

**CRITICAL APPRAISAL OF LEGAL SPECTRUM REGULATING
SURROGACY CONTRACT: A COMPARATIVE STUDY WITH SPECIAL
REFERENCE TO INDIA**

ABSTRACT

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All that glitters is not gold

Surrogacy is a practice wherein a woman carries and gives birth to a baby for an infertile couple. This system seems to be a gift but if the concept is deeply examined, it is also not untouched from the lacunas of this materialistic world. Surrogacy poses a serious threat to human rights and has been thoroughly condemned as it acts as a channel for the exploitation of surrogate mothers. Numerous cases in India, USA, China and several other countries have catapulted surrogacy into the forefront of public debate and policy. For infertile parents, bearing children is Fundamental Right and for surrogate mother, surrogacy is a gross violation of human rights. In India, Surrogacy is highly unregulated and hardly ever monitored. There is a need to regulate the system of surrogacy.

There is no binding law protecting the rights of surrogate mothers. Although the Assisted Reproductive Technology Bill, 2010 and the Indian Council for Medical Research Guidelines seek to protect the interest of surrogate mothers the consequences of commercial surrogacy on our women are grave. When we compared legal framework in other countries relating to commercial surrogacy, we find that the laws exists in that countries are more strict and regulated. Generally, the process of surrogacy is undertaken in cases where the couple cannot naturally produce a child or there is some form of deficiency either in the mother or the father.

Researcher in this paper would deal with the concept of commercial surrogacy, position of the same in major countries of the world, present scenario in US and UK laws relating to commercial surrogacy, provisions in Indian law dealing with commercial surrogacy, judicial

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pronouncements in India directing the Government to make changes in the law relating to surrogacy, critical analysis of ill effects of the surrogacy and conclusions and suggestions

KEYWORDS: Commercial Surrogacy, ill effects, legal framework, and Judicial Interpretation etc

ARTICLE

INTRODUCTION:

The roots of surrogacy can be traced long back in Indian history. Nature has bestowed the beautiful capacity to procreate a life within women and every woman cherishes the experience of motherhood. Unfortunately, some women due to certain physiological conditions cannot give birth to their own progeny. The desire for motherhood leads them to search for alternative solutions, and surrogacy presents itself as the most viable alternative. Surrogacy is a method of assisted reproduction. The word surrogate originates from Latin word surrogates (substitution) which means to act in the place of. Further the very word surrogate means “substitute”². In general terms surrogacy is the practice where by one woman carries a child for another with the intention that the child should be handed over after the birth. According to Artificial Assisted Reproductive Technique guidelines surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate”.

Surrogate mother “is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry th pregnancy to full term and deliver the child to its biological parents(s)”³. In simple words Surrogate mother means a “woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman,

²Surrogacy from a feminist perspective by Malini Karkal, published in Indian Journal of Medical Science (IJME), available at <<http://www.Issuesinmedicalethics.org/054mi15.html?>> (Oct. - Dec. 1997 – 5(4)) Also in Nelson Hilde Lindeman, Nelson James Linde mann: Cutting motherhood in two: some suspicions concerning surrogacy. In: Holmes Helen Bequeath, Purdy Laura (Eds.): Feminist perspectives in medical ethics. New York: Hypatia Inc., 1992

³The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India (2010) 4

implanted in her to carry the pregnancy to viability and deliver the child to the couple / individual that had asked for surrogacy. Surrogacy Agreement means a contract between the person(s) availing of assisted reproductive technology and the surrogate mother.

Tracing the way back history of India we come across the phenomenon cases such as the case of Kauravas. At that time also the concept of surrogacy might be in existence so that a lady (Gandhari) was able to become mother of hundred sons which is not possible for normal human being to procure hundred children in one life⁴. Looking at the UK scenario, Louise Brown was the first child to be born through IVF (In Vitro Fertilization) technique. Just after two months of this India's first IVF baby was born in Kolkata. Since the concept of legal surrogacy is of recent origin it is unavoidable that different countries will have different stand point on the subject or on the topic. In India after the legalization of surrogacy the concept has developed at an immense rate and now it has become a reproductive tourism destination. Even the Law Commission of India described it as "Pot of Gold"⁵

If methodology is to be believed, this is the best techniques of surrogate motherhood may not be new after all. It explains the one hundred children's of Dhritarashtra and Gandhari in Mahabharata⁶. The term surrogacy is used when woman carries Pregnancy and gives birth to a baby for another woman. This woman may be the child's genetic mother, or she may carry the pregnancy to deliver after having an embryo, to which she has no genetic relationship, transferred to her uterus⁷. This procedure is legal in several countries including in India where due to high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "Wombs for rent", "outsourced pregnancies" or "baby farm" Surrogacy is commercial or altruistic depending on whether the surrogate receives financial reward for her pregnancy or the relinquishment of the child, or not.

Moreover Feminists have denounced surrogacy as ultimate form of medicalization, commodification and technological colonization of female body and as a prostitution and slavery resulting from the economic and patriarchal exploitation of woman. The true incidence of the

⁴ Anu, Pawan Kumar et al., Surrogacy and Women's Right to Health in India: Issues and Perspective, Indian Journal of Public Health, (Volume 57, Issue 2, April-June, 2011)

⁵ 228th Law commission report (August 2009)

⁶ State Conference on "Secure Women For Secure State" (25th & 26th August 2012) 35

⁷ *Ibid*

surrogacy is unknown, though it seems likely that amount of emotion expended upon it is out of all proportion to the extent to which people would and do resort to it in order to have children. Artificial reproduction gives childless families a chance to fulfil a basic human need that would otherwise be impossible to achieve. However, surrogacy contracts raise several critical questions abortion being one of them⁸. But surrogacy, together with abortion, rises in perhaps starkest from the questions of a) the extent to which women should be free to exploit and control their reproductive capacity, even when they have no wish to raise a child themselves. b) the degree to which orders should be able to call upon the reproductive capacity, to fulfil their own needs.⁹

On the note of defining surrogacy it may be very well noted here that surrogacy is of three broad types:¹⁰

- Traditional Surrogacy- It involves the artificial insemination of the surrogate mother by using the sperm of the intended father.
- Gestational Surrogacy- This sort of surrogacy involves the creation of an embryo in a Petri dish and its implementation into the womb of the surrogate mother who carries it to the term.
- Donor Surrogacy- In donor surrogacy there is no genetic relationship between the child and the intended parents as the surrogate is inseminated with the sperm, not of the intended father but of an outside donor.

There is a growing demand for fair skinned¹¹, educated young women to become surrogate mothers for foreign couples. Often, couples have to wait for as long as eight months to a year for their turn. Normally women from small towns are selected for outsourcing pregnancy¹² It is of great notion that at birth, the child is turned over to the individual or couple, either privately or through a legal adoption process. Couples with fertility problem, same sex couples, and single people who wish to be parents are the most common types of people who seek to surrogate mother.

⁸ *Ibid*

⁹ Douglas Gillian, " *Law Fertility and Reproduction*", (1991, London, Sweet and Maxwell) 141-142

¹⁰ Surrogacy & its Legal Aspect available at < <http://Legalsutra.Org/1561/surrogacy-And-Its-Legal-aspect>> accessed on 12/01/2015

¹¹ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, 35 *Journal of Women in Culture and Society* 2013

¹² *Ibid*

Every country in the world has a different standpoint on surrogacy. The Indian society and legal system differs from the rest of the world. The concept of surrogacy is not a new phenomenon in India. Way back in 1978, the concept of surrogacy was known to the Indian culture when the World's second and India's first IVF (in vitro fertilization) baby kanupriya was born in Kolkata on 3rd, Oct, 1978 just two months after the birth of the World's first IVF boy, Louise Brown in Great Britain on 25th July 1978¹³. The first "official" legal surrogacy agreement was enacted in the mid-1970 with the child who was referred to as Baby M. The same lawyer who brokered this agreement went on to found the Infertility Centre, a company that arranges hundreds of surrogate births every year. In the last few years India has emerged as a leading International destination for surrogacy. Dubbed by many as fertility tourism, India surrogacy is a popular choice for couples from industrialized nations because of the much lower costs involved in renting a womb. Surrogacy in India is estimated to be 445 \$ million a year industry and looks set to grow even more.¹⁴

Commercial surrogacy has been banned in several countries such as United Kingdom¹⁵, Finland, Canada¹⁶, France¹⁷, Hungary, Iceland, Italy, Pakistan, and Serbia. However, in India, it has been legal since 2002¹⁸ and by 2012 turned into a booming industry worth \$2.5 billion¹⁹ India has probably recorded the biggest growth in Assisted Reproductive Technology (ART) centres and the number of ART cycles being performed in our country has steadily raised over the last decade²⁰. Factors such as illiteracy, gender inequality, and poverty have led to this sudden upsurge.

¹³ Ibid

¹⁴ Surrogacy In India, "*Commercial Surrogacy in India is Morally accepted*" available at <www.Britishcouncil.org.in/debetaingmattersIndia/.../surrogacy.Doc> accessed on 14/01/2015

¹⁵ European Centre for Law and Justice, Surrogacy Motherhood: A Violation of Human Rights, (Report Presented at the Council of Europe, Strasbourg, April 26, 2012)

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Surrogacy Arrangement Act, 1985

¹⁹ Assisted Human Reproduction Act, S.C. 2004, c.2

²⁰ French Civil Code, 1804

2. AMERICAN HISTORY OF SURROGACY: CONCEPTUAL ANALYSIS

Surrogacy is not just a late twentieth century phenomenon in American history. Arguably, all African American slave women before the Civil war were surrogate mothers for their American history. Arguably, all African American slave women before the Civil War were surrogate mothers for their owners, gestating and giving birth to children who would not belong to them but become the property of their masters. Indeed, in one famous case a slave woman who had been kidnapped from Illinois and sold into slavery in Mississippi, sued and won, first her own freedom and then custody of her teenage daughter²¹.

In the United States surrogacy is governed at the state level. In the aftermath of the infamous *Baby M case*²² in the late 1980s in which a "traditional surrogate" decided to renege on her surrogacy contract and fight to keep the genetically related baby she has carried a number of state legislatures passed laws prohibiting surrogacy to ensure that a similar scenario would never be repeated. Arizona led the pack, passing a law that made surrogacy contracts void and against the public policy. Such reasoning led to decisions such as the Baby M. case, discussed below-

In the early seventies, a California couple placed an advertisement in a local newspaper seeking a woman to bear a child for them through artificial insemination. A woman answered the ad and agreed to bear the couple's child in return for a fee of \$7,000 and a \$3000 in legal and medical expenses. When word about the arrangement got out, a Michigan couple approached a local become known as the father of surrogate motherhood, and asked him lawyer, Noel Keane, who was to help them find a surrogate and negotiate a similar deal for them. To figure out the legal parameters of the law in this area, Keane wrote inquiries to the State Attorney General, a judge and a doctor only the judge responded, expressing the opinion that having a surrogate agrees to be

²¹ Anita L. Allen, "The Black Surrogate Mother," (Harv Black Letter L. J. 17, 17 (1991)) 8

²² 537 A.2d 1227, 109 N.J. 396 (N.J. 1988)

inseminated, carry a baby to term and give up her parental rights to the child upon birth in favour of the contracting couple was perfectly legal under Michigan law²³, as was the payment of the surrogate's expenses, but that payment of a fee for the service of gestating the child would be considered illegal. Frustrated by the ban on compensation to surrogates, Keane eventually began sending couples to Kentucky, which had no such prohibition. Keane's work served to make surrogacy widely known and popular for infertile couples²⁴.

Due to the implication of having federal set up, United States has varied laws on surrogacy, but over all they seem to have promoted a laissez faire approach towards legislatively regulating surrogacy arrangements. Out of the range of the provisions mentioned above, the best practices which can be imbibed in the Indian context include the right to elect to keep the child by the surrogate mother, focus of consent on all parties involved, making it one of the mandatory aspects of the contract, which is to be ensured via a pre arrangements findings of the court, or because of the high case load and backlog of cases in India, through an independent agency created only for these purposes. Not only this should the parties be given choice to decide while framing the contract as to who is to bear the medical costs involved, instead of making the commissioning parents bear this cost under all circumstances.

The New Jersey court ruled that the surrogacy contract was invalid and unenforceable according to the state statutes and public policy. Custody was determined on the basis of 'best interest of the child' analysis. At least in New Jersey, *the Baby M* ruling continues as precedent. In 2009, New Jersey Superior Court ruled that *In re Baby M* applies to gestational surrogacy as well as traditional surrogacy cases

2.1 SURROGACY LAWS IN UNITED STATES: AN OVERVIEW

This part of the paper throws light on the striking characteristics of the legislations relating to ART (Assisted Reproductive Technology) and surrogacy in United States. Unlike the UK, there is no uniform national position on surrogacy in the USA²⁵. In USA, surrogacy is governed by disparate state laws which fall into four broad categories of legal policy 1) prohibition 2) inaction

²³ Michigan is one of the states in USA.

²⁴ Lisa L. Behm, Legal, "Moral and International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States," (DePaul. J. Health Care L. 557, 561-562 (1999)) 2

²⁵ Rachel Cook and Shelley Day Sclater "Surrogate Motherhood- International Perspective" (2003) 2

3) status regulation and 4) Contractual ordering²⁶. The USA's Law on Surrogacy is very complicated as different states have different laws. The law of surrogate motherhood in the United States varies from state to state. In some states, surrogacy is banned and in some it can be enforced. Since USA is a federal country, liberty is given to states to legislate on surrogacy. The US Supreme Court could base central legislations on the commerce clause, substantive due process or as the right to surrogacy being a subset of the right to procreations²⁷.

United States Supreme Court presents the various legal theories and used to decide parenthood disputes arising from surrogacy contracts. Moreover in US, there is no overwhelming Act on surrogacy, apart from an American Bar Association Model Act Governing Assisted Reproductive Technology, 2008²⁸, which promoted the case for uniform law²⁹. With respect to ART (Assisted Reproductive Technology), while most states law down the eligibility criterion as heterosexual couples, few states have omitted the use of the word 'married' from the Acts, thereby, allowing unmarried women to be the recipient of techniques like artificial insemination³⁰. The focal point of ART legislations is the issue of parentage of the child born out of ART. In the majority of states, when the husband of the women consents to the use of the technique, he is deemed to be the natural father, instead of the sperm donor. In *Delaware & New Mexico*³¹, the interest of the donor are interesting taken into account, wherein the intention and the written consent, respectively, of the donor to parent the child, are taken as rationale to grant him with the status of natural father. As regards the legal mother, the legal assumptions in most states is that if at the time of birth of the child, the married couple consents, they are taken as the legal parents. While the Uniform Parentage Act, 1973, along with legislations in few states, impliedly grants

²⁶ For a detailed description of several models of state policy in the surrogacy context, see US Congress, Office of Technology Assessment, *Infertility: Medical and Social choices* (1988)

²⁷ *Ibid*

²⁸ American Bar Association, American Bar Association, Model Act Governing, Assisted Reproductive technology, 2008 A.B.A. sec Fam L Committee report & Generic Tech, Available at <<http://www.abnet.org/family/committees/artmodelact.pdf>> accessed on 31/3/2015

²⁹ Aruna Nigam et al., *Surrogacy: An Indian Perspective*, Tropical Clinics of Obstetrics and Gynecology, available at: <http://www.tcoj.in/articles/1/1/surrogacy-an-indian-perspective.html#10>, Published on Oct. 7, 2013

³⁰ As Interpreted In The California And Colorado Courts. See *Jordan C V Mary K 224 Cal Rptr* (Californian Ct of App, 1986), *The Colorado Supreme Court*, 1989) 530

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eligibility to unmarried women, they do not specifically define the rights of ‘A donors’, which may lead to ambiguity in the legal percentage of the child, culminating in paternity suits³².

The interrelation between ART and surrogacy legislations is evidenced from the fact that while some states authorize surrogacy contracts and others do not, some states do not differentiate between traditional and gestational surrogacy in their legislative endeavours. The draft of Assisted Reproductive Technology (ART) Bill to regulate surrogacy which was introduced in Parliament in 2010 made an attempt to resolve the issue of abortion by mandating 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 pregnancy³³ thus offering some legal “guarantee” to the commissioning parents³⁴. Thus, the laws relating to surrogacy provides for an anti abortion clause which raises the question about the enforcement of right to abort by the surrogate in advance and the remedies to the parties in the event of such a breach.

Some states have enacted comprehensive statutes that recognize and regulate surrogacy, authorising court approved surrogacy contracts that contain mandatory terms and create preordained statute relationship³⁵. More fundamentally, if the constitutional right to procreate did require court enforcement of surrogacy contracts, recognition of such an expansive right to procure would diminish other constitutional right and also disregard the constitutional rights of others. As a result, the right to reproduce does not necessarily entail the right to rear one’s biological child.

³²The Colorado Supreme Court found that although the Legislative Scheme Protected Unmarried Women Paternity Suits by Unknown Donors, The provisions As Applied to the Rights Known Donors and Unmarried Women Was Ambiguous (Colorado Supreme Court, 1989) 35

³³Akker, Olga : “A Longitudinal Pre-Pregnancy to Post-Delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers: Confidence and Genealogy”, (26 J Psychosomatic Obstetrics & Gynaecology) 277

³⁴ *Ibid*

³⁵ These states include Florida, New Hampshire and Virginia, (See eg, Fla. State Anna 742.16, 1996)

3. SURROGACY LAWS IN UK: AN ANALYSIS

• HUMAN FERTILIZATION AND EMBRYOLOGY ACT, 1990:

The Human Fertilization and Embryology, (HEF, Act 1990) applies to all of the United Kingdom and is the Act which regulates parental orders. Other aspects of Surrogacy are regulated by the Surrogacy Arrangements Act 1998. There are no international agreements or Conventions which regulates how surrogacy should be managed between countries so anyone considering entering into an inter country surrogacy arrangements must remember that if they reside in the UK, they are subject to UK law and the definitions which underlie it. In England and Wales as such is not illegal. Neither the intended parents nor the surrogate commit an offence. However, it is illegal on the part of the person who does it for commercial purpose³⁶. Surrogacy is legal in the UK, although the law does not recognise it as a binding agreement on either of the parties involved during the period preceding and immediately after the birth of the child³⁷. In fact UK couples who are planning a child through surrogacy are looking abroad to countries where surrogacy is legal. This then entails complicated issues of international family law and immigration law in an area of law that is ready complex and does not reflect clearly the reality of the situation³⁸. Treatment by a Vitro Fertilization surrogacy is accepted in the UK for appropriate indications. Moreover it is recognized that in depth counselling is essential for the preparations of couples for the treatment.

³⁶ S.2 of Surrogacy Arrangements Act 1985(1) No person shall on a commercial basis do any of the following acts in the United kingdom, that is-

A) Initiate or take part in any negotiations with a view to the making of a surrogacy arrangements and no person shall in the UK knowingly cause another to any of the act of surrogacy on a commercial basis.

³⁷Legal Issues & Surrogacy Laws available at <<http://www.britishsurrogacycentre.com/legalissues/>> accessed on 15/01/2015

³⁸Alternative Family Law children, International surrogacy available at <<http://www.alternativefamilylaw.co.uk/en/children/international-surrogacy.htm#4>> accessed On 15/01/2015

The Surrogacy Arrangements Act 1985, which was hastily drafted following concerns raised by the "Baby Cotton Case" (box), prohibits commercial (but not voluntary) surrogacy agencies and outlaws advertising for or about surrogacy.³⁹ Only the commissioning couples and the host surrogate may initiate, negotiate, or compile information to make a surrogacy arrangement. The act does not prohibit payments to surrogate mothers. It has been supplemented by clauses relating surrogacy in the Human Fertilisation and Embryology Act 1990, which restricted "licensable activity" to premises licensed by the Human Fertilisation and Embryology Authority.⁴⁰ These activities include the creation or use of an embryo outside the body and the use of donated eggs, sperm, or embryos. The Human Fertilisation and Embryology Act 1990 clarified uncertainties about the legal status of surrogacy contracts by unambiguously declaring them unenforced able in law (section 36). It clarified the issue of legal parentage by defining the child's legal mother as the woman carrying it, regardless of whether mother and child are genetically related (section 27). These two sections of the act ensure that if the surrogate host changes her mind and decides to keep the child she is legally entitled to do so. If the commissioning couple decide to reject the child it remains the legal responsibility of the host the act also defines the legal paternity of the child.

³⁹ British Medical Association Annual Representative Meeting Report (1987. BMJ 1985;295(suppl))

⁴⁰ British Medical Association Surrogate motherhood Report of the board of science and education (London: BMA Publications, 1987)

4. SURROGACY LAW IN INDIA: AN OVERVIEW

INTRODUCTION:

According to a survey conducted in 2011, pregnancy outsourcing is a 20 billion rupee industry in India, and is expected to increase to two and half times that in 2012⁴¹. As one of the world's outsourcing destinations, India capitalizes on its comparative advantages to play host to a variety of Foreign Service sectors. But in addition to attracting commonplace jobs such as information technology (IT) services, India in recent years has seen a dramatic increase in its international surrogacy business, which serves foreign couples seeking surrogate mother⁴².

Commercial surrogacy is legal in India. Surrogacy in India is unregulated as they yet do not have legislations controlling surrogacy although the Indian Council of Medical Research (ICMR) has set "National Guidelines"⁴³ to regulate surrogacy, these are simply guidelines. This means that surrogate mothers need to sign a "contract" with the childless couple. Moreover there are no stipulations as to what will happen if this "contract" is violated. Whether these contracts are enforceable is debatable. Furthermore, the tempting salary has brought many willing Indian women from all regions of the country to fertility clinics in major cities. Agreeing to carry and deliver a baby may result in new houses, debt repayment, or even investments for their own children's future.

In India, under sec 23 of the Indian Contract Act, 1872 a surrogate agreement may be declared void on the considerations being immoral or against public policy.⁴⁴ Not only this but also the concept of surrogacy being amalgamated in Indian society as a commercial vehicle and surrogate

⁴¹ Divya Gupta, " *Inside India's Surrogacy Industry*", (Guardian Weekly, 6th December, 2011) 56

⁴² Womb For Rent, Mina Chang Available at <<http://www.jstor.org/stable/pdfplus/42763262.pdf?acceptTC=true>> accessed on 16/01/2015

⁴³ National Guidelines for Accreditation, Supervision and Regulations of ART clinics in India (2005, ICMR, New Delhi)

⁴⁴ Sec 23 what considerations and objects are lawful.

tourism for the foreign couples. The cost is substantially less than they would spend in developed countries like the USA and the UK. There is no paper work involved, the couples don't have to go through the lawyers, and it's a clean issue, there is no litigation⁴⁵. The legal perspective on surrogacy has to be essentially coloured by moral & ethical overtones on which the public policy considerations are grounded. Since the courts need to fight with such issue, it is important to delineate the major ethical issues involved⁴⁶.

4.1 LAWS IN INDIA: RISE OF SURROGACY

To understand surrogacy in the Indian context, one must begin with the fact that, while the Transplantation of Human Organs Act, 1994 banned the sale of human organs, organ loaning an equally difficult and risky venture is being promoted through paid surrogacy. This is due to a medical industry that welcomes profitable international ventures like "reproductive tourism", even when infertility constitutes a small segment of domestic priorities⁴⁷. The incidence of total infertility in India is estimated at 8 to 10%, and for the vast majority of Indian women it is preventable as it is caused by poor health, nutrition, maternity services and high levels of infections. Only about 2% of Indian women suffer from "primary" infertility which is amenable to art alone. Moreover, it is further reported that among the cases of women who come for art treatment, barely 1% require surrogacy assistance. Because art amplifies deep-seated notions of "blood", now bolstered by genetics, it tends to overshadow safer, cheaper and more progressive options like adoption, art clinics do not provide reliable information about low rates of success, the probability of multiple pregnancies and the high possibility of foetal abnormalities instead they promote false and unethical claims to the client. The starting point for tackling the question of surrogacy lies in recognising that this new technology splits up older notions of natural reproduction into three parts social parents, a gestational mother, and the genetic matter that links the first two. While it is usually the case that one or both of the subsequent social parents are also donors of gametes, the possibility cannot be ruled out that both egg and sperm donation are from other sources.

⁴⁵ India's surrogate mother industry, By Poonam Taneja, BBC, News (2010)

⁴⁶ Sharma Raghav, " *An International , Moral & Legal Perspective: The Call For Legalization of Surrogacy In India* " (2011, NLU- Law Journal 2000) 1

⁴⁷ The Business & Ethics of Surrogacy Available at

<<http://www.jstor.org/stable/pdfplus/40278374.pdf?acceptTC=true> > accessed on 15/01/2015

The main reason behind the position of India as a favourite surrogacy destinations and provides fact like “The usual fee is around \$ 25,000 to \$ 30,000 in India which is around 1/3rd of that developed countries like USA. Another most important reason for India surrogacy as having emerged as a popular choice is the low expenditure involved and improved techniques. Indian surrogacy clinics charge roughly a third of the price compared to a surrogacy procedure in a western country. Never the less the concept of surrogacy, the possible motivations behind its practice and the verity of forms it may take is described by Gillian Douglas, “Surrogacy has received more adverse criticism than any of the other ‘new’ reproductive techniques. It was first to receive legislative attention in the year 1985. The main object behind endorsement of surrogacy law is still unknown but it seems likely that the amount of emotion expanded upon it is out of all proportions to the extent to which people would and do resort to it in order to have children.

The Draft Assisted Reproductive Technology Regulation Bill and Rules (2008) intends to regulate an "industry" in India that has been expanding by leaps and bounds, mainly on account of a growing demand by foreign couples in search of relatively cheap surrogacy arrangements. This commentary argues that there has been next to no public debate on the ethical, social and medical questions around infertility and surrogacy in our context, and makes a beginning in this direction. Thanks to pressure from women's groups the draft has now been placed on the web site of the Indian Council of Medical Research for comments.

A) Law Commission of India’s Report on surrogacy:

The Draft Assisted Reproductive Technology (Regulation) Bill & Rules 2008:

Certain observations were made on the draft inn this Law Commission Report. The observations are given below:

- (ICMR) has come out with a draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008. The draft Bill contains 50 clauses under nine chapters.
- The Bill acknowledges surrogacy agreements and their legal enforceability. This will ensure that surrogacy agreements are treated as on par with other contracts and the principles of the Indian Contract Act, 1872 and other laws will be applicable to these kinds of agreements. The Bill provides that single person may also go for surrogacy arrangements.

- The Bill provides that a foreigner or foreign couple not resident of India or 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 is delivered to the foreigner and foreign couple.
- The Bill further provides that a couple or an individual shall not have the services of more than one surrogate at any given time. Couples shall also not have simultaneous transfer of embryos in the women and in the surrogate.
- Not but not the least the Bill also provides that the child born to a married couple or single person through the use of ART shall be presumed to be the 17 legitimate child of the couple or the single person, as the case may be.

However, in India there is no specific law on surrogacy. In other sense we can say that there is no uniform law on pre requisites of commercial surrogacy. The growing demand for surrogacy in India has also raised the issue, including those of the child rights.⁴⁸ This lead to the government drafting a bill which is called as “Assisted reproductive Technology Bill, 2008”⁴⁹ but the draft is still pending with the Union Law Minister, whose approval will take it to the Union cabinet before being presented in the Indian Parliament.

B) Indian Council of Medical Research Guidelines, 2005

The Indian Council for Medical Research has given Guidelines in the year 2005 regulating Assisted Reproductive Technology procedures. In the absence of any law to govern surrogacy, the Indian Council of Medical Research Guidelines, 2005 for accreditation, supervision and regulation of ART clinics in India are often violated. Exploitation, extortion and ethical abuses in

⁴⁸India’s Legislations of Commercial Surrogacy, available at <<http://Www.Indiansurrogacy.com/Item/India-Legislationsof-Commercial-Surrogacy.Html>> accessed on 16/01/2015

⁴⁹ The Proposed Legislation Provide For The Following-

- a) A cap on the age of the surrogate mother: The surrogate mother must not carry more than five pregnancies to term and mandate medical insurance during pregnancy.
- b) It will prohibit any sort of contract between surrogate mother and child after birth and any such contract is punishable by a fine or imprisonment for up to two years.
- c) Foreign couples should provide proof that the child Born to a surrogate mother will automatically get the citizenship of the intended parent’s home country: This includes registering with their embassy or High Commission in India, and providing a signed and notarised statement accepting the terms as lay out by the law.
- d) It proposes to set up a database of surrogate mothers throughout the country.
- e) It will limit the role of those monitor clinics to conducting the actual IVF procedure as opposed to their current role of arranging the entire process.

surrogacy trafficking are widespread and surrogate mothers are misused with impunity. Therefore, following observation had been made by the Law Commission:

- 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.
- 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.
- One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- Legislations itself should recognize a surrogate child to be the legitimate child of the commissioning parents(s) without there being any need for adoption or even declaration of guardian.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only. Right to privacy of donor as well as surrogate mother should be protected.
- Sex relative surrogacy should be prohibited
- Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

C) Article 16.1 of the Universal Declaration of Human Rights 1948⁵⁰

1. 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. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

⁵⁰Claiming Human Rights- Relating to Human Right Violation available at
< http://www.claiminghumanrights.org/udhr_article_16.html>

2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State

5. JUDICIAL TREND IN INDIA ON SURROGACY

The India surrogacy journey can be said to have actually begun in 2002, when the Supreme Court, the apex Court of the Country, acknowledged commercial surrogacy in India as a legal, even though India's first surrogate baby was delivered on June 23rd, 1994.⁵¹

Subsequently, by virtue of **Baby Manji Yamada V/s Union of India**⁵² in this case Baby Manji was born to a surrogate mother through in vitro fertilization using a Japanese man's sperm and an egg from an unknown donor at Anand. In less than a month, 'Baby Manji' has already seen fierce legal battles in two constitutional courts, Rajasthan High Court and now in Supreme Court, where an NGO has raised questions on legal propriety of surrogacy and the child's nationality. Anxious for the outcome are her Japanese father and grandmother. Therefore the writ of Habeas Corpus has been filed claiming that money making racket is perpetuated in the name of the surrogacy. Therefore, Apex Court held that commercial surrogacy is permitted in India and consequently that has increased the international confidence in going in for surrogacy in India.

Very recently, in the case of **Jan Balaz V/s Union of India**⁵³ the Gujarat High Court has come to a decision that the child born in India to a surrogate mother, an Indian national whose biological father is a foreign national, would get citizenship in India by birth. Emotional and legal relationship of the surrogate child with biological parents, moral and ethical issues is vital importance. The crux of this case is that the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand districts.

The Division bench of the HC comprising Justice K.S Radhakrishnan and A.S. Dave, in this landmark judgement observed that a comprehensive legislations defining the rights of the child born out of surrogacy agreement, rights and responsibilities of a surrogate mother, egg donor,

⁵¹Indian Surrogacy Journey (Smith,2011) available at <<http://www.surrogacyclinics.com/tag/Commercial-Surrogacy-In-India>> accessed on 17/01/2015

⁵² JT 2008 (11)SCC 150

⁵³ AIR 2010 Gujarat 21

commissioning parties, legal validity of the agreement, the parent child relationship, responsibilities of the Infertility clinic was also required. Upholding the citizenship rights of the boys, the Court said: “we, in the present legal framework, have no other go but to hold that the babies born in India to gestational surrogate are citizens of this country and therefore entitled to get the passport and therefore direct the passport authorities to release the passport withdraw from forth with.”

It is aptly pointed out in the 228th Law Commission Report that in **Javed V/s State of Haryana**⁵⁴, though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati 12 Raj election it refrained from stating that the right to procreation is not a basic right.

The judiciary in India has too recognized the reproductive rights. In **B.K. Parthasarathi V/s Government of Andhra Pradesh**⁵⁵, An important question of law as to the constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is raised in these writ petitions. In all these three writ petitions, the individual petitioner is either an elected Chairman or some other office bearer of one of the local bodies created under the Andhra Pradesh Panchayat Raj Act, 1994. The "right of privacy" as a constitutionally protected right is not to be found in the express language of the Constitution of India. However, the said right is recognized as a facet of Article 21 of the Constitution of India. The High Court of Andhra Pradesh subsequently held that ‘the right of reproductive autonomy’ of an individual is his ‘right to privacy’.

In order to legalize the act of surrogacy it is very well said by Kerala High Court in its latest judgement **P Geetha Nagar V/s Kerela Live stock development Board**⁵⁶ held that ‘even in the absence of statutory frame work, surrogacy in India is not illegal, thus the country becoming a favourite destination for international destitute of children. Before referring to the specifics, it is appropriate to appreciate the essential terminology employed in this field.

⁵⁴ (2003) 8 SCC 369.

⁵⁵ AIR 2000 AP 156

⁵⁶ WP(C).No. 20680 of 2014 (H)

6. CONCLUSION AND SUGGESTIONS

Several western countries such as USA, UK, Germany and Australia have legislated in this area and the case law and principles regarding paternity, legitimacy of children, status of frozen pre embryos, surrogacy contracts are more or less settled. As far as the Indian scenario is concerned, to deal with legal pre requisites for a commercial surrogacy, there is no uniform law in India till date. The growing demand for surrogacy in India has raised various issues which include rights of surrogate mother, rights of infertile parents, enforcement of surrogacy contract etc. Surrogate motherhood is a term referred to an arrangement in which a woman becomes pregnant for the sole purpose of having a child that another couple will raise. Surrogacy is not a simple arrangement; it is extremely complex. The relationship can be stressful, overwhelming and intense, patience and perseverance are must.

With the advancement in the technology and medical sciences, to avoid the intricate complications arising to surrogate mother should not be neglected. Legitimacy of the child is another important aspect that needs to be dealt. The Draft Assisted Reproductive Technology (Regulation) Bill & Rules 2008 lacks the creation of a specialist legal authority for adjudications and determination of legal rights of the parties by a judicial verdict and falls in conflict with the existing laws. These problem need to be examined closely before enacting the legislations. Moreover, in the absence of any comprehensive law in the area it may give rise many immoral practices, legal complexities etc.

The 228th Law Commission Report of India also recommends for the need for legislations in India to regulate the assisted reproductive technology clinics as well as the rights and obligations of the parties to surrogacy. So many emotional and psychological issues are involved in the surrogate arrangement. Complete ban of the surrogacy may be irrational but the commercialization of surrogacy is a social obstacle and legal challenge and ignominy in the society like India. Various instances on these dilemmas are vulnerable to imperfection due to equally convincing counter arguments, and therefore law need to strike a delicate balance, not attempting to take sides on the moral battle front, but by devising a framework in light of various

interests involved. Finally, “Women as conscious, moral, social and political being is also woman as economic being. We cannot separate ourselves from our economic existence or ignore the value of our reproductive powers. The failure to acknowledge labor is blind folly for those who wish for equity in women’s social situation.”⁵⁷ Even at last we can say that the good step was taken by Union Home Ministry in the year 2013 to regulate surrogacy in India and this would definitely enhance the mindset of people for surrogacy.

SUGGESTIONS

- Personal laws governing the surrogate child’s right needs to be amend.
- Paramount consideration should be given to the welfare of the child
- Commercial surrogacy should not be legalised fully, only right to enjoy parenthood should be there.
- The Artificial Reproductive Technology clinics and practice should be regulated by the proper legislations.
- Most importantly, the rights and obligations of the biological parents, surrogate mother should be determined by the statute not by the contract. Such a socially sensitive issue should not be regulated by contractual relations.
- There is need to re draft the ART Bill in compliance with public policy.

⁵⁷ Christian L. Kieran , “*Surrogacy: A Last Resort Alternative for Infertile Women or A Commodification of Women’s Bodies & Children*”, (1997, London Women’s Law Journal) 113

BIBLIOGRAPHY:

BOOKS & ARTICLE:

1. Malhotra Anil & Malhotra Ranjit *Surrogacy in India* (Universal Law Publishing Co 2013)
2. Douglas Gillian, “ *Law Fertility and Reproduction*”, (1991, London, Sweet and Maxwell)
3. Anita L. Allen, “*The Black Surrogate Mother*,” (Harv Black Letter L. J. 17, 17 ,1991)
4. Andrews, L. B., “*New Conceptions: A Consumer's Guide to the Newest Infertility Treatments including In Vitro Fertilization*” Artificial Insemination, and Surrogate Motherhood (1984).
5. Blank, R., “*Redefining Human Life: Reproductive Technologies and Social Policy*” (1984)
6. Buchanan, J., “*Baby "M" and Surrogate Motherhood: A Resource Guide*” (1987).
7. Council for Science and Society Staff, *Human Procreation: Ethical Aspects of the New Techniques* (1984).
8. Higginson, R., “*Reply to Warnock (1986). On the Problem of Surrogate Parenthood: Analyzing the Baby 'M' Case*” (H. Richardson ed. 1987).
9. Rees, N., C. Thaler & K. Hamod “*Adoption, Surrogate Mothers, and Other Legal and Medical Remedies for Infertility*” (1986).
10. *Surrogacy and the Best Interests of the Child*, 16 Fam. Law. 59 (1986)
11. Organ, *Making Motherhood Male: Surrogacy and the Moral Economy of Women*, 12 J.L. & Soc. 219 (1985).

URL:

1. <<http://Legalsutra.Org/1561/surrogacy-And-Its-Legal-aspect>>
2. <<http://Www.surrogacyclinics.com/tag/Commercial-Surrogacy-In-India>>
3. <<http://Www.Indiansurrogacy.com/Item/India-Legislationsof -Commercial-Surrogacy.Html>>
4. <<http://Www.Abnet.Org/Family/Commilites/ Artmodelact.pdf>>
5. <www.Britishcouncil.org.in/debetaingmattersIndia/.../surrogacy.Doc>
6. <<http://www.jstor.org/stable/pdfplus/40278374.pdf?acceptTC=true>>
