CHAPTER - 4
SURROGACY IN INDIA AND ITS CHALLENGES

4.1 INTRODUCTION

The Biomedical technologies and other scientific advances like Genetic Engineering, Assisted Reproductive Technologies (ARTS), Human Cloning etc., have opened new ways in unimagined dimensions in benefiting the mankind. On practical side with phenomenal growth and social change, particularly in the area of reproduction, in responding to the desire of person to have children as kinship and family lies are dependent on progeny.¹ As social values and norms change, laws too have to be re-interpreted and re-caste, since social change is an important phenomenon of every society because social conditions never remain static. It keeps on changing with the change in society. Social change whether it comes through legislation or through judicial interpretation indicates the change in accepted mode of a better life.

The changing patterns have an impact on laws and life of a given society as law must keep pace with changing socio-economic trends and political movement of the society, while keeping balance between individual rights and public interest. Thus law and justice provide a potential force for attainment of a progressive social change in the larger public interest.

With the advent of the new reproductive technologies, human beings now have the advantage of selecting from a number of options, including Artificial insemination, In-vitro fertilization and Surrogacy. The human procreation can be accomplished through a variety of reproductive technologies that do not involve sexual intercourse. Out of these new technological advancements, surrogacy is arguably the most controversial.² The controversy surrounding surrogacy has been brought to limelight by the leading surrogacy cases all over the world as well as agreement made by legal scholars and commentators. The discussion about this is

important in determining how surrogacy should be dealt with by the legal systems in different countries in future. Most of the issues involved in surrogacy are based on various social, ethical, moral and legal grounds. Admittedly, the influence of ethics, society and morality practices cannot be ruled out in a legal discussion, as morality and ethics have played an important role in shaking the society’s attitude towards legal issues as well as the foundation of most of legal system of the world. The moral and ethical issues to surrogacy are based on the premise that life is the creation of God and human beings should not attempt to play God by interfering in the natural processes. Another issue in this regard is the fact that surrogacy procedure involves repeated trials which use either male or female genetic material or the human embryo. The waste of human embryo is criticized as similar to murder, because according to some scholars, human life begins at fertilization. New reproduction technology no doubt, claims to help human beings through creative interventions that reduce suffering and have the potential to transform the society. But the commercialization of surrogacy however created several social conflicts rather than resolving a few. It generates the family pressure on the indigent women to offer their work for a price. Majority of the women becoming surrogates are extremely vulnerable due to poverty, lack of financial resources, low education levels. For them the financial gain is the main factor. The dilemma faced by the surrogate that they will not be socially accepted is also one of the social issues involved in this process. Another controversial situation arises in surrogacy, as surrogacy treats children as commodities that can be bought or sold for a price. Thus it may be characterized as baby selling, a premise that is totally against a civilized society. Another category of challenges faced in surrogacy are, where the surrogate mothers have refused to accept the child with deformity or due separation of parents.  

Closely linked to such ethical and social questions are a multitude of legal issues concerning surrogacy. One of the main challenges is that there is no law governing surrogacy in India. The Indian council of Medical Research (ICMR) issued National guidelines for Accreditation, supervision and Regulation of ART

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clinics in India in 2005, but the guidelines are legally non-binding. On 5th Aug 2009, the Law Commission of India in its 228th Report has made recommendation to be kept in mind while legislating on surrogacy. Assisted Reproductive Technology (Regulation) Bill was drafted by Ministry of Wealth and Family Welfare, government of India in year 2008, 2010 and 2013 but it has not been yet presented before parliament. Surrogacy in commercial form was formally legalized with Supreme Court Judgment of Baby Manji Yamma v. Union of India reiterated in Jan Balaz V. Anand Municipality.  

Hence surrogacy in India is legitimate because no Indian law prohibits surrogacy to determine the legality of surrogacy agreement. The Indian contract Act 1872 could be applied: But such contract raises serious question such as Are surrogacy contracts enforceable? Are they Illegal? Is the contract counter to public policy? What would be the appropriate damages for the breach of contract? Another legal challenge is related to cross Border surrogacy arrangement. The Issue involved are citizenship, nationality and parentage, where the commissioning parents or parent are beyond the territory of India.

4.2 LEGAL ISSUES INVOLVING SURROGACY

4.2.1 No Specific Legislation

In India, though surrogacy is the latest outsourcing industry and it has become a booming Centre of fertility market with its reproductive tourism; but the government has been very slow in responding to the changing situations. In absence of legislative measures, the Indian Council for Medical Research has come up with certain ethical guidelines for regulating assisted human reproductive technologies in general and it also includes guidelines for surrogacy Research The Indian council for Medical Research guidelines, 2005 was adopted with the main objective to provide ethical guidelines for regulating ART clinics. These guidelines, though are a positive step towards the regulation of surrogacy in India and contain provision for protecting the Interests of surrogate women as well as the child but suffered from many drawbacks. One of the major drawbacks is that these guidelines are non-

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4 AIR 2010 GUJ 21.
binding and voluntary in nature, due to which ART clinics often do not adhere to these directives and thereby potentially compromise on the safety of surrogates.

Another lacuna in the guidelines is that only gestational surrogacy can be practiced in India. Moreover the women can act as a surrogate only for the genetic parents. The guidelines are unclear about the situation where one of the intended parents was not able to contribute the genetic material. The legal question arises whether they can take the help of a donor? This is important, and then gays, lesbians and single individuals want to use surrogacy for begetting a child. An important drawback of the guidelines is that genetic parents name will be mentioned in the birth certificate of surrogate child. Which again raise issue, if intended parent has not contributed the genetic material? The guideline of 2005 are silent regarding the important issues like the minimum age for acting as a surrogate, the previous pregnancies and number of children. Thus though the ICMR guidelines aim towards regulation of ART practice including surrogacy, they are not adequate to protect the interests and rights of all people involved.

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

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6 ICMR, Guidelines, 2005
7 Rule 3.10.2 ICMR Guideline
Realizing the increasing need to regulate ART practices and surrogacy in India, the government, took steps for establishing a binding legal framework. As a result, the assisted Reproductive Technology (Regulation) Bill and Rules, 2008 were drafted. This Bill and Rules were drafted by 15 member committee consisting of experts from ICMR, representatives from Ministry of Health and Family Welfare and ART specialists. However the parliament has failed to adopt it as law.

Keeping in view, the growing need to regulate ART practice and particularly surrogacy the law commission has came forward with its recommendations. The Law commission submitted its 228th Report to the Government of India in August 2009, under the title “Need for legislation to Regulate Assisted Reproductive Technology clinics as well as Rights and obligations of parties to a surrogacy.”9 Thus it was recommended that active intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. Considering the pressing need for a legal frame work, a draft bill was prepared by a 12 member committee, keeping in view the recommendations of the law commission and views of experts from ICMR, Ministry of Health and Family Welfare and specialists in the field of ART. The main objective of The Assisted Reproductive Technology (Regulation) Bill, 2010 was for providing a national framework. For the accreditations and supervision of assisted reproductive technology clinics, for prevention of misuse of ART, for safe and ethical practice of assisted reproductive technology service and for matters connected therewith or incidental thereto.10 However this Bill has not been yet officially enacted as legislation and more over bill fails to address certain complex issues relating to surrogacy and thus suffer from various drawbacks. The Bill legalizes commercial surrogacy and declares that such agreements are legal and enforceable. However the law commission in its 228th Report has recommended that surrogacy arrangement should not be for commercial purposes. Bill is silent about the provisions relating to breach of surrogacy contract and its remedies. There is

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9 This Report was submitted to Union Minister of Law and Justice, Government of India by Dr. Justice A.R Lakshmanan, Chairman, Law Commission on 5th day of Aug 2009.
absence of designated court or judicial forum\textsuperscript{11} to resolve the dispute arising out of surrogacy agreement in Draft Bill of 2010.

The ART Bill mandates that, the persons who initiate surrogacy for begetting a child should accept the child after its birth and any refusal would amount to an offence. However the deterrent effect of this provision is reduced in case of foreign couple/individuals who avail surrogacy service because the Bill mentions that in case of refusal by the intended parents to accept the child, the local guardian appointed by such couple will be responsible to accept the child. Thus the real culprits i.e. the person who initiated the surrogacy can absolve themselves from liability by simply refusing to accept the child. Moreover though there is an offence of refusal to accept, the implementation of punishment would be difficult in such cases as the persons are in foreign countries. Thus a major lacuna in the bill is that, though majority of persons a availing surrogacy in India are from foreign countries the Bill does not contain any provision to compel the persons to stay back in India upto the birth of the child.\textsuperscript{12}

To overcome the lacunas in the Bill of 2010 Department of Health and Family Research, Ministry of Health and Family welfare proposed to enact legislation titled “Assisted Reproductive Technology (Regulation), Bill, 2012.”

Another Bill titled “The Surrogacy (Regulation) Bill, 2014” was introduced by Dr. Kiril Premjibhai Solanki, A member of Parliament from Gujarat.

Thus in the absence of a specific legislation it has become difficult to resolve these issues. It is necessary to address these issues urgently because of the fact that India is fast becoming a hot-step destination for surrogacy. Moreover there are no reliable statistics on how many surrogacy have been arranged in India.

\textbf{4.2.2 Indian Contract Act, 1872}

In the absence of a specific legal provision surrogacy arrangements are covered under India contract Act, 1872. As surrogacy is a lengthy time consuming process which requires sincere cooperation and understanding between the parties so


every surrogacy process involves an agreement between commissioning parents and surrogate women. However, there are no legal provisions directly dealing with surrogacy contracts in India. Therefore when a dispute arises the court will have to decide the case on the basis of traditional contract law and other laws. Such an approach may detrimentally affect the interest of the parties (i.e. commissioning parents and surrogate mother) and also the interest of surrogate children.\textsuperscript{13}

The approaches adopted by different countries towards surrogacy contracts are not uniform. The approaches of the various legal systems can be classified into 3 types (1) prohibition of all types of surrogacy contracts (2) prohibition of only commercial surrogacy contracts.\textsuperscript{14} (3) Allowing both commercial and altruistic contracts. In India all types of surrogacy contracts are considered valid and enforceable\textsuperscript{15} but there are various conflicting issues involved in surrogacy contracts.\textsuperscript{16} Researcher in this present chapter has made an effort to discussed few of the controversial issues arising out of surrogacy contract.

\textbf{4.2.2.1 Enforceability of Surrogacy Contracts}

The question whether surrogacy contracts should be enforced is one of the most controversial issues in the contemporary times. Those who are against these contracts argue that if surrogacy contracts are made enforceable it would lead to potential exploitation of the surrogate, the commoditization of women and children.\textsuperscript{17} In Indian, though surrogacy contract satisfies all the essentials of valid contract such contract are still based on unethical and immoral consideration and leads to pure commercialization of surrogacy.

\textsuperscript{13} For example countries like Austria Germany, Sweden several states of USA which prohibits all forms of surrogacy
\textsuperscript{14} Countries like United Kingdom, Greece, and Denmark etc. prohibit commercial surrogacy.
\textsuperscript{15} These is no law but ICMR Guidelines presuppose the validity of such contract and the surrogacy cases deal with Supreme Court of India
\textsuperscript{17} Larry Gostin, “A Civil Liberties Analysis of surrogacy Arrangement”, 16 Law and Medicine Health care, 1988
4.2.2.2 Comoditization of Motherhood

This issue is based on the premise that when resources are allowed to be exchanged through contract, it requires that the resources be commoditized. Surrogacy contracts are contracts which decide the initiation of procreation and its continuation and culmination with the handing over of the child to the intended parents. Thus it leads to commodity the reproductive ability of a woman. If it involves payment of compensation to the surrogacy women for her service it becomes commercial surrogacy. In such surrogacy surrogate motherhood creates a market for gestational and genetic service because the infertile couples or individual search for a surrogate women and avail her procreative service for helping them in begetting child. This commoditization of reproductive act may prove to be harmful to identity and the dignity of women. As she has been given the status of “Incubator, Breeder Machines or Rented womb.”

4.2.2.3 Baby Selling

One of the serious issues involved in commercial surrogacy is that, it is a form of baby selling. This is based on the premise that the payment of compensation to the surrogate mother is similar to a consideration in contract and the intended parents are purchasing the child. No doubt in non-commercial surrogacy no such payment of compensation is involved but still the medical expenditure, necessity provided to surrogate mother are all indirect form of consideration.

4.2.2.4 Economic exploitation of poor women

Commercial surrogacy contracts, would lead to exploitation of poor women who may be induced to become surrogates because of their own financial need or

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their families. This concept is based on the assumption that financial\textsuperscript{22} necessity could force some poor women to enter into surrogacy agreements which they otherwise would not have entered. Large sums of money could entice such women to become surrogates without truly understanding the nature of process. With increasing demand for surrogate women, middlemen or brokers also come into picture to provide information to both intended parents and clinics. Women involved in surrogacy contract are mostly illiterate and are not aware of their legal rights.

4.2.2.5 Against Public Policy and Trafficking in Women

In India commercial surrogacy is not prohibited. It is one of the most attractive offers for the surrogate mother or her family to enter into surrogacy contracts. But commercial surrogacy converts surrogacy into a business activity which seemingly falls foul of Article 23 of the Constitution of India and section 23 of Indian contract Act, 1872.

Article 23 prohibits trafficking in human being\textsuperscript{23} whereas section 23 of Indian Contract Act, 1872 makes agreement contrary to public policy\textsuperscript{24} unenforceable embracing within its fold such contracts which are likely to deprave, corrupt or injure the public morality. The world traffic connotes an element of trade i.e. buying and selling. i.e. Renting Women womb, baby selling involves traffic in women and children.\textsuperscript{25} In \textit{Rajasthan v. Basant Nahata},\textsuperscript{26} Hon’ble Supreme Court observed that Article 23 of Indian Constitution prohibits trafficking in human beings while section 23, makes agreements contrary to public policy unenforceable embracing within its fold such contracts which are likely to deprave, corrupt or injure the public morality.

4.2.2.6 Nature of Surrogacy Contracts

Whenever dispute regarding surrogacy contract are laid before court, court faces problem regarding what could be the nature of surrogacy contracts? So that


\textsuperscript{23} Narender Kumar, “Constitutional Law India”, Allahabad Law Agency, New Delhi, 2012, p. 384

\textsuperscript{24} Avtar Singh, “Law of Indian Contract and Specific Relief”, Eastern Book company, Lucknow, 2002, Ed. 8th, p.386


\textsuperscript{26} AIR 2005 SC 540.
appropriate remedies are available according to it. Various nature of surrogacy contracts are as follows:

4.2.2.6.1 Sale of Goods Contract

Section 2 of the Sale of Goods Act 1930\textsuperscript{27} defines Good as

(a) All chattels personal other than money or chooses in action and
(b) Emblements, growing and things attached to or forming part of land that are agreed to be served before sale or under contract of sale and
(c) Computer software

A human being does not fit within any of these categories. Additionally the so called “good, cannot exist at the time of the agreement as the child is yet to have been conceived. The baby would have to be considered a future good. But in order to sell a future good, the seller must have a vested right to do so. At the time of agreement a baby will not have been conceived thus the surrogate will have no right over the child and cannot pertain to sell a good that she has no present right to. Therefore upon these grounds it would be unlikely that a surrogacy agreement would be rewarded as a sale of goods contract.

4.2.2.6.2 Contract for Relinquishment of Parental Rights

The guidelines laid down IMCR\textsuperscript{28} as well as drafted Bill of 2010 states that surrogated mother has no legal right to the child. To begin with, genetic parents are named on the birth certificate. In this situation commissioning parents would already retain legal right to shield and the surrogate would have no such right to see. Therefore both present and future of surrogacy contracts formed in India will not be able to be regarded as a contract of the relinquishment of parental rights.

4.2.2.6.3 Employment Contract

An employment contract could form the basis of a surrogacy agreement as the surrogate may be considered to be under the employment of commissioning couple for nine months. However, employment contracts are voluntary contract under which each party enters into upon the knowledge that they can voluntarily

\textsuperscript{27} Section 2, Sale of Good Act, 1908.
\textsuperscript{28} Ministry of Health and Family Welfare, Government of India
terminate the agreement with Notice.\textsuperscript{29} Termination however is not an option in case of surrogacy contract. As surrogate cannot give notice half way through the pregnancy indicating that she no longer wishes to be employed. Nor can intended parents terminate the agreement. Therefore surrogacy contract will not be governed by law of employment.

\textbf{4.2.2.6.4 Contract for Services}

A surrogacy contract is likely to be considered a contract for the provision of services. This is because a surrogate is offering a service for limited period of time for which she freely and voluntary agrees to undertake. Her baby is not sold but her services are hired namely the carrying of an unborn child.\textsuperscript{30} Therefore, courts are likely to treat a surrogacy agreement as a service contract when applying the law.

\textbf{4.2.2.7 Breach of contract}

Surrogacy contract can be considered as valid and enforceable contract under the Indian contract Act 1872. Similar to any other contract, there are chances of breach in a surrogacy contract also. In case of non- fulfillment of promise on the part of either surrogate mother or intended parents would amount to breach of contract and other party would be entitled to take action for remedies under the law.\textsuperscript{31} However due to the peculiar nature of surrogacy arrangement it is very difficult to identify appropriate remedies for any breach in such contract. As in ordinary contract remedies falls under 3 categories namely (1) Damages (2) compensation (3)Specific performance.

\textbf{4.2.2.8 Positive Eugenics}

This is also one of the hassles related to surrogacy contract. The world eugenics indicates the practice of hereditary improvement of the human race by controlled selective breeding. The controversy that surrogacy contracts may lead to promotion of positive eugenics is based on the fear that, in surrogacy the intended


parents selects the surrogate women on the basis of positive attributes she offers as colour, height race, intelligence, athletic ability etc. In this process intended parents pay a huge amount of money for the surrogacy procedure and in case of commercial surrogacy also pay money to surrogate women, they may want a perfect child with particular characteristics. The commercialization of such technologies would encourage and legitimized the practice of eugenics among the more economically privileged members of society.\textsuperscript{32} Even altruistic surrogacy contract may promote positive eugenics.

\textbf{4.2.2.9 Remedy under surrogacy contract}

The surrogacy contract between the surrogate mother and the parents is treated as a simple agreement and is governed by Indian contract Act 1872 and Specific Relief Act1963. Abortion amounts to breach of surrogacy contract. Section 10 of the specific Act, 1963\textsuperscript{33} provides for specific performance of contract in the cases where the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Under section 42 the court may also grant injunction to aid the specific performance of negative agreement contained in the term of contract\textsuperscript{34}. Other relief in case of non-performance of duty is compensation under section 73 of the Indian contract Act, 1872 and specific performance under section21 of the Specific Relief Act, 1963. In measuring the compensation, standard laid down for any ordinary breach under section 73 of Indian contract are taken into consideration by the court.\textsuperscript{35}

The nature and object of surrogacy arrangements that is, help to fulfill the long cherished desire of couple/individual to beget a child with the help of a surrogate in absence of specific legislation dealing with surrogacy contracts will lead to an endless legal battle rather than happy new family.

\textsuperscript{34} Ibid.
4.2.3 Legitimacy of Children under Personal Law

Parentage is the relation of parents with their children. Maternity is a natural and legal relation between mother and child. Paternity is the legal relation between father and child. The term parentage is generally used for the legal relationship, which a child has with the parents. These legal relations give rise to certain rights and duties. Such as mutual right of Inheritance, maintenance and guardianship. Under Indian legal system a child born in lawful wedlock is legitimate and born out of wedlock is illegitimate.\(^{36}\) The condition precedent is lawful marriage and conception during the subsistence of the marriage. Thus the status of children in a family is established by reference to the marital status of their parents. In Indian, legitimacy of children is governed by the personal laws. There is no provision for legitimating under the Indian legal system.\(^{37}\)

The Hindu Marriage Act, 1955\(^{38}\) and Special Marriage Act, 1954\(^{39}\) confers legitimacy on children of void marriage and deny legitimacy to children of other void marriage which falls outside the purview of these Acts. Even under Muslim law, Acknowledgement of Paternity or Legitimacy is important for the purpose of rights of Inheritance and maintenance. It exists in offspring born out of lawful wedlock.\(^{40}\) But a child born through assisted reproductive technology such as surrogacy, AID, IVF etc. will not come under the provision enumerated under any of personal law above mentioned. Hence they will be illegitimate in the absence of any legislation legitimizing the ART children and continue be in conflict with concept of legitimacy under personal law surrogacy versus consummation of Marriage.


\(^{38}\) Section 16 of Hindu Marriage Act, 1955.

\(^{39}\) Section 26 of special Marriage Act, 1954.

4.2.4 Consummation of Marriage

Under Indian Personal Laws\textsuperscript{41}, a marriage is said to be consummated when the parties to marriage have sexual intercourse. This is one of the basis of Indian Marriage system. As in Muslim law object of marriage is legalization of sexual intercourse and procreation of children. Even under Hindu law consorter is essential in deciding certain rights.\textsuperscript{42} However the non-consummation has been considered as one of the grounds for divorce under the Parsi Marriage and Divorce Act, 1936, non consummation within one year of marriage owing to willful refusal of the respondent is ground for divorce\textsuperscript{43} on the same ground one can see for a decree of annulment of marriage under special marriage Act, 1954\textsuperscript{44}. Under Hindu Marriage Act 1955, parties can seek annulment of marriage on non-consummation of marriage due to the impotency of the husband.\textsuperscript{45} But it is more complex in the Muslim law as therein, consummation is presumed in the presence of valid retirement.\textsuperscript{46} Thus for observation of Iddaat, confirmation of Dower, right to maintenance during ideal establishment of paternity, valid retirement has the same effect as the consummation of marriage. But with advancement of Reproductive Technologies Artificial Insemination Donor (AID), surrogacy, etc. what is the status of the child born form husband and wife who never had physical intercourse. Though they have a child which is genetically their but the marriage is not consummated.\textsuperscript{47} Thus it leads to variation between the personal laws and reproductive technology.

4.2.5 Legal Status of Surrogate Child and Indian Evidence Act, 1872

One of the most important and controversial issues affecting a surrogate child is the question regarding the status of child whether the child is legitimate or illegitimate.\textsuperscript{48} In all societies where marriage came to be established as a social

\textsuperscript{41} Paras Diwan, “Family Law”, Allahabad Law Agency, New Delhi, 2013, p. 11
\textsuperscript{43} Section 32 (9) of the Parsi Marriage and Divorce Act, 1936.
\textsuperscript{44} Section 25 (1) of the Special Marriage Act, 1954.
\textsuperscript{45} Section 12 (1) of Hindu marriage Act, 1955.
\textsuperscript{46} Anil Ahmad, “Mohammedan Law”, Central Law Agency, Allahabad, 2008, p. 123
institution, the concept of legitimacy of children is the direct outcome of the concept of marriage.\textsuperscript{49}

In India the issue of legitimacy of child other than personal law is primarily governed by section 112 of Evidence Act, 1872 which declares that birth during marriage shall be conclusive proof of legitimacy. It states that “Any person born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after it’s dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to marriage had no access to each other at any time when he could have been begotten\textsuperscript{50}.

However in a surrogacy arrangement, the intended parent depending upon their medical conditions or other social factors may or may not contribute the genetic material. In situation where that surrogacy arrangement was made by a gay couple or lesbian couple or single individual or where both sperm and egg are taken from donors, the legitimacy of child can be questioned due to the absence of genetic relationship as well as absence of either mother or father. In another situation, where child born to woman or surrogate artificially inseminated with the stored sperms of women husband after the expiry of 280 days.\textsuperscript{51}

These circumstances do not fall within the scope of the existing law of presumption under Indian Evidence Act, 1872. Therefore the law needs to take note of scientific advancements in order to cope with the present situations.

Thus the application of section 112 for determining the legitimacy of surrogate child would create difficulties. In case where surrogate mother is married, her husband has access, a literal interrelation of section 112 shows that the child is the legitimate child of surrogate. However such an interpretation will adversely affect the interest of intended parents as well the child and also the interest of surrogate mother. Hence the provision in the Indian audience act, 1872 has no relevance while determining

\textsuperscript{49} Indu S Nair “ Right of the Child Challenges for Law in New Era of Technology”, 2003, (CULR) 101, p. 115
\textsuperscript{51} National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India. Chapter 3.165 Code of practice, ethical consideration and legal issues.
the legitimacy of surrogate child the Gujrat High Court in Jan Balaz v. Anand Municipality and other,\textsuperscript{52} held that “under Indian Evidence Act, no presumption can be drawn that child born out of surrogate mother is the legitimate child of intended parents.

The Transplantation of Human organ Act, 1994, bans the sale of Human organs, loaning of organs and any commercialization of the trade of human organ. Section 19 of human organs transplant act 1994, prohibition on financial transition in bodily organs.\textsuperscript{53}

In contradiction to this, in surrogacy whether commercial or non-commercial, the sperms eggs and embryo are hired and used. They are also part of human organs.

4.2.6 Law of Adoption and Surrogacy

Indian Council Medical Research guidelines of 2005 for accreditation, supervision and Regulation of ART clinics in India has made special rule and code of ethics for surrogacy practice in India. Chapter 3.10.1 states “A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting of which the records will be maintained in the clinic that the child is their”. This rule gives rise to controversial issue that if child is not related genetically with the intended parent or individual, they have to adopt the child. In Indian personal law, adoption can be made only by Hindu under Hindu Adoption and maintenance Act, 1956. There is no provision of adoption by non-Hindu or foreign parents in above Act of 1956.\textsuperscript{54} In this case they can only act as guardian as per the provision of Guardian and Ward Act, 1890.

In absence of any specific legislation it is the guidelines which are applied by ART Clinics and Intended parents. Another issue related to adoption provision is section 17 (1) of the Hindu Adoption and Maintenance Act, 1956. It enumerates that no payment or reward can be reserved by any person as consideration for the adoption of any person. Hence in surrogacy, payment made to surrogate mother

\textsuperscript{52} AIR 2010 Guj 21
\textsuperscript{53} Report of the National Conference on Surrogacy “A Policy Dialogue on Issues Around Surrogacy in India”, Centre for Social Research, Sept 22\textsuperscript{nd} - 23\textsuperscript{rd}, 2014.
either as consideration or compensation or cost expenses of pregnancy is in direct contravention to section 17 (1) of Hindu Adoption and maintenance Act, 1956.  

4.2.7 Legal Concern Relating to Commissioning Parents

Intended parents are the couples or individual who enter into a surrogacy agreement with the surrogate mother with the Intention to become legal parents or parent of the child born through surrogacy. Both the intended parent may be genetically related to the child in case both are donors or only one of them be genetically related to child in case one of the parent is donor. In very rare cases neither of them may be genetically related to the child. It is case where both eggs and sperms are of third person.

There are significant issues relating to intended parents, which are discussed by the researcher as follows.

4.2.7.1 Right to be an Intended Parent

Reproduction is a natural instinct of all human beings and the foundation for the growth of human communities and societies. National procreation is an established basic fundamental right of every individual. However, right of the intended parent to procreate with the help of surrogate mother is highly debatable issue and there are diverse opinion in this regard. The United States Constitution do protect surrogacy as a form of conception equal to traditional form. They argue that “if the right to procreate through traditional, coital method is a projected right, then procreation through surrogacy or other medically available options, should also be protected” The Indian consultation contains similar provision as that of US Constitution equality cause. Most recently Supreme Court in Baby Manji case, has approved surrogacy as an alternative means for human reproduction. However, those who are against the surrogacy as alternative to human reproduction argue that non-

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56 John A. Robertson, “Procreative Liberty and the Control of conception Pregnancy and Child birth”, 69 Virginia Law Reviews, 983, p. 409
58 Baby Manji Yamada V. Union of India, AIR 2009 SC 84
coital means of reproduction are beyond the scope of Constitutional protection. They contend that “bringing a third party (surrogate) into the procreative relationship cannot be justified on theory of marital intimacy.” Moreover if surrogacy is given a constitutional protection, it would lead to commercialization and exploitation of surrogate mother. These diverse opinions regarding existing of right to use surrogacy had failed to formulate legal framework within the nation as well outside the nations. However in this expanding era of human rights jurisprudence this right should be exercised keeping in view the right of personal liberty, right to procreation right to found family, right to privacy and right to enjoy benefits of scientific and technological progress.

4.2.7.2 Criteria for being an Intended Parent

The issue of who can be the intended parent or parents is a highly controversial one. Large number of couples as well as other individuals are opting for surrogacy for begetting a child. This has generated a serious debate among jurists, Law makers, judges and academicians. Each and every individual is having human right to procreation and which include right to procreate with help of surrogate. One of the prominent opinion is that surrogacy is more suitable choice for infertile who intend to beget child. However in the current scenario, it is not only the infertile, gay and lesbian couples whose are also seeking the help of surrogacy for begetting a child. Single individuals, gay couples and lesbian couples raises various complicated legal and human rights issues too. On the other hand restricting the availability of surrogacy to certain group or class may give rise to constitutional challenges in Countries like UK & US which have framed legislation for regulating surrogacy have not dealt adequately with this issue. In India ART Bill 2010, states that assisted reproductive technology shall be available to all persons including single person married couples and unmarried couples. In other hand Indian council of medical research guidelines 2005 states that surrogacy by assisted conception should normally be considered only for patients for whom it

63 Rule 3.10.2 the ICMR, Guideline, 2005.
would be physically or medically impossible undesirable to carry a baby to term. Thus domestic law in India is unclear regarding the eligibility criteria for being an intended parent.

4.2.7.3 Right of Intended Parent to Select a Surrogate.

Where these is right of access to surrogacy there also exists right to select the surrogate women of the choice of intended parent for fulfilling their right to procreate. This right gives vast power to select surrogate, taking into consideration factors like age, color body structure, family background etc. In absence of any proper legal frame-work for selection of age and other factor in surrogate women, exploitation of female has increased tremendously.

4.2.7.4 Restriction Imposed Upon Surrogate Mother

The main object of availing the services of surrogate mother is to beget a healthy child. For this reason the surrogate mother is bound to follow various duties and restriction during the continuing of surrogacy and the subsequent pregnancy, so that child is born without any complication. Certain restrictions are imposed by the medical practitioners or clinics, keeping in view the health and interest of surrogate mother. But sometimes restrictions are imposed by the Intended parents. This give rise to issues concerning right of dignity and piracy of surrogate women.

4.2.7.5 Maternity and Paternity Leave for Intended Parents.

In India, every working women is entitled to get maternity leave with wages for a period of 12 weeks. This right is protected under the Maternity Benefit Act, 1961 as well as the Employees State Insurance Act, 1948. The object of this maternity leave is to ensure that new-born baby will get adequate maternal care from the mother. But this provision is applied in case of normal or natural pregnancy, it does not include the intended parent whose child is born of surrogacy arrangement. The government has through its order, dated 11 September 2008 extended the maternity leave for adopting mothers. As per the order, adoptive mothers with fewer than 2 surviving children are entitled to a child adoption leave on adoption of a child.

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65 Issued by Ministry of Personal Public Grievances and Pension, Government of India.
upto one year of age. But such provision is not made in case of child born of surrogacy.

4.2.7.6 Right to custody of child

The drafted ART bill 2010 states that surrogate mother shall relinquish all parental rights over the child.\textsuperscript{66} It also states that a child born to married couple through the use of assisted reproductive technology should be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouse and shall have identically legal rights as a legitimate child born through sexual intercourse.\textsuperscript{67} However ICMR guidelines also provide that, a child born through ART shall be presumed to be the legitimate child of the couple having been born in wedlock and with the consent of both the spouse.\textsuperscript{68} But further it states that child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting that that child is there.\textsuperscript{69} Thus there are different approaches with respect to custody and parentage of the child. There difference of view would affect the right of the indented parent who has undergone all the hardships of arranging a surrogacy process.

4.2.8 Legal Concern Relating to Surrogate Mother.

A surrogate mother is a women who agrees to conceive a child through assisted reproductive technique. There are various factors which lead a women to enter into surrogacy agreement arrangement.

(1) Better economic opportunity than alternative forms of employment.

(2) Love and maternal instinct and sense of unique ability to help infertile couple

(3) Helping who is friend or blood relationship.

But absence of any specific legislation in India make the participants in surrogacy agreement especially the surrogate mother subject to significant legal risks. Therefore its essential to examine the various legal issues surrounding a surrogate mother.

\textsuperscript{66} Selection 34 (4) of the Assisted Reproductive Technology (Regulation) Bill, 2010

\textsuperscript{67} Ibid section 35 (1)

\textsuperscript{68} 3.12.1 the ICMR ,Guidelines, 2005

\textsuperscript{69} 3.10.1. Ibid.
4.2.8.1 Right to be a Surrogate

The ever increasing demand for surrogacy and the large member of women offering to act as surrogates has brought to light one of the most important and basic question whether a women has a right to rent her womb or whether a women has right to be surrogate. It is essential to examine this basic question because the surrogacy arrangement depends upon the availability of surrogate women. Right of women to be surrogate has not been expressly laid down in any international and national legal documents in India. This question has gained significance due to the fact that India is becoming a hub for surrogacy practice\textsuperscript{70} and many economically deprived women are offering to act as surrogate. More over there is no specific legal recognition to settle this fundamental question. However there is diverse opinion, one based on the idea that right should be restricted on the ground of public interest and morality. On other hand, there is strong view to support this right. Which is based on 3 basic human right: (1) right to personal liberty and right to privacy (2) right to governorship of body (3) right to enjoy benefits of technological and scientific developments.\textsuperscript{71}

4.2.8.2 Eligibility Criteria for a Surrogate Mother

The issue that who can be a surrogate is very complex and sensitive and it raises various other questions. Although each and every women has a right to act as a surrogate for another or has the right to rent her womb which can be traced to right of personal liberty and privacy, property right over body and right to enjoy benefits of developments in science and technology.\textsuperscript{72} However indiscriminate use of this right by each women will raise a bundle of legal issues. In case an unmarked girl chooses to exercise this right it would come into conflict with public morality. If a married woman opts to be surrogate without the consent of husband it may be considered as adultery. In case postmenopausal women acts surrogate it may affect the health of the women as well as of child. In India, though the proposed ART bill

\textsuperscript{70} Dr Anesh V. Pellai, “Surrogate Motherhood and the Law- International and National perspectives,” Real Publications, New Delhi, 2015, p. 184.


2010\textsuperscript{73} does not impose any restriction on the basis of marital status and even unmarried girl can also be a surrogate. But keeping in view the social and moral standard of traditional country like India unmarried girls should not be allowed to act as surrogate mother. However this argument is subject to violation of Article 14 of the Indian constitution. The ICMR guideline, 2005\textsuperscript{74} states that, the artificial insemination by donor without the husband’s consent can be ground for divorce or judicial separation. These are conflicting views regarding age of surrogate mother. As according to ART Bill 2010, the upper age limit is 35 years\textsuperscript{75} and according to ICMR guidelines upper age limit must be fixed as 45 years. Similarly, the ICMR guidelines\textsuperscript{76} provide that no woman may act as a surrogate more than thrice in her lifetime. But ART Bill, 2010 lay down that “no women shall act as a surrogate for more than five successful live births in her life, including her own children”\textsuperscript{77} This conflicting provision opens the chance of misuse of surrogacy arrangement and exploitation of poor women, who has, undertaken both emotional and physically challenging task.

4.2.8.3 Right to an Informed Consent

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 pros and cons of a particular medical procedure or treatment and accordingly select the most appropriate one. The object of informed consent is that the patient has an opportunity to decide about his or her health care. The consent given by the patient on the basis of the information provided by the doctor is known as informed consent. This right of an individual is recognized under both international law and national law. In India, the draft ART Bill, 2010 also describe about this right as ‘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 at all possible

\textsuperscript{73} The Assisted Reproductive Technology (Regulation) Bill, 2010
\textsuperscript{74} Rule 3.16.2 of IMCR Guideline 2005,
\textsuperscript{75} Section 34 (5) of ART Bill, 2010.
\textsuperscript{76} Rule 3.10. of ICMR Guideline.
\textsuperscript{77} Section 34 (5) of ART Bill, 2010.
stages of such treatment or procedure including the freeing of embryos’.78 The violation of this right give rise to Criminal as well or Tortious liability.79

But in absence of any specific legislation this right could not be properly exercised by the surrogate. Illiterate and poor women many not be able to understand the various medical procedures involved in surrogacy. Though capable of understanding, but due to financial gains, ignore them and give consent even when they are not willing to do so. Such informed consent is thus based on influence from intended parent, force and fraud on part of their husband or relative.

4.2.8.4 Right to Remain Anonymous: No Sanctions

Right to remain anonymous is a very important right of the surrogate women. This is due to the fact that surrogacy has mocked different opinions from different sections of the society.80 Revealing of indemnity of surrogate or disclosing the information about surrogate to general public have severe impact on the husband, children and family members of surrogate. It could cause embarrassment, misery and mental agony to the surrogate because she would become an object of ridicule, criticism and rejection from society.81 Moreover such disclosure may also affect the relation of intended parents with surrogate child. This issue is addressed by the Draft Bill, 201682 as well as the ICMR83 guidelines which provides that, “all information about the surrogate shall be kept confidential and information about surrogacy shall not be disclosed to anyone other than the control database of the department of health research, except by an order of a court of competent jurisdiction.”84

But due to lack of stringent enforcement machinery information is disclosed by the staff and administration authorities on monetary consideration.

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78 Section 21 (1) of ART Bill, 2010.
79 Section 304 A, 318, 319, Assault, Criminal force under Indian Penal Code, 1986.
80 Under Law of Torts. Assault and Battery
82 Section 34 (12) of The ART Bill, 2010.
83 Rule 3.2.3 of ICMR Guidelines, 2005
84 Section 34 (12) of The ART Bill, 2010
4.2.9 Legal Issues Relating to Surrogate Child

The child is most vulnerable among all the persons involved in surrogacy arrangement. It is a fact that child is unable to express its own will regarding its birth into this world or speak of its own wishes or interest before it is born and even after the birth. Therefore it is responsibility of all the parties evolved in surrogacy arrangement as well as state to ensure welfare and interest of the child to the maximum extent. Hence it is necessary to examine the various legal issues which may have an impact on the interest and welfare of the child.

4.2.9.1 Custody of Child and its Refusal

In a surrogacy arrangement the most controversial issue is related to custody of child and its refusal. As per surrogacy agreement, surrogate mother agrees to relinquish all her parental right on birth of the child, but there may be cases in which, she refuses to hand over the child. The reason may be moral out of love and affection or legal due to in adequate compensation. But such refusal by surrogate mother should be considered as violation of her contractual duty. On other hand, intended parents may refuse to accept the child in certain circumstance. In case intended parents are separated or divorce after entering into contract with surrogate or the child is born with defects or in cases where multiple births take place. Although in all cases either refusal or non acceptance of custody, it is considered as a breach of contract. The remedy no doubt is available to both surrogate mother as well as to intended parent. But it affects the interest and welfare of child as (a) who would have the custody till dispute is settled? (b) Legal status of child? (c) Maintenance to child?

4.2.9.2 Legal Status of Surrogate Child: Conflicting Laws.

Another most important and controversial issue affecting a surrogate child is the question regarding the status of child i.e. whether the child is legitimate or illegitimate. Such controversy regarding the legitimacy of child due to the absence of genetic relationship has been discussed in various cases of artificial insemination by donor. For example anonymous V. Anonymous, “In this case the husband had

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consented to his wife’s therapeutic impregnation. Later when the wife claimed alimony the husband pleaded that the child was illegitimate. However court rejected his plea and held that the child was legitimate and awarded the alimony.”

In *People v. Sorensen*, 87 a divorced woman sued her former husband for non-support of their son born through artificial insemination by donor. In this case the defendant had consented after 15 years of marriage and a medical determination of this sterility to allow his child to be artificially inseminated. After the child was born, he represented that he was the child’s father. However after divorce the husband withdrew his support to the child on the ground that the child was illegitimate. The court rejected his plea and held that he was lawful father of child.

In India the draft ART bill 2010 and IMCR guidelines give legal status to the child born of surrogacy but personal laws and the Indian Evidence Act 1872 are in conflict with these proposed bill and guidelines.

**4.2.9.3 Right to know his origin and United Nation Declaration on Right of Child, 1959**

UN declaration on the right child 1959and convention on right of child 1989 conferred some of the important right on child out of which one is right to preserve his or her identity 88 and right not to be separated from his or her parent. 89 The right to know one’s genetic origins is a basic human right. 90 The Hague conference of the UNICEF highlights the right of child to know his/her parents and to be cared for by them. 91 So every child born out of surrogacy is also entitled to know the details of his origin. There are 3 major reasons which makes this right very important. 92

(1) The identity of child enables the child to understand the social legacy, traditional, cultural and ideological heritage.

(2) A person’s genetic history provides vital information in diagnosing and treating certain diseases.

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87 68 cal 2b 280.
88 Article 8, Convention on the right of child 1989
89 Article 9, Ibid
91 UNICEF’s position on Inter-country adoption www.unicef.org, visited on 15-7-2014.
(3) Knowledge of biological origin would enable prevention of incestuous relationships.

In contrast to this, most of the legal systems of the world have therefore induced provisions that the anonymity of the donor or surrogate shall be maintained. In India, the ICMR guidelines provide that children born through the use of donor gametes shall not have any right whatsoever to know the identity of their genetic parents.  

ART bill provides that, all information about donors shall be kept confidential. Further in ART bill 2010 under section 36 it is provided that a child may upon reaching the age of 18, ask any information, excluding personal identification relating to donor or surrogate. Thus there is imbalance between the right of surrogate to access genetic information and right of donor or surrogate to remain anonymous.

4.2.9.4 Right not to be separated from Parents and Right on Surrogacy.

Another important right of child is right not to be separate from parents. Thus right is recognized by Convention on Right of Child, 1898 under Article 9.1 “states parties shall ensure that a child shall not be separated from his or her parents against child’s will, except when competent authorities subject to judicial review, Determines, in accordance with applicable law and procedure that such separation is necessary for the best interests of the child”. Similar principle 6 of Declaration on Children Right states that, child of tender years shall not, save in exceptional circumstances be separated from his mother. It is argued that surrogacy arrangement are in direct conflict with these provisions as every surrogacy. Arrangement is undertaken with the explicit intention of removing the child from his or her gestational mother. And in case embryo has been created using gametes donated by women, not the child intended mother, child is removed from his or her biological mother.

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93 Rule 3.12.3 of ICMR guidelines  
94 Section 33 of ART Bill, 2010  
95 Section 36, the ART Bill, 2010  
4.2.9.5 Surrogacy Leads to Sex Selection

Sex selection is the practice of using medical technique to choose the sex of one’s offspring. The increase in the use of surrogacy has raised main criticism that it will lead to sex selection of the child. The advance in reproduction technologies on one hand opened the doors for infertile couples and on the other hand, it has provided option to select sex of the child by intended parents. Surrogacy involving in-vitro fertilization has the maximum possibility of sex selection. In India Pre-Natal diagnostic Techniques (Regulation and prevention of Misuse) Act, 1994 strictly prohibits any type of sex selection. Section 3 A\(^98\) prohibits sex selection and states that “no person including a specialists or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on woman or man or both or any tissue, embryo concepts, fluid or gametes derived from either or both of them”. The ICMR guidelines prohibits sex selection “at any stage of fertilization, except to avoid the risk of transmission of a genetic abnormality assessed through pre-implantation genetic diagnosis.”\(^99\) Further draft ART Bill, 2010 also prohibits sex selection of a prospective child born through ART.\(^100\) However ICMR are non statutory guidelines and ART Bill, 2010 is just a proposed law, they fail to check and prevent sex selection during surrogacy process.

4.2.10 Cross Country Surrogacy : Legal Issues

India is rapidly becoming the center for child process outsourcing (CPO).\(^101\) Large number of couples across the world are travelling to India for surrogacy practice. Despite this growing prominence of the Indian surrogacy industry in recent year, it is strange but true that surrogacy practice in India remains legally unregulated. This lacuna in the legal system creates a myriad of problems to the couples and individuals coming from different countries to avail the service of surrogacy arrangement. The legal problems not only effect the intended parents,

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\(^97\) K.A Haugh, “Ethical issue in Reproductive Technology”, www.qub.ac.uk, visited on 16-7-2014.
\(^98\) This section was inserted by amendment of 2003 in PNDT Act, 1994
\(^99\) Rules 3.5.9, ICMR Guideline.
\(^100\) Section 25, The draft ART Bill, 2010.
\(^101\) Report of Centre for Social Research (CSR) in year 2012. www.womenleadership.in, visited on 7-7-2013.
surrogate women and child but also pose new challenges before the courts and government.

4.2.10.1 Citizenship of a Child Born through Surrogacy

The right to citizenship is a very important right of an individual as it is the basis of his civil and political rights. Citizenship is generally understood as referring to the relationship between the individual and state.\textsuperscript{102}

In India, initially Article 5 to 8 of the Indian Constitution describes the classes of person. Who would be deemed to be the citizens of India at the commencement of the Constitution, on 26\textsuperscript{th} Jan, 1950. The India citizenship Act, 1955 was enacted by exercising the power by parliament under Article 11 of Indian Constitution.\textsuperscript{103} Indian citizenship Act, 1955, is a legislation which deals with the acquisition and determination of India citizenship. The Act provides for modes of Acquisition of Citizenship; (1) citizenship by birth, section 3 (2) citizenship by descent section 4 (3) citizenship by registration section 5 (4) citizenship by naturalization.

The problem relating to citizenship does not arise in case the intended parents as well as surrogate mother both are Indian citizen. As section 3 of Indian citizen Act, 1955 provides that person born in Indian on or after 1-7-1987 is considered a citizen of India only if either of his parents is a citizen of India at the time of his birth. Further, those born in India on or after 7-1-2004 are considered citizens of India only if both of their parents are citizen of India or one of whose parents is a citizen of India and the other is not an illegal migrant at the time of their birth.\textsuperscript{104} Further passport can only be issued to Indian citizens in India.

In the context of cross-border surrogacy, the acquisition of citizenship for a surrogate child is becoming a complex issue. In such surrogacy process, the intended parents are non-citizen of India and surrogate mother is citizen of India. Since there is no exclusive and separate legislation governing nationality and citizenship issue of children born out of surrogacy arrangements in India all the nationality and


citizenship issues continued to be governed by the provision of the India citizenship Act, 1955. Thus child born through Indian surrogate mother acquire citizenship of India according to section 3 of the Indian citizenship Act, 1955. This creates legal barriers for intended parents to take the child out of India and acquiring the citizenship of their respective native country. The above issue came before Supreme Court in Jan Balaz Case. In this case a German National, Jan Balaz, had sought India passports for his twins Nikolas and Leonard born to surrogate mother Martha Kristsi, in Anand in central Gujarat in 2008. The couple applied for Indian passports for his children to take them to the U.K as surrogacy was banned in Germany. The passports were initially issued but later, they were asked by Ahmadabad passport office to surrender the passport on the ground that the Column of mother name carried that of Mrs. Balaz, Who did not conceive the children and violated the Birth and Death Registration Act, 1969. Mr. Balaz surrendering the passports moved the High Court to get them back, so that he could take the boys along with them and make them citizens of his country. The High Court held that surrogate mother as the natural mother and her nationality to decide the citizenship of the newborn babies irrespective of the nationality of the father. The matter has gone on in to the Supreme Court. Understanding the feeble chances of granting Indian citizenship to the children, the India government tried to negotiate with German authorities to grant nationality for the children as a special case. However the German Authorities held a firm ‘no’ as surrogacy was not permitted in Germany. The government however requested central adoption research agency (CARA) to take up the matter on basis of necessity and relax the rules of adoption so that German couple may adopt the children. Thus the impact of decision is that surrogate mother is legal mother of child and intended parent have to adopt the child irrespective of surrogacy agreement and ICMR guidelines”.

4.2.10.2 Non-Recognition of Overseas Surrogacy

Non-Recognition of overseas surrogacy by certain countries is a contentious issue at international level affecting the interest of surrogate child as well as the intended parents. There are situations where the commissioning parents belong to a

105 Jan Balaz v. Anand Municipality, AIR 2010 Guj 21
country where surrogacy practices are considered as illegal and opposed to public policy and thus surrogacy is banned in these countries. To overcome this situation, intended parents search for surrogacy arrangement in other country which allows such practices. However when the intended parents take back the surrogate child to their country, intended parents are not recognized as legal parents of the child even though they are genetically related to child. The conflicting views and approaches adopted in different countries as well as the variation in law regulating surrogacy poses a legal problem for the intended parents who wish to opt for surrogacy in another country for begetting a child.

4.2.10.3 Guardian of Surrogate Child: A conflicting Issue

India is rapidly becoming the surrogacy capital of the world. The draft ART bill, 2010 provides that a foreigner or foreign couple not resident in 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 surrogate during and after the pregnancy, till the child or children are delivered to intended parents. However, the local guardian is free to handover the child to an adopted agency, if intended parents/ parent fails to claim the child within one month of the birth of the child. In case of adoption or the legal guardian having to bring up the child, the child will be given Indian citizenship. The important social and legal issue which arises here is, whether guardian is competent person to see the welfare and interest of child? What would be the effect on such child, who was desired by one, begotten by another and adopted by someone else. If child is abandoned by guardian, what legal enforcement would lie?

4.2.11 Parenthood

Parenthood is generally determined in accordance with the genetic relationship between child and parents. Mother was the women who gave birth to the child. Traditionally, in the process of procreation, the women contributed the ovum and gestation. The determination of motherhood was virtually uncontestable because the pregnancy was physically and eternally manifested. Moreover the father

107 Section 34, The ART Bill, 2010
is generally the husband of the mother of child. Thus procreation of child is purely an act of husband and wife. But the advent of ART (Assisted Reproductive Technology), this traditional process has undergone a drastic change. The new technology has the ability to separate the gestational and genetic components of motherhood. The contribution of female gamete (genetic motherhood), gestation (gestational motherhood) and the role of legal-social mother (legal motherhood) can each correspond to different women.\textsuperscript{108} Similarly two classes of father genetic father and legal father.

In surrogacy process if intended parents have contributed genetic materials but the resulting foetus is implanted in the womb of surrogate women, then child will has 2 mothers (gestational and genetic mother who is the intended mother). And one father in case where surrogate mother has contributed genetic material, then child will have two mothers (gestational who is also the genetic mother and the intended or socio-legal mother) and one father. In another case where only father has contributed genetic material and the egg is from a donor woman then the child will have three mothers (genetic mother, gestational mother and Intended mother) and one father. In case where only the intended mother has contributed genetic material and the sperm is from donor the child will have two fathers (genetic father and intended father). In case where only the intended mother has contributed genetic material and the sperm is from donor, the child will have two father (genetic father and intended father) and two mothers (gestational mother and intended mother who is also the genetic mother). In case both the intended parents have not contributed their genetic material and an embryo is created from the sperm of donor and egg of surrogate women, the child will have 2 fathers (genetic and intended) and 2 mothers (gestational and intended). In case where both the intended parents have not contributed their genetic material and the embryo is created through donor genetic material, then it will give rise to two father and 3 mothers (genetic father & Intended father, genetic gestational and intended mother respectively). These circumstance has created complex situation in all the countries dealing with the parentage of surrogate child. Most of the legal systems provide that the gestational mother is the

legal mother of the surrogate child at the time of its birth. If surrogate mother is married and her husband has given his consent for the procedure he will be considered as the legal father. Thus its analyzed that the intended parents do not automatically become the legal parents of the child on its birth\textsuperscript{109} they can become legal parents only through a parental order by the appropriate authority. Example in USA, under section 807 of Uniform Parentage Act, 2002, intended parents have to file notice in the court that the child has been born to the gestational mother. Then court issue on order confirming that the intended parents are the parents of child. In India the ICMR guidelines provide a child born through ART shall be presumed to be the legitimate child of couple having born in wedlock and with the consent of husband. Similar provision is provided under section 35 of the draft ART Bill, 2010. But both the ICMR guidelines and Draft ART Bill are silent on the issue of parent right in situation where intended parents are gay couple or lesbian couples. \textsuperscript{110}Gujarat High Court in \textit{Jan Balaz v. Anand Municipality}\textsuperscript{111} further held, “In absence of binding legal proposition in India, we are more inclined to recognize the gestational surrogate who has give birth to the child as the natural mother.” Anonymous Indian women, i.e. the egg donor is not the natural mother. She has of course a right of privacy that forms part of right to life and liberty granted under Article 21 of the Constitution of India.

4.2.12 Surrogacy and the Registration of Births and Deaths Act, 1969.

The object of the Act is to provide for the regulation of Registration of births and deaths and for mothers connected there with. In India this Act keeps the record of births and deaths of person and contains provisions relating to parentage of the persons. But does not contain any such provision regarding child born out of surrogacy. As surrogacy was not an issue at the time of passing the Act of 1969 and there has been no amendments or addition in the said Act related to surrogacy. In absence of any legislation on legal parentage as a result of surrogacy arrangement Registration of Births and Deaths Act, 1969 continue to be an authentic legislation.

\textsuperscript{109} Surrogacy Act, 2010 (western Australia)
\textsuperscript{110} Section 32 (2) and (3) of the Draft ART Bill, 2010, in case where an unmarried or single individual use surrogacy. The child will be the legitimate child of such individuals.
\textsuperscript{111} AIR 2010 Guj 21
No doubt ICMR guidelines 2005\textsuperscript{112} and draft ART Bill, 2010\textsuperscript{113} contain appropriate provision relating to birth registration and parentage of the child born out of surrogacy. But they continue to be non-speak-able piece of legislation and having conflicting provisions. According ICMR guidelines Birth Certificate contain the name of genetic parents. In cases where intended parents are not genetically related to child (both egg and sperm of donor), they will not be legal parents of the surrogate child. Draft ART Bill, 2010 on the other hand states that birth certificate should be in the name of commissioning parents. It means commissioning parents may or may not be genetic parent, still they are legal parents of surrogate child.

In case of cross border surrogacy, the name of surrogate mother is contained in the birth certificate which creates difficulty in obtaining the passport and other legal documents in relation to child.

4.3 **SOCIO-ETHICAL IMPLICATION OF SURROGACY**

When a society changes rapidly, its ethical norms are challenged. They are challenged on the basis of new knowledge and by the conflicts created as new practices threaten old norms. Ethics is the notion of what is good and right in society that guides human action. In period of transition new understandings emerge of what is ethical practice. This emergence is not a linear process but a trajectory interspersed with conflicts of ideas and in various areas of the technology-society interface. One of them is the surrogacy process. This new reproductive technology though claim to help human being through creative interventions that reduce suffering and have the potential to transform society but on the same side creates several social and ethical conflicts.

4.3.1 **Surrogacy versus Rule of Nature.**

Procreation is the rule of nature. It is fundamental to the existence and continuation of any species. It is natural desire and biological instinct of every creature to reproduce and to have an offspring. Among human beings not only the natural and biological instincts play a major role, but there are also strong

\textsuperscript{112} Rule 3.5.4. of the ICMR Guideline 2005, It clearly provides that birth certificate of children born out of surrogacy arrangement shall be in the name of genetic parents.

\textsuperscript{113} Section 34 (10) of chapter VII of ART Bill 2010, The Birth Certificate issued in respect of a baby born through Surrogacy shall bear the name(s) Surrogate, as parents.
psychological and social needs to have children. The social concepts of love, family, community and morality strengthen the biological drive, for genetic procreation. Procreation is a biological process by which women give birth to children. Procreative rights are rights relating to reproduction and reproductive health and induce access to sexual and reproductive health care and autonomy in sexual and reproductive decision making. These rights are human rights and are universally indivisible and undeniable.\textsuperscript{114} The moral and ethical objections to surrogacy are based on the premise that life is a creation of God and human being and surrogacy attempt to play God by interfering in the natural processes. The procreation is created with the assisted reproduction technology. It involutes repeated trials which use either male or female genetic material or the human embryo. The wastage of human embryo is homicide as human life beings at fertilization. More over in certain cases child may not be genetically related to intended parents. Thus parents have no role in the procreation of such child.

No doubt assisted reproduction technology, specially surrogacy gave ray of hope to many infertile couples but on the same side it has been morally and socially criticized as it involves the intervention of the third person in privacy right of couples or individual.

\textbf{4.3.2 Social Stigmatization of Surrogacy}

The Inability to have children can be one of the greatest challenges that a person or couple will ever face in their social life. It can place tremendous stress on a couple’s relationship with one another and with their family and friends. It causes loss of social status, social stigma, social isolation and alienation and community ostracism.\textsuperscript{115} That is why in majority of the cases, even if they are opting for alternative methods of reproduction, especially surrogacy they do not disclose this fact to the society. Thus one of the major reasons for not disclosing the fact that couple or individual have opted for surrogacy it the social stigma of being infertile or not able to procreate child. Another issue is difference of opinion between

\textsuperscript{114} Carter J.Dillard, “Rethinking the Procreative Right”, 10 Yale Human Rights and Development Law Journal, 2007, p. 3


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traditional values and new scientific technology, specially within their family i.e. old generation vis-a-vis new generation.

Though India has become one of the hub of surrogacy arrangement of the world, still at is traditional valued based country where majority of classes do not support this kind of assisted reproduction technology. So the people (women/men/couple) often choose to disclose only those from whom they expect to have unconditional support rather than who might question their decision. There is an inherent fear among the user of surrogacy process that this medical intervention will not be taken by the family and society in the right spirit. Thus secrecy and silence around these becomes an important pointer about the attitude and acceptance of these technologies within the larger society. On the other hand surrogates too face the dilemma that being surrogate is socially unacceptable when they directly accept monetary consideration. So rather than telling their neighbors and relatives that they gave away their child, they tell them that the baby died.\textsuperscript{116} In Indian society, the women who has consented to become a surrogate mother has to face a social stigma of offering services similar to a prostitute. The process of artificial insemination is not very commonly known amongst people and women who is to act as surrogate belongs to underprivileged class, so there is a possibility that the women stands to live on the fringes of the society during and even after the delivery of the child.\textsuperscript{117}

\subsection*{4.3.3 Surrogacy an Alternative to Adoption}

With the growth of society and legal system the method of adoption was developed to enable childless couples to have a child. Adoption provided an opportunity to have a child and fulfill the desire of an individual to raise a child. Adoption is the act of lawfully assuming the parental rights and responsibilities of another person (child) and it was assumed that child is naturally born in the family. Adoption on one hand not only fulfill the innate desire of individual to have a child but also offer may advantages to the childless couples like satisfied religious requirement, carry or the family lineage and rituals.\textsuperscript{118} On the other hand it provides

\begin{itemize}
\item \textsuperscript{116} Dr. Jyoti Bhakre, “Surrogacy- A reality Eclipsed by Ethical, Social, Legal Issues –Indian Perspectives”, Navadeep, 2010, p. 29
\item \textsuperscript{117} Ethical Issues of Surrogate Pregnancy www.indiarenting.com visited on 10-5-2013
\item \textsuperscript{118} B Siva Sankara Rao, “Is Surrogacy an Alternative to Adoption in Wake of Social Change of the Globe”, Andhra Law Times, May 2013
\end{itemize}
home to orphans and deprived children and grant social, emotional and legal family membership. However the advancements in medical science and technology have led to development and discoveries in the treatment of infertility. These developments offer various solutions to the childless couples and enable them to have children genetically related at least to one of them. The surrogacy as one of assisted reproductive technologies not only provide solution to infertile couple but also to individual (Single, gay, lesbians). Surrogacy though have fulfilled the innate desire of an individual to have a genetic connection to a child. It represents both the act of procreation and physical reflection of the parent’s body in the body of the child. Thus making emotional and psychological attachment of child and parent stronger. But at the same time it has affected the future of millions of orphans, abundant children who are waiting for their ideal home and parenthood. Lack of legislative measures on surrogacy process has forced the people to opt this arrangement rather going through complex adoption laws and provisions. This situation has segregated the society into two parts i.e. one part favoring the medical advancement and other part appreciating the age old traditional concept of adoption.

4.3.4 Social Issue on who can be Intended Parent

The issue of who can be the intended parent is highly controversial one and affecting the wellbeing of the child. In past few years an increasing number of couples as well as other individual are opting for surrogacy for begetting a child and this has generated a serious social issue relating to welfare of the child. There are different classes of intended parents who avail the surrogacy services.

1. A married hetero-sexual infertile
2. A married hetero-sexual fertile couple.
3. Same sex couple
4. Single individual
5. Aged couple
6. Disabled persons.

The law is not clear that surrogacy process can only be used by infertile couples only or that any person following under above categories can use this process. In case of married couples whose parental aspirations have been frustrated due to infertility suffer enormous personal anguish and even marital conflict. The method of surrogacy provides a solution to such infertile couples who wish to have a child that is genetically linked to them. But now a days even fertile couples are also opting for surrogacy due to various reason like career, life style, fashion etc. Famous examples is that of Michael Jackson who declared that he had hired a traditional surrogate mother to deliver this third child Prince Michael II various celebrities like Deridre Hall and Joan Lunden, Angela basset, Kelsey grammar, Aamir Khan, Shahrukh Khan etc. The important social issue here arises whether medical advancement can be used for personal benefits? Whether the People who opt for surrogacy for purpose of career or life style will able to provide love and affection to child? What would be the future of child whose parents fail to beget him due to their busy schedules?

The concept of family is undergoing a revolutionary change and society is facing with the emergence of different kinds of families such as homo-nuclear family, single parent family. Even aged individual and disabled person can be intended parent with the help of surrogacy. This changing concept of families has raised various social and ethical issues. One of the major problem that arise in case of same-sex couples is that, their relations may not be long-lasting. If they discontinued their relation after entering into surrogacy arrangement and prior to birth of child or after the birth of the child, what will be the future of child? Who will take responsibility and custody of child in such cases of same sex couple. Child will be deprived of his right to natural family and parenting because of the fact that, either father or mother are absent in homo-nuclear families. Single parents, aged

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122 www.jurconsur.ru Surrogacy in Russia.
124 Bharti Dubey & Malathiyer, “Aamir Khan, Kiran get a son through WF, surrogacy”, The Times of India, 6 Dec, 2011
couples and disabled persons, no doubt are genetically related to the child but social environment, status and growth may not be provided by them due to incomplete family within them can a single parent (male or female) able to develop the child as normal family consisting both male and female, especially when child is of opposite sex? Whether aged individual or couple be able to take care of child? Or they nominate some other persons to share the responsibility? Can a disabled parent right to be an intended parent should be considered on the basis of the best interest and welfare of child. These are few of the questions which have not been satisfactorily answers in the modern society.

4.3.5 Surrogacy as Challenge to Institution of Marriage

The institution of marriage has been recognized by almost all civilizations across the globe. Though love and security have been identified as the salient reasons of marriage, procreation holds the essence of the entire concept of marriage.\(^{126}\) Marriage is the sine qua non for having children. In a country like India with traditional taboos women is respected as a wife only if she is the mother of a child. She herself feels secured and provides if she is having issues. Thus marriage as an institution is the social order through which a married couple consider it wise to beget a child.\(^{127}\) However the medical advancement in form of surrogacy has brought the traditional concept “Marriage is the sine qua non” for having children under debate. The process of surrogacy for begetting a child is not restricted to infertile married couple but other fertile married couple, single individuals, gays, lesbians and even same-sex couples. In this sense procreation does not hold have essential essence of the entire concept of marriage. Surrogacy has segregated sexuality and procreation. In modern world beeting child is not depended upon the marriage of mother and begetter of the child. This changing scenario has broken the age old traditional system that child born out of lawful wedlock is considered to be legitimate child. This has adverse impact on the society as people no longer believe in institution of marriage. The new variety of relationship have the authority of the existing traditional values, moral, norms and customs. The basic issue that society today faces that, whether the non-traditional families could be able to provide

\(^{126}\) Anil Bhardwaj and others v. State 1985 (8) DRJ, 75

secured and developed future to the child; whether the scientific development has destroyed the traditionally in-depth concept of sacramental marriage from Indian society?

4.3.6 Commodity of Children and their Characteristic

Surrogacy is a baby manufacturing and selling activity whereby the surrogate mother ‘leases’ her womb and manufactures the child like a product from raw materials provided by the genetic parents. The commercial surrogacy places a child in a home without considering whether the prospective parents would be suitable to raise the child. Instead, money is paid to the surrogate woman in exchange for the baby and her parental rights. Thus couple has bought a baby. Even in non-commercial surrogacy, the compensation in the form of medical expenses are paid to surrogate which amounts to purchasing of the child by intended parents for consideration fixed in surrogate contract. Another social issue which has emerged by combining use of genetic engineering technologies with ART is creation of designer babies. Genetic modification is used by the doctors to remove genetic diseases\textsuperscript{128} and chromosomal abnormalities in baby during pregnancy. But now it has been used for manipulation of the existing genes, so that parents will be able to choose the traits of their unborn children. Thus it raise profound social and ethical issues. So far God is considered as the creator and sustainer of life. Through the procedure of surrogacy couples or individuals can beget a child of their own choice. Can such an attempt by man put him in the position of creator of life? Whether by genetic manipulation of embryos, society is destroying its humanity and mankind. Whether by interfering with the intrinsic being of person, science is not allowing the child/baby to fully become themselves by natural process.

4.3.7 Violation of Ethics of the Medical Profession

4.3.7.1 Favoring the Rich Intended Parent at the cost of Surrogate life

Medical profession casts duty upon doctors and clinics to take direct responsibility for first and proper care or both the client and surrogate. The contractual relationship arising in surrogacy is for the interest of parties that may be

surrogate woman or commission parent. But in majority of cases the wealthy couple are protected and surrogate mother has to suffer harm. Specially in a medical situation where clinician must act prudently to save the life of the foetus or surrogate, ethics are violated to save the interest of strong financial incentive (intended parent) and foetus is saved at the cost of surrogate women’s life. Thus surrogate have unequal status in this commercial relationship.

4.3.7.2 Informed Consent

The object of informed consent was that doctor should not violate the bodily integrity and autonomy of another person without their permission. Informed consent is the process by which a fully informed patient can participate in choices about her health care. It is ethical duty of the medical persons to inform the merits and demerits of a particular procedure or treatment and accordingly the patient selects the most appropriate one. Surrogate is often quite poor, uneducated and semi-literate, it seems that she is not aware about the medical terminology and cons of surrogacy process. As result she is unable to understand the nature of the procedure and the risk involved, thus consent given by surrogate is not truly informed consent. She is medically exploited by not disclosing the fact that, procedure can cause gestational injury, frequent abortions, impairment of her ability to have future children and even death in certain cases.

4.3.7.3 Misleading advertisements

The ART clinics often publish success stories of the surrogacy process, thus attracting emotional couples within and outside the country. These advertisement direct only the positive aspect of the surrogacy arrangement and the hard reality attached with surrogacy are not shown to intended couples, individual and surrogate mother. A brochure of an Indian ART clinic featured the following quotation from surrogate who has recently produced a child for an American client: “It’s a miracle I myself was wondering how I managed to deliver such a beautiful American, totally white boy. Couldn’t believe it- I am very happy.”\textsuperscript{129} Such statement is presented as a marketing tool for potential foreign clients. But what should be evident is that the

women failed to understand the genetic realities of the procedure in which she was a central part and foreign client fails to understand the legal procedure and hassle and social challenges encountered by them in taking the custody of the child.

4.3.7.4 Sex selection

The increase in use of surrogacy has also lead to sex selection of the child. The advances in reproductive technologies have in fact given to the prospective parents, a choice to select the sex of their children. Sex selection is high and in fact it is being rampantly used in surrogacy involving in-vitro fertilization.\(^{130}\) In Indian society where gender/sex biasness is already a major issue and has created imbalance in the community, these advanced technique added further to this social challenge. Surrogacy increased the probability that an embryo will be of a particular sex or that would identify the sex of an in-vitro embryo. This gives opportunity to couples or individual to abort the female foetus and select male child. It is violation of right of the girl child to be born and basic human rights.\(^ {131}\)

4.3.8 Choice of Surrogate

Right to personal liberty and privacy, property right over body and right to enjoy benefits of development in science and technology has given each and every women right to act as a surrogate for another or has the right to rent her womb. However the indiscriminate use of this right by each and every woman has raised a bundle of social issue. In case single women (including an unmarried girl, divorced women and widow) becomes pregnant and gives birth to child it 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 and amounts to prostitution. In case married women act as surrogate and gives birth to child outside lawful wedlock, it is equivalent to adultery, especially when she has acted as surrogate without the consent of her husband. In such cases surrogate women bear the stigma of immoral act or immorality. It also affects the future life and marriage prospect of the girl because unmarried mother in Indian society is an unacceptable issue. Another social issue involved is that who should act as surrogate whether a


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relative known to intended couple i.e. one of their family member or a women totally stranger with whom surrogacy contract is entered through middlemen-brokers or agents. In case relative from family is chosen as egg donor or surrogate,\textsuperscript{132} it amounts to an important attempt to reconnect to the conception and the pregnancy which has the probability of being served by use of donor egg. The egg being from family member gives an assurance that the rupture of genetic ties which is supposed to have accrued has been bypassed to the extent possible. For example Gerad Line Wesolouski, 53 years old women, gave birth to her grandchild, conceived from her son’s sperm and his infertile wife’s eggs.\textsuperscript{133}

However, this leads to incestuous relationships as well as amounts to degrees of prohibited relationships.

On the other hand, if unrelated or unknown women is chosen as surrogate. The brokers, agent or middle man selecting the surrogate for their client exploit both client and women. In case client is from foreign country huge amounts of commission are demanded for choosing the women of particular traits and quality. Thus criteria of choosing surrogate in absence of legislature measure raises various local issues which remain unsolved.

4.3.9 Socio-Economic exploitation of Surrogate mother

India is becoming a hub of surrogacy practices due to its Low medical expenditures and lack of legislative measures to check surrogacy process. Indian reproductive tourism is providing better economic opportunity to females than alternative forms of employment. But at the same time it leads to exploitation of poor women who may be induced to become surrogate because of their own financial needs or their families. Economic necessity force some poor women to enter into surrogacy agreements which they otherwise would not have entered, large sum of money entice such women to become surrogate without truly understanding the nature of the process and the risk involved. With increasing incidents of

\textsuperscript{132} It is mandatory that donor sperm should be anonymous and taken from sperm banks. As said by the providers and users, this guideline was strictly followed. Strong demand of sperm from father or brother of husband in order to preserve the bloodline. www.surrogacy.com, visited on 18-4-2015.

surrogacy, the middlemen brokers or agents also come in picture to provide information to the intended parents as well or clinics regarding the availability of surrogate. This practice has the potential to causes exploitation of surrogate women as they mostly belong to low income groups, are illiterate or less literate and are not aware of their legal rights.

The term exploitation means, when women consent to a transaction which is either harmful or unfair to her and does so because some aspect of her character or circumstances is used against her by the other party to agreement. Financial incentives exploit her to enter into unfair contract with the intended parents. Under influence from the middlemen and family pressure forces women to suffer harm or injury resulting from surrogacy process. Economic gains cannot compensate for physical changes in her body, the change in lifestyle, the pain, the medical risk of labour and parturition and above all the emotional attachment with the child.

4.3.10. Commoditization of Motherhood

One of the issues related to surrogacy contract is that it commodities the reproductive ability of women.\textsuperscript{134} Surrogate motherhood creates a market for gestational and genetic service because infertile couples or individuals search for a surrogate woman and avail her procreative service for helping them in begetting child. Thus surrogate motherhood treats the ability to procreate as tradable commodity. This commoditization of the reproductive act may prove to be harmful to the identity and the dignity of a women. The surrogate mother has been reduced to the status of an ‘incubator’ or ‘breeder machines’ or ‘rented wombs’.\textsuperscript{135} This amounts to violation of the principle of inalienability of a human body. The person can have a proprietary right to their body, however any attempt to sell their body or body parts in market place is ethically and socially wrong.


4.3.11. Changing Concept of Parenthood

Parentage is the relationship of parents to their child or children. Parenthood (motherhood and fatherhood) is not only prerequisite for having parent authority, but also determines the surname that the child will acquire and be identified with all through his life. It is basis of many legal rights and obligations. Traditionally, defining a parent was relatively easy because there were only three ways to acquire parenthood; (1) giving birth, (2) Being married to the mother of the child (3) Adopting a child. Modern reproductive technologies, especially surrogacy, challenge these traditional presumptions. A women may give birth to a child with no act of sexual intercourse, with no genetic relationship to the child and with no intention to raise the child. A child may have 3 mothers gestational, genetic and intended and may have 3 fathers genetic and intended father. Who is the legal father or mother of surrogate child is a controversial legal issue. Due to lack of proper legislation dispute regarding parenthood arises, which adversely affect the interests and welfare of the child.

4.3.12. Psychological Effects Associate with Surrogacy

The attachment that mother has towards her delivered child is by blood relation and it is extremely difficult to separate oneself from this emotion. Surrogacy aims at this separation and causing immense trauma to the women when she gives up the child to intended parents. Surrogate mother after handing the child over to the commissioned parents become deeply disturbed, disconsolate, stricken with unbearable sadness and wants to have her child back. This situation arises in cases where surrogate is biologically related to the baby, even if she had entered into a written contract with the intended parents and had received money, it would be practically very difficult for her to part with new born as emotional

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bondage developed from the moment baby started growing in her womb and through the gestational period.

The women starts lactating and if the milk is not sucked by the baby, it would affect the baby as well as the mother so badly, resulting in severe health hazards. The new born needs the breast milk, care, and concern and body warmth of its mother for its survival, at least for a period of first 2 years. In surrogacy where child is separated immediately, it affects the baby, physically as well as emotionally. This would ruin the child physical, mental, emotional and intellectual development to a considerable extent.

Surrogacy has affected the marital life of surrogate and her husband. Surrogates are usually from conservative families and society based on patriarchal system. Domestic violence and household strife have been known to increase when a surrogate’s husband dislikes the fact that she is carrying the child of another man.

The carnal relationship with husband is disturbed and discontinued during pregnancy which results in frustration, aggression and violence in him.

Surrogate mother may change her mind about the pregnancy and opt for abortion. This may affect the contractual relationship between commission parent and surrogate as well as emotional feeling of intended parents who were desperately waiting for the child to come in the world.

4.3.13 Non Acceptance of Child after Birth

One of the important duty of the intended parent or parents, is to accept the responsibility for surrogate child after its birth in every circumstance. In surrogacy the genetic material is mixed outside the human body and the resultant embryo/foetus is subsequently implanted in the womb of the surrogate mother. Thereafter the development of the foetus takes place as in normal pregnancy. But chances of defective birth and birth triplets or quadruplets are more in surrogacy

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pregnancy. In such circumstance if intended parent refused to accept the child with defect or disease. In case twin or triples or quadruplets they accept only one baby and refused to accept other. These issues depict the plight of the surrogate child who is “unwanted” by the person on whose desire they were born and brought them in the world.

4.4 Religious and Cultural Approach towards Surrogacy

Religious response to surrogacy has been different under different religion. Though the concept of surrogacy may not be new in certain religion but assisted reproductive technology has not been universally accepted by all the cultures and society. There has been diverse opinion based on moral and ethical issues.

4.4.1 Christianity and Surrogacy

The Bible does not forbid the use of a surrogacy parent but raises questions as to whether or not it is ethical. Marriage is designed to be between two person and children are to be born of that union. To bring in a third party means that the child will have a third parent. According to Bible children are a gift not a right.\textsuperscript{143} Just as God blesses some people with wealth and success, he blesses some with children and others not. Using a surrogate out of arrogant defiance of God would be a sin, but using a surrogate after prayerful consideration and a time of seeking God’s well and guidance may be a viable alternative for the Childless. However most Christians oppose surrogacy more out of concern for its possible commercialization ion of human life and for the social and psychological problems that might arise.

4.4.2 Islam and Surrogacy

Muslim considered surrogacy equivalent to Zina (Adultery). This is because the surrogate mother is carrying the fertilized egg of a person that is not her legal husband. The child has no lineage by a legal marriage and is technically illegitimate. Such child is Haram, which means forbidden.\textsuperscript{144} However there is contradictory view in Muslim which considered use of a surrogate mother is permissible. They favour the preservation of human species and is one of primary objectives of

\textsuperscript{143} Muriel Larson, “The Importance of a Child”, Mennonite Brethren Emerald, Volume, 40, No.12, 2001

maqasid. So if a married couple cannot conceive, they should be allowed Muslim surrogacy. The womb is in reality being rented as an incubator and the surrogate is not actually engaged in Zina.

4.4.3 Judaism and Surrogacy

There are different views among different groups of Jewish people. Reform Judaism covers about 85 percent of those in the Jewish faith, Conservative Judaism represents about 5 percent and orthodox followers represent about 10 percent. In orthodox belief the edict in genesis to be fruitful and multiply requires that an infertile couple trying to have a child must be assisted in every permissible way. Insemination with the husband’s sperm is permissible if the wife cannot become pregnant in any other way. But they view that the egg donor as interfering in the couple’s marriage, challenging family integrity. The sanctity of family life requires a single husband and wife. On other hand reform Judaism has approved of artificial insemination using the husband’s sperm. In-vitro fertilization and surrogate motherhood are accepted as well. Thus defining Hewish view on fertility treatments based solely on a branch of Judaism is problematic since many different opinions cross over and compete for moral authority.

4.4.4 Hinduism and Surrogacy

Surrogacy was known and practiced in Hindu religion from ancient times. Hindu Mythology provides many examples in which assisted reproductive technologies have been applied. In Mahabharata, Gandhari, wife of king Dhitarashtra conceived but the pregnancy went on for nearly 2 years after which she delivered a mass (mole). 100 male children were developed from this mass. Another example is of how Sage Bhardwaj produced drama, the story relating to birth to Drishtadyumma and Draupadi is even more interesting and reflects the supernatural power of great rishi’s. In the Bhagvata Purana there is a story that

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146 Ibid.
147 Ibid.
148 Prstibha Ganesh Chavan, “ Psychological and Legal Aspects of Surrogate Motherhood,” AIR July 2008, p.103
suggests the practice of surrogacy motherhood transfer of fetus from womb of Devaki to the womb of Rohini.\textsuperscript{150} Thus the child conceived in one womb incubated in and delivered through another womb.

Surrogacy as one of the important development of this new age of medical advancement is a blessing for couples or individual who cannot procreate a child through natural course. Regardless of its benefits, surrogacy has also generated considerable legal, social, moral and ethical debate within and outside the country. In the absence of a specific legislation it is very difficult to resolve the socio-legal issues. However while it is impossible to resist the waves of technological changes, ushered in by the concept of surrogacy, the society should adopt itself to the changes and manage the change in terms of the prevailing socio-moral values.

\textsuperscript{150} Naushad Ansari, “Surrogacy in the Mirror of Hinduisms and Islam”, www.Surrogacymirror.com, visited on 12-08-2014