CHAPTER -1

INTRODUCTION AND HISTORICAL BACKGROUND

_The boy asked his mother,
‘Where did I come from?
Did you pick me up from anywhere?
Mother replied laughing and crying,
Hugging the boy to herself
‘You were the desire in my heart’._

Rabindranath Tagore

1.1 INTRODUCTION

Procreation is essential for survival of all forms of life including man because no living being is immortal. Like animals, human beings also require mutual co-operation of two individuals with different sex structures for the act of procreation. Urge in living being in this regard is called sexual urge. To channelize this, concept of marriage developed in the society of human being. In a broad sense marriage means a legally and socially sanction union of man and woman that accords status to them as husband and wife and legitimacy to their off springs. The institution of marriage is beneficial to society, as a whole because it is the foundation of family which in turn is the fundamental building block of the society. It is considered that birth of children makes the marriage of a man and women more meaningful and secure. In fact, giving birth to child establishes the real status of women in society as is also proof of the virility of man. The institution of marriage gives conjugal rights to the couple in the family and social legitimacy to their relationship which results in the procreation of children. Since pre-historic times almost in all civilizations, the reproduction, bearing and arising of children has been assigned to the institution of family through marriage. Thus procreation of children is the primary biological function of marriage and it is the family which ensures the continuity of human race. More over every human being has an innate desire to have a natural offspring. The reasons are many, to love and to be loved, for performing

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1 P.C Pant, “Law of Marriage, Divorce and other Matrimonial Disputes”, Orient Publishing Company, New Delhi, 2003, p. 3
the religious or spiritual rituals at funeral pyre, for carrying the tradition of family and so on.  

With the emergence and development of the concept of human rights, this basic need of a human being to have children has been recognized as fundamental human right and incorporated as right to procreate. The Preamble of India Constitution comprises paramount objectives of the Constitution as to secure social, economic and political justice through protection of basic human rights and reproductive rights are also integral part of the basic human rights. Further Article 21 also grants fundamental right to privacy that could be invoked to protect the right of individual to reproductive health care information and personal liberty, as women’s right to make reproductive choices. 

Procreation means a biological process by which women gives birth to a child. Women are raised to see themselves as child bears, men to see themselves as generators of procreation. A child is raised by the biological parents to achieve the success and identity that comes from genetic heritage. Thus reproduction transcends the boundaries of individual lives to signal the survival and continuation of the family and the species. Fertility is revered in almost all cultures and the ability to reproduce is perceived as a milestone in adult development. However, unfortunately a large number of people due to various reasons are unable to fulfill this biological process fruitfully and beget a child. The major reason for childlessness is infertility which may be either medical or social.

Medical infertility:- It refers the inability or failure to have a child even after one year or two year of regular sexual inter course without any contraceptives, due to biological reasons. There are various reasons for this kind of infertility such as Diabetes Mellitus, Adrenal disease etc.

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2 V. Rajalakshmi “Reproductive Technology V. Women”, Supreme Court Journal, 1991, p. 49  
5 Suchita Srivastava and Another v. Chandigarh Administration (2009) 9 SCC. 1  
7 www.gerrystahnet visited on 7-6- 2015  
Social Infertility:- It means the inability of individuals to have child due to various social factor in their life.\textsuperscript{9} For instance lesbians, gays, widow person, single individual and divorced individuals such people may be fertile but because of this situation and way of life and social circumstances they are unable to have a child. Infertility is like a Multi-Pronged assault on their partnership, an attack on their sexual relationship, their plans, their dreams, their time and their finances. Infertility is always a couple problem, both men and women suffer greatly from it but the emotional impact of this crisis is very severe on women wearing away at their sense of feminism. Majority of women irrespective of their social and professional status have a natural desire for motherhood and thus inability to bear a child threatens their very object in life.\textsuperscript{10} Infertility in men may be a blow to their ego and they may consider it as an impaired masculinity. But in this situation also women are held responsible by the family members and have to suffer mental torture and harassment.\textsuperscript{11} Infertility is much more than just a medical problem. It is a stigma. Since the interpretation of the term infertility is socially constructed the meaning of infertility has changed with passage of time and change in society.\textsuperscript{12} Thus social consequences of infertility vary from one society to another society and from culture to culture.\textsuperscript{13} According to Abrahamic faith which includes the religion of Judaism and Christianity; infertility is considered as a gift of God and must be accepted by couple with it most calmness and faith.\textsuperscript{14} They believed that infertility is the result of past sin.” Islamic religion also accepts absolute sovereignty of God as is clearly expressed in the Quran “God Creates what he pleases; He grants to whom he pleases, females: and he grants to whom he pleases, males: He gives them in pairs males and females: and he makes whom he pleases barren verily. He is knowing powerful”.\textsuperscript{15} In Hinduism and Buddhism, all the important events and circumstances occurring in life including fertility or infertility are considered as the outcome of

\textsuperscript{9} Ibid
\textsuperscript{10} R. Mander, “Men and Maternity”, Routledge, New York, 2004, p. 147
\textsuperscript{11} Mary Clai Mason, “Male Infertility: Men Talking”, Routledge, New York, 1993, pp. 72-74
\textsuperscript{15} Daud Rahbar, “God of Justice: A Study in the Ethical Doctrine of the Quran: E.J Brill, Laidan”, Netherlands, 1960, p. 303
cycle. Infertility is result of past misdeeds. According to their belief marriage between the spouses is not thought to be a matter of chance but is considered as guided by Karmic cycle itself and infertility is viewed as a judgment or penalty for wrong doing. In some communities infertile people are ostracized as they are perceived to be unlucky or the source of evil, or they become the object of public humiliation and shame. In other communities infertile men and women are often denied proper death rites. In Asia, especially, India, being childless has more negative social, cultural and emotional repercussions for women than, perhaps any other non life threatening condition. On one hand if Childlessness was considered to be curse or a judgment passed by God on infertile couple, on the other hand there was always a search for finding solutions to overcome the problem of infertility. Therefore various measure were taken to please the Gods and Goddess by people and many of these practices such as visiting temple making offering to God, doing penance, wearing charms, gems etc. are still prevalent in India. In primitive societies and subsequently successive civilizations, the aspiration for a child have been gradually transformed into rights and obligations, embodied and projected by customary religious and later on legal rules. The ancient societies provided various methods to overcome childlessness; one which exists in Hindu society was Niyoga. The institution of Niyoga provided and approved the method by which the sperm somehow or they could reached inside the woman so that the ovum could be fertilized. This was how Ksetraja son was begotten. The Niyoga was practiced when man was impotent or had a incurable disease or dead, and the family in accordance

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18 Nicole J. Wiersema, Anouck J Drupper, “Consequences of Infertility in Developing Countries: Results of a Questions and Interviews Survey in the south of Vietnam”, Journal of Translational Medicine, Vol 4, 2006, p.56
20 Santhana Gopala Homa is particular pooja for overcoming childlessness offered by most of people in Lord Vishnu temples in India
21 Maja Kerlova Erickson, “Reproductive Freedom”, Martinus Nijhoff Publication, Netherlands, 2000, p. 166
with its swadharma authorized the husband’s brother or other Sapinda to beget a son in his wife.  

In Biblical tradition procreation was given utmost importance and in case a man died childless, his brother was required to go to his widow and conceive a child to carry on the deceased brothers line and in case of refusal to perform this duty, he would be publically humiliated. In ancient Mohammad societies, childlessness was considered as a punishment given by Allah and hence couples would perform various prayers, undergo fast and give offerings. In case of childlessness due to male infertility the religious texts prescribed various prayers and rituals to be performed by the couple and also allowed medical treatments. However in case of childlessness due to female infertility the husband had the option to go for remarriage for obtaining and ensuring child. The Jewish tradition also dictated that man can marry his brother’s widow if brother dies childless. The concept of polygamy was also the outcome of female infertility under Indian traditional system.

The growth and progress of the society and formation of state led to the development of legal system and establishment of legal institutions. The recognition of the significance and need of child for a family in this legal system therefore led to the development of mechanism of adoption as an alternative measure having legal basis for those couples unable to have children. Adoption is the lawful transfer of parental obligations and rights. It grants social, emotional and legal family membership to the person who is adopted. However the issue of adoption is a very sensitive and emotionally charged issue which an infertile couple faces. Adoption though makes them parents but can never fulfill the innate desire of an individual to have a genetic connection to child or to have child resembling them.

This urge for a biological child has tempted mankind to find out newer methods and search for alternatives for begetting a biological child. Medical science has always tried to search for alternatives and treatments to help the infertile couples

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to beget a biologically related child so as to fulfill their natural desire. The advancement of technology and medical science offers various solutions and procedure to the childless couples and enable them to have children genetically related, one of them is covered under the heading, Assisted Human Reproductive Technologies (ARTs). Assisted Human Reproductive Technology is a term used to mention advanced and innovative medical inventions that help people to realize their dream of giving birth to a child. According to Black’s Law dictionary, Assisted Reproductive Technology is using any medical means to aid in human reproduction, especially by means of laboratory procures.

Kindregan and Mc Brien define ART, “as any technology that is employed to conceive a child by means other than sexual intercourse.”

Section 2 (c) of the Draft Assisted Reproductive Technology (Regulation) Bill, 2010 defines ART as:

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

Thus ART is a general term used to refer method employed to achieve pregnancy by artificial or partially artificial means.

1.2 DIFFERENT TYPES OF ASSISTED REPRODUCTIVE TECHNOLOGY USED FOR HUMAN REPRODUCTION.

Assisted human reproduction technology gives hope to couple who have been trying since years to conceive and beget a child. The major types of ART methods are as follows.
1.2.1 Artificial Insemination

It is one of the oldest and most common forms of alternative procreation. Artificial insemination means the injection by instrument of semen into the women’s reproductive tract for the purpose of procreation. Insemination in literary term means, “the act of sowing (of seeds in the ground or figuratively of germs in the body or ideas in the mind etc.).” In the context of ART it may means, “The introduction of semen into genital tract of a female.” Broader term insemination can happen naturally as well as artificially. Natural insemination with the help of sexual intercourse and Artificial Insemination through the use of instruments or other artificial means. Artificial insemination in its simplest form requires the donation of sperm from a man and the mechanically injection of it into vagina of the women.

Artificial Insemination can be practiced in three ways:- Firstly, artificial Insemination by husband (AIH) or homologous Artificial insemination. In such process child conceived and born is biological offspring of both the women and her husband. Secondly, Artificial Insemination by donor (AID) or Hetero logos Artificial insemination. In this practice child is biological related to women only.

Thirdly confused or combined Artificial insemination in this method a married women is inseminated with a mixture of her husband’s and donor’s sperm. This method is not much popular as the above two.

1.2.2 In Vitro Fertilization (IVF)

In vitro means “Within glass ware.” In vitro Fertilization (IVF) is fertilization of gametes outside the body in a test tube or Petri dish. IVF was originally designed to treat women only when infertility was due to body damaged fallopian tube. Today IVF has become the readymade answer for male factor

31 Rashid R. Khilawala, “Human Artificial Insemination”, www.buzzle.com, visited on 30-10-2010
32 Ibid
34 Pedro, “Artificial Reproductive Technique, Fertility regulations: The challenges of Contemporary Family Law”, 34 A. JIL (Supp) 125, 1948, p. 126
infertility, for women having POF (Premature Ovarian Failure) and for women whose is uterus either absent from birth, surgically removed or badly damaged and distorted. IVF first caught the public eye in 1778 with the birth of test tube baby Louise brown. It was first ‘out of womb’ conception technique perfected by reproduction scientists. The first step in IVF is the collection or harvesting of healthy qua from the woman’s ovaries. The second step is the fertilization of the successful retrieved eggs with the man’s sperm in petri-dish. In the event of successful fertilization, the embryo is implanted into a woman’s uterus, with the hope that pregnancy will result. There are various kind of IVF

1. IVF with donor Egg
2. IVF with Donor Embryo
3. IVF with surrogacy arrangement

1.2.3 Gamete Intra – Fallopian Transfer (GIFT)

It is the most recently developed non-coital reproductive method. It involves directly injecting an unfertilized mixture of sperm and egg into the fallopian tubes of infertile women. Unlike IVF however, the sperm and egg are not incubated together but are placed in a small catheter for transfer. The physician, through laparoscope incision, completes this procedure by inserting the tip of the catheter into the fallopian tube and gently discharges its contents.

1.2.4 Zygote intra – Fallopian Transfer (ZIFT)

It is a combination of IVF and GIFT. Zygote intra fallopian transfer works like in-vitro fertilization however; the embryos are transferred to the woman’s fallopian tubes instead of her uterus. The sperm and eggs are combined in the lab. after fertilization, they are placed in the woman’s fallopian tubes, where they will

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37 IVF with oocyte is indicated for women with established POF, natural menopause or who are carrier of genetic diseases.

38 Embryo donation is a well established and successful form of ART where both partners are subfertile.

39 In this woman act as a temporary mother by allowing her work to carry a pregnancy for another couple.

40 Types of assisted reproductive technologies, www.livestrong.com visited on 24-04-2013
travel to the uterus. ZIFT has the highest success rate of all of the ART procedure. It has a live birth rate of about 29% per cycle.\textsuperscript{41}

1.2.5 Reproductive Cloning

Reproduction in human beings is possible in normal situation by the fertilization of eggs and sperms. But in cloning, embryo is formed by removal of nucleus of an egg cell and replacing it by the nucleus of somatic cell.\textsuperscript{42} The United States Presidents Commission on Bioethics defines cloning as a “Asexual production of a New human organism that is, all stage of development, genetically virtually identical to a currently existing or previously existing human being. It would be accomplished by introducing the nuclear material of a human somatic cell (donor) into on oocyte (egg) whose own nucleus has been removed or inactivated, yielding a product that has a human genetic constitution virtually identical to the donor of the somatic cell.” The aim of reproductive cloning is to produce a child and the cloned embryo is transplanted into the womb to develop.\textsuperscript{43}

1.2.6 Surrogacy

Surrogacy is yet another alternative for those who cannot procreate in the traditional manner. Surrogacy involves a women acting as a surrogate or as an incubator for bearing a child for another person or couple. A surrogate woman conceives by using egg from another woman or by using her own donated egg and sperm of donor.\textsuperscript{44} The concept of surrogate motherhood is not new and has been practiced since ancient times. The practice of surrogacy has developed with the passage of time and in the present scenario it has become the most popular and controversial form of ART both at national as well as international level.

\footnotesize{\textsuperscript{41} Jancy Lewis, “Types of Assisted Reproductive Technologies”, www. chow.com, visited on 11-5-2014
\textsuperscript{42} Indu S. Nair, “Rights of the Child: Challenges for Law in the New Era of Technology”, C.U.L.R., 2003, p. 124
\textsuperscript{43} Jonathan Herring, Medical law and Ethics, Oxford University Press, U.K, 2006, pp. 990-91
\textsuperscript{44} Ved Kumar, “Fertility Revolution and Changing concept of Family and Identity”, xxv Delhi Law Review, 103, 2003 p. 109}
1.2.7 Intra-Cytoplasmic Sperm injection (ICSI)

Intra-cytoplasmic sperm injection is often used for couples in which there are serious problems with the sperm. Sometimes it is also used for older couples or those with failed IVF attempts. In ICSI a single sperm is injected into a mature egg. Then the embryo is transferred to the uterus. The child will not be genetically related to either parent.\(^{45}\)

1.3 INTERNATIONAL PERSPECTIVE OF ASSISTED REPRODUCTIVE TECHNOLOGIES AND SURROGACY

Human rights are vital to individual’s existence. They are the fundamental and inalienable rights, perquisite to life as human being.\(^{46}\) The international community has established several instruments detailing the inalienable human rights. The various means to achieve or avoid human reproduction are viewed as integral to concept of human dignity, personal identity and community. The significance of reproductive rights is evident in its entrenchment in international law under four health related categories (1) The right to found a family (2) The right to decide the number and spacing of children (3) The Right to family planning information and services (4) The right to benefit from scientific advancement.\(^{47}\) The individual’s right to receive the benefits of scientific progress or technology includes assisted reproductive technologies like In vitro fertilization (IVF), Controlled ovarian hyper stimulation (COH), Intrauterine Insemination (IVI), Gamete intra fallopian transfer (GIFT) and Zygote intra fallopian transfer (ZIFT) and other scientific technologies. These technologies are the method that enable infertile person to reproduce biologically. The reproduction autonomy includes within its ambit all ideas relating to reproduction such as whether or not to have children, when to have children, where, how and with whom to have children. The right to use ART in fact is a part of reproductive autonomy which is essential for exercise of right to procreation.

\(^{45}\) www.medicinenet.com, visited on 5-11-2012
These reproductive rights and use of scientific technology for procreation has enshrined in international human rights instruments, conventions and discussed in various international conferences.

1.3.1 Universal Declaration of Human Right, 1948\(^{48}\) (UDHR)

Article 16 of Universal Declaration of Human Right states that “Men and women of full age without any limitation due to race, nationality or religion have the right to marry and to found a family.”\(^{49}\) Family is the natural and fundamental group unit of society and is entitled to protection by society and the state. This right lays the foundation for the reproductive rights in UDHR. Further the right to benefit from advancements of science\(^{50}\) can be considered the repository for the use of modern scientific technologies for the enjoyment of reproductive rights.\(^{51}\)

1.3.2 The International Covenant on Civil and Political Rights, 1966 (ICCPR)

This is first binding international human right document. Like UDHR, in ICCPR also there is no express provision regarding the right to reproduction. But the provision relating to right to family and privacy are considered as the foundation for reproductive rights.

Article 23 of ICCPR provides production for the right to found a family.\(^{52}\) The human rights committee, the adjudicative body for the enforcement of ICCPR states that, Article 23 should be interpreted to include a codification of national obligations to enact non-discriminatory family planning policies. This is also a positive right to non-discriminatory access to reproductive technologies.

1.3.3 The International Covenant on Economic Social and Cultural Rights, 1966

This covenant recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.\(^{53}\) This right includes the

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\(^{49}\) Universal Declaration of Human Rights, 1948.

\(^{50}\) Article 27, UDHR which states that: “Everyone has the right freely to participate in the cultural life of the community to enjoy the arts and to share in scientific advancements and its benefits”.

\(^{51}\) Centre for Reproductive rights Women of the world, Law & Policies, www.reproductiveright.org

\(^{52}\) Laura Shanner, “The right to procreate: When rights claims have gone wrong”, 40 Mc Gill Law Journal, 1995, p. 823

\(^{53}\) Article 12 ICESCR
right to treatment for maternal and infant mortality and the promotion of children’s health within the right to medical treatment for illness. This covenant also includes right to education and personal development. This right can be interpreted to include one of the elements of reproductive right i.e. rights to information relating to family planning, access to technologies and other relevant information’s related to reproduction. Thus, the covenant also confers a right to enjoy the benefits of scientific progress and its application to everyone.

1.3.4 Convention on Elimination of all Forms of Discrimination Against Women, 1979 (CEDAW)

Article 12 of CEDAW states about the women’s reproductive rights as follows.

(1) State parties shall take all appropriate measure to eliminate discrimination against women in the field of health care in order to ensure on a basis of equality of men and women, access to health care services, including those related to family planning.

(2) Notwithstanding the provisions of paragraph I of this Article, state parties shall ensure to women appropriate service in connection with pregnancy, confinement and the post natal period, granting free services where necessary as well as adequate nutrition during pregnancy and lactation.

1.3.5 The Convention on the Rights of Person with Disabilities, 2006

This convention is the first comprehensive International Human Rights, instruments that specially recognized the right to reproduction and sexual health as a human right. Article 23 declares that “States parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters to marriage family, parenthood and relationship, on equal basis with other, so as to ensure that

(a) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age- appropriate information, reproduction and family planning education are recognized and the means necessary to enable them to exercise these rights are provided.

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54 Article 12 (2) ICESCR
(b) Persons with disabilities including children retain their fertility on an equal basis with others.”

1.3.6 International Conferences

The reproductive rights were specially addressed in various international human rights conference. The first conference in which reproductive rights were recognized internationally as human right was the International Human Rights Conference in Teheran held in 1968. It associated quite exclusively, development and promotion of human rights with birth control in developing countries.\(^{55}\) It did not recognize on individual right to reproductive autonomy. Bucharest world population conference held in 1974 declared that, ‘the right to decide freely and responsibly on the number and spacing of their children was extended to couples and individuals’. A position that is still endorsed today by most of the stakeholders involved in reproductive issues. In 1975 women’s conference\(^{56}\) that officially launched the women’s rights movement was clearly women oriented. It used the notion of bodily integrity and control as a reference point to interpret the right to decide on the number and spacing of children. An international conference in Mexico held in 1984 changed the circumstances on the previous conference on world population as U.S. made a complete U-turn from their population growth control position following the appearance of a powerful ‘right life movement’. In 1990’s three international conference were held which were marked as milestones in the recognition of reproductive health rights.\(^{57}\) The first was International Conference on human rights held in Vienna, Austria in 1993. It pronounced that rights of women are an inalienable integral and invisible part of human rights. The second conference in 1994 was international conference on population and development; it extended women’s reproductive rights from merely serving the goals of population control to the respect for the right of women as autonomous individuals with the capacity to decide on matters pertaining to their sexuality within their social, economic and political context. The 1995 fourth world conference of women held in Beijin, re-

\(^{55}\) Dr Ancesh V. Pillai, “Surrogacy Motherhood and the Law, International and National perspectives”, Regal Publication, New Delhi, 2015, P. 34

\(^{56}\) Centre for the study of global ethics, “Background report on women’s Reproductive Rights”, www.infroworldbank.org, visited on 7-11-2014

emphasized a holistic approach in defining reproductive rights. It underscored the point that issues of reproductive health should not be viewed in isolation from the underlying social, economic and other conditions.

1.3.7 Hague Conference on Private International Law

Hague Conference on Private International Law (HCCH) is the oldest international organization based in the Hague. Since 1983 it is a melting pot of different legal traditions has developed and served conventions which respond to global needs in the areas of International protection of children, Family and Property relations, International legal co-operation and Litigation, International Commercial and Finance law being the world’s leading Intergovernmental organization in the field of private international law. It has drawn up no less than 38International Treaties or Conventions to overcome legal obstacles faced by individuals and companies in cross-border relations and transactions.58

1.3.7.1 Hague Convention on Inter Country Adoption in 1993.

The Hague convention on protection of children and co-operation was formed in respect of inters country adoption, which came into force on May, 1995.59

The main objectives of the convention are:

To establish safeguards to ensure that inter-country adoptions take place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law.

- To establish a system of co-operation amongst contracting states to ensure that those safeguards are respected
- To establish formal international and inter government recognition of inter country adoption.
- To secure the recognition in contracting states of adoptions made in accordance with the convention.

On of October, 2008, this convention has been rectified by 76 countries.

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58 www.hcch.net.visited on 20-5-2015
59 www.adoptionindia.nic.in, visited 1-6-2015
The private International Law issues surrounding the status of children, including issues arising from International Surrogacy Arrangements.

Historically, the issue of whom the law should identify as child’s legal parents in most states relatively settled, as result of convention of 1993. However, uncertainly has arisen in recent times in some states as a result of a combination of changing family patterns and advance in medical science. Thus in an era of globalization burning issue has came to light called “Surrogacy”.

A brief internet search of “Surrogacy” and in today’s world one is a click away from hundreds of websites promising to solve the problems of infertility through in-vitro fertilization techniques and surrogacy. It is now a simple fact that surrogacy is a booming, global business. This has created a number of challenges, above all when surrogacy arrangements involve parties in different countries. In particular, international surrogacy arrangements can often result in the difficulties described above concerning the establishment or recognition of the legal parentage of the children born as a result of the arrangement. This can have far-reaching legal consequences for all involved for example, it may affect the child’s nationality, immigration status, the attribution of parental responsibility regarding the child or the identity of the individual (s) under a duty to financially maintain the child, etc. difficulties may also arise because the parties involved in such an arrangement are vulnerable and at risk.

Pursuant to a mandate from its members, the permanent bureau of the Hague Conference on Private international law is currently studying the private international law issues being encountered in relation to the legal parentage or “filiations” of children, as in relation to international surrogacy arrangement more specifically.60

The following efforts have been made by Permanent Bureau of the Hague Conference:

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1.3.7.2 Preliminary note on the Private International Law Document No. 11, Year 2011

On 10th March 2011 the permanent Bureau of the Hague Conference on Private international Law Published a preliminary but comprehensive not entitled “Private International Law issues Surrounding the Status of children including issues arising from international surrogacy arrangements.” A press release followed, “Cross-Frontier Surrogacy Issues added to Hague conference work programme” issued by the Hague conference on 7th April 2011, inviting its permanent Bureau to intensify work on the broad range of issues arising from international surrogacy arrangements. The ‘mandate’ issued by the Hague conference’s council “requires the permanent bureau to gather information on the practical legal needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach to addressing international surrogacy issues.”

With international and commercial surrogacy arrangements on the increase, the risks and consequences produced by so called ‘global reproductive tourism’ now needs to be addressed at a global level.

It was further stated that61 surrogacy law both domestic and international has been playing catch up. The responses of individual states to the question of surrogacy have been diverse and disparate. They broadly fall into four broad categories:

(a) Those states where surrogacy arrangements are legal and enforceable;
(b) Those states where surrogacy arrangements are legal, but strictly controlled and subject to meeting specific criteria;
(c) Those states where surrogacy is illegal; and
(d) Those states which have made no provision in their domestic legislation

There is a wide variation in approach between states to such fundamental questions as whether a sperm donor should be a legal parent or how the law should treat a person who has carried a child but has no genetic link to that child when one

throws into the mix the issue of the rights of parenthood to be ascribed to same sex partners, the spectrum of approaches becomes even wider.

With so many children born by way of surrogacy arrangements, the time has now come for the establishment and implementation of international standards by way of a multi-lateral convention. Thus the aim of this document was to sets out the background to surrogacy issue and the consequences of the current lack of any international agreement. It also looks at the existing international agreements which could potentially be used to regulate international surrogacy and the initiatives currently underway to establish internationally recognized standards in this area.

The permanent bureau was also asked to continue gathering information on practical needs in the area comparative prospects of achieving consensus on a global approach as well as the consult with legal profession as well as health and other relevant profession concerning the nature and incidence of problems accruing in this area a preliminary report on progress was requested for the council of 2012.

1.3.7.3 Preliminary Report on International Surrogacy Document No. 10 year 201262

In March 2012, A preliminary report on the issues arising in relation to international surrogacy arrangement was published for consideration by the members of Hague conference. In April 2012 falling the consideration of preliminary document No.10 of March 2012 the council requested that permanent Bureau to “continue the current work under the 2011, Council Mandate” and they further prepared and distributed questionnaires in order to obtain more detailed information regarding the extent and nature of private international law issue being encounter in relation to international surrogacy arrangement as well as in relation to legal parentage or filiations more broadly. The questionnaire shall seek view on needs to be addressed and approaches to be taken.” The Permanent Bureau was invited to present its final report to the Council in 2014.

At the April 8-10-2014 council meeting the members of Hague conference welcomed the work carried out by permanent bureau and agreed that work should

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62 www.hcch.net. visited on 7-7-2015
continued to further explore the feasibility of drawing up a multilateral instrument in this area to this end, the council-invited the permanent bureau to continual information responses to questionnaire No- 1 in particular from states where international surrogacy arrangement takes place. While the council voted to support expressed by a considerable number of member for the establishment of an ‘Expert Group’ It decided to defer the final determination of matter to its meeting in 2015.

1.3.7.3.1 The Parentage/Surrogacy Project, 2015

At 2015 council on general affairs and policy of the conference, “The Council”, 24-26 March 2015, Members of Hague conference decided that an experts groups should be convened to explore the feasibility of advancing work in this area.

The council decided that ‘expert’s groups should meet in early 2016 and report to do 2016 council need and that the group should be geographically representative and be composed in consultation with members’.

1.4 SURROGACY

Surrogacy is an important method of Assisted Human Procreation for those who cannot or choose not to procreate in the traditional manner. 63 Surrogacy as a reproductive technology is an arrangement by which a woman agree to be impregnated by assisted conception, carries the resulting foetus and relinquishes all parental rights of the child at birth 64. The word ‘surrogate’ has its origin from a Latin word “Surrogatus” which means substitute, that is a person appointed to act in the place of another. Hence a surrogate mother is a woman who carries a child on behalf of another woman, either from her own ovum or from the implantation in her womb of a fertilized egg from another woman.

Black’s Law dictionary defines surrogacy as an “agreement wherein a women agrees to be artificially inseminated with the semen of another women’s

husband. She agrees to conceive a child, carry the child to term and after the birth, assign her parental rights to the biological father and his wife.\textsuperscript{65}

Warnock Commission Report\textsuperscript{66} defines surrogacy as the practice where by one women carries a child for another with the intention that the child should be handed over after birth American Law Reports\textsuperscript{67} define surrogacy as a contractual undertaking where by the surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural or biological father to bear and deliver it to natural or biological father and to terminate all of her parental rights subsequent to the child’s birth.

According to ICMR, Guidelines 2005, surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate.\textsuperscript{68}

Section 2 (t)\textsuperscript{69} Surrogacy means an arrangement in which a women agrees to a pregnancy, achieved through assisted reproductive technology in which neither of the gametes belong to her or her husband, with the intention to carry it for term and hand over the child to the person or persons for whom she is acting as a surrogate. These definition, however, refer to one of the form of surrogacy i.e. gestational surrogacy. The surrogate mother is not biologically related to the child, she only rents her womb. Surrogacy agreement or contract surrogacy is a process by which the intended parents take the help of surrogate women for begetting a child. Generally every surrogacy process involves an agreement between commissioning parents and surrogate women.

According to section 2 (v) of The Assisted Reproductive Technology (Regulation) Bill 2008,


\textsuperscript{66} The report of the committee of inquiry into human fertilization and embryology, 1984, U.K Para 81

\textsuperscript{67} Surrogacy: Is it your right. www. is karasmithblogst.com visited on 2-1- 2015.

\textsuperscript{68} Rule 1.2.33, National guidelines for accreditation supervision and regulation of ART clinics in India. Indian council of Medical Research, Issued by Ministry of Health and family welfare, Government of India, 2005.

\textsuperscript{69} The Draft Assisted Reproductive Technology(Regulation) Bill, 2008 and section 2 (aa) the Assisted Reproductive Technology(Regulation) Bill, 2010, Section 2 (f) the Surrogacy (Regulation) Bill, 2014.
Surrogacy agreement means a contract between the persons availing of assisted reproductive technology and the surrogate mother.\textsuperscript{70}

1.4.1 Parties to Surrogacy Agreement

There are namely two parties, one who wishes to beget a child with the help of surrogate and bring up the child after his or her birth, known as Commissioning Parents or Intended Parents. Second party is a women who agrees to conceive a child through assisted reproductive technology, carry the child to term and relinquish her parental rights after birth known as Surrogate Mother.

Section 2 (g) of the Assisted Reproductive Technology (Regulation) Bill, 2010, defines Commissioning Parents. “Commissioning parents/ couples/individual means parents, couples or individuals, respectively, who approach on ART clinics or ART bank for providing services that the ART clinic or the ART bank is authorized to provide. Surrogate mother, according to section 2 (bb), the Assisted reproductive technologies (Regulation) Bill 2010, means a women who is citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of man who is not her husband and oocyte of another women implanted in her to carry the pregnancy to viability and deliver the child to the couple individual that had asked for surrogacy.”\textsuperscript{71}

Surrogate mother means women who agrees to have an embryo generated from the sperm of man who is not her husband and oocyte of another women, implanted in her to carry the pregnancy to full term and deliver the child to its biological parent. (s).

1.4.2 Historical Background

Surrogacy has been in existence in the world for a long time, even though its significant role has been noticed only recently. Practice of surrogacy dated back to Biblical times. The Old Testament offers the example of Abraham’s infertile wife, Sarah, who commissions her maid Hagar to bear her child by persuading Abraham to sleep with her. Similarly, Rachel the barren wife of Jacob ‘commissions’ her maid

\textsuperscript{70} Section 2 (cc), The Assisted Reproductive Technologies (Regulation) Bill ,2010; Section 2( g) the Surrogacy (Regulation) Bill, 2014

\textsuperscript{71} Section 2 U, Assisted Reproductive Technology (Regulation) Bill, 2008.
Bilhah to have a child by convincing Jacob to sleep with her. The class distinctions between the commissioning and surrogate women in these stories reflect modern day practice of surrogacy. Indian mythology too points out that surrogacy was traditionally prevalent in India during ancient times. There are various mythological epics written in India, which shows the occurrence of surrogate pregnancies. In The, Bhagvata, Purana, there is a reference to the birth of Balaram, which suggests the practice of surrogate motherhood. Kansa, the wicked king of Mathura, had imprisoned his sister Devaki and her husband Vasudeva Because a prophecy had informed him that their child would be his killer. Every time Devaki delivered a child, he smashed its head on the floor. In this way he killed six children. When the seventh child was conceived, the Gods intervened. They summoned the Goddess Yogamaya and with her help transferred the foetus from the womb of Devaki to the womb of Rohini (Vasudeva’s other wife who lived with her sister Yashoda across the river Yamuna, in the village of cowherds at Gokul) Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kamsa that the child was born dead. Thus the child conceived in the womb of Devaki was incubated in and delivered through another womb i.e. of Rohini. It is to be noted here that the present modern day developments in surrogacy allow transfer of foetus which is developed in the test tube to the womb of a women. But the above incidence in Indian mythology refers to a type of surrogacy in which the developed foetus was transferred from one womb to another womb. It reflects the level and extent of science and medical knowledge of ancient Indians.

Another popular story is that which is related to the birth of Kartikeya also called as Subramanya swamy. Lord Kartikeya is the commander of the army of the Gods and he is also considered as the God of fertility by tradition. He is the son of lord Shiva, the father of universe and Goddess Parvati, the mother of universe. It is said that at the request to Gods for a person for the post of their army commander,

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75 Basantuj Naikar, “Indian English Literature”, Atlantic Publishers and Distributors, New Delhi, 2003, p. 23
Shiva gives a bija to be implanted in mother Ganga.\textsuperscript{76} In the modern times the bija can be considered as the genetic material of the father and because it is implanted in the river Goddess Ganga, she can be considered as a surrogate. However, after sometime it becomes unbearable for the surrogate mother Ganga to carry the embryo.\textsuperscript{77} She makes a miscarriage. Then the god of fire Agni keeps the embryo on Saravana (A kind of grass believed to have potential of nectar) and which may be considered as modern day incubator. The Sapta Matrakas who can be considered as the nurses or care takers fed the child. Thus the God Kartikeya is born. This incidence can also be considered as a form of surrogacy in which initially the womb of a woman is used for conception of the foetus and later on the foetus is developed in incubator due to the inability of the surrogate mother to carry the foetus to the full term. At the same time this incidence also points out the various problems which may arise during a surrogacy procedure like inability of surrogate mother to carry foetus to full term, or a situation where surrogate mother wants to terminate her pregnancy before the full term. Thus the ancient India mythology offers a solution to the present day conflicts which may arise between the surrogate mother and commissioning parents.

Another well known story is that of the birth of Kauravas. According to the Mahabharata, Queen Gandhari (the wife of king Dhritarashtra) suffered a miscarriage. The embryo was split into one hundred pieces by the sages (doctors of the day) and implanted in one hundred Kumbhas and subsequently hundred children were born. Some of the historians argue that these Kumbhas are equivalent to the present day anonymous surrogate women.\textsuperscript{78} Thus it can be said that the glimpses of modern developments in surrogacy can be traced to the ancient mythology.

\subsection*{1.4.3 Kinds of Surrogacy}

Surrogacy is considered as a very sensitive and emotional issue which has far reaching impact on all the parties involved in it. Due to the delicate nature of surrogacy, it is essential that in order to be successful procedure, all the parties are

\textsuperscript{76} Dr. B.R Kishore, “Lord Shiva”, Diamond Pocket Books Pvt Ltd, New Delhi, 2001, p. 23
\textsuperscript{77} Murugan, www.wikipedia.org visited on 29-9-2013
\textsuperscript{78} Nigam M. Nigam, R. Chaturvedi R and Jain, “A Ethical and legal Aspect of Artificial Reproductive Techniques including surrogacy” , Anil Aggrawal’s Internet Journal of Forensic Medicine and Toxicology, Vol. 12 No 1 Jan-June, 2011.
comfortable and confident with one another. There are various arrangements which are possible in surrogacy depending upon the suitability and convenience of the parties. This has given rise to various forms of surrogacy. The various classes of surrogacy according to choice and convenience of the parties are namely.

1.4.3.1 Class of surrogacy on the basis of type of agreement entered into.

One of the basic classifications of surrogacy is based on the nature of agreement entered into by the parties. Thus surrogacy can be classified as formal or informal surrogacy.

(A) **Formal Surrogacy:**- It is also known as contractual surrogacy. They are kind of surrogacy arrangements in which the nature and terms of agreement between the commissioning parents and surrogate are clearly specified and are generally in writing. Such arrangements are legally enforceable by a court of law.

(B) **Informal Surrogacy:**- They are also called as non-contractual arrangement. In informal written arrangements parties do not make written agreement. They lack the legal requirements of an enforceable contract in that they are often vague and uncertain.\(^79\)

1.4.3.2 Class of Surrogacy on the Basis of Financial Transactions.

Surrogacy can be commercial surrogacy and altruistic surrogacy depending upon the financial transaction between the surrogate women and commissioning parents.

A Commercial Surrogacy:- It refer to arrangement which includes payment of money or other benefits along with medical expenditure to surrogate mother and in some cases, her agents. Commercial surrogacy is a form of surrogacy in which gestational carrier is hired and paid to carry a child in her womb to a full term.\(^80\) It is kind of selling of baby as product. This form of surrogacy is usually resorted to by well off couples who can afford the cost involved. This type of surrogacy is legal in various countries including India where due to excellent medical infrastructure, high

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international demand, un-regulated laws, ready availability of poor surrogate women, it has reached industrial proportions. Commercial surrogacy is sometimes referred offensive by terms such as ‘Wombs For Rent’; ‘Outsourced Pregnancies’ or ‘Baby Farms’.

B. **Altruistic Surrogacy**

It is a situation where the surrogate mother receives no financial reward or fees for carrying the baby of the intended parent on relinquishment of the child. In such surrogacy arrangement medical expenses, maternity clothing other necessity relating to pregnancy and birth are paid by the commissioning parents. This kind of surrogacy deals only with affection and care as consideration which is a relevant criterion.

**1.4.3.3 Class of surrogacy on the Basis Relationship Involved**

On the basis of relationship, whether surrogate mother is genetically related to baby or not surrogacy may be classified as traditional surrogacy and gestational surrogacy.

A. **Traditional surrogacy**

It is the most widely used method of surrogacy pregnancy as well as the most historically prevalent. In this process the woman is artificially inseminated with the semen of the husband of the genetic couple. Because it is her own egg that is being fertilized, the surrogate mother is genetically related to the foetus that she conceives. Therefore, any resulting child is genetically related to male partner of the commissioning couple but not the female.\(^{81}\) This is also known as partial surrogacy or natural surrogacy as the surrogate contributes genetic material to the resulting child.\(^{82}\)

Traditional surrogacy or partial surrogacy though complicated by ethical uncertainty over the relationship between biological relatedness and kinship bonds,

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remain the most popular form of surrogacy in the world due to its high success rates and its low cost.\textsuperscript{83}

B. Gestational surrogacy

It is referred by couple who desire a biological connection to their child. It is a pregnancy in which one woman (Genetic Mother) provides the egg, which is fertilized and another woman carries the foetus and gives birth to the Child. It is the treatment in which the gametes of the genetic couple or commissioning parent or intended parents are used to produce embryo by the process of In- vitro fertilization (IVF). These embryos are subsequently transferred to a woman who has agreed to act as a host for these embryos. The surrogate host is therefore genetically unrelated to any child that may be born as a result of this arrangement.\textsuperscript{84} This type of surrogacy is also known as total surrogacy or full surrogacy because the foreign genetic material is implanted into a woman who gestates the child for another couple who are the genetic parents.\textsuperscript{85}

1.4.3.4 Class of Surrogacy on the Basis of Transparency of Information

A. Open Surrogacy:- In open surrogacy, the parental rights are transferred to the intended parents by the surrogate as per the contract. There is a sense of openness in such kind of surrogacy agreement wherein the commissioning parents want their child to know about his birth. In India, open surrogacy means that the child is made aware of his/her birth via surrogacy and to learn about his/her birth mother i.e. surrogate.

B. Closed Surrogacy:- In a process whereby an infant is born out of any agreement which is very private and is concerned only with those who are involved. It is a closed affair in which the record of the biological parents and information regarding the surrogate mother or egg or sperm donor is kept sealed. There is prohibition of any sort of contact between the surrogate mother and child even after the birth. The

\textsuperscript{83} Faith Merino, “Adoption and surrogate pregnancy InfoBase publishing”, U.S.A, 2010, P. 20
\textsuperscript{84} Glenda Emmerson, “Surrogacy: Born for Another” Research Bulletin, No. 8/96 Queensland parliamentary library, publications and resources, section, Brisbane Sept. 1996
commissioning parents look at the surrogate women as one who is hired to do a job and to whom they are paying considerable huge sum for such purpose.\textsuperscript{86}

1.4.4 History of Surrogacy Arrangements

Surrogacy arrangement is basically a private matter. It dated back to 1500 BC and is found among the artifacts of the Hurricane of Mesopotamia. Surrogacy was practiced in the Greek society as early as the 4\textsuperscript{th} century BC and in medieval Tuscany preserved from around the year AD 1500 gives another perspective of surrogacy. However no descriptive details of the ancient surrogacy arrangements are available.\textsuperscript{87}

The first incidents of various kinds of surrogacy arrangements done as a part of clinical treatment are as following.

1.4.4.1 First Paid Traditional Surrogacy Arrangement

In 1980, Elizabeth Kane (assumed name) created history by being the first paid surrogate mother who gave birth to a child in the traditional way. She received $10,000/- as remuneration for the successful delivery of the baby. This first-ever recognized traditional surrogacy heralded the beginning of changes in surrogacy arrangements. After the birth of the child, Elizabeth Kane regretted her decision of being a surrogate mother and later on campaigned against surrogacy. She wrote about her experiences as a surrogate mother in a book titled, ‘Birth Mother’ where she described the emotional difficulties she had experienced and also the agony her family suffered due to the surrogacy arrangement. Her children were teased and humiliated and her husband faced difficulties in his career which resulted in a lot of suffering by the family in their social live.\textsuperscript{88}

1.4.4.2 First Menopausal Surrogacy via Egg Donation

At Monash University, Australia in 1983, a menopausal woman was the first mother to give birth to a baby using donated eggs proving that surrogate pregnancy is possible even in menopausal women. This experience as well as the above

\textsuperscript{86} www.henoline.org, visited on 23-5-2015
\textsuperscript{87} Gehnu Vaishavi, Navneet Takkar, “Surrogacy Medico legal Issues”, Jaypee Brothers Medical Published (Pvt.) Ltd. New Delhi, Ed. 2015, P. 15
instance was the initial basic important step that led to the ground-breaking advent of surrogacy industry, which has taken the present shape.  

1.4.4.3 First Gestational Surrogacy Arrangement

A couple of years later in 1985 a surrogate mother gave birth to the biological child of a hysterectomies woman who luckily had preserved her ovaries. This was the first gestational surrogate pregnancy which indeed was a landmark epic in the history of surrogacy.

1.4.4.4 First Oldest Surrogate Mother

In 2001, a grandmother, Vivien Morris, aged 54 became the first oldest surrogate mother in the world. However this record has since been broken. Laura, the daughter of Vivien could not have children of her own after a cancer operation. So Vivien gave birth to her own grandchild, Maisie.

1.4.4.5 First Multiple Births by Surrogate Mother

Quintuplet boys were born on April 26, 2005 to 54 years old Teresa Anderson who served as a gestational surrogate mother to a couple she met online. The biological mother, Luisa Gonzalez, and her husband were combating infertility for over a decade. However when Teresa found out that she was carrying quintuplets, she waved off her $15,000/- compensation arrangement realizing that the biological parents would be more in need of the money than she herself to raise their boys.

1.4.4.6 First Oldest Surrogate Mother to Twins

In August 2007, a 58-year-old woman, Ann Stopler from America gave birth to her own twin granddaughters Itaj and Maya. The twins were delivered by cesarean section six weeks early. Her own daughter, Caryn Chomsky, was unable to conceive due to cervical cancer. Caryn had a hysterectomy and surgeons also

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performed an "ovarian transposition," carefully repositioning Caryn’s ovaries out of her pelvic area into her abdominal cavity. This way they could give her the radiation she needed for the cancer without damaging her ovaries. Caryn's eggs were thus saved.

1.4.4.7 First Oldest Surrogate Mother to Triplets

2008, 56-year-old Jaci Dalenberg became the first oldest woman to give birth to triplets. She delivered her own grandchildren by becoming a gestational surrogate mother for her daughter, Kim.

1.4.4.8 First Oldest Surrogate Mother in Japan

A Japanese woman gave birth to a child she had carried for her daughter who was hysterectomies due to cervical cancer and was therefore unable to conceive. But fortunately doctors were able to use her eggs. In spite of being in her early sixties she became the oldest surrogate mother in Japan, who gave birth to her own grandchild at the age of 61 years. In fact it was the first time in Japan that a woman became a surrogate for the child of her own daughter, successfully delivering her own grandchild. Despite surrogacy being frowned upon in Japan, this unusual case occurred in the country.

1.4.4.9 First Surrogate Pregnancy in Britain

Surrogacy is legal in Britain as long as it is unpaid - although surrogate mothers can claim "reasonable" expenses, sometimes up to £10,000. The first British woman to go through the surrogacy procedure was Edith Jones aged 51. In 1991, she gave birth to a girl, the child of her daughter Suzanne Langston, who was born without a womb.

1.4.4.10 First Gestational Surrogacy in India

In India the first gestational surrogacy took place in 1994 in Chennai.\textsuperscript{93} i.e. First surrogate baby was delivered on June 23, 1994. In 1997, the first commercial surrogacy was reported in India. A woman from Chandigarh agreed to carry a child

for Rs. 50, 000 in order to obtain medical treatment for her paralyzed husband.\textsuperscript{94} Further in 1999, an Indian Newspaper reported the story of village women in Gujarat who served as a surrogate for a German couple.\textsuperscript{95} India’s Surrogacy boon began in January 2004, with a grandmother delivering her daughter’s twins.\textsuperscript{96} Surrogacy as a medical process has matured over the year it has become a booming Centre of a fertility market and there are an estimated 200,000

Clinics across the country offering artificial insemination, IVF and surrogacy. India has emerged as a favourable destination for surrogacy and its assisted Reproductive Technology industry has evolved into a 25 billion – rupee business annually with Law Commission describing it as a gold pot.\textsuperscript{97}

\subsection*{1.4.5 Methods of Surrogate Parenting}

There are mainly three methods of surrogate parenting. The first method is the artificial insemination method which is the traditional method and includes three steps. In the first step, the surrogate mother is artificially inseminated with the biological father’s sperm. In the second step, the surrogate mother carries the foetus in her uterus for nine months and gives birth to the child. Lastly, the surrogate mother terminates all parental rights over the child and gives it to the biological or adopting father for his custody or adoption. This procedure is commonly known as traditional surrogacy.\textsuperscript{98} This method is normally used in cases where the wife is infertile and the husband is fertile. In this method child have two mothers, gestational who is also genetic mother and the intended mother and one father.

The second method of surrogate parenting is in-vitro fertilization. It involves the following five steps. Firstly, a fertile couple desiring a child gives an egg and semen to a doctor. Secondly, the doctor fertilizers the eggs with the sperm in that

\begin{footnotes}
\footnote{Sandhya Srinivasan, “Surrogacy Comes out of the closet”, Sunday Times of India, July 6, 1997, P. 1}
\footnote{Anil Malhotra and Ranjit Malhotra, “Surrogacy in India – A Law in the making”, Universal Law Publishing Co., New Delhi, 2013, p. 30}
\footnote{Dr. Abhishek Kumar, “Surrogacy in India: A Growing Phenomenon with many Issues Involved”, Competition success Review, May 2015, p. 66.}
\end{footnotes}
semen through in-vitro fertilization. Thirdly, the fertilized egg is implanted in the surrogate mother’s uterus. Fourthly, the surrogate mother carries the foetus in her uterus for nine months and gives birth to the child. Lastly, the surrogate mother terminates all parental rights over the child and gives it to the couple who donated the egg and semen. This method is used when the wife has an abnormality in her reproductive organs that prevents her egg from being fertilized by her husband’s sperm or when the wife is unable to carry a child to term because she has an abnormality in her uterus. If the wife is able to conceive, but unable to carry the gestating foetus, the embryo transfer methods allow transfer of the naturally fertilized egg from the biological mother’s womb to the surrogate mother’s womb. This method is known as gestational surrogacy. According to this method surrogate child will have two mother ‘gestational mother’ and ‘genetic mother’ who is the ‘Intended mother’ too and one father.

The third method of surrogate parenting is a modification of the in-vitro fertilization method and known as donor surrogacy which involves five steps. The first four steps are identical to that of in-vitro fertilization method. The fifth step, however, differ, instead of giving the child to the couple who donated the semen and egg the surrogate mother gives the child to adoptive parents who are not biologically related to the child. There have been no reported incidents of the use of this method, but the method could be utilized in a situation in which both the husband and wife are infertile but wish to have a child with specific trait. In this method surrogate child will have two fathers’ i.e. ‘genetic father’ and ‘intended father’ and three mothers ‘genetic mothers’, ‘gestational mother’ and ‘intended mother’.

Although the above-mentioned three methods of surrogate parenting involve different medical techniques, and although the biological relationship of the couple receiving custody of the child may vary depending upon the method used, the consequences of contracting to perform each method are surprisingly similar. The methods are treated very much the same because most countries presume that the

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100 Timothy F. Murphy, “Selection the Traits of Children prior to Birth”, Virtual mentor, Vol. 14, No. 2, 15-8-63 February 2012.
woman who gives birth to a child is the natural, biological mother of the child\textsuperscript{101} thus, depending on the infertility problem involved, either artificial insemination or IVF may be used in a surrogacy situation.\textsuperscript{102}

1.4.6 Surrogacy: Boon in Contrast to other Assisted Reproductive Technology

Surrogacy has an edge over other ARTS. It encapsulated within its ambit the following merits:-

1.4.6.1 Child Genetically Related

One of the most important benefits of surrogacy is that it helps the individual or couple to beget a child genetically related to at least one of the parent. This fulfills the natural instinct and desire to have a biologically child. This method is more, advantageous in contrast to adoption as it transmit one’s own genetic heritage to the child and to participate in gestation and parturition.\textsuperscript{103}

1.4.6.2 Prevent Hereditary Diseases

Another advantage of surrogacy is that by using this method an individual can prevent transmission of hereditary diseases to his biological child. Those who have a history of genetic illness or who have given birth to children with genetic diseases can with the help of genetic screening find out whether they might transfer a harmful trait to their offspring.\textsuperscript{104} By selecting an appropriate surrogate and using genetic material from a male surrogate and using genetic material from a male donor or female donor, individual with hereditary disease may prevent such transmission to their offspring.

1.4.6.3 Overcome Medical Risk

In case, where pregnancies involve high risks due to medical problems of mother and could pose serious complications of premature birth leading to

\begin{itemize}
\item Katherine B. Lieber. “Setting the womb; Can the feminist Critique of Surrogacy be answered?”, Indiana Law Journal, 1992, p 205.
\item Ibid
\end{itemize}
deformities in the child or causes danger to life of the mother or child or both.\textsuperscript{105} Surrogacy is the only available option to couples who are fertile but unable to beget a child. In case women is disabled and it is difficult to carry a child and also where couples have crossed their age of natural conception\textsuperscript{106} and also where they have undergone tubectomy or vasectomy.\textsuperscript{107} In all these circumstances surrogacy is the best option available for the couple to beget a child.

1.4.6.4 Breaks Traditional Family System

Surrogacy arrangement breaks the traditional family system where a male and female can only beget a child. In modern times even single men and women, gays and lesbians couples may wish to beget and raise a child. The couples or individuals due to inherent biological reasons, are unable to procreate naturally can with surrogacy process beget a child. Surrogacy with female donor or male donor may help there individuals to satisfy their natural craving for a child.

1.4.6.5 An Option for People with Modern Life Style

Surrogacy in modern times can be used for begetting a child by those couples and individuals, who are fertile and able to carry a child, but are unwilling, to do so due to various reasons. The reasons can be their life style, career prospects, profession etc.\textsuperscript{108}

1.4.6.6 Avoid Problems Related to Infertility Treatment

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

\textsuperscript{105} Martha, A.Field, “Surrogate Motherhood: The legal and human issues”. Howard University Press USA, 1999, p. 31
\textsuperscript{107} Tubectomy is surgical procedure for permanent contraception to prevent future pregnancies in women.
\textsuperscript{108} Vasectomy is a surgical procedure for male sterilization and birth control.
1.4.7 Factors Responsible for the Growth of Surrogacy Arrangement in India

Thus the method of surrogacy is ray of hope for infertile and other individuals to become parents. It facilitates the pursuit of biological parenthood. \(^{109}\) India is rapidly developing as a major destination for surrogacy practices. This is due to the following factors namely.

1.4.7.1 Modern Technology and Medical Expertise

One of the important reason due to which the foreign couples or individuals come to India for availing the benefits of surrogacy are the well qualified and experienced doctors, world class private health care providers. Modern infrastructure along with English speaking doctors and staffs to facilitate such process and more importantly easy access to surrogate women. \(^{110}\)

1.4.7.2 Excellent Service

Indians show a great commitment in handling over the new born to their intended parents immediately after birth and till now no dispute is reported regarding refusal of surrogate to hand over the baby to the intended parents. \(^{111}\) After business process, knowledge process and legal process outsourcing, genetic pool bank of India are the latest outsourcing industry from India. It has become a booming Centre of a fertility market called as reproductive tourism. \(^{112}\)

1.4.7.3 Better Lifestyle of Surrogate Woman

Indian women have a more methodical life style and most of them do not indulge in drinking smoking, use of drugs and narcotics. There healthy and traditional living standard as compared to cross border women make them more favorable choice of surrogate.

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\(^{109}\) M. Humphrey, “Families with difference: Varicities of surrogate parenthood”, Rutledge, USA, 1988, p. 157

\(^{110}\) SAMA, Resource groups for women and health “Unraveling the fertility industry: Challenges and strategies for movement. Building international consultation on commercial, economic and ethical aspects of assisted reproductive technologies. SAMA, New Delhi, 2010, p. 47


\(^{112}\) Anil Malhotra, Ranjit Malhotra, “Surrogacy in India- A law in the making”, Universal law publishing co, New Delhi, 2013, p. 1-2
1.4.7.4 Low Cost of Living

The cost of living in India is more economical as compared to other western countries. Couples or individuals who visit world famous reproductive tourist destination\textsuperscript{113} enjoy low cost of living and then go back with the baby once the surrogacy arrangement is over.

1.4.7.5 Lack of Specific Legislation on Surrogacy

There is no law to regulate and restrict surrogacy in India. Thus surrogacy in India is legitimate because no India law prohibits surrogacy. Law is only in form of drafted bill one awaiting for becoming statutory enactment. The Indian council of Medical Research Guidelines in 2005 are non-statutory, have no legal sanctity and are not binding. Silent on major issue, they lack teeth, and are often manipulated to protect the interest of intended couples or individual.

1.4.7.6 Low Medical Cost

The cost of surrogacy arrangement in Indian is very low when compared to other countries.

The law commission of India in its report points out that the surrogacy costs in India is about $25000 to $30000 which is around 1/ 3\textsuperscript{rd} of the costs in developed countries like United States of America.\textsuperscript{114} The Centre for Social Research (CSR),\textsuperscript{115} New Delhi in its study report given in the year 2012\textsuperscript{116} identifies that the fees for surrogates in India ranges from $2,500 to $7,000 and the total costs for surrogacy arrangements can be anything between $10,000 and $35,000. Therefore, it is a lot less than what intended parents pay in the United States, where rates fluctuate between $ 59,000 and $80,000\textsuperscript{117} Another Statistics shows that, a surrogacy arrangement, including IVF, costs about $11,000 (approximately Rs.

\textsuperscript{114} Law Commission of India, “ Need for Legislation to Regulate Assisted Reproductive Technology clinics as well as rights and obligations of Partites to a surrogacy”, Report No. 228, Aug 2009, p. 11
\textsuperscript{115} Centre for Social Research, Report of the National conference on. A policy dialogue and issues around surrogacy in India” Sept 22\textsuperscript{nd}-23\textsuperscript{rd}, 2014
\textsuperscript{116} Centre for Social Research, Report of the National Conference on “Surrogate motherhood-ethical or commercial” March 2012, www.womenleadership.in
5100,000) in India, while in the United States of America, surrogacy alone, excluding ART charges, costs $ 15,000 (Rs. 6,75,000). Likewise in United Kingdom, an IVF cycle costs about $7,000 (Rs. 5,00,000) and surrogacy costs about $10,000 (Rs. 7,00,000.) The cost of gestational surrogacy in Canada is approximately $29,600-$68,500 and the cost of traditional surrogacy is approximately $19,600-$68,500.118 In Russia the Minimum cost for surrogacy arrangement is about $35,000.119

1.4.7.7 Easy Availability of Surrogate Woman

Mostly the women offering herself for surrogacy arrangement belong to poor social and economical background and are living in slums. Due to their social economic backwardness and limited work wages, they are willing to take surrogacy practice as a livelihood option. Thus facilities and huge amount being offered in view of providing services are attracting more women.

The surrogacy business is well-established in India with an estimated annual turnover of half a billion dollars. The exact figures are not available and hard to verify. However, according to one estimate, India’s reproductive tourism industry is estimated to be approximately 400 million US dollars a year. As per the CSR report the volume of surrogacy industry is estimated to be $500 million and the numbers of cases of surrogacy are increasing rapidly. However the extent of surrogacy practice in India is not known exactly but from the above two reports it is clear that, the surrogacy industry is ranging from 400-500 million US dollars a year.120 In India, the places like Anand, Suraj, Jamnagar, Bhopal and Indore have become the major centers for surrogacy practices. Large numbers of couples are travelling to these places not only from India but also from western countries and also from other countries like Sri Lanka, Pakistan, Bangladesh, Thailand and Singapore to fulfill their desire for a child.121 It is estimated that there are more than 600 fertility clinics established in both rural and urban areas spread almost all states of India. However,

121 Shyantani Das Gupta & Shamita Das Gupta, “Motherhood Jeopardized: Reproductive Technologies in India Communities” in Jane Maree Maher, the global Politics of Motherhood: Transformation and Fragmentation Rutledge, USA, 2010, p. 138
the state of Gujarat is particularly popular, especially among westerners. In fact, India in general and the state of Gujarat in particular is rapidly becoming the center for child process outsourcing (CPO). Though surrogacy trade in India attracted people from world around as an answer to their silent prayers, it has also created a platform for Indian medical experts to profit from their expertise in the field. Thus resulted in mushrooming of various profit seeking Assisted Reproductive Technology clinics and their unethical practice.

In India, though surrogacy is gaining popularity and it rapidly developing as an industry, the government has been very slow in responding to the changing situations. In absence of a legislative measures, the Indian Council of Medical Research (ICMR) in year 2005, after consultation with the national academy of medical science, practitioner of ART and the ministry of Health and Family welfare drafted guidelines for regulation of surrogacy in India. These guidelines were regarding Assisted Reproductive Technology (ART) clinics for accreditation, supervision and regulation in India. Realizing the increasing need to regulate ART practice and surrogacy in the country, government took steps for establishing a binding legal framework. As a result, the Assisted Reproductive Technology Regulation Bill and Rules, 2008 were drafted. There were certain issues which were left unaddressed, a need was felt to re-draft the Bill. So Draft of Assisted Reproductive Technology (Regulation) Bill, 2010 was prepared. Again in 2013, Draft of Assisted reproductive technology (Regulation) Bill, 2013 was prepared in order to keep check on the ever-growing fertility clinics across the nation. Law Commission Report No.228, Titled “Need for legislation to regulate Assisted Reproductive Technology clinic as well as rights and obligation of parties to a surrogacy” in year 2009 discussed the rights and obligations of parties to surrogacy and recommended for legalization of altruistic surrogacy arrangement in India in order to protect the surrogate mother from exploitation. Moreover Ministry of Home Affairs in year 2012 has stipulated mandatory conditions for foreign nationals intending to visit India for commissioning surrogacy in order to protect the welfare of surrogate child. Besides these legal instruments the Supreme Court in two

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122 Centre for Social Research, Report of the National conference on. A policy dialogue and issues around surrogacy in India” Sept 22nd- 23rd, 2014
landmark cases Baby Manji V. Union of India\textsuperscript{123} and Jan Balaz V. Union of India,\textsuperscript{124}
has touched upon the rights of surrogate child seeking to establish legitimacy of
birth accordingly. Right to parentage and right to citizenship of the surrogate child.
However due to non-binding and voluntary nature of ICMR guidelines lack of
authentic piece of legislation and ad hoc arrangement made by apex Court to meet
the needs of particular case only. Surrogacy arrangements are decided on the basis
of traditional contract law. These surrogacy contract too, raise a bundle of concerns
from legal and social standpoints. Regardless of its benefits, surrogacy has also
generated considerable legal, social and ethical debate, which the researcher will
evaluate in foregoing Chapter.

1.5 STATEMENT OF PROBLEM

Embedded in our culture in historical and mythological terms ‘surrogacy’
today, is an accepted societal practice propelled by economic necessity and fueled
by the “Reproductive Tourism Industry” wantonly flourishing in India. Surrogacy
arrangements are no longer discussed in hushed tones or hidden from public gaze.
Websites freely advertise sperms, ovum’s and wombs on rent like any other
commercial merchandise. Sadly, an altruistic phenomenon, motivated by love,
concern and affection, surrogacy today has only commercial propositions
degenerated with international business dimensions.

The increasing demand for ART has resulted in mushrooming of infertility
clinics in India. Many of these technologies require enormous technical expertise
and infrastructure. However the success rate is very low under the best of
circumstances. Thus hospital authorities and medical expertise engaged in this
process are not giving due consideration to the ethical standards since they are
influenced by the values of market.

Surrogacy involves conflict of various interests and has inscrutable impact
on the primary unit of society, viz. Family. These conflicts are based on ethical,
social and moral grounds and clustered around the key participants of the surrogacy
arrangement the commissioning parents, the surrogate mother and the surrogate

\textsuperscript{123} (2008) 3 SCC 518
\textsuperscript{124} Jan Balaz V. Anand Municipality & other AIR 2010 Guj 21
child. Despite the growing prominence of the Indian surrogacy industry in recent years, the surrogacy practices remain largely unregulated. Non-intervention of law in this knotty issue would not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements.

Due to the uncertainty prevailing over the various issues surrounding surrogacy, it is considered as a legal, social and ethical mine-field.

1.6 SIGNIFICANCE OF THE STUDY

Surrogacy has emerged as one of the fastest growing modern Assisted Reproductive Technique in which a woman carries in her womb the baby of another woman for monetary return. After B PO’s &LPO’s this womb renting business has become genetic pool banks of India and is the latest outsourcing industry due to modern technologies and medical expertise, low cost, permissive regulatory climate and easy availability of surrogate women. The increased use of surrogacy has generated a huge debate and controversy among the society as well as legal fraternity due to its potential to affect various human rights. The complex nature of surrogacy procedure has brought to the forefront issues like legality of surrogacy practices, validity of commercial surrogacy, enforcement of surrogacy contracts, parentage of surrogate child, rights of surrogate women, rights and duties of intended parents and the rights of surrogate child. Due to lack of active legislative incentives in India, surrogacy process has resulted in unethical practice among the medical practitioners and socio-economic exploitation of surrogate women and baby farming.

Thus the developments in medical science and technology and establishment of legal system have created a growing awareness regarding the concept and use of surrogacy, Nevertheless the various legal and social issues relating to the stakeholders involved in surrogacy cannot be overlooked.

1.7 OBJECTIVES OF THE STUDY

The present research has been conducted with the following objectives:

1. To study the concept of surrogacy
2. To evaluate the genesis of the concept of surrogacy in India
3. To examine the international trends in surrogacy
4. To discuss the legislative incentives relating to surrogacy
5. To examine the role of Judiciary in surrogacy arrangement
6. To highlight socio-legal issues involved in surrogacy arrangement.

1.8 SCOPE OF STUDY

The advancements in medical science and technology have proved to be a boon to mankind. One such advancement is that of assisted human reproductive technologies, which have revolutionized the reproductive environment resulting in surrogacy as the most desirable option. The systems of surrogacy have made it possible for individual to beget a genetically related child with the help of third party and without sexual intercourse. In the past, surrogacy arrangements were generally confined to four walls of house, usually as an altruistic deed. But with the introduction of financial arrangements in the process, surrogacy has extended its sphere beyond family, community, state and even across the country. The commercialization of surrogacy has made India as a popular destination of surrogacy practice for rich and foreign couples on the other hand it has raised various socio-legal and ethical issues.

Lack of regulatory measure, low medical cost advanced reproductive technology coupled with poor socio-economic conditions of surrogate had made Punjab along with other states an attractive option for surrogacy arrangements. The study has been conducted taking Punjab as Universe and three district of Punjab i.e. Jalandhar, Ludhiana and Amritsar have been as sample representing the 3 Region Doaba, Malwa and Majha respectively.

1.9 REVIEW OF EXISTING LITERATURE

One’s research cannot be complete without making the review of literature on the subject matter. The descriptive study of the past is very essential as it provides the guidance to researcher to get knowledge about the present as well as to predict the future. It also throws light on those issues which needs the attention of the community as a whole. Therefore, the researcher has made thorough study of the number of books, Articles, Reports and Journals. All sources have been referred to
in the footnotes and also listed in the bibliography. But some of them have been discussed below without which the study is incomplete.

Books

*Surrogacy Medico-Legal Issues*\(^{125}\) by Gehna Vaishnavi and Navneet Takkar, elaborates the judicial pronouncements of eminent jurists around the global in relation to surrogacy and portrays the new definition as to what now constitutes a family. It includes foreign judgments and Indian judicial precedents which have set bench mark as to how to deal with this issue. A worldwide perspective of all such laws as regards this issue concerning each and every aspect dealing with surrogacy has been incorporated in the book. The book also highlights the pain of families struggling to have children without being bothered about the consequences.

*Surrogacy in India - A Law in the Making*\(^{126}\) by Anil Malhotra and Ranjit Malhotra, describes a complete picture to its reader on the present position of surrogacy in India. It offers insight into the Draft Assisted Reproductive Technology (Regulation) Bill, 2010 and points to the various lacunas. Book also includes relevant guidelines and regulations of Indian council of medical research and ministry of home affairs respectively. It generate more interest and research on the issue and is a reliable source for legislators, lawyers, judges, N GOs, foreign missions in India and abroad and students alike.

*Surrogate Motherhood and the Law: International and National Perspectives*\(^{127}\) by Dr. Aneesh V. Pillai discusses the need and importance of surrogacy and the conflicting legal and human rights issues raised by surrogacy practices in contemporary times. It also examines the adequacy of existing legal framework in India and attempts to provide pragmatic solutions for regulating surrogacy and protecting the interest of various stakeholders involved in surrogacy.

*Constitutional Law of India*\(^{128}\) by Prof. Narendra Kumar is valuable addition concerning a constitution is the vehicle of nation’s progress. It is a living and organic document. The book further highlight that the development of law, the

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\(^{125}\) The Health Sciences Publishers, New Delhi, 2015

\(^{126}\) Universal Law Publishing Co. Pvt. Ltd, New Delhi, 2013

\(^{127}\) Regal Publications, New Delhi, 2015

changing social economic and political values of its people, their constitution has the
greater claim to be constructed broadly and liberty. In keeping with the current
assent of justice to the common man, the Supreme Court has widened the ambit of
Article 21 of the Constitution of India to determine the scope of women’s right to
make reproduction choice in view of the right to privacy and personal liberty.

*Legal and Ethical Issues in Human Reproduction*\(^{129}\) by John A. Robertson,
Covers that egg donations and gestational surrogacy are both promising techniques
for treating infertility but they both lack the legal infrastructure necessary to provide
the participants with certainty about the legal consequence of this collaborative form
of Assisted Reproduction. The book further highlights that with legislation, judicial
decision and standard practices will eventually cure these uncertainties. In the
meantime, interested parties need not refrain from participation in human egg
donation and gestational surrogacy, but they should be fully aware of the area of
uncertainty that exists and take steps to minimize undesired consequences.

*Medical Law and Ethics*\(^{130}\) by Jonathan Hearing throws light on the concept
of infertility reproductive autonomy and surrogacy. It also discusses the ethical and
social aspect of surrogacy. It also highlights the problem of surrogacy and its
concept at international level. The legal status of women and children has been
discussed.

*Surrogate Motherhood*\(^{131}\) by Martha A. Field is a remarkable work on the
legal issues involved in the surrogate motherhood debate. Since 1988 when this
book was originally published, several states and foreign countries have enacted
laws to deal with surrogacy. Accordingly, in this paperback edition appendix to
reflect those changes and to provide an analysis of how surrogacy law is actually
developing has been updated. In most states it still is not decided what rules will
apply to surrogacy, so it is the task of the public generally and not first of lawyers,
politicians or courts to resolve those issue of value. The book also discusses about
spectrum of positions that might be adapted to deal with surrogacy and the reasoning
that might support them.

\(^{130}\) Oxford University Press, London, 2008
Law and Medicine\textsuperscript{132} by Dr Lily Srivastava, deals with the numerous important Judicial case laws, scientific developments, recent surveys in the field of law & Medicine and their impact on human life. The book also discusses about various Artificial reproductive Techniques and concept of surrogacy with reference to legitimacy of surrogate child.

Women and Law\textsuperscript{133} by Dr. Krishna Pal Malik is Comprehension work on law relating to woman problem of gender injustice and violence against women existing in our society. It further contains all the international commitments of the nation, especially to protect women in the country. Special provisions contained in the Constitution of India, which is the law of the land with all the landmark fragments of higher Judiciary. It also focuses that surrogacy in the recent times is booming issue in our country Gujarat, M.P and Maharashtra are the most prominent centers witnessing this problem since surrogate mother and the child need protection. In chapter sixteen the Author analyses the magnitude and causes for surrogacy. It also covers the provisions contained in a bill pending before the parliament.

Law and Medicine\textsuperscript{134} by Dr Nandita Adhikari highlights, that there has been tremendous technological progress in the field of medicine and some-high tech findings are to be interpreted in the court of law. It is further stated that there is a public discussion that surrogacy as a profession should be legalized so surrogate motherhood is pertinent. The enlarged scope of biotechnology in manufacturing Antibiotics, Anticancer and Ant diabetic Medicines is a boon for the human society. Thousands of infertile couples are being blessed with test tube babies but to decide the parenthood is a complex law point. Human rights and human dignity are to be integrated with the ethical aspect of the scientific advancement.

Articles

Assisted Reproductive Technology (ART): Are we Heading towards Designer Babies by Dr Archana Gadekar and Ms. Sandhya Kalamadhad reviews that ART touches fundamental issues of life, family and society structures that are influenced by religion and traditions. Undoubtedly, these techniques provide major

\textsuperscript{132} Universal Law Publishing Co, New Delhi, 2013.
\textsuperscript{133} Allahabad Law Agency, Allahabad, 2009
\textsuperscript{134} Central Law Publications, Allahabad. 2012
breakthrough in the treatment of infertile couples but involves conflict of various interests and has inscrutable impact on the primary unit of society. However in view of complicated and sensitive issues involved in ART, proper legal regulations and guidelines are required in India which shall put to rest all the controversial issues surrounding the use of ART.  

*Surrogate Parenthood: An Indian Socio-Legal Scenario*  

by Dr. Manju Koolwal describes that in formulating on Indian law on artificial insemination, the following fundamental issues will need to be necessarily tracked by the policy makers: (i) The ethical and moral consequences of Artificial insemination (ii) the primacy to be accorded to the biological need to bear a child (iii) the repercussions of Artificial insemination on the stability of family life. (iv) economic advantages of adoption vis. a vis artificial insemination (v) The effect of artificial insemination on the population control policy of the country.

*Commercial Surrogacy: The Need for Regulation*  

by Dr. Shashi Bala analyzes that right to surrogacy is necessary and is a boon to humanity on the condition that the legislation regulates Assisted Reproductive Technology clinics as well as rights and obligation of parties to surrogacy Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. A statutory authority needs to be set up to adjudicate all matters in relation to surrogacy however it is also essential to remove as fast as possible, the feeling of degradation that comes into peoples’ when faced with the concept of renting a womb. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibits commercial ones.

*Lost Citizenship of A Surrogate Child* by Anupama Agrawal and Kuman Ankil  

reviews that in future before entering into surrogacy agreement parties should be made aware of citizenship issues that may arise for the child if the country, to where the parents belong, does not recognize surrogacy because such

135 Andhra Law Times, 2010  
136 Journal of Legal Studies, 2012  
137 Indian Bar Review, 2012  
138 Supreme Court Cases, 2012
children cannot get Indian citizenship till the surrogate is recognized as the legal
mother. This would involve complications of adoption and will be against the spirit
of the contract entered into between the parties. Therefore the parents should change
their residence/domicile or frame the agreements accordingly to that the child gets
the citizenship of the country where the parents intend to take the child and in all
other cases agent should also cooperate in this regard keeping the interest of the
child above their commercial interest.

An Insight of the Conflicting Interests of Surrogacy Arrangement in India by
Ishita Chatterjee describes that in absence of law on commercial surrogacy, it has
become a great threat to the welfare of the parties involved in commercial surrogacy.
The rights and interest of the surrogate mother, surrogate child and commissioning
parents are conflicting with each other. The conflict of interest and rights are putting
adverse impacts on the basic unit of the society i.e. the family. The assisted
Reproductive Technology (Regulation) Bill, 2008 and 2010 succeeded to same
extent to protect the interest and right of parties of surrogacy but the problem is that
the ART Bill 2010 till date has not been approved by our Parliament. This lethargic
attitude and indifferent approach on part of law makers to pass bill shows that even
people sitting in Parliament are not bothered much about the flourishing business of
commercial surrogacy in India.  

Restructuring the Debate on Surrogacy an Overhaul of the Indian
Legislative Policy by Saurav Bhaumik elaborates that the best interest of child
born out of the surrogate mother needs to be protected and the exploitation should be
prevented as far as possible. The legislature should also take into account the
loopholes which were pointed out in the draft bill on assisted reproductive
technologies. The Hindu laws should be amended as far as possible primarily
because the process of adoption in the case of a surrogate child is very complex.
However, commercial surrogacy is in contravention of section 23 of the Indian
contract Act, 1872 and Section 17 (1) of the Hindu Adoption and Maintenance Act
1956. Hence the dichotomy between the various statutory laws and the right to

139 Madras Law Journal, 2012
140 Madras Law Journal, 2013
procreation and right under Article 21 of the Constitution needs to be addressed by the legislature expressly.

*Mothering for Money: Regulating Commercial Intimacy*\textsuperscript{141} by Pamela Laufer-Ukeles is comprehensive framework for considering the complex nature of surrogate motherhood, regulating domestic surrogacy and regulating international surrogacy. It covers, that the benefits to surrogacy are real. History and empirical studies demonstrate the benefits as do the thousands of personal success stories. Litigation is rare and general satisfaction is high among both the commissioning parents and surrogates. Surrogacy should therefore not be prohibited or suppressed but, the ongoing concern about surrogacy is also real especially potential exploitation and commoditization of women’s bodies.\textsuperscript{142}

*Commercial Surrogacy and Feminist Perspectives* by Sonali Kusum highlights that there are divergent feminist views on commercial surrogacy. Each school has its own respective stand based on their own philosophy, their contribution has only initiated the debate on regulation of surrogacy from a feminist or women centric perspective. This line of thought gives surrogate mother an important place in the discussion on surrogacy and gives expression to her rights and interest involved in the process of acting as surrogate mother, it is significant that the issue concerning surrogate mother are given due consideration in law drafting or policy making.

*Overview of Surrogacy Law in India*\textsuperscript{143} by Sonali Kusum covers surrogacy as one of the Assisted Reproductive Technique has gained popularity in world over by achieving parenthood for infertile individuals and facilitating for infertile individuals and facilitating family formation. However it is evident that the laws as well as the cases seeking to address surrogacy in India are besides being inadequate and inconsistent and they do not provide any solution for complex issues raised by surrogacy in India any solution, therefore there is need to regulate the surrogacy arrangements by formulating uniform compressive and effective legislative provisions.

\textsuperscript{141} Indian Law Journal, 2013
\textsuperscript{142} Karnataka Law Journal, 2013
\textsuperscript{143} Indian Bar Review, 2014
Right to Abort in Surrogacy Contract: Enquiry\textsuperscript{144} by Dey Sharma throws light on the rights and duties of intended parents and the surrogate women in surrogacy contract. Considering the peculiar nature of surrogacy arrangement, involving various medical procedures and lengthy duration of time as well as the obligations to be performed by parties, such arrangement requires careful consideration of various factors for this purpose, the practice of making of formal surrogacy contract becomes mandatory. It also highlights agreement in favor and against surrogacy agreement.

1.10 RESEARCH GAP

No detail research has been conducted in India. If at all any efforts have been made on this subject, they have been made only by Research Scholars . There is need to touch upon different issues and challenges of surrogacy . Therefore in this research work, the Researcher will make an attempt to abridge upon the Socio-Legal research gap of surrogacy arrangements.

1.11 HYPOTHESIS

In India, though surrogacy has developed as a million dollar business, there are no Specific Legislations for the regulation and control of surrogacy. This Inadequate existing Legal framework in India has paved an easy way for ART clinics to indulge in unethical practices in the name of surrogacy arrangements.

Surrogacy Practice is considered to be against the Rule of Nature. It is also looked down upon as a Social Stigma as it discloses the inability to procreate. Surrogacy gives birth not merely to Legal Issues but it has many Social and Ethical issues in its lap.

Lack of sufficient Legal sanctions has also led to Commercialization of Surrogacy. Consequently it results in Socio-Economic exploitation of Surrogate Mother.

1.12 RESEARCH QUESTION

1. What is the assisted reproductive technology?
2. What is the concept of surrogacy?

\textsuperscript{144} Economic and Political Weekly, 2015
3. What are different types of surrogacy?
4. What are the legislative measures to check surrogacy practice?
5. How for these measures are successful in achieving their goal.
6. What are socio-legal challenges involved in surrogacy?
7. Is surrogacy being commercialized in India?
8. Does surrogacy lead to exploitation of surrogate women?
9. How surrogacy emerged as major outsource industry in India?
10. What are the rights of surrogate Mother viz-a-viz. Commissioning Parents and Surrogate Child?

1.13 RESEARCH METHODOLOGY

Keeping in mind the significance and objectives of the topic under study, the present research is both Doctrinal and Non Doctrinal. For doctrinal study, data has been gathered through various primary and secondary sources. The primary sources include statutes passed by legislatures, decisions of judiciary, orders of executive, rule and regulations of various administrative bodies. The secondary sources includes books, law journals, periodicals, Articles and research papers, newspapers, websites etc. besides enactment at, National and regional levels, various international conventions, treaties and protocols reports have been referred to analyze and evaluate the clear picture of the topic under study.

In order to peep into the roots of socio-legal implications of surrogacy in India an empirical study was conducted. For the purpose of empirical study State of Punjab was taken as sample to collect the data and to undertake analysis of the socio legal implication of surrogacy. As the State of Punjab is divided into three regions that is Doaba, Malwa and Majha, so in order to collect the data Jalandhar, Ludhiana and Amritsar (Representing Doaba, Malwa & Majha) were selected as units for the collection of empirical data.

Tools for primary data include Structured Questionnaire to Assisted Reproductive Technology (ART) Clinics, Structured Interview Schedules with Surrogate Mothers and Unstructured Interview with Commissioning Parents. A pilot study was conducted and a few questionnaires were tested and modified accordingly. 10 ART clinics were selected from 3 unit each. 10 commissioning
parents and 5 surrogate mothers were randomly selected in each unit, for the purpose of collection of primary data.


The secondary data was also collected from Centre for Social Research (CSR), New Delhi, Indian Law Institution, New Delhi, Department of Social welfare, Punjabi University, Patiala, Indian Council of Medical Research, New Delhi.

1.14 LIKELY CONTRIBUTION OF THE STUDY

In the light of the result of the study an effort has been made to fulfill the lacuna in the existing laws, rules, regulations and implementation of the laws relating to surrogacy. Suggestions have been made so that appropriate amendments can be proposed in existing laws and rules to make them more effective. Hence the present study will have a great futuristic value.

1.15 CHAPTERIZATION PLAN

Chapter one: Introduction and Historical Background

Chapter one deal with the preliminary introduction of the concept of Assisted Reproductive Technologies and surrogacy as one of the most popular form of ART. Is also focus on the different types of surrogacy and history of surrogacy arrangement in India. It will include the entire Research Design.

Chapter Two: Legislative Efforts for Surrogacy in India

This Chapter deals with various constitutional and legislative provisions relating to surrogacy practice. An attempt has been made to critically evaluate these provisions and regulations and to expose whether there are sufficient and adequate to address the issue involved in surrogacy arrangement. It also includes the role of judiciary.
Chapter Three: Legalizing the Surrogacy: A Global Perspective

Chapter three discuss that there are a plethora of views regarding the issue of surrogacy birth in various countries. It is rather point of law as there are only a handful of nations recognizing it and there is also lack of uniformity in the rules and policy followed by their nations with respect to the phenomenon of surrogate birth.

Chapter Four: Surrogacy in India and its Challenges

Chapter four deals with various social legal and ethical challenges encountered in surrogacy arrangement. Surrogacy being controversial form of ART raises various issues like interference with nature, commoditization of child, exploitation of surrogate women. In this chapter attempt has been made to throw light of various such issues.

Chapter Five: Socio- Legal Analysis of Surrogacy in Punjab

In this chapter the researcher has critically evaluated that how the lack of legislation has became a major cause for unethical practices by the ART’s clinics in surrogacy arrangement in the state of Punjab. It further discusses that lack of legislation has also lead to commercialization of surrogacy and socio-economic exploitation of the surrogate mother.

Chapter Six: Conclusion and Suggestions

Chapter six has discussed the changing scenario of surrogacy arrangement in India how it has become one of the outsourcing industry in India in the name of reproductive tourism and on other hand lack of legislative action has various serious question on its unethical practice. The findings of the present study and suitable suggestions thereof have been provided in this Chapter.