CHAPTER V

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“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

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 couple. 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 health. 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 desert. 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 rights. 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.

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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*. Surrogate motherhood, however, is an ancient concept. For example, the Bible notes two occasions where surrogate mothers provided infertile women with children.

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 child.

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.” 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 money.

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 home.

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

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10 *Supra* Chapter III.


sperm 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 father.\textsuperscript{15}

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 promises.\textsuperscript{16} 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 center.\textsuperscript{17} 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


genetic relationship to the child, but simply provides a womb for the development of the child\textsuperscript{18}.

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 mother\textsuperscript{19}. 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


\textsuperscript{19} Supra n. 13.
subject to significant legal risks\textsuperscript{20}. Surrogate motherhood has been criticized as presenting intolerable risks to women, including physical risks, psychological risks, and symbolic risks such as objectification and commodification\textsuperscript{21}. 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 practices\textsuperscript{22}, while certain countries have permitted altruistic surrogacy\textsuperscript{23}; and some other countries have completely permitted both altruistic and

\textsuperscript{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.
\textsuperscript{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 surrogacy\textsuperscript{24}. 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 Laws\textsuperscript{25}. 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 surrogate\textsuperscript{26}.

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

\textsuperscript{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.


\textsuperscript{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 liberty. 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* 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 case*, the judicial approach was that the scope of liberty under the Indian Constitution is

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27 Supra Chapter II.
28 94 U.S. 113 (1877) (U. S. Supreme Court)
narrower than in the US Constitution and that it was confined only to freedom from detention or personal restraint. However, in *Kharak Singh* case\(^{30}\), 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 residue\(^{31}\)”. 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


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 liberty\textsuperscript{35}. 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 womb\textsuperscript{36}.

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 solitude\textsuperscript{37}. The literal meaning of privacy, as defined in the \textit{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”\textsuperscript{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


is not necessarily concerned\(^{39}\). It is a fundamental human right recognized under both international law\(^{40}\) as well as municipal law of most countries\(^{41}\). 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 cases\(^{42}\) 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 privacy\(^ {44}\). 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.


\(^{43}\) 381 U.S. 479 (1965).

\(^{44}\) *Id.* at p. 484.

\(^{45}\) 405 U.S. 438 (1972).

\(^{46}\) *Id.* at p. 453.

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 decisions\(^51\).

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.  
\(^{52}\) A.I.R. 1975 S.C. 1375.  
\(^{54}\) 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 body\(^{55}\). 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 activities\(^{56}\). 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 body\(^{57}\). 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 limbs\(^{58}\). Referring to this maxim, the UK Court of Appeal observed that, “the common law has always

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\(^{57}\) 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. Benthom* [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 owned. However, this rigid view was diluted when the common law in 1840 recognized the right of the dead to a dignified disposition.

One of the earliest cases relating to this issue is *Regina v. Price*, 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 body. Another relevant case in this direction is *Doodeward v. Spence* 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 body. 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*, 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 protect. 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

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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.).
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\textsuperscript{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 subjects\textsuperscript{68}. 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

\textsuperscript{67} 793 P.2d 479 (Cal. 1990).
\textsuperscript{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 cells. 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 embryos. One of the important cases in this regard is *Hecht v. Superior Court* (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”. 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

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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.


71 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

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


\(^{74}\) *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 civil and criminal laws 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 benefits. 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 right. 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

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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 technology. 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 US, UK, France, Japan, and Germany, 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.

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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.
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.
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 irrelevant 88. 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 child 89. An analysis of the proposed Artificial Reproductive Technology (Regulation) Bill, 2010 90 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 irrelevant\(^91\). 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 donor\(^92\).

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”.

Kristine Casey gave birth to a male baby in 2010. Likewise 56 year old Jaci Dalenberg gave birth to triplet girls in 2008. 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 years while the ICMR Guidelines sets an upper age limit of 45 years. 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 eggs. Likewise, Kristine Casey acted as a surrogate for her infertile daughter by carrying and giving birth to her own grandson. This has however been criticized on the grounds that it leads to incestuous relationships as well as amounts to degrees of prohibited relationships.

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95 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.
In most of the countries marriage between individuals of certain degrees of prohibited relationships are not allowed\textsuperscript{99}. 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 regard\textsuperscript{100}. In India, the \textit{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 surrogate\textsuperscript{101}. The ART Bill, 2010 under Section 34(18) also reiterates the same\textsuperscript{102}. 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 surrogacy\textsuperscript{103}.

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

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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”.

\textsuperscript{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.

\textsuperscript{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 parents\textsuperscript{104}. In another example, Carole Horlock, a surrogate acted 9 times as a surrogate for another\textsuperscript{105}. 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 \textit{ICMR Guidelines} provide that, no woman may act as a surrogate more than thrice in her lifetime\textsuperscript{106}. 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 fit\textsuperscript{107}, 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:


\textsuperscript{105} See, “Surrogate Mother Carole Horlock”, available at \textit{<http://www.incrediblebirths.com/Carole_Horlock-Surrogate.html> Visited on 20.11.2011.}

\textsuperscript{106} See, Para.3.10.8 of \textit{ICMR Guidelines}.

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 husband\textsuperscript{108}. 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 pregnancy\textsuperscript{109}. 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 mother\textsuperscript{110}. 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:

\textbf{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 beliefs\textsuperscript{111}.

\textbf{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 body\textsuperscript{112}. The ART Bill, 2010 and


\textsuperscript{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.allaboutsurrogacy.com/sample _contracts/GScontract2.html> Visited on 20.8.2012.

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 procedures\(^\text{113}\).

\(^{113}\) 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 physician\textsuperscript{114}.

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 period\textsuperscript{115}.

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 foetus\textsuperscript{116}. 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 mother\textsuperscript{117}. The surrogate mother should also refrain from indulging in any work or activity which may affect the child in the womb\textsuperscript{118}. 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

\textsuperscript{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 child\textsuperscript{119}. 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 surrogate\textsuperscript{120}.

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 child\textsuperscript{121}. 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

\textsuperscript{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”.
\textsuperscript{121} Supra n.111.
corresponding right\textsuperscript{122}, 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 care\textsuperscript{123}.

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


of informed consent is that the patient has an opportunity to be an informed participant in his/her health care decisions.\textsuperscript{124}

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 law\textsuperscript{125} and national laws\textsuperscript{126}.

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 agreement.\textsuperscript{127} 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.”\textsuperscript{128}


\textsuperscript{126} For example, Health Care (Consent) and Care Facility (Admission) Act, 1996, Part 2 (British Colombia); Health Care Consent Act, 1996, Section 20 (Ontario); Health and Disability Commissioner Act, 1994, S. 20 (New Zealand).


\textsuperscript{128} See, The ART Bill, 2010, S. 21(1).
Further the violation of this right gives rise to criminal\textsuperscript{129} and tortious liability\textsuperscript{130} 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 countries\textsuperscript{131} 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 surrogacy\textsuperscript{132}. The ICMR Guidelines also states that, all the expenses of the surrogate mother during the period of pregnancy and post-natal care

\textsuperscript{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.

\textsuperscript{130} Under Tort of Assault and Battery.


\textsuperscript{132} See, The ART Bill, 2010, S. 34(2).
relating to pregnancy should be borne by the couple seeking surrogacy. The Guidelines further states that, payments to surrogate mothers should cover all genuine expenses associated with the pregnancy.

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 material or developed embryo to the womb of the surrogate. It is also seen that surrogacy process often results in the woman giving birth to triplets or quadruplets. Thus surrogacy process may involve some complications and pose a risk to the health or life of the surrogate woman. 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 necessity. In fact many of the Indian women are forced to act as surrogates due to reasons of poverty or other economic needs. 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,

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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.
138 Supra n.111 at p. 309. Also see, supra n.1 at p. 40.
2004 which provides for a health insurance policy throughout the pregnancy and for eight weeks after the birth that covers major medical treatments and hospitalization\textsuperscript{141}.

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”\textsuperscript{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 prohibited\textsuperscript{143}, while in some other countries it is allowed\textsuperscript{144}. 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


\textsuperscript{142} See, The ART Bill, S. 34 (24).


\textsuperscript{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 peonage, and no entitlement to control any human being. 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

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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.

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 surrogate\(^ {148}\). 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 surrogate\(^ {149}\). 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 participating\(^ {150}\).

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\(^{147}\) See, The *ICMR Guidelines*, R. 3.5.4.


\(^{149}\) *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 parents\textsuperscript{151}. 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 secret\textsuperscript{152}. 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 marriage\textsuperscript{153}.

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 situations\textsuperscript{154}. 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 jurisdiction\textsuperscript{155}. 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 offence\textsuperscript{156}. The ICMR Guidelines also mentions about confidentiality in ART procedures\textsuperscript{157}.

\textsuperscript{152} See, Chattman 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.
\textsuperscript{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.
\textsuperscript{155} See, S. 34 (12).
\textsuperscript{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”.
\textsuperscript{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 issue\textsuperscript{158}. There is no legal provision directly addressing this issue but in certain cases courts have allowed this right to the surrogate mother\textsuperscript{159}. 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 separation\textsuperscript{160}. However this right should be allowed only if she desires and only with the consent of the intended parents. Moreover, it should be

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\textsuperscript{158} For example, \textit{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 \textit{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 \textit{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.


\textsuperscript{160} Douglas T. Carrell, \textit{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 woman 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 section\(^{161}\) 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 health\(^{162}\).

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 subsection (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.

immediately preceding the date of her expected delivery\textsuperscript{163}. 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,\textsuperscript{164} payment of medical bonus\textsuperscript{165}, leave for miscarriage\textsuperscript{166}, leave with wages for tubectomy operation\textsuperscript{167}, and other leaves\textsuperscript{168}. Further the Act provides for nursing breaks to be allowed to the woman in the course of daily work\textsuperscript{169}. 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 leaves\textsuperscript{170} 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

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\textsuperscript{163} Id. S. 5(2).
\textsuperscript{164} Id. S. 7.
\textsuperscript{165} Id. S. 8.
\textsuperscript{166} Id. S. 9.
\textsuperscript{167} Id. S. 9-A.
\textsuperscript{168} Id. S. 10.
\textsuperscript{169} Id. S. 11.
\textsuperscript{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.