically surrogacy. This demand is not only due to the fact that every married couple wishes to have a

¹ Quoted in Rachel Cook, Shelley Day Sclater and Felicity Kaganas (eds.), *Surrogate Motherhood: International Perspectives*, Hart Publishing Oxford and Portland, U.K. (2003), p.214.

² See, Susan A. Ferguson, “Surrogacy Contracts in the 1990’s: The Controversy and Debate Continues”, 33 *Duquesne Law Review*, 903 (Summer 1995).

³ See, Christine L. Kerian, “Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?”, 12 *Wis. Women’s L.J.* 113 (1997), at p.117.

⁴ Norma Juliet Wikler, “Society’s Response to the New Reproductive Technologies: The Feminist Perspectives”, 59 *Santa Clara Law Review*, 1043 (1986), at p.1044.

biological child of their own but also due to the changing social and economic characteristics of modern society. Presently, a large number of couples are suffering from infertility problems. Also a number of women are opting to work and are career oriented and may delay childbearing. There has also been a change in the concept of nuclear family and relationships. In addition, lifestyle problems like rising divorce rates, sexually transmitted diseases, affect the child bearing capacity of the couple⁵. Surrogacy provides an attractive reproductive alternative to such couples and individuals. The increasing use of surrogacy in which women agree to offer their bodies for begetting a child is becoming a major issue of the 21st century. This practice is surrounded by various complex and controversial issues which raise concern for women's rights and health⁶. Among the various classes of stake-holders in surrogacy, the issues relating to surrogate women are the most important.

If we trace the history of surrogacy the very first incident of surrogacy mentioned in the Bible reveals the problems of surrogate mother. The problems encountered by Abraham, Sarah and Hagar and the difficulties which subsequently arose between their children can be considered as first indication of the dilemmas faced by surrogate mother. Sarah began to mistreat Hagar, the surrogate mother when she conceived Ishmael and as a result Hagar retreated to the desert⁷. During those days there was no medical technology and legal intervention. There were no surrogacy contracts and the concubines were not paid a fee, and they had no choice but to relinquish their parental rights⁸. In modern times, the establishment of legal systems and development of medical technology has led to a concern regarding the human rights and legal rights of the women participating as surrogate mother. This chapter focuses on the various legal and human rights issues relating to surrogate mother.

⁵ John A. Robertson, "Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction", 59 *South California Law Review*, 942 (1986), at p.943.

⁶ See, "Surrogacy: A 21st Century Biotechnology Issue Impacting Women's Rights", available at www.councilforresponsiblegenetics.org/.../8MT01X4VTN.pdf - Visited on 20.11.2011.

⁷ Krimmel, "The Case Against Surrogate Parenting", 13 *Hastings Center Report*, 35 (1983), at p.36.

⁸ See, Nancy W. Machinton, "Surrogate Motherhood: Boon or Baby-Selling the Unresolved Questions", *Marquette Law Review*, Vol. 71:115 (1987); Anne R. Dana, "The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers", *Duke Journal of Gender Law & Policy*, Vol. 18:353 (2011).

5.2 Surrogate Mother: Concept and Meaning

The phrase “surrogate motherhood” may spark notions of advanced scientific procedures similar to those described in Aldous Huxley’s *Brave New World*⁹. Surrogate motherhood, however, is an ancient concept. For example, the Bible notes two occasions where surrogate mothers provided infertile women with children¹⁰. Surrogate motherhood has continued through the centuries, and it is likely to remain a viable alternative for infertile couples and other individuals who wish to have a child. An increasing number of infertile couples use surrogacy because of the desire to have a genetically related child¹¹.

Generally, most people use the phrase “surrogate mother” “to designate a woman who gives up a child born to her to be raised by another woman and her husband, the latter being the child’s biological father.”¹² A surrogate mother is a woman who agrees to conceive a child through the artificial insemination by sperm, carry the child to term, and relinquish custody of the child in exchange for money¹³. The South African Law Commission in its *Report on Surrogate Motherhood*, for instance, makes use of the term ‘hostess mother’, thereby suggesting that the baby is merely a guest in the mother’s body, availing itself of her kind offer of boarding and lodging while away from its real home¹⁴.

Surrogate mothering is a service generally sought by married couples who are incapable of having children. The husband has a normal sperm count, however, the wife, for various medical reasons is either incapable of conceiving or unable to carry a child to term. In order to facilitate such a couple to have a child who is biologically related to at least its father, a surrogate mother is artificially inseminated with the

⁹ See, Aldous Huxley’s, *Brave New World*, Chatto and Windus Publication, London (1932), full text available at <<http://www.nalanda.nitc.ac.in/resources/english/etext-project/huxley/bravenewworld.pdf>> Visited on 20.11.2011.

¹⁰ *Supra* Chapter III.

¹¹ Stephen G. York, “A Contractual Analysis of Surrogate Motherhood and a Proposed Solution”, 24 *Loy. L.A. L. Rev.* 395 (1991), at p.395.

¹² Alexander M. Capron, “Alternative Birth Technologies: Legal Challenges”, 20 *U.C. Davis L. Rev.* 679 (1987).

¹³ Brain J. Carney, “Where Do the Children Go? – Surrogate Mother Contracts and the Best Interests of the Child”, 22 *Suffolk University Law Review*, 1187 (1988), at p.1190.

¹⁴ See, Clarke B., “South African Law Commission Report on Surrogate Motherhood”, 110 *South African Law Journal*, 777 (1993).

semen of the husband. This procedure is performed pursuant to a contract which provides that the surrogate, in consideration of a substantial fee, will carry the baby to full term, and on its birth she will give the child to the natural father¹⁵.

A surrogate mother provides a strange blend of intimate services and products. She permits a doctor to artificially inseminate her, carries a child to term, and in nine months delivers a child to whoever hired her. She sells her ovum (in some cases), her ability to nurture a single cell into an infant, and all her future claims to rear the child she bears. Her client can purchase, by contract, a series of promises¹⁶. Surrogate mother can be of two types, i.e. Traditional and Gestational Surrogate depending upon the contribution of genetic material in surrogacy.

Traditional surrogates are both the biological mother and the pregnancy carrier. In other words, a traditional surrogate provides her own eggs for the pregnancy. The intended father provides the sperm or donor sperms are used, and the surrogate undergoes insemination with either an intra-uterine insemination (IUI) or intra-cervical insemination (ICI) procedure at the fertility center¹⁷. This arrangement is often called “partial surrogacy,” because the “surrogate” is the genetic mother of the child, while the woman who will raise the child as its mother has no genetic relationship to it.

Gestational surrogates are women who carry a pregnancy with eggs donated from the intended mother or an egg donor and sperm donated from the intended father or a sperm donor. This involves the creation of an embryo from the sperm and ovum of the couple who intend to raise the child or from the donor/donors. This embryo is then implanted in the womb of the surrogate, where it develops until birth. This arrangement is often called “full or total surrogacy,” since the surrogate has no

¹⁵ Valerie Wilt, “A Surrogate Contract and its Enforceability Under Ohio Law”, 12 *U. Dayton L. Rev.* 575 (1986-1987), at p.577.

¹⁶ See, Note, “Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers”, 99 *Harv. L. Rev.* 1936 (1985-1986).

¹⁷ Dani Singer & Myra Hunter, *Assisted Human Reproduction Psychological and Ethical Dilemmas*, Whurr Publishers Ltd., U.S.A. (2003), p.44.

genetic relationship to the child, but simply provides a womb for the development of the child¹⁸.

The practice of surrogacy often raises the commonly asked question as to why a woman agrees to be a surrogate mother and takes up the responsibility of carrying the child for someone else. It is seen that most of the surrogate mothers are married and have already raised children. Surrogate mothers enter into such arrangements for a variety of reasons; money, however, is of primary importance. Certain women choose the surrogate role because the fee provides better economic opportunity than alternative forms of employment. Surrogate mothers express consent due to other reasons such as a love or maternal instinct and a sense of altruism in the unique ability to help an infertile couple to obtain a child. Additionally, the friendly or blood relationship with the couples having infertility problems may induce a woman to become a surrogate mother¹⁹. Some reasons are also cited as to why surrogates assume their role and these are less tangible than the economic factors. For example, many surrogates feel a sense of fulfillment in giving the gift of life to another couple. Others want to have the experience of bearing and giving birth to a child without the obligation of rearing a child.

In the past few years, many infertile couples have turned to surrogate motherhood as an alternative to begetting a child because of the desire to have a child genetically related to at least one parent. However, couples choosing surrogate motherhood as a procreative alternative often face considerable legal uncertainty. According to one commentator, the complicated new reproductive technologies seem to be much simpler when compared to the legal intricacies and complexities which arise with respect to the rights and responsibilities of those who participate in these new means of conception. Absence of any specific guiding legislation or case law in India, make the participants in surrogacy agreements especially the surrogate mother

¹⁸ See, Laurence E. Sweeney, "Chilling the Procreational Choice: Frozen Embryos-Who Gets What When the Donor Couple Divorce", 25 *New England Law Review*, 367 (1990).

¹⁹ *Supra* n. 13.

subject to significant legal risks²⁰. Surrogate motherhood has been criticized as presenting intolerable risks to women, including physical risks, psychological risks, and symbolic risks such as objectification and commodification²¹. Hence it is essential to examine the various legal and human rights issues surrounding a surrogate mother.

5.3 Right to be a Surrogate – Legal and Human Rights Basis

The growing demand for surrogacy and the increasing number of women offering to act as surrogates has brought to light one of the most important and basic question, i.e. whether a woman has a right to rent her womb or whether a woman has a right to be a surrogate. It is essential to examine this basic question because the very practice of surrogacy depends upon the availability of a surrogate woman. In fact, without a surrogate there cannot be any surrogacy practice. It is to be noted here that a woman's right to be a surrogate is not expressly mentioned in any international as well as national legal documents.

The international and national human rights documents however, consider a wide range of related issues, including the right of individuals to marriage and to establish a family, the right of individuals to bear children, to make a choice with respect to continuation of pregnancy, number and spacing of children and also prevention of conception as well as the right of the State to interfere with these rights on the ground of public interest. Various legislations in different countries relating to regulation of surrogacy also differ on this account. Some of the countries have expressly prohibited all the surrogacy practices²², while certain countries have permitted altruistic surrogacy²³; and some other countries have completely permitted both altruistic and

²⁰ Janet S. Watson, "Surrogate Mother Agreements in Georgia: Conflict and Accord with Statutory and Case Law", 4 *Ga. St. U. L. Rev.* 143 (1988), at p.154.

²¹ Lori B. Andrews, "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", 81 *Virginia Law Review*, 2343 (1995), at p.2358.

²² For example, the countries like, Austria, Germany, Sweden, Norway, Switzerland, Italy, Iceland, Japan, Spain, Vietnam and some of the states in USA like West Virginia, New Jersey, Arizona, Kentucky, Michigan, Nebraska, Indiana, District of Columbia, and Tennessee.

²³ Canada, Hungary, Hong Kong, United Kingdom, Greece, Denmark, Netherlands, Belgium, Philippines, etc. and some of the states in USA like New York, Washington, and North Dakota.

commercial surrogacy²⁴. Thus there is no consensus among different countries of the world with respect to surrogacy and right to rent a womb.

In India, this question has gained significance due to the fact that India is becoming a hub for surrogacy practices and many poor Indian women are offering to act as a surrogate. The case of Nirmala, a poor Indian woman has brought this question to limelight in the country. Nirmala was a poor woman of Chandigarh and was ready to be a surrogate mother for 50,000 rupees to save her paralyzed husband. Later she found out that her act would amount to adultery and she would be detained under Immoral Traffic (Prevention) Act, 1986. Hence with the help of a lawyer she filed a petition in the District and Sessions Court praying that since the child born to her by the unidentified partner was without sexual intercourse and through surrogacy and was with her husband's consent there was no violation of Immoral Traffic Laws²⁵. It can be mentioned here that these types of litigations are happening due to the fact that there is no express recognition of the right to be a surrogate²⁶.

Therefore, in the absence of a specific legal recognition, it is essential to determine the fundamental question whether there is a right at all to be a surrogate i.e. right to rent a womb and what is the legal basis of such a right? Moreover, in the contemporary human rights jurisprudence of expanding notion of rights as well as the State's right to interfere and restrict these rights on the grounds of public interest and morality, it is essential to determine the nature and extent of the right to rent womb or right to be a surrogate. It is argued by various authors and jurists that there is a right to rent womb and this right stems from three basic human rights i.e. the right to

²⁴ South Africa, India, Georgia (Country), Russia, Ukraine, Armenia, Iran, Bahrain, New Zealand, Lebanon, Saudi Arabia, etc. and some of the states in USA like Maryland, Ohio, Oklahoma, Illinois, Utah, Arkansas, Florida, New Hampshire, Nevada, Texas, and Virginia.

²⁵ See, Sandhya Srinivasan, "Surrogacy Comes out of the Closet", *Sunday Times of India*, July 6 (1997); Pritam Singh, *Text Book of Sex Education*, Bright Publishers, New Delhi (2008), p.206; Aditya Bharadwaj, "The Other Mother: Supplementary Wombs and the Surrogate State in India", in Stefan Beck, Maren Klotz & Michi Knecht, *Reproductive Technologies as Global Form: Ethnographies of Knowledge, Practices, and Transnational Encounters*, Campus Verlag GmbH, Germany (2012), p. 151.

²⁶ For example in the case of Nirmala in India (1996), the question was whether acting as a surrogate for another would amount to a violation of Immoral Traffic Act, 1956.

personal liberty and right to privacy; right to ownership of body; and right to enjoy benefits of technological and scientific developments.

5.3.1 The Right to Personal Liberty and Right to Privacy

Right to life and personal liberty is one of the most basic and fundamental rights enshrined in the *Universal Declaration of Human Rights*, 1948. It has strong foundation in the *International Covenant on Civil and Political Rights*, 1966; as well as various regional human rights documents and many national Constitutions. The right to life and personal liberty is considered as a bundle of rights and a repository of various facets of human life. It has been interpreted in a very broad manner by various courts and has been the foundation of numerous other fundamental human rights.

The right to procreation is also considered as a facet of right to life and personal liberty²⁷. It is to be noted here that these rights speak about the right of an individual to procreate for himself. The pertinent question here is whether this right can be extended to include right of a woman to procreate for another. In other words whether right to personal liberty of woman includes right to rent her womb. In order to answer this question it is necessary to first understand the meaning of ‘personal liberty’ as interpreted by various courts.

As per *Munn v. Illinois*²⁸ the expression ‘liberty’ in the 5th and 14th amendments to the US Constitution has a very wide meaning. It takes in all the freedoms. The expression is not confined to mere freedom from bodily restraint and liberty under law, but extends to the full range of conduct which the individual is free to pursue.

Under Article 21 of the Indian Constitution in contrast to the US Constitution, the word ‘liberty is qualified by the word ‘personal’. In *A K Gopalan* case²⁹, the judicial approach was that the scope of liberty under the Indian Constitution is

²⁷ *Supra* Chapter II.

²⁸ 94 U.S. 113 (1877) (U. S. Supreme Court)

²⁹ *A.K.Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27.

narrower than in the US Constitution and that it was confined only to freedom from detention or personal restraint. However, in *Kharak Singh* case³⁰, the majority speaking through Ayyangar, J. rejected the contention that ‘personal liberty’ was confined to “freedom from physical restraint or freedom from confinement within the bounds of a prison”. His Lordship held that, “the term ‘personal liberty’ is used in Article 21 to make up the shortcomings of ‘personal liberties’ of man dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, ‘personal liberty’ in Article 21 takes in and comprises the residue³¹”. Thus the concept of ‘liberty’ has received a far more expansive interpretation in India. The Supreme Court has rejected the view that liberty denotes merely freedom from bodily restraint; and has held that it encompasses those rights and privileges which have long been recognized as being essential to the orderly pursuit of happiness by free men.

In *Maneka Gandhi v. Union of India*³², finally the Supreme Court has not only overruled *Gopalan’s* case but has widened the scope of the words ‘personal liberty’ considerably. The Court held that “the expression ‘personal liberty’ in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19”³³.

The concept, scope and nature of right to personal liberty can be further understood from the words of Justice K. Ramaswamy, who observed that, “the right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality”³⁴. Thus, now it is well settled that right to personal liberty of an individual under Article 21 has both negative and affirmative

³⁰ *Kharak Singh v. State of U.P.*, A.I.R. 1963 S.C. 1295.

³¹ Paramjit S. Jaswal & Nishtha Jaswal, *Human Rights and the Law*, APH Publishing Co., New Delhi (1996), p.87.

³² A.I.R. 1978 S.C. 597.

³³ Brinder Pal Singh Sehgal, *Human Rights in India: Problems and Perspectives*, Deep & Deep Publications, New Delhi (2008), p.211.

³⁴ See, *Kartar Singh v. State of Punjab*, (1994) 3 S.C.C. 569.

dimensions. So from this an analogy can be drawn that the right to personal liberty also includes within its ambit the right of a woman to rent her womb. This argument is further justified on the grounds that the various aspects relating to right to procreation are included within the scope of personal liberty³⁵. Right to procreation is considered as basic and important right of an individual. In certain individuals this right can be achieved only through application of assisted human reproductive technologies and with the help of a surrogate woman. Hence it is logical to argue that right to procreation should include right to procreate for another i.e. right to be a surrogate and right to rent a womb³⁶.

However it is pertinent to mention here that like any other aspect of personal liberty, the right to be a surrogate must also be regulated in the interest of the society to subserve public good. At the same time the social interest must never be overbearing to justify total deprivation of individual liberty. Thus there has to be a balance between the conflicting and competing interests of the society and that of the individual's liberty to procreate for another. It is relevant to mention here that there are numerous dimensions of right to personal liberty and right to privacy is one among them. Though right to privacy has evolved from personal liberty, in due course of time it has attained the status of a distinctive and individual right with various facets and is relevant for this discussion relating to right to rent a womb.

Privacy means seclusion or solitude³⁷. The literal meaning of privacy, as defined in the *New Oxford English Dictionary* is, "the absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion"³⁸. In legal sense privacy means the right to be let alone; the right of a person to be free from unwanted publicity; and the right to live without unwarranted interference by the public in matters with which the public

³⁵ See for more, U.S. Congress, Office of Technology Assessment, *Infertility: Medical and Social Choices*, OTA-BA-358, U.S. Government Printing Office, Washington, DC, (May 1988).

³⁶ See, Vaibhav, "Article 21 - An Analysis", available at <<http://jurisonline.in/2010/10/article-21-an-analysis/>> Visited on 20.11.2011.

³⁷ See, Prof. S. S. Lal, "Human Rights and Right to Privacy: In Historical and Present Perspective", *Journal of Legal Studies*, Vol. XXXVII 124 (2006-07), at p.130.

³⁸ Namit Oberoi, The Right to Privacy: Tracing the Judicial Approach Following the Kharak Singh Case, *The Indian Journal of Constitutional Law*, Vol.1(1) 216 (2007), at p.216.

is not necessarily concerned³⁹. It is a fundamental human right recognized under both international law⁴⁰ as well as municipal law of most countries⁴¹. It is said that privacy is a chameleon like word used to designate a wide range of diverse interests of individuals- ranging from confidentiality of personal information to reproductive decision making. It is always considered as a mark of privilege and deeply connected with a person's self-respect and dignity.

In America, the Courts have held in numerous cases⁴² that the right to privacy is a constitutional right originating from the Due Process Clause of the Fourteenth Amendment. This right to privacy also extends to issues concerning family and procreative matters. This interpretation of the right to privacy was given by the Court in the case of *Griswold v. Connecticut*⁴³, which was one of the first cases dealing with contraceptives. The Court held that a law prohibiting distribution of contraceptives to married couples would violate the constitutional right to privacy. This judicial decision suggests that the intimate relation of husband and wife and the role of their physician in this regard are matters which come within the ambit of right to privacy⁴⁴. Further in the case of *Eisenstaedt v. Baird*⁴⁵, the Court stated that, "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"⁴⁶. The language of the Court refers clearly to procreative decisions which are protected under right to privacy. Hence the right to privacy includes right to make procreative decisions.

In *Carey v. Population Services International*⁴⁷, the Court referred to the cases

³⁹ *Ibid.*

⁴⁰ For example, The *Universal Declaration of Human Rights*, 1948, Art.12; The *International Covenant on Civil and Political Rights*, 1966, Art.17; The *European Convention on Human Rights*, 1950, Art.8; etc.

⁴¹ For example, South Africa, Hungary, USA, Ireland, India, Sweden etc.

⁴² *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Irwin Ravin v. State Alaska*, 537 P.2D 494; *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977).

⁴³ 381 U.S. 479 (1965).

⁴⁴ *Id.* at p. 484.

⁴⁵ 405 U.S. 438 (1972).

⁴⁶ *Id.* at p. 453.

⁴⁷ 431 U.S. 678 (1977).

of *Griswold* and *Eisenstaedt* and held, “read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. The Court elaborated and described the categories of issues which are protected by the right to privacy and stated that “among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage; procreation; contraception; family relationships; and child rearing and education”⁴⁸.

Court further cited the case of *Skinner v. State of Oklahoma*⁴⁹, and observed that, the constitutionally protected zone of privacy involves decision ‘whether to bear or beget a child’⁵⁰ and ‘matters of childbearing’. Thus right to privacy is one of the basis for the right to make procreative decisions⁵¹.

Right to privacy has developed as a fundamental human right in India also. In *Gobind v. State of Madhya Pradesh*⁵², the Court declared that right to privacy is itself a fundamental right. The scope and ambit of this right was further expanded in the case of *R. Rajagopal v. State of Tamil Nadu*⁵³, wherein the Court held that a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. The matters relating to procreation and pregnancy have also been included under right to privacy. In *B. K. Parthasarthy v. State of Andhra Pradesh*⁵⁴, the Court held that right to make decisions about reproduction is essentially a personal matter.

In the light of these judicial interpretations, it can be argued that when right to privacy includes the right to make decisions to bear or beget a child, then as a necessary corollary, this right should also include the right to bear or beget a child for another i.e. right to rent womb or right to be surrogate. However this right is not an

⁴⁸ *Id.* at p. 684-85.

⁴⁹ 316 U.S. 535 (1942).

⁵⁰ 405 U.S. 438 (1972), p. 453.

⁵¹ See for more discussion, Roger J. Chin, “Assisted Reproductive Technologies Legal Issues in Procreation”, 8 *Loyola Consumer Law Reporter*, 190 (1996).

⁵² A.I.R. 1975 S.C. 1375.

⁵³ A.I.R. 1995 S.C. 264.

⁵⁴ A.I.R. 2000 A.P. 156.

absolute right and it can be restricted or limited on grounds of compelling public interest.

5.3.2 Property Rights Over Human Body and Right to be a Surrogate

The view that the body of an individual is his property can be traced to the liberal political philosopher John Locke. He argued that the principle of autonomy provides a basis for ownership over the body⁵⁵. The foundation for the social contract is that individuals own their own bodies and products of the body because the latter come from their labor or other activities⁵⁶. This liberal view is followed by many jurists including utilitarian thinkers who consider that ownership based on autonomy gives individuals the most extended rights over their bodies. In this sense an individual can be said to own his body and no one else has a superior claim. An individual can do whatever he wants with his own body as long as it does not affect the rights of others. Thus an individual can enter into an agreement to work for eight hours a day in exchange for fixed wages; may offer own body for sexual pleasure of another or for medical experimentation etc. All these may be considered as a type of renting of the body of an individual since he is the owner of his body and can decide what he wants to do with it. Thus, theoretically it can be said that one has a property right over one's own body⁵⁷. However, historically, the common law has denied the recognition of property in a living human body. This denial of recognition of property rights over human body was based on the Latin maxim *dominus membrorum suorum nemo videtur* i.e. no one is to be regarded as the owner of his own limbs⁵⁸. Referring to this maxim, the UK Court of Appeal observed that, "the common law has always

⁵⁵ See, David B. Resnik, "The Commodification of Human Reproductive Material", *Journal of Medical Ethics*, (24) 388-393 (1998).

⁵⁶ See, Jacob Dahl Rendtorff, "Bio-banks and the Rights to the Human Body", available at <<http://www.crb.uu.se/downloads/biobanks-report/JDRendtorff.pdf>> Visited on 20.11.2011.

⁵⁷ For more on this point, see, Robert W. McGee, "If Dwarf Tossing is Outlawed, Only Outlaws Will Toss Dwarfs: is Dwarf Tossing a Victimless Crime?" 38 *American Journal of Jurisprudence* 335-358 (1993).

⁵⁸ This phrase was coined by Ulpian, a Roman jurist (a person who writes about Roman law), cited in *R v. Bentham* [2005] U.K.H.L. 18 at *para.* 14 (Lord Rodger of Earlsferry).

adopted the same principle: a living human body is incapable of being owned⁵⁹. However, this rigid view was diluted when the common law in 1840 recognized the right of the dead to a dignified disposition⁶⁰.

One of the earliest cases relating to this issue is *Regina v. Price*⁶¹, in which the court held that a father had a right to possession of his dead daughter's body and a duty to dispose it off in a legal manner. This view may be considered as the foundation for the existence of a property right in human body⁶². Another relevant case in this direction is *Doodeward v. Spence*⁶³ in which the High Court of Australia held that it would allow the doctors to have property rights over the preserved body, mainly on grounds of scientific endeavors and interests of mankind in the larger sense. Even if the exception in this case applies to that of living human body, the exception is based on scientific grounds and some kind of greater good that can be achieved from recognizing property in the body⁶⁴. Initially, the American Courts also adopted the English Common Law view that a dead body cannot be the subject of a property right. However, by the end of the nineteenth century, changes due to scientific and medical advancements led to a change in this view. In the case of *Pierce v. Proprietors of Swan Point Cemetery*⁶⁵, the court held that, while a dead body cannot be considered property as defined in common law, it can be considered as a *quasi property*, which entitles the relatives of the deceased to certain rights in the body that courts will protect⁶⁶. Thus the earlier cases relating to right over human body were centered on property rights with respect to a dead body. However, the advancements in scientific and medical technology have brought to forefront the issue

⁵⁹ See, "Commoditization of the Human Body", available at <www.stopsextrafficking.wordpress.com/>Visited on 20.11.2011.

⁶⁰ *R v. Stewart*, (1840) 113 E. R. 1007, 1009 (Q.B.) (imposing common law duty that required "the individual under whose roof a poor person dies" to provide with proper Christian burial).

⁶¹ (1884) 12 App. Cas. 247 (Q.B.D.).

⁶² Michelle Bourianoff Bray, "Personalizing Personality: Towards a Property Right in Human Bodies", 69 *Texas Law Review*, 209 (1990), at pp.226-27.

⁶³ [1908] H.C.A. 45. The case deals with the issue as to whether one can have property over a corpse, specifically a preserved body of a two-headed stillborn baby.

⁶⁴ *Supra* n.59.

⁶⁵ 10 R.I. 227 (1872).

⁶⁶ *Pierce*, 10 R.I., p.238 (explaining that quasi-property right entails right to protection from violation and proper burial).

whether individuals have a property right over their own body and body parts and whether they can use them as they want.

In *Moore v. Regents of the University of California*⁶⁷, the California Court discussed directly the issue, “whether people own their body parts when the parts are in, or attached to their bodies, and whether people continue to own them once the parts are removed from their bodies?” The plaintiff, John Moore, underwent extensive treatment for hairy-cell leukemia at UCLA Medical Center. Moore consented to a splenectomy in order to retard the progression of his disease. Following the surgery, his physicians required Moore to return to the UCLA Medical Center for further testing and treatment. During these visits, they withdrew additional samples of Moore’s bodily tissue and, without Moore’s knowledge, continued to perform research on the tissue samples and removed portions of his spleen until they ultimately developed a valuable cell line from his bodily materials. The physicians obtained a patent for the cell line and negotiated various commercial agreements for development of the cell line and products to be derived from it. Moore based his claim of conversion on the theory that he retained ownership rights in his cells after they were removed from his body, that these rights allowed him to direct the use of his cells, and that he never consented to their use in medical research.

The California Second District Court of Appeal held that Moore’s allegation of a property right in his own tissue was sufficient to sustain a cause of action for conversion. The Court held that an individual’s right of dominion over his own body, including the rights of use, control, and disposition, constituted a property interest. On the basis of the existing case law, the Court found that an individual’s property interest in his own body was recognized in cases discussing requirements of informed consent, laws regarding disposition of dead bodies, and statutes protecting medical experimentation on human subjects⁶⁸. The Court of Appeal emphasized that there was no existing public policy or statutory authority that would bar finding a property interest in one’s own body. However, the California Supreme Court reversed the

⁶⁷ 793 P.2d 479 (Cal. 1990).

⁶⁸ *Moore*, 249 Cal. Rptr. at pp.505-07.

Court of Appeals' decision and held that Moore had no cause of action for conversion under the existing law because the existing California statutes limited a patient's control over excised cells⁶⁹. Thus, though Moore lost his case, the decision of the Court established the property right of an individual over his own body when it is within the body or if outside is in original form. However when any part of the body is separated from the body, the individual ceases to have any right over that part.

With the developments in assisted human reproduction technologies, various cases have come up before the courts regarding the ownership interests in reproductive material such as human sperm, eggs, and embryos⁷⁰. One of the important cases in this regard is *Hecht v. Superior Court*⁷¹ (*Hecht I*). In this case William Kane who was 48 years old committed suicide. Before this act, he bequeathed fifteen vials of sperm, already deposited in a sperm bank, to his girlfriend Deborah Hecht. However a legal battle ensued between Deborah Hecht and Kane's two adult children for the ownership of Kane's sperm. As the probate court ordered that the sperm be destroyed, Hecht made an appeal to higher court. The contention of Kane's children was that the decision given in *Moore* case prevented Kane from having an ownership or possessory interest in his sperm once it had left his body.

The Higher Court however held that it was "self-defeating" to follow *Moore* because of the fact that if Kane had no property interests in his sperm once it left his body, "the sperm would not have constituted part of Kane's estate and the probate court would not have Jurisdiction over its disposition"⁷². The Court further distinguished the *Hecht* case from the *Moore* case on various grounds. The court observed that the *Moore* decision relied largely on a specific statute intended to

⁶⁹ John Moore's claim was rejected by the Court because the patented cell line was distinct, both factually and legally, from Moore's excised cells. Furthermore, the court refused to extend the tort of conversion to cover Moore's claim. It based its conclusion largely on the policy consideration that extension of the law would greatly hinder researchers by increasing their liability and limiting their access to raw materials.

⁷⁰ For a comprehensive discussion of cases, statutes, and medical issues involving property and personhood interests in cryopreserved embryos, see, Laura S. Langley & Joseph W. Blackstone, "Sperm, Egg and a Petri Dish: Unveiling the Underlying Property Issues Surrounding Cryopreserved Embryos", 27 *Journal of Legal Medicine*, 167 (2006).

⁷¹ 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

⁷² See, *Hecht v. Superior Court (Kane)* (1993) 16 Cal. App. 4th 836 [20 Cal. Rptr. 2d 275].

control the use and destruction of biological material and had thus left open the possibility that other specialized statutes may evince “some limited right to control” over excised cells. Therefore the court ultimately held that, at the time of his death, Kane had an ownership interest in the sperm “to the extent that he had decision making authority” with regard to its intended use and that “such interest is sufficient to constitute ‘property’ within the meaning of the probate code”⁷³.

Further in its subsequent proceedings the Court re-emphasized the uniqueness of both Kane’s and Hecht’s property interest in the sperm. With respect to Kane’s intention of bequeathing his sperm to Hecht so as to produce a child with her, the Court held that it limited Hecht’s property interest and that she lacked “legal entitlement to give, sell, or otherwise dispose of the sperm”. It stated that “to the extent this sperm is ‘property’ it is only ‘property’ for the person to whom it was bequeathed”⁷⁴. Further discussing the fundamental right of Kane to procreate, the Court held that to protect this right the recipient of the sperm is prohibited from selling or contracting away the bequest. Finally, the Court cited the Ethical Statement of the American Fertility Society, which states that “gametes . . . are the property of the donors”⁷⁵. It also referred to *Davis v. Davis*⁷⁶, in which the Tennessee Supreme Court while determining a divorced couple’s interests in seven of their cryogenically preserved pre-embryos had held that the plaintiffs had “an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the pre-embryos”⁷⁷.

An analysis of all the above cases reveals that, an individual has a right over his body and body parts as long as it is within the body. However, with respect to reproductive materials such as sperms, eggs and embryo, an individual continues to have a property right over such material even after it leaves the body. Hence it is

⁷³ Erin Colleran, “My Body, His Property?: Prescribing A Framework to Determine Ownership Interests in Directly Donated Human Organs”, *Temple Law Review*, Vol. 80, 1204 (2007), at pp.1212-1213.

⁷⁴ *Supra* n.72.

⁷⁵ *Supra* n.73.

⁷⁶ 842 S.W.2d 588, 597 (Tenn. 1992).

⁷⁷ *Davis*, 842 S.W.2d at 597.

submitted that, every woman including surrogate woman has a property right over her body and it includes the right over womb also. Therefore every woman can use her womb and such use can be considered as an exercise of property right over body.

In India, most of the human rights of an individual can be traced to Article 21 of the Constitution which states that, “no one shall be deprived of his right to life and personal liberty except according to procedure established by law”. Thus Article 21 protects the liberty of an individual over his body and prevents any arbitrary and unlawful interference. Further the various civil⁷⁸ and criminal laws⁷⁹ also acknowledge the fact that an individual has a right over his own body and no one can interfere with it. Thus from the above discussion it can be inferred that the individuals have a property right over their own body and body parts including biological materials whether within the body or outside the body. This right over one’s own body confers a woman the right to rent her womb. Like any other property right, the property right over human body is not an absolute right and thus it is also subject to reasonable restrictions.

5.3.3 Right to Benefit from Scientific Progress and Right to be a Surrogate

The right of a woman to rent her womb is based on the premise that it is a facet of her personal liberty and an exercise of her property right over her own body. Further it can be justified on the ground that every individual has a right to enjoy the benefits of scientific progress. The right to enjoy the benefits of scientific progress and its applications is enshrined in various international and regional instruments. It was recognized for the first time in Article 13 of the *American Declaration of the Rights and Duties of Man*, 1948 which states that “every person has the right to participate in the benefits that result from intellectual progress, especially scientific discoveries.” This right was further seen enshrined in Article 27 of the *Universal Declaration of Human Rights*, 1948 which stipulates that “everyone has the right to

⁷⁸ Any invasion against human body is protected under Tort of Assault and Tort of Battery under civil law.

⁷⁹ The Indian Penal Code provides the offences of Criminal Force (Section 349 & 350) and Assault (Section 351).

share in scientific advancements and its benefits⁸⁰.” This right gained more prominence when it was included in Article 15 of the *International Covenant on Economic, Social and Cultural Rights*, 1966 which recognizes “the right of everyone to enjoy the benefits of scientific progress and its applications.”

Further the *Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind*, 1975 has elaborated the right to enjoy the benefits of scientific progress and imposed a duty on the state parties to take adequate measures to ensure this right. The *Universal Declaration on Bioethics and Human Rights*, 2005 under Article 15 reaffirms this right⁸¹. Thus every individual has the right to take benefits of scientific progress and its applications. The developments in assisted reproductive technologies have opened up new possibilities for a woman to act as a surrogate for another and thereby obtain monetary benefits. In majority of the cases women act as surrogate due to economic necessity. Thus it is essential to recognize the right of a woman to rent her womb as a surrogate for economic benefits by using the advancements in assisted human reproductive technologies.

Therefore, the right to be a surrogate for another can be considered as one of the rights implied by the other fundamental human rights. It originates from the right to personal liberty of a person and is also a facet of right to privacy. Further, the right to be a surrogate may also be covered under property rights over human body as well as right to enjoy benefits of progress in science and technology. Thus every woman can act as a surrogate; however it is necessary to regulate this right in the interest of various stakeholders in a surrogacy. Hence it is essential to identify the criteria for determining who can be a surrogate.

5.4 Eligibility Criteria for a Surrogate Mother

The question that who can be a surrogate to beget a child for another is a very complex question to answer because of its sensitivity and also because of the various

⁸⁰ See, *The Right to Enjoy the Benefits of Scientific Progress and its Applications*, United Nations Educational, Scientific and Cultural Organization, 2009. Full text available at <www.unesdoc.unesco.org/scientific_applications> Visited on 20.11.2011.

⁸¹ *Ibid.*

issues which it raises. This is due to the fact that each and every woman has the right to act as a surrogate for another or has the right to rent her womb which can be traced to right to personal liberty and privacy, property right over body and right to enjoy benefits of developments in science and technology⁸². However, the indiscriminate use of this right by each and every woman will raise a bundle of legal issues. For example, if an unmarried girl chooses to exercise this right it would come into conflict with public morality and also raise the issue whether it will amount to prostitution. Likewise, if married woman opts to be a surrogate for another it may be criticized as adultery. Further, if postmenopausal woman acts as a surrogate it may affect the health of the child as well as health of the woman. Therefore it is essential to determine who can be a surrogate mother i.e. it is necessary to identify the eligibility criteria for exercising this right. This question is very important in India because every year large number of women are acting as surrogate mother and there is no legislation dealing with this issue. Even countries which have legislations for regulating surrogacy, have not addressed this issue adequately. The well developed jurisdictions like US⁸³, UK⁸⁴, France⁸⁵, Japan⁸⁶, and Germany⁸⁷, etc. have also not dealt with this issue adequately. However some of the countries have mentioned a few conditions regarding who can be a surrogate. Different countries have given different conditions for being a surrogate and since there is no uniformity with respect to these conditions, it is essential to examine all these legislations of different countries in order to arrive at a proper eligibility criterion suitable to Indian situations.

⁸² See for more, *K.L. v. Peru*, No 1153/2003, paras. 2.1-2.6, UN Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005).

⁸³ There is no Federal Law regulating surrogacy. However various states have adopted laws for the regulation of surrogacy such as the, Texas Law relating to Surrogacy, Tex. Fam. Code §§ 160.751 to .763 (2007); and Utah Law relating to Surrogacy, Utah Code Ann. §§ 78-45g-801 to -809 (2007), etc.

⁸⁴ The major laws are, the Surrogacy Arrangements Act, 1985 and the Human Fertilization and Embryology Act, 1990.

⁸⁵ Surrogacy is declared as illegal on the basis of Articles 6 & 1128 of the French Civil Code, together with Article 353 of the same code in 1994. See, Hugh Beale, Arthur Hartkamp, Hein Kotx & Dennis Tallon, *Cases, Materials and Text on Contract Law*, Hart Publishing, U.K. (2002), pp. 302-303.

⁸⁶ In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements.

⁸⁷ The practice of surrogacy is prohibited in Germany under Embryo Protection Act, 1990. See <http://www.dnapolicy.org/policy.international.php?action=detail&laws_id=52> Visited on 20.11.2011.

5.4.1 *Single Woman*

A single woman may include an unmarried girl, divorced woman and a widow. An unmarried girl becoming pregnant and giving birth to a child is considered as a taboo in Indian society and if it is for the purpose of gaining money by acting as a surrogate, it would be considered as an immoral activity. It may be considered as prostitution and may affect the future life and marriage prospects of the girl. Further such indiscriminate use of surrogacy would create situation of unmarried mothers in the society and it is an unacceptable situation in India.

In countries which have legislations regulating surrogacy, the right to act as a surrogate is restricted only to woman who has at least one child of her own. However most of these legislations are silent with respect to marital status of the surrogate and some of the legislations are specific. For example, the Russian Law says that the prospective surrogate must have at least one healthy child of her own and the marital status of the surrogate is irrelevant⁸⁸. Likewise the Clause 123 of the Ukrainian Family Code and Order 24 of the Health of Ministry of Ukraine mention that the surrogate woman is to have at least one child of her own and it is not necessary that the prospective surrogate mother should be married. The surrogacy legislation in Victoria says that, the surrogate mother has previously carried a pregnancy and given birth to a live child⁸⁹. An analysis of the proposed Artificial Reproductive Technology (Regulation) Bill, 2010⁹⁰ of India reveals that an unmarried girl can also be a surrogate. None of the legislations mention about the eligibility for the categories of divorced and widowed woman.

From the above it can be seen that the marital status of surrogate is irrelevant in most countries. In India, though the proposed ART Bill, does not impose any restriction on the basis of marital status it is submitted that considering the social and moral standards of the country an unmarried girl should not be allowed to act as a

⁸⁸ According to the Order 67th of the Russian Federation, Ministry for Health (Reg. No. 4452 24.04.03 RF Justice Ministry).

⁸⁹ Section 40 (1) (ac) provides that, “the surrogate mother has previously carried a pregnancy and given birth to a live child”. See, Assisted Reproductive Treatment Act, 2008 (Victoria).

⁹⁰ Hereinafter referred to as ART Bill.

surrogate mother. It may be argued that such a prohibition violates Article 14 of the Indian Constitution. However it is to be noted that reasonable classification is permissible. A divorcee or a widow may be permitted to act as a surrogate in view of their previous marriage.

5.4.2 Married Women

Among the various categories of women, those women who are married are most eligible to act as a surrogate. However the question that primarily arises is, whether it will amount to adultery and secondly whether the consent of the husband is required. With respect to the first question, most of the legislations mention that the surrogate woman must have at least one child and their marital status is irrelevant⁹¹. This means that a surrogate woman can be married or unmarried. Moreover the express recognition that a woman who has a child can act as a surrogate shows that, it would not amount to adultery. In India, the *ICMR Guidelines* specifically declare that, the artificial reproductive technology used for married woman with the consent of the husband does not amount to adultery on part of the wife or the donor⁹².

With respect to the consent of husband most of the legislations are silent. However in India the proposed ART Bill, 2010 under section 34 (16) states that, in the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate. The *ICMR Guideline* states that, the artificial insemination by donor without the husband's consent can be a ground for divorce or judicial separation. It is submitted that the same condition can be applicable to a surrogate woman also.

5.4.3 Post Menopausal Woman

In the recent times, there have been many instances of post menopausal women acting as a surrogate to beget a child for another. For example, the 61 year old

⁹¹ See, Texas Law relating to Surrogacy, Tex. Fam. Code §§ 160.751 to 160.763 (2007); Utah Law relating to Surrogacy, Utah Code Ann. §§ 78-45g-801 to -809 (2007). These laws are modeled after Part 8 of the Uniform Parentage Act of 2002 and provide that, "the gestational surrogate must have had at least one prior pregnancy and delivery".

⁹² See, *The ICMR Guidelines*, R. 3.16.2.

Kristine Casey gave birth to a male baby in 2010⁹³. Likewise 56 year old Jaci Dalenberg gave birth to triplet girls in 2008⁹⁴. It is argued that surrogacy acting as a surrogate at this age may affect the health of the child as well as the health of the surrogate. Considering this aspect most of the countries have fixed an upper age limit for the surrogate. For example, in Russia the upper age limit is 35 years old and in Ukraine it is 40 years.

In India the proposed ART Bill, 2010 mentions the upper age limit as 35 years⁹⁵ while the *ICMR Guidelines* sets an upper age limit of 45 years⁹⁶. Thus it can be seen that in India there is a conflict regarding the upper age limit for acting as a surrogate. This conflict needs to be resolved and the upper age limit for surrogate must be fixed as 45 years in order to protect the health of surrogate and welfare of the child.

5.4.4 Family Relative

Another recent trend in surrogacy is that, the surrogate woman may be the relative of the couple or the individual who desire the child. For example, Geraldine Wesolowski, a fifty-three year old woman, gave birth to her grandchild, conceived from her son's sperm and his infertile wife's eggs⁹⁷. Likewise, Kristine Casey acted as a surrogate for her infertile daughter by carrying and giving birth to her own grandson⁹⁸. This has however been criticized on the grounds that it leads to incestuous relationships as well as amounts to degrees of prohibited relationships.

⁹³ See, Lindsey Gruson, "When 'Mom' and 'Grandma' are One and the Same", *New York Times*, Feb. 16, 1993, at B1, available at <www.nytimes.com/> Visited on 20.11.2011.

⁹⁴ See, "Surrogate Grandmother Gave Birth to Her own Daughter's Triplets, November 11, (2008), available at <<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/3441499/Surrogate-grandmother-gave-birth-to-her-own-daughters-triplets.html>>- Visited on 20.11.2011.

⁹⁵ See, S. 34(5).

⁹⁶ See, para 3.10.5 which states that, "A surrogate mother should not be over 45 years of age".

⁹⁷ *Supra* n. 93.

⁹⁸ See, the Kirkman sister's case in Victoria, popularly known as 'My sister's baby'. In this case Linda Kirkman agreed to gestate the genetic child of her older sister Maggie. The baby girl was handed over to Maggie and her husband at birth. See, Dhananjay Mahapatra, "Baby Manji's Case Throws up Need for Law on Surrogacy", Aug. 25, 2008, available at <<http://articles.timesofindia.indiatimes.com/>> Visited on 20.11.2011. Also see, Paul Thompson, "Woman Gives Birth to Own Grandson", Feb. 13 (2011), available at <<http://www.telegraph.co.uk>> Visited on 20.11.2011.

In most of the countries marriage between individuals of certain degrees of prohibited relationships are not allowed⁹⁹. Begetting of a child by individuals within these degrees of prohibited relationships is also considered as against the societal interest. It is necessary that the legislations dealing with surrogacy should also address this sensitive issue which affects the society. However, it is seen that different countries have adopted legislations suited to their own conditions and there are diverse approaches in this regard¹⁰⁰. In India, the *ICMR Guidelines* state that, a relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate¹⁰¹. The ART Bill, 2010 under Section 34(18) also reiterates the same¹⁰². Thus in India there is no bar for a relative woman to act as a surrogate, and the only condition is that the relative woman should be of the same generation as the intended mother. It is to be noted that the above condition would help to avoid a situation where mother or mother-in-law or a woman of similar status give birth to their grandchild. But it may create a situation where a sister or sister-in-law or a woman in similar status may act as a surrogate. It is submitted that a woman having the status of a mother or mother-in-law to an intended parent should not be allowed to act as a surrogate. However a woman in the status of a sister or sister-in-law of an intended parent can be allowed provided it is a gestational surrogacy¹⁰³.

Becoming a surrogate mother is a wonderful way to help a couple with fertility issues to beget a child as well as to help an individual who has a desire to have a child. In the past few decades more and more women are seen willing to act as a

⁹⁹ For Example, the Marriage Act, 1949 (UK and Wales); The Hindu Marriage Act, 1955 (India) and Marriage (Prohibited Degrees) Act (S.C. 1990, c. 46) (Canada).

¹⁰⁰ Countries like Israel specifically prohibits while UK permits that a relative can be a surrogate. Most of the American States which permits surrogacy also allows a relative as a surrogate.

¹⁰¹ See, Para 3.10.6 which provides that, “A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate”.

¹⁰² A relative, known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate.

¹⁰³ Gestational Surrogacy means, a surrogacy in which there is no contribution of genetic material by surrogate mother.

surrogate due to financial reasons. Every surrogacy process requiring payment of huge amount of money to the surrogate mother and it is fast developing as a lucrative business. It is reported that in many of the major cities in India there are agents and brokers for recruiting women to act as a surrogate. This may lead to a situation that women may opt to act as a surrogate again and again for gaining money and the agents may also recruit them several times. For example, The Kehoe's surrogate, Ms Baker, who herself had four children, had previously delivered and handed over three other surrogate born children to their intended parents¹⁰⁴. In another example, Carole Horlock, a surrogate acted 9 times as a surrogate for another¹⁰⁵. Therefore, an important question which arises here is that how many times a woman can act as a surrogate for another. It is seen that most of the surrogacy legislations in different countries of the world are silent on this issue.

In India, the *ICMR Guidelines* provide that, no woman may act as a surrogate more than thrice in her lifetime¹⁰⁶. The ART Bill, 2010 also made a limitation under section 34(5) which states that, no woman shall act as a surrogate for more than five successful live births in her life, including her own children.

Acting as a surrogate mother is not an easy task and should not be taken lightly. In fact it is both emotionally and physically a challenging task. Most of the legislations regulating surrogacy mention that, a potential surrogate must be mentally and physically fit¹⁰⁷, and be capable of carrying the baby to a full term. Therefore, careful consideration must be given while allowing a woman to act as a surrogate.

From the above discussion it can be summarized that, a woman can be allowed to act as a surrogate only if she satisfies the following eligibility criteria:

¹⁰⁴ See, Louisa Ghevaert, "What happens when Surrogacy Goes Wrong: The Recent Indiana Surrogacy Case in Wider Context", <available at http://www.bionews.org.uk/page_54415.asp> Visited on 20.11.2011.

¹⁰⁵ See, "Surrogate Mother Carole Horlock", available at <http://www.incrediblebirths.com/Carole_Horlock-Surrogate.html> Visited on 20.11.2011.

¹⁰⁶ See, Para.3.10.8 of *ICMR Guidelines*.

¹⁰⁷ See, Liza Charlesworth, *The Couple's Guide to In Vitro Fertilization*, Da Capo Lifelong Books, Cambridge, U.K. (2004), p.158.

i) Age Limit: A woman acting as a surrogate must be between 25 – 45 years of age.

ii) Marital Status: Surrogate woman must be married and they should obtain consent of their husband if he is alive. An unmarried girl should not be allowed to be a surrogate; however divorced as well as a widows can be allowed.

iii) Fitness: Surrogate woman must be mentally and physically fit for carrying a child to a full term and must be free from any disability which adversely affects this capacity. She must also be free from any hereditary and communicable diseases etc.

iv) Previous Experience: It is desirable that the woman acting as a surrogate must have at least one child before participating in surrogacy. This will help to avoid the problems related to first pregnancy.

v) Family Relatives: Relatives can be allowed only if they are having the status of a sister or sister-in-law with the intended parents and only for gestational surrogacy.

vi) Maximum Limit: A woman can be allowed to act as a surrogate up to a maximum of three times including her own child.

Any legislation dealing with regulation of surrogacy should consider these criteria's while determining the eligibility of a woman to act as a surrogate.

5.5 Duties of Surrogate Mother

Surrogacy procedures usually involve agreements between the surrogate mother and intended parents. However in the absence of any specific legal provision for regulation of surrogacy agreements, the terms and conditions in such agreements are usually determined by the parties themselves. It is very essential that the conditions and duties imposed on the surrogate mother are not derogatory to the inherent human rights of the surrogate mother. Generally, in surrogacy agreements, the surrogate mother has to follow the duties like, abstaining from taking alcohol, drugs and other practices which may affect the child, and in case of a married

surrogate mother even abstaining from sexual intercourse with her husband¹⁰⁸. She also has to take proper care of her health, undergo regular medical checkups and allow the intended parents to visit her. In some cases there is a condition that she should not back out from the process and terminate her pregnancy¹⁰⁹. The duties of the surrogate mother have not been clearly mentioned in various laws regulating surrogacy in many countries.

Generally, the duties and conditions are imposed by the intended parents and the physician as per their convenience. Some of the authors have criticized that these conditions in a surrogacy procedure have the effect of violating the personal autonomy of the surrogate mother¹¹⁰. Hence it is essential to identify and examine the various duties which can be legitimately imposed on surrogate mothers. The various duties identified are as follows:

5.5.1 Duty to Disclose Details About the Family, Marital Status and Number of Children

It is the duty of every woman who wants to act as a surrogate to disclose all the details about herself, her family, marriage, spouse and children. This would help the intended parents to select the surrogate as per their requirements and beliefs¹¹¹.

5.5.2 Duty to Disclose Hereditary or Any Other Communicable Diseases

Every prospective surrogate has a duty to disclose all the details about any hereditary or any communicable diseases. This duty includes disclosing all those medical conditions which she is aware about her body¹¹². The ART Bill, 2010 and

¹⁰⁸ See generally, Carolyn Sappideen, "The Surrogate Mother – A Growing Problem", 6 *U.N.S.W. Law Journal*, 80 (1983), at p.90.

¹⁰⁹ See, Malini Karkal, "Surrogacy from a Feminist Perspective", *Indian Journal of Medical Science*, 5(4), (Oct. - Dec. 1997), available at <<http://www.issuesinmedicalethics.org/054mi15.html>> Visited on 20.5.2012.

¹¹⁰ See for more, Ragone H., *Surrogate motherhood: Conception in the Heart*, Westview Press, Oxford, U.K. (1994).

¹¹¹ This type of duty can be seen in most of the sample surrogacy contract formats published in infertility clinics websites, for example, see <http://www.allaboutsurgacy.com/sample_contracts/GScontract2.html> Visited on 20.8.2012.

¹¹² Pankaj Talwar, *Manual of Assisted Reproductive Technologies and Clinical Embryology*, Jaypee Brothers Medical Publishers (P) Ltd., New Delhi (2012), p.99.

ICMR Guidelines in India mentions the duty of the surrogate mother to undergo medical test for diseases which may endanger the health of the child. Section 34(6) of the ART Bill, 2010 provides:

“any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months”.

A similar provision is there in Rule 3.10.7 of the *ICMR Guidelines* which provides that, a prospective surrogate mother must be tested for HIV and shown to be zero-negative for this virus just before embryo transfer. She must also provide a written certificate that (a) she has not had a drug intravenously administered into her through a shared syringe, (b) she has not undergone blood transfusion; and (c) she and her husband (to the best of her/his knowledge) has had no extramarital relationship in the last six months. (This is to ensure that the person would not come up with symptoms of HIV infection during the period of surrogacy.) The prospective surrogate mother must also declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank.

5.5.3 Duty to Permit Medical Examination

Before entering into any surrogacy arrangement she should be ready to avail and present herself for any medical examination. This is necessary to ensure that the surrogate woman is physically and mentally fit to undergo surrogacy process and also free from any genetic, hereditary or communicable diseases. She should also cooperate with the physician in all the necessary medical procedures¹¹³.

¹¹³ See, Surrogacy law in Florida, Fla. Stat. §§ 63.212 to .213 and 742.15 to .16 (2007) which require the surrogate mother to submit to medical evaluation.

5.5.4 Duty to Undergo Regular Medical Checkups During Pregnancy

Once the woman is selected as a surrogate and the surrogacy procedure becomes successful, the surrogate should undergo regular medical checkups and is bound to follow the instructions of the physician¹¹⁴.

5.5.5 Duty to Take Adequate Health Care During Pregnancy

The health and development of the foetus in the womb, depends upon the health of the mother. Hence, like any other pregnant woman, the surrogate woman also has a duty to take adequate care of her health during the pregnancy period¹¹⁵.

5.5.6 Duty to Avoid those Practices which Adversely Affect the Normal Development of the Child

Certain practices like consumption of alcohol, smoking, and drugs affect the normal development of the foetus¹¹⁶. It is reported that in some of the countries litigations have come up before the court, claiming compensation for injury to the child during pregnancy due to activities of surrogate mother¹¹⁷. The surrogate mother should also refrain from indulging in any work or activity which may affect the child in the womb¹¹⁸. It includes abstaining from sexual intercourse during the pregnancy also.

5.5.7 Duty to Carry the Child for a Full Term

The most important duty of the surrogate is that once the surrogacy procedure is initiated and she conceives, she should not change her mind and withdraw from the

¹¹⁴ See for more, "Surrogacy: The Journey", available at <<http://www.surrogatemaker.com/data/surrogacy-journey-book.pdf>> Visited on 20.8.2012.

¹¹⁵ George Patrick Smith, *Bioethics and the Law: Medical, Socio-Legal and Philosophical Directions for a Brave New World*, University Press of America, U.S.A. (1993), p.241.

¹¹⁶ George P. Smith, *Human Rights and Biomedicine*, Martinus Nijhoff Publishers, Netherlands (2000), p.73.

¹¹⁷ Comment, "Surrogate Mothers and Tortious Liability: Will the New Reproductive Technologies Give Birth to a New Breed for Parental Tort", 4 *Clev. St. L. Rev.* 311 (1986); Note, "Maternal Substance Abuse: The Need to Provide Legal Protection for the Foetus", 60 *South California Law Review*, 1209 (1987).

¹¹⁸ See, The ART Bill, 2010, Section 34 (23) which states that, "Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act that would harm the foetus during pregnancy and the child after birth, until the time the child is handed over to the designated person(s)".

surrogacy agreement. It is the duty of the surrogate to carry the child for a full term and give birth to the child¹¹⁹. However the termination of the pregnancy may be allowed only in cases where the continuation of such pregnancy will affect the health or life of the surrogate.

5.5.8 Duty to Relinquish the Right over the Child and to Hand over the Child

The surrogate mother is bound to relinquish all her rights over the child and hand over the child within 72 hours of its birth if the intended parents have fulfilled their obligations towards the surrogate¹²⁰.

5.5.9 Duty to Abstain From Visiting

Once the surrogate mother has relinquished her rights over the child and handed over the child to the intended parents, she has a duty to abstain from visiting the child¹²¹. The surrogate mother shall not interfere in the relationship of surrogate child and intended parents. However, the surrogate may be allowed a visitation right if consented to by the intended parents.

It is relevant to mention here that the various duties imposed on surrogate mother are very essential for a successful surrogacy procedure. However, these duties sometimes may come in conflict with the individual rights of the surrogate woman. But since the woman is voluntarily agreeing to act as a surrogate mother, it cannot be criticized that her individual rights are violated. Considering the fact that surrogacy procedures are increasing in India, it is necessary to take care and precaution so that poor women are not exploited and forced to accept the conditions fixed by the other parties. In a welfare state like India, it is the duty of the state to adopt specific legal provisions for laying down the duties of a surrogate mother. Every duty has a

¹¹⁹ Larry Ogalthorpe Gostin, *Surrogate Motherhood: Politics and Privacy*, Indiana University Press, U.S.A. (1990), p.145.

¹²⁰ See, Draft ART Bill, 2010, Section 34 (4) states that, "A surrogate mother shall relinquish all parental rights over the child. So also the *ICMR Guidelines*, R. 3.5.5 states that, "A third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa".

¹²¹ *Supra* n.111.

corresponding right¹²², and therefore along with these duties a surrogate mother also has certain rights.

5.6 Rights of Surrogate Woman

A surrogacy arrangement typically involves a woman who is consenting to act as a surrogate and bear a child for another. Thus she is willing to undergo all the trials and procedures and is subjecting herself to the decisions of the physicians and intended parents. Sometimes repeated attempts may be required for the success of the surrogacy pregnancy. Further she is carrying the child in her womb for nine months and then giving birth to it. It is seen that the surrogacy arrangements largely focus on the duties of the surrogate mother than her rights. It is essential to mention here that along with duties a surrogate also has certain rights. However most of the legislations in different countries dealing with surrogacy have not seriously addressed this aspect. Therefore it is necessary to identify those rights which are essential for protecting the interests of surrogate mother. The main rights identified are as follows:

5.6.1 Right to an Informed Consent

The concept of informed consent has evolved considerably over the past Century. It began with an early recognition that doctors should not violate the bodily integrity and autonomy of another person without their permission. From there it progressed to the current concept that, informed consent properly understood must be considered an essential ingredient of good patient care¹²³.

Informed consent is the process by which a fully informed patient can participate in choices about her health care. It originates from the legal and ethical right of a patient to know the merits and demerits of a particular medical procedure or treatment and accordingly select the most appropriate one. The most important goal

¹²² According to Hofelidan Analysis. See, Nikolai Lazarev, "Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights", *Mur. U. E. J. L.* 9 (2005).

¹²³ See, Holly Goldberg, "Informed Decision Making in Maternity Care", *J. Perinat. Educ.* 18(1): 32–40 (2009).

of informed consent is that the patient has an opportunity to be an informed participant in his/her health care decisions¹²⁴.

The patient after getting necessary information about its impacts on body can decide whether to proceed or withdraw from such procedure. The consent given by the patient on the basis of the necessary information given by the doctor is known as informed consent. This right of an individual is recognized under both international law¹²⁵ and national laws¹²⁶.

Right to informed consent is one of the most important rights of a surrogate. This is due to the fact that surrogacy procedures involve various medical procedures for ensuring her suitability for being a surrogate. It involves procedures for implanting the foetus into her womb and sometimes repeated procedures may be required for successful implantation. All these procedures have significant impact on the body of the woman agreeing for surrogacy. Thus it is necessary to explain the possible consequences of each and every procedure involved in a surrogacy before entering into a surrogacy agreement¹²⁷. In India, the Draft ART Bill, 2010 also mentions about this right. It states:

“No assisted reproductive technology clinic shall perform any treatment or procedure of assisted reproductive technology without the consent in writing of all the parties seeking assisted reproductive technology to all possible stages of such treatment or procedures including the freezing of embryos”¹²⁸

¹²⁴ See, John F. Monagle & David C. Thomasma, *Health Care Ethics: Critical Issues for the 21st Century*, Jones and Barlett Publishers, Canada (2005), p. 272.

¹²⁵ *Helsinki Declaration*, 1964, Articles II & III; *International Ethical Guidelines for Biomedical Research Involving Human Subjects* adopted by Council of the International Organization of Medical Societies (CIOMS) in 1982 (CIOMS Guidelines); *Convention on Human Rights and Biomedicine*, 1997.

¹²⁶ For example, Health Care (Consent) and Care Facility (Admission) Act, 1996, Part 2 (British Columbia); Health Care Consent Act, 1996, Section 20 (Ontario); Health and Disability Commissioner Act, 1994, S. 20 (New Zealand).

¹²⁷ F. Shenfield, G. Pennings, J. Cohen, P. Devroey, G.de Wert and B. Tarlatzis, “ESHRE Task Force on Ethics and Law 10: Surrogacy”, *Human Reproduction*, Vol.20, No.10, 2705–2707 (2005), at p.2706.

¹²⁸ See, The ART Bill, 2010, S. 21(1).

Further the violation of this right gives rise to criminal¹²⁹ and tortious liability¹³⁰ in India.

5.6.2 Right to Receive Expenses of Pregnancy and Hospital Treatments

In a surrogacy procedure the surrogate woman has a duty to submit herself for medical examination and treatments as required. Also, during pregnancy, she has to undergo all necessary tests and medical treatments till the birth of the child. A surrogate is undergoing all these procedures and treatments for fulfilling the desire of another. Hence, it is necessary to ensure that all these expenses are borne by the intended parents. It is also necessary to cover certain medical expenses even if they are not related to her pregnancy because those conditions may affect the normal development of the foetus if they are not taken care of in a timely manner.

Further, it is necessary that during pregnancy a surrogate should take proper care of her health and take adequate nourishment in order to ensure the protection of the child in her womb. Hence she should be given all those expenses. This right is protected by almost all the legislations regulating surrogacy in many countries¹³¹ including India. In India, the Draft ART Bill states that, all expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy¹³². The *ICMR Guidelines* also states that, all the expenses of the surrogate mother during the period of pregnancy and post-natal care

¹²⁹ In case of any adverse outcome, including death of the patient, in the course of medical practice, in the absence of an informed consent the medical personal may be liable under Sections 304 A and 318, 319 and assault, criminal force etc. of Indian Penal Code, 1860. They can claim exception on the basis of section 87-92 in case where there is an informed consent.

¹³⁰ Under Tort of Assault and Battery.

¹³¹ The countries like Ukraine, (Clause 123 of the Family Code of Ukraine and Order 771 of the Health Ministry of Ukraine); Russia (Family Code of Russia (art. 51-52) and the Law on Acts on Civil Status (art. 16)), Canada (Assisted Human Reproduction Act)etc. Also the American State Laws such as Utah (Utah Code Ann. §§ 78-45g-801 to -809 (2007)); State of Nevada (Nev. Rev. Stat. Ann. § 126.045 (2007)); New Hampshire (RSA §§ 168-B:1 to -B:32 (2007)); Virginia (Va. Code Ann. §§ 20-156 to -165 (2007)).

¹³² See, The ART Bill, 2010, S. 34(2).

relating to pregnancy should be borne by the couple seeking surrogacy¹³³. The *Guidelines* further states that, payments to surrogate mothers should cover all genuine expenses associated with the pregnancy¹³⁴.

5.6.3 Right to Receive Reasonable Insurance Expenses

It is said that successfully giving birth to a child is like a rebirth for the woman. This is because of the inherent risk involved in the process of pregnancy and delivery. Therefore, like any other pregnancy, surrogate pregnancy also involves various risk factors. Further, due to the fact that it involves, a technological interference, the risk factors may be high. In surrogacy there is transfer of either genetic material¹³⁵ or developed embryo to the womb of the surrogate¹³⁶. It is also seen that surrogacy process often results in the woman giving birth to triplets or quadruplets¹³⁷. Thus surrogacy process may involve some complications and pose a risk to the health or life of the surrogate woman¹³⁸. Therefore, it is necessary to provide insurance protection to the health and life of the surrogate woman. This is very essential because most of the women opt to act as a surrogate mother due to their economic necessity¹³⁹. In fact many of the Indian women are forced to act as surrogates due to reasons of poverty or other economic needs¹⁴⁰. Hence in such a situation if anything happens to a surrogate mother during the pregnancy or child birth it will defeat her sole purpose of being a surrogate as well as affect her family. Therefore every surrogate mother is entitled to receive a reasonable coverage of insurance protection. For example, in USA, the State of Illinois has passed the Gestational Surrogacy Act,

¹³³ See, The *ICMR Guidelines*, R. 3.5.4.

¹³⁴ *Id.*, at R. 3.10.3.

¹³⁵ Partial Surrogacy, See for more *supra* Chapter III.

¹³⁶ Gestational or Full Surrogacy, see for more *supra* Chapter III.

¹³⁷ In 1987 a South African mother bore *triplets* for her daughter. See, Barbara Smith, *The Reader's Companion to U.S. Women's History*, Houghton Mifflin Harcourt, U.S.A. (1999), p.513. See also, Sheila McLean & John Kenyon Mason, *Legal and Ethical Aspects of Healthcare*, Cambridge University Press, U.K. (2003), p.113.

¹³⁸ *Supra* n.111 at p. 309. Also see, *supra* n.1 at p. 40.

¹³⁹ See, John Dwight Ingram, "Surrogate Gestator: A New and Honorable Profession", 4 *Marquette Law Review*, Vol. 76: 675 (1993).

¹⁴⁰ See the case of Nirmala, noted in Dr. T. Sita Kumari, "Surrogacy and its Legal Implications in India", available at <<http://airwebworld.com/articles/>> Visited on 28.8.2011.

2004 which provides for a health insurance policy throughout the pregnancy and for eight weeks after the birth that covers major medical treatments and hospitalization¹⁴¹.

In India, the Draft ART Bill mentions about this right in the following words:

“The intended parents shall ensure that the surrogate mother and the child she delivers are appropriately insured until the time the child is handed over to the intended parent(s) or any other person as per the agreement and till the surrogate mother is free of all health complications arising out of surrogacy”¹⁴².

5.6.4 Right to Compensation

The right of a surrogate mother to receive compensation for her service is a highly controversial issue. There are conflicting opinions among different countries regarding the payment of compensation in surrogacy. In some countries commercial surrogacy i.e. receiving money for surrogacy as such is prohibited¹⁴³; while in some other countries it is allowed¹⁴⁴. The payment of money to surrogate for her service is criticized mainly on the ground that it degrades the dignity of woman and enslaves her and reduces the value of a child as a product.

However, it is submitted that the right of a woman to act as a surrogate is a part of her right to personal liberty and privacy, and an expression of property right over her body. Moreover, every individual has the right to enjoy benefits from scientific

¹⁴¹ See, The Illinois Gestational Surrogacy Act, 2004, S. 356 (m), full text is available at <http://www.advancedfertility.com/download_files/illinois-infertility-law.pdf> Visited on 20.8.2012.

¹⁴² See, The ART Bill, S. 34 (24).

¹⁴³ For example in Hong Kong (Human Reproductive Technology Ordinance 2000); Germany (Embryo Protection Act, 1990) and also in Iceland, Italy, Japan and Hungary, See www.wikipedia.org/- Visited on 20.11.2011. So also various American State's such as Virginia (Va. Code Ann. §§ 20-156 to -165 (2007)); State of Nevada (Nev. Rev. Stat. Ann. § 126.045 (2007)); New Hampshire (RSA §§ 168-B: 1 to -B: 32 (2007)); Kentucky (KRS § 199.590 (2006)); and New York (NY Domestic Relations Law Art 8).

¹⁴⁴ For example in Ukraine (Clause 123 of the Family Code of Ukraine and Order 771 of the Health Ministry of Ukraine); Russia (Family Code of Russia (art. 51-52) and the Law on Acts on Civil Status (art. 16)); Canada (The Assisted Human Reproduction Act (AHRC)), etc.; So also the American State Utah (Utah Code Ann. §§ 78-45g-801 to -809 (2007)).

and technological developments. Thus it is the choice of the woman whether to act as a surrogate or not. If a woman chooses to act as surrogate due to economic necessity or any other similar reasons, then she shall be entitled to receive compensation for her service.

The participation of a woman in surrogacy for payment of money should not be criticized as degrading the dignity of the woman because she is acting as a surrogate by her own will after getting all necessary information about the procedure. The service provided by the surrogate woman is an invaluable service to the intended parents. The “woman’s work” of conception, gestation, and birth is arduous, and has a high social worth. The prohibition of payment for such work by the state would deprive women of compensation for her valued labor. They are entitled to economic gain for the physical changes in their bodies, the changes in lifestyle, the work of carrying the foetus, and the pain and medical risk of labor and parturition. Such payment is also justified on the ground that every human being has a right to contract with another and to be paid for the performance of services, even for highly personal services. At the same time it cannot be denied that there may be exploitation of poor and illiterate women who may be forced to act as surrogates. Therefore, the state should make appropriate regulations for preventing fixation of arbitrary conditions which may degrade the dignity of surrogate women.

Further, the performance of personal services and labor in exchange for money in a surrogacy is not equivalent to slavery as there is no slave-master relationship in a surrogacy, no involuntary peonage¹⁴⁵, and no entitlement to control any human being¹⁴⁶. The speculation that a child is treated as a product is not justifiable because the very objective of appointing a surrogate by the intended parents is to beget a child biologically related to at least one of the parents. It is for fulfilling their innate desire to have a child of their own. It is an accepted fact that most of the women agree to act as surrogate in return for money. Hence if there is a ban on payment in surrogacy, it

¹⁴⁵ It means a system in under which a debtor was forced to work for a creditor until a debt was paid. This was prevalent in Latin America and the southern U. S.

¹⁴⁶ L. Gostin, “A Civil Liberties Analysis of Surrogacy Arrangements”, 17 *J. Contemp. Health L. & Pol’y* 432 (2000-2001), at pp.440-441.

may lead to a situation where the women may not come forward to act as surrogate. This would affect the innate desire of infertile couples as well as those wish to have a child through surrogacy. Hence considering the interests of the various stakeholders, it is essential that the surrogate women must be given compensation. In India the Draft ART Bill specifically recognizes this right under section 34 (3), which states:

“subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as surrogate”.

The *ICMR Guidelines* also recognize this right, and provides that, “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”¹⁴⁷.

5.6.5 Right to Remain Anonymous

Right to remain anonymous is a very important right of the surrogate¹⁴⁸. This is due to the fact that surrogacy has invoked different reactions from different sections of the society. It may be possible that if the general public comes to know that a particular woman has acted as surrogate, she may become an object of ridicule and criticism and may be rejected by her community. This would be a cause of embarrassment, misery and mental agony to the surrogate¹⁴⁹. Further such revealing of identity of the surrogate and making it public may also have severe impact on the family members of the surrogate, her husband and children. They may also feel embarrassed and ultimately it would affect the family life of the surrogate. Anonymity may even be a provision of the contract, without which the surrogate mother might be wary of participating¹⁵⁰.

¹⁴⁷ See, The *ICMR Guidelines*, R. 3.5.4.

¹⁴⁸ Theresa M. Mady, “Surrogate Mothers: The Legal Issues”, 7 *American Journal of Law & Medicine*, 323 (1981-1982), at p.344.

¹⁴⁹ *Id* at p. 350; Also See Note, “The Adult Adoptee’s Constitutional Right to Know his Origins”, 18 *South California Law Review*, 1196 (1975).

¹⁵⁰ *Supra* n.148 at p.344.

Further, it is relevant that such disclosure may also affect the relation of the surrogate child with the intended parents¹⁵¹. Therefore, in order to protect the interest of the surrogate as well as the other stakeholders, it is essential to protect the identity of the surrogate woman and keep it as secret¹⁵². However in certain compelling situations it may be necessary to reveal the identity of the surrogate in order to provide information to the child for medical treatments and also about its lineage to prevent incestuous marriage¹⁵³.

The legislations all over the world regulating surrogacy have not adequately dealt the issue whether the surrogate mother's identity may be revealed or not. The laws governing the disclosure of the identity of the biological parents to an adopted child may probably be applied to the surrogate arrangements, given the similarity between the two situations¹⁵⁴. This issue is addressed by the Draft ART Bill, 2010 in India. The Draft Bill provides that, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction¹⁵⁵. Further section 34 (14) states that, no assisted reproductive technology clinic shall provide information on or about surrogate mothers or potential surrogate mothers to any person". The violation of this provision would amount to an offence¹⁵⁶. The *ICMR Guidelines* also mentions about confidentiality in ART procedures¹⁵⁷.

¹⁵¹ Clare Murray, Dani Singer, and Myra Hunter, *Assisted Human Reproduction Psychological and Ethical Dilemmas*, Whurr Publishers Ltd., London, (2003), p.108.

¹⁵² See, *Chatman v. Bennett*, 57 A.D.2d 618, 393 N.Y.S.2d 768 (1977). In this case the court allowed adopted child access to records of biological parents to obtain medical information, but not access to their identities.

¹⁵³ See, Pedro F. Silva Ruiz, "Artificial Reproductive Techniques, Fertility Regulations: The Challenges of the Contemporary Family Law", 34 *Am. J. Comp. L. (Supp.)* 125 (1986). For more, see *infra* Chapter VII.

¹⁵⁴ In both adoption and the surrogacy, a genetic parent relinquishes the child and most likely wishes to remain anonymous. For more, see *infra* Chapter VII.

¹⁵⁵ See, S. 34 (12).

¹⁵⁶ See, S. 34 (15) which states that, "Any assisted reproductive technology clinic acting in contravention of sub-section 14 of this section shall be deemed to have committed an offence under this Act".

¹⁵⁷ However it does not specifically talk about surrogacy. It provides under para 3.2.3 that, "Any information about clients and donors must be kept confidential. No information about the treatment of couples provided under a treatment agreement may be disclosed to anyone other than the accreditation

5.6.6 Right to Visitation

The basic condition in every surrogacy is that the surrogate woman should relinquish all her rights and claims over the child after its birth and hand it over to the intending parents. The agreement between surrogate woman and intended parents comes to an end on fulfillment of obligations by the intended parents towards the surrogate. The surrogate woman cannot claim any right over the child thereafter. This provision is for the protection of interests of all the stake holders in surrogacy. However, the process of carrying a child in the womb for nine months and giving birth to it is not merely a mechanical process, but one involving profound physical and psychological impact over the surrogate. After the birth of the child it may be difficult for the surrogate to detach herself suddenly from the child and hand it over to the intended parents. So also in some cases a surrogate mother may change her mind and wish to keep the child with herself. Many cases have been reported involving this important issue¹⁵⁸. There is no legal provision directly addressing this issue but in certain cases courts have allowed this right to the surrogate mother¹⁵⁹. To avoid these problems it is necessary to allow right to visitation to a surrogate to help her to cope up with the pains of separation¹⁶⁰. However this right should be allowed only if she desires and only with the consent of the intended parents. Moreover, it should be

authority or persons covered by the registration, except with the consent of the person(s) to whom the information relates, or in a medical emergency concerning the patient, or a court order. It is the above person's right to decide what information will be passed on and to whom, except in the case of a court order".

¹⁵⁸ For example, *In the Matter of W and W v. H*, No. 2 [2002] 2 F.L.R. 252, in this case an English surrogate and US intended parents entered into a binding surrogacy agreement in California. During the pregnancy the surrogate mother had a change of heart and returned to the UK where she gave birth to twins. The court finally determined that the babies should be returned to California, following international abduction proceedings brought by the US intended parents. Another case of *Re N (a Child) In the Matter of N*, [2007] EWCA Civ. 1053, involved a dispute over a surrogate born child between the surrogate parents and intended parents. The court eventually awarded care of the then 18 month old child to the intended parents. Likewise in the case of *R.R. v. M.H.*, 426 Mass. 501,689 N.E.2d 790,1998 Mass, the Plaintiffs, M.H. & another, entered into a surrogacy agreement with defendant, R.R. The defendant changed her mind prior to giving birth and expressed a desire to keep the child., etc.

¹⁵⁹ For example, in the case of *In re Baby M.*, 109 N.J. 396, 537 A.2d 1227; Also in the case of *R.R. v. M.H.* 426 Mass. 501,689 N.E.2d 790,1998 Mass; Also see *T v. G* (NY 2001) Referred by Douglas T. Carrell, *Reproductive Endocrinology and Infertility: Integrating Modern Clinical and Laboratory Practice*, Springer Publications, U.S. A. (2010), p.19, etc.

¹⁶⁰ Douglas T. Carrell, *supra* at pp.18-19.

allowed only for a minimum duration of time so that it does not affect the child's relation with intended parents.

5.6.7 Right to Maternity Benefit

It is a basic right of a working women in India that in case of pregnancy and related cases they are entitled to have certain special treatments and benefits. In case of surrogacy, a woman who is acting as a surrogate is carrying a child for another. It is possible that she may be a working woman. This gives rise to an important question that whether the surrogate is entitled to have maternity benefits as per the provisions of Maternity Benefit Act, 1961?

The Maternity Benefit Act, 1961, prohibits the employment of any woman worker knowingly by the employer in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy. It further states that no pregnant woman shall be required by her employer to do during the period specified in the section¹⁶¹ any work which is of an arduous nature or which involves long hours of standing, or which in any way is likely to interfere with her pregnancy or the normal development of the foetus, or is likely to cause her miscarriage or otherwise to adversely affect her health¹⁶².

Further this Act provides the right to maternity benefits to a woman worker. Section 5 provides that, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day. However no woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months

¹⁶¹ See, the Maternity Benefit Act, 1961, S. 4(4) which provides that the period referred to in sub-section (3) shall be :(a) the period of one month immediately preceding the period of six weeks, before the date of her expected delivery; (b) any period during the said period of six weeks for which the pregnant woman does not avail of leave of absence under section 6.

¹⁶² See, The Maternity Benefit Act, 1961, S. 4(3).

immediately preceding the date of her expected delivery¹⁶³. The maternity benefit under this Act is available to a woman for a minimum period of 12 weeks, i.e. 6 weeks upto and including her day of delivery and six weeks immediately following that day. The Act contains provisions for payment of maternity benefit in case of death of a woman,¹⁶⁴ payment of medical bonus¹⁶⁵, leave for miscarriage¹⁶⁶, leave with wages for tubectomy operation¹⁶⁷, and other leaves¹⁶⁸. Further the Act provides for nursing breaks to be allowed to the woman in the course of daily work¹⁶⁹. The objective of all these provisions is to ensure the welfare of the child in the womb as well as after its birth. Hence these welfare provisions should also be extended to include the surrogate woman as it is necessary for ensuring the welfare of the surrogate child. Thus every working surrogate woman should also be given these rights and benefits during the pregnancy and after the birth of the child. However, there is a need to distinguish between commercial surrogacy and altruistic surrogacy.

In case of altruistic surrogacy i.e. where the woman is acting as a surrogate mother purely on altruistic reasons and not on financial motive; this Act should be made applicable as it is. But in case of commercial surrogacy i.e. where the woman is agreeing to act as a surrogate on the basis of a payment; there is no need to pay monetary maternity benefits as the surrogate woman is receiving adequate compensation from the intended parents/parent. However all the other welfare provisions, like prohibition of arduous employment and other leaves¹⁷⁰ etc. should be given to the surrogate mother also. With respect to the maternity leave, it is pertinent to mention here that in case of surrogacy; whether altruistic or commercial, immediately after the birth of the child, the child is handed over by the surrogate mother to the intended parent/parents. Hence the maternity leave to a surrogate mother can be limited to such period as required for improving the health of the

¹⁶³ *Id.* S. 5(2).

¹⁶⁴ *Id.* S. 7.

¹⁶⁵ *Id.* S. 8.

¹⁶⁶ *Id.* S. 9.

¹⁶⁷ *Id.* S. 9-A.

¹⁶⁸ *Id.* S. 10.

¹⁶⁹ *Id.* S. 11.

¹⁷⁰ *Id.* S. 10.

surrogate mother as per medical advice. These rights are very vital for protecting the interests of surrogate mothers as well as to prevent any exploitation and derogation of individual human dignity. Therefore it is necessary to give statutory recognition to these rights and make them as justiciable rights.

5.7 Conclusion

In the last two decades there has been considerable increase in the number of women acting as surrogate mothers. This is due to the increasing use of surrogacy by infertile couples and other individuals for begetting a child biologically related to at least one of them. Many women are also opting to act as surrogate mothers because of financial motives. Though the procedure of surrogacy and the role of a woman as surrogate mother have been sharply criticized on various ethical, moral and social grounds, it is necessary to examine the issue of surrogate mothers from a legal and human rights perspective. In the expanding human rights jurisprudence, it cannot be denied that every woman has a right to personal liberty. In fact the right to be a surrogate can be linked to this fundamental basic human right to personal liberty. Further the right to privacy of a woman, the property right over human body and the right to enjoy the benefits of developments in science and technology provide a basis for supporting the right to be a surrogate. Though these rights are available to every woman, the right to be a surrogate cannot be exercised by every woman. This is due to the fact that to act as a surrogate woman requires certain eligibility criteria such as age, physical and mental health, consent of the spouse, etc. Thus the right to be a surrogate is not an absolute right and can be limited in the interests of various other stakeholders involved in the surrogacy including the state.

The legislations regulating surrogacy all over the world have however not adequately dealt with all these issues. In order to ensure the success of surrogacy arrangements as well as to protect the dignity of the surrogate mother, the various duties and rights of surrogates should be clearly defined. It is to be noted that the woman acting as a surrogate mother is providing an invaluable service to the medically and socially infertile couples/individuals and fulfilling their desire to have

a child. Hence, in order to protect the interests and welfare of the surrogate mother, it is essential that any legislation dealing with the regulation of surrogacy should adequately address the issues of eligibility criteria to be a surrogate, as well as the rights and duties of the surrogate. It is to be noted that, prior to the surrogate pregnancy, both the intended parents and surrogate woman will enter into an agreement, i.e. the surrogacy contracts in which they themselves decide their rights and obligations. The next chapter examines the various aspects related to surrogacy contracts.

CHAPTER -VI

SURROGACY CONTRACTS: ISSUES AND CHALLENGES

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SURROGACY CONTRACTS: ISSUES AND CHALLENGES

6.1 Introduction

Surrogacy is a process by which the intended parents take the help of a surrogate woman for begetting a child and the surrogate woman agrees to carry the child for full term and also to relinquish her parental rights over the child after birth and hand it over to the intended parents. Thus surrogacy is a lengthy and time consuming process which requires sincere cooperation and understanding between the parties. Generally every surrogacy process involves an agreement between commissioning parents and surrogate woman. The couples/ individuals who wish to beget a child through surrogacy must first find a female who is willing and able to fulfill the particular needs unique to that couple/individual. After a suitable surrogate is found out, the intended parents/parent may enter into an agreement, i.e. a surrogate contract with the prospective surrogate. This contract can be a formal written agreement or a mere understanding between the parties and may or may not involve payment of monetary compensation to the surrogate woman for her service. A surrogacy contract involving payment of monetary compensation to the surrogate is considered as a commercial surrogacy contract, while a surrogacy contract in which no monetary compensation is given to the surrogate for her service is considered as an altruistic surrogacy contract. Such a contract between the intended parents/parent and the surrogate woman is very essential to protect the interests of the various stakeholders involved in the surrogacy arrangement.

The surrogacy contract generally contains in it the rights and duties of surrogate mother and intended parents as well as terms regarding the welfare of child like

custody, parentage, etc¹. However, the issues regarding the legality and enforceability of such a surrogacy contract is debatable because every surrogacy contract raises various legal and human rights questions. For example, the questions that arise in a surrogacy contract are whether surrogacy contract is yet another form of prostitution, a form of slavery or whether it involves commodification of motherhood. It is often criticized that commercial surrogacy is a form of baby selling and would lead to promotion of positive eugenics. It is also argued that surrogacy contracts and more specifically commercial surrogacy arrangements are against public policy. Further, surrogacy contracts also raise questions regarding the appropriate remedies in case of any violation of such contracts. All these issues are very controversial and difficult to answer due to the fact that there is no uniformity in the legal systems prevailing in the world. This diversity has led to different approaches towards the legality and enforceability of surrogacy contracts.

The approaches adopted by different countries towards surrogacy contracts are not uniform. Only some of the countries have enacted legislations dealing with surrogacy contracts and they widely vary in their approach. Some countries consider surrogacy contracts as illegal, some permit only certain types of surrogacy contracts and some countries recognize all types of surrogacy contracts. Thus the approaches of the various legal systems can be classified into three types: a) prohibition of all types of surrogacy contracts² b) prohibition of only commercial surrogacy contracts and allowing only altruistic surrogacy contracts³ and c) allowing both commercial and altruistic surrogacy contracts⁴. In India all types of surrogacy contracts are considered

¹ See, Katherine Drabiak *et al.*, “Ethics, Law and Commercial Surrogacy: A Call for Uniformity”, 35 *Journal of Law, Medicine & Ethics*, 300 (2007); Alan Wertheimer, “Exploitation and Commercial Surrogacy”, 74 *Denv. U. L. Rev.* 1215 (1997).

² For example, countries like Austria, Germany, Sweden, Norway and Switzerland, etc. There are several states in USA also which prohibits all forms of surrogacy like Arizona, New Jersey, and Michigan.

³ For example, countries like United Kingdom, Belgium, Greece, Denmark and the Netherlands, etc. Several states in USA also prohibit commercial surrogacy and allows altruistic surrogacy contracts, they are New York, Washington, North Dakota, Kentucky and Nebraska.

⁴ For example, countries like Israel, Ukraine, India, Iran, Bahrain, Lebanon, Saudi Arabia, etc. Various states of USA like Maryland, Ohio, Oklahoma, Illinois, Utah, Arkansas, Florida, New Hampshire, Nevada, Texas, Virginia also allows all forms of surrogacy contracts.

as valid and enforceable⁵. However, there are no legal provisions directly dealing with surrogacy contracts in India. In the absence of a specific legal provision it is very difficult to answer the various questions raised by surrogacy contract. Therefore when a dispute arises the courts will have to decide the case on the basis of traditional contract law and other laws. Such an approach may detrimentally affect the interests of the parties to such surrogacy contracts and also the interests of surrogate children.

There is therefore a need to resolve the ambiguity relating to surrogacy contracts as well as various legal issues surrounding such contracts. This necessity is now a days of utmost importance due to the increasing use of surrogacy in recent times by individuals and couples. It is argued that the current laws in India do not address these issues adequately and the increasing disputes in surrogacy contracts lead to court battles that may adversely affect the interests of various stakeholders involved in surrogacy contracts⁶. Hence it is essential to examine the existing legal framework in India and its adequacy to deal with various issues raised by a surrogacy contract.

6.2 Surrogacy Contracts: Meaning

A surrogacy arrangement between an intended parent/parents and the surrogate woman requires clear understanding between them regarding their rights and duties towards each other. Such an agreement may or may not be reduced into writing. When the arrangement between the parties is reduced formally into writing, to give effect to the intention of the parties, it may be termed as a contract. Generally every contract exists to enforce promises and protect the parties' expectations in a transaction⁷. However, with respect to surrogacy arrangements, there is a debate regarding whether the agreement between the parties in a surrogacy is a contract or not. Hence it is essential to determine the legal status of a surrogacy agreement. In

⁵ There is no law but the *ICMR Guidelines* presuppose the validity of such contracts, and the surrogacy cases dealt with by Supreme Court of India also are supporting such a view.

⁶ See generally, Valerie L. Baker, "Surrogacy: One Physician's View of the Role of Law", 28 *U.S.F. L. Rev.* 603 (1993-1994).

⁷ See, John Edward Murray, *Murray on Contracts*, Lexis/Michie, U.S.A. (3rd edn. - 1990), p.8.

this context it is necessary to understand the meaning and nature of a contract as recognized in legal terms in general and in India in particular.

A contract is a voluntary, deliberate, and legally binding agreement between two or more competent parties. A contractual relationship is evidenced by an offer, acceptance of the offer, and a valid (legal and valuable) consideration⁸. According to Sir Frederick Pollock, “every agreement and promises enforceable at law is a contract⁹.” As per Sir William Anson, a contract is an “agreement enforceable at law made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.”¹⁰ Each party to a contract acquires rights and duties relative to the rights and duties of the other parties. However, while all parties may expect a fair benefit from the contract (otherwise courts may set it aside as inequitable) it is not necessary that each party will benefit to an equal extent. Contracts are normally enforceable whether or not in a written form, although a written contract protects all parties to it¹¹. The object of contract law is to deal with the situations in which the parties are breaking their promises or due to unwarranted circumstances are unable to fulfill their promises and thereby violate the contract¹².

In India, the legal principles governing contracts are codified in the Indian Contract Act, 1872. According to this Act, ‘a contract is an agreement enforceable by law’¹³. An agreement consists of reciprocal promises between the two parties.¹⁴ Therefore to create contractual obligations there must be both a proposal and

⁸ See for more <<http://www.businessdictionary.com/definition/contract.html#ixzz1xPIk2cvC>> Visited on 20.6.2012

⁹ M. Krishnan Nair, *The Law of Contracts*, Orient Longman Pvt. Ltd., Chennai, (5th edn. - 1997), p.5.

¹⁰ *Ibid.*

¹¹ See for more <<http://www.businessdictionary.com/definition/contract.html#ixzz1xPIk2cvC>> Visited on 20.6.2012.

¹² Ian R. Macneil & Paul J. Gudel, *Contracts, Exchange Transactions and Relations*, (Statutory and Administrative Law Supplement) (University Casebook Series), Foundation Press, U.S.A. (3rd edn. - 2001), p.29; See, Flavia Berys, “Interpreting a Rent-A-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour”, 42 *California Western Law Review* 321 (2006), at p.335.

¹³ See, The Indian Contract Act, 1872, S. 2(h).

¹⁴ R. K. Bangia, *Indian Contract Act*, Allahabad Law Agency, Haryana (14th edn.- 2009), p.1.

acceptance¹⁵. The most common way of making a contract is through a proposal by one party and its acceptance by another party. A contract creates rights and obligations between the parties entering into a contract. Refusal by any one party to a contract to honor a contracted obligation gives a right of action to another party¹⁶.

It is to be noted that in every surrogacy arrangement there is an agreement or understanding arrived between the intended parents/parent and the surrogate woman. There is an offer from intended parents/parent and an acceptance by the surrogate woman. Thus the agreements between the intended parents/parent and the surrogate woman can also be termed as a contract within the meaning of the Indian Contract Act, 1872.

A surrogacy contract can be defined as a private contract based on which a woman (single or married), acts as a surrogate, agrees to become pregnant through artificial reproductive techniques, carry the foetus to term, give birth to the baby, and relinquish her rights over the baby and hand it over to his/her intended parent/parents.¹⁷ In a surrogacy contract the parties to the contract are the intended parents/parent, the surrogate woman and in certain cases the husband of the surrogate woman.

Most infertility clinics require a contract between the intended parents and the surrogate. The object of such a contract is to avoid any dispute between the intended parents/ parent and the surrogate woman in future. Disputes may arise in issues like payment of medical expenses, payment of compensation to surrogate, liability of intended parents in cases of any harm to surrogate, liability of surrogate in case of non-fulfillment of the obligations, biological parenthood, parental rights¹⁸, and

¹⁵ S. S. Ujjannavar, *Law of Contract*, Eastern Law House, New Delhi (2000), p.5.

¹⁶ See for more <<http://www.theseoguru.com/SearchMania/2009/02/meaning-and-definition-of-contract/>> Visited on 20.6.2012.

¹⁷ Amir Samavati Pirouz & Nassrin Mehra, "Legal Issues of A Surrogacy Contract Based on Iranian Acts Continuation", 2 *Journal of Family and Reproductive Health*, Vol. 5, 41, June (2011), at p.43.

¹⁸ See, Steven H. Snyder, "The Use of Pre-birth Parentage Orders in Surrogacy Proceedings", 39 *Family Law Quarterly*, 633 (2005).

custodial aspects of the child to be born¹⁹. A standard surrogacy contract will remove ambiguities and provide a clear answer in cases where a dispute arises between the parties in relation to the matters mentioned in the contract²⁰. Thus every surrogacy is usually preceded by some form of an agreement or contract between the surrogate mother and the intended parents/parent²¹.

A surrogacy contract can be between family members or between total strangers²². It can evolve out of purely altruistic reasons such as love and affection or it may be due to economic reasons²³. Depending upon the nature of payments involved, the surrogacy contracts can be classified into two types, viz. “*commercial*” and “*non-commercial (altruistic)*” surrogacy contracts²⁴. A commercial surrogacy contract is one in which the intended parents agree to pay an amount to the surrogate for her service. These types of contracts are also known as *compensated surrogacy contracts*²⁵. In case of a non-commercial or altruistic surrogacy contracts, the surrogate woman agrees to act as a surrogate without any compensation for the service. However, the intended parents may agree to provide for the medical expenses incurred during the surrogacy process. This type of contract is also called as *uncompensated surrogacy contracts*²⁶.

A surrogacy contract usually defines the rights and duties of the intended parents and the surrogate woman. Such contracts typically provide that the surrogate woman will be artificially inseminated, and carry the resulting foetus to term, and

¹⁹ Kelly Oliver, “Marxism and Surrogacy”, in Helen B. Holmes (ed.), *Feminist Perspectives in Medical Ethics*, Indiana University Press, Bloomington, U.S.A. (1992), pp.270-71; and Martha A. Field, “Surrogate Motherhood”, in John Eekelaar (ed.), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century*, Martinus Nijhoff Publishers, Leiden, Netherlands (1993), pp.228-229.

²⁰ *Supra* n.17.

²¹ *Supra* n.1.

²² Lisa L. Behm, “Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States”, 2 *DePaul J. Health Care L.* 557 (1999), at p.560.

²³ *Id.* at pp.560-61.

²⁴ Glenda Labadie-Jackson, “The Reproductive Rights of Latinas and Commercial Surrogacy Contracts”, 14 *Tex. Hisp. J.L. & Pol’y* 49 (2008), at p.54.

²⁵ Charlene Elena Carolyn Peabody Zil, “The Effects of Compensation on the Supply of Surrogate Mothers”, (Spring 2006), p.8, available at <<http://weber.ucsd.edu/~vcrawfor/Zil06Essay.pdf>> visited on 20.6.2012.

²⁶ *Ibid.*

then relinquish her parental rights to the intended parents. Some of the contracts may also require the surrogate to undergo physical and psychological testing before the artificial insemination takes place²⁷. The contracts may require the surrogate to refrain from the use of alcohol, drugs or tobacco during pregnancy. In addition, some contracts may require an amniocentesis test and if it reveals any defect in the pregnancy, the intended parents may have the contractual right to demand an abortion. Many contracts forbid the surrogate mother from aborting the foetus unless it is necessary for the surrogate's physical well-being. In exchange for these services, the intended parents agree to pay all medical and health-related expenses associated with the surrogate's pregnancy. Contracts may also provide that the intended parents pay for the living expenses of the surrogate during the period of pregnancy. Further, the intended parents may agree to pay health insurance connected with the pregnancy. So also the contracts may provide for the fee to be paid to the surrogate in consideration for her services²⁸.

6.3 Object and Purpose of Surrogacy Contracts

The object and purpose of every surrogacy contract is to protect the rights and interests of all the stake holders involved in the surrogacy arrangement, i.e. the intended parents/parent, surrogate woman and the surrogate child. Therefore, the surrogacy contracts must clearly lay down the rights and duties of the parties involved. Further it must also consider the interest and welfare of the surrogate child which would be born as a result of such contract. Thus every surrogacy contract may have the following objectives:

- (i) To confirm an agreement between the intended parents/parent and the surrogate woman that the surrogate woman agrees to become pregnant through ART and carry the child to the full term. This is because every

²⁷ Andrew Kimbrell, "The Case Against the Commercialization of Childbearing", 24 *Willamette Law Review* 1035 (1988), at p.1040.

²⁸ Stephen G. York, "A Contractual Analysis of Surrogate Motherhood and a Proposed Solution", 24 *Loyola of Los Angeles Law Review*, 395 (January 1991), at pp. 399-400.

surrogacy contract is based on the desire of the individuals to beget a child.

- (ii) To establish the paternity and maternity of the surrogate child. The intended parents enter into surrogacy arrangement with the desire to beget a child of their own and bring it up. The surrogate woman and her husband generally are not interested to assume any parental obligations. So also the anonymous sperm or egg donors are also not interested to have any parental obligations. Therefore, a surrogacy contract can clearly establish the paternity and maternity of the child. Usually it is the intended parents, as they have entered into contract with the intention to have a child to assume parental responsibility. Such a declaration prior to the birth of the child would help to resolve any disputes at a later stage.
- (iii) The surrogate agrees to relinquish her parental rights over the child immediately after its birth and hand it over to the intended parents. This is because if the surrogate woman changes her mind after the birth of the child and refuses to hand over the child to intended parents, it would defeat the very object of a surrogacy arrangement. Hence the surrogacy contracts expressly terminate parental rights of the surrogate woman so as to ensure that the surrogate child is placed under the custody of intended parents.
- (iv) The surrogacy contract seeks to provide compensation to the surrogate woman for acting as a surrogate as well as for medical expenses incurred during surrogacy process. However in case of commercial surrogacy contracts, the surrogate is provided with both compensation for acting as a surrogate as well as medical expenses. In case of altruistic surrogacy contracts, there is provision only for providing medical expenses during the surrogacy process.

- (v) Every surrogacy contract attempts to regulate the conduct of the surrogate woman during pregnancy by imposing certain duties²⁹. This is to ensure the normal development of the foetus as well as to prevent the surrogate woman from entering into any activity that may adversely affect the safety of the child to be born.

Finally, every surrogacy contract seeks to take care of any unwarranted situation which may arise in a surrogacy process. Such unwarranted situations may arise due to the fact that every pregnancy carries risks and may cause harm to the health and life of surrogate woman or the child in the womb. Therefore, the surrogacy contract provides for liability of intended parents in case the surrogate suffers any harm or if the surrogate child suffers from any birth defects. Therefore the surrogacy contract attempts to deal with the situations where there is divorce or dispute between the intended parents or death or injury to such parents or any refusal by intended parents to accept the child³⁰.

6.4 Essentials of Surrogacy Contracts

A contract is an agreement enforceable by law. Thus every agreement is not a contract but only those agreements which are enforceable by law are contracts. Therefore in order to be an enforceable contract, the agreements should satisfy the essential elements of a valid contract. In India the essential ingredients of a valid contract are provided under Section 10 and 56 of the Indian Contract Act, 1872. According to Section 10, “all agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void”. Section 56 provides that an agreement to do an act impossible in itself is void. It is to be noted that the surrogacy agreements between the intended parents/parent and the surrogate woman are also a form of contract and therefore to be considered as a valid contract they must also satisfy the essential conditions of a valid contract. In this context it is necessary to

²⁹ *Supra* Chapter V.

³⁰ Noel Keane, “The Surrogate Parenting Contract”, 2 *Adelphia Law Journal*, 45 (1983), at p.46.

examine the surrogacy contracts in the light of essential ingredients of a valid contract.

6.4.1 *There must be an agreement*

An agreement either oral or in writing is very essential condition of a contract. Every promise and every set of promises forming the consideration for each other is an agreement³¹. There must be at least two parties to an agreement, one party makes a proposal and the other accepts the same. A contract arises only if the other party accepts the proposal. A proposal from one party to do or abstain from doing a particular act and its acceptance by the other party are the two essential conditions of an agreement. In every surrogacy contract there is a proposal from the intended parents/parent asking the woman to act as a surrogate and carry their child for full term and hand over the child to them after its birth. If the woman accepts this proposal there comes into existence an agreement between the intended parents/parent and the surrogate woman.

6.4.2 *Consensus-ad-idem (meeting of minds) and Free Consent*

To constitute a valid contract, there must be meeting of minds i.e. *consensus-ad-idem*. The parties should agree to the same thing in the same sense and at the same time. Section 13 of the Indian Contract Act provides that two or more persons are said to consent when they agree upon the same thing in the same sense. Thus when it is said that there should be meeting of minds, it only means that the offer and acceptance must correspond. It is the sense of both of them but not the sense of one of them that constitutes consent. In a surrogacy arrangement when the surrogate woman accepts the proposal of intended parents/parent it means that she has understood the intention and purpose of the surrogacy and has agreed to fulfill the same³². To be a valid contract, the consent must be free³³. According to Section 14, “consent is said to

³¹ See, The Indian Contract Act, s. 2(e).

³² *Supra* n.15 at p.56.

³³ See, “Essential Elements of a Valid Contract”, available at <shivamlawworld.blogspot> visited on 10.6.2012.

be free when it is not caused by Coercion, Undue influence, Fraud, Misrepresentation, or Mistake.

In a surrogacy contract if the surrogate woman agrees to act as a surrogate without any Coercion, Undue influence, Fraud, Misrepresentation, or Mistake, it may be considered that there is a free consent to such agreement. The nature of a surrogacy arrangement is such that it requires the surrogate woman to undergo various medical tests and procedures and become pregnant through ART and carry the baby to full term. Thus if after knowing these terms and conditions if a woman agrees to act as a surrogate must be considered that she has given her free consent.

6.4.3 Competency of the Parties

The parties to an agreement must be competent to contract. The capacity to enter into a contract is mentioned under Section 11 of the Indian Contract Act, 1872. According to this Section, every person is competent to contract who is of age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. It means that the following three categories of persons are not competent to contract: (a) Minors, (b) Persons of unsound mind, and (c) Persons disqualified from contracting by some law to which they are subject³⁴.

The parties to a surrogacy contract are the surrogate woman, her husband if she is married, and the intended parents/parent.³⁵ It is to be noted that every individual has the right to procreation and is entitled to beget a child with the help of another³⁶. Thus if the intended parents/parent and the surrogate woman are major; are not of unsound mind; and are not disqualified from entering into such surrogacy arrangements³⁷; they are competent to enter into a valid contract of surrogacy.

³⁴ *Supra* n.14 at p.82.

³⁵ Barbara L. Keller, "Surrogate Motherhood Contracts In Louisiana: To Ban or to Regulate?", 49 *Louisiana Law Review*, September, 143 (1988), at p.160.

³⁶ *Supra* Chapter II.

³⁷ *Supra* Chapter IV & V.

6.4.4 Lawful Consideration.

Another important element of a contract is the presence of consideration which can be said to be the price for the promise³⁸. Consideration can be defined as the price of a promise, a return or *quid pro quo*, something of value received by the promisee as inducement of the promise³⁹. Section 25 of the Indian Contract Act, 1872 declares that an agreement made without consideration is void. Further this consideration must be lawful. The Act also states the circumstances under which consideration of the contract is treated unlawful⁴⁰.

A contract of commercial surrogacy similar to other contracts involves consideration and the intended parents agree to pay some amount of money to the surrogate woman. However in case of altruistic surrogacy contract there is no monetary consideration and the surrogate may agree to the contract due to love and affection. It may be argued that, altruistic surrogacy contracts are void because they do not involve monetary consideration. In this context it is pertinent to point out that Section 25 of the Indian Contract Act, 1872 provides three exceptions to the general rule that an agreement without consideration is void. One of the exceptions is that, the contract is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other⁴¹. It is to be noted here that in case of altruistic surrogacy, the surrogate woman may generally be a near relative i.e. a woman in the status of sister or sister-in-law provided it is gestational surrogacy⁴². Thus an altruistic surrogacy contract also comes within the ambit of exceptions mentioned under Section 25 because in such cases the surrogate is acting

³⁸ The term consideration is defined under Section 2(d) of the Indian Contract Act, 1872. It states that, ‘when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise’.

³⁹ See, This definition is given by Calcutta High Court in the case of *Fazaluddin v. Pnachanam Das*, A.I.R. 1957 Cal. 92.

⁴⁰ See, The Indian Contract Act, 1872, S. 23; It provides that, “a consideration is considered to be illegal if it is forbidden by law; if it is of such nature that if permitted it would defeat the provision of any law; if it is fraudulent; if it involves an injury to the person or property of any other; and if the court regards it as immoral or opposed to public policy”.

⁴¹ *Id.*, S. 25(1).

⁴² See, Chapter V.

as a surrogate out of love and affection. Hence an altruistic surrogacy can also be considered as a valid contract. It may again be argued that an altruistic surrogacy contract is invalid in case a total stranger acts as a surrogate without any consideration. However it is to be noted that such a possibility is very rare and even if it occurs the contract should be protected under Section 25 (1) due to the nature of service rendered by a surrogate. Hence, an exception should be added to Section 25 of Indian Contract Act, 1872 to include altruistic agreements including surrogate and intended parents.

6.4.5 Lawful Object

The object of an agreement must be valid. The object of the agreement would be unlawful if it is forbidden by law or if permitted it would defeat the provisions of any law or is fraudulent or causes injury to the person or property of any other or where it is immoral or opposed to public policy⁴³. Every agreement in which the object is unlawful is void⁴⁴. It is to be noted that the object of every surrogacy contract is to beget a child. The right to beget a child is a basic human right and is recognized by national and international human rights law⁴⁵. This right is an expression of the right to procreation and includes right to beget a child through surrogacy also⁴⁶. Thus the object of surrogacy agreement which is to beget a child is in consonance with the national and international human rights provisions cannot be said to be unlawful. It does not defeat the provision of any other law nor is it fraudulent in nature. Further in India, there is no legal provision that prohibits the getting of a child through surrogacy. Hence the surrogacy contracts can be considered lawful in India. However various authors have argued that all types of surrogacy contracts are immoral and opposed to public policy. It is submitted that surrogacy contracts are not immoral and are not opposed to public policy⁴⁷ and in fact such contracts are aiding the individuals to exercise their right to beget a child.

⁴³ See, The Indian Contract Act, 1872, s. 23; Also see *supra* n.9 at p.7- 8.

⁴⁴ *Id.*, at p.8.

⁴⁵ *Supra* Chapter II.

⁴⁶ *Supra* Chapter III.

⁴⁷ See, for detailed analysis, the latter part of this chapter.

6.4.6 Not Declared to be Void or Illegal

A contract may satisfy all the essential conditions of a valid contract and may still be void or illegal if it is declared to be void or illegal by any law. Therefore the agreement though satisfying all the conditions for a valid contract must not have been expressly declared void by any law in force in the country⁴⁸. The Indian Contract Act, 1872 expressly declares agreements mentioned in Section 24 to 30 as void.

According to Section 24 and 25 an agreement devoid of a lawful consideration or a lawful object is void. It is already discussed above that a surrogacy contract includes a lawful consideration and lawful object. Further Sections 26, 27 and 28 provide that those agreements which are in restraint of trade, marriage, and legal proceedings respectively are void. A surrogacy contract does not involve any such restraint of trade marriage or legal proceedings. Section 29 of Indian Contract Act states that, “agreements, the meaning of which is not certain or capable of being made certain are void”. The meaning of a surrogacy agreement is certain and the purpose of such agreement is capable of being made certain. Further Section 30 provides that agreements by way of wager are void. An agreement is said to be a wager if the parties have opposite views regarding an uncertain event, and if there are chances of gain or loss to either of the parties on the determination of the event one way or other and if the parties have no other interest except winning or losing of bet⁴⁹. Thus it is promise to give money or money’s worth upon the determination of ascertainment of uncertain event⁵⁰. Every surrogacy contract depends upon the surrogate woman becoming pregnant through ART and carrying the child for full term and giving birth to the child. It may be argued that due to this peculiar nature of surrogacy the surrogacy contract is equivalent to a wagering contract and is void. It is submitted that though a surrogacy procedure involves numerous experiments to initiate a successful pregnancy through ART, it is not uncertain and in fact the surrogacy arrangement becomes certain as soon as a surrogate woman becomes pregnant

⁴⁸ *Supra* n.33.

⁴⁹ *Supra* n.14 at p.201.

⁵⁰ Sir William Anson’s definition of ‘wager’, quoted by Subba Rao, J. in *Gherulal Parakh v. Mahadeodas Maiya and Others*, A.I.R.1959 S.C. 781. Referred in Dr. Avtar Singh, *Law of Contract and Specific Relief*, EBC, Lucknow, (9th edn.-2005), p. 288.

through ART. Further a surrogate woman is selected only after various clinical tests to determine whether she is capable of becoming pregnant through ART and is able to deliver a child. Therefore a surrogacy contract cannot be equated with a wagering contract.

6.4.7 Possibility of Performance

An essential ingredient of a valid contract is that the obligations created through the contract are not impossible to perform. The Indian Contract Act, 1872 provides that, an agreement to do an impossible act is void⁵¹. It is submitted that the agreement in a surrogacy arrangement is not impossible to perform and therefore a surrogacy contract cannot be held to be void on ground of impossibility of performance. A surrogacy contract thus fulfills all the essential ingredients of a valid contract as per the provisions of the Indian Contract Act 1872.

6.5 Enforceability of Surrogacy Contracts

The question whether surrogacy contracts should be enforced is one of the most controversial issues in the contemporary times⁵². The opponents of surrogacy contracts argue that if surrogacy contracts are made enforceable it would lead to potential exploitation of the surrogate⁵³, the commodification of women⁵⁴ and children⁵⁵, and promote positive eugenics, etc. The supporters on the other hand argue that, if surrogacy contracts are made unenforceable, it would undermine the woman's ability to contract freely for the use of her body⁵⁶. Moreover making a surrogacy contract enforceable would not lead to exploitation, slavery, baby selling and

⁵¹ See, The Indian Contract Act, 1872, S. 56.

⁵² Molly J. Walker Wilson, "Pre-commitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity", 31 *Journal of Legislation*, 329 (2004-2005), at pp.329-330.

⁵³ See, Katherine B. Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?", 68 *Indiana Law Journal*, 205 (1992), at p.232.

⁵⁴ See, Margaret Jane Radin, "Reflections of Objectification", 65 *South California Law Review*, 341(1991), at p.351.

⁵⁵ Larry Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements", 16 *Law and Medicine Health Care*, 7 (1988).

⁵⁶ Lori B. Andrews, "Surrogate Motherhood: The Challenge for Feminists", 16 *Law Medicine & Health Care* 72 (1988), at p.76; and Ruth Macklin, "Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis", 16 *Law Medicine and Health Care* 57 (1988), at p.60.

commodification as argued by the critics; but it would help to protect the rights and interest of parties to such contracts by providing them an opportunity to enforce the obligations.

The courts all over the world have also discussed the issue of legality of surrogacy contracts. For example, the first landmark surrogacy case of *Baby M*⁵⁷ raised the question regarding the legality of surrogacy contracts⁵⁸. Thereafter, this issue has been discussed in a number of cases in various countries⁵⁹. There is however no consensus in the judicial decisions regarding the legality of such contracts. The courts in certain countries have held such contracts as valid, while in some other countries the courts have held such contracts as invalid. Yet in some other countries the courts have validated only altruistic surrogacy contracts and invalidated all commercial surrogacy contracts. The legislations in different countries have also adopted diverse approaches with respect to the legality of surrogacy contracts. In India, there is no direct legal provision dealing with surrogacy contracts. In the absence of such legal provision, the general laws regulating commercial contracts i.e. The Indian Contract Act, 1872 can be applied to such contracts. According to Indian Contract Act, all contracts which satisfy the essential ingredients of a valid contract are legal and enforceable. As stated above, a surrogacy contract satisfies all the essentials of a valid contract. However various authors have pointed out that though surrogacy contract satisfies all the essentials of valid contract, such contracts are still illegal and should not be enforced. Most of the arguments against surrogacy contracts are based on legal, ethical and moral considerations. Some of the arguments are

⁵⁷ *In re Baby M*, 537 A.2d 1227, 109 N.J. 396.

⁵⁸ In this case, in 1987, New Jersey Superior Court Judge Harvey R. Sorkow formally validated the surrogacy contract and awarded custody of Baby M to William Sterns (intended father) under a “best interest of the child analysis”. On February 3, 1988, however, the Supreme Court of New Jersey, led by Chief Justice Robert Wilentz, invalidated surrogacy contracts as against public policy but *in dicta* affirmed the trial court’s use of a “best interest of the child” analysis and remanded the case to family court. On remand, the lower court awarded the custody to Bill and Betsy (intended parents) and Mary Beth (surrogate mother) was given visitation rights. See, <http://en.wikipedia.org/wiki/Baby_M> Visited on 10.6.2012.

⁵⁹ For example, the cases like *The Re C (A Minor) (Ward Surrogacy) (Baby Cotton Case)* 1985 F.L.R. 846; *In the Matter of Baby M*, 537 A.2d 109 N.J.396 (1988); *Johnson v. Calvert*, (1993) 851 P 2d 776 (Cal); *Jaycee B. v. The Superior Court of Orange County*, 42 Cal.App.4th 718 (1996), 49 Cal. Rptr.2d 694; *Soos v. Superior Court of the State of Arizona*, 182 Ariz. 470(1994); 897 p.2d 1356(Ariz. Ct. App.1994); etc.

specifically against commercial surrogacy. Therefore, in order to protect the interest of the parties in a surrogacy contract, it is essential to determine whether such contracts are legal or illegal. The major contentions are discussed below:

6.5.1 Commodification of Motherhood

One major criticism against the surrogacy contracts is that it promotes commodification of motherhood⁶⁰. This criticism is based on the premise that when resources are allowed to be exchanged through contract, it requires that the resources be commodified⁶¹. In case of surrogacy contracts, the surrogate woman agrees to procreate through surrogacy and hand over the resulting child to the intended parents. Thus it is a contract which decides the initiation of procreation and its continuation and culmination with the handing over of the child to the intended parents. Hence it is criticized that surrogacy contracts, commodify the reproductive ability of a woman⁶². This objection is often assumed to apply solely to commercial surrogacy because it involves payment of compensation to the surrogate woman for her service.

The critics argue that surrogate motherhood creates a market for gestational and genetic services because the infertile couples or individual search for a surrogate woman and avail her procreative services for helping them in begetting child. Thus surrogate motherhood treats the ability to procreate as a tradable commodity. It focuses upon the particular services provided by the surrogate mother and thus fosters a “commodification” of parenthood. This commodification of the reproductive act may prove to be harmful to the identity and the dignity of a woman. These critics point out that, the surrogate mother has been reduced to the status of an ‘incubator’⁶³,

⁶⁰ Pamela Laufer-Ukeles, “Approaching Surrogate Motherhood: Reconsidering Difference”, 26 *Vt. L. Rev.* 407 (2001-2002), at p.417.

⁶¹ William Joseph Wagner, “The Contractual Re-allocation of Procreative Resources and Parental Rights: The Natural Endowment Critique”, 41 *Case W. Res. L. Rev.* 1 (1990), at p.7.

⁶² See for more, Jay R. Combs, “Stopping the Baby - Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico”, 29 *N.M. L. Rev.* 407 (1999), at p.408.

⁶³ See, Lee Quinby, *Women’s Studies Quarterly: Women and New Technology*, The Feminist Press, New York, (2001), p.23; Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self*, University of California Press, U.S.A. (2010), p.32.

or ‘breeder machines’⁶⁴ or ‘rented wombs’⁶⁵. Further, the surrogacy arrangement may in the long run lead to institutionalizing of female body as property. According to critics this would be violative of the principle of inalienability of the human body. This principle of inalienability of human body has been invoked in France to justify the prohibition of all forms of surrogacy arrangements⁶⁶. A person cannot make his or her body available either for non-commercial or for commercial purposes⁶⁷. Treatment may be performed on the human body but only where it is medically necessary for the person concerned⁶⁸. Accordingly, surrogacy arrangements, whether paid or unpaid, are unlawful⁶⁹. Thus a person can have a proprietary right to their body; however any attempt to sell their body or body parts in the marketplace is ethically wrong⁷⁰. Due to the involvement of technological assistance, money and other arrangements between various persons for begetting a child, it is feared that the surrogacy contracts would commodify and devalue parenthood⁷¹.

It is also argued that a woman’s reproductive ability is an intrinsic capacity or property of the woman and should not be commodified in the open market. It creates the danger that woman’s attributes such as height, eye colour, race⁷², athletic ability,

⁶⁴ See, Patrick D. Hopkins, *Sex Machine: Readings in Culture, Gender, and Technology*, Indiana University Press, U.S.A. (1998), p.160; D. Kelly Weisberg, *Applications of Feminist Legal Theory*, Temple University Press, U.S.A. (1996), p.1114; Lori B. Andrews, “Surrogate Motherhood: The Challenge for Feminists”, p.167 in Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy*, Indiana University Press, Bloomington, U.S.A. (1990).

⁶⁵ See, Janice Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women’s Freedom*, Harper Collins Publishers, San Francisco, (1993), p.31.

⁶⁶ See, Bartha M. Knoppers, “Reproductive Technology and International Mechanisms of Protection of the Human Person”, 32 *Mc Gill Law Journal* 336 (1987).

⁶⁷ See generally, H.A. Ten Have, Jos V. M. Welie, and Stuart F. Spicker, *Ownership of the Human Body*, Kluwer Academic Publishers, Netherlands (1998).

⁶⁸ See, Kathy Hudson, Susannah Baruch, and Gail Javitt, “Genetic Testing of Human Embryos: Ethical Challenges and Policy Choices”, available at <<http://www.dnapolicy.org/resources/GeneticTestingEthicalChallenges.pdf>> Visited on 10.6.2012.

⁶⁹ See, Michael Hancock, “Surrogacy Arrangements in Europe and Worldwide Medical, Social, Ethical and Legal Aspects Situation and Outlook”, (September 2004), p.13. Available at <<http://www.freya.nl/webdraagmoeder/Surrogacyarrangements.pdf>> visited on 10.6.2012.

⁷⁰ John Haskell, “The Parent Trap: Implications of Surrogacy on Motherhood, Fatherhood and the Family”, 6 *Whittier J. Child. & Fam. Advoc.* 107 (2006-2007), at p.113.

⁷¹ *Supra* n.62 at p.409.

⁷² See, Jennifer L. Watson, “Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for their Services?”, 6 *Whittier J. Child. & Fam. Advoc.* 529 (2006-2007).

beauty, or intelligence will be commercialized⁷³. Surrogates with better quality will command higher prices by virtue of those qualities⁷⁴. If human beings can be bought and sold, then they have a market value and can be treated as mere objects by themselves or other people. According to Kant, it is always wrong to treat people as mere objects, since human beings have inherent moral worth and dignity⁷⁵. Although objects can be treated as commodities and can be assigned a market value, human beings cannot be treated as commodities and should not be assigned a market value. Human beings have an unconditional or absolute value. Thus, commodification of human beings is inherently wrong because it violates human dignity and worth⁷⁶.

The supporters of surrogacy argue that, the use of one person for the benefit of another does not necessarily mean that, the person is treated as a commodity and the dignity and worth of an individual is reduced in such situations. For example, in every country abortion laws permit abortion of foetus if it is necessary to protect the life of the mother. Thus the performance of abortion does not mean that the dignity and worth of the human foetus is reduced. Likewise there are various other instances in which one person may enter into contractual agreement and agree to give up certain aspects of his autonomy. For example, athletes often have to submit to drug tests⁷⁷, an employee enters into a contract with an employer to perform a work for a stipulated number of hours and under certain conditions, etc. Due to this reasoning it is argued by the supporters that surrogacy contracts do not convert a woman's reproductive ability as a commodity and reduce her inherent dignity and worth. A surrogate simply agrees to carry a child for compensation and hand it over to the intended parents after its birth. The legal toleration of surrogacy presupposes that the "woman's body is hers

⁷³ See, Sherrie A. Kossoudji, "The Economics of Assisted Reproduction", IZA Discussion Paper No. 1458 (2005), available at <<http://ftp.iza.org/dp1458.pdf>> Visited on 20.2.2013; Kimberly D. Krawiec, "Altruism and Intermediation in the Market for Babies", 66 *Wash. & Lee L. Rev.* 203 (2009).

⁷⁴ John Lawrence Hill, "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights", 66 *New York University Law Review* 353(1991), at p.410.

⁷⁵ See, Elizabeth Anderson, "Is Women's Labor a Commodity?", 19 *Phil. & Pub. Aff.* 71 (1990); Richard J. Arneson, "Commodification and Commercial Surrogacy", 21 *Phil. & Pub. Aff.* 132 (1992).

⁷⁶ See, Kass L., "Organs for Sale? Propriety, Property and the Price of Progress", 107 *The Public Interest*

(A quarterly public policy journal, New York) 65 (1992).

⁷⁷ *Supra* n.70 at p.116.

and hers alone unless she consents to some particular use of it⁷⁸. Further, the strict adherence to the principle of inalienability of human body would mean that donating blood, bone marrow, the donation of gametes, organ donation between living persons and medical research on human beings, etc., would all be unlawful. However all these are permitted by law subject to reasonable restrictions⁷⁹.

It is also submitted that, there is no reason to criticize that a surrogacy contract is commodification of motherhood and is legally and morally wrong. This is due to the fact that, there are various instances where the abilities and capacities of individuals are used for the benefit of themselves as well as for others. For example, a model uses her face and physique, a construction worker uses his physical strength and the professional utilizes his intelligence, character and motivations in the same manner a surrogate woman uses her womb⁸⁰. It is pertinent to point out here that, every individual can use his body in whatever way he wants as long as it does not interfere with the rights of others⁸¹. In case of a surrogacy contract, a woman uses her womb and begets a child for another, and this arrangement does not interfere with the right of any other person. On the contrary every surrogacy contract seeks to fulfill the basic human right of an individual to beget a child.

It can be argued that, any attempt to prohibit the surrogacy contracts on the ground of commodification would amount to a violation of the basic human right to be a surrogate as well as the right to be an intended parent. It has been discussed in Chapter V that, right to be a surrogate is derived from the right to life and personal liberty and right to procreation; right to privacy which includes the right to make decision to bear or beget a child; right of an individual over her body; and the right to enjoy benefits of scientific progress. Likewise it has been discussed in Chapter IV that every individual has a right to be an intended parent and to procreate with the help of another. Therefore surrogacy cannot be prohibited on the ground that it

⁷⁸ *Supra* n.75.

⁷⁹ *Supra* n.69.

⁸⁰ *Supra* n.74 at pp.412-413.

⁸¹ *Supra* Chapter V.

commodifies motherhood. However surrogacy contracts can be regulated through appropriate legislations in order to avoid its misuse.

6.5.2 Baby - Selling and Commodification of Child

One of the serious objections regarding the legality of surrogacy contract is that, commercial surrogacy is a form of baby selling⁸². This objection is based on the premise that the payment of compensation to the surrogate mother is similar to a consideration in contract, and the intended parents are purchasing the child. This objection was highlighted by the Waller Report of Victoria⁸³ in 1984. The Report criticized commercial surrogacy and stated that such arrangements as “agreements for the sale and purchase of a child, the buying and selling of children has been condemned and proscribed for generations. It should not be allowed to reappear”⁸⁴.

The basis for such criticism against surrogacy contracts and specifically against commercial surrogacy is that, like baby-selling, commercial surrogacy places a child in a home without considering whether the prospective parents would be suitable to raise the child. Instead, money is paid to the surrogate in exchange for the baby and her parental rights, and thus, the couple has bought a baby⁸⁵. To examine the issue whether commercial surrogacy contract amounts to baby selling one needs to look into the meaning of ‘sale’.

⁸² See, Martha A. Field, “Surrogacy Contracts-Gestational and Traditional: The Argument for Non-enforcement”, 31 *Washburn L.J.*, 1 (1991-1992), at p.7 ; Martha A. Field, “Reproductive Technologies and Surrogacy: Legal Issues”, 25 *Creighton Law Review*, 1589 (1991-1992), at p.1591; Hugh V. McLachlan and J. Kim Swales, “Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts”, 72 *Law and Contemporary Problems*, 91 (Summer 2009); Richard A. Posner, “The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood”, 5 *J. Contemp. Health L. & Pol’y* 21 (1989).

⁸³ Victoria is a state in the south-east of Australia.

⁸⁴ In May 1982 the State of Victoria appointed a Committee to consider the social, ethical and legal issues arising from in vitro fertilization. This Committee is popularly known as Waller Committee and its report (Waller Report) was published in August 1984. See, Louis Waller, *Victoria- Committee to Consider the Social, Ethical and Legal Issues Arising from In-Vitro Fertilization*, Govt. Printer, Melbourne, (1986).

⁸⁵ See, Pamela R. Tepper, *The Law of Contracts and the Uniform Commercial Code*, Cengage Learning, Kentucky, U.S.A. (1995), pp.154-55.

A 'sale' can be defined as, 'an act of meeting prospective buyers and providing them with goods or service in return of money or other required compensation'⁸⁶. Every sale thus includes, 'an exchange of goods or services for money'⁸⁷. In a surrogacy contract the surrogate woman is being paid compensation for handing over the baby to the intended parents. Thus there is an exchange of baby and parental rights for money in surrogacy contracts. However an important question to be answered is whether such an exchange involves an exchange of commodity, i.e. can a baby, or the parental rights to a child, be considered as "goods"? Generally, "goods" are defined as things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid. Thus goods must be, both existing as well as identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

In a surrogacy contract, no child exists at the time of the contract and the parties to such an agreement have no parental rights. Hence the definition of "goods" is not satisfied because not only is the child non-existent, but also the surrogate mother has no parental rights to the child. Now the question arises that if the child is non-existent at the time of the contract can the surrogacy contract be treated as a contract to sell future goods? In order to contract to sell a future good, one must have a right to the future goods at the time of contract. However the gestational surrogate never has any rights to the child she carries⁸⁸. Thus a child is neither an existing good nor a future good and a child born to a surrogate mother thus fails to meet the definition of "goods"⁸⁹. Hence a surrogacy contract does not come within the meaning of 'sale of goods' as well as 'contract to sell'. The above reasoning was

⁸⁶ See <<http://legal-dictionary.thefreedictionary.com/Sales+Law>> Visited on 10.6.2012.

⁸⁷ *Ibid.*

⁸⁸ See, Barbra E. Homier, "Gestational Surrogacy: An Appeal to Reform Michigan's Surrogate Parenting Act", p.21, available at <http://www.law.msu.edu/king/2003/2003_Homier.pdf> Visited on 10.6.2012.

⁸⁹ See for more, Denise E. Lascarideas, "A Plea for the Enforceability of Gestational Surrogacy Contracts", 25 *Hofstra Law Review*, 1221 (1996-1997), at p.1242.

applied by US Court in the *Johnson case* and the Court ruled that there is no sale of baby involved in surrogacy contracts⁹⁰.

In India, the law relating to sale of goods is governed by the Sale of Goods Act, 1930. The Act defines a contract of sale of goods as, 'is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price'⁹¹. It further provides, 'where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell'⁹². In both the situations the subject matter of a sale is goods. The definition of the goods is given under the Act as 'every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale'⁹³. In order to be a 'good' as a subject matter of sale, such 'good' must be in existence. Likewise to constitute an agreement to sell, the seller should have a right over the subject matter of sale. However, as discussed above in case of a surrogacy contract, the subject matter of such contract i.e., the child is not in existence at the time of contract. So also the surrogate mother is not having any parental rights over the future child. Thus by applying the same reasoning as discussed in *Johnson case*, it can be seen that in India also, the surrogacy contracts cannot be considered as a contract for sale or agreement to sell.

In order to justify that surrogacy contract is not a baby selling contract; it is further argued by some authors that in most of the surrogacy arrangements, the intended parents contribute the genetic material for the child. In such cases where there is genetic contribution by the intended parents, the payment made to the surrogate mother should be considered as a payment for her willingness to be impregnated with the embryo created through such genetic material and for carrying

⁹⁰ See, *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) at p.784.

⁹¹ See, The Sale of Goods Act, 1930, S. 4 (1).

⁹² *Id.*, S. 4 (3).

⁹³ *Id.* S. 2 (7).

the child to full term. Thus the intended parents are the real owners of the child and therefore they cannot purchase a thing in which they already hold an interest i.e. parenthood⁹⁴. In cases where the surrogate mother contributes the genetic material, it may be argued that, she has an interest over the child and relinquishing the same for money is equivalent to baby selling. However, it is submitted that, in such a case the surrogate mother is simply donating her genetic material and the intention is to beget a child for the intended parents. Once the donation is made the donor does not have any interest or right over the donated matter and cannot claim it back. The reason is that, if the right of the donor over the donated material is recognized by law it would adversely affect the various types of donations made in medical field like blood donation, eye donation, kidney donation, etc. Likewise, in cases where genetic material is contributed by anonymous donor, the intended parents who accept such genetic material have the right over it. Therefore, in every case of surrogacy arrangement only the intended parents have the right over the genetic material. Thus it can be concluded that since intended parents already have a right over the genetic material they cannot purchase the resulting child; so also the surrogate mother is not having any right over the child and therefore is not selling the child. Hence it is submitted that a surrogacy contract cannot be termed as a contract for baby selling.

Some authors have also criticized surrogacy contracts as a contract promoting commodification of child. In this context it is submitted that, surrogacy contracts does not amount to commodification of child. This is because a child is not a ‘good’ or ‘commodity’ for sale⁹⁵. It is to be noted here that, the word commodity is a generic term for a class of goods. It indicates any marketable item produced to satisfy wants or needs⁹⁶. It is used to describe a class of goods for which there demand is, but which is supplied without qualitative differentiation across a market and in fact it is difficult to identify from where it was produced. It is submitted that a surrogate child does not come within the meaning of a commodity as the child is not a class of goods. It is accepted that a surrogate child is begetted to satisfy the desire of another

⁹⁴ See, L. Haberfield, *Surrogate Motherhood in Victoria: What Now for Altruistic Surrogacy?*, Monash University, Melbourne, (1988), p.13.

⁹⁵ *Supra* n.88 at p.20.

⁹⁶ See <<http://en.wikipedia.org/wiki/Commodity>> Visited on 10.6.2012.

individual; however a child is not produced in mass like any other commodity. In fact every surrogate child is unique and different from the other and begetted only to satisfy the desire of a particular intended parents/parent. Therefore, a surrogate contract cannot be termed as commodification of child. Professor Epstein also argues that surrogacy contracts do not commodify children. He states that, a commodity is typically meant for consumption and does not have a unique subjective value. In other words, a commodity may be perfectly substituted with another unit. However a baby is unique and cannot be perfectly substituted⁹⁷. Thus the term ‘commodity’ is inappropriate to describe the relationship of a parent to a child and hence it is impossible for a surrogacy contract to commodify a child⁹⁸. Thus it can be safely concluded that a surrogacy contract, whether altruistic or commercial is neither a contract for baby selling nor an agreement to sell and nor a contract for commodification of child.

6.5.3 Potential for Economic Exploitation

Another major criticism specifically against commercial surrogacy contracts is that, it would lead to exploitation of poor women who may be induced to become surrogates because of their own financial need or their families⁹⁹. It is argued that surrogacy contracts open up the possibilities of economic exploitation of poor women who may be forced to act as a surrogate for the rich due to economic necessity¹⁰⁰. This argument is based on the idea that economic necessity could force some poor women to enter into surrogacy agreements which they otherwise would not have entered. Large sums of money could entice such women to become surrogates without truly understanding the nature of the process¹⁰¹. With the increasing incidents of surrogacy, the middlemen or brokers also come into picture to provide information

⁹⁷ See, Richard A. Epstein, “Surrogacy: The Case for Full Contractual Enforcement”, 81 *Virginia Law Review*, 2305 (1995), at pp. 2325-40.

⁹⁸ *Supra* n.89 at p.1237.

⁹⁹ See, Sara K. Alexander, “Who is Georgia’s Mother? Gestational Surrogacy: A Formulation for Georgia’s Legislature”, 38 *Georgia Law Review*, 395 (2003-2004), at p.400; and also see, Alan Wertheimer, *supra* n.1.

¹⁰⁰ Kevin Tuininga, “The Ethics of Surrogacy Contracts and Nebraska’s Surrogacy Law”, 41 *Creighton Law Review*, 185 (2008), at p.195.

¹⁰¹ *Supra* n.72.

to the intended parents as well as clinics regarding the availability of surrogates. It is argued that, such a practice has the potential to cause exploitation of surrogate women as they mostly belong to poor families, are illiterate and are not aware of their legal rights¹⁰².

The term exploitation means, when women consent to a transaction which is either harmful or unfair to her, and does so because some aspect of her character or circumstances is used against her by the other party (or parties) to the agreement¹⁰³. Harm occurs when the surrogate is traumatized by the experience of handing over the child she has carried for nine months or suffers any harm or injury during the surrogacy pregnancy or during childbirth. It is submitted that, prior to the surrogacy arrangement, the woman is aware of the fact that she has to hand over the child after birth to the intended parents. In fact, the sole purpose of surrogacy is to beget a child for another. Therefore, it cannot be criticized that the surrogate woman would be traumatized by the experience of handing over the child she has carried for nine months. It is accepted that some of the surrogate woman may generate an emotional bond with the child they carried and may undergo trauma. It may also be due to the feeling of shame or guilt regarding the act they have done. This can be taken care of by providing proper counseling and guidance prior to the initiation of contract as well as during surrogate pregnancy¹⁰⁴.

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

¹⁰² *Supra* n.27.

¹⁰³ See, Catriona McKinnon, *Issues in Political Theory*, Oxford University Press, U.K. (2008).

¹⁰⁴ See for more, Ragonne, H., *Surrogate Motherhood: Conception in the Heart*, Westview Press, New York, U.S.A. (1994).

liability as well as make provisions for insurance policy in favour of surrogate in case of any harm or injury to the surrogate woman. Thus the possibility of a harm or injury to the surrogate woman is not a ground to negate the validity of a surrogacy contract.

The critics argue that exploitation may be there if the contract is unfair and the surrogate is induced to accept a smaller financial settlement than she would be able to demand if her bargaining position were stronger. However the supporters of commercial surrogacy claim that the exploitation is not always inherent in the practice of surrogacy contracts. On the contrary the woman may actually be in a position to negotiate favorable terms, given the strong desire of the intended parents for a child¹⁰⁵. So also, if a surrogacy contract is criticized as economic exploitation only because the surrogate woman is poor and illiterate, then logically it follows that every other contract which a poor and illiterate woman enters into should also be considered as economic exploitation and must thus be prohibited. By applying the same logic a surrogacy contract shall be accepted if the surrogate woman is economically well-off and literate. Hence there is no justification in criticizing a surrogacy contract as economic exploitation just because the surrogate is poor and illiterate.

Further, the intended parents opt for surrogacy procedure to fulfill their long cherished desire of begetting a child. It is not a one-day decision, but a decision which might have been taken after trying other methods of procreation and years of emotional stress. Thus the object of intended parents is to beget a child and they may be ready to spend any amount of money of course depending on their financial position. They would also be very careful in selecting a surrogate woman and would not want to cheat her because they would not like any dispute later which may affect the outcome of the surrogacy. Therefore, they would be very careful in making the terms and conditions of the contract. It is accepted that there can be exploitation by middleman and brokers. However it can be taken care of by proper regulation of surrogacy contract through legislation. The supporters maintain that surrogacy contracts could be regulated so as to minimize the danger of exploitation, and by

¹⁰⁵ See, Werheimer, A., *Exploitation*, Princeton University Press, Princeton, U.S.A. (1996).

preventing surrogacy firms from applying undue pressure on women to agree to ungenerous settlements¹⁰⁶.

6.5.4 Trafficking in Women and Children

One of the objections against the legality of surrogacy contracts is that it is similar to trafficking in women and children¹⁰⁷. Trafficking in women and children is an offence both at international¹⁰⁸ and domestic levels¹⁰⁹. Trafficking is defined as a trade in something that should not be traded in for various social, economic or political reasons. The concept of human trafficking refers to the criminal practice of exploiting human beings by treating them like commodities for profit¹¹⁰.

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

¹⁰⁶ Fabre, C., *Whose Body is it Anyway? Justice and the Integrity of the Person*, Oxford University Press, U.K. (2006), p.211.

¹⁰⁷ Raghav Sharma, “An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India”, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=997923> Visited on 6.8.2012.

¹⁰⁸ See, for example, The Convention on the Rights of the Child, 1989 and its Optional Protocol Sale of Children, Child Prostitution and Child Pornography, 2000; Convention on Elimination of All Forms of Discrimination Against Women, 1979; UN Convention Against Transnational Organized Crime, 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing above Convention, 2000, etc.

¹⁰⁹ For example, in USA, The Trafficking Victims Protection Act of 2000; In India, the Indian Penal Code, 1860 (Sections 359-373); Juvenile Justice (Care and Protection of Children) Act, 2000, etc. See for more domestic legislations, Blanka Hancilova and Camille Massey, *Legislation and the Situation Concerning Trafficking in Human*

Beings for the Purpose of Sexual Exploitation in EU Member States, International Centre for Migration Policy Development (ICMPD), Austria (2009).

¹¹⁰ See, “Girl and Women Trafficking in India”, available at <<http://www.azadindia.org/social-issues/WomenTrafficking-i-India.html>> Visited on 20.6.2012; and P. M. Nair & Sankar Sen, *Trafficking in Women and Children in India*, Orient Longman Private Ltd., Hyderabad (2005).

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children¹¹¹ defines human trafficking as:

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

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

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article¹¹².

Thus trafficking of women means, the recruitment, transportation, transfer, harboring or receipt of women, by means of the threat or use of force or other forms of coercion, etc¹¹³. In a surrogacy contract all these features are absent and thus it cannot be equated with trafficking. The trafficking of children is the recruitment, transportation, transfer, harboring, or receipt of children for the purpose of

¹¹¹ It is a protocol to the Convention Against Transnational Organized Crime, adopted by the United Nations in Palermo, Italy, in 2000. This Protocol entered into force on 25 December 2003.

¹¹² See, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000, Article 3(a).

¹¹³ *Ibid.*

exploitation¹¹⁴. It is to be noted that in a surrogacy the child is begetted not for the purpose of exploitation but for fulfilling the long cherished desire of the intended parents to have a child of their own. The surrogate child is begetted with the intention to bring it up like any other child of their own. Hence a surrogacy contract cannot be considered as violative of human trafficking laws.

6.5.5 Prostitution

One of the serious objections to a surrogacy contract is that, such agreements are similar to prostitution¹¹⁵. The critics claim that because prostitution is morally wrong and often illegal, therefore surrogacy is also morally wrong and illegal¹¹⁶. They point out that, there exists a close similarity between the two activities. Firstly, the surrogates are always female and prostitutes are also mainly female¹¹⁷. Secondly, both surrogates as well as the prostitutes permit other people to use their reproductive organs in exchange for compensation¹¹⁸. Thirdly, most prostitutes and some surrogates are forced into their respective situations to earn money¹¹⁹. Fourthly, in both the cases one's physical service is being offered, and there is no need of a deep personal or emotional relationship for the transaction to be completed¹²⁰. Fifthly, some of the feminists argue that, the broker in the surrogacy contract, who brings the contracting parties together for a fee, is similar to a pimp in a prostitution racket¹²¹.

¹¹⁴ *Ibid.*

¹¹⁵ See, Kathryn Venturatos Lorio, "Alternative Means of Reproduction: Virgin Territory for Legislation", 44 *Louisiana Law Review*, 1641 (1984), at p.1657; Erika Hessenthaler, "Gestational Surrogacy: Legal Implications of Reproductive Technology", 21 *N.C. Cent. L. J.* 169 (1995), at p.177; Abby Brandel, "Legislating Surrogacy: A Partial Answer to Feminist Criticism", 54 *Medical Law Review* 488 (1995), at p.492; Mary Becker, "Four Feminist Theoretical Approaches and the Double Bind of Surrogacy", 69 *Chi. - Kent L. Rev.* 303 (1993), at p.307.

¹¹⁶ Weldon E. Havins & James J. Dalessio, "Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating 'Non-Traditional' Gestational Surrogacy Contracts", 31 *Mc George Law Review*, 673 (2000), at pp.688-689.

¹¹⁷ *Supra* n.88 at p.1237.

¹¹⁸ Paula Barbaruolo, "The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions", 3 *Alb. L.J. Sci. & Tech.* 39 (1993), at p.72.

¹¹⁹ *Supra* n. 72 at p.546; and John Lawrence Hill, "Exploitation", 79 *Cornell Law Review*, 631 (1994), at p.641.

¹²⁰ See, Anton Van Niekerk and Liezl Van Zyl, "The Ethics of Surrogacy: Women's Reproductive Labour", *Journal of Medical Ethics*, 21(6) 345-349 (1995), at p.346.

¹²¹ See generally, Jean M. Sera, "Surrogacy and Prostitution: A Comparative Analysis", 5 *Am. U. J. Gender Soc. Pol'y & L.* 315 (1996-1997).

Sixthly, it is argued that, surrogacy is similar to prostitution because in both cases once the woman agrees for the act they have no choice over their body¹²².

The supporters of surrogacy however claim that, any comparison between a surrogacy contract and prostitution is unreasonable. This is because surrogacy process is totally different from prostitution, in its nature, objective and act involved. In prostitution, the prostitute is required to have sexual intercourse with the customer, but in a surrogacy contract, the surrogate is not required to have sexual intercourse with a man in order to carry out their agreement. In prostitution, the prostitute cannot exercise any control over her body and is subjected completely to the will and desire of the customer. However, in surrogacy, the surrogate may be subjected to medical tests and some reasonable restrictions which are imposed only for the purpose of ensuring the normal development and health of the foetus as well as for maintaining the health of the surrogate. In prostitution the objective is to provide few hours of sexual pleasure to the customer, but in surrogacy the objective is to provide a lifetime joy to the intended parents by gifting them a child which they would not have had otherwise. Further it is to be noted that, prostitution is considered as immoral and illegal due to the involvement of sex, however in case of surrogacy there is no such involvement of sex in any form. Hence there is no justification to consider surrogacy contracts as equivalent to prostitution.

6.5.6 Slavery and Violation of Human Dignity

A surrogacy contract, according to certain authors can be characterized as a form of modern slavery. This is because in a surrogacy contract, the surrogate woman has to abide by the conditions imposed on her by the intended parents and the physician. Once a woman agrees to act as a surrogate for another, she has to undergo various medical tests and is bound to refrain from acting according to her wish. In most of the cases the surrogate has to stay in the special accommodation provided by the clinic and subject to supervision by the physician. So it can be considered as

¹²² See, Andrea Dworkin, *Right-Wing Women*, Perigee Publication, Penguin Group, U.S.A. (1983), pp.181-88; and Beverly Horsburgh, "Jewish Women, Black Women: Guarding against the Oppression of Surrogacy", 8 *Berkeley Women's Law Journal* 29 (1993).

commercial servitude during the period of surrogacy process¹²³. Thus it is similar to the characteristic feature of slavery in which the slaves do not have self ownership and are bound by the orders of the owners¹²⁴. The critics also point out that such surrogacy arrangement degrades the inherent dignity of a woman as it involves the use of a woman's body for producing a baby which is handed over to the commissioning parents¹²⁵. During the term of pregnancy the surrogate mother has to abide by the conditions laid down in the contract and has no right to take any decision affecting her body. The opponents who profess surrogacy as 'akin to slavery' also argue that surrogacy involves one person (the intended parents) using another person (the surrogate mother) as a means to their ends. The surrogate mother is regarded as an instrument, for fulfilling the desire of intended parents and not as a person. Thus surrogacy treats women as a means to an end¹²⁶ which is a form of slavery¹²⁷.

It is submitted that, in case of slavery a slave does not have any freedom and can be used, sold or bought by the owner. However in case of surrogacy contracts, the surrogate woman is not sold or bought by the intended parents. On the contrary in surrogacy contracts, the woman herself agrees to act as a surrogate and accepts the duties imposed by the intended parents. More importantly, the conditions and duties imposed on the surrogate woman are reasonable and only to the extent required for ensuring the welfare of the child in the womb. The surrogacy contract does not violate the inherent dignity of women and in fact not only mentions about duties of a surrogate but also provides various rights of surrogate woman. Therefore, if the surrogacy contracts are considered as slavery, then every other contract in which an individual agrees to perform some duties for another based on certain terms should

¹²³ See for more, *supra* n.27 at p.1036.

¹²⁴ Anita L. Allen, "Surrogacy, Slavery and the Ownership of Life", 13 *Harv. J. L. & Pub. Pol'y* 139 (1990), at p.142.

¹²⁵ Judith Hendrick, *Law and Ethics in Nursing and Health Care*, Stanly Thomes (Publishers) Ltd., U. K. (2000), p.157.

¹²⁶ This principle was first formulated by Immanuel Kant, who argued that one must never treat another person merely as a means to one's ends but rather as a means in themselves.

¹²⁷ See, Ayesha Hasan, "Surrogacy: Enhancement or Restriction of a Woman's Autonomy? 6 *U.C.L. Juris. Rev.*, 101-122 (1990), at p.115; and Anita Stuhmcke, "For Love or Money: The Legal Regulation of Surrogate Motherhood", *E Law - Murdoch University Electronic Journal of Law*, Vol. 3, No. 1, 1-25 (1996).

also be considered as slavery. Thus a surrogacy cannot be equated with any form of slavery.

Regarding the objection that surrogacy contracts treat women as a means to an end¹²⁸, it is pertinent to point out here that though treating an individual as a means to an end is unethical; nevertheless it is permissible in certain situations. For example, it is permissible to employ another person to perform some service for a reward¹²⁹. In day to day life there are many situations where a person may employ another person to perform some service for him like, construction of home, cleaning, looking after a garden, etc. There is nothing wrong with these arrangements as long as the person performs the service by free consent and there is no exploitation. Therefore it is submitted that surrogacy contracts should not be considered unlawful merely on the ground that, it uses the surrogate woman for begetting a child for another.

6.5.7 Positive Eugenics

The next objection to a surrogate contract is that, such contract may lead to promotion of positive eugenics. The word eugenics is used to indicate the practice of hereditary improvement of the human race by controlled selective breeding¹³⁰. It is concerned with promotion of optimal mating and reproduction by individuals considered as having desirable or superior traits¹³¹. The criticism that surrogacy contracts may lead to promotion of positive eugenics is based on the fear that, in a surrogacy the intended parents select the surrogate woman on the basis of positive attributes she offers such as height, eye colour, race, intelligence, and athletic ability,

¹²⁸ See, Matthew Tieu, "Oh Baby Baby: The Problem of Surrogacy", *Bioethics Research Notes* 19(1), March (2007);

Margaret Brazier, Alastair Campbell & Susan Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation*, A Report presented to Parliament by the Secretary of State for Health

by Command of Her Majesty, U.K. (1998), p.35, available at <<http://claradoc.gpa.free.fr/doc/7.pdf>> Visited on 10.6.2012.

¹²⁹ *Supra* n. 127.

¹³⁰ See, Houghton Mifflin Company, *The American Heritage Dictionary of the English Language*, Houghton Mifflin Company Publication, U.S.A. (4th edn. – 2000), available at <<http://www.thefreedictionary.com/positive+eugenics>> Visited on 10.6.2012.

¹³¹ See, Saunders, *Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health*, Elsevier Press Inc., U.S.A. (7th edn. – 2003) available at <<http://medical-dictionary.thefreedictionary.com/positive+eugenics>> Visited on 10.6.2012.

etc. It is argued that surrogacy procedures give an opportunity to the intended parents to select the desired qualities and traits of the surrogate child with the help of genetic engineering. So if the surrogate baby does not have the desired characteristics, some surrogacy contracts mandate abortion¹³². It is feared that since the intended parents pay a huge amount of money for the surrogacy procedures and in case of commercial surrogacy also pay money to the surrogate woman, they may want a perfect child with particular characteristics. For this purpose they may go into the market and purchase an embryo produced by the sperm and egg of persons possessing characteristics desired by them, and then contract with a surrogate to carry the embryo. They may also screen the embryo and modify its genetic makeup to ensure desirable characteristics for the child¹³³. Therefore, it is argued that permitting the commercialization of such technologies would encourage and legitimize the practice of eugenics among the more economically privileged members of society¹³⁴. It is also stated that even altruistic surrogacy contracts may also promote positive eugenics¹³⁵.

It is submitted that, the practice of positive eugenics is not a valid ground to prohibit surrogacy contracts. The reason is that, positive eugenics also exists in other institutions like marriage. For example, the decision to marry a particular person is often based on preference for certain characteristics like race, color, caste, religion, and physical attributes¹³⁶. One of the objects of such a selection is to continue these traits through the progeny. Therefore, when the selection of partner with desirable characteristics is allowed in marriage, there is no justification to prohibit the selection of surrogate as well as the donors with desired characteristics in case of surrogacy. However, it is pertinent to point out here that, the positive eugenics can be allowed

¹³² Thomas A. Shannon, *Surrogate Motherhood: The Ethics of Using Human Beings*, Crossroad Publishing Co., New York (1988), p.118.

¹³³ See, R. Arditti, R. Duelli Klein, and S. Minden (ed.), *Test-Tube Women: What Future for Motherhood*, Pandora Press, London (1984), pp.43-44.

¹³⁴ *Supra* n.27 at p.1050.

¹³⁵ The procedure involved in surrogacy is same in both commercial and altruistic surrogacy contracts; the only difference is compensation to the surrogate mother. Thus the intended parents in altruistic surrogacy contracts may also go for a perfect child with desired characteristics. See for more, Mac Fadden, "Surrogate Motherhood - Refusing to Relinquish a Child" in J. A. Scutt (ed), *The Baby Machine: Commercialization of Motherhood*, Mc Culloch Publishing, Sydney (1988), p.71.

¹³⁶ See generally, Anita Stuhmcke, *supra* n. 127; and E. M. Landes & R. A. Posner, "The Economics of the Baby Shortage", 7 *Journal of Legal Studies*, 323 (1978), at p. 345.

only to the extent of selection of surrogate mother or donors with desirable characteristics. It cannot be allowed to the extent of manipulating the embryo for begetting a child with desirable characteristics as well as to select the sex of the child. Any such attempt would amount to creation of designer babies and hence appropriate laws should be enacted to prevent such practices.

6.5.8 Immoral and Opposed to Public Policy

All types of surrogacy contracts are generally criticized on the ground that they are immoral and opposed to public policy and hence void and unenforceable. A contract which is immoral and opposed to public policy is considered as void and unenforceable in India. In this context it is necessary to examine the meaning of the terms 'immoral' and 'public policy'.

An act is considered as immoral if it is not adhering to ethical or moral principles¹³⁷ or is conflicting with generally or traditionally held moral principles¹³⁸. In India, a contract is said to be lawful only if it satisfies all the essential ingredients of a contract and is made for a lawful object. Section 23 of the Indian Contract Act, 1872 provides that every agreement of which the object or consideration is unlawful is void. The Act also states that, the object or consideration is unlawful if the contract is immoral¹³⁹. Thus it is essential to identify whether the object of a surrogacy contract is moral or immoral. The word 'immoral' is not defined in the Indian Contract Act, 1872. However, the Supreme Court has discussed this term in *Gherulal Parakh v. Mahadeodas Maiya and Others*¹⁴⁰. The Court has stated that, the word "immoral" is very comprehensive and varying in its contents and no universal standard can be laid down¹⁴¹. The Court observed that, the provisions of Section 23 of the Indian Contract Act indicated that the Legislature intended to give that word a

¹³⁷ See, Manuel G. Velasquez, "Business Ethics Concepts & Cases", *Business Ethics* (Fall 2001), available at <http://www.karlknapp.com/resources/ethics/businessethics_summary.doc> Visited on 20.6.2012; and "Ethics and Morality", available at <<http://www.philosophy-religion.org/handouts/pdfs/ch7-ethics.pdf>> Visited on 20.6.2012.

¹³⁸ *Ibid.*

¹³⁹ See, The Indian Contract Act, 1872, S.23.

¹⁴⁰ A.I.R. 1959 S.C. 781, 1959 S.C.R. Supl. (2) 406.

¹⁴¹ *Id.* at p.409

restricted meaning. The limitation imposed on it by the expression “*the Court regards it as immoral*” clearly indicated that it was also a branch of the common law and should, therefore, be confined to principles recognized and settled by courts. The Court further identified that all judicial decisions confined immorality to sexual immorality. Therefore, it can be stated that in India, the word immoral under Section 23 of the Contract Act, 1872 refers only to sexual immorality. In surrogacy contracts there is no sexual activity between the surrogate woman and intended parent/parents and hence a surrogacy contract is not immoral in India.

Regarding the criticism that a surrogacy contract is opposed to public policy and therefore illegal, it is necessary to look into the meaning of the term ‘public policy’. It is an accepted fact that all agreements which are opposed to public policy are null and void¹⁴². The term ‘public policy’ refers to “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good”¹⁴³. ‘Public policy’ encompasses those principles designed to protect the welfare of the people. It is a well recognized principle of contract law that a court may choose not to enforce a contract if it violates public policy¹⁴⁴. There are two basic reasons why a court will not enforce a contract or a portion thereof which offends public policy. Firstly, by refusing to enforce the contract, the court hopes to deter others from making similar agreements. Secondly, the court does not want to assist the promisee by permitting him or her to use the judicial system to enforce a contract that violates public policy¹⁴⁵. Thus public policy is the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare. It is a principle of law, under which freedom for contract or private dealings is restricted by the law for the good of the community. The Supreme Court has stated that, the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of

¹⁴² See, The Indian Contract Act, 1872, S. 23.

¹⁴³ Bryan A. Garner, *Black’s Law Dictionary*, Thomson Reuters, U.S.A. (5th Edn. - 1979), p.1041.

¹⁴⁴ See, Jessica H. Munyon, “Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions”, 36 *Suffolk University Law Review*, 744 (2002-2003).

¹⁴⁵ Barbara L. Atwell, “Surrogacy and Adoption: A Case of Incompatibility”, 20 *Colum. Hum. Rts. L. Rev.* 1 (1988-1989), at p.8.

society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called the public policy¹⁴⁶.

In India, Section 23 of the Contract Act, 1872 specifically states that those contracts which are opposed to public policy are unlawful and void. The Act does not define the expression ‘public policy’ or ‘opposed to public policy’. From the very nature of things, these expressions are incapable of precise definition. The Supreme Court has held that public policy is not the policy of a particular Government but it connotes some matter which concerns the public good and public interest¹⁴⁷. In various cases the court has held that, a contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration¹⁴⁸. In the case of *Maharashtra Apex Corporation v. Sandesh Kumar and Others*¹⁴⁹, the Court held:

“a contract which has the tendency to injure public interest or public welfare is a contract opposed to public policy. What constitutes an injury to public interest or welfare would depend upon the times and the claims. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. The concept of public policy is not immutable, since it must vary with the changing needs of the society”¹⁵⁰.

In the case of surrogacy contract there is no injury to public welfare or public interest. Further the nature of surrogacy contract and the consideration involved do not have any adverse effect on the public welfare or public interest. On the contrary, the surrogacy is acting as a boon to a section of the public which is not able to beget a child due to various medical, social or other reasons. Hence, there is no justification

¹⁴⁶ See, *Gherulal Parakh v. Mahadeodas Maiya and Others*, A.I.R. 1959 S.C. 781; 1959 S.C.R. Supl. (2) 406.

¹⁴⁷ See, *Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly*, A.I.R. 1986 S.C. 1571.

¹⁴⁸ Shearman J., in *Montefiore v. Menday Motor Components Co. Ltd.*, (1913) 2 K.B. 241.

¹⁴⁹ A.I.R. 2006 Kant. 138.

¹⁵⁰ *Id.* at para 7. Also see, *Bhagwant Genuji Girme v. Gangabisan Ramgopal* A.I.R. 1940 Bom. 369.

to criticize surrogacy contracts as opposed to public policy. Thus it can be concluded that the legality of surrogacy contracts either commercial or altruistic are not affected by Section 23 of Indian Contract Act, 1872.

Further, in order to declare a contract as illegal and unenforceable, there should be an extremely powerful justification. This is because every individual has a right to contract freely with another and this right is recognized under the principle of freedom of contract. The freedom of contract has been linked to the principle of private autonomy, long recognized as necessary in our society¹⁵¹. Freedom of contract benefits society by maximizing the welfare of the parties involved and by granting individuals a sphere in which they can act freely. Freedom of contract is an important liberty that recognizes the importance of allowing individuals to reliably order their own affairs¹⁵². At the same time freedom of contract is not an absolute freedom and can be restricted on reasonable grounds. The Courts and legislatures are supposed to act with caution when limiting this freedom and care must be taken to see that a proper balance is maintained between individual interest and public interest¹⁵³. Thus it is submitted that surrogacy contracts can be considered as legal and enforceable. However, it can be regulated through proper legislations in order to avoid any unwarranted use of such contracts.

6.6 Breach of Surrogacy Contracts and its Remedies

The traditional contract law considers a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty”¹⁵⁴. The very object of entering into a contractual relationship is to ensure that the promises made by the parties to the contract are fulfilled by the parties. This assurance is given by law by creating obligations on the parties to fulfill their promises. A breach of contract occurs when a party thereto renounces his liability under it, or by his own act makes it impossible

¹⁵¹ *Supra* n.144.

¹⁵² E. Allen Farnsworth, *Farnsworth on Contracts*, Aspen Publishers, New York (2nd edn. – 2001).

¹⁵³ *Supra* n.144.

¹⁵⁴ See, Yvonne M. Warlen, “The Renting of the Womb: An Analysis of Gestational Surrogacy Contracts Under Missouri Contract Law”, 62 *U.M.K.C. L. Rev.* 583 (1993-1994).

that he should perform his obligations under it or totally or partially fails to perform such obligations¹⁵⁵. The failure to perform or renunciation may take place when the time for performance has arrived or even before that.¹⁵⁶ In case of any such breach on the part of one party to fulfill the promises, the law provides a right to the other party to seek appropriate remedy. Thus the contract law provides provisions for breach of contract and the remedies for the same. This is because a contract being a fountain head of a correlative set of rights and obligations for the parties, would be of no value, if there are no remedies to enforce the rights arising there under¹⁵⁷. A remedy here means ‘the manner in which a right is enforced or satisfied by a court when some harm or injury, recognized by society as a wrongful act, is inflicted upon an individual’¹⁵⁸. The law of remedies is concerned with the character and extent of relief to which an individual who has brought a legal action is entitled once the appropriate court procedure has been followed, and the individual has established that he or she has a substantive right that has been infringed by the non-fulfillment of obligation by the other party¹⁵⁹. Under the contract law the injured party has the following remedies viz. (i) to sue for damages for the loss suffered by the breach¹⁶⁰; (ii) to sue for *quantum meruit*¹⁶¹; or (iii) in certain circumstances to sue for specific performance¹⁶².

It has already been stated above that a surrogacy contract can be considered as a valid and enforceable contract under the Indian Contract Act 1872. Similar to any other contract, there are chances of breach in a surrogacy contract also. Thus any non-fulfillment of promise on the part of either the surrogate mother or the intended parents would amount to a breach of such contract and the other party would be

¹⁵⁵ Avtar Singh, *Law of Contract and Specific Relief*, EBC, Lucknow (8th end. - 2002), p. 386.

¹⁵⁶ *Ibid.*

¹⁵⁷ See, <<http://220.227.161.86/16820Remedies.pdf>> Visited on 10.6.2012.

¹⁵⁸ See, *West's Encyclopedia of American Law*, available at <<http://www.answers.com/topic/remedy#ixzz23S>> Visited on 10.6.2012.

¹⁵⁹ *Ibid.*

¹⁶⁰ See, The Indian Contract Act, 1872, S.73.

¹⁶¹ The expression *quantum meruit* means ‘the amount he deserves’ or ‘what the job is worth’. Essentially, *quantum meruit* is an action for payment of the reasonable value of services performed. See, Allens Arthur Robinson, “*Quantum Meruit*”, available at <<http://www.allens.com.au/pubs/pdf/const/pap23jun06.pdf>> Visited on 10.6.2012.

¹⁶² Under the provisions of the Specific Relief Act, 1963. For more see, *supra* n.15 at p.289.

entitled to take action for remedies under the law. However, due to the peculiar nature of surrogacy arrangements it is very difficult to identify an appropriate remedy for any breach in such contract.

In every surrogacy arrangement, the process starts with an initial screening of the surrogate woman. If the woman is considered fit and selected to act as a surrogate, the parties will make a formal contract. Once the contract is entered into by the parties, the surrogacy procedures will be initiated. Firstly, the surrogate will be artificially inseminated with the genetic material of the intended father or anonymous donor or implanted with an embryo created by combining genetic material of intended parents or from the anonymous donor. If in case the pregnancy is not successful, the contract would come to an end. If the pregnancy is successful she is expected to carry the baby to the full term. During the period of nine months she is required to follow certain conditions imposed by intended parents as per the instructions of the physician. After successful delivery of the child, the surrogate mother has to hand over the child to the intended parents and relinquish all her parental rights over the child. The intended parents also have to fulfill their obligations during all these stages such as arranging the physician, providing for the medical expenses, paying premiums to the insurance policy, making payment of compensation, and most importantly to accept the child after its birth. A breach of contract can occur during each of these stages either by the surrogate mother or by the intended parents. In a surrogacy contract, depending upon the stage where a breach has occurred, it can be classified into the following three broad categories.

6.6.1 Breach Prior to Artificial Insemination or Implantation of Embryo

The breach most likely to occur prior to artificial insemination or Implantation of Embryo is a refusal by the surrogate mother to submit to the artificial insemination procedure or Implantation of Embryo¹⁶³. The intended parents could also breach the agreement by backing out prior to artificial insemination¹⁶⁴. They may either refuse

¹⁶³ Hereinafter referred to as AI or IE.

¹⁶⁴ See, Keith J. Cunningham, "Surrogate Mother Contracts: Analysis of a Remedial Quagmire", 37 *Emory Law Journal*, 721, (Summer 1988), at p.746; David K. Martin, "Surrogate Motherhood:

the surrogate woman or they may not fulfill their agreed obligations like advance payment to surrogate, or insurance policy or any other obligation agreed to be performed by them prior to artificial insemination or Implantation of Embryo. The breach of surrogacy contract prior to these processes may occur due to an anticipatory breach or due to discharge of contract by a breach on part of any of the parties.

The Indian Contract Act, 1872 under Section 39 deals with anticipatory breach as well as discharge of a contract by breach. It provides that, ‘when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance’. The consequences of an anticipatory breach and discharge of a contract by breach are mentioned under Sections 64 and 73 of the Indian Contract Act. Section 64 of the Act provides that, ‘when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he had received any benefit there under from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received’. Further Section 73 of the Act states that, ‘when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach’.

An anticipatory breach can occur in a contract, by the promisor either by refusing to perform the contract, or disabling himself from performing the contract in its entirety, before the due date of performance has arrived¹⁶⁵. In a situation where the surrogate woman informs regarding her refusal to undergo AI or IE prior to the date

Contractual Issues and Remedies under Legislative Proposals”, 23 *Washburn Law Journal* 601 (1983-1984).

¹⁶⁵ *Supra* n.14 at p.238.

on which such procedure was fixed, it can be considered as an anticipatory breach in the surrogacy contract. So also if the intended parents inform the surrogate regarding their refusal to accept her as a surrogate for the AI or IE before the date on which such procedure was to be conducted, it can be considered as an anticipatory breach of surrogacy contract. So also when the intended parents may inform the surrogate regarding their refusal or inability to perform the obligations like advance payment to the surrogate, or to take an insurance policy or any other act agreed to be performed by them prior to AI or IE, it can be considered as an anticipatory breach.

When a party has made an anticipatory breach of contract, the other party may put an end to the contract, unless he/she has signified by words or conduct his/her acquiescence in its continuance. It means that on the anticipatory breach of contract by one party, the other party has two alternatives open to him/her, i.e.

- a. He/she may rescind the contract immediately, i.e., he/she may treat the contract at an end, and may bring an action for the breach of contract without waiting for the appointed date of the performance of the contract.
- b. He/she may not put an end to the contract but treat it as still subsisting and alive and wait for the performance of the contract on the appointed date¹⁶⁶.

Thus, in case of an anticipatory breach by a surrogate woman, the intended parents can either treat the contract as ended and bring an action for the breach of contract without waiting for the appointed date for AI or IE; or the intended parents may not put an end to the contract and treat it as still subsisting and wait for the date of AI or IE. Generally, in a contract, when the promisee accepts the repudiation of the contract even before the due date of performance and elects to treat the contract at an end, he is discharged from his obligation to perform the contract, and also gets a right to bring an action for the breach of contract, if he so likes, even before the due date of

¹⁶⁶ *Id.* at p.239.

performance has arrived¹⁶⁷. Thus if the intended parents accept the repudiation of the contract by the surrogate woman, the intended parents are absolved from performing their part of the obligations and can maintain an action for damages if they want¹⁶⁸. In case where the intended parents consider the contract as still subsisting, they may dispute the repudiation and hold the surrogate to fulfill her promise. If the intended parents adopt this option they keep the contract alive not only for their benefit but also for the benefit of the surrogate, subject to the condition that they may recover damages for any loss sustained by them. In such cases the intended parents can approach the court after the due date for the damages. However such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach¹⁶⁹.

In cases where there is an anticipatory breach by the intended parents, the surrogate can either consider the contract as came to an end or she can treat the contract as still subsisting and wait for the due date with the expectation that, the other party may perform their duty. If the surrogate adopts the first option and considers the contract came to an end, then she will be relieved from performing any duty and she can approach the court for damages. If the surrogate adopts the second option, i.e. if she is not accepting the repudiation of contract by the intended parents and waits for due date, then after the due date she can approach the court for damages. However as mentioned earlier, the surrogate cannot claim compensation for the remote and indirect loss or damage sustained by reason of the breach¹⁷⁰. If the contract is discharged by an anticipatory breach, the parties have a duty to restore to the other all the advantages or benefits they received from the other party¹⁷¹.

In situations where the surrogate woman remains absent or refuses to submit herself for AI or IE on the date appointed for such procedure without any prior information, the surrogacy contract can be considered as discharged by breach by

¹⁶⁷ *Id.* at pp. 239-240.

¹⁶⁸ See, The Indian Contract Act, 1872, S. 73.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Id.* S. 64.

surrogate woman¹⁷². The intended parents can maintain an action for damages¹⁷³. Likewise, in situation where the surrogate woman presents herself for AI or IE and the intended parents inform her, either that her services are not required or that they would not perform any obligation agreed in the contract, the surrogacy contract can be considered as discharged by breach by the intended parents¹⁷⁴ and the surrogate can maintain an action for damages¹⁷⁵. Thus it can be concluded that in case of a breach prior to AI or IE in a surrogacy contract, the parties can treat contract as come to an end and claim any damages which they have suffered due to such contract and are obliged to restore all the benefits that they have obtained from other party.

6.6.2 Breach after the Artificial Insemination or Implantation of Embryo

In a surrogacy, the artificial insemination or implantation of embryo may be either successful or unsuccessful. In cases where artificial insemination or implantation of embryo is unsuccessful the contract may automatically be treated coming to an end. But in cases where the pregnancy is successful, the contract continues and the parties should fulfill all the terms and conditions of such contract which they have agreed. Further, during a surrogacy pregnancy, the breach can occur by the surrogate or by the intended parents.

The surrogate woman can commit breach by performing certain activities which adversely affect the development and health of the foetus and are prohibited by the terms and conditions of the contract; or the surrogate may not perform activities which are required by the contract. For example, activities like smoking, drinking, and sexual intercourse may be prohibited by the contract while regular medical checkups and taking proper food and medicines may be required by the contract¹⁷⁶.

¹⁷² Such circumstances are covered under Section 39 of Indian Contract Act, 1872. It provides that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance’.

¹⁷³ See, The Indian Contract Act, 1872, S. 73.

¹⁷⁴ *Id.* S. 39.

¹⁷⁵ *Id.* S. 73.

¹⁷⁶ See generally, Carolyn Sappideen, “The Surrogate Mother – A Growing Problem”, 6 *U.N.S.W.L.J.* 79 (1983), at p.91.

Any failure on part of surrogate woman to perform these obligations can be considered as a breach of contract. Further the most serious form of breach can be abortion of the foetus by the surrogate against the wish of the intended parents. Intended parents may break the contract by not-fulfilling their obligations towards the surrogate mother. For example, they may not provide the agreed amount, medical expenses, insurance policy as well as any other obligations agreed to have been performed by the intended parents.

If the AI or IE was not successful the surrogacy contract can be considered as frustrated¹⁷⁷. Frustration of contract may be defined as the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If an event which could not be foreseen by both the parties occurs, the doctrine of frustration would apply. Frustration signifies a certain set of circumstances arising after the formation of contract, the occurrence of which is due to no fault of either party and which render performance of the contract by one or both parties physically and commercially impossible. Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is *prima facie* dissolved by the doctrine of frustration¹⁷⁸. It is to be noted that the reason for entering into a surrogacy contract is to beget a child. Therefore, if the surrogate woman is not able to conceive through AI or IE successfully, the surrogacy contract can be considered as frustrated.

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it¹⁷⁹. Thus in cases where, the surrogate mother is not able to conceive

¹⁷⁷ See generally, Michael J. Trebilcock, "Critiques of the Limits of Freedom of Contract: A Rejoinder", *Osgoode Hall Law Journal*, Vol. 33, No. 2, 353 (1995).

¹⁷⁸ See, Priyadarshini Satapathy, "Interpretation of Doctrine of Frustration and Force-Majeure Clause", available at <<http://www.legalserviceindia.com/article/I289-Doctrine-of-Frustration-&-Force-Majeure-Clause.html>> Visited on 10.6.2012.

¹⁷⁹ See, The Indian Contract Act, 1872, S. 65.

through AI or IE, the surrogacy contract becomes void and the surrogate is bound to return the payment or any other benefits she received from the intended parents as per Section 65 of the Indian Contract Act, 1872. However, it is pertinent to point out here that, while making a contract; the parties are empowered to make express provisions to deal with a contingency. In such cases though the contract will be void, the rights and liabilities of the parties will be decided as per the provisions made by the parties to deal with such a contingency¹⁸⁰. Since in a surrogacy there are chances that the AI or IE may be unsuccessful, the parties to a surrogacy contract shall make provisions for dealing with such a situation. This is very much essential to protect the interest of the surrogate woman, because she might have incurred certain expenses or suffered injuries in connection with her participation in such surrogacy procedures. In the absence of such a provision it may not be possible for her to claim any compensation for the loss suffered¹⁸¹.

In case where the surrogate woman breaches the contract after successful AI or IE by performing prohibited activities or not performing required activities, any breaches which do not have an adverse effect on the fundamental object of the contract cannot give rise to a right to the intended parents to rescind the contract. Thus the intended parents are bound to perform their obligations as per the contract even if there are minor breaches on the part of surrogate woman during pregnancy. However, in such cases after the delivery the intended parents can sue for damages due to such breach by surrogate woman. A major difficulty which arises with respect to such a situation is the question of calculation of compensation to be given to the intended parents. It is submitted that, in such cases the court may appoint an expert committee including medical personals and lawyers to determine the quantum of compensation depending upon the effect of such breach on the child delivered by the surrogate¹⁸².

¹⁸⁰ *Supra* n.15 at p.271.

¹⁸¹ In case where the AI or EI is not successful, the surrogacy contract will become void because of the application of doctrine of frustration. No party can claim compensation in such a situation because the circumstances causing frustration is beyond the control of both parties.

¹⁸² See, Flavia Berys, *supra* n.12 at p.351.

Further, the surrogate can break the contract by aborting the foetus without informing and without the consent of intended parents. In such a situation two important questions arise i.e. firstly, whether the surrogate woman has a right to abort foetus without the consent of the intended parents; secondly what will be appropriate remedy available to the intended parents in such a case? Regarding the question whether the surrogate has a right to abort without the consent of intended parents, it is submitted that a surrogate cannot claim such a right and if she does so, then the intended parents can claim compensation. The quantum of compensation should be determined by the court taking into account the financial loss as well as mental sufferings of the intended parents. However, if the continuation of pregnancy poses a risk to the life and health of the surrogate mother, the foetus can be aborted¹⁸³. A surrogacy contract which makes a provision to restrict the right of surrogate woman to abort the foetus in case where the continuation of such pregnancy poses a risk to the life and health of surrogate woman, should be considered as an illegal contract¹⁸⁴.

In case the surrogate informs or threatens the intended parents with her decision to abort the foetus, the question arises whether the intended parents can approach the court for an order compelling the surrogate to continue with the pregnancy. Generally when there is a threat from one party regarding his non-willingness to perform, the other party may approach the court for an order for specific performance. However, in surrogacy contract if the surrogate informs or threatens the intended parents with her decision to abort, the intended parents cannot approach the court for an order for specific performance by the surrogate mother because an order for specific performance cannot be awarded in each and every circumstance¹⁸⁵. The Specific Relief Act, 1963 deals with the circumstances in which a specific performance can be awarded¹⁸⁶ and cannot be awarded¹⁸⁷. Section 14 of the Act provides the circumstances in which an order of specific performance cannot be awarded. One

¹⁸³ See, The Medical Termination of Pregnancy Act, 1971, S. 3(2) (a) (i).

¹⁸⁴ Such contracts are considered as opposed to public policy and derogatory to human dignity.

¹⁸⁵ Specific performance is not available for contracts requiring personal services such as employment contracts because such an order would restrict an individual's freedom, See, *Chappell v. Times Newspapers Ltd* [1975] 1 W.L. R. 482.

¹⁸⁶ See, The Specific Relief Act, 1963, S.10.

¹⁸⁷ *Id.* S.14.

such circumstance is, if the performance of a contract is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the court cannot enforce specific performance of its material terms¹⁸⁸. The carrying of a foetus and delivery of the child is purely based on the personal qualification and volition of the surrogate woman. Thus the court cannot award an order for specific performance in cases where the surrogate threatens or informs about her decision to abort the foetus. However, in case where the surrogate actually aborts the foetus, the intended parents can consider that the contract is discharged by breach and approach the court for compensation.

A breach of surrogacy contract can also occur due to the act of intended parents during the stage after the AI or IE has been performed. This can happen in situations where the intended parents are not fulfilling their obligations such as not providing the agreed amount, medical expenses, insurance policy as well as any other obligation agreed to be performed by them. In such cases the surrogate woman can approach the court for seeking an order for specific performance. Thus the court can issue an order for specific performance of the obligations by the intended parents. However, even after the order of specific performance if the intended parents are not performing their obligation, the surrogate can consider that the contract is discharged by breach and can abort the foetus. However if she wishes she may continue with the pregnancy and can also claim damages for such breach. It is submitted that termination of a pregnancy due to the breach of a surrogacy contract by intended parents should be made legal in India. For this the Medical Termination of Pregnancy Act, 1971 should be amended to include breach of surrogacy contract by the intended parents as a ground for terminating pregnancy¹⁸⁹. However, there may be a situation in which the termination of pregnancy may be dangerous to the health and life of the surrogate. In such cases, the surrogate can deliver the child and can be allowed to claim compensation. If the surrogate wants, she can keep the child or if the intended parents are ready to accept the child, the surrogate can hand over the child to them. If the

¹⁸⁸ *Id.* S.14 (b).

¹⁸⁹ In Section 3 after Clause 4 of MTP ACT, 1971. Section 3 provides various grounds in which a pregnancy can be terminated legally.

surrogate keeps the child, she can claim the maintenance expense from the intended parents. In case where the surrogate and the intended parents are not willing to accept the child, the child can be given to any near relative of the intended parents if they are willing or should be placed for adoption or should be handed over to an orphanage. If the child is placed for adoption, the court can issue an order that, the intended parents have an obligation to maintain the child until the adoption is complete. If the child is placed in an orphanage, it should be made as a mandatory obligation of the intended parents to maintain the child up to the age of majority.

6.6.3 Breach after Birth

Breach of the surrogacy contract may occur after the birth of the child either by the surrogate or by the intended parents. The surrogate mother may breach the contract by refusing to hand over the child to the intended parents or by claiming parental rights over the child or demanding more money for relinquishing her parental rights. Likewise, the intended parents may breach the contract by refusing to accept the child after its birth or by refusing to make the payment of medical expenses or the agreed compensation to the surrogate¹⁹⁰.

In cases where the surrogate makes breach of contract, the intended parents can approach the court for specific performance. The Specific Relief Act, 1963 provides that, ‘when there exists no standard for ascertaining the actual damage caused by the non- performance of the act agreed to be done; or when the act agreed to be done is such that compensation in money for its non- performance would not afford adequate relief’, an order for specific performance can be issued by the court¹⁹¹. In a surrogacy contract, if the surrogate refuses to hand over the child after its birth, it is very difficult to ascertain the actual damage caused to the intended parents due to the refusal to hand over the child. So also no amount of money can adequately compensate the intended parents for their shattered expectations of having a child¹⁹². Thus the court can issue an order for specific performance. However in such cases,

¹⁹⁰ *Supra* n.176.

¹⁹¹ See, The Specific Relief Act, 1963, S.10 (a) (b).

¹⁹² *Supra* n.6 at p.588.

the intended parents should perform their part of the obligations as per the terms of the contract, before approaching the court, since specific performance is an equitable remedy.

Some of the authors have criticized that, compelling the surrogate to hand over the child is unfair¹⁹³. However, it is submitted that requiring the surrogate to perform her contractual obligation through an order of specific performance is not unfair, because the surrogate woman agreed to become a surrogate only after extensive legal, medical and psychological counseling and she was appraised of the ramifications of her service to both herself and the intended parents. The surrogate entered into the contract expecting to be paid of her services while the intended parents entered into it to have a child. Accordingly, the surrogate's expectations are fulfilled by payment of her fee while the intended parent's expectations can be fulfilled only through specific performance of the contract, i.e. giving them custody of the child¹⁹⁴.

In case there is a breach by intended parents, i.e. if the intended parents refuse to accept the child, the surrogate woman can approach the court for specific performance. This is because the surrogate has entered into surrogacy contract only on the basis of the promise that the intended parents would accept the child after its birth. So it is necessary that, the intended parents should accept the child. As per the provisions of Specific Relief Act, 1963 the court is empowered to issue an order of specific performance¹⁹⁵. This is because the damage to the surrogate due to such refusal cannot be ascertained and no amount of money can compensate for such damages. There may be a situation where the intended parents may refuse to accept the child even after the order for specific performance. In such cases if the surrogate

¹⁹³ For example see, Keane N., Breo D., *The Surrogate Mother*, Everest House, New York (1981); Iwan Davies, "Contracts to Bear Children", 11 *Journal of Medical Ethics*, 61-65 (1985), at p.63.

¹⁹⁴ *Supra* n.192 at p.588. Some authors have argued that, 'If the surrogate breaches by refusing to relinquish the child, this should be treated as a kidnapping. If she demands additional money in exchange for relinquishing the child, this is a ransom because she should have gone to court seeking additional compensation rather than resorting to self-help. See, for example, Flavia Berys, *supra* n.12 at p. 351.

¹⁹⁵ As per Section 10 an order for specific performance can be issued, 'when there exists no standard for ascertaining the actual damage caused by the non- performance of the act agreed to be done; or when the act agreed to be done is such that compensation in money for its non- performance would not afford adequate relief'.

or any relative of the intended parents are willing to accept the child, they may be allowed to keep. Otherwise the child may be placed for adoption or given to an orphanage. If the child is placed for adoption, the intended parents should make arrangements for its maintenance till the adoption is completed. In case where the child is given to an orphanage, the intended parents have to provide maintenance for the child till it attains majority. In all cases, the intended parents have to provide to the surrogate, the agreed amount of compensation or any amount to be decided by the court depending upon the circumstances.

Further if the contract involves a breach by the intended parents due to the failure of payment of agreed compensation and other medical expenses, the remedy available to the surrogate is to approach the court for specific performance of contract and compensation and she is entitled to keep the child till the obligations are fulfilled by the intended parents.

It is pertinent to point out that, there may be certain situations where the purpose of the surrogacy contract may be adversely affected in spite of the performance of obligations by both parties to the contract. They are miscarriage, still birth, defective birth or multiple births, etc. Thus an important question which arises in such cases is that, whether the intended parents can refuse to fulfill their obligation towards the surrogate? It is submitted that, such circumstances should be considered as an Act of God¹⁹⁶ and the intended parents cannot excuse themselves from the fulfillment of their obligations towards the surrogate¹⁹⁷.

6.7 Conclusion

Surrogacy arrangements can bring joy to both a childless couple who wish to beget a child as well as to the surrogate woman who enables such childless couples or individuals to have the child of their own. However, considering the peculiar nature of surrogacy arrangement, i.e. involving various medical procedures and lengthy duration of time as well as the obligations to be performed by the parties, such

¹⁹⁶ This is applicable because those events are not in the hands of surrogate mother.

¹⁹⁷ See for more, *supra* n.89 at pp.1254-55.

arrangement requires careful consideration of the various factors involved. Factors like, rights and duties of the surrogate as well as the intended parents; consequences of any breach of such duties; and liabilities of the parties in case of any unwarranted situations, etc. must be considered by the parties which entering into such arrangements. For this purpose, the practice of making a formal surrogacy contract can be adopted.

Surrogacy contracts are formal agreements which provide the terms and conditions of a surrogacy arrangement between the surrogate and intended parents. Such contracts are essential to protect the interests of both the parties involved in such surrogacy. This is because nobody can foresee the disputes which may arise between the surrogate and intended parents or the problems which may develop before the initiation of AI or IE, during the pregnancy and after the delivery of child so as to defeat the purpose of such surrogacy arrangement. Thus if all goes well in the surrogacy arrangement, the couple takes home the healthy baby they wanted so badly, and the surrogate mother receives monetary compensation. However, if any dispute arises between the parties, it would lead to court battles between them. Unfortunately in India there is no specific law for regulating surrogacy contracts. In the absence of specific law, the determination of any such dispute based on a surrogacy contract becomes very difficult and may adversely affect the interests and rights of the parties. Such difficulties can be avoided to an extent by applying the general law applicable to contracts in India, i.e. The Indian Contract Act, 1872. Though surrogacy contract satisfies all the essential ingredients of a valid contract as per the Act, there are various criticisms regarding its enforceability on the ground that it would lead to violation of individual dignity, commodification of motherhood and child, slavery, prostitution, baby selling, positive eugenics, and trafficking in women and children. It is also argued that surrogacy contracts are immoral and opposed to public policy.

However, as discussed in this chapter all these arguments cannot be considered as an adequate ground for invalidating a surrogacy contract. Further any attempt to invalidate a surrogacy contract on these grounds is a violation of the individual's right to freedom of contract, as well as the basic human right to beget a child with the help

of another and the right of a woman to act as a surrogate. However, due to the special nature of surrogacy contracts, more complicated questions can arise regarding its breach and the appropriate remedies for such breach. The breach of a surrogacy contract can occur in any of the three stages of a surrogacy arrangement, i.e. before the initiation of AI or IE, during the surrogacy pregnancy and after the delivery of child. The remedies like damages and specific performance can be availed by the parties depending upon the breach involved.

A specific legislation can resolve all the uncertainties surrounding the surrogacy contracts and provide a proper regulatory framework for dealing with most of the difficulties faced by the parties. It is to be remembered that surrogacy arrangements help to fulfill the long cherished desire of a couple/ individual to beget a child with the help of a surrogate. Hence if they undergo hardships to achieve this goal due to the absence of a law, it may be considered as a failure on part of the state to protect the rights and interests of these individuals. Therefore, the state should enact a specific legislation dealing with surrogacy contracts so that there is a greater chance that the end result of the surrogacy will be a happy new family rather than an endless legal battle.

CHAPTER -VII
SURROGATE CHILD AND THE
LAW

CHAPTER VII

SURROGATE CHILD AND THE LAW

“Currently, the biggest risk to children in the surrogacy context comes not from the actions of either set of parents but from the uncertain status of the law, which..., can lead to the child being subjected to years of litigation to determine who will be considered to be his or her legal parents” ...Lori B. Andrews¹.

7.1 Introduction

Children are precious to every country and are the future citizens and pillars of the nation. In every society children are considered as necessary and desirable. Though there is no duty to reproduce, the desire to do so is strong in human beings due to religious, cultural, social, family, personal and legal motives². The desire to beget and rear a child can be so overwhelming as to cause people to go to great lengths to achieve such a goal³. Thus in cases where the couples or individuals are unable to have a child of their own through natural biological process, they may take the help of assisted reproductive technologies for begetting a child. Surrogacy has emerged as the best option for begetting a child, and every year, more and more children are born to surrogate mothers. This increased use of surrogacy has received worldwide attention in recent years and has generated huge debate regarding the protection of rights and welfare of the various stakeholders involved in surrogacy. The diverse issues concerning the stake holders like surrogate mother and intended parents as well as issues relating to surrogacy contract have been discussed in previous chapters⁴. In any discussion on surrogacy, the issues that affect the surrogate

¹ Lori B. Andrews, “Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood”, 81 *Virginia Law Review*, 2343 (1995), at p.2358.

² *Supra* Chapter I.

³ See, Barbara Veile, “Surrogate Motherhood: The Need for Social Acceptance”, 13 *Ohio N.U. L. Rev.* 517 (1986), at pp. 523-524.

⁴ *Supra* Chapters IV, V & VI.

children are also equally important and controversial and require adequate attention. Among the various stakeholders involved in surrogacy contracts, the child is the most vulnerable and may be exposed to the hard impacts of surrogacy. It is generally argued that the ultimate victim of surrogacy arrangements is the child⁵. This is because in a surrogacy the creation of a child no longer occurs within the traditional formula of one biological unit i.e. the father as the sperm donor; the mother as the egg donor and provider of womb; and the child being the genetic offspring of the two. In a surrogacy the creation of child involves the presence of a third party i.e. the surrogate mother and in certain cases a stranger egg donor, or sperm donor⁶. Due to the involvement of a third party in the creation of a child, surrogacy has raised concerns about the protection of the rights and interests of the surrogate child.

The surrogate child is not a party to the surrogacy contract, but is the outcome of such a contract and due to the inherent vulnerability of a child, it becomes imperative for the state to interfere in surrogacy agreements and procedure for ensuring protection of rights and welfare of the surrogate child⁷. Many countries of the world have adopted legislations for the protection of the surrogate child. In India there is no specific legislation till now for dealing with the protection of rights of surrogate child. India being a world-capital for surrogacy process, the absence of a legal framework would adversely affect the interests of a surrogate child. The *Baby Manji*⁸ case is a glaring example which highlights the immediate and urgent need to address the issue of surrogate child.

In the case of *Baby Manji Yamada v. Union of India and Another*⁹, a Japanese couple Ikufumi and Yuki Yamada entered into a surrogacy contract with Pritiben Mehta (a married Indian woman with children) under the supervision of Dr. Nayna

⁵ Adrew Kimbrell, "The Case against the Commercialization of Childbearing", 24 *Willamette Law Review* 1035 (1988), at p.1047.

⁶ See generally, Victoria L. Fergus, "An Interpretation of Ohio Law on Maternal Status in Gestational Surrogacy Disputes: Belsito V. Clark, 644 N.E.2D 760 (Ohio C.P. Summit County 1994)", 21 *University of Dayton Law Review*, (Fall 1995), at pp. 229-230.

⁷ The State can act on the basis of the doctrine *parens patriae*. This doctrine grants the inherent power and authority to the state to protect persons who are legally unable to act on their own. See, <<http://legal-dictionary.thefreedictionary.com/Parens+Patriae>> Visited on 20.7.2012.

⁸ See *infra*.

⁹ *Baby Manji Yamada v. Union of India and Another*, (2008) 13 S.C.C. 518.

Patel¹⁰ in Gujarat. The clinic staff under the supervision of Dr. Patel created an embryo from Ikufumi Yamada's sperm and an egg harvested from an anonymous Indian woman¹¹ and then implanted the embryo into Mehta's womb. Meanwhile in June 2008, the Yamadas divorced. A month later, on July 25, 2008, Baby Manji was born to the surrogate mother. Though Ikufumi Yamada wanted to raise the child, his ex-wife, Yuki, did not want the child as she was unrelated to the baby biologically, genetically and legally. The surrogacy contract did not cover such a situation of refusal by one of the intended parents. There was no law existing in India to clarify and solve this matter¹². The grandmother of the baby Manji, Ms Emiko Yamada came from Japan to take care of the child and filed a petition in the Supreme Court of India under Article 32 of the Constitution. The Court relegated her to the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act, 2005. Finally, baby Manji left for Japan in the care of her genetic father and grandmother¹³.

This case raised various questions related to the care and welfare of the surrogate child for which there is no clear answer in Indian legal framework. For example, who is the mother of the child; whether the intended mother has any liability if she refuses to accept the child and what is the appropriate remedy in such cases; whether the child is an Indian citizen or foreign citizen; whether the child can obtain a passport in India without having a mother and so on. The *Baby Manji* case is only a tip of the iceberg. The surrogacy practice may present more complex and serious problems for the surrogate child. There may be situations where both the intended parents may refuse to accept the surrogate child after its birth; or one of the

¹⁰ Dr. Nayna Patel is a Gynaecologist and the Medical Director of Akanksha Infertility Clinic, Anand, Gujarat.

¹¹ One report identifies the egg donor as a Nepali woman living in India. See Brasor, Philip, "Surrogate Path for Dads not Always as Easy as for Ricky", *The Japan Times*, August 31, 2008.

¹² See, Kari Points, "Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji", available at <<http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf>> Visited on 20.7.2012.

¹³ See, Law Commission of India, "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy", Report No. 228, August 2009, at p.15.

intended parents may have died and the other may not be in a position to accept the child. In such cases the welfare of the child is at stake.

A surrogate child is brought into existence due to the desire of the heterosexual infertile couples, or homosexual couples or single individuals to have a child of their own. Thus the surrogate child may be deprived of the natural consequences which are applicable to a child born to married heterosexual couples through natural procreation. For example, the very status of the surrogate child is debatable i.e. whether a surrogate child is legitimate or illegitimate. Further, questions regarding maintenance and inheritance of a surrogate child are also relevant. It is very essential to have a clear answer to all these issues so as to protect the rights of the surrogate child and ensure its welfare. This chapter examines in detail the problems which a surrogate child may face and the various legal and ethical issues related to surrogate child. It also discusses the different rights of surrogate child and the need to protect those rights.

7.2 Surrogate Child: Concept and Meaning

Child usually refers to the status of a person in a relationship as parent and child, and it includes a person of that status even after the person has reached the age of full legal capacity¹⁴. It is generally a known natural fact that a child is born as a result of sexual union between an adult male and female. However, due to the development of medical science and technology, a child can take birth even without sexual intercourse, i.e. the child can be born with the help of assisted human reproduction which requires only the genetic material from the male and female. One of the commonly practiced methods of ART is surrogacy in which a woman agrees to bear the child for another and relinquishes parental rights on its birth and hand it over to the intended parents. Such a child is known as a surrogate child. Thus a surrogate child is the result of a surrogacy arrangement in which a woman agrees to be impregnated by assisted conception, carries the resulting foetus and delivers it after

¹⁴ See, The Surrogacy Act, 2008 (Western Australia), S. 14.

the full term¹⁵. They are the children who come into the world through the arrangements between specific persons, i.e. intended parents, surrogate woman and in certain cases egg or sperm donors and with the assistance of technology. The concept of surrogate child has been in existence since ancient times and mythology is replete with instances of surrogate child like, Balam¹⁶; Ishmael¹⁷; Dan and Naphtali¹⁸.

7.3 Surrogate Child: Legal and Human Rights Issues

The child is the most vulnerable among all the stake holders involved in surrogacy arrangement. It is a fact that the child is unable to express its own will regarding its birth into this world, or speak of its own wishes or interests before it is born and even after birth till attaining maturity. Therefore, the welfare of the child must be considered to the maximum extent possible in any surrogacy arrangement. The surrogacy arrangement which is entered into between the intended parents and the surrogate mother is motivated by various desires. The intended parents strongly intend to have a child of their own and the surrogate mother may agree to act as a surrogate due to her altruistic or financial motives. In such an arrangement, once the child is born and handed over by the surrogate mother to the intended parents, the surrogacy contract ends. However the interest of the child begins right from the inception and continues even after birth and transfer of the child from surrogate mother to intended parents. Therefore, it is the responsibility of all the stake holders in surrogacy arrangements to ensure that the child being born as a result of surrogacy is not adversely affected. As a welfare state it is the duty of the government to ensure that the actions of an individual would not cause harm to the interests of the child.

¹⁵ Lieber Katherine B., "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered", 68 *Ind. L. J.* 205 (1992-1993), at p.206.

¹⁶ In the *Bhagvata Purana*, Lord Vishnu transferred an embryo from Devaki's womb to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby, Balam. See, Veronica Ions, *Indian Mythology*, Octopus Publishing Group, London (1983), pp.58-59.

¹⁷ Abraham and Sarah his wife were passed child bearing age but God had promised them a son. Being impatient, as we humans are, and as was a custom then, Sarah tried to hurry things along. She told Abraham to take her handmaid, Hagar and have son by her, which Abraham then did. The son so produced was named Ishmael. See, <<http://wiki.answers.com/>> Visited on 20.7.2012.

¹⁸ Rachel remained unable to conceive. She became jealous of Leah and gave Jacob her maidservant, Bilhah, to be a surrogate mother for her. Bilhah gave birth to two sons that Rachel named and raised as Dan and Naphtali. See, <<http://wiki.answers.com/>> Visited on 20.7.2012.

Hence it is necessary to examine the various legal issues which may have an impact on the interests and welfare of the child. Issues which pose a serious threat to the interest and welfare of the surrogate child are as follows:

7.3.1 Refusal to Accept the Child

One of the most important duties of the intended parents is to accept the child once it is born. Any refusal on part of the intended parents would have a serious impact on the welfare and interests of the child. This is because the surrogate child has come into existence only because of the wish and initiation by the intended parents. Hence, any such refusal is a violation of their duty¹⁹ and in cases where there is a surrogacy contract, it should be considered as a breach of such contract²⁰.

The intended parents would accept the surrogate child generally; however there may be a refusal to accept in certain circumstances. For example, there may be a situation in which the intended parents may separate or divorce after entering into contract with the surrogate mother. One such case is that of *Buzzanca v. Buzzanca*²¹. In this case an infertile married couple contracted with a married woman who agreed to act as a surrogate. The embryo was created through anonymous egg and sperm donations and implanted in the womb of surrogate. However before the end of the term of pregnancy, the intended parents divorced. Mr. Buzzanca claimed that there were no children born to the marriage, and he was not responsible for the child born to the surrogate, financially or otherwise. The California lower Court ruled in favor of Mr. Buzzanca and held that the child had no lawful parents based on three grounds: (1) the surrogate and her husband stipulated that they were not the biological parents; (2) Mrs. Buzzanca could not be the child's mother because she had neither contributed the egg nor given birth; and (3) Mr. Buzzanca could not be the child's

¹⁹ The Indian Council of Medical Research ART Guidelines, 2005 which at present are the governing guidelines for assisted reproductive technologies makes no specific provision for this. However, the new Draft Assisted Reproductive Technology Act, 2010, under S.34 (11) provides that, "the person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act".

²⁰ *Supra* Chapter VI.

²¹ 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

father because he had not contributed the sperm and, therefore, had no biological relationship with the child. However in an appeal filed by Mrs. Buzzanca, the Appellate Court reversed the lower Court decision and held that the intended parents, i.e. the Buzzancas, are by law, the natural parents of the child.

In a similar case, *Jaycee B. v. The Superior Court of Orange County*²², the intended parents Luanne and John agreed to have a surrogate child with the help of a surrogate woman. An embryo, genetically unrelated to either of them was implanted in the womb of surrogate woman. However after the implantation, the intended parents separated. Luanne claimed that she and John were the lawful parents, but John disclaimed any responsibility. The trial court held that Luanne and John were not the legal parents of the child because there was no biological connection with the child who would be born to surrogate woman as the embryo and sperm were not of the intended parents. But the appellate court held that since the husband, i.e. John consented for such procedure he could be treated as the lawful father of the child.

In India, a similar dispute arose in the case of *Baby Manji*²³, due to refusal of one of the intended parents, i.e. wife of the intended father to accept the child. In the absence of a specific law, the Supreme Court of India directed the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act, 2005 to consider about the custody and parentage of the child. Finally the child was handed over to the intended father and grandmother who were ready to accept the child.

The separation or divorce of the intended parents during the surrogate pregnancy thus creates a legal problem for the child. Now a day's gays or lesbian couples are also opting for surrogacy to beget a child and since the chances of separation and breaking up are more in such relationships, it would lead to a situation where both may reject the child. The intended parents may also refuse to accept the

²² 42 Cal.App.4th 718 (1996), 49 Cal. Rptr.2d 694.

²³ *Supra* n.9.

child in cases where the child is born with a defect²⁴ or in cases where multiple births take place²⁵. It is very difficult to predict the outcome of surrogacy pregnancy due to the fact that it involves intervention of technology in natural procreation process²⁶. It is seen that in case of surrogacy, multiple births are very common²⁷. In such cases the intended parents may accept only one child and may refuse to accept the remaining. So also the possibility of refusal to accept the child, due to death/injury to one of the intended parents/parent cannot be ruled out.

The refusal by the intended parents to accept the surrogate child due to any of the above reasons would impair the interests of the child. The innocent child would be at the mercy of close relatives or orphan homes and in spite of having intended parents; the child would be forced to live like an orphan. This would also pose a serious question for the State that who should be held liable to accept the child. To tackle this issue it is proposed that, the surrogacy contracts should include specific clauses dealing with responsibility of intended parents to accept the child²⁸.

In situations where there are two intended parents (either husband and wife, or lesbian couple or gay couple) and both of them are not ready to accept the child, it should be considered as an offence. Likewise, in cases where there is only one intended parent and he or she refuses to accept the child, the refusal should also be

²⁴ See for more, Tom Frame, *Children on Demand: The Ethics of Defying Nature*, UNSW Press Ltd., Sydney (2008), p.158; Janna C. Merrick, Robert H. Blank, *Reproductive Issues in America: A Reference Handbook*, ABC-CLIO Inc., California (2003), p.43; Ethel Sloane, *Biology of Women*, Thomson Learning, New York, (2002), p.415.

²⁵ D. Kelly Weisberg, *Family Law*, Aspen Publishers, U.S.A. (2008), p.261.

²⁶ See generally, Olga B.A. Van Den Akker, "Psychosocial Aspects of Surrogate Motherhood", *Human Reproduction Update*, 13(1) (2007), pp. 53-62.

²⁷ For Example, Catherine Toole, the 36-year-old surrogate woman who gave birth to triplets for the Venezuelan couple, See, Carol Lawson, "Couple's Own Embryos Used in Birth Surrogacy", *The New York Times*, available at <<http://www.nytimes.com/1990/08/12/us/couples-own-embryos-used-in-birth-surrogacy.html>> Visited on 20.6.2012; In 2005, a woman gave birth to quintuplet boys that were placed with the intended parents. See, Christine Adamec & Laurie C. Miller, *The Encyclopedia of Adoption*, Infobase Publishing, New York (3rd edn.-2007), p.278; In 1987 a South African mother bore triplets for her daughter. See, Barbara Smith, *The Reader's Companion to U.S. Women's History*, Houghton Mifflin Harcourt (1999), p.513; See also, Sheila McLean & John Kenyon Mason, *Legal and Ethical Aspects of Healthcare*, Cambridge University Press, U.K. (2003), p.113.

²⁸ John Dwight Ingram, "Surrogate Gestator: A New and Honorable Profession", *76 Marquette Law Review* 675 (Summer 1993), at p.697; Also see, Dr. Nandita Adhikari, *Law and Medicine*, Central Law Publications, Allahabad (2007), p.161.

considered as an offence²⁹. If any close relative such as mother or father, brother or sister of the intended parents/ parent are ready to accept the child, the child should be handed over to them and the maintenance amount should be recovered from the intended parents/parent. In the absence of acceptance by one of such relatives, the child can be given to the surrogate mother if she is ready to accept and the maintenance amount should be met from the intended parents/parent. In cases where the surrogate mother also refuses to accept the child, the child may be given for adoption or put in an orphanage.³⁰ However in cases where there are two intended parents, and one of them is ready to accept the child, then the child should be given to such parent and half of the maintenance amount should be taken from the other intended parent.

In case of a foreign intended parents/parent refuses to accept the child after the birth, it shall be made an offence and the local guardian should be made liable to accept and keep the child for six months. If intended parents fail to accept the child even after six months, the local guardian can give the child for adoption or to an orphanage. The maintenance expenses of the child should be met from the intended parents till the adoption or upto the age of majority of the child. If the intended parents refuse to pay the maintenance, it shall be treated as an offence and the local guardian shall be made responsible for maintenance of the child. For the protection of the best interest of the child, the state should make appropriate legislative framework addressing the issue of refusal to accept the child and the above said suggestions can be considered while making any such law.

7.3.2 Legal Status of Surrogate Child

One of the most important and controversial issue affecting a surrogate child is the question regarding the status of the child, i.e. whether the child is legitimate or

²⁹ See, The Draft Assisted Reproductive Technology Act, 2010, S. 34 (11). The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act.

³⁰ Carol A. Crow, "The Surrogate Child: Legal Issues and Implications for the Future", 7 *Journal of Juvenile Laws*, 80 (1983), at p.90.

illegitimate³¹. The status of a child is very important, since it decides many of the rights of the child, like the custody and maintenance, inheritance, etc³². Childless couples and individuals resorting to surrogacy are happy to have the child. But if the child born through surrogacy is considered illegitimate, it would be an injustice to the intended parents and most importantly to the surrogate child³³.

The concept of legitimacy of children is the direct outcome of the concept of marriage. In all societies where marriage came to be established as a social institution, it was laid down that children born within the lawful wedlock were legitimate children of the man and his wife. As a corollary, it was laid down that the children born outside the lawful wedlock were illegitimate. This continues to be the position in most of the societies and legal systems of the world even today³⁴.

In a surrogacy arrangement, the intended parents depending upon their medical condition or other social factors, may or may not contribute the genetic material. In situations where both the intended parents have contributed the genetic material, the chances of dispute regarding the legitimacy of surrogate child may be very less. However, in certain situations the question regarding legitimacy or illegitimacy of the child can arise due to the fact that there is interference of a third party/parties, i.e. egg donor or sperm donor or both egg and sperm donor. In situations where only one of the intended parents has contributed the genetic material or both the intended parents have not contributed the genetic material, either the sperm or egg or both the sperm and egg are taken from donor/donors, the chances of dispute regarding the legitimacy of surrogate child may be very high. This is because the surrogate child is not genetically related to either one of the intended parents who have not contributed the genetic material; or is not genetically related to both the intended parents. Likewise, in situations where the surrogacy arrangement was made by a gay couple or lesbian

³¹ Theresa M. Mady, "Surrogate Mothers: The Legal Issues", 7 *Am. J.L. & Med.* 323 (1981-1982), at p.345.

³² See generally, Indu S. Nair, "Rights of the Child: Challenges for Law in the New Era of Technology", (2003) [C.U.L.R.] 101, at p.115.

³³ *Ibid.*

³⁴ Paras Diwan, *Muslim Law in Modern India*, Allahabad Law Agency, Faridabad (9th edn – 2004), p.115.

couple or single individuals, the legitimacy of child can be questioned due to the absence of genetic relationship as well as absence of either mother or father.

The legal provisions must be equipped to deal with such disputes in order to protect the interests and welfare of the surrogate child. In this context it is significant to refer the similar cases involving disputes over legitimacy of child. Such controversy regarding the legitimacy of the child due to the absence of genetic relationship has been discussed in various cases of Artificial Insemination by Donor. For example, in the case of *Anonymous v. Anonymous*³⁵, the husband had consented to his wife's therapeutic impregnation. Later when the wife claimed for alimony the husband pleaded that the child was illegitimate. The court rejected his plea and held that the child was legitimate and awarded the alimony on the ground that consent to such a procedure carried with it an implied promise to furnish support for the resulting progeny³⁶.

In *People v. Sorensen*³⁷, a divorced woman sued her former husband for non-support of their son born through Artificial Insemination by Donor. In this case the defendant had consented after 15 years of marriage and a medical determination of his sterility to allow his wife to be artificially inseminated. After the child was born, he represented that he was the child's father. However after divorce the husband withdraw his support to the child on the ground that the child was illegitimate. The California Supreme Court rejected his claim and held that he was the lawful father of the child, because he had given his consent³⁸.

It is pertinent to point out that most of the jurisdictions having a legal framework to deal with legitimacy of child have impliedly recognized that a surrogate child is a legitimate child³⁹. For example, the Uniform Parentage Act, 2000 of USA

³⁵ 41 Misc.2d. 886.

³⁶ Dr. Lily Srivastava, *Law and Medicine*, Universal Law Publishing Co., New Delhi (2010), p.88.

³⁷ 68 Cal. 2d. 280.

³⁸ Kusum, "Artificial Insemination and the Law", 19 (3) J. I. L. I. 283 (1977), at p.292.

³⁹ See, The Children Act, 2005 of South Africa, under S. 297 (1) (a) which provides that the effect of a valid surrogate motherhood agreement is that any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned.

has not expressly mentioned about the legal status of a child born out of surrogacy, however the various provisions of the Act can be interpreted to establish that a surrogate child is a legitimate child⁴⁰. The Human Fertilization and Embryology Act, 2008 of United Kingdom also does not contain any express provision, but from the provisions of the Act, it is implied that a surrogate child is a legitimate child⁴¹.

In India, the issue of legitimacy of a child is primarily governed by section 112 of the Evidence Act, 1872 which declares that, birth during marriage shall be conclusive proof of legitimacy. It states that, any person born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. Thus the essential conditions for the legal presumption of legitimacy in India are:

- a) The child should have been born during the continuance of a valid marriage between his mother and any man, or if the marriage was dissolved, within 280 days after its dissolution, the mother remaining unmarried;
- b) The parties to the marriage should have had access to each other at any time when the child could have been begotten⁴².

The application of section 112 for determining the legitimacy of surrogate child would create difficulties. For example, in cases where surrogate mother is a married woman and the husband has access to her, a literal interpretation of Section 112 shows that the child is the legitimate child of surrogate. However, such an interpretation will adversely affect the interest of intended parents as well as the child

⁴⁰ The Uniform Parentage Act, 2000 section (a) (3). A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that the intended parents become the parents of the child.

⁴¹ See, Section 33 (1)The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

⁴² Dr. Avtar Singh, *Principles of Law of Evidence*, Central Law Publications, Allahabad (14th edn.-2004), p.382.

and also the interests of surrogate mother. This is due to the fact that, the basic objective of surrogacy arrangement is to beget a child for the intended parent/parents. So also the surrogate mother may not want to keep the child and accept any responsibility over the child. Thus the above provision in the Indian Evidence Act, 1872 has no relevance while determining the legitimacy of a surrogate child. The Gujarat High Court in *Jan Balaz v. Anand Municipality and Others*⁴³ held that, under the Indian Evidence Act, no presumption can be drawn that child born out of a surrogate mother, is the legitimate child of the intended parents, so as to have a legal right to parental support, inheritance and other privileges of a child born to a couple through their sexual intercourse⁴⁴. It is to be noted that if the child is not considered as the legitimate child of the intended parents, they would face difficulties in bringing up the child and the innocent child would also suffer injustice⁴⁵. The Gujarat High Court observed in the above case that, the only remedy is a proper legislation drawing such a presumption of legitimacy⁴⁶.

In India, in the absence of a law, the *ICMR Guidelines* are relevant for determining the legitimacy of a surrogate child. The *Guidelines* provide that, a child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple through sexual intercourse⁴⁷. Further the Draft ART Bill, 2010 contains comprehensive provisions relating to the determination of status of a surrogate child. Section 35 of the Draft Bill states that, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent

⁴³ A.I.R. 2010 Guj. 21.

⁴⁴ *Id.* at para. 20.

⁴⁵ See for more, P. C. Bedwa, "Problems of Illegitimate Children under Various Personal Laws in India", 11 *Indian Bar Review*, 337 (1984).

⁴⁶ *Supra* n.44.

⁴⁷ See, Rule 3.12.1 & 3. 16 .1 of *ICMR Guidelines*. Rule 3. 16.1 provide that, "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".

of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse. Similarly a child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties⁴⁸. In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man⁴⁹. In case a married or unmarried couple gets divorced or separates, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple⁵⁰. A child born to a woman artificially inseminated with the stored sperm of her dead husband shall be considered as the legitimate child of the couple⁵¹. Thus, it can be seen that, the Draft ART Bill, 2010 is adequate enough to guarantee legal status of a surrogate child in India. It is submitted that, the surrogate child should be considered as the legitimate child of the intended parents/ parent with all the rights of parentage, support and inheritance, same as that of a child born through sexual intercourse.

7.3.3 Parentage of Surrogate Child

Parentage is the relationship of parents to their child or children⁵². Legal parenthood (motherhood and fatherhood) is not only a prerequisite for having parental authority, but also determines the surname that the child will acquire and be identified with all through his life. Parenthood is also the basis for granting custody rights and gives rise to mutual rights of inheritance, duty to support dependent family members, and other such rights and obligations between the person regarded as the parent and the person regarded as the child⁵³. Therefore any dispute regarding the

⁴⁸ See, The ART Bill, 2010 (India), S. 35(2).

⁴⁹ *Id.* S. 35(3).

⁵⁰ *Id.* S. 35(4).

⁵¹ *Id.* S. 35(5)

⁵² V. P. Bharatiya, *Syed Khalid's Rashid's Muslim Law*, EBC, Lucknow (4th edn. - 2004), p.135.

⁵³ See, Boniface, Amanda Elizabeth, *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact*, Thesis submitted in partial fulfillment of the degree Doctor Legum in the Faculty of Law, University of Pretoria, South Africa (2007), Chapter 3, pp.73 – 361. Available at <<http://upetd.up.ac.za/thesis/available/etd-04092008-122134/unrestricted/02chapter3.pdf>> Visited on 20.7.2012

parenthood of a child will adversely affect the interests and welfare of the child and needs to be resolved.

Traditionally, defining a parent was relatively easy because there were only three ways to acquire parenthood: giving birth (*mater sempe certe est*)⁵⁴, being married to the mother of the child (*pater est quem nuptiae demonstrant*)⁵⁵, or adopting a child⁵⁶. For centuries, the law has also developed and relied on certain presumptions to establish the legal parenthood of children⁵⁷. For example, when a married woman gave birth to a child, common law presumed her husband to be the father. These presumptions reflect, in large part, the natural birth process, starting with an act of sexual intercourse and ending with a birth of the child nine months later. Modern reproductive technologies, especially surrogacy, challenge these traditional presumptions. A woman may give birth to a child with no act of sexual intercourse, with no genetic relationship to the baby, and with no intention to raise the child⁵⁸. It is to be noted that the term ‘parent’ includes both mother and father. In fact, the determination of parentage means determining who is the mother and who is the father of the child?

Till the advent of ART, a ‘mother’ was simply the woman who gave birth to the child. With the technological ability to separate the gestational and genetic components of motherhood, this maternal presumption now needs clarification⁵⁹. Traditionally, in the process of procreation, the woman contributed the ovum and gestation. The determination of motherhood was virtually uncontestable because the pregnancy was physically and externally manifested. With the development of

⁵⁴ *Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001).

⁵⁵ See, William Blackstone, *Commentaries on the Laws of England*, (1765 -1769), p.455, full text available <<http://www.lonang.com/exlibris/blackstone/index.html>> Visited on 20.7.2012.

⁵⁶ Linda D. Elrod, “A Child’s Perspective of Defining a Parent: The Case for Intended Parenthood”, 25 *Brigham Young University Journal of Public Law* 245 (2011), at p.246

⁵⁷ See, Helene S. Shapo, “Matters of Life and Death: Inheritance Consequences of Reproductive Technologies”,

25 *Hofstra Law Review*, 1091 (1997), at p.1097.

⁵⁸ F. Barrett Faulkner, “Applying Old Law to New Births: Protecting the Interests of Children Born through New Reproductive Technology”, 2 *Journal of High Technology Law*, No. 1, 27 (2003).

⁵⁹ Scorr B. Rae, “Parental Rights and the Definition of Motherhood in Surrogate Motherhood”, 3 *S. Cal. Rev. L. & Women’s Stud.* 219 (1993-1994), at p.223.

assisted reproduction, the relative ease of determining motherhood has diminished. Today, the contribution of the female gamete (genetic motherhood), gestation (gestational motherhood) and the role of legal-social mother (legal motherhood) can each correspond to different women⁶⁰. Thus the surrogate child can have three mothers, firstly, the legal mother could be the woman who gestates the pregnancy and gives birth. Secondly, legal motherhood could be synonymous with genetic motherhood, so that the woman whose egg was fertilized would be the resulting child's mother. Thirdly, legal motherhood could vest in the woman who intends to raise the child, sometimes referred to as the social mother⁶¹.

The 'father' is generally the husband of the mother of the child. This is a rebuttable common law presumption of paternity within marriage based on the fact that, the procreation of a child is purely an act of husband and wife. However, in the case of surrogacy there may be an interference of another male as a sperm donor. In such cases the child can have two fathers, i.e. one who intended to have the child and the one who donated the sperm and is genetically related⁶². Hence in case of surrogacy arrangements defining a parent seems to be very complicated.

Parenthood is generally determined in accordance with the genetic relationship between child and the parents. In surrogacy process if both intended parents have contributed genetic material, but the resulting foetus is implanted in the womb of the surrogate women, then in such cases the child will have two mothers (gestational and genetic mother who is the intended mother) and one father. In cases where the surrogate mother has contributed genetic material, then the child will have two mothers (i.e. gestational who is also the genetic mother and the intended mother) and one father⁶³. In cases where only one of the intended parent i.e. the father, has contributed genetic material, and the egg is from a donor woman, then the child will have three mothers (genetic mother, gestational mother and intended mother) and one

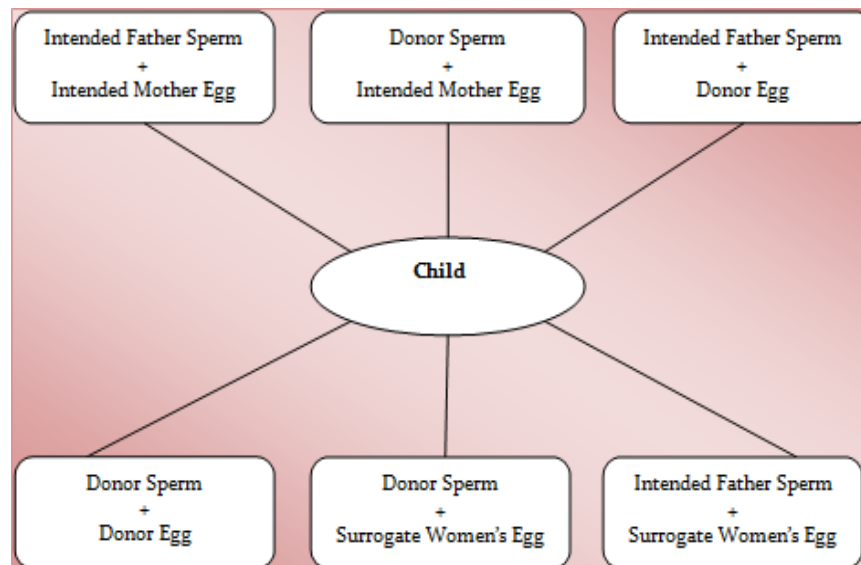
⁶⁰ Glenda Labadie Jackson, "The Reproductive Rights of Latinas and Commercial Surrogacy Contracts - English Translation", 14 *Tex. Hisp. J.L. & Pol'y* 49 (2008), at p.63.

⁶¹ Emily Jackson, *Regulating Reproduction Law, Technology and Autonomy*, Oxford and Portland, Oregon, U.K. (2001), p.272.

⁶² *Ibid.*

⁶³ In cases of Partial Surrogacy.

father. In cases where only the intended mother has contributed genetic material and the sperm is from a donor, the child will have two fathers (genetic father and intended father) and two mothers (gestational mother and intended mother who is also the genetic mother).⁶⁴ In cases where both the intended parents have not contributed their genetic material and an embryo is created from the sperm of donor and the egg of surrogate woman, the child will have two father's (genetic father and intended father) and two mothers (gestational mother who is also genetic mother and the intended mother). In cases where both the intended parents have not contributed their genetic material and the embryo is created through donors genetic material, then it will give rise to two fathers (genetic father and intended father) and three mothers (genetic mother, gestational mother and intended mother)⁶⁵. These various complex situations which may arise in surrogacy arrangements are given in the chart below⁶⁶:



It can be seen that in all these situations it is very difficult to identify who are the legal parents of the child. Various authors have proposed different theories to identify the parenthood of a child. The four main theories are as follows:

⁶⁴ For example, see, the case of *In re Baby M*, 537 A.2d 1227, 109 N.J. 396.

⁶⁵ For example, see, the case of *Jaycee B. v. Superior Court*, 42 Cal.App.4th 718 (1996).

⁶⁶ *Supra* n. 26 at p.54.

(a) Theory of Genetic Link between the Child and Adult

This theory means that, if there is a genetic link between the child and the adult in question, he or she or both can be considered as the parent of the child⁶⁷. The merit of this theory is that if both intended parents contribute genetic material, they can be considered as the legal parents. At the same time the demerit of this theory is that in case of surrogacy often only one or neither of the intended parents is biologically related to the child. Therefore, in situations where only one of the intended parents contributes genetic material, he or she will be considered as legal parent. If the surrogate mother had contributed genetic material she can also be considered as a parent.

In cases where there is an involvement of a donor, he or she can be considered as the parent. However in most cases the surrogate mother does not intend to keep the child and assume the responsibility of parenthood. So also in most cases the egg and sperm donors are either anonymous or not interested to take up the responsibility of child. Thus emphasis on theory of genetic link to determine legal parentage would create complex legal disputes⁶⁸.

An application of genetic link theory can be seen in the case of *Belsito v. Clark*⁶⁹ in which the court gave importance to the genetic relationship to determine the parentage of the surrogate child. In this case, the intended parents wanted an order placing their names on the birth certificate of their genetic child who was carried to term by the intended mother's sister⁷⁰. The court placed a primary emphasis on the rights of the genetic parents and held that unless the genetic parents waive their parental rights (as donors to a sperm bank might) they will be the natural parents of the child⁷¹.

⁶⁷ M. L. Shanley, *Making Babies, Making Families*, Beacon Press, Boston, U.S.A. (2001), pp.129–30.

⁶⁸ See, *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998).

⁶⁹ 644 N.E.2d 760 (Ohio Ct. of Com. Pleas 1994).

⁷⁰ Molly Miller, "Embryo Adoption: The Solution to an Ambiguous Intent Standard", 94 *Minnesota Law Review*, 869 (2010), at p.889.

⁷¹ *Supra* n.58 at p.42.

(b) Theory of Intent-Based Parenthood⁷²

According to this theory an individual can be a parent of the child even if there is no genetic connection between him/her and the child, if he/she is having an intention to raise the child. The advantage of this theory is that it would make it possible for an individual who is genetically unrelated to a child to assume parental status by agreement or contract⁷³. Moreover this theory would be useful in cases where disputes arise between the intended parents and surrogate mother. This theory has been applied in many cases and considered as the most appropriate theory to resolve disputes relating to the parentage of surrogate child. For example, in *Johnson v. Calvert*⁷⁴, a dispute arose between the gestational surrogate and the intended parents. The question before the court was, “when, pursuant to a surrogacy agreement, a zygote formed of the gametes of a husband and wife is implanted in the uterus of another woman who carries the resulting foetus to term and gives birth to a child not genetically related to her, then who is the child’s ‘natural mother?’” The surrogate claimed she was the natural mother by virtue of giving birth to the child. The intended mother claimed parentage on the basis of the biological relationship she had with the child. The court concluded that the genetically linked intended mother was the natural mother because “she was the one who intended to bring about the birth of a child that she intended to raise as her own.” The court looked to the intention of the parties as indicated by the surrogate agreement itself, to determine the child’s mother⁷⁵.

An intention-based approach was also taken in *Buzzanca v. Buzzanca*⁷⁶. A donor embryo was used and no genetic connection existed between child and surrogate mother or child and intending parents. The court held that the intended mother and intended father were the legal parents of the child. This is because the

⁷² See, M. M. Shultz, “Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality”, 2 *Wisconsin Law Review*, 297 (1990).

⁷³ See, Jonathan Hearing, *Medicinal Law and Ethics*, Oxford University Press, U.K. (2010), p.312.

⁷⁴ (1993) 851 P 2d 776 (Cal).

⁷⁵ See, Trowse Pip, “Surrogacy: Is it Harder to Relinquish Genes?” *Journal of Law and Medicine*, 18(3), 614 - 633 (2011).

⁷⁶ (1998) 72 Cal. Rptr. 2d 280 (Ct App).

intended mother had arranged surrogacy with the consent of intended father and their intention was to raise a child⁷⁷.

(c) Theory of Social Role or Parenting

This theory is based on the assumption that what makes someone parent is not merely a biological link, but rather the day to day caring for the child, i.e. the washing, feeding, clothing and educating the child. It is performing the work of parenthood that earns the title parent, and not the genetic link⁷⁸. This theory recognizes the parental claims of biologically unrelated individuals like, lesbians and gay couples or single individuals⁷⁹. The main advantage of this theory is that, in cases where only one of the intended parents has donated the genetic material, the partner of such intended parent can also be considered as legal parent on the presumption that they would perform the role of parent. This theory can be considered as an extension of the Intention-Based Parenthood theory. This is due to the fact that the intended parents, who intended to beget a child, initiate the surrogacy arrangements on the implied promise that they would take care of the child after its birth and perform the role of parents.

An application of this theory can be seen in *In Re Mark*⁸⁰. In this case, a gay couple, Mr. X and Mr. Y wanted legal recognition as parents of a surrogate child. The court made parental orders in favour of both Mr. X and Mr. Y on the basis that best interests of the surrogate child, i.e. Mark, would be advanced by a legal recognition of their role in his life. The court noted that both Mr. Y and Mr. X were raising Mark together and that both of them were involved in each and every aspects of his care. The Court also observed that both Mr. X and Mr. Y had an excellent relationship with Mark and that he was strongly attached to both⁸¹.

⁷⁷ See, *New Issues in Legal Parenthood*, New Zealand Law Commission Reports, [2005] NZLCR 88 at p.89, available<<http://www.austlii.edu.au/au/other/nz/other/lawreform/NZLCR/2005/88.html?stem=0&synonyms=0&query=surrogate%20child> - Visited on 20.7.2012.

⁷⁸ *Supra* n.73.

⁷⁹ Bonnie Steinbock, "Defining Parenthood", in J.R. Spencer and Antje du Bois-Pedain (eds.) *Freedom and Responsibility in Reproductive Choice*, Hart Publishing, Oxford and Portland, U.K. (2006), p.116.

⁸⁰ [2003] Fam. C.A. 822.

⁸¹ *Supra* n.77 at p.89.

(d) Theory of Causation

According to this theory those who are the primary cause of the child or those who are best held as being responsible for the procreation of the child should be regarded as the parents⁸². Thus the intended parents will be considered as the parents as they are the primary cause for bringing the child into existence. One of the case in which this theory was discussed is the case of *K.M. v. E.G.*⁸³. This case involved a custody dispute between an egg donor and a gestational mother who were part of a lesbian relationship⁸⁴. The Supreme Court of California held that both the genetic mother and the gestational mother who had agreed to bring the child into the world through ART can be considered as full legal parents⁸⁵.

It can be seen that this theory of causation is similar to the theory of Intention-Based Parenthood, because the intended parents who have intention to raise the child are also the primary cause for bringing the child into existence as they initiate the surrogacy arrangement. Thus both these theories consider the intended parents as the legal parents.

An analysis of all the above theories as well as various case laws shows that, the theory of ‘intent-based parenthood’ is the most appropriate theory for determining parenthood of a surrogate child. This is because the basis of every surrogacy arrangement is the desire of the intended parents/parent to beget a child. Due to their intention to have a child they enter into surrogacy arrangements and are ready to assume the parental responsibility.

In this context, it is necessary to examine the legal framework existing in other countries dealing with the parentage of surrogate child. Most of the legal systems provide that the gestational mother is the legal mother of the surrogate child at the

⁸² See, Rebecca Probert, “Families, Assisted Reproduction and the Law”, 16 *Child and Family Law Quarterly*, 273-288 (2004).

⁸³ 117 P.3d 673 (Cal. 2005) (Supreme Court of California)

⁸⁴ Sanja Zgonjanin, “What does it take to be a (Lesbian) Parent? On Intent and Genetics”, 16 *Hastings Women’s Law Journal*, 251, (2005), at pp. 251–52.

⁸⁵ Heather A. Crews, “Women be Warned, Egg Donation isn’t all it’s Cracked Up to Be: The Copulation of Science and the Courts, Makes Multiple Mommies”, *North Carolina Journal of Law & Technology*, Vol.7, Issue 1, 141 (Fall 2005), at p.146.

time of its birth⁸⁶. If the surrogate mother is married and her husband has given his consent for the procedure he will be considered as the legal father⁸⁷. Thus it can be seen that the intended parents do not automatically become the legal parents of the child on its birth. They became the legal parents of the child only through a parental order by the appropriate authority. For example, section 807 of the Uniform Parentage Act, 2002 of USA, provides that, upon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the court shall issue an order (1) confirming that the intended parents are the parents of the child; and (2) if necessary, order that the child be surrendered to the intended parents. Similarly, the Human Fertilization and Embryology Act, 2008 of UK provides that, on an application made by two people (“the applicants”), the court may make an order providing for a child to be treated in law as the child of the applicants if (a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of either an embryo or the sperm and eggs in her through artificial insemination, (b) the gametes of at least one of the applicants were used to bring about the creation of the embryo⁸⁸. Similar laws can be seen in the Surrogacy Act, 2010 of Western Australia⁸⁹; and Surrogacy Act 2010 of Queensland⁹⁰.

In India, the *ICMR Guidelines* provide that a child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple through sexual intercourse⁹¹. The Draft ART Bill, 2010 under section 35 also provides that, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple,

⁸⁶ For Example, see Surrogacy Act, 2010 (Western Australia); Surrogacy Act 2010 (Queensland) . etc.

⁸⁷ See, The Uniform Parentage Act, 2002, S. 703. It provides that, “a man who provides sperm for, or consents to, assisted reproduction by a woman as provided in section 704 with the intent to be the parent of her child, is a parent of the resulting child”.

⁸⁸ See, the Human Fertilization and Embryology Act, 2008 (UK), S. 54

⁸⁹ See, The Surrogacy Act, 2010 (Western Australia), Part 2, Ss. 12- 29.

⁹⁰ See, The Surrogacy Act, 2010 (Queensland), Chapter 3, Ss. 19- 53.

⁹¹ See, Rules 3.12.1 & 3.16.1 of *ICMR Guidelines*.

having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse⁹². It can be seen that both the ICMR Guidelines and Draft ART Bill, 2010, are silent on the issue of parental rights in situations where the intended parents are gay couples or lesbian couples⁹³.

In the absence of a binding legal proposition in India, the Gujarat High Court in *Jan Balaz v. Anand Municipality*⁹⁴ held that, “in the absence of any legislation to the contrary, we are more inclined to recognize the gestational surrogate who has given birth to the child as the natural mother⁹⁵. Anonymous Indian woman, i.e. the egg donor, in our view, is not the natural mother⁹⁶. She has of course a right to privacy that forms part of right to life and liberty guaranteed under Article 21 of the Constitution of India⁹⁷. Nobody can compel her to disclose her identity. Wife, of the biological father, who has neither donated the ova, nor conceived or delivered the babies, cannot in the absence of legislation be treated as a legal mother and she can never be a natural mother⁹⁸. Further the court observed that, “by providing ova, a woman will not become a natural mother. Life takes place not in her womb, nor does she receive the sperm for fertilization. Human fertilization is the union of a human sperm and egg usually occurring in the ampulla of the uterine tube⁹⁹. In surrogacy the procedure followed is In-Vitro Fertilization, a process by which egg cells are fertilized by sperm outside the womb in-vitro. Resultantly, the only conclusion that is possible is that a gestational mother who has blood relations with the child should be considered as the natural mother. She has carried the embryo for full nine months in her womb, nurtured the babies through the umbilical cord¹⁰⁰. Thus it can be seen that in India, similar to the position of USA and UK, the intended mother cannot be

⁹² See, The Draft ART Bill, 2010, S.35 (1).

⁹³ However, in cases where an unmarried or single individual uses surrogacy, the child will be the legitimate child of such individuals. See, *Id.* S. 32(2) & (3).

⁹⁴ A.I.R. 2010 Guj. 21.

⁹⁵ *Id.* at p.25, para.16.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

considered as the parent of the surrogate child on its birth. However, the position in India differs from that of US and UK as there is no law providing for applying for a parentage order.

In the absence of such a law providing for acquisition of parentage by intended parents in India, it will cause hardships to the intended parents. This vacuum in the legal framework in India needs to be addressed urgently. It is submitted that, any such law should adopt the Intention - Based Parenthood Theory for the determination of legal parentage of surrogate child. However, there should not be any requirement of a parentage order or an official declaration for the intended parents to be considered as the legal parents of the surrogate child. They should be automatically considered as the legal parents on birth of the child.

Parentage determination is the most vital aspect of any surrogacy arrangement. In fact if the parentage of the surrogate child is not determined clearly it would frustrate the very objective of surrogacy and also create difficulties for all the stake holders as there may be more than two or three individuals claiming parentage. It is one of the basic interests of the intended parents/parent who enters into a surrogacy arrangement, that they be recognized as the resulting child's legal parents. It is necessary to establish the parentage before the birth of surrogate child in order to avoid unnecessary litigation that is both potentially harmful to the interests and welfare of the child and costly to the relevant parties.

7.3.4 Custody of the Surrogate Child

Generally, parents as per the law are entitled to have the custody of the child. From the above discussion relating to the parentage of surrogate child, it is clear that the intended parents are to be considered as the legal parents of such child. Therefore, the intended parents are entitled to have custody of the surrogate child. However, in surrogacy arrangements, custody disputes may arise in a number of contexts and it is sometimes very difficult to settle such a dispute. Custody may be disputed between the surrogate mother and the intended parents, or at divorce or separation of intended

parents or between never-married parents of a surrogate child¹⁰¹. Any such custody dispute is potentially harmful to the interests and welfare of the surrogate child and must be avoided wherever possible¹⁰². Thus any law dealing with surrogacy should also address the issue of custody of surrogate child¹⁰³.

In a surrogacy arrangement the most common custody dispute is between the surrogate mother and the intended parents. It is seen that, though surrogate mother agrees to relinquish all her parental rights on birth of the child, there are instances in which she refuses to hand over the child¹⁰⁴. Any refusal by the surrogate mother should be considered as a violation of her contractual duty¹⁰⁵ and in cases where there is a surrogacy contract, a breach of such contract¹⁰⁶.

Custody dispute may also arise in situations where the dispute is between the intended parents themselves due to they having been separated or divorced during the surrogate pregnancy or after the birth of the child. An example of such a dispute is the case of *Soos v. Superior Court of the State of Arizona*¹⁰⁷. In this case the fertilized eggs created from the gametes of the intended parents were implanted in the surrogate who became pregnant with triplets. However, prior to the birth of the babies the intended mother filed a petition for dissolution of marriage and requested shared custody of the unborn triplets with the intended father. The intended father alleged that, since the surrogate was the legal mother pursuant to Arizona statute¹⁰⁸, the

¹⁰¹ Robert F. Kelly and Sarah H. Ramsey, “Child Custody Evaluations: The Need for Systems Level Outcome Assessments”, p.287, available at <<http://www.thelizlibrary.org/therapeutic-jurisprudence/child-custody-evaluations-value.pdf>> Visited on 20.7.2012.

¹⁰² See, L. Gostin, “A Civil Liberties Analysis of Surrogacy Arrangements”, 16 *Law, Medicine & Health Care*, 7-17 (1988).

¹⁰³ *Supra* n.30.

¹⁰⁴ For example, the cases like *In the Matter of Baby M*, 225 N.J. Super. 267 (N.J.Super.Ch. 1988); *Anna Johnson v. Mark Calvert et al*, 5 Cal.4th 84, 851 P.2d 776, etc.

¹⁰⁵ *Supra* Chapter VI.

¹⁰⁶ *Ibid.*

¹⁰⁷ 182 Ariz. 470(1994); 897 p.2d 1356(Ariz. Ct. App.1994).

¹⁰⁸ See, The Arizona Revised Statutes, Ss. 25-218. It provides that, “a) no person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract; b) a surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of the child, c) if the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. This presumption is rebuttable.

intended mother had no standing to request for the custody. The court found the statute as unconstitutional¹⁰⁹ and upheld the intended mother's right to custody.

Thus in cases where both the intended parents have contributed genetic material and both are equally fit to take care of the child; both of them are entitled to have the custody of the child. It is submitted that in such situations the 'best interests of the child' should be the guiding factor for awarding the custody of the child. A decision of the court on the basis of the best interests of the child means the determination of the type of services, actions, and orders that will best serve the child as well as who is best suited to take care of the child¹¹⁰. The court determines what is the 'best interests of the child' on the basis of a number of factors such as: personal safety, morals, health, general welfare and happiness of the child as well as on satisfying itself as to the character, conditions, habits and surroundings of the respective parents¹¹¹."

In situations where only one of them had contributed genetic material, the general rule can be to award custody of the child to such parent who had contributed the genetic material. However, while awarding custody of the child, 'the best interests of the child' must be taken into account and shall override all other considerations including genetic relationship.

In *Jane Doe v. John Doe*¹¹² the Connecticut Supreme Court dealt with a situation in which the wife of the intended father was not genetically related to the surrogate child. The court ruled in favor of the wife, saying that the wife's role in raising the child outweighed the statutory presumption that the child's best interest remains in the hands of the biological parents, which would have been the husband

¹⁰⁹ *Supra* n.75 at pp.622-23.

¹¹⁰ See, Child Welfare Information Gateway (Webpage), "Determining the Best Interests of the Child: Summary of State Laws", available at <http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm> Visited on 20.7.2012.

¹¹¹ See, Joanna L. Grossman, "The Complications of Surrogacy: A New Jersey Court Refuses to Uphold a Surrogacy Arrangement, but Awards Full Custody to the Intended Father", available at <<http://verdict.justia.com/2012/01/10/the-complications-of-surrogacy>> Visited on 20.7.2012.

¹¹² *Jane Doe v. John Doe*, 470 F.3d 331 (US Court of Appeal Cases).

and the surrogate mother. This rule of ‘best interests of the child’ for determining custody disputes is accepted universally including India¹¹³.

7.4 Surrogacy and the Rights of the Surrogate Child

The issue of welfare and rights of child is very complex and interrelated with various other issues. It involves addressing issues like right to preserve his or her identity, right not to be separated from his or her parents, maintenance, inheritance, and citizenship, etc. The issue of rights of child is also a great concern in international law. The rights and welfare of the children under international law is addressed by the *UN Declaration on the Rights of Child, 1959*¹¹⁴ and *Convention on Rights of Child, 1989*¹¹⁵ which has been adopted by most of the countries¹¹⁶. Some of the important rights mentioned under these documents are: Right to life¹¹⁷, Survival and development¹¹⁸, Right to non-discrimination¹¹⁹, Respect for the views and feelings of the young child¹²⁰, Right to preserve his or her identity¹²¹, Right not to be separated from his or her parents¹²², and Right to have his or her best interests given priority over the rights and interests of adults wherever such rights are in conflict¹²³, etc.

These rights are important and need to be addressed in the case of surrogate child. It is argued that most of the rights expressly recognized under the *United Nations Convention on the Rights of the Child* are violated in a surrogacy arrangement. Therefore, it is essential to examine all these issues and arrive at a

¹¹³ See, Lynne Marie Kohm, “Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence”, available in <http://www.epubs.utah.edu/index.php/jlfs/article/download/46/> Visited on 20.6.2012.

¹¹⁴ This Declaration was adopted by UN General Assembly on 10th December 1959. Hereinafter referred to as DRC.

¹¹⁵ The Convention on the Rights of the Child was adopted by the UN General Assembly 30 years later on 20 November 1989 and was entered into force on 2 September 1990. Hereinafter referred to as CRC.

¹¹⁶ India is a party to both these instruments and the Government of India has ratified the Convention on the Rights of the Child on 12 November 1992.

¹¹⁷ See, The CRC, Art. 6.

¹¹⁸ *Ibid.*

¹¹⁹ *Id.* Art. 2; The DRC, Art. 1.

¹²⁰ *Id.* Art. 12.

¹²¹ *Id.* Art. 8.

¹²² *Id.* Art. 9.

¹²³ See, The DRC, Art. 8.

proper solution so as to protect the rights and interests of the surrogate child. However, resolving of these issues is much more complicated in case of a surrogacy, due to the fact that it involves the interference of third party/parties¹²⁴ and further, even a single individual or gay or lesbian couple can also beget a child through surrogacy. Some of the important rights of the child which are argued to be at stake in a surrogacy arrangement are as follows:

7.4.1 Right to Know his Origin

The right to know one's genetic origins is a basic human right¹²⁵. The Hague Conference of the UNICEF highlights the right of a child to know his /her parents and to be cared for by them¹²⁶. Similarly, Article 7 (1) of the CRC implies, on the one hand, the right to information to a child about his/her origins, and, on the other hand, the need for authorities to preserve this information and to enable the child's access thereto. So every child born out of surrogacy is also entitled to know the details of his origin. The information regarding one's biological origin is essential not only in the social context or satisfaction of a child's right to know his origins but also due to three major reasons which make this right very important. They are as follows:

- (i) The identity of a child enables the child to understand the social legacy; traditional, cultural and ideological heritage; the circumstances of the child's birth and identity of the father. The moral justification which underlines the right of every person to know one's origin has often been termed as informational self-determination¹²⁷.
- (ii) A person's genetic history provides vital information in diagnosing and treating certain diseases. The genetic history of a

¹²⁴ Egg Donor or Sperm Donors or both.

¹²⁵ Ravitsky V., "Knowing Where You Come From: The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness", *Minnesota Journal of Law, Science & Technology*, 11(2): 655-84 (2010), at p.679; Eric Blyth, "Donor Assisted Conception and Donor Offspring Rights to Genetic Origins Information", *The International Journal of Children's Rights* 6: 237-253(1998).

¹²⁶ See, "UNICEF's position on Inter-country adoption" (Webpage), available at <<http://www.unicef.org/media>> Visited on 20.6.2012.

¹²⁷ See, *Rohit Shekhar v. Shri Narayan Dutt Tiwari & Anr.*, [2011] INDLHC 4637 (23 September 2011).

child would enable the child to be aware of genetic predispositions to certain illnesses; anticipate disease; facilitate accurate diagnosis and efficient treatment. It may allow a child to take preventive medical measures or undertake lifestyle adaptations to prevent disease, if possible or cope with them. In the medical sense, such information would thus enable prevention of any hereditary disease¹²⁸. However, some children may be unable to obtain their biological parents' genetic history, which can lead to misdiagnosis and cause the child to undergo unnecessary treatments or forego necessary treatments¹²⁹.

- (iii) Knowledge of biological origin would enable prevention of incestuous relationships¹³⁰, that is to say, marriage between the children of surrogate mother and intended parents or marriage between two surrogate children who may have the same donor. Recent studies have showed that many doctors tend to use the same donors over and over again¹³¹.

Generally, surrogacy procedures have been undertaken in secrecy and the identity of the sperm or the egg donor is kept anonymous. This is to ensure that the children born out of surrogacy as well as the intended parents do not know the identity of donor¹³². Further the identity of the surrogate woman is also kept secret from the child. The purpose of such anonymity is to protect the right to privacy of donors and to protect them from any unwarranted interference by the public as well as the surrogate child into their lives¹³³. The apprehension is that if the identity of the donor or surrogate is revealed, their private life may become a subject matter of

¹²⁸ *Ibid.*

¹²⁹ Araceli Jim'enez, Axini S'anchez-Gregorio, Vernica Calder'on and Robert Onick, "Artificial Reproductive Technology and its Implication in the Offspring's Right to Know", available at <<http://ezineArtificialReproductiveTechnologyandItsImplication.pdf>> Visited on 20.7.2012.

¹³⁰ *Supra* n. 127.

¹³¹ Pedro, "Artificial Reproductive Technique, Fertility Regulations: The Challenges of Contemporary Family Law", 34 *A. J. I. L. (Supp.)* 125 (1940), at p.129.

¹³² See generally, Johnston J., "Mum's the Word: Donor Anonymity in Assisted Reproduction", *Health Law Review*, Vol. 11, No.1, (2003), pp.51-55.

¹³³ *Supra* Chapter V, Rights of Surrogate Mother.

public discussion. The practice of egg or sperm donors may not be acceptable to some sections of the society and the donors may be ridiculed by the society. This would adversely affect their social and family relations and may have a serious impact on their life. Therefore, any claim of a surrogate child to know genetic information would come into direct conflict with the right of the donors and surrogate mother to remain anonymous.

Most of the legal systems of the world have therefore included provisions that the anonymity of the donor or surrogate shall be maintained¹³⁴. At the same time it is imperative to disclose the genetic information to a child in certain circumstances. Thus, certain countries have adopted provisions for dealing with disclosure of genetic history of a child on attaining a particular age. For example, Netherlands introduced a law in 2004 giving offspring's conceived by donated semen or oocyte the right to know the identity of the donor when they reach the age of 16 years¹³⁵.

In India, the *ICMR Guidelines* provides that 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 about the donor as and when desired by the child, when the child becomes an adult¹³⁶. However the intended parents are not obliged to provide such information to the child on their own. At the same time no

¹³⁴ See for example, The Surrogacy Act, 2010 (New South Wales), Section 52 prohibits any disclosure relating to surrogate or donors. It provides that, 'a person must not publish any material that identifies, or is reasonably likely to identify, a person as a person affected by a surrogacy arrangement'; The Surrogacy Act, 2010 (Queensland), Section 53 prohibits any such disclosure. It provides that, 'a person must not publish identifying material unless written consent to the publication has been given. The section defines identifying material as any material (identifying material) that identifies, or is likely to lead to the identification of, a person as— (a) a child born as result of a surrogacy arrangement or a child to whom a court proceeding under this Act relates; or (b) a party to a surrogacy arrangement; The Children's Act, 2005 (South Africa) section 302 also prohibits any disclosure regarding the surrogate mother as well as the child. It states that, the identity of the parties to court proceedings with regard to a surrogate motherhood agreement may not be published without the written consent of the parties concerned. No person may publish any facts that reveal the identity of a person born as a result of a surrogate motherhood agreement.

¹³⁵ See, Dutch Law: Wet Donorgegevens Kunstmatige Bevruchting, 2004. Discussed in P.M.W. Janssens, A.H.M. Simons, R.J. van Kooij, E. Blokzijl and G.A.J. Dunselman, "A New Dutch Law Regulating Provision of Identifying Information of Donors to Offspring: Background, Content and Impact", *Human Reproduction*, Volume 21, Issue 4, 852-856 (2006).

¹³⁶ See, *ICMR Guidelines*, R. 3.12.3.

deliberate attempt will be made by the intended parents or others concerned to hide such information from the child as and when asked for by the child¹³⁷. For the purpose of this provision, a child would be considered as an adult on attaining the age of 18 years¹³⁸.

The Draft ART Bill, 2010 also contains provisions dealing with disclosure of genetic information. Under section 33, the Bill provides that, all information about the donors shall be kept confidential and information about gamete donation shall not be disclosed to anyone other than the central database of the Department of Health Research, except with the consent of the person or persons to whom the information relates, or by an order of a court of competent jurisdiction. The donor shall have the right to decide what information may be passed on and to whom, except in the case of an order of a court of competent jurisdiction. Further under section 36, the Bill provides that, a child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother¹³⁹. The legal guardian of a minor child may apply for any information, excluding personal identification, about his/her genetic parent or parents or surrogate mother when required, and to the extent necessary, for the welfare of the child¹⁴⁰. Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother¹⁴¹. However such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother¹⁴².

It is submitted that, the rights of children born through surrogacy must not be subordinated to the needs, wants and desires of parents or donors. The rights of the children must be a primary consideration. Thus it is necessary to achieve a balance between the right of surrogate child to access genetic information and right of donor/

¹³⁷ *Ibid.*

¹³⁸ See, *ICMR Guidelines*, R. 3.4.8.

¹³⁹ See, The ART Bill, 2010, S.36 (1).

¹⁴⁰ *Id.* S.36 (2).

¹⁴¹ *Id.* S.36 (3).

¹⁴² *Ibid.*

surrogate to remain anonymous. It is submitted that a central database should be developed by the state. This database should keep the record of the surrogate woman as well as donor if any and other relevant information. Disclosure can be made only if such disclosure is essential in compelling circumstances like for the protection of health and life of the surrogate child or for preventing incestuous relationships. However personal identity such as name, address of the surrogate woman as well as donor should not be revealed except in cases where they consent for the same.

7.4.2 Right to Maintenance

The wants and vulnerability of children render it necessary that some person maintains them, and nature has ordained the parents as the most fit and proper persons to carry out this obligation. From time immemorial, the laws and customs of all societies have enforced this basic rule as a universal law. The obligation on the part of the parent to maintain the child continues until the child is able to maintain himself/herself¹⁴³.

The question of maintenance to child assumes great importance in cases where the couples have decided to separate or have divorced. This question is much more complex in surrogacy arrangements because the intended parent/ parents may or may not be genetically related to the child. Such a situation has been discussed in the case of *Jaycee B. v. The Superior Court of Orange County*¹⁴⁴. In this case the commissioning mother Luanne B. was requesting support for the child from her ex-husband for a child conceived with the help of a surrogate. The child had been conceived through a surrogate parenting arrangement in which the intended parents as well as the surrogate and her husband were genetically unrelated to the child. The intended father, John contended that he did not owe any duty to provide child support because he did not meet the criteria typically used to establish paternity, viz. (1) his wife had not given birth to the child; (2) he was not genetically related to the child; and (3) he had never formally adopted the child.

¹⁴³ See, “The Legal Status of the Child in the Family”, (webpage), available at < http://www.h-net.org/~child/Bremner/Volume_I/40_P3_I_B_The_Legal_Status_of_the_Child.html> Visited on 20.6.2012.

¹⁴⁴ 42 Cal.App.4th 718 (1996), 49 Cal. Rptr.2d 694.

The trial court declined to make a temporary child support order because it found that the unborn child was not yet a “child of the marriage” under the Californian state law. The Court of Appeal held that it was unnecessary at this point in the litigation to conclusively establish the issue of the husband’s parenthood. It was sufficient that the husband admitted signing the agreement which, for all practical purposes, caused the child’s conception and that the husband would likely be found to be the child’s father. Thus the court held that the intended father is bound to support and maintain the child.

The right to maintenance of a surrogate child is not directly addressed by any legislation dealing with surrogacy arrangements. However, the express declaration that, the intended parents are the legal parents of surrogate child, shows that they are responsible for supporting and maintaining the child. Once it is declared that the surrogate child is the legal child of the intended parents, the surrogate child is also entitled to have all the legal rights which are available to a child born through sexual intercourse between a couple in a wedlock. Thus as a necessary implication, the surrogate child’s right to maintenance can be traced to the provisions which confer legal parentage to intended parents.

In India the issue relating to maintenance is mainly dealt under section 125 of Criminal Procedure Code, 1973. It says that a minor child, if unable to maintain itself is entitled to claim maintenance from its parents. It is immaterial that whether such child is legitimate or illegitimate or whether born out of marriage or otherwise¹⁴⁵. Therefore, a surrogate child can also claim maintenance from his parents as per this provision. The *ICMR Guidelines* in India also establishes the right to support and maintenance of surrogate child. It states that, child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple

¹⁴⁵ See, The Criminal Procedure Code, 1973, S. 125 (1) (b) ; For more details see, Dr. K. N. Chandrashekharan Pillai, R. V. Kelkars *Lecture Notes on Criminal Procedure Code*, EBC, Lucknow, (3rd edn.-1998).

through sexual intercourse¹⁴⁶. The Draft ART Bill, 2010 also confers the right to maintenance of a surrogate child. Under section 35, the Bill states that, child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse¹⁴⁷. Thus it can be seen that in India, the right to maintenance of a surrogate child is recognized and protected.

7.4.3 *Right to Inheritance*

The right to inheritance is the right by virtue of which movable and immovable properties of every kind are transmitted, after the death of those who possessed them, to their legal heirs or descendants¹⁴⁸. In most of the societies and legal systems of the world, the children have a right to inherit from their biological parents. In case of surrogacy the question arises, whether a surrogate child has a right to inherit property of the intended parent's, similar to a child born through a sexual intercourse in wedlock. This question is relevant due to the fact that, in certain surrogacy arrangements the child is genetically related to only one of the intended parents or is not related to both the intended parents. One of the instances in which this issue came up for discussion is reported from Nepal.

In this case, Ujjwal Rana bequeathed his property to his three year old daughter Bina who was born through commercial surrogacy. This was objected by his wife, Sambhavi Rana and his mother, Vidya Rana. The objection by Sambhavi Rana was based on the ground that, she was kept in darkness about the surrogacy contract. In the absence of a law or a precedent, a judge of a single bench, J. Tek Narayan Kunwar resolved the dispute and held that a surrogate child should have the same rights as a biological one and should be entitled to parental property¹⁴⁹.

¹⁴⁶ See, *ICMR Guidelines*, Rule 3.12.1 & 3.16.1.

¹⁴⁷ See, The ART Bill, 2010, S.35 (1).

¹⁴⁸ Lalor John J., "Cyclopedia of Political Science, Political Economy, and the Political History of the United States", available at < <http://www.econlib.org/library/YPDBooks/Lalor/IIICy578.html> > Visited on 20.7.2012.

¹⁴⁹ See, "Womb for Sale Debate Surfaces in Nepal", *Times New Network*, Mar. 8, 2011, available at

Thus it can be seen that, a surrogate child is also entitled to have right to inheritance like any other child born through sexual intercourse in lawful wedlock. However the right to inheritance of a surrogate child has not been dealt with adequately by most of the legislations dealing with surrogacy in various countries. In this context it is pertinent to mention here that the right to inheritance of a child is derived from its relationship with the parents. Hence, a surrogate child can also claim right to inheritance due to the fact that, they are also recognized as the legitimate children of the intended parents. Thus the enactments which confer the status to the surrogate child equal to the status of a child born through sexual intercourse in a lawful wedlock are impliedly recognizing the surrogate child's right to inheritance¹⁵⁰.

In India, the *ICMR Guidelines* expressly recognizes this right. It provides that, a child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to couples through sexual intercourse¹⁵¹. The Draft ART Bill, 2010 also recognizes this right. Under section 35, it states that, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse¹⁵². Thus the present regulatory framework in India dealing with surrogacy recognizes the right to inheritance of surrogate child.

7.4.4 *A Child's Right to Preserve Identity and Right Not to be Separated from Parents*

For every human being, identity is a very important aspect of life. In fact without identity a person cannot exist. The identity of a person is derived from his

<http://articles.timesofindia.indiatimes.com/2011-03-08/south-asia/28667774_1_surrogate-mother-commercial-surrogacy-surrogate-child> Visited on 20.7.2012

¹⁵⁰ See for example in South Africa Children's Act, 2006, S.297. Effect of surrogate motherhood agreement on status of child.—(1) The effect of a valid surrogate motherhood agreement is that - (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned.

¹⁵¹ See, Rules 3.12.1 & 3.16.1 of *ICMR Guidelines*.

¹⁵² See, The Draft ART Bill, 2010, S. 35 (1).

parents. The right to identity of a child is recognized under international law. The *Convention on the Rights of Child*, 1989 under Article 8.1 provides that, state 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. It is argued that surrogacy practices violate this basic right of a child. This is due to the fact that surrogacy arrangement involves interference of a third party/parties i.e. surrogate mother or donor/donors. Therefore a surrogate child may have two or three mothers¹⁵³ and two or three fathers¹⁵⁴. Thus it creates confusion regarding the identity of the child's mother and father¹⁵⁵.

In this context it is relevant to mention that in every surrogacy arrangement, the intended parents/parent want to be the legal parents of the surrogate child. The surrogacy contracts usually contain an express clause that the intended parents/parent will be the legal parent of the child and the surrogate mother does not have any parental right over the child. Many countries have also made legal provisions for conferring legal parentage of a surrogate child to the intended parents/parent immediately after the birth of the child¹⁵⁶. Thus the surrogate child would be known as the legal child of the intended parents/parent and will be known by their name and identity.

Another important right of a child is his/her right not to be separated from parents. This right is recognized by CRC under Article 9.1, which provides that, States parties shall ensure that a child shall not be separated from his or her parents against child's will, except when competent authorities subject to judicial review, determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the

¹⁵³ Intended Mother, Surrogate Woman and Egg Donor

¹⁵⁴ Intended Father, Sperm Donor and Husband of Surrogate Woman.

¹⁵⁵ See, Tim Cannon, "Surrogacy: A Black-Hole for Children's Rights", *AFA Journal*, Vol.30, No.2 (2009), available at <http://www.family.org.au/index.php?option=com_content&view=article&id=292> Visited on 20.7.2012.

child's place of residence. Similarly, Principle 6 of the DRC states that "...a child of tender years shall not, save in exceptional circumstances, be separated from his mother...".

It is argued that surrogacy arrangements are in direct conflict with these provisions. Every surrogacy arrangement is undertaken with the explicit intention of removing the child from his or her gestational mother. Furthermore, in cases where the embryo has been created using gametes donated by a woman who is not the child's intended social mother, surrogacy arrangements will intentionally remove the child from his or her biological mother. These consequences, which constitute explicit breaches of Article 9.1 of the CRC and Principle 6 of the DRC, are simply unavoidable when a child is brought into the world through surrogacy arrangement¹⁵⁷.

In every surrogacy arrangement the child will be separated from the gestational mother and in certain cases from its biological mother and/ or biological father¹⁵⁸ and handed over to the intended parents. Such a separation is not covered under Article 9.1 of CRC and Principle 6 of DRC due to the fact that though the child is removed from the gestational mother and/or biological parents/parent, the child is placed in the care of the intended parents/parent who is recognized under law as the legal parents of the surrogate child. It is submitted that there is only a transfer of the surrogate child to the legal parents and such a transfer would not affect the child adversely because the child is brought into existence due to the long-standing desire of the intended parents/parent to beget a child.

7.4.5 Right to Citizenship

The right to citizenship is a very important right of an individual as it is the basis of his civil and political rights. Citizenship is generally understood as referring to the relationship between the individual and the state¹⁵⁹. It is the relationship between them and the municipal law. A citizen possesses full civil and political

¹⁵⁷ *Ibid.*

¹⁵⁸ In cases where a donor is involved.

¹⁵⁹ See, Anupama Roy, "Citizenship and Rights", available at <http://www.du.ac.in/fileadmin/DU/Academics_03.pdf> Visited on 20.7.2012.

rights¹⁶⁰. Therefore acquiring a citizenship is very important for every individual. In the context of surrogacy, the acquisition of citizenship for a surrogate child in cases of cross-border surrogacy¹⁶¹ is becoming a complex issue.

During the past few decades, the use of surrogacy procedures has increased not only by the nationals within the country but also by foreigners who visit a country for availing it. In recent times, India has developed as a mega-destination for surrogacy practices. In fact India has become an attractive destination for foreigners opting for surrogacy to beget a child. This is due to the easy availability of surrogate woman at low cost coupled with absence of legal impediments. Increased use of cross-border surrogacy however has raised many legal questions regarding the citizenship of the surrogate child in India. This is because in certain cases if the intended parents want to take their child to another country they have to obtain an Indian Passport from the concerned authority. However, the Indian Passport Act, 1967 allows passport only to an Indian Citizen. Therefore, when the intended parents are foreigners, the question arises whether a child born to such parents through surrogacy in India can be treated as an Indian Citizen.

This question came up for consideration before the Gujarat High Court in the case of *Jan Balaz v. Anand Municipality and Others*¹⁶². In this case, the petitioner, a German national was the biological father of two babies born through surrogacy to a surrogate woman named Marthaben Immanuel Khristi, a citizen of India. The petitioner's wife Susanne Anna Lohle was a German national and due to biological reasons, was not in a position to conceive a child. The couple therefore opted for surrogacy and entered into a surrogacy contract with the Indian surrogate in a clinic in Anand, Gujarat. The petitioner's sperm was fertilized with an anonymous donor's ova and the fertilized embryo was implanted in the uterus of the surrogate woman. The surrogacy procedure was successful and the surrogate woman gave birth to twin babies and handed over the babies to the intended parents.

¹⁶⁰ See, S. K. Kapoor, *International Law and Human Rights*, Central Law Agency, Allahabad (14th edn.-2002), p.329; H. O. Agarwal, *International Law & Human Rights*, Central Law Publications, (6th edn.-2000), p.243.

¹⁶¹ This term is used to indicate a surrogacy arrangement involving a foreigner.

¹⁶² A.I.R. 2009 Guj. 21.

The petitioner then applied to the Indian Passport authorities for obtaining a passport for the babies. The petitioner and his wife, though German nationals, were working in UK and wanted to settle there and had to obtain VISA from the Consulate of the United Kingdom in India. The VISA can be issued only to a person holding a valid passport. The passport authorities initially issued two passports in the name of both the babies. However, later the Government of India, Ministry of External Affairs, through Regional Passport Office issued a letter directing the petitioner to surrender both the passports to the office. The petitioner surrendered the passports accordingly. Thereafter a petition was filed by the petitioner before the Gujarat High Court seeking a direction from the Court to the Regional Passport Officer to return those Passports so that he could take the babies to Germany for acquiring German Citizenship. The petitioner submitted that though he and his wife were German citizens, the children were not born in Germany, and so they would not get German citizenship, especially when German law does not recognize surrogacy. He stated that for the purpose of obtaining Visa from the Consulate of United Kingdom, it is necessary that children should have an Indian Passport since they were born in India and not in Germany.

The petitioner further argued that the babies were entitled to get the passport because they were born in India and were citizens of India by birth as per section 3 of the Indian Citizenship Act, 1955 and therefore they were entitled to have all the rights of Indian citizens and the Passport Authorities are legally obliged to issue Passports to them under the Indian Passports Act, 1967. Further it was submitted that surrogacy is not prohibited in India and the children are born in India to a surrogate mother who herself is an Indian citizen. Thus the denial of Passports, according to the petitioner, was illegal and violative of Article 21 of the Constitution of India.

The Court held that the only conclusion that is possible is that 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 full term in her womb and nurtured the babies through the umbilical cord. Both the egg donor and the gestational surrogate are Indian nationals, and hence the babies are born to an Indian national.

It is to be noted that a child born to an Indian national in India is considered as an Indian citizen as per the provisions of Indian Citizenship Act, 1955 and such children are entitled to have passport as per the provisions of Indian Passport Act, 1967. Thus children born through surrogacy to an Indian surrogate mother for a foreign intended parent are considered as an Indian citizen. However, the Draft ART Bill, 2010 declares that, if a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen¹⁶³. However, a dispute regarding citizenship would adversely affect the interests and welfare of the surrogate child. Therefore to avoid any future disputes regarding the citizenship of surrogate children born to Indian surrogates for foreign intended parents/parent, the law made shall be unambiguous and mention clearly how the citizenship of the child be settled without causing difficulties to the child and foreign intended parent/parents.

7.5 Surrogate Child and Contentious Issues

The rampant use of surrogacy has raised various contentious issues concerning the surrogate children. Some of the important controversial issues are: selection of sex of the child, creation of designer babies and the establishment of non-traditional families, etc.

7.5.1 Sex Selection

Sex selection is the practice of using medical techniques to choose the sex of one's offspring. Sex selection means the selection of the foetus based on its gender for either medical or social reasons before implantation in the uterus. Sex selection also occurs if a foetus is aborted on the basis of its gender. There are various reasons for the practice of sex selection. One of the main argument for supporting the practice of sex selection is that it helps to prevent having children with sex-linked diseases such as hemophilia¹⁶⁴ or Duchenne's muscular dystrophy¹⁶⁵. If there is a strong

¹⁶³ See, The Draft ART Bill, 2010, S. 35(8).

¹⁶⁴ Hemophilia is a group of hereditary genetic disorders that impair the body's ability to control blood clotting or coagulation, which is used to stop bleeding when a blood vessel is broken. See <<http://en.wikipedia.org/wiki/Haemophilia>> Visited on 20.6.2012.

family history of such a disease, then it is likely that any sons born will also inherit the disease. However, it is much less likely for a daughter to suffer from the same disease because females have two X chromosomes whereas males have X and Y chromosomes¹⁶⁶. Besides these medical reasons there are certain social reasons also for this practice of sex-selection in most societies including India which are: preference for a male child due to social and religious reasons, fear of having to pay huge amount of money as dowry for female child, family balancing¹⁶⁷, and in certain cases to rebuild their family¹⁶⁸, etc.

Sex selection of the babies is not a new phenomenon, but it has been in existence since ancient times. In various societies of the world different practices have been followed for selecting the sex of the baby. Factors such as the timing of conception, sexual position used and types of food eaten while pregnant were said by some to affect the sex of the baby¹⁶⁹. The development of science and medical technology has led to newer and newer methods for enabling sex selection before the

¹⁶⁵ Duchenne muscular dystrophy is a form of muscular dystrophy that worsens quickly. Other muscular dystrophies (including Becker's muscular dystrophy) get worse much more slowly. Duchenne muscular dystrophy is caused by a defective gene for dystrophin (a protein in the muscles). However, it often occurs in people without a known family history of the condition. It is an X-linked disease of muscle caused by an absence of the protein dystrophin. Affected boys begin manifesting signs of disease early in life, cease walking at the beginning of the second decade, and usually die by 20 years. Until treatment of the basic genetic defect is available, medical, surgical, and rehabilitative approaches can be used to maintain patient function and comfort. See, Michael Sussman, "Duchenne Muscular Dystrophy", 10 *J. Am. Acad. Orthop. Surg.*, No. 2, 138-151 (2002); Also see, Animated Dissection of Anatomy for Medicine, *Medical Encyclopedia*, available in <<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001724/>> Visited on 20.7.2012.

¹⁶⁶ K. A. Haughe, "Ethical Issues in Reproductive Technology", available at <<http://www.qub.ac.uk/HaugheyK.pdf>> Visited on 20.7.2012.

¹⁶⁷ Margaret Lock & Vinh-Kim Nguyen, *An Anthropology of Biomedicine*, Wiley & Sons, New York (2010), p.133; Ian R. Freckelton & Kerry Anne Petersen, *Disputes and Dilemmas in Health Law*, Federation Press, Sydney (1999), p.227.

¹⁶⁸ John Bliss, *Designer Babies*, Raintree Publishers, U.K. (2011), p.18; Louise P. King, "Sex Selection for Nonmedical Reasons", *Virtual Mentor* (American Medical Association Journal of Ethics), Vol.9, No.6, 418-422 (2007).

¹⁶⁹ It was not until the 1970s, however, that scientific methods began to be developed for selecting gender. One example of such technology is the Ericsson method, which was developed by Ronald Ericsson in 1975 and continues to be used at clinics today. In the Ericsson method, sperm are placed in a test tube filled with viscous fluid. Since male-producing Y-chromosome sperm swim faster than female-producing X-chromosome sperm, they can be separated from each other based on their positions in the test tube and then used for insemination. The Ericsson method is inexpensive, but its success rate is debated, with detractors saying it has no more than a 50% chance of producing the desired gender. See, for more, "Gender Selection of Babies" (Webpage), available at <<http://staff.esuhd.org/danielle/english%20department%20village/CAHSEE%20English/Gender%20Selection%20of%20Babies.pdf>> Visited on 20.7.2012.

birth of a child. Some of these techniques include Sperm Sorting, Pre-Implantation Genetic Diagnosis (PGD)¹⁷⁰, and Selective Abortion¹⁷¹. In this context it is relevant to discuss the new assisted reproductive technologies, particularly surrogacy which has emerged as a boon for begetting biologically related child by individuals who wish to have such child. The increase in the use of surrogacy is being criticized and one of the main criticisms is that it will lead to sex selection of the child. The advances in reproductive technologies have in fact given to the prospective parents, a choice to select the sex of their children. In surrogacy involving In-Vitro Fertilization, the possibility of sex selection is very high and in fact it is being rampantly used for this purpose¹⁷².

It is criticized that the practice of surrogacy may be misused for begetting a child of the desired sex. Selecting a child on the basis of sex is violative of the basic human rights of the child particularly girl child, because in most of the circumstances a baby boy is preferred over a baby girl¹⁷³. Thus selection of sex of a child discriminates against the girl child and it may cause gender imbalance in the society¹⁷⁴. In situation where a female foetus is aborted it is violative of right of the girl child to be born¹⁷⁵.

To prevent the use of ART including surrogacy for the purpose of begetting a child with desired sex, most of the countries have made specific laws in this regard.

¹⁷⁰ Preimplantation genetic testing is a technique used to identify genetic defects in embryos created through In Vitro Fertilization (IVF) before pregnancy.

¹⁷¹ See, Neil Samson Katz, "Abortion in India: Selecting by Gender", *Wash. Post*, May 20, 2006, at p.9.

¹⁷² See for more, Patricia Bayer, "Rights, Relationships, Class and Gender Issues in the Politics of Surrogate Contracts", *Politics and the life Sciences*, 8 (2), 211 -215 (1990).

¹⁷³ See generally, E. Scott Sills and Gianpiero D. Palermo, "Preimplantation Genetic Diagnosis for Elective Sex Selection, the IVF Market Economy, and the Child—Another Long Day's Journey into Night?", *Journal of Assisted Reproduction and Genetics*, 19(9) 433-437(2002); Joseph G. Schenker, "Gender Selection: Cultural and Religious Perspectives", *Journal of Assisted Reproduction and Genetics*, 19(9) 400 - 410 (2002).

¹⁷⁴ See generally, Frank Van Balen and Marcia C. Inhorn, "Son Preference, Sex Selection, and the 'New' New Reproductive Technologies", *International Journal of Health Services*, Vol. 33, No. 2, 232-252 (2003); Rajani Bhatia's Essay, "Constructing Gender from the Inside Out: Sex-Selection Practices in the United States", *Feminist Studies*, Vol. 36, No. 2, available at <<http://www.feministstudies.org/issues/vol-30-39/36-2.html>> Visited on 10.6.2012.

¹⁷⁵ See generally, Goldberg Pamela and Kelly Nancy, "International Human Rights and Violence against Women", 6 *Harv. Hum. Rts. J.*, 195 (1993); Bumgarner Ashley, "Right to Choose: Sex Selection in the International Context", 14 *Duke J. Gender L. & Pol'y*, 1289 (2007).

For example, the Assisted Human Reproduction Act, 2004 of Canada under section 5 provides that, no person shall knowingly for the purpose of creating a human being, perform any procedure or provide, prescribe or administer anything that would ensure or increase the probability that an embryo will be of a particular sex, or that would identify the sex of an in-vitro embryo, except to prevent, diagnose or treat a sex-linked disorder or disease¹⁷⁶. Likewise Article 32 of the Law on Maternal and Infant Health Care, 1994 of China provides that, sex identification of the foetus by technical means shall be strictly forbidden, except that it is positively necessitated on medical grounds¹⁷⁷. So also, the Assisted Reproductive Treatment Act, 2008 of Victoria¹⁷⁸, states that, a person carrying out a treatment procedure must not use gametes or an embryo, or perform the procedure in a particular way, with the purpose or a purpose of producing or attempting to produce a child of a particular sex. However this section does not apply if, (a) it is necessary for the child to be of a particular sex so as to avoid the risk of transmission of a genetic abnormality or a genetic disease to the child; or (b) the Patient Review Panel has otherwise approved the use of the gametes or embryo for the purpose or a purpose of producing or attempting to produce a child of a particular sex¹⁷⁹.

In India, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 strictly prohibits any type of sex selection. Section 3A¹⁸⁰ of the Act prohibits sex-selection and states that, no person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them. Any contravention of this provision is punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an

¹⁷⁶ See, The Assisted Human Reproduction Act, 2004 (Canada), S. 5(1) (e).

¹⁷⁷ See, <http://www.unescap.org/esid/psis/population/database/poplaw/law_china/ch_record006.htm> Visited on 10.6.2012.

¹⁷⁸ *Victoria* is a state in Australia, in the south-east of the country.

¹⁷⁹ See, The Assisted Reproductive Treatment Act, 2008 (Victoria), S. 28 (1) & (2).

¹⁸⁰ This Section was inserted by Act 14 of 2003 and came into force on 14-2-2003.

additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention¹⁸¹.

The *ICMR Guidelines* prohibits sex selection “at any stage of fertilization, except to avoid the risk of transmission of a genetic abnormality assessed through Pre-Implantation Genetic Diagnosis¹⁸².” Moreover, the guidelines prohibit ART clinics from providing couples with a child of a desired sex¹⁸³. Further the Draft ART Bill, 2010 also prohibits sex selection of a prospective child born through ART. It provides that, no assisted reproductive technology clinic shall offer to provide a couple with a child of a pre-determined sex¹⁸⁴. It shall be a criminal offence and it is prohibited for anyone to do any act, at any stage, to determine the sex of the child to be born through the process of assisted reproductive technology¹⁸⁵. Further it states that, no person shall knowingly provide, prescribe or administer anything that would ensure or increase the probability that an embryo shall be of a particular sex, or that would identify the sex of an in-vitro embryo, except to diagnose, prevent or treat a sex-linked disorder or disease¹⁸⁶. Any violation of this provision shall be considered as an offence under this Act¹⁸⁷.

7.5.2 *Designer Babies*

The last few decades have seen a vast revolution in the medical field. The development of Assisted Reproductive Technologies, particularly surrogacy has given a new ray of hope for childless couples as well as single individuals who wish to beget a child of their own. However these procedures are not free from criticisms and controversies.

One of the most severe criticisms against surrogacy is that it has an adverse impact on the rights of a child. It is argued that surrogacy practices reduce the child to a product

¹⁸¹ See, The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, S. 25.

¹⁸² See, *ICMR Guidelines*, R. 3.5.9.

¹⁸³ *Id.* R. 3.5.10.

¹⁸⁴ See, The Draft ART Bill, 2010 (India), S. 25 (1).

¹⁸⁵ *Id.* S.25 (2).

¹⁸⁶ *Id.* S.25 (3).

¹⁸⁷ *Id.* S.25 (5).

to be sold or bought in the market¹⁸⁸. This criticism is based on the ground that surrogacy would lead to the creation of designer babies by combining use of genetic engineering technologies with ART. These experiments are still in the initial stages but they have raised huge debate regarding the welfare of the child.

The term ‘Designer Baby’ means “a baby whose genetic makeup has been artificially selected by genetic engineering combined with In-Vitro Fertilization to ensure the presence or absence of particular genes or characteristics¹⁸⁹”. Designer babies are babies whom doctors and scientists genetically alter while the babies are still in their mothers’ wombs. Genetic modifications range from the often touted removal of diseases to purely physical changes including hair, eye, and skin color¹⁹⁰. The child’s genes and physical appearance are modified so that the appearance of the child is as per the wish of the parents. In the process the doctors remove or attempt to remove whatever characteristics are considered undesirable¹⁹¹. Thus the phrase “designer babies” refers to genetic interventions into pre-implantation embryos in an attempt to influence the traits the resulting children will have¹⁹². Over the past several years, scientists have been experimenting on the human genome and attempting to alter the genes of an embryo before its birth. Eventually parents will be able to choose the traits of their unborn children. The most popular method to achieve this goal is through Pre-Implantation Genetic Diagnosis¹⁹³. It is a technology that is used in

¹⁸⁸ *Supra*, Chapter VI. Also see for more, Martha A. Field, “Surrogacy Contracts-Gestational and Traditional: The Argument for Non-enforcement”, 31 *Washburn Law Journal*, 1 (1991-1992), at p.7 ; Dr. Martha Field, “Reproductive Technologies and Surrogacy: Legal Issues”, 25 *Creighton Law Review*, 1589 (1991-1992), at p.1591; Hugh V. McLachlan and J. Kim Swales, “Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts”, 72 *Law and Contemporary Problems*, 91 (Summer 2009).

¹⁸⁹ See, *Oxford English Dictionary*, available at <<http://oxforddictionaries.com/definition/english/designerBaby>> Visited on 20.6.2012.

¹⁹⁰ Jessica B. Fry, “Designer Babies: A Proposal to Apply Best Interests of the Child to Designer Babies”, available at <<http://www.regent.edu/acad/schlaw/blogs/docs/designerbaby.pdf>> Visited on 20.6.2012.

¹⁹¹ Michael Poore, “Baby Shopping: The Class of Worldviews in Bioethics”, The Humanitas Project, Center for Bioethics Education, U.S.A. (2007) at p.1, available at <<http://www.humanitas.org/articles/babyshopping.htm>> Visited on 20.7.2012.

¹⁹² John A. Robertson, “Procreative Liberty and Harm to Offspring in Assisted Reproduction”, 30 *American Journal of Law & Medicine*, 7- 40 (2004).

¹⁹³ Hereinafter referred as PGD. Also see Molina B. Dayal & Richard Scott Lucidi, “Pre-Implantation Genetic Diagnosis”, *Medscape Reference* (Aug. 29, 2011), available at <<http://emedicine.medscape.com/article/273415-overview>> Visited on 20.6.2012.

conjunction with In-Vitro Fertilization to screen embryos for genetic conditions prior to transfer. The procedure involves removing a single cell from a 3-day old embryo fertilized in-vitro, and then analyzing that cell for specific genetic or chromosomal abnormalities¹⁹⁴. The technician then removes the undesired genes and injects the desired genes into several embryos¹⁹⁵. The strongest embryo is then placed back inside the mother. The other embryos are frozen. Doctors frequently check the strongest embryo's status to ensure that the embryonic infant complies with the parents' specifications. If the child's development is as per the parents' specifications, the pregnancy continues. If the child's development is not in compliance with the specifications, then the child may be aborted, which is what many physicians recommend¹⁹⁶. This modification in genetic make-up and selection of desirable traits is justified on the grounds that it helps to prevent birth of child with genetic diseases. In fact the supporters argue that one should undergo prenatal testing and screening because it is in the best interests of one's future child¹⁹⁷.

The concept of designer babies however raises serious criticisms. Though it is still in its experimental stage and therefore its application to humans is remote, concern is there about the possible harm to the children who may be born. Designer baby concept involves modification of the genes which involves manipulation of the existing genes with the help of technology. Apprehensions are expressed regarding the safety and reliability of the genetic enhancement procedures because nobody can predict the way in which the gene will manifest itself and what would be the unforeseen adverse effect. The research has shown that in mice the addition of a particular gene made them better at running mazes but also made them hypersensitive

¹⁹⁴ Tania M. Simoncelli, "Pre-Implantation Genetic Diagnosis: Ethical Guidelines for Responsible Regulation", A paper submitted to the President's Council on Bioethics, The International Center for Technology Assessment, May 2003, available at <<http://209.200.74.155/doc/pgd%20guidelines.pdf>> Visited on 20.6.2012.

¹⁹⁵ Human Fertilization & Embryology Authority, "Pre-Implantation Genetic Diagnosis (PGD)", (Oct. 29, 2009), available at <http://www.hfea.gov.uk/preimplantation-genetic-diagnosis.html#3> > Visited on 20.6.2012.

¹⁹⁶ *Supra* n.190.

¹⁹⁷ See, Robert Wachbroit, "What is Wrong with Eugenics?", in Edward Erwin, Sidney Gendin & Lowell Kleiman (eds.), *Ethical Issues in Scientific Research: An Anthology*, Routledge, U.S.A. (1994), p.331; Also see, Michael J. Malinowski, "Coming into Being: Law, Ethics, and the Practice of Prenatal Genetic Screening", 45 *Hastings L. J.* 1435 (1994), at pp.1472-74.

to pain. The possibility of such adverse impacts due to modification of genes in human beings cannot be ruled out¹⁹⁸.

An attempt to create a designer baby through surrogacy also raises profound religious and ethical issues. So far God is considered as the creator and sustainer of life. Through the procedure of surrogacy the infertile couples or individuals can beget a child of their own. But the concept of designer babies is going far beyond this and attempts to create a baby with desired characteristics and traits are going on. Thus it is argued that such an attempt by man would put him in the position of creator of life. This has hurt the moral and religious sentiments of people all over the world. Questions are being asked as to whether man should become the architect of life itself and whether surrogacy technology be allowed to let man play with God. The concept of creating designer babies also involves experiments with the embryos and hence in the process destruction of embryos which do not have desired traits will occur¹⁹⁹. Further, it is argued that creating designer children by genetic manipulation of embryos, destroys the essence of their humanness and, ultimately, the essence of humanness of all mankind. This is because it is interfering with the intrinsic being of a person and not allowing them to fully become themselves but designing and modifying them to become someone whom their parents want them to be²⁰⁰.

In many countries, there are regulations for the use of PGD and most of these regulations limit the use of PGD only for therapeutic purposes i.e. to exclude the risk of genetic diseases. For example, the Czech Republic Law on Research on Human Embryonic Stem Cells, 2006, states that, the pre-implantation genetic testing of the embryo is allowed for specified indications only, in order to exclude the risk of serious genetic diseases. The sex selection is allowed only to prevent serious gender related genetic diseases which are either incompatible with postnatal life, considerably shorten life or cause early invalidity and are not curable with present

¹⁹⁸ Bonnie Steinbock, "The Art of Medicine, Designer Babies: Choosing Our Children's Genes", *The Lancet*, Vol.372, Oct. 11, 1294 (2008), at pp.1294-95.

¹⁹⁹ Bratislav Stankovic, "It's a Designer Baby: Opinions on Regulation of Pre-Implantation Genetic Diagnosis", 1 *U.C.L.A. J.L. & Tech.* 3 (2005).

²⁰⁰ Margaret Somerville, "Children's Human Rights to Natural Biological Origins and Family Structure", 2 *Australian Family Association Journal*, Vol.32, 6 (2011).

knowledge²⁰¹. So also Article 10 of Law on Medically Assisted Reproduction, 2002 of Greece provides that PGD can be allowed only for diagnosis of genetic disorders in embryos, following appropriate genetic counseling and informed consent²⁰².

The Draft ART Bill, 2010 in India regulates the use of PGD. It states that, Pre-implantation Genetic Diagnosis shall be used only to screen the embryo for known, pre-existing, heritable or genetic diseases or as specified by the Registration Authority. Destruction or donation (with the approval of the patient) to an approved research laboratory for research purposes, of an embryo after Pre-implantation Genetic Diagnosis, shall be done only when the embryo suffers from pre-existing, heritable, life-threatening or genetic diseases. The State Board²⁰³ may lay down such other conditions as it deems fit in the interests of Pre-implantation Genetic Diagnosis²⁰⁴. Thus, it is submitted that the genetic manipulation of embryo can be allowed only to the extent required for screening and avoiding genetic diseases. It cannot be allowed for creating a designer baby as per the whims and fancies of the parents.

7.5.3 Creation of Non-traditional Families and Surrogate Child

Generally, surrogacy is criticized on the ground that it will allow creation of non-traditional families and such families are not in the interest of the child²⁰⁵. This is because surrogacy allows single individuals, lesbian couples and gay couples to beget a child. In such type of families the child would be having only one type of parent or would be having either only females or only males as a parent. It is argued that for the proper development and welfare of the child both mother and father are very

²⁰¹ Anniek Corveleyn and Eleni Zika, *et al.*, “Pre- Implantation Genetic Diagnosis in Europe”, European Commission, Joint Research Centre, Institute for Prospective Technological Studies, p.63, available at <<http://ftp.jrc.es/EURdoc/eur22764en.pdf>> Visited on 20.6.2012.

²⁰² *Id.* at p.64.

²⁰³ The Draft ART Bill, 2010 (India), Section 6, provides for the establishment of State Boards to exercise the jurisdiction and powers and discharge the functions and duties conferred or imposed on the State Boards by or under the Draft Bill, 2010.

²⁰⁴ See, The Draft ART Bill, 2010 (India), S.24.

²⁰⁵ See, John A. Robertson, *supra* n. 192. See also, Radhika Rao, “Assisted Reproductive Technology and the Threat to the Traditional Family”, 47 *Hastings L. J.* 951 (1996).

essential²⁰⁶. Thus in non-traditional families the child is deprived of the care and assistance of either mother-figure or father-figure. However, it is to be noted that right to beget a child is a fundamental human right. Hence every individual is having the right to beget a child if he/she desires. So also, even a single individual or gay or lesbian can be an intended parent²⁰⁷. Moreover, there are no studies to prove that children raised by only one parent or by two males or by two females would not be normal. These single individuals or gay and lesbian couples are also human beings with love and affection and the reason for their begetting a child is to take care of the child similar to the other hetero-sexual couples²⁰⁸. Therefore, it is unjustifiable to restrict the right of an individual to beget a child on the reason that he is single or leading a lesbian or gay life.

7.5.4 Non-recognition of Overseas Surrogacy by Certain Countries

Another contentious issue affecting the interests of surrogate child as well as the intended parents is the non-recognition of overseas surrogacy by certain countries due to a ban on surrogacy in their country. The conflicting views and approaches adopted in different countries as well as the variation in laws regulating surrogacy poses a problem for the intended parents who wish to opt for surrogacy in another country for begetting a child. There can be a situation where the intended parents belong to a country where surrogacy practices are considered as illegal and opposed to public policy and therefore the intended parents opt for surrogacy in other country which allows such practices. In such a situation, when the intended parents go back to their country with the surrogate child and their country does not recognize them as the legal parents of the child even though they are genetically related to the child, then it creates problem for the intended parents as well as the child. For example, a similar situation was discussed in *Aki Mukai Case in Japan*.

²⁰⁶ Goldman, J., Salus, M. K., Wolcott, D., & Kennedy, K. Y, "A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice", (2003), available at <<http://www.childwelfare.gov/pubs/usermanuals.cfm>> Visited on 20.6.2012.

²⁰⁷ *Supra*, Chapter IV.

²⁰⁸ See, John A. Robertson, *supra* n.192 at p.39.

In *Aki Mukai* case, a Japanese television actress Aki Mukai who was infertile due to cervical cancer, opted for surrogacy and had twins through an American surrogate mother. The American Court had recognized Ms. Aki Mukai and her husband Nobuhiko Takada who were both genetically related to the child as the natural parents of the child. However, the couple's application to register the children in Japan was denied on the ground that Mukai was not a legal mother since she had not given birth to the children. The Japanese Supreme Court also did not accept Mukai as the legal mother on the ground that she had not given birth to the babies. The children were considered as foreigners and finally the couple had to officially adopt them in order to become the legal parents²⁰⁹.

This case brought to light an important question that, whether a country which does not allow surrogacy practices in its domestic jurisdiction is bound to recognize a surrogacy legally performed in a foreign country? It also raises the question whether the country is bound to recognize the parentage certificate issued by another country? These two issues have not been dealt with by any of the legal framework of different countries. However, a recent decision in Belgium had adopted the principle of 'best interest of the child' to deal with such issues. In a case concerning the recognition of foreign birth certificates, the court recognized the foreign birth certificates as valid authentic acts insofar only as they established the legal paternity of the intending father²¹⁰. The court held that, "the illicit nature of the surrogacy arrangements under internal law could not be given greater weight than the superior interests of the child"²¹¹. Hence, it is submitted that irrespective of the differences in domestic laws, every country should recognize the legal certificate of parentage issued by another

²⁰⁹ See, Melissa Ahlefeldt, "Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan", 32 *J. Japan. L* 65 (2011), at pp.68-69; Danielle Franco-Malone, "Forging Family Ties Through Full Surrogacy: An Argument in Favor of Recognizing Nontraditional Parents in Japan", available at <http://lsrj.org/documents/awardsgrants/Forging_Families.pdf> Visited on 20.2.2013.

²¹⁰ See, *The Twins H&E* case, Court of First Instance, Antwerp, 19th December 2008, referred in The draft made by Permanent Bureau of Hague Conference on Private International Law established by the World Organization for Cross-Border Co-Operation in Civil and Commercial Matters, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, Preliminary Document No. 11, (March 2011) for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, p.21. Available at <<http://www.hcch.net/upload/wop/gap2012pd10en.pdf>> Visited on 20.1.2013.

²¹¹ *Ibid.*

country in order to protect ‘the best interests of the child’ as well as the interests of the intended parents. This is possible only when the international community cooperates and develops a framework in the form of a convention or declaration to recognize overseas surrogacy practices and parentage.

7.6 Conclusion

The welfare and interests of the surrogate child must be given prime consideration in a surrogacy arrangement. The interests of the child depends on various issues like legal status of the child, parentage, custody, citizenship as well as various other rights such as right to know his or her genetic origin, right to maintenance, right to inheritance, right to preserve his or her identity and right not to be separated from parents. All these issues arise only after the birth of the surrogate child. For example, though the intended parents entered into agreement with the surrogate woman, the surrogate woman may refuse to hand over the child to the intended parents; or the intended parents may after the birth of the child refuse to accept the child due to their separation or divorce or if the child born is defective. Further, concerns have been raised about the welfare of the surrogate child due to certain contentious issues in surrogacy such as creation of designer babies, sex-selection and creation of non-traditional families, etc.

The protection of the interests of the surrogate child lies in the hands of the other stakeholders involved in surrogacy arrangements i.e. the intended parents and surrogate woman. However the intended parents who initiate the surrogacy arrangement are interested in begetting a child, while the surrogate woman who entered into surrogacy arrangement may do so either for money or for altruistic reasons. Thus these stakeholders may be concerned about their interests and in the process the welfare and interests of the surrogate child may be overlooked. Hence it is essential to have a proper legal framework to regulate surrogacy arrangements.

For the last few decades, various cases have come up before the courts in different countries for seeking an answer to the complex legal questions such as

whether the surrogate child is legitimate or illegitimate; who is the legal parent of the child; who is entitled to have custody of the child in case of dispute between the intended parents; whether surrogate child is entitled to get maintenance from intended parents; whether surrogate child has right to inheritance; and in cases of cross-border surrogacy what is the citizenship of the child, etc. The legislations dealing with surrogacy in various countries have also not addressed these issues adequately. In most of the cases the courts of different jurisdictions have decided these questions on the basis of the facts and circumstances of each case and always tried to protect the best interests of the surrogate child. Courts in many cases have attempted to find a set of rules for determining these complex issues, using legislations adopted at a time when legislatures could not have anticipated such births²¹².

In view of the advancements in ART and particularly the increasing use of surrogacy, the laws should be modified and adequately equipped to cope up with these technological changes. Any dispute in surrogacy would adversely affect the rights and interests of the surrogate child. Hence such laws should clearly address the various issues which affect the rights and interests of the surrogate child. In this context it is the duty of the State to make adequate regulations for ensuring that every surrogacy arrangement considers the future issues relating to surrogate child and its welfare. Such an action on part of the State is essential in order to protect the innocent surrogate child and prevent the child from becoming a victim of surrogacy arrangement.

²¹² *Supra* n.58.

CHAPTER –VIII
CONCLUSION AND
SUGGESTIONS

CHAPTER VIII

CONCLUSION AND SUGGESTIONS

8.1 Conclusion

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

With the advent of the concept of human rights, the innate desire of an individual to beget a child has been recognized as a basic human right and established as a right to procreation. The legal framework for the right to procreation as a human right is derived from various international human right documents such as, the *Universal Declaration of Human Rights*, 1948; the *International Covenant on Civil and Political Rights*, 1966; the *International Covenant on Economic, Social and Cultural Rights*, 1966; and the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979 as well as regional human right documents like the *European Convention on Human Rights*, 1950; and the *American Convention on Human Rights*, 1969, etc. It is true, that, the right to procreation is not expressly defined by most of these documents. However, this right is a facet of various other human rights that are already recognized under these documents. The rights such as the right to life, the right to reproductive health, the right to personal freedom, the right to privacy, the right to

equality and non-discrimination, the right to marriage and to found a family, right to decide the number and spacing of one's children, etc. are rights that are considered as the basis for right to procreation. Moreover, the right to procreation is expressly mentioned under the *Convention on the Rights of Persons with Disabilities*, 2006 and the Protocol to *African Charter on Human and People's Rights*, 1998. The right to procreation is seen recognized under various domestic jurisdictions including India.

The right to procreation is one of the basic and fundamental rights of an individual and is a means to fulfill the innate desire of an individual to beget a child. However a large section of the population is unable to satisfy this right due to infertility caused by various medical and social reasons and as a result they remain childless. The childlessness has a severe impact on the individual's personal, family as well as social life. Due to the serious impacts of childlessness as well as the stigma associated with it, there has been a search for finding appropriate solutions for overcoming childlessness. Attempts to find solutions for overcoming childlessness are not a new phenomenon but have been in existence since ancient times. In fact, all the major religions of the world have recognized and accepted the fact that some couples may not be able to have a child due to various reasons and hence prescribed different methods for begetting a child not only by conjugal relationship but also through non-conjugal and other means.

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

grounds. Among these methods of ART's, surrogacy is the most widely used method and also most controversial.

Surrogacy in itself is not a treatment for infertility but a method which allows individuals/couples to beget a child genetically related to them. Surrogacy is an arrangement which enables couples or individuals who wish to beget a child but are unable or unwilling to sustain a pregnancy due to various reasons, to become parents of a genetically related child with the help of another. Though the practice of surrogacy to beget a child dates back to ancient times and is mentioned in Hindu mythology as well as in Bible, the developments in modern medical science and technology have made this method more accessible and convenient. Today, the various methods of ART and particularly surrogacy have made it possible for couples or individuals to beget a child without sexual intercourse. The woman or surrogate conceives, gestates and delivers a baby to such couple either for commercial or for altruistic reasons. In such arrangements generally the intended parents who wish to have a child may contribute genetic material, or sometimes genetic material may be contributed by surrogate mother or may be by donor/donors. Depending upon the contribution of genetic material as well as payment of compensation, there are different types of surrogacy arrangements. In gestational surrogacy or full surrogacy arrangements, the intended parents or donors are contributing the genetic material. In traditional or partial surrogacy, the surrogate mother contributes the genetic material. In case of commercial surrogacy arrangements, the surrogate woman receives a compensation for the services which she performs while in altruistic surrogacy arrangements, there is no payment involved.

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

couples/individuals. Due to these advantages, surrogacy has emerged as an attractive option during the last few decades for couples/individuals who wish to beget a child.

The increased use of surrogacy has generated a huge debate and controversy among the society as well as legal fraternity due to its potential to affect various human rights. Legal and human rights issues raised by surrogacy have been discussed in various cases like, *Baby M*¹; *Johnson v. Calvert*²; *Buzzanca v. Buzzanca*³; and *Soos v. Superior Court of the State of Arizona*⁴, etc. These cases brought to the forefront issues like legality of surrogacy practices, validity of commercial surrogacy, enforcement of surrogacy contracts, parentage of surrogate child, rights of surrogate women, rights and duties of intended parents and the rights of surrogate child. Thus a need was felt for regulating surrogacy and it led to the adoption of legal measures by various countries depending upon their approach to surrogacy.

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

These differences in approaches in legal framework towards surrogacy, has led the couples/individuals who wish to have a child through surrogacy to select those countries which are surrogacy-friendly. As a result, the past two decades have seen the emergence of cross border surrogacy practices. Among the various surrogacy - friendly countries, India has become a favorite destination for such couples/individuals. The factors like, availability of well qualified and experienced doctors, quality facilities in

¹ 537 A.2d 1227 (N.J. 1988).

² (1993) 851 P 2d 776 (Cal).

³ 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

⁴ 182 Ariz. 470(1994); 897 p.2d 1356(Ariz. Ct. App.1994).

clinics at low cost compared to other countries, English speaking staff, and most importantly easy availability of surrogate women at a low cost and minimum regulatory framework have contributed towards the development of India as an international centre for surrogacy services. The surrogacy business in India currently is estimated to be approximately \$450 -500 million a year.

In India, though surrogacy has developed as a million dollar business, there are no specific legislations for the regulation and control of surrogacy. The two draft Bills introduced by the Government of India in 2008 as well as in 2010, for regulating the practices of assisted reproductive technologies including surrogacy in India have not yet been enacted as law. In the absence of such specific legislations, the *ICMR National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India*⁵, are the only available regulatory framework. However, these guidelines are not binding and are primarily focusing on the regulation of ART clinics. The Law Commission of India in its 228th Report has recommended the need for adopting a pragmatic approach to regulate surrogacy in India. The Indian Judiciary has in the landmark case of *Jan Balaz v. Anand Municipality and Others*⁶ emphasized the urgent need for a legislation to deal with various issues raised by surrogacy. Thus the need for a specific legislation dealing with surrogacy cannot be ignored any longer due to the fact that, India is one of the major hubs for surrogacy in the world. The notable absence of specific legislation creates hurdles for the stakeholders involved in surrogacy because surrogacy is the most controversial form of ART and raises various conflicting social, legal and human rights issues. Hence in order to protect the rights and interests of the various stakeholders, the issues related to these stakeholders such as intended parents, surrogate mother, surrogate child as well as issues related to surrogacy contracts require immediate and detailed analysis and solution.

The developments in medical science and technology and establishment of legal system have created a growing awareness regarding the concept and use of surrogacy

⁵ Jointly adopted by Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS), India in 2005. The full text of the guideline is available at <http://www.icmr.nic.in/art/art_clinics.html> Visited 10.6.2011

⁶ A.I.R. 2009 Guj. 21.

as well as various legal and human rights issues relating to the stakeholders involved in surrogacy. All the major legal and human rights issues and controversies related to surrogacy practices can be clustered under four major heads, i.e. the issues related to intended parents, surrogate mother, surrogacy contracts and the issues concerning surrogate child.

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

The interest of the intended parents need to be given adequate attention due to the fact that, surrogacy is the last option available to them and any failure in the arrangement would be detrimental to them. Unfortunately, most of the countries have not considered the issue of various rights and duties of intended parents seriously. However, a close examination of many surrogacy arrangements, legal provisions and case laws indicates that, the intended parents are entitled to the following rights, such as right to select a surrogate mother; right to impose restrictions upon surrogate mother; right to information and visit surrogate mother during pregnancy; right to custody and parentage of child; right to maternity and paternity leave for intended parents. Most of the countries which have regulated surrogacy practices have not expressly mentioned these rights except the right to custody and parentage of child.

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

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

The claim that a woman has a right to rent her womb or to act as a surrogate can be justified on the ground that such right originates from the three basic human rights i.e. right to personal liberty and right to privacy; property rights over human body; and right to benefit from progress in science and technology. At the same time this right to act as a surrogate is not an absolute right and can be restricted like any other human rights. Therefore, in order to exercise this right a woman must satisfy certain eligibility criteria relating to age, mental and physical health, previous child birth, marital status,

and relation with intended parents, etc. However, these factors have not been adequately addressed by legislations regulating surrogacy in most of the countries.

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

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

relinquish the right over the child and to hand over the child; and duty to disclose hereditary or any other communicable diseases. The *ICMR Guidelines* are voluntary in nature and absence of binding legal provisions creates a hurdle in the enforcement of these rights and duties of a surrogate woman in India.

The success of surrogacy arrangement depends upon the proper fulfillment of rights and duties of the stakeholders i.e. intended parent/parents and the surrogate mother involved in surrogacy. Usually the rights and duties of the parties to a surrogacy are expressed in the form of agreements or formal contracts. However the surrogacy contracts may give rise to various legal and human right issues and hence their legality and enforceability is highly controversial. The approach of countries all over the world towards this issue is also not uniform. Different approaches can be seen taken such as, prohibition of all types of surrogacy contracts; prohibition of only commercial surrogacy contracts; and to allow all forms of surrogacy contracts. Due to the ambiguity prevailing regarding the legality of surrogacy contracts, issues raised by such contracts become difficult to answer. In the absence of a specific law for regulating surrogacy in India, the legal principles governing contracts as codified in the Indian Contract Act, 1872 can be applied to determine the question whether surrogacy contracts are valid and enforceable. A surrogacy contract between the intended parents/parent and the surrogate woman can be considered as a contract within the meaning of Indian Contract Act, 1872 due to the fact that there is an offer from intended parents/parent and an acceptance by the surrogate woman. Moreover there is *consensus-ad-idem* between the intended parents/parent and surrogate woman as well as free consent by the surrogate woman and a lawful consideration and lawful object. However it may be argued that altruistic surrogacy contracts are not valid contracts as they do not involve monetary considerations. This argument can be rebutted on the ground that altruistic contracts are made on account of love and affection, and even if a total stranger acts as a surrogate the act is providing a gift of life to the intended parents/parent and thus it comes within the ambit of exceptions mentioned under Section 25 of the Indian Contract Act, 1872. Further, the object of surrogacy contracts is to beget a child which is a basic human right recognized under international and

national law. This position coupled with the absence of a legal provision prohibiting the begetting of a child through surrogacy strengthens the contention that surrogacy contracts are having a lawful object and thus valid. However, though a surrogacy contract satisfies all the essential ingredients of a valid contract, the question whether it should be enforced is highly controversial and debatable issue all over the world.

Surrogacy contracts are severely criticized on the ground that they are opposed to public policy and morals, would lead to exploitation and commodification of women, baby selling and positive eugenics. The strongest criticism against surrogacy contracts is that it creates a market for gestational and genetic services, leads to commodification of women and reduces a surrogate woman to the status of an incubator or breeder machine. However, such criticisms can be negated due to the fact that every individual has a right to procreation which includes the right to beget with the help of another. Hence, instead of prohibiting surrogacy on such grounds, the surrogacy practices can be regulated through appropriate legislations by the State so as to prevent any misuse. Further, a surrogacy contract is not a contract for sale, and in fact involves in most of the cases, genetic contribution by the intended parents/parent and hence cannot be equated to baby selling. So also a surrogacy contract is entered into by the intended parents/parent to fulfill their long-cherished desire of begetting a child and hence they would not like to cheat the surrogate or exploit her as it would affect their own interest of begetting a child. However, to avoid any such possibility, the terms and conditions can be clearly laid down in the surrogacy contract which can be regulated by legislations. Further, surrogacy procedure does not involve any sexual intercourse between the surrogate woman and the intended father or male donor and thus does not amount to prostitution or adultery. Moreover, surrogacy is not causing any injury or harm to public welfare. On the contrary, it is helping a section of the society to fulfill their desire of begetting a biologically related child. Thus a surrogacy contract is to be considered legal and enforceable. One of the pertinent questions that arise in this regard is the appropriateness of remedies for any breach of surrogacy contracts.

Breach of surrogacy contracts raises major legal and human rights concerns. The breach can occur by the act or conduct of intended parents/parent or by the surrogate

woman either prior to artificial insemination or implantation of embryo; after AI or implantation of embryo; or after the birth of the surrogate child. In such circumstances of breach, the remedies like damages and specific performance of contract can be utilized by the parties depending upon the type of breach. The ambiguities and uncertainties surrounding the legality of surrogacy contracts and remedies for any breach can be resolved only through a proper and adequate legislation by the State. Such a specific legislation is imperative for India for ensuring protection of rights and interests of the stakeholders involved in surrogacy and achieve a happy outcome from surrogacy arrangements.

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

Another controversial issue affecting the interests of the surrogate child is the question regarding the legal status of the child due to the interference of a third party or third parties, i.e. surrogate, egg donor or sperm donor. This issue has been discussed in many cases and the opinion of the court has been that, the surrogate child is a lawful child of the intended parent/parents because they have given their consent. The laws in most of the countries including India provides that a child born through surrogacy shall be presumed to be the legitimate child of the intended parent/parents. Though there are

various theories propounded by various authors to identify the legal parentage of a surrogate child, the theory of 'intent-based parenthood' is considered as the most appropriate theory in case of a dispute regarding the parentage of such child. The fact that the child has come into existence only because of the intention of the intended parents supports this view. This theory is also supported by law in countries like USA, UK, Western Australia, and Queensland which provide that intended parents can become legal parents of surrogate child only through a parental order by the appropriate authority. However in India, though *ICMR Guidelines* provide that child born through ART shall be presumed to be legitimate child of the couple for all purposes, the absence of a binding legal provision for applying for a parentage order creates difficulties for the intended parents.

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

The welfare and interests of the surrogate child need urgent and adequate attention due to the fact that the welfare of surrogate child is interlinked with numerous issues which have an impact on the rights of the child. Though the international conventions and declarations expressly recognize the rights of every child such as, right to life; right to non-discrimination; right to know his/her origin; right to preserve

his/her identity and right not to be separated from parents; the protection of these rights is a complex and daunting challenge in case of a surrogate child. This is due to the fact that a surrogate child is born through the involvement of third party or parties and the rights of the surrogate child often come into conflict with the rights of other stakeholders involved in surrogacy i.e. surrogate woman or donor or intended parents themselves. For example, an important right of the child is to know his/her origin as it is essential for establishing its identity; for understanding genetic origin for medical purposes and also for preventing incestuous relationships between surrogate children born through same surrogate or donor. However this right is in conflict with the right of surrogate woman or donor to remain anonymous. Though most of the countries have provided legal provisions for maintaining anonymity of the surrogate or the donor, they have also adopted provisions for disclosing genetic history of the child in certain circumstances. However, regarding the disclosure of personal identity of the surrogate or donor, the legal opinion is divided. In India all genetic and medical information about the surrogate mother and donor can be provided to the surrogate child except information relating to their personal identity such as name and address. Regarding the right to maintenance and right to inheritance, it is universally accepted among all the legal systems that the surrogate child would be presumed to be the natural born child of the intended parents and hence have all the rights similar to a child born through sexual intercourse.

The issue of citizenship of surrogate child has also emerged as a contentious issue due to the increasing number of cross-border surrogacy practices in India. The Gujarat High Court in the case of *Jan Balaz v. Anand Municipality and Others*⁷ has settled this issue by holding that, a child born to an Indian surrogate mother in India would be considered as an Indian citizen. However, the Draft ART Bill, 2010 has made a departure from this decision by stating that if a foreigner or a foreign couple seeks sperm or egg donation or surrogacy in India the surrogate child even though born in India to an Indian surrogate shall not be an Indian citizen. This conflict would naturally get resolved when the Bill gets passed in the Parliament.

⁷ *Supra* n.7.

Increasing use of surrogacy has also raised various other issues such as selection of sex of the child, creation of designer babies and establishment of non-traditional families. The concerns regarding sex selection and creation of designer babies have been well addressed by laws all over the world including India. The countries have adopted various legislations prohibiting such practices and making it an offence. However a limited use of pre-implantation genetic diagnosis is allowed for medical purposes. Further, the concern that, surrogacy would lead to creation of non-traditional families such as gay or lesbian family and it would affect the child's welfare, is not having any force due to the fact that, there are no studies to prove that children raised by such families may be adversely affected due to absence of mother-figure or father-figure. However such concerns cannot be ruled out completely in near future and therefore need to be addressed adequately by the State. In view of the increasing use of surrogacy, and considering the fact that, the interest and welfare of the child depends upon the stakeholders involved in surrogacy, it is the duty of the State to ensure that proper and adequate legal provisions are made to protect the interests and rights of the surrogate child. Thus the interests and rights of each and every stakeholder are equally important in every surrogacy arrangement and adequate steps are to be taken by the State to protect such interests and rights.

Though surrogacy raises a myriad of legal and human rights issues, it is a boon to those individuals or couples who wish to beget a biologically related child. Therefore, surrogacy practices would continue to take place all over the world, irrespective of the hardships and disputes involved. Hence, prohibiting surrogacy practices or considering the surrogacy contracts as null and void is not a wise step in a welfare State. On the contrary, such a step would deprive a large section of the population of their basic human right to beget a child. Moreover, it may lead to such practices being carried out secretly and may cause harm to the interests of all stakeholders. Hence, it is necessary to develop an appropriate legal framework for regulating surrogacy. In India there is no specific law dealing with surrogacy and the existing legal provisions are inadequate to cope up with the various legal and human rights issues raised in surrogacy arrangements. Therefore a specific law dealing with

surrogacy is a dire necessity in India due to the fact that, the surrogacy practices are on the rise in the past few years. Any such legislation should expressly declare both altruistic and commercial surrogacy as legal as well as declare surrogacy contracts as valid and enforceable. It should necessarily take care of the conflicting interests of various stakeholders involved in surrogacy and strike a balance between their interests and also the interests of society.

8.2 Suggestions

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

8.2.1 General Suggestions

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

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

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

8.2.2 Suggestions in Relation to Intended Parents

(i) The right to be an intended parent must be recognized as a part of right to personal liberty, right to privacy, right to procreation, right to found a family and decide on the number and spacing of children, and right to enjoy benefits of scientific and technological progress. However reasonable restrictions can be imposed by the State on the exercise of these rights by the individuals.

(ii) The legal framework for regulating surrogacy shall specify clearly the eligibility criteria regarding who can be an intended parent? Married infertile couples shall in ordinary circumstances be allowed to use surrogacy for begetting a child. However, married fertile couples must be allowed to use surrogacy for begetting a child only in situations where the pregnancy gives rise to medical complications or causes risk to the life of mother or child; and where at least one of the couples can contribute genetic material for the child.

Same sex couples can also be allowed to be intended parents provided at least one of the partners contributes the genetic material for a child. A single man or single woman can also be allowed to be an intended parent provided he or she provides the genetic material. The disabled individual shall also be allowed to be an intended parent provided the disability does not affect the upbringing and care of the child. The right to be an intended parent can be allowed to single individuals only if they are below the age of 50 years. However, an individual as well as couples above 50 years of age can be allowed, if there is a nominee who must be younger than the intended parents and who will take care of the child in the absence or inability of the intended parent/parents to do so.

(iii) The rights of intended parents must be recognized and specified clearly by the laws. The following rights of the intended parents have been identified as essential, viz. (a) the right to select surrogate mother of their own choice subject to restrictions by the State on grounds of public interest; (b) right to impose reasonable restrictions upon surrogate mother as are necessary for the normal development of the child; (c)

right to information and visit surrogate mother during pregnancy; (d) right to custody of the child within 72 hours of its birth; (e) the right to be considered as legal parents/parent of such child for all purposes; and (f) the intended parents shall also be given the maternity and paternity leave if they are employed.

(iv) There is a need to specify the duties of intended parents so as to protect the interests of other stakeholders. The following duties shall be imposed on intended parents, *viz.* (a) duty to refrain from sex selection and improvement of non medical characteristics; (b) to pay all necessary medical expenses of surrogacy pregnancy as well as reasonable medical insurance policy expenses and the agreed compensation to the surrogate; (c) most importantly, it shall be made a mandatory duty of intended parents to accept the child even if there are multiple births or child born with defects and to consider the child similar to a child born naturally in wedlock for all purposes; (d) there is a need to make it mandatory for intended parents from foreign countries to appoint a local guardian in order to protect the interests of the child. In case of any refusal by intended parents to accept the child, the local guardian must be held responsible to take care of the child for minimum six months and after such period the local guardian may continue to take care of the child if he/she desires to do so; or hand over the child to adoption agency. However in both the cases it shall be made mandatory for the intended parents to provide adequate maintenance to the child.

8.2.3 Suggestions in relation to Surrogate Mother

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

(ii) The legal framework for regulating surrogacy arrangements shall clearly specify the eligibility criteria as to who can be a surrogate. The State however can take into account the moral, social, ethical, legal and human rights aspects while specifying the

eligibility criteria. An unmarried girl shall not be allowed to act as a surrogate. A married woman can be allowed to act as a surrogate only with the consent of her husband. However divorced or widowed women can be allowed provided if they satisfy other relevant criteria. The surrogate woman shall be above 25 and below 45 years of age; must be free from any hereditary or communicable diseases; and must be physically and mentally fit to carry a child to full term. A relative shall be allowed to act as a surrogate only if she is having the status of a sister or sister-in-law and only for gestational surrogacy. The maximum number of children to be allowed for a woman may be fixed as three in her lifetime, including her own children as well as through surrogacy.

(iv) There is a need to specify clearly the duties of a surrogate mother for ensuring the success of surrogacy arrangements and protecting the interests of intended parents/parent and surrogate child. The following duties have been identified as essential viz. (a) duty to disclose details about the family, marital status, number of children, and hereditary or any other communicable diseases; (b) permit medical examination and regular medical check-ups as required prior to and after successful surrogacy procedures; (c) to take adequate health care during pregnancy and to avoid habits like taking alcohol, drugs, smoking, etc. which adversely affect normal development of the child; (d) the surrogate must carry the child for a full term and shall relinquish all her parental rights over the child after its birth and hand over the child to the intended parents/parent; and (e) the surrogate shall also abstain from visiting the child and shall not interfere in the relation between the intended parents/parent and the surrogate child.

(iv) The rights of the surrogate woman must be stated clearly. She shall be provided with the following rights, viz. (a) right to informed consent and proper counseling prior to initiation of surrogacy process; (b) to receive all expenses for pregnancy and hospital treatments as well as insurance coverage; (c) to receive compensation as agreed by the parties; (d) to remain anonymous; and (e) a limited right to visitation can be allowed subject to the consent of intended parents/parent.

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

8.2.4 Suggestions Concerning Surrogacy Contracts

(i) All the surrogacy contracts, whether altruistic or commercial must be considered as valid and enforceable. In the absence of specific laws regulating surrogacy contracts, the Indian Contract Act, 1872 shall be made applicable. It is also important to declare that surrogacy contracts are not opposed to public policy and are not immoral.

(ii) Section 25 of Indian Contract Act, 1872 shall be amended to include a new exception, i.e. all altruistic surrogacy agreements between intended parents and a surrogate woman (whether a near relative or stranger) is valid even without consideration.

(iii) Though surrogacy contracts are declared valid, the danger of its misuse cannot be ruled out. As a welfare state it is the duty of the Government to adopt adequate steps to prevent exploitation of poor women through surrogacy contracts. Therefore, it is suggested that the legal framework shall provide for an effective mechanism for ensuring that surrogacy contracts are made properly by the parties and are not discriminatory or adversely affecting the interests of the surrogate women. In this regard it is proposed that, the Government shall introduce a process of 'Vetting of Surrogacy Contracts', i.e. every surrogacy contracts shall be reviewed by an appropriate competent authority. It shall be made mandatory for the parties to submit their surrogacy contracts before the competent authority for vetting prior to the

initiation of surrogacy procedures. Only those surrogacy contracts which have been reviewed and approved by the competent authority shall be considered as valid and enforceable.

(iv) The ART clinics performing surrogacy shall inform the intended parents and surrogate women regarding the mandatory requirements of vetting of surrogacy contracts. So also the clinics shall perform the surrogacy procedures only if there is a surrogacy contract between the parties and such contract has been reviewed and approved by the authority stated above.

(v) The general law relating to breach of contracts can be applied in case of a breach in surrogacy contracts. In situations of a breach of surrogacy contracts prior to artificial insemination or embryo implantation, the parties can treat contract as ended and claim for damages which they have suffered due to such contracts and are obliged to restore all the benefits which they have obtained from other parties if the circumstances so warrant.

(vi) In cases where there is a breach of contract after AI or EI by surrogate woman by performing certain activities prohibited by the contract, the doctrine of substantial performance shall be applied if the surrogate ultimately completes the contract and delivers the child. The minor breach of terms and conditions by surrogate woman shall not be considered as a ground for intended parents to rescind the contract if such breach does not have adverse effect on the fundamental object of the contract. However, the surrogate woman can be sued for damages due to such breach by the intended parents. The court shall appoint an expert committee including medical experts and lawyers to determine the quantum of compensation in such cases.

(vii) If the surrogate breaches the contract by aborting the foetus, without informing and without the consent of intended parents, the intended parents shall be provided with right to compensation by taking into account the financial loss as well as mental sufferings of the intended parents.

(viii) In surrogacy contracts, if the surrogate changes her mind after AI or EI or

threatens to abort the foetus, the intended parents shall not compel the surrogate woman to carry the child. Therefore, the courts should not grant an order for specific performance in favour of intended parents to enforce such surrogacy contracts. However in cases where surrogate actually aborts the foetus, the intended parents can consider the contract is discharged by breach and approach the court for compensation.

(ix) In situations where the intended parents do not fulfill their obligations after the AI or IE has been performed, the surrogate woman shall be provided with the remedy to approach the court for seeking an order for specific performance. If intended parents do not perform their obligation even after the order of specific performance, the surrogate can consider the contract as discharged by breach and abort the foetus. For this purpose the Medical Termination of Pregnancy Act, 1971 shall be amended to include breach of surrogacy contract by the intended parents as a ground for termination of pregnancy.

(x) In case of breach of surrogacy contract after the birth of child by the intended parents, the court shall grant the remedy of specific performance, i.e. the intended parents should be compelled to fulfill their part as agreed in the surrogacy contracts. Likewise in case of breach of surrogacy contract after the birth of the child by the surrogate woman, the court shall issue an order for specific performance, i.e. the surrogate woman should be compelled to hand over the child to the intended parents.

8.2.5 Suggestions for the Welfare of Surrogate Child

(i) The refusal by the intended parents/parent to accept the surrogate child shall be considered as an offence. If the surrogate or any close relative of intended parents /parent are ready to accept the child, the child shall be handed over to them. If they are not willing to accept the child, the child may be put in an orphanage or given for adoption and the intended parents shall be held liable for providing maintenance expenses to such child till adoption or upto the age of majority of the child. However in case where the child is given for adoption, this liability of intended parents to

maintain such child can be restricted till the completion of adoption procedures.

(ii) In case a foreign or NRI intended parents/ parent refuses to accept the child, it shall be considered as an offence. The local guardian appointed by such parents should be held responsible to accept the child and take care of the child for six months. After that the local guardian can give the child for adoption or to an orphanage. The intended parents should be made responsible for the maintenance of the child till adoption of such child or upto the age of majority. Any default on the part of intended parents to pay the maintenance shall be considered as an offence. If the intended parents are unwilling or not available for paying the maintenance, the local guardian shall be made liable for such maintenance.

(iii) Every child born through surrogacy shall be considered as the legitimate child of intended parents/parent. For determining the legitimacy of child, the section 112 of Indian Evidence Act, 1872 shall not be considered relevant.

(iv) The traditional definition of parent should be expanded to include the modern developments in reproductive technologies, particularly surrogacy. Thus the intended mother shall be considered as the legal mother and the intended father shall be considered as the legal father irrespective of the fact, whether he or she contributed their genetic material to such child.

(v) The legal parents shall be given the custody of the surrogate child. In case of any custody dispute between the intended parents and surrogate mother, it shall be considered as a breach of duty on the part of surrogate mother and the custody must be given to the intended parents. In case of any dispute between the intended parents themselves 'the best interest of the child' shall be considered as the criteria to award custody. However if both parents are equally fit to take care of the child, the genetic relationship can be considered as the deciding factor.

(vi) The legal system shall develop a balance between the rights of surrogate child to know his origin and the right of surrogate and donor to remain anonymous. The State shall develop a Central Database containing record of the surrogate and donor and other relevant information's. The disclosure may be allowed only if such disclosure is

essential in compelling circumstances like protection of health and life of the surrogate child or for preventing incestuous relationship. However personal identity such as name, address of the surrogate and donor should not be revealed except in the cases where the surrogate and donor give their consent.

(vii) A surrogate child shall be given the similar status of a child born in wedlock for the purpose of maintenance and inheritance rights.

(viii) The surrogate child born to an Indian surrogate woman for intended parents including foreigners shall be considered as an Indian citizen.

(ix) The use of ART and surrogacy for sex-selection and creation of designer babies shall be strictly prohibited by law and stringent punishments may be prescribed for any violation of such provisions. However sex-selection and genetic manipulation may be allowed only to the extent it is required for screening and avoiding sex-linked diseases and genetic diseases.

All the above mentioned suggestions may be incorporated in the specific legislation for regulating surrogacy in India. In the era of expanding human rights jurisprudence coupled with technological advancements it has become imperative for the Government to re-examine the legal framework and introduce new legal provisions to cope up with the emerging challenges raised by such technological advancements. In this context it is worth to remember the words:

“Laws and institutions must go hand in hand with the progress of the human mind. As the human mind becomes more developed, more enlightened, and as new discoveries are made, new truths discovered and manners and opinions change with the change of circumstances, the Laws and Institutions must also advance to keep pace with the changing times⁸”.

⁸ See, Victor Williams & Alison M. Macdonald, “Rethinking Article H, Section 1 and its Twelfth Amendment Restatement: Challenging Our Nation’s Mal-apportioned, Undemocratic Presidential Election Systems”, 77 (2) *Marquette Law Review*, 201 (1994).

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APPENDIX

APPENDIX

DETAILS OF PUBLICATION OF RESEARCH PAPERS

1. “Surrogate Mother and Its Challenges to the Indian Legal System” – in *The Legal Analyst*, (ISSN 2231-5594) Vol. I, No.2, 2011, pp.89- 94.
2. “Surrogacy and Gender Based Human Rights Concerns: A Dilemma for Legal System”, *S. P. Law Review*, Vol.1, January – 2013, (ISSN 2278-7811), pp.30-35.

Full published copies of both the papers are attached.

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