Infertility is always considered as a social stigma apart from physical incapability of giving birth to a child. However, with the advancement of science and technology, different kinds of techniques are developed to overcome infertility. These are commonly known as assisted reproductive technologies. These are a group of technologies which involve a number of procedures for overcoming both male and female infertility. Surrogacy is also included under these technologies. It is an arrangement under which a woman agrees to carry a child for other till delivery and also agrees to hand over the child after delivery to the custody of persons for whom she is acting as surrogate.\(^1\) The surrogacy arrangements can be possible in two ways. One way is that in which surrogate is genetically linked with the child as her egg is used in the procedure for pregnancy. It is known as traditional surrogacy. The other way is when the surrogate is not genetically related with the child. She is just carrying the child in her womb. It can be possible when the genetic material is either provided by intended parents or by anonymous egg or sperm donor. It is also known as gestational surrogacy.\(^2\) The different kinds of surrogacy also include commercial and altruistic surrogacy. It depends upon the exchange or no exchange of money in between the parties to the surrogacy contract. In case the surrogate is taking money for carrying the child, the surrogacy is termed as commercial surrogacy and in case she is carrying child for other out of love, affection, generosity, then it is termed as altruistic surrogacy.

Surrogacy arrangements are not new. The reference of surrogacy is also found in Bible, Babylonian Code of Hammurabi, Hindu Mythology.\(^3\) However, these practices

---

were limited to traditional surrogacy where in the sexual intercourse between a man and surrogate used to take place in order to achieve pregnancy. With the passage of time, the technique of artificial insemination was developed and it was linked to surrogacy in a way that the surrogate was insemminated with the sperm of man in order to achieve pregnancy. This was also a form of traditional surrogacy. However, with the advent of IVF, surrogacy also become possible by placing embryo containing both egg and sperm of intended parents or the anonymous donors in to the uterus of surrogate.4

With the advent of surrogacy, a number of complex issues and controversies have also arisen. It has raised a number of social, ethical and legal implications. The controversies and disputes have arisen not only at national but also at international level.5 There is conflict of laws in different countries regarding surrogacy arrangements as no single regulation or provision has yet been drafted at international level in order to deal with the international surrogacy arrangement.6 The different nations have drafted their own legislations in regard to surrogacy arrangements.7 Some nations have completely banned the arrangements and some though not banned but have taken strict stand in regulating the surrogacy arrangements. There are still other countries where surrogacy arrangements are not regulated at all and even commercial surrogacy is allowed.8 It has further resulted in making million dollar reproductive tourism industry in these countries.9 The people of those nations where either the surrogacy is prohibited or completely banned move to the nations where surrogacy is not regulated at all. It has also resulted in black marketing at international level.10

---

It has further raised various implications like applicability of domiciles, residence, nationality and citizenship issues. Apart from the international perspective, if our country i.e. India is looked in to from the side of surrogacy, presently there is no law for regulating surrogacy in the country. For the purpose of enactment of law on surrogacy in India, different aspects in relation to surrogacy like contract, adoption, citizenship, succession, legitimacy is required to be analyzed apart from framing specific laws and regulations for surrogacy. Apart from international and national issues, surrogacy has also raised ethical and social implications. The arrangements also touch upon the issues of sexuality, genetics, parenting, family structure, biology, exploitation of surrogate and child, issues of privacy, autonomy. It has also resulted in different social issues like harm to the human dignity, reinforcement of gender hierarchy, conflict of motherhood, disintegration of parent child relationship, commodification of woman and child. It is often compared with prostitution and adultery. The issue of adverse psychological impact on child as well as surrogate is also associated with surrogacy. Even though a number of issues and controversies have arisen both at national and international level, yet the courts in India and in other countries are not successful in resolving the same. The courts in different cases have to ignore the applicable laws and regulations for determining the rights of a child in order to resolve the matter in case of surrogacy.

Chapter 2 deals with the international development of surrogacy. Surrogacy arrangements are not consistently regulated at international level. Different countries have adopted different stands for regulation of surrogacy at their national level or when surrogacy is agreed between the people of different

---

nations. There are countries like China, Sweden, Germany, France, Italy, Japan, U.S. (State of Arizona, District of Columbia) etc. which completely bans surrogacy arrangements of any nature.\textsuperscript{17} Further there are certain countries like Australian North Territory, Canada, Brazil etc. where surrogacy is highly regulated and in certain cases entering in to surrogacy contract is made an offence. Still there are some countries like Canada (British Columbia), Greece, United Kingdom, Israel etc. where the surrogacy is permitted with regulation. There are some more countries where surrogacy arrangements are not regulated at all and even the commercial surrogacy is allowed. These countries among others include India, Russia, and Ukraine etc.\textsuperscript{18}

As far as United States is concerned, there was promulgation of three statutory provisions in United States of America which could be followed by the states in relation to surrogacy arrangements. The states in the country were free to adopt or not to adopt any of the statutory arrangements. First statutory legislation was in the form of United Status of Children of Assisted Conception Act which was promulgated by National Conference of Commissioners in 1988. The Act provides for limited use of surrogacy arrangements and is not a regulatory statute for surrogacy arrangements. It provides for two alternatives. Option A provides that if the surrogacy contract is approved by the court, the same will be valid. Option B declares surrogacy contracts as void.\textsuperscript{19} As far as alternative A is concerned, it invalidates only gestational surrogacy arrangements and is silent on traditional surrogacy arrangement which in a way gives authority to the parties to enter in to traditional surrogacy contracts without any regulation. The alternative provides for the payment of consideration, but what is reasonable consideration is not decided by the alternative, it is just left to the discretion of the court. Moreover, the Act is silent on taking the written acknowledgement from the parties that they have received all the information regarding the acts and consequences of entering in to the surrogacy arrangements. So far as alternative B is concerned it simply declares the contracts as void. However, mere declaring the contracts as invalid can not be treated as solution to a problem


\textsuperscript{19}United Status of Children of Assisted Conception Act, 1988, section 5.
unless some regulations are imposed in order to ensure that invalidity is implemented in all the aspects of these contracts.

The other statutory provision in regard to surrogacy is Uniform Parentage Act which was enacted in 1973, revised in 2000 and amended in 2002. The Act deals with gestational surrogacy arrangements and provides limited rights only to the married couples to enter into the surrogacy arrangements.20 The other legislation is American Bar Association Model Act which was adopted in 2008. It also provides for two alternatives for surrogacy arrangements. Alternative A provides for the validity of court approved surrogacy contracts. On the other hand, Alternative B provides for the validity of privately drafted surrogacy contracts. The Act though prohibits the traditional surrogacy arrangements yet lays down no further guidelines in its relation. Moreover, the Act is not applicable to single woman, single male, gay couples. The Act talks about reasonable consideration, but does not define it. This can result in different forms of consideration in different cases depending upon the facts and circumstances of each and every case. Moreover, the Act provides for regulation of surrogacy arrangements but nowhere it provides for the provisions relating to counseling, psychological evaluation, fitness of the parties, acknowledgment regarding the information relating to all the aspects of surrogacy arrangements. Although Model Act is providing for the two alternatives, yet there are limitations in it. So far as alternative ‘A’ is concerned, it requires the pre validation of contract by the court. However, no time limit has been specified with in which the court has to decide the matter.21 So parties are in afflux that even after waiting for unlimited period of time or after spending lots of money in the form of court fee, attorney fee etc. the result in form of the decision of the court will be in their favour or not.22 Thus the alternative limits the reproduction autonomy of the couple as the decision regarding reproduction is to be decided by the judge and not by the couple themselves.23

On the other hand alternative ‘B’ provides about privately drafted contacts. There are chances of commercialization and exploitation in this alternative as the parties are free to decide except certain obligatory requirements of this alternative. As per the requirements, the parties can enter in to the surrogacy contract if there is a medical need and that is required to be based on the affidavit of a qualified physician. However, what is medical need is nowhere defined and explained in the alternative.\(^{24}\) The requirement that at least one intending parent donate a gamete is also not without limitation as it eliminates from consideration single woman who can not donate an egg or gestate, single heterosexual men who are not able to marry or find partners, heterosexual couples where both partners are completely infertile.\(^{25}\) Thus if the requirement of at least one gamete is dropped it would nicely balance the interest of the child as well as infertile parents and all those associated with gestational agreement.

As far as the state wise analysis of United States is concerned, there are only a few states that allow gestational carriers to be compensated for their services.\(^{26}\) There are two states i.e. Arizona and District of Columbia that bans surrogacy arrangements altogether. The states of Kentucky, Michigan, New York and Washington are such states where surrogacy agreements are declared as void with penalties. The states of Alabama, Indiana, Louisiana and Nebraska declare surrogacy agreements as void. The states of Arkansas, Florida, Illinois, Nevada, New Hampshire, North Dakota, Tennessee, Texas, Utah and Virginia are such states which allow surrogacy contracts but only under regulations imposed by the statute. The other states where no statutory arrangement exists for surrogacy includes Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode island, South Carolina, South Dakota, Vermont, West Virginia, Wisconsin and Wyoming.\(^{27}\)

\(^{27}\)Larry Gostin, “Forum on Surrogate Motherhood”, 16 L. Med. & Health Care, 5-6 at 6 (1988).
Thus it can be concluded after analyzing the law in various states of U.S.A, that there is a need of national and uniform law in regard to surrogacy. It will help all the citizens of different states in the country to have equal availability of options in case of surrogacy which are not available presently. The same objective can be achieved only through regulation adopted at national level and not on state to state basis. Although the constitution of the country gives sovereignty to the state in this matter as family law provisions are in the state jurisdiction which can not be interfered by the centre, yet keeping in mind the nature of the arrangements involved, the law has to be made at national level in order to ensure the rights and responsibilities of all the involved parties.

As far as United Kingdom is concerned, it has uniform regulatory system in the context of surrogacy arrangements. The authorities of the country took in to account the rising trend of surrogacy arrangements and formulated a committee known as Warnock Committee to study the situation of surrogacy in 1984.²⁸ The recommendations of the committee lead to passing of Surrogacy Arrangement Act, 1985 which is current legislation for surrogacy in United Kingdom. The Warnock committee considered the aspect of enforceability of the surrogacy contracts but had not dealt with the aspects of payments to be made to the surrogate in a contract of surrogacy. This again led to the formulation of another committee known as Brazier Committee.²⁹ The committee recommended limited payments to the surrogate and proposed new and additional control over surrogacy arrangements. The present Act makes the surrogacy arrangements as unenforceable and prohibits the advertisements relating to surrogacy on commercial basis.³⁰ There is also legislation in the form of Human Fertilization and Embryology Act, 2008 in England which partly deals with the surrogacy agreements. The Act is mainly dealing with the specific requirements for a parental order by the intended parents from court. It declares gestational mother as the legal mother of the child.

Thus the law in England does not deal with the altruistic surrogacy arrangements as it is neither validating nor prohibiting these arrangements. In this case there are possibilities that the parties can enter into private surrogacy contracts. The effect of these contracts is that there is no one to regulate these arrangements. So indirectly parties can enter into the surrogacy contracts as the law only considers the commercial aspect of surrogacy not the altruistic aspect. As far as commercial surrogacy agreements are concerned the parties can not take legal advice because it is prohibited as per law. In this case the parties can move to non profit agencies whose guidelines are either vague or informal. It can result in the exploitation of the intended couple as well as the surrogate. The law does not take into account the intention of the intended parents or the commissioning couple when it makes surrogate as the legal mother of the child. The law discriminates about the availability of parenting orders in surrogacy arrangements to the commissioning couple as it requires providing the gamete by one of the applicant. Moreover, law requires that the child should be residing with the commissioning parents before declaring them as legal parents. This would mean that the child will for the time being be in the custody of the persons who are not yet legally authorized for the custody.

The law in Australia allows for individual state regulation of surrogacy. The country has imposed either prohibition or strict regulation in relation to surrogacy contracts. In all states of Australia, the surrogate mother is deemed by law to be the legal mother of child and any surrogacy arrangement which provides custody to others is void.31 In some states, arranging commercial surrogacy is a criminal offence. Australia's first national governmental inquiry into the issue of surrogacy took place in 1985 and resulted in a Family Law Council recommendation that Australia should adopt uniform legislation prohibiting commercial surrogacy. Before national legislation could be written, a second governmental inquiry was conducted into the issue of surrogacy. It recommended that there is a need to permit and regulate altruistic surrogacy at national level. However, the reproductive technology working group which was established by the Australian health minister's advisory committee recommended that the states and territories should prohibit surrogacy and make all contracts for surrogacy void through their own legislation. As a result seven

---

31 Hasina Parvin, “Surrogate Mother: Legalise Surrogacy in India”, 21 Civil Services Chronicle, at 22 (December 2008).
Australian states and territories have sought to develop and, in some cases, have adopted legislation regarding surrogacy. Couples who make surrogacy arrangements in Australia have to complete a complicated process of adopting the child, as they are not legally recognized as birth parents.

As far as the Australian states are concerned, these are mostly declaring the surrogacy contracts as void, illegal and not enforceable and also prescribe penalty for the contract on commercial basis. It is applicable in case of Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria and Western Australia. From the analysis of different states and territories it can be concluded that arrangement in case of surrogacy in the country is only laying emphasis on the commercial aspect. Some of the states permit altruistic surrogacy arrangements, but no further legislation in this respect has been laid down in order to regulate this form of surrogacy in any of the state or territory. Moreover, it is not clear from the law in these states that whether it is in regard to gestational surrogacy arrangements or traditional surrogacy arrangements as meaning of surrogacy arrangements has not been explained in this context. So need is to make laws more clear and impose regulations on every kind of surrogacy arrangements.

In case of Canada, reproductive technologies are covered by the Assisted Human Reproduction Act, 2004 including surrogacy. Before the enactment of the Act, surrogacy arrangements were unregulated in Canada. Though some efforts were made in form of establishment of commissions first in 1985 in form of Ontario Law Commission and secondly in form of Royal Commission whose suggestions and recommendations were not adopted. Finally Bill C-56 was presented which was approved by senate in the form of the present Act. The Act prohibits commercial

33 This is the reason that India has become a booming centre market with its reproductive tourism industry reportedly estimated at Rs. 25,000 crore. Today it is estimated that 2,00000 clinics across the country are offering artificial insemination, IVF and Surrogacy.
surrogacy. Specifically, the Act allows an intended parent to reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy provided that a receipt is provided to that person for the expenditure. The Act provides for the establishment of the assisted human reproduction agency of Canada to assist in regulation. As far as the states are concerned it is only the state of Quebec where all kinds of surrogacy is prohibited.

The law in Canada does not expressly regulate who can or can not enter in to the surrogacy arrangements. The law does not prohibit altruistic surrogacy arrangements but at the same time does not provide for any guidelines for regulation in case these arrangements are undertaken by the parties. It is silent on the consequences if the altruistic arrangements are undertaken by the parties. The law prohibits any kind of payment and makes it an offence. But the law is silent regarding the custodial issues of the child in case of death, divorce, refusal to give or take the child. Thus it is against the interest of the child. Moreover, surrogacy arrangements are inevitable. Just declaring them as offence will not serve the purpose till it is properly regulated.

It can be concluded that different countries have differently regulated the surrogacy arrangements. It has lead to lot of controversies and problems in international surrogacy arrangements. These problems at international level emerge especially when the intended parents cross borders to made surrogacy arrangements in the countries where surrogacy laws either are favourable to them or where there are no regulations for undertaking this process. So the difference in state domestic laws have given rise to a number of questions which could not be solved on national basis rather international regulation is required in this regard. The questions are not only concerned with the interest of parties but most importantly with the interest of the child which could not be put on stake by way of surrogacy arrangements.

37 Id., section 12 (1).
40 The rights of the children are recognized internationally by way of United Nations Convention on Rights of the Child 1989, Art. 7 & 8 recognizes that children have fundamental right to grow in a safe and happy family environment.
Thus the regulation of international industry is necessary to clarify the laws of surrogacy across borders. It will help in ensuring the rights of all the parties involved and extent to which their interest can be protected in case they enter in to surrogacy arrangements. However, in order to regulate the provisions internationally deliberations, discussions, research, interactions with the countries are required at international level. Though it is not an easy option which can be enacted in a day or two, yet first step has to be taken in this direction to ensure the welfare of all the parties involved.\textsuperscript{31} However, it must also be kept in mind that it should not undermine the sovereignty of the countries with in their internal sphere as the countries are free to decide about the internal surrogacy arrangements. Moreover, in the option of international regulation, one problem can arise regarding the ratification of the international regulation by all the countries. However, this issue can be solved by making efforts in this direction like social pressure for requiring the countries to adopt same practices at international level. Another option can also be international consensus on bilateral agreements between the countries in which surrogacy to be allowed in between those countries that have made bilateral agreements for the same. As these arrangements might take a number of years to come in to existence, timely help can be taken by way of making amendments in immigration laws to ensure strict regulation in case the couples enters in to surrogacy arrangements in other country.\textsuperscript{42}

Chapter 3 deals with socio ethical implications of surrogacy. A number of arguments are advanced in favour and against surrogacy and its social ethical implications. It is believed that there are chances of exploitation of the surrogate. Her health issues can be ignored while giving preference to the child over the surrogate.\textsuperscript{43} Moreover, especially the surrogates in India are made to live in the dormitory like


\textsuperscript{42}Hague Convention which came in to existence on May 29, 1995 has been ratified by many countries including India. India has ratified the convention on 6-6-2003. Efforts have already been started in this direction as Permanent Bureau of Hague Convention on International Law has been involved in a project of Private International Law issues surrounding the status of the children, including the issues arising out of international surrogacy arrangements. For More Details See www.hcch.net/index_en.php?act=text. Display &trial=181.

houses by the infertility clinics which raises more chances of exploitation.\textsuperscript{44} It also entails the issues of baby selling, commodification, immorality, harm to the surrogate and the child born through surrogacy. Further it is asserted that it has negative psychological effects both on the surrogate and the child. It is believed that along with the exploitation of the surrogate it leads to exploitation of the child. On the other hand it is also believed that surrogacy is not similar to adoption.\textsuperscript{45} In case of adoption, an agreement is undertaken when already the child is in existence. In this case the mother has to terminate the relations with the child. It is further argued that in case of surrogacy, the surrogate mother conceives a child after the arrangement of surrogacy is decided in between the parties. The surrogate is aware of the fact of relinquishment of child from the beginning even before the pregnancy that she is just to deliver the child to the intended parents after his birth. It is believed that surrogacy provides reproductive choice to the women serving as surrogate, however, it has to be interpreted in a strict sense in case of surrogacy in India as Indian women are required and forced to fulfil the wishes of their husbands, relatives and family members.

In case of surrogacy, surrogate mother should not be treated as the mother of the child rather intended mother should be considered as the mother of the child. It is based on the assumption that it is the intended mother only on whose intention the contract of surrogacy is enacted and it resulted in the birth of a child. Surrogacy do not result in disintegration of family rather the bond of love and affection become more strong as it shows the collective efforts of intended parents to bring the child in to the living world for themselves by surrogacy which can never be possible otherwise. Surrogacy do not have adverse psychological impact on the surrogate as she is clear at the time of entering in to the contract that she is only to deliver the child for the intended parents.\textsuperscript{46} It does not have impact on her own children.\textsuperscript{47} Moreover, in order to avoid any chance of adverse impact on surrogate, extensive counseling is

to be provided to the surrogate. Surrogacy is not like prostitution as the basis of surrogacy is not sexual intercourse between the intended father and the surrogate as is applicable in case of prostitution. It also can not be compared with adultery as it is with the consent of the intended father that surrogacy arrangement is initiated.

Thus after considering the social ethical perspectives of surrogate motherhood arrangements in relation to child and the surrogate, it can be concluded that these socio ethical challenges can be overcome if some aspects are carefully considered and analyzed by the parties. First is that at the time of entering in to the contract, the parties must be made clear about all the risks involved and consequences that can follow from the surrogacy contracts. Secondly, in order to minimize the harm to the women, the reproductive rights of women must be recognized. Most emphasis should be on psychological counseling or evaluation of the surrogate. It should be part of the surrogacy contract for whole of period of pregnancy so that the surrogate does not feel psychological and emotional distress on relinquishing the child. Thirdly, the primary focus should be on the potential impact on children. A child’s development and well being is more important as compared to the question of how he is conceived. If the surrogacy arrangements are not enforceable, the unborn child will be at risk. If the contract is unenforceable, then couple will not pay the surrogate as compared to the care and attention she is giving to resultant child. There is also need of counselors who can guide and provide correct information about all the queries of the parties involved. Moreover, in case of child it must be taken in to account that it was intended parents who intended the birth of the resultant child. The majority of problems arise only when the arrangement goes unsupervised and counseling is not provided to the intended parents. Thus in order to make the arrangement a success more emphasis should be on the overall supervision and counseling needs of the parties rather than considering legal and financial basis.

Chapter 4 deals with Legal implications and framework of surrogacy in India. India currently has no laws for regulating surrogacy. Due to non regulation of surrogacy

---

India has emerged as global reproduction tourism industry. In response to rising demand of surrogacy many of the clinics have started offering surrogacy even in the absence of the expert doctors. The unregulated fertility clinics also indulge in medical malpractices. Many surrogacy rackets have also been unearthed by the police authorities in different cases. These rackets are proof of fact of absence of law and regulation of surrogacy in India. In order to overcome these issues the first effort in this regard was made in 2005 by the Indian Council of Medical Research (ICMR) who released non binding guidelines in respect of assisted technologies which include surrogacy also.

The guidelines have been laid down in order to ensure the accreditation, supervision & regulation of ART clinics so that international standards are followed and there is no malpractice. The Indian Council of Medical Research has further issued ethical guidelines for bio medical research in 2006. It represents a statement of specific principles for Assisted Reproductive Technologies. According to these guidelines surrogacy contract should be made legally enforceable. It should be resorted to only when it is medically certified that the intended mother is unable to carry pregnancy due to infertility. In August 2009, the Law Commission of India formulated a report on need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties in a surrogacy contract. Specifically, the Commission recommended the enforceability of surrogacy agreements but not for the commercial purpose. However, the commission was of the opinion that the contract should provide for financial support for the resulting child in case of divorce or death of the commissioning couple.

In order to give a shape of law to the surrogacy provision, the draft Bill is prepared in the form of Assisted Reproductive Technologies Bill, 2014. The present Bill aims

54 Id., at 25.
at proper regulation and supervision of ART clinics and banks. It also aims to prevent
the misuse of technology including surrogacy. It has been drafted to provide safe and
ethical practice of ART services. The draft of the Bill was framed firstly in 2008 and
it was reframed again in 2010 and yet again in 2013. However, the Bill of 2013 was
not made public and treated by governmental officials as highly confidential.
According to the provisions of the 2014 Bill, the surrogacy agreement will be binding
between the parties. It imposes a number of duties on ART clinics, ART banks and
all the involved parties in the surrogacy contract. It provides legitimacy to the child
born out of surrogacy. The Bill prohibits the use of individual brokers or paid
intermediaries.

Even though a number of provisions have been made in the Bill to regulate
surrogacy, yet there is requirement to make changes in the Bill to make the law more
effective. The contract of surrogacy should be valid and enforceable. It should not be
declared unenforceable simply on the basis that some reasonable consideration is
involved in it. In fact the contract based on the principle of fair dealing requires that
every person or party in the contract must perform. In case of surrogacy contract the
surrogate is performing her part by delivering the child to the intended parents. The
intended parents must also perform their part by providing reasonable compensation
to her for her services. In case of a surrogacy contract a surrogate provides a service
of giving birth to the child. In this contract certain limitations can also be imposed on
her till the child is delivered to the intended parents. She can thus be forced to
relinquish custody of the child and if she refuses then the contract can be specifically
enforced up to this extent. However, she can not be forced to carry the child up to
delivery if there is some danger to her life.

55 For Details See Letterno.V.25011/444/2011-HR (Vol. II) (Part), dated 30th September, 2015,
Department of Health Research, Ministry of Home and Family Welfare, Government of India.
(Saturday).
57 Assisted Reproductive Technology (Regulation) Bill, 2014, section 60 (1).
58 Id., section 68.
60 Pamela Laufer Ukeles, “Gestation: Work for Hire or the Essence of Motherhood? A Comparative
In order to avoid conflict between any parties, the surrogacy contract must clearly mention the consequence of breach of the contract by either of the party. In case the surrogate refuses to carry with pregnancy without any medical reasons, then it must be made certain that she has to return all the expenses including insurance which is incurred by the intended parents before and after pregnancy along with reasonable compensation. In case breach is made by the intended parents and they refuse to carry with the contract before the pregnancy of the surrogate, then the compensation for breach should be paid to the surrogate that must include all the cost i.e. legal, financial, medical and loss of wages if the surrogate is employed. In case the surrogate is already pregnant, the intended parents should be under obligation not to make a breach of contract. It must also be made mandatory that they have to accept the custody of the child even in case of defect or deformity. The penalty in the form of punishment should be imposed on the intended parents who refuse to take the custody of child after birth.

Thus it can safely be concluded that the conscious and intentional exertion of right to procreate should be given more protection than the accidental and unintended action of procreation. So the right of intended parents to have children through surrogacy process should also be recognized. If the procreative right of intended parents exists, it should not only apply to them but also to the surrogate who is involved in the procreative process. Considering this aspect in relation to surrogate mother it can be recognized that she also have right of reproductive autonomy i.e. to decide whether she will serve as a surrogate for giving birth to child for intended parents or not.

The termination of pregnancy is only permitted when the conditions specified in applicable statutes are fulfilled. In case of surrogacy contract also the same provisions should be made applicable. Further there is also a state interest in

---

protecting the prospective child. So keeping in mind this interest, some restrictions can be imposed on the surrogate also. It is in the form that she should not perform any act which can harm the child. So the reproductive autonomy of surrogate can be restricted to a limited extent in order to protect the interest of the child. As far as the issue of citizenship is concerned, the child born to intended parents who are Indian citizen should be treated as citizen of India. In case of the foreigners entering in to the surrogacy arrangements, the child should be treated as not the Indian citizen but as the citizen of a foreign country. The intended parents should be treated as the natural parents of the child born through surrogacy. The child should be treated as the legitimate child of the intended parents and should be given all the rights as are provided to the natural born child. The name of the child as natural child of the intended parents must also be entered in the birth register which is kept by the officials. In case of foreigners, the child must be treated as belonging to them and they should be made responsible for the upbringing of the child.

Chapter 5 deals with judicial response to surrogacy at national and international level. Surrogacy contract involves divergent views on different issues and these issues are differently dealt by courts of different countries. The courts in U.S.A. took in to account the acceptability of the practice of surrogacy while dealing with the different case laws. However, due to lack of complete legislation in this regard in a number of states in U.S.A. and specially the states where arrangements are criminally prohibited, the courts are not very successful in coping and balancing between the rights and liabilities of the parties on the one hand and framework of the legislation on the other hand. The courts in such situation have referred only to the need of legislative enactment in regard to surrogacy arrangement. The case law in the U.K. suggests that the relinquishment disputes are more frequent between the parties where the

---

67 In the case of Javed v. State of Haryana, A.I.R. 2003 S.C. 3057, the Supreme Court was confronted with the question of the validity of the two-child norm, sought to be enforced at the Panchayat level in Haryana, in the interests of population control. As is the case in American legal discussion within the reproductive rights framework, the issue yet again, was the balancing of the individual's reproductive autonomy with community interests, represented by population control in this case. The Court held that the law is not violative of the right to reproductive autonomy.


surrogate is genetically linked with the child.\(^{71}\) The courts in almost all the cases have looked in to the welfare of the child.\(^{72}\) In certain cases even though the payment is made exceeding the permissible limit of law, the court granted parental order ignoring the exchange of payments between the parties.\(^{73}\) The courts in different cases have given priority to the interest of the child over the interest of the parties and enacted legislation.

As far as Canadian courts are concerned, they are inclined towards the child friendly approach in recognizing the parentage. It is applicable especially in those cases where there is no evidence of exchange of any payment or compensation in between the parties.\(^{74}\) The court in some cases has also taken in to account the intention of the parties who have entered in to the surrogacy contract. So far as Indian courts are concerned, they have taken up the references from different countries in order to resolve the matter as there is no enacted law in India in relation to the surrogacy agreements.\(^{75}\) The Indian courts have not come across a number of surrogacy disputes.\(^{76}\) The disputes in relation to surrogacy before the courts mainly involves the issues of nationality, citizenship etc. in respect of the foreign surrogacy agreements. There is no such case where the surrogate has refused to hand over the child to the intended parents. Although India serves as international hub for surrogacy arrangements, the Indian courts have not yet extensively dealt with the matter.\(^{77}\)

It can be concluded after analyzing the case laws of different countries that it clearly demonstrate that courts have encountered great difficulties in resolving surrogacy related custody disputes. Although the issues surrounding such disputes have not been completely resolved, this legal vacumm has engendered debate in a number of other

\(^{71}\) Available at http://eprints.qut.edu.au/45775/.
societal circles also. Thus the courts in different countries have decided different case laws according to the facts and circumstances of the cases and applicable law. However, the conflict becomes more complicated when the applicable law is not clear. In such situation the courts are left with no option but to analyze the case by exercising discretion. The court in that case sometimes took in to account the interest and intention of the parties, sometimes the welfare and best interest of the child. The judicial decisions in different countries reflects that there is need to place the surrogacy arrangement on international front specially for resolving the cases where surrogate is from one country where surrogacy is permitted and the intended parents are from other where it is either made punishable or strictly banned.

Chapter 6 deals with empirical analysis of surrogacy in the State of Punjab and U.T. Chandigarh. For the purpose of research, data is collected from 10 infertility clinics, 15 infertile parents and 10 surrogates from the State of Punjab and U.T. Chandigarh. It was very difficult to get the information from any of the respondent in the research as the different issues of privacy, prestige, individuality, fear of disclosure, unwillingness were involved in giving information. It is found through study that the patients visiting infertility clinics for the purpose of surrogacy involves both Indian and foreigners. They are both from rural and urban background. According to the infertility clinics, the patients are generally aware of surrogacy. The infertility clinics are generally practicing gestational surrogacy. Surrogacy is suggested to such infertile parents on the basis of damaged or no uterus, multiple failures of IVF, risk or danger in carrying pregnancy to term. According to the clinics, IVF poses no health risk either to the surrogate or the child and it is just the normal pregnancy complications that follow IVF. Counseling is part of process of surrogacy.

As far as infertile parents are concerned, they are generally aware about surrogacy and its social and ethical implications. However, they are not fully aware about legal aspects of surrogacy. According to the infertile parents, surrogacy should be legal. Option of surrogacy should be available to all the Indians, NRIs and foreigners. Surrogacy should be available to only married and infertile. Infertility should only be basis for entering in to surrogacy contract. Only gestational surrogacy should be practiced. Intended parents should be parent of child in case of surrogacy arrangements. The surrogate should possess qualities like she should be fair, educated
and good looking. Infertile parents should be decision maker in surrogacy. The compensation should be paid to the surrogate and it should also involve financial, legal, medical and other costs. The amount of the compensation should be more than 1 lakh Rs. However, compensation should not be paid to the surrogate if she refuses to give up the child after delivery. The surrogate should be given right to abortion if there is danger to her life. No relation should be maintained with the surrogate after the delivery of the child. The intended parents should be bound to take custody of children in case of multiple births and also in case there are birth defects. Breast feeding should not be allowed to the surrogate. However, it may be allowed in those cases where there is need for the welfare of the child. Neither the child should be informed about birth through surrogacy nor should he be allowed to meet the surrogate. Surrogacy is more preferable than adoption due to genetic link with the child along with more closeness and birth of the child in healthy environment.

As far as surrogates are concerned it is clear from the study that they are poor, unemployed, and not much educated. Mostly the ladies who are married enter in to surrogacy in order to maintain their family and educate their children. Only 50% of surrogates enter in to surrogacy contracts in writing, copy of the contract is not provided to these surrogates also. Surrogates are not even aware about the contents of the surrogacy contract. The contract is entered only after the confirmation of pregnancy. The surrogates are generally compensated. The amount of compensation provided to the surrogate falls with in a range of 1-2 Lakh. However, only 10,000-15,000 Rs. are paid before the confirmation of pregnancy. In case of unsuccessful pregnancy no further amount is paid to the surrogate. Most of the surrogates pretend to have knowledge of the health risks as they believe that surrogate pregnancies are just like other normal pregnancies. The surrogates feel attachment with the child but are willing to relinquish the custody of child after birth.

There are certain facts which become clear in case of surrogacy through empirical study. It is clear from the study that different costs of treatment are taken by different clinics in undertaking same process of surrogacy. It could result in undue profits to the clinics. The written contract is although made compulsory for the surrogacy; however, it is not entered in to by all the surrogates. In such a situation also the clinics are treating such patients. It is also clear that in case written contract is entered, copy
of same is not provided to the surrogate. Most of the clinics declined to have any role in the written contract, but some of the surrogates accept that clinics have the copy of the contract. The clinics have also declined to have any role in deciding the compensation and its payment to the surrogate. However, it is clear from the study that the intended parents are not meeting regularly with the surrogates or in some cases they have not met at all as the pregnancy is not confirmed, still they are paid initial amount of compensation. Thus it is concluded on this basis that it is the clinics that are paying compensation to the surrogate on behalf of the intended parents.

The clinics also decline any role in arranging the surrogate; however, it is clear from the study that surrogates got information through agent or infertility clinic regarding surrogacy. It is thus clinics only who are acting in consonance with the agents for arranging surrogates. The clinics are performing 3 to 4 embryo transfers. However, mostly the surrogates are not willing to have more than 2 embryo transfers. Further most of them are willing to carry only one fetus. Thus irrespective of the willingness of the surrogates, clinics are placing more embryos at the desire of the intended parents. The clinics on the one hand are not in the position to settle the dispute between the parties to surrogacy. On the other hand surrogates are also unaware about such situation. This conflict raises a question regarding the kind of counseling which is provided to the surrogate and the intended parents. It is also clear from the study that intermediaries or agents are playing a key role in the surrogacy.

It is also clear from the study that the generally parents are meeting with surrogate only after confirmation of pregnancy. This raises a question that how in such case the surrogates can be arranged by the intended parents, how contract can be entered in to between the intended parents, how the compensation can be decided between the surrogate and the intended parents. Thus clinics are acting on the behalf of their clients/parents for all the requirements of surrogacy. The infertile parents seems to be not bothered about the rights and health of the child as most of them believe that breast feeding and information to the child regarding his surrogate birth should not be allowed. The infertile parents also feel that the surrogate should stay in the intended parent’s home. However, they ignore her responsibilities towards the family members and children.
In the light of the above discussions and conclusion drawn, it can be stated that all the hypotheses of present study stands proved.

- India is becoming destination country for foreigners requiring surrogacy arrangements: Hypothesis Proved
- Surrogacy arrangements ignore emotional and physical consideration of child and the woman who is serving as surrogate: Hypothesis Proved
- Infertility is the main reason for adoption of surrogacy arrangements by parents: Hypothesis Proved
- Success rate of surrogacy is low as compared to monetary and ethical considerations: Hypothesis Proved
- Surrogacy in a way poses a danger for exploitation of surrogate mothers in general: Hypothesis Proved
- “Gestational Surrogacy” is more practiced than “Traditional Surrogacy”: Hypothesis Proved
- There is currently no legislation governing surrogacy in India: Hypothesis Proved
- Surrogacy is not equivalent to prostitution and adultery: Hypothesis Proved

7.1 **Suggestions:** The contract of surrogacy should be declared as valid and enforceable. However, to make it more voluntary and to avoid the exploitation, there is need to protect the rights of all the parties involved in the surrogacy arrangements. The regulation is required to be made not only at national but also at international level. There are certain suggestions to make the surrogacy contract as more effective and less exploitative.

7.1.1 **Suggestions as to Contract of Surrogacy:**

1. Altruistic surrogacy should be enforced where the surrogate should be allowed to get reasonable compensation from the intended parents.
2. The reasonable compensation should include the costs like financial, legal, and medical, expenses of loss of earnings. It should also include the health and life insurance to the surrogate during the period of surrogacy and after delivery till she recovers physically. No extra amount should be paid to the surrogates apart from the actual costs. It will also help in checking reproductive tourism.
3. The cost of surrogacy including the compensation to the surrogate must be fixed and it should also be ascertain that how it will be applicable in different cases. Like what will the extent of compensation in case the treatment has not resulted in the pregnancy of the surrogate. How much will be paid to the surrogate if miscarriage has taken place or the child has to be aborted due to complications to the surrogate.

4. The reasonable compensation should not depend upon the race, caste, colour, religion, education of the surrogate.

5. Only the gestational surrogacy should be allowed where surrogate is not genetically related with the child.

6. Surrogacy should only be allowed to married infertile couples. It could also be allowed in those cases where there is a danger or risk to the women in carrying a child. However, in both the cases it must be certified by the registered medical practitioner that the couple is suffering from such infertility or such physical condition where surrogacy is the only option. The infertile couple should be allowed to undertake surrogacy only after getting the necessary certificate from the concerned medical practitioner.

7. In the context of surrogacy, what is medical need must be properly defined and enumerated.

8. The contract of surrogacy should not be applicable to single, unmarried, gay or lesbian couples.

9. Surrogacy should only be carried by the government hospitals and clinics. The government should display the list of authorized and registered government hospitals and clinics for the purpose of surrogacy. This would help in transparency and discouraging corrupt practices in case of surrogacy. Further ART banks should also be under the direct control and supervision of the government.

10. Surrogacy should be allowed to Indians as well as foreigners. However, in case the foreigners enter in to the contract of surrogacy, more strict provisions should be enacted in consonance with the foreign countries.

11. In case surrogacy is entered in to by the foreign infertile couple, there should be bilateral or multi lateral treaty between India and that foreign country whose citizen that couple is. It is required to assure that surrogacy creates no problem as already the two countries have decided on mutual terms and
conditions about surrogacy. Mutual terms and conditions should necessarily include about the status of surrogacy in between the nationals of two countries, the rights of the child, surrogate and the intended parents and determination of issues of parentage, nationality, residence, citizenship.

12. In case of surrogacy by foreigners, surrogacy should take place only in home country. The surrogacy should not be allowed to move to other nation for the purpose of surrogacy.

13. There should be establishment of separate authority to deal with the cases of international surrogacy. The approval should be made compulsory from the authority before undertaking the contract of surrogacy by foreign nationals.

14. In case any infertility clinic provide services to foreign infertile patients seeking surrogacy without following the rules and regulations, then the penalty should be imposed on such clinic along with the punishment to the authorized persons of the clinic.

15. The written contract of surrogacy must be made compulsory. It must be made before the process of surrogacy is carried on the surrogate. It should be written in legible and clear words. It should also be made in the language which can be understood by the surrogate. All the terms and conditions must be duly disclosed in the contract. It must also declare the consequence on non compliance with the terms of the contract. Apart from writing in the contract, the provision must also be made of an interpreter who should be required to explain all the terms of the contract to the surrogate. Surrogate should also be provided with the copy of the contract.

16. The clinics should be bound to give medical treatment only after ascertaining that the contract of surrogacy is already made between the parties.

17. There should not be any role of the clinic in surrogacy contract except providing medical treatment to the intended parents and the surrogate.

18. The role of agents or intermediaries should be strictly prohibited and penalty should also be imposed.

19. The advertisement relating to surrogate should not be made by the infertility clinic or the intended parents. It must only be made by ART bank. Further in such a case also, it should not be specified for a particular couple, but must be in relation to recruitments of surrogates generally.
20. The clinics should be under the obligation to provide counseling and undergo medical, psychological evaluation of the surrogate before, during and after the process of surrogacy.

21. The cost of medical procedures involved in the surrogacy must be same and fixed in all the clinics.

22. There is a need of transparency as compared to maintaining confidentiality in case of surrogacy contracts.

7.1.2 Suggestions as to Intended Parents

1. The detailed assessment of the commissioning parents should be made before they enter into the surrogacy contract. It must also include the information regarding the criminal records of the commissioning parents, the suitability of parents to bring up the child with care and attention. The attempt should also be made to look into account the better prospects of the child to be born through surrogacy.

2. The intended parents should be required to declare before the infertility clinic that they have entered into surrogacy and they are requiring a child by surrogacy.

3. There should be clear determination of legal parentage before the entry of the contract of surrogacy especially in case of international surrogacy.

4. It should be made compulsory for the intended parents to take custody of child in all the cases. Even if there is defect in the child, then also it should be binding on the intended parents to take custody of the child. In case of the death of the intended parents during the process of surrogacy, provisions should be made in the contract regarding the person who will be taking custody of the child. It should be the family members or near relative of the intended parents who should be bound to take the custody of the child. The contract of surrogacy should mention the name of the person who will be taking custody in such case and such person should also be made party to the contract up to the extent that he will be bound to take the custody of the child in such a situation.

5. The intended parents should not compel the surrogate to abort the child only on the basis of some defect in the child or that they are no more interested in taking custody of the child. They should be liable for penalty in such a case.
6. The intended parents should be declared as the parents of the child born through surrogacy. It should be applicable in those cases also where only one parent has provided genetic material for birth of the child or anonymous donor has provided with the material. For this purpose the birth certificate of the child should contain the name of the intended parents as the legal parents.

7. The intended parents should be required to certify that they have cleared all the reasonable expenditures, costs and expenses of the surrogate to ART bank of which details should be kept by the respective ART banks.

7.1.3 Suggestions as to Surrogate

1. The woman serving as surrogate should be at least 21 years of age and should be married and should have her own child so that she is aware about the complications of pregnancy.

2. The husband of the surrogate should be made party to surrogacy as it would check the practice of comparing surrogacy with adultery and prostitution.

3. She should be allowed to serve only once in her life time as a surrogate. Online data base should be created in order to ensure that which woman have served as surrogate and for whom she has served. It should also be open for public access.

4. The suitability of the surrogate should also be assured. She should also be physically, mentally and emotionally fit. It should also ensure the autonomy and welfare of the surrogate.

5. It should be ensured that she is entering in to the contract of surrogacy voluntarily and without pressure from her husband or family members. It can be assured by making the provision that she will not be allowed to serve as surrogate for her own or husband’s any of the relatives or friends.

6. It should be ensured that surrogate mother is not abandoned, coerced or has to accept the unreasonable terms and conditions of the intended parents. The terms that are unreasonable, exploitative, inappropriate should be declared as void on the basis of unconscionable nature.

7. Surrogate should also receive independent legal consultation as well as psychological assistance before, during and after surrogacy of which expenses should be given by the intended parents. The contract of surrogacy should contain all the terms requiring the consent of the surrogate, details of different
expenses, insurances and emergency needs of the surrogate in the process of surrogacy.

8. Surrogate should be perceived as other human having rights in the contract. She should be disclosed all the information regarding the intended parents. There should be prolonged relationship between the surrogate and the intended parents. It should not be limited to the period of surrogacy.

9. The health of the surrogate should be given priority. Her basic right to health should be protected. There should also be medical screening of the surrogate before undertaking surrogacy so that the risk to her health could be assessed. This information should also be disclosed to the surrogate so that she can decide to carry further with the surrogacy contract or not. This will also help in ensuring the informed consent of the surrogate regarding the risks involved to her health. The medical check up should also be done after the delivery in order to see the health risk as a result of surrogate pregnancy.

10. The surrogate should not be forced to undergo medically unnecessary procedure. It should not result in termination of the contract on this basis. She should not be forced to have caesarean delivery if the normal delivery is possible.

11. The surrogate should be given the right to consult her own physician or demand second opinion in case of the medical procedures to be undertaken on the surrogate. She should have right to take maternity leave for the purpose of delivery of the surrogate child.

12. Surrogate should not be forced to live in clinic or surrogate home during the period of surrogacy. It should be left on the will of the surrogate. Moreover, if she accepts to live in the surrogate home, then also she should be having the right to visit her home. She should also be allowed to leave the accommodation at her own desire without inflicting any penalty for the same. The living conditions of the accommodation should be such as are suitable for a person to live with human dignity.

13. The surrogate should be required to relinquish the custody of the child after delivery.
7.1.4 Suggestions as to the Child Born Through Surrogacy

1. The child born through surrogacy should be treated as the legitimate child of the intended parents.

2. The child should have all the rights as are applicable to a child who is born naturally.

3. The child should be treated as citizen of India in case surrogacy is undertaken by Indian citizens. On the other hand if the foreigners have made the arrangement, then the child should be treated as foreign citizen.

4. The right to know about the identity should be applicable to the child born through surrogacy. The child should be given the information regarding his birth through surrogacy by the intended parents.

5. Breast feeding should be allowed to the child at least for 6 months in order to protect her health and for better care and protection.

6. Abandonment of the child by any party to the surrogacy contract should be declared as an offence.