2.1 Introduction: International surrogacy also termed as overseas and cross border surrogacy, took place between the intended parents of one country and surrogate of another country. However, it is not consistently regulated at the international level. There is conflict of laws in different countries regarding surrogacy arrangements. Several countries have developed their own mechanism to deal with the situations arising out of surrogacy contracts. However, no country has till achieved success for resolving all the issues relating to the surrogacy arrangements. In many of the countries the arrangements have either been banned completely or strictly regulated. 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. Further there are certain countries like Australian North Territory, Canada, Brazil etc. where surrogacy is highly regulated and in certain cases 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, Ukraine etc.

Despite these regulations and prohibitions, international surrogacy arrangements have emerged as a global option.\textsuperscript{7} One of the reason is the prevalence of a global village due to the advancement of scientific know how and means of the communication and transportation.\textsuperscript{8} Moreover, in order to avoid the prohibitions in their own country for carrying out the surrogacy arrangements, many people prefer moving to countries where strict rules and regulations do not act as a hindrance for surrogacy services.\textsuperscript{9} This is the reason that the surrogacy contracts are also termed as reproductive tourism.\textsuperscript{10} It has created dangerous and irresponsible conditions which resulted in black marketing at international level.\textsuperscript{11} Moreover, the complications arise due to applicability of different domiciles, residence, nationality, laws etc. which represents a situation of conflict of laws at international level.\textsuperscript{12} Thus there is a need to study the arrangements in different countries in order to find out the applicable law. For this purpose four countries have been made the subject matter of study in the present chapter.

\textbf{2.2 United States:} The law of surrogate motherhood in U.S.A. is not uniform as it does not have a national law.\textsuperscript{13} Different states have different provisions for the contract of surrogacy.\textsuperscript{14} Some states in U.S.A. validate this contract, while some entirely bans it.\textsuperscript{15} There are some states which allow surrogacy contracts only under the specified circumstances. Moreover, there is another category of states which do

\begin{footnotesize}
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\item Supra note 2 at 121.
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not have laws or regulations regarding surrogacy arrangements.\textsuperscript{16} Some efforts were made from time to time to frame national laws but all lacks required sanctions as it is not mandatory for all the states to adopt these provisions. Moreover, the option is provided to the states for declaring surrogate’s contract as valid or invalid.\textsuperscript{17} First such step in this direction was United Status of Children of Assisted Conception Act (USCACA).

\textbf{2.2.1 United Status of Children of Assisted Conception Act (USCACA):} In 1988, the national conference of commissioners on uniform state laws promulgated United Status of Children of Assisted Conception Act (USCACA).\textsuperscript{18} The Act itself mentions that it is not a surrogacy regulatory Act as it has made limited use of surrogacy arrangements.\textsuperscript{19} It defines surrogate as an adult woman who enters in to the agreement to bear the child conceived through assisted conception for intended parents.\textsuperscript{20} As the commissioners were unable to reach at some consensus, two alternatives were provided in relation to surrogacy contracts. Option ‘A’ provides that surrogacy contract will be valid if it is previously approved by the court.\textsuperscript{21} For the purpose of validation the court petition has to be filed in which the court can order the home study of the intended parents and surrogate and further requires that both the parties should meet certain requirements or standards.\textsuperscript{22} The Act provides that surrogate must have already one pregnancy so that she knows about the emotional attachment with the child after delivery and this requirement is also to be ensured by the court.\textsuperscript{23} The Act also provides for different provisions for safeguarding the interest of the surrogate like appointment of counsel for the surrogate, payment for health care of the surrogate by intended parents till the birth of the child,\textsuperscript{24} payment for any attorney or court fee

\textsuperscript{17} Supra note 10 at 486.
\textsuperscript{18} Amy Shelf, “A Need to Know Basis: Record Keeping Information Access and The Uniform Status of Children of Assisted Conception Act”, 51 Hastings L. J., 1047-72 at 1048 (1999-2000). It lays emphasis on the point that this Act do not address about the maintaining of records regarding the genetic material or identification of providers of genetic material.
\textsuperscript{19} Prefatory Note, United Status of Children of Assisted Conception Act, 1988.
\textsuperscript{20} Id., section 1 (4).
\textsuperscript{21} Id., section 5 (Alternative A).
\textsuperscript{22} Id., section 6 (Alternative A).
\textsuperscript{23} Id., section 6(b) (6) (Alternative A).
\textsuperscript{24} Id., section 6 (b) (9) (Alternative A).
incurred in the suit etc.\textsuperscript{25} So far as option ‘B’ is concerned, it declares the surrogacy contracts as void.\textsuperscript{26}

Thus from the analysis of the Act it is clear that in case of alternative A, 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 unless some regulation are imposed in order to ensure that invalidity should be implemented in all the aspects of these contracts.

\textbf{2.2.2 Uniform Parentage Act (UPA):} The Act was first enacted in 1973 by national conference of commissioners on uniform state laws.\textsuperscript{27} The Act was silent on most surrogacy issues except for providing some protection to sperm donor from parental obligation.\textsuperscript{28} In 2000, uniform law was revised and in 2002 it was again amended. Under the Act, the gestational surrogate and the infertile couple can enter in to contract for giving birth to the child and then relinquishing the rights and duties towards the child.\textsuperscript{29} The Act also provides for payment of consideration to the surrogate.\textsuperscript{30} It requires that man and woman who are intended parents must be parties to the contract. It obligates the parties to reside at least 90 days in a state where the petition is filed for court’s approval.\textsuperscript{31} If the court does not approve the agreement, it can not be enforced but the parents can be made liable for supporting the child.\textsuperscript{32} In such a case the woman who has given birth to the child is treated as legal mother and

\begin{thebibliography}{99}
\bibitem{25} Id., section 6 (10) (c) (Alternative A).
\bibitem{26} Id., section 5 (Alternative B).
\bibitem{29} Article 8, Section 801 (a) (1) Uniform Parentage Act, 2000.
\bibitem{30} Id., article 8, section 801 (3) (e).
\bibitem{31} Id., article 8, section 802 (b) (1).
\bibitem{32} Id., article 8, section 809.
\end{thebibliography}
the contracting male is treated as legal father. It is required as per the provisions of this Act that the intended parents must be married.\textsuperscript{33} Thus the Act limits the use of surrogacy arrangements for married couples.\textsuperscript{34} Along with all these requirements it also allows termination by any party but it should be prior to gestational carrier becoming pregnant.\textsuperscript{35} While the Act presents regulation for gestational surrogacy contracts, the states are free to adopt and alter the Act according to their own requirements. The Act remains ineffective to bring a truly uniform approach to surrogacy arrangements due to the fact that it gives discretion to the state.

Thus from the analysis of the Act it is clear that 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 and gay couples. The Act provides 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 no where 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.

\textbf{2.2.3 American Bar Association (ABA) Model Act:} ABA formally adopted the Model Act governing assisted reproduction technology in 2008.\textsuperscript{36} It provides an excellent framework for states as it contains several provisions which reflects the intention of the infertile couple while protecting the interest of child.\textsuperscript{37} This Model Act also offers two alternatives and both alternatives provides for enforceability of surrogacy agreements.\textsuperscript{38} Alternative ‘A’ closely follows the model of Uniform Parentage Act and imposes nearly identical requirements. It provides that a gestational surrogacy agreement must receive validation from the court.\textsuperscript{39} According to this

\textsuperscript{33} \textit{Id.}, article 8, section 801 (3) (b).
\textsuperscript{35} \textit{Supra} note 30, article 8, section 806.
\textsuperscript{37} Prefatory Note, \textit{American Bar Association Model Act Governing Assisted Reproductive Technology} (February 2008).
\textsuperscript{38} Id., article 7 deals with gestational surrogacy and provides alternative A and B.
\textsuperscript{39} \textit{Supra} note 37, § 704 (Alternative A).
alternative court has independent discretion regarding whether or not to approve the agreement even if all statutory requirements are complied with. It requires the fulfillment of number of procedures before declaring the agreement as valid. The parties have to satisfy before the court that they have complied with the residence requirements, home study and reasonable health care expenses.\textsuperscript{40} It is further required that the parties must reside in the state for at least 90 days before the filing of application before the court for validation of the agreement.\textsuperscript{41} The agreement should involve only reasonable consideration.\textsuperscript{42} The alternative further provides for filing of notice before the court by the intended parents with in 300 days of assisted reproduction in order to declare them as the legal parents of the child born.\textsuperscript{43} The court is required to make an order for confirming them as parents of the child and further directing the agency maintaining birth records to issue birth certificate and register their name as legal parents.\textsuperscript{44}

Alternative ‘B’ enforces privately drafted gestational surrogacy agreement in which there is no need to take validation from the court before entering in to the surrogacy contract. Under the alternative the parties are required to fulfill certain conditions. It requires that gestational carrier must be at least 21 yrs. of age, she must have given birth to at least one child and she should have completed a medical evaluation, a mental health evaluation and undergone legal consultation also.\textsuperscript{45} It also provides that there should be an arrangement for a health insurance which should not only be applicable during the pregnancy, but even eight weeks after the birth of the child.\textsuperscript{46} It is required that at least one of the intended parent contribute the genetic material.\textsuperscript{47} The parties are allowed to carry the surrogacy arrangements if there is a medical need which is to be evidenced by affidavit of qualified physician.\textsuperscript{48} The agreement must be in writing and executed before the commencement of any medical procedure.\textsuperscript{49} It further requires that the parties should acknowledge in writing that they have received

\textsuperscript{40} Id., § 703 (2) (Alternative A).
\textsuperscript{41} Id., § 702 (2) (Alternative A).
\textsuperscript{42} Id., § 701 (5) (Alternative A).
\textsuperscript{43} Id., § 703 (1) (Alternative A).
\textsuperscript{44} Id., § 707 (Alternative A).
\textsuperscript{45} Id., § 702 (Alternative B).
\textsuperscript{46} Id., § 702 (1) (f) (Alternative B).
\textsuperscript{47} Id., § 702 (2) (a) (Alternative B).
\textsuperscript{48} Id., § 702 (2) (b) (Alternative B).
\textsuperscript{49} Id., § 703 (2) (a) (Alternative B).
information regarding legal, financial, contractual rights, expectations, penalties and obligations of gestational surrogacy agreement.\textsuperscript{50} If the gestational carrier is married, then her husband should also be a party to the surrogacy contract. The alternative also provides for a situation where the intended parents have refused to take the custody of the child. In such a situation, they are bound to support the child.\textsuperscript{51}

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.\textsuperscript{52} So parties are in afflux of mind 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.\textsuperscript{53} 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.\textsuperscript{54}

On the other hand alternative ‘B’ provides about privately drafted contracts. As per the requirements the parties can enter into to the surrogacy contract if there is a medical need and that is based on the affidavit of a qualified physician. However, what is medical need is nowhere defined and explained in the alternative.\textsuperscript{55} Moreover, there are chances of commercialization and exploitation in this alternative as the parties are free to decide except certain obligatory requirements of this alternative. 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,

\textsuperscript{50}Id., § 703 (2) (d) (Alternative B).
\textsuperscript{51}Id., § 704 (Alternative B).
heterosexual couples where both partners are completely infertile.\textsuperscript{56} 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.

\textbf{2.2.4 State Wise Analysis of Surrogacy Arrangements:} In order to completely understand the legislative trend in U.S.A., it is essential to make a study of all the relevant provisions in the states. For that purpose the states can broadly be divided in to five parts which includes firstly the states those bans, secondly those voids and penalizes, thirdly those declares arrangements void only, fourthly which allows but regulates, and fifthly those having no statutory provisions in regard to surrogacy arrangements. This division has also been named as prohibition, inaction, status regulation and contractual ordering.\textsuperscript{57}

\textbf{2.2.4.1 States which Bans Surrogacy Arrangements:} There are two states that bans surrogacy arrangements altogether. These are Arizona and District of Columbia.

\textbf{2.2.4.1.1 Arizona:} The state bans both traditional and gestational surrogacy contracts.\textsuperscript{58} It defines surrogacy contracts as agreements in which a woman agrees for implantation of embryo or conceives a child by natural and artificial insemination for another.\textsuperscript{59} The statute provides for illegality of the surrogacy contracts. The illegality is not limiting for the purpose of entering in to the agreement but also includes arrangement, inducement, procurement or assistance by other person.\textsuperscript{60} It further provides that even if the resident of state enters in to this kind of arrangement, the custody will remain with the surrogate only and she will be treated as legal mother.\textsuperscript{61} If the surrogate is married then her husband will be treated as legal father unless presumption in his case is rebutted by giving genetic evidence by intended father of

\textsuperscript{59} Arizona Revised Statute § 25-218 (D).
\textsuperscript{60} Id., § 25-218 (A).
the child born through surrogacy arrangement that the child is genetically related to him.  

2.2.4.1.2 District of Columbia: The state prohibits surrogacy parenting agreements and declares it as unenforceable.  It defines surrogacy agreements as agreement either orally or in writing where a woman agrees to be artificially inseminated by sperm of man who is not her husband or she agrees to carry the pregnancy using the embryo of other woman.  It also provides that woman also agrees to release and relinquish all the rights relating to the child born thereafter.  The statute also penalizes the parties to the surrogacy contracts as it provides that any person who is in any way involved in the contract or gives some inducement, makes arrangement or gives assistance in formulation of the contract for fee or compensation is liable for civil penalty to the extend of $10,000 and can also be liable for imprisonment extending one year.  From the analysis of the statute it is clear that it prohibits both gestational and traditional surrogacy arrangements.

2.2.4.2 States Which Declares Surrogacy Contracts as Void and Provides Penalty
The states where the surrogacy agreements are declared as void and penalties are imposed in violation of the statutory provisions are Kentucky, Michigan, New York and Washington.

2.2.4.2.1 Kentucky: In this state it is illegal for a party or person to enter in to any contract for compensation to a woman for her gestational services and then for termination of her parental rights.  It specifically provides that no person, agency, institution or intermediary enters in to a contract for compensating a woman for artificial insemination and termination of her parental rights subsequently.  It is further provided that if any person enters in to surrogacy contract without regard to

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61 Id., § 25-218 (B).
62 Id., § 25-218 (C).
63 District of Columbia Official Code § 16-402.
64 Id., § 16-401 (4) (A).
65 Id., § 16-401 (4) (B).
66 Id., § 16-402 (b)
68 Kentucky Revised Statute § 199.590 (4).
these provisions, he can be punished with a fine extending to $2000 or imprisonment which can extend to six months or both.\textsuperscript{69}

2.2.4.2.2 Michigan: The state legislature passed Surrogacy Parenting Act, 1988 in order to address the issue of surrogacy contracts.\textsuperscript{70} The statute deals with both traditional and gestational surrogacy agreements. The statute invalidates all the surrogacy contracts and declares these as void, unenforceable\textsuperscript{71} and contrary to public policy.\textsuperscript{72} According to the provisions of the Act, the surrogate parenting contract means a contract or agreement in which surrogate agrees to conceive a child through natural or artificial insemination by a person who is not her husband and also agrees to relinquish her parental and custodial rights over the child.\textsuperscript{73} It provides that the person who enters, induce, arrange, procure or assist in formulation of surrogacy contract is guilty of felony which is punishable with fine up to $50,000 and imprisonment up to 5 yrs.\textsuperscript{74} It further provides that if any kind of compensation is exchanged between parties then the person is guilty of misdemeanor which is punishable with fine up to $10,000 and imprisonment up to 1 yr.\textsuperscript{75} It also prescribes penalty as felony for other person who induce, assist, arrange, procure the surrogate contract for compensation which is punishable with fine up to $50,000 and imprisonment up to 5 yrs.\textsuperscript{76} The law provides that the courts have to consider the best interest of the child in deciding the physical custody of the child\textsuperscript{77}

2.2.4.2.3 New York: Surrogacy contracts according to the law are against public policy.\textsuperscript{78} The state declares these contracts as void and unenforceable.\textsuperscript{79} The statute provides that the surrogate parenting agreements are the agreements which are entered

\textsuperscript{69}Id., § 199.590 (2).
\textsuperscript{71}Surrogate Parenting Act § 722.853 (3) (h) and § 722.855 (5).
\textsuperscript{72}Id., object and Statement.
\textsuperscript{73}Id., § 722.853 (3) (1).
\textsuperscript{74}Id., § 722.857 (7) (1) (2).
\textsuperscript{75}Id., § 722.859 (9) (1) (2).
\textsuperscript{76}Id., § 722.859 (9) (3).
\textsuperscript{77}Id., § 722.861 (11).
\textsuperscript{79}New York Domestic Relation Law Article 8 Section 122.
by birth mother in the form of insemination of the sperm relating to man who is not her husband or egg of the intended mother. The agreement can be oral or in writing. In this agreement the surrogate further agrees to surrender the custody of child after birth.\textsuperscript{80} The state imposes a penalty up to $500 on any person who enters in to surrogacy agreement.\textsuperscript{81} It imposes a harsher penalty on intermediary as it provides for civil penalty up to $10,000 for facilitating a surrogacy agreement and also for getting some compensation for such facilitation.\textsuperscript{82} It is provided that if the person who is already liable for civil penalty, again assists in arranging surrogacy, then he will be liable for the offence of felony.\textsuperscript{83}

2.2.4.2.3 Washington: The code of the state deals both with gestational and traditional surrogacy.\textsuperscript{84} The code makes those kinds of surrogacy arrangement void, unenforceable and against public policy in which compensation is arranged between the parties to the surrogacy contract.\textsuperscript{85} It provides that the person who violates the provisions will be guilty of misdemeanor.\textsuperscript{86} It further provides that if the child is born to surrogate pursuant to surrogate parentage contract and there is dispute as to custody, then the custody will be decided by the superior court and till that period the physical custody of child will be with the party already having custody of the child.\textsuperscript{87} Thus indirectly the statute validates the altruistic surrogacy contracts.

2.2.4.3 States Which Declares Surrogacy Contract as Void
There are four states in U.S.A. which declares surrogacy agreements as void. These states include Alabama, Indiana, Louisiana and Nebraska.

2.2.4.3.1 Alabama: The state enacts Uniform Parentage Act with some modification for the surrogacy arrangements.\textsuperscript{88} It refers surrogacy contracts as assisted

\textsuperscript{80}Id., article 8 section 121 (4) (a) & (b).
\textsuperscript{81}Id., article 8 section 123 (2) (a).
\textsuperscript{82}Id., article 8 section 123 (2) (b).
\textsuperscript{84}Revised Code Washington § 26.26.210 (4) define surrogacy contract as agreement or arrangement in which female not married to contributor of sperm agrees to conceive child through natural or artificial insemination and voluntarily relinquishes her rights to child.
\textsuperscript{87}Id., §26.26.260.
\textsuperscript{88}Chapter 17 of Alabama Code deals with Uniform Parentage Act.
reproduction. The state does not specifically authorize or prohibit the agreements relating to surrogacy. However, it is implied from the provisions of the statute that if the child is conceived through assisted reproduction and it is decided between the parties that woman giving birth will relinquish all the rights relating to the child, such agreement is treated as unenforceable under law. It specifically defines gestational mother as a woman who gives birth to the child.

It further provides that intended parents will mean the couple who enters into the agreement with gestational mother for delivery of the child. It is not necessary for the intended parents to be genetically related with the child. The statute does not recognize traditional surrogacy. It is provided through the statute that consent of gestational mother who is married must be in the form of record which is to be maintained by assisted licensed physician and must be signed both by gestational mother and her husband. It is provided through the statute that the agreement and consent given by intended parents can be withdrawn only before the placement of egg, sperm or embryo in the gestational mother and not afterwards and this withdrawal must also be in a signed record maintained by licensed assisting physician. After analyzing the provisions of state code, it can be concluded that as far as surrogacy arrangements are concerned, financial transactions are not prohibited between the parties.

2.2.4.3.2 Indiana: The statute in the state provides for gestational surrogacy and declares it as void and against public policy. It defines surrogate as a party to the agreement who agrees to bear child not genetically related to her but related to intended parents or a gamete donor who is neither intended parent nor spouse of

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90 Alabama Code Uniform Parentage Act § 26-17-103 (d).
91 Ibid.
92 Id., § 26-17-102 (11).
93 Id., § 26-17-102 (12).
94 Id., § 26-17-102 (4).
95 Id., § 26-17-704 (a).
96 Id., § 26-17-704 (c).
97 Supra note 89 § 26-10A-33 and § 26-10A-34 deals with crime to place children for adoption and payments to parents for placing minor by adoption, maternity expenses, receipt of financial benefits by father are not applicable to surrogate mother contracts.
98 Indiana Code §§ 31-20-1-1 and §§ 30-20-1-2.
intended parent.\textsuperscript{99} Further it defines surrogacy agreement as agreement which is entered into between the parties before the birth of child and it is made to induce the surrogate to relinquish all rights, control, and custody of child.\textsuperscript{100} It is further provided that after the enactment of provisions relating to surrogacy agreement, the custody of child will not be decided on the basis of best interest of child.\textsuperscript{101} However, if the party proves duress, fraud or misrepresentation in agreement, then best interest clause can be referred by the courts.\textsuperscript{102} It is further provided that the parties can not give consent to step parent adoption after the agreement or birth of the child.\textsuperscript{103}

2.2.4.3.3 Louisiana: State legislature has enacted the legislation regarding surrogacy which declares that the surrogacy contracts are null and void.\textsuperscript{104} It declares surrogacy contracts as against public policy.\textsuperscript{105} The statute only addresses traditional and compensated surrogacy contracts and do not consider gestational or uncompensated surrogacy.\textsuperscript{106} It defines a surrogacy contract as an agreement which involves valuable consideration and in which a woman who is unmarried to sperm donor agrees to be inseminated, carries the fetus and after delivery surrender all the rights and obligations to the sperm donor.\textsuperscript{107}

2.2.4.3.4 Nebraska: The statute of Nebraska defines a surrogacy contract as a contract in which a woman is compensated for bearing a child of a man who is not her husband.\textsuperscript{108} The statute provides that such contracts are void and unenforceable.\textsuperscript{109} However, the statute clearly provides that the biological father of a child born out of the surrogacy contract shall have rights and obligations regarding the child.\textsuperscript{110} Thus the statute clearly defines the rights of legal father. But so far as status of legal mother is concerned, the statute has left the question for the determination of court. The court

\begin{footnotes}
\item[99] Id., §§31-9-2-126 (1) & (2).
\item[100] Id., §§31-9-2-127.
\item[101] Id., §§31-20-1-3.
\item[102] Id., §§31-20-1-3 (2).
\item[103] Id., §§31-20-1-1 (8).
\item[104] Louisiana Revised Statute § 9:2713 provides that contract for surrogate motherhood is null.
\item[105] Id., § 9:2713 (A).
\item[106] Supra note 68 at 427.
\item[107] Supra note 104, § 9:2713 (B).
\item[108] Nebraska Revised Statute § 25-21-200(2).
\item[109] Id., § 25-21-200(1).
\item[110] Id., § 25-21-200(1) para 2.
\end{footnotes}
has to decide whether the infertile woman will be considered as legal mother or the surrogate.

As far as statute is concerned, it only provides about the surrogacy arrangements involving compensation, but it do not expressly mentions about uncompensated surrogacy contracts. Moreover, the statute does not expressly deal with gestational surrogacy contracts, but provides about surrogacy contracts in general i.e. including gestational as well as traditional surrogacy contracts.

2.2.4.4 States Which Allows but Regulates Surrogacy Agreements: There are ten states which allow surrogacy contracts but only under regulations imposed by the statute. These include state of Arkansas, Florida, Illinois, Nevada, New Hampshire, North Dakota, Tennessee, Texas, Utah and Virginia.

2.2.4.4.1 Arkansas: The state approves gestational surrogacy agreements. The statute provides that if the intended parents are married then the biological father and his wife will be legal parents of the child. If the biological father is unmarried then the child will belong to him only. It further provides that the intended mother will be legal mother in case the sperm is donated by some person other than the husband of intended mother. The code provides that if surrogate is unmarried then child will belong to biological father and his wife. However, it is provided through the code that surrogate mother will be natural mother for the purpose of registration of birth. For declaring paternity in case of biological mother, the petition can be filed and court of competent jurisdiction is given the authority to order the substitution of certificate of birth after determination of paternity of child born outside marriage.

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112 Arkansas Code § 9-10-201 (b) (1), § 9-10-201 (c) (1).
113 Id., § 9-10-201 (b) (2), (c) (2).
114 Id., § 9-10-201 (b) (3), (c) (3).
115 Id., § 9-10-201 (2).
117 Supra note 112, § 9-10-104 (1).
118 Id., § 9-10-201 (2).
2.2.4.4.2 Florida: In Florida, surrogacy arrangements are referred to as pre-planned adoptions in the case of traditional surrogacy. However, this agreement is subject to right of traditional surrogate to rescind the contract with in 48 hours following child birth. In case of gestational surrogacy contracts, it is required that at least one of the intended parents is genetically related to the child. The state requires and allows only binding and enforceable surrogacy contracts between the surrogate mother and the commissioning parents. It is also required that for the validity of surrogacy contracts it is essential that the contract has been entered in to only on the basis that there is a health risk to the mother or the fetus. It also requires that there is a medical evaluation of the surrogate and also an agreement from the side of surrogate that she will relinquish all the rights over the child. In case of gestational surrogacy agreement, it is required that the intended parents must be married. Thus this type of agreement is not allowed in case of single adults or same sex couples.

The statute also provides for expeditious determination of parentage after the birth of child. It provides that with in three days of birth of child, the parents must petition for determination of legal status of intended parents. It is provided through statute that intended parents must agree to accept the child regardless the health of the child. So far as compensation to surrogate is concerned, it permits couples to enter in to non commercial surrogacy contracts and payment of reasonable living, medical, psychological and psychiatric expenses directly related to the pregnancy.

2.2.4.4.3 Illinois: In 2004, the state passed Gestational Surrogacy Act which allow and enforces gestational surrogacy agreements. The purpose of the Act is to provide safeguards and set up standards for protection of all the parties involved in the

120 Id., §§ 742.16 (c).
122 Supra note 119, §§ 742.15 (2) (b) & (c).
123 Id., §§ 742.15 (3) (b).
124 Id., §§ 742.15 (1).
125 Id., §§ 742.16.
126 Id., §§ 742.16 (1).
127 Id., §§ 742.16 (2) (d).
128 Id., §§ 742.16 (4).
129 750 ILCS 47 (1).
gestational surrogacy agreements. It defines gestational surrogacy as a process in which a woman agrees to give birth to a child. It is required by the provisions of the Act that at least one intended parent must provide for the gamete and surrogate has no genetic relation. The Act presumes that the intended parents are legal parents of the child. The gestational surrogate or her husband has no relation with child after his birth. The Act provides for fulfillment of certain requirements by the surrogate and intended parents. It also mentions requirements for formulation of surrogacy contract. As far as the requirement of surrogacy is concerned, the Act requires that surrogacy contract must be in writing and should be witnessed by two competent witnesses. It is also required that the contract of surrogacy should be executed prior to any medical procedure. There is further requirement of written acknowledgement which must state that gestational surrogate and intended parents received all the information regarding their legal, financial and contractual rights as well as expectations, penalties and obligations of the contract.

From the side of surrogate it requires that she must at least be 21 yrs of age and should have previously given birth. It is further required that she must have completed a medical health evaluation and have consulted an independent attorney to discuss about the terms of the contract and legal consequences of entering into the contract. It is further required that she must have obtained medical health insurance policy or it can also be insured by the intended parents. The Act also provides some of the requirements for the intended parent such as at least one parent should donate the gamete for the surrogacy arrangement. The carrying of surrogacy arrangement

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130 Id., 47 (5).
131 Id., 47 (10).
132 Ibid.
133 Supra note 129, 47 (15) (3), (4) & (5).
134 Id., (15) (6).
135 Id., 47 (25) (b) (1).
136 Id., 47 (25) (a) (5).
137 Id., 47 (25) (2).
138 Id., 47 (25) (3.5).
139 Id., 47 (20) (a) (1).
140 Id., 47 (20) (a) (2).
141 Id., 47 (20) (a) (3) & (4).
142 Id., 47 (20) (a) (5).
143 Id., 47 (20) (a) (6).
144 Id., 47 (20) (b) (1).
must be based on the medical need and it must be recognized by the affidavit of the medical practitioner. 145

It is also provided that the parents must undergo medical health evaluation and must also consult the attorney for legal consequences of surrogacy agreement. 146 The surrogacy arrangements are valid only when all these requirements are satisfied by the parties to the contract. After the birth of the child the intended parents are considered as the legal parents of the child. Apart from these provisions the Act also provides for the pre birth parentage orders from state department of public health. As to the compensation, it is required that it must be reasonable. 147 The law in the state presumes that terms of the contract are enforceable even if it contain some terms such as surrogate’s agreement to undergo examination, treatment, monitoring provisions for the success of pregnancy. 148 However, the compensation has to be placed in escrow with independent escrow agent. 149 The parties can claim damages in case of non performance of the contract. 150 However, specific performance on breach by gestational surrogate is not available. 151 Thus in whole the Act establishes a regulatory framework for enforcing the rights and obligation of parties of gestational surrogacy agreement along with protecting all the parties. 152

2.2.4.4.4 Nevada: The statute recognized the validity of surrogacy contracts. 153 However, the enactment of agreement is not available option for all the persons in the statute. It specifically provides that a man and woman acting as intended parents can only enter in to the contract with the surrogate. 154 It further provides that surrogate should not have genetic relationship with the child as egg and sperm are to be provided by intended parents. 155 Thus it is clear that if either of the couple or intended parents is unable to donate egg or sperm then they can not undertake surrogacy

145 Id., 47 (25) (b) (2).
146 Id., 47 (20) (b) (3) & (b) (4).
147 Id., 47 (25) (d) (3) & (4).
148 Id., 47 (25) (d) (1) & (2).
149 Id., 47 (25) (a) (4).
150 Id., 47 (55) (a) (b).
151 Id., 47 (50) (b).
153 Nevada Revised Statute (1993), § 126.045.
154 Id., § 126.045 (1) & 4 (b).
contract. It also prohibits that payment of money except in case of medical and
necessary living expenses related to the birth of the child.\textsuperscript{156}

\textbf{2.2.4.4.5 New Hampshire:} The statute recognizes gestational surrogacy.\textsuperscript{157} However, certain requirements are to be fulfilled before the undertaking of surrogacy agreement. It provides that prior to insemination, in vitro fertilization or pre embryo transfer of surrogate a joint petition for judicial pre authorization of surrogacy arrangements in the court has to be filed.\textsuperscript{158} The petition should contain the name, age, place and duration of residence of intended parents and surrogate.\textsuperscript{159} It also requires that intended parents must be married and surrogacy contracts must be duly executed.\textsuperscript{160} The court is required to hold hearing with in 90 days after filing of petition.\textsuperscript{161} The court will validate the surrogacy contract if all the requirements of statute relating to surrogacy are complete. The statute requires that all the parties to the surrogacy contracts must be 21 yrs. of age or older.\textsuperscript{162} The surrogacy arrangements are permitted only if intended mother is medically determined as unable to carry the child without risk.\textsuperscript{163} It is essential that either of the intended parents provides for the gamete.\textsuperscript{164} It is required from the side of surrogate that at least she has delivered a baby before undertaking surrogacy agreement.\textsuperscript{165}

It is further required that non medical evaluation shall be performed on each party. A home study of each party is also required to be undertaken by licensed child placing agency or department of health and human services to satisfy itself for provisions like food, clothing, shelter, medical care and necessities for the child.\textsuperscript{166} It is essential for the surrogate to under go medical examination.\textsuperscript{167} The intended parents are treated as legal parents of the child born through surrogacy arrangements.\textsuperscript{168} However, the

\begin{footnotesize}
\textsuperscript{155} Id., § 126.045 (4) (a).
\textsuperscript{156} Id., § 126.045 (3).
\textsuperscript{157} New Hampshire Revised Statute S. 168 B:1 XII.
\textsuperscript{158} Id., s. 168 B: 21 (1).
\textsuperscript{159} Id., s. 168 B: 21 (2) (a).
\textsuperscript{160} Id., s. 168 B: 21 (2) (b) & (d).
\textsuperscript{161} Id., s. 168 B: 22 (1).
\textsuperscript{162} Id., s. 168 B: 17 (1).
\textsuperscript{163} Id., s. 168 B: 17 (II).
\textsuperscript{164} Id., s. 168 B: 17 (III).
\textsuperscript{165} Id., s. 168 B: 17 (IV).
\textsuperscript{166} Id., s. 168 B: 18 (I) & (II).
\textsuperscript{167} Id., s. 168 B: 16 (III).
\textsuperscript{168} Id., s. 168 B: 9, S. 168 B: 23.
\end{footnotesize}
statute also gives an option to the surrogate to keep the child within 72 hours of birth of the child.\textsuperscript{169} It is also provided through the provisions of the statute that in the case of surrogate intention to keep the child is applicable, it must be executed in writing and in such a case the right solely vests with the surrogate and her husband.\textsuperscript{170} The statute recognizes payment of reasonable compensation including pregnancy related medical expenses which include complications expenses after 6 weeks of delivery, actual loss of wages, health, disability and life insurance during the term of pregnancy and 6 weeks after, reasonable attorney fee, court fee, counseling fee and cost associated with non medical evaluation and home study.\textsuperscript{171} The statute further provides that no specific performance will be applicable for the breach of the terms relating to impregnatation and abortion.\textsuperscript{172} It further provides that if surrogate fails to become pregnant after the contract has been judicially approved, the contract can be avoided by either of the party.\textsuperscript{173} If the intended parents made a breach of a material term of contract, the surrogate can recover health care expense and fee provided for in the contract.\textsuperscript{174} Even if the intended parents refuse to accept the child, the court can make the parents liable for the support of the child.\textsuperscript{175}

2.2.4.4.6 North Dakota: The statute in this state addresses both traditional and gestational surrogacy agreement.\textsuperscript{176} It defines the term assisted conception, surrogate and gestational carrier.\textsuperscript{177} The statute permits gestational surrogacy agreements but prohibits traditional surrogacy arrangements. In case of traditional surrogacy the egg of the intended mother is not used for the purpose of insemination.\textsuperscript{178} It also defines gestational carrier as a woman who enters in to agreement to implant embryo in her by using egg and sperm of intended parents.\textsuperscript{179} As traditional surrogacy are declared void by the statute, surrogate is treated as the legal mother of the child and if the surrogate is married and her husband is not a party to the surrogacy contract or

\textsuperscript{169} Id., s. 168 B: 25 (IV)
\textsuperscript{170} Id., s. 168 B: 23 (IV).
\textsuperscript{171} Id., s. 168 B: 25 (V).
\textsuperscript{172} Id., s. 168 B: 26.
\textsuperscript{173} Id., s. 168 B: 28 (I).
\textsuperscript{175} Supra note 157, S. 168 B: 28 (II) (a) (b) & (c).
\textsuperscript{176} North Dakota Century Code Chapter 14-18, under which the state has adopted Uniform Status of Children of Assisted Conception Act.
\textsuperscript{177} Id., § 14-18-01 (1).
\textsuperscript{178} Ibid.
surrogate is unmarried then the paternity in this case will be determined through the process of the court.\textsuperscript{180} In case of gestational surrogacy contracts, only those contracts are permitted where the genetic material is provided by the intended parents.\textsuperscript{181} It means that if in a surrogacy arrangement there is involvement of egg or sperm donor, then it is not recognized. However, in other situations the law is clear enough to provide about the cases in which the surrogacy contracts are permissible. The statute is also clear about the rights of surrogate and intended parents.

2.2.4.4.7 Tennessee: The statute in the state addresses gestational surrogacy contracts.\textsuperscript{182} It defines surrogate birth as union of egg and sperm of husband and wife, which are placed in other woman who carry it till delivery and then after delivery relinquish all the rights to the biological parents.\textsuperscript{183} It also refers to a situation where sperm is provided by husband. In such a situation, the child will belong to the biological father and his wife.\textsuperscript{184} However, even the contract is arranged between the parties, it will not legalize the contract unless it is authorized by the court or the legislature.\textsuperscript{185} Thus the state regulates the gestational surrogacy by putting some limitation of authorization of some authority whether it is court or general assembly.

2.2.4.4.8 Texas: The statute expressly validates the gestational surrogacy contracts.\textsuperscript{186} However, it explicitly excludes traditional surrogacy.\textsuperscript{187} For declaring the gestational surrogacy contracts as enforceable the parties are required to fulfill the requirements laid down in the provisions of the statute. It is provided that only after judicial authorization the parties or intended parents will be declared as legal parents of the child born through surrogacy.\textsuperscript{188} For that purpose a petition has to be filed by the parties for validating gestational surrogacy contract.\textsuperscript{189} The petition is maintainable only if the parties have lived 90 days in the state before the commencement of the

\textsuperscript{179} Supra note 176, § 14-18-01 (2).
\textsuperscript{180} Id., § 14-18-05.
\textsuperscript{181} Id., § 14-18-08.
\textsuperscript{182} Tennessee Code § 36-1-102 (48).
\textsuperscript{183} Id., § 36-1-102 (48) (A) (i) (ii).
\textsuperscript{184} Id., § 36-1-102 (48) (B).
\textsuperscript{185} Id., § 36-1-102 (48) (4).
\textsuperscript{186} Texas Family Code Section 160.751-762 which deals with gestational agreements.
\textsuperscript{187} Id., section 160.754 (5) (f).
\textsuperscript{188} Id., section 160.753 (a) (b).
\textsuperscript{189} Id., section 160.755.
proceedings. It is required that the agreement must be in writing and if the surrogate is married then her husband must be a party to the contract. It is also essential that the intended parents are married and must be having medical need for entering in to the agreement. It is further required that the eggs and sperm should be either from the intended parents or from the donor. Gestational mother should already have pregnancy and delivery of child without involving any physical or psychological risk. After the birth of the child the intended parents are required to file a notice of birth before the court with in 300 days after assisted reproduction actually occurs. After filing of notice the court will confirm that intended parents are the parents of the child and gestational surrogate has surrendered all the rights to the intended parents. After that the birth certificate will be issued in the name of the intended parents.

2.2.4.4.9 Utah: Before the adoption of Utah Uniform Parentage Act (UPA), 2005 the gestational surrogacy contracts were prohibited in the state. However, in 2005 these contracts were declared valid after the enactment of UPA by the legislature. The Act authorizes gestational surrogacy contracts and specifically excludes traditional surrogacy contracts. The foremost requirement is of written contract where gestational mother agrees to pregnancy by means of assisted reproduction. The Act establishes some of the requirements for upholding of the contract. It requires that parties must be at least 21 yrs. old and must have gone through sufficient mental health counseling. There is also a requirement of certificate from mental health professional signifying the need for surrogacy arrangement. It is essential that all the parties have entered in to the contract voluntarily and have made all the adequate

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190 Id., section 160.755 (b) (1).
191 Id., section 160.755 (b) (2).
192 Id., section 160.754 (b).
193 Id., section 160.756 (2).
194 Id., section 160.754 (e).
195 Id., section 160.756 (5).
196 Id., section 160.760 (a).
197 Id., section 160.760 (b) (1) (2) & (3).
198 Supra note 15, at 920.
200 Id., § 78 B-15-801 (5).
201 Id., § 78 B-15-801 (1) (a) (b) (c).
202 Id., § 78 B-15-801 (6).
203 Id., § 78 B-15-803 (2) (b) & (d).
provisions regarding health care expenses.\textsuperscript{204} It further requires that surrogate must have one successful pregnancy and delivery before undertaking surrogacy contract.

It puts a limitation on the parties that a surrogate egg can not be used as embryo and if she is married, her husband’s sperm will also not to be used. It requires a home study to determine that the intended parents meet the standards of fitness which is applicable to adoptive parents.\textsuperscript{205} This requirement can also be waived by the tribunal. It is also required that one of the intended parents is donor of genetic material. If all these establish requirements are fulfilled, the parties can move to the tribunal for validation of the contract and the tribunal has to declare whether the intended parents are legal parents or not. It is also required by the tribunal that parties must be residing in the state 90 days prior to filing of petition for validation.\textsuperscript{206} After the birth of the child the intended parents are required to file a notice of birth before the court within 300 days after assisted reproduction actually occurs.\textsuperscript{207} After filing of notice the court will confirm that intended parents are the parents of the child and gestational surrogate has surrendered all the rights to the intended parents. After that the birth certificate is to be issued in the name of the intended parents.\textsuperscript{208} The statute does not invalidate the provisions of payment of reasonable consideration to gestational surrogate.\textsuperscript{209}

2.2.4.4.10 Virginia: The state validates gestational surrogacy contracts.\textsuperscript{210} However, in order to enforce the contracts, it is necessary that surrogacy contracts are approved by the court.\textsuperscript{211} It is not necessary for the applicability of the surrogacy contracts that there must be genetic relationship between both the intended parents and child born through the arrangement.\textsuperscript{212} The surrogacy arrangement can be entered into with the help of the donor who contributes either egg or sperm.\textsuperscript{213} The statute also explains the term surrogacy contracts which mean an agreement between intended parents,
surrogate and her husband where surrogate agrees to be impregnated through assisted conception for carrying the fetus and on delivery to relinquish all the rights and obligation regarding the resultant child. For the approval of the surrogacy contract a petition is required to be filed before the court. It is required that surrogacy contract should be signed by all the parties and all the parties should join as party to petition. After hearing petition, the court may approve the contract and authorize the parties to perform the contract with in a period of 12 months after the order. The court will take in to account that a home study has already be conducted, all the parties are fit enough to enter in to the contract, compensation is not provided or arranged between the parties.

It is also required that surrogate has at least one pregnancy without risk to her or the child. It also requires physical and psychological evaluation and counseling by qualified health care professional or social worker. The intended parents are required to file written notice with the court with in 7 days of birth of the child. After satisfaction that one of the intended parents is genetic parent of the child, they are treated as legal parents except where subsequent to approval of the court the contract of surrogacy is terminated before pregnancy. The statute prohibits any person, firm, corporation, partnership or other entity to accept compensation for recruiting surrogate or compensation for arranging services. Any one who violates the provision is guilty of misdemeanor. It further provides that the person who acts as broker will be liable in addition to all the parties to pay three times the amount of compensation which is to be paid to the broker.

2.2.4.5 States which do not have Statutory Provisions Regarding Surrogacy Contracts: There are thirty one states where there are no statutory provisions in

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214 It is also required for the validity of surrogacy agreement that surrogate husband is also a party to the contract if she is married.
215 *Supra* note 210, § 20-160-A.
216 *Id.*, § 20-160-B.
217 *Id.*, § 20-160-B (2) (3) & (4).
218 *Id.*, § 20-160-B (7) (11).
219 *Id.*, § 20-160-D.
220 *Id.*, § 20-158-D & § 20-161.
221 *Id.*, § 20-165-A.
222 *Id.*, § 20-165-B.
relation to surrogacy agreements. The states includes Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, 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. However, in certain states there are some indirect provisions which can be applied to surrogacy agreements.

2.2.4.5.1 Colorado: As far as the statute of this state is concerned, it is silent in relation to surrogacy arrangements. It talks of assisted reproduction by using egg donation by another woman. However, it specifically mentions that this arrangement is not to be compared with serving as a surrogate but the wife is taking that donated egg for her and she will be treated as the legal mother of child after the child is conceived.

2.2.4.5.2 Delaware: The state statute has adopted the Uniform Parentage Act. However, in either of the provisions the surrogacy arrangements are not mentioned. It mentions the term assisted reproduction but the term no where defines surrogacy agreement or contracts.

2.2.4.5.3 Maryland: The statute does not expressly address surrogacy. However, it prohibits the sale of minor. It declares it as a misdemeanor and provides imprisonment up to 5 yrs. and fine up to the extent of $ 10,000.

2.2.4.5.4 Missouri: There is no statute addressing surrogacy but the state prohibits the trafficking of child if money is exchanged between the parties.

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223 Larry Gostin, “Forum on Surrogate Motherhood”, 16 L. Med. & Health Care, 5-6 at 6 (1988).
224 Colorado Revised Statute § 19-4-106 (1).
225 ibid.
227 Supra note 29, § 13-8-701 to 13-8-707.
228 Supra note 226, § 13-8-102 (4).
229 Maryland Code Annotated Family Law § 5-327.
230 Id., § 3-603 (a).
231 Id., § 3-603 (b).
232 Missouri Annotated Statute § 568.175.
2.2.4.5.5 New Mexico: No statute directly deals with surrogacy. Only provision that is provided in the statute is relating to the prohibition of payment to woman for conceiving and carrying the child.233

2.2.4.5.6 North Carolina: No statute in the country directly relates to surrogacy arrangements. It prohibits unlawful payments relating to the adoption of the child.234

2.2.4.5.7 Ohio: The revised code of the state does not directly deal with surrogacy arrangements.235 However, mentioning the non spousal artificial insemination, the code specifically provides that the provisions are not related to surrogate motherhood.236

2.2.4.5.8 Oklahoma: The state does not provide any direct provision relating to surrogacy arrangement. Indirectly the statute of the state has some provisions for prohibition of any exchange of money except reasonable expenses in case of adoption that can be taken in to account for considering the surrogacy contracts where money is exchanged between the parties.237

2.2.4.5.9 Oregon: There is no statutory provision in the state dealing with surrogacy contracts. The statute refers only to artificial insemination which is not at all related to surrogacy arrangements.238

2.2.4.5.10 Wisconsin: The state has no statute specifically prohibiting surrogacy agreement. It is not clear that if the surrogacy contracts are entered in to between parties then it can be enforced or not if one party refuses to fulfill its obligation.239 Even the courts have not provided any guideline in this matter. Thus the law in this state is underdeveloped so far as it relates to gestational surrogacy contracts.

233 *New Mexico Statute* § 32 A-5-34 (F).
236 *Ohio Revised Code*, Title 31 § 3111.89.
237 *Oklahoma Statute Annotated* § 10-7505-3.2 which deals with cost, funds or monies expanded by adoptive family.
238 *Oregon Statute* Title 11 Chapter 109.
Thus after analyzing the law in various states of U.S.A, it can definitely be asserted 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 parties involved.

2.3 United Kingdom (U.K.): The country has established Uniform regulatory system in case of regulation of surrogacy arrangements. Towards the end of 20th century, the fear started growing among the government and citizens of England (U.K.) that the practice of commercial surrogacy is growing day by day and need is felt to put a control over the practice in the country. It leads to formation of Warnock Committee to consider the then situation of surrogacy and to provide measures for regulating to these arrangements.

2.3.1 Report of the Committee of Inquiry in to Human Fertilization and Embryology (Warnock Committee Report): The conflicts in law lead to the formation of committee to consider the then situation of surrogacy and to provide measures relating to these arrangements. The committee is also known as Warnock committee. The committee considered the situation of surrogacy arrangements and declared that it was quite risky to involve oneself in to these arrangements as there were lots of problems in the enforcement of the contract if any party to the contract breached it. The committee took in to account various arguments leveled against the practice of surrogacy such as it is against marital relationship, inconsistent with

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243 Ibid.
244 Id., para 8.5 and 8.6 at 43.
human dignity, commodification of child, poses risk to both mother and child etc.\textsuperscript{245} The committee had also considered the arguments in favour of surrogacy arrangements like it is a very good option for the infertile, it involves act of generosity rather than exploitation and commodification.\textsuperscript{246} After analyzing the arguments in favour and against the surrogacy contracts, the committee was of the opinion that surrogacy is unethical and exploitative.\textsuperscript{247} The committee opined that as surrogacy arrangements includes commercial exploitation; it should be made as an offence.\textsuperscript{248} It further recommended that any person or agency who is involved in creating, utilizing, assisting in surrogacy agreements must be made criminally liable.\textsuperscript{249} However, in the opinion of the committee if a private person entered in to the contract, illegality and unenforceability of such a contract is sufficient.\textsuperscript{250} The committee recommended that the surrogate mother should be regarded as legal mother even if the eggs and sperms are provided by the commissioning couple.\textsuperscript{251} The committee further recommended that there was need to make changes in adoption laws for providing commissioning mother a right to adopt the child if she served as genetic mother.\textsuperscript{252}

Apart from the majority opinion of the committee, there was also dissenting opinion which recognized that in a case where surrogacy is the last resort, the couple should be allowed to undertake the arrangement through non profit agency licensed by the authority in the country.\textsuperscript{253} The expert emphasized that only commercial transactions should be prohibited. It was further recommended that payment must be made to the surrogate for any of the expenses incurred by her in carrying out the desired pregnancy.\textsuperscript{254} The recommendations of the committee lead to passing of Surrogacy Arrangements Act, 1985, which prohibits the surrogacy arrangement by person or agencies on commercial basis.\textsuperscript{255}

\textsuperscript{245} Id., para 8.10 at 44.  
\textsuperscript{246} Id., para 8.13 and 8.14 at 45.  
\textsuperscript{247} Id., para 8.17 at 46.  
\textsuperscript{248} Id., para 8.18 at 46.  
\textsuperscript{249} Id., at 47.  
\textsuperscript{250} Id., para 8.19 at 47.  
\textsuperscript{251} Id., para 8.20 at 47.  
\textsuperscript{252} Ibid.  
\textsuperscript{253} Supra note 242 at 87.  
\textsuperscript{254} Id., at 89.
2.3.2 Report of Review Team for Review of Health Ministers Current Arrangement for Payments and Regulations (Brazier Report): The committee was constituted in order to review the then law and practice on the one hand and public opinion on the other hand.\textsuperscript{256} The committee had considered three aspects of surrogacy including whether payments should be continued, whether it should be regulated by the agency and whether there was need to make any changes in Surrogacy Arrangements Act, 1985 and Human Fertilization and Embryology Act, 1990.\textsuperscript{257} The committee had not dealt with the commercialization and enforceability aspect of surrogacy arrangements.\textsuperscript{258} The committee while analyzing the position opined that neither the Act nor the Warnock committee addressed the issue of payments directly.\textsuperscript{259} The committee considered a number of developments in the surrogacy arrangements that took place after the Warnock committee report.\textsuperscript{260} These developments among other included the changed attitude of the court in relation to surrogacy arrangements.\textsuperscript{261}

The committee also reviewed the social, ethical and legal issues relating to surrogacy arrangements. The committee expressed the view that there was no direct and empirical study\textsuperscript{262} to know about the impact of surrogacy arrangements on child, nevertheless the committee believed that there is potential risk to the child.\textsuperscript{263} The committee stressed upon the need of state intervention even when the actual impact of surrogacy was not clear.\textsuperscript{264} The committee stressed the need of regulation of surrogacy arrangements which should ensure that parties were fully informed and interest of all were fully protected.\textsuperscript{265} However, the committee rejected the proposal of making surrogacy arrangements as criminal offence.\textsuperscript{266} The committee had not

\textsuperscript{257}Hugh V. Mc Lachlan, “Surrogate Motherhood: Beyond the Warnock and Brazier Report”, Human Reproduction and Genetic Ethics, Vol. 11, No. 1, 12-25 at 19 (2005). See Also Supra note 256, Executive Summary Chapter 1, para 1.2 at 1.
\textsuperscript{258} Supra note 256 para 1.4 and 1.5 at 1 & 2.
\textsuperscript{259} Id., para 3.2 at 17.
\textsuperscript{260} Id., para 3.4 at 17.
\textsuperscript{261} Id., para 3.5 at 18.
\textsuperscript{262} Id., para 4.8- 4.15 at 30- 33.
\textsuperscript{263} Id., para 4.16 at 33.
\textsuperscript{264} Id., para 4.21 at 34.
\textsuperscript{265} Id., para 4.39- 4.45 at 39-41.
\textsuperscript{266} Id., para 4.38 at 39.
favoured a single regulatory system for surrogacy rather it suggested a code of practice which must be followed by the parties in a surrogacy contract. The committee opined that the payments made to the surrogate must be limited as it will result in reducing the practice of surrogacy less exploitative for women and there will be no commercialization of children.

The committee recommended that mechanism should be set up to ensure the details of the expenditure. It further suggested that the expenditure must be forwarded to the authority before the creation of surrogacy arrangements. In the opinion of the committee there was no need to establish new authority rather it recommended that it should be mandatory for all the agencies to register themselves under U.K. Health department. The committee further recommended the repeal of both Surrogacy Arrangement Act, 1985 and Section 30 of Human Fertilization and Embryology Act, 1990 and further suggested the enactment of new surrogacy Act. The committee was of the opinion that even after passing of new surrogacy Act, the surrogacy contracts will remain unenforceable. It also expressed the opinion that there must be restriction on the advertisement by commercial agencies in relation to surrogacy arrangements. It provided that there must be registration of non profit surrogacy agencies. The committee further recommended that there must be new provisions for the grant of the parental orders to the commissioning couples. In order to ensure the welfare of the child, the committee recommended that parental orders should be given by High Court only. The Judges should be given the power to order DNA etc. Thus Brazier committee proposed new and additional control over the surrogacy arrangements.

2.3.3 Surrogacy Arrangement Act, 1985: The current surrogacy perspective in the form of legislation falls under Surrogacy Arrangement Act 1985 which have been

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267 Id., para 4.48 at 42.
268 Id., para 5.10- 5.23 at 44-47.
269 Id., para 5.24 at 47.
270 Id., para 6.23 at 55.
271 Id., para 7.2 at 57.
272 Id., para 7.3 (i) at 58.
273 Id., para 7.3 (ii) at 58.
274 Id., para 7.3 (v) & (vii) at 60.
amended by Human Embryology and Fertilization Act, firstly in 1990 and then in 2008.\textsuperscript{276} The Act has been enacted for the purpose of regulating the arrangements carried in the form of surrogacy.\textsuperscript{277} As per the Act, surrogacy arrangements have been declared as unenforceable.\textsuperscript{278} The Act defines surrogate as a woman who delivers a child on the basis of arrangement which is executed between surrogate and commissioning couple before carrying of child.\textsuperscript{279} The Act makes it as an offence to negotiate the surrogacy contract on commercial basis for third parties including persons and body of persons.\textsuperscript{280} However, the liability is not extended to surrogate mother as the payment for the benefit of the surrogate is excluded from the purview of the Act.\textsuperscript{281} It also excludes the liability of intended father. It also bans the advertisement relating to surrogacy arrangement in any form whether it is published through visual or telecommunication means.\textsuperscript{282} However, the Act permits the non-profit making agencies to receive reasonable payment for facilitation of surrogacy arrangements.\textsuperscript{283} The Act also excludes the liability in case of advertisement if its purpose is only to facilitate the carrying of surrogacy arrangements.\textsuperscript{284}

\textbf{2.3.4 Human Fertilization and Embryology Act, 2008:} This Act basically deals with assisted conception or reproduction\textsuperscript{285} and partly with surrogacy arrangements.\textsuperscript{286} The Act has amended Surrogacy Arrangements Act, 1985.\textsuperscript{287} As per the provisions of the Act, the gestational mother is the legal mother of the child.\textsuperscript{288} The position of the

\textsuperscript{277} Surrogacy Arrangement Act, 1985 came in to force on 16\textsuperscript{th} July 1985.
\textsuperscript{278} Id., section 1A Inserted by Human Fertilization and Embryology Act, 1990.
\textsuperscript{280} Derek Morgan, “Who to be or Not to be: The Surrogacy Story”, 49 Mod. L. Rev., 358-68 at 363 (1986).
\textsuperscript{281} Supra note 277, section 2.
\textsuperscript{282} Id., section 3 makes it an offence to publish, distribute or apply for any advertisement and persons like proprietor, editor, publisher of newspaper, periodical or person who distribute, apply for advertisement are made liable or guilty.
\textsuperscript{284} Id., section 59 (6) (7) inserted Section 8A, 8B and 3 (1) (A) in to Surrogacy Arrangements Act, 1985.
\textsuperscript{286} The Human Fertilization and Embryology Act has first been amended in 1990 and subsequently in 2008.
\textsuperscript{287} Section 1A has been inserted through Human Fertilization and Embryology Act 1990 which makes surrogacy arrangements as unenforceable.
\textsuperscript{288} Supra note 277, section 33 (1).
father under the Act depends upon certain factors like if the surrogate is married at the
time of treatment then her husband is considered as the father of the child even when
the creation of embryo is not with the sperm of the husband. However, if it is
proved that he has not consented to the treatment, then in that case, he will not be
presumed as the father of the child. In such a situation the provisions of the Act
provides for the agreed fatherhood. In this case any person can agree to act as the
father of the child who will be born through surrogacy arrangements. It is required
that the agreed father should give notice to the responsible person about his consent
and that must have not been withdrawn till the birth of the child. It is further
required that the surrogate must be a consenting party to this agreement. It is
required that the notice must be in writing and signed by the person making it.
However, the Act also specifies that when the sperm of man is used for treatment
services or non medical infertility service through his consent, then he is not treated as
the father of the child. It is also required in case of agreed fatherhood that the
surrogate and man are not with in the prohibited degree relationship.

The Act also specifies the paternity of the child in case of woman in civil
partnership. The Act prescribes that if at the time of placing embryo or sperm, the
surrogate is living in civil partnership, then the second woman in civil partnership will
be treated as parent of the child. In this case also the agreement can be made with
the intended woman for becoming parent if the other party to civil partnership does
not give the consent to placing of the embryo, eggs or artificial insemination. The
Act further provides for parental orders for declaring the child as legal child of the
applicants. For this purpose the applicants must satisfy certain requirements like the
applicants must be above the age of 18 yrs, the application must be made before the

289 Id., section 35.
290 Id., section 35 (2).
291 Id., section 36.
292 Id., section 37.
293 Id., section 37 (a) & (c).
294 Id., section 37 (b).
295 Id., section 37 (2).
296 Id., section 41.
297 Id., section 37 (1) (e).
298 Id., section 42-46.
299 Id., section 42 (1).
300 Id., section 43 and 42 (1).
301 Id., section 54.
302 Id., section 54 (5).
court, the court must be clear that child must be carried by the other woman and at least one of the applicants provide gamete.\textsuperscript{303} It is further required that the applicants must either be husband and wife or in civil partnership or at least should not be in the prohibited degree relationship.\textsuperscript{304} At the time of making application it is further required that the child must be living with the applicants and either or both the applicants are domicile of U.K., Channel Island or Isle of Man.\textsuperscript{305} The Act also provides a period of six months to the surrogate or woman carrying the child to decide about the custody of the child.\textsuperscript{306} The Act allows the incurring of the reasonable expenses for making the order, agreement, and handling of the child. However, it must be authorized by the court.\textsuperscript{307}

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 in to private surrogacy contracts. The effect of these contracts will be that there is no one to regulate these arrangements. So indirectly parties will be entering in to the surrogacy contracts as the law only take in to 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 in to 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 should for the time being remain in the custody of the persons who are not yet legally authorized for the same.

\textsuperscript{303} Id., section 54 (1) (a) (b).
\textsuperscript{304} Id., section 54 (2) (a) (b).
\textsuperscript{305} Id., section 54 (4).
\textsuperscript{306} Id., section 54 (7).
\textsuperscript{307} Id., section 54 (8).
2.4 Australia: Surrogacy is a kind of hypothetical option in the country as the law imposes either prohibition or strict regulation on surrogacy. The country allows for individual state regulation of surrogacy arrangements. The aim of the surrogacy laws in the country is to prevent the commercialization and exploitation of the parties concerned while at the same time ensuring the best interest of the child. The law does not make distinction between the birth mother and the legal mother as surrogate is treated as mother of child in all the capacities and her husband as father irrespective of the fact that the genetic material is provided by the commissioning parents. However, there has been no significant study in the country to know about the incidence of surrogacy. The law in the country can be analyzed taking in to account the state regulations.

2.4.1 Australian Capital Territory: The law governing the state in relation to surrogacy is Parentage Act 2004. The present Act makes use of term ‘substitute parent agreement’ for surrogacy agreements. It refers the agreement as a contract, agreement, arrangement or understanding where a woman either on basis of pre conception or post conception agrees to become pregnant and deliver the child to someone else by way of agreement or otherwise. The Act permits only altruistic surrogacy arrangements. It is required as per the provisions that neither of the birth parents of the child are genetic parents. It is further provided that at least one of the substitute parents is the genetic parent of the child and parents must be living in the

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316 Id., section 23 (a) (b).
317 Id., section 24 (b).
state. It prohibits the commercial substitute parent agreements and provides penalty of 100 penalty units, imprisonment for 1 yr or both. It also prescribes similar punishment for any one who procures some one to enter in to substitute parent agreement or in any way facilitate the agreement. The Act also prohibits any kind of advertisement and makes it punishable with 50 penalty units or 6 months imprisonment or both. The substitute parents can make an application to Supreme Court for a parentage order about the child. It provides that the application can be made only when the child is between the age of 6 weeks and 6 months. The court can make the parentage order if it is satisfied that making of the order is in the best interest of the child and both the parents have freely agreed to the making of the order. The court will take in to account that the child is living in substitute parents home and parents are at least 18 yrs of age. It is further required that the parents have received appropriate counseling and assessment from independent counseling service. If the parentage order is given by the court then it will be presumed as if the child is an adopted child.

2.4.2 New South Wales: The law relating to surrogacy arrangements is presently governed by Surrogacy Act, 2010. The Act defines surrogacy arrangements in to two parts i.e. pre conception and post conception. The Act makes the surrogacy arrangements as unenforceable. However, the Act prescribes that in case surrogacy arrangements are altruistic, the parentage order can be granted by the court. It further provides that if there is obligation to pay or reimburse the surrogacy cost then it is enforceable if it is pre conception surrogacy arrangement. Surrogacy cost has

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318 Id., section 24 (d) & (e).
319 In case of penalty one penalty unit is equal to $110 in case of persons and $550 in case of corporations.
320 Supra note 315, section 41.
321 Id., section 42.
322 Id., section 44.
323 Id., section 43.
324 Id., section 25 (1).
325 Id., section 25 (3).
326 Id., section 26 (1) (a) & (b).
327 Id., section 26 (3) (a) & (b).
328 Id., section 26 (3) (c).
329 Id., section 29.
331 Id., section 6 (1).
332 Id., section 6 (2).
been defined as reasonable cost for becoming or trying to become pregnant, carrying pregnancy or giving birth.\textsuperscript{334} It also includes medical, travel or accommodation cost, premium paid for health, disability, loss of earnings for leave taken not exceeding 2 months.\textsuperscript{335} It further includes the cost associated with birth mother and her partner cost of receiving counseling and legal advice.\textsuperscript{336} The Act prohibits commercial surrogacy arrangements and also prescribes a penalty up to extend of 2,500 penalty units in case of corporation or 1000 penalty units or imprisonment for 2 yrs. or both in other case.\textsuperscript{337} It also prescribes same penalty in case of advertising of surrogacy arrangements.\textsuperscript{338}

The Act also provides for granting of parentage orders which can be given on the basis of joint or sole application of intended parents.\textsuperscript{339} The application can be made not less than 30 days and not more than 6 months after the birth of the child.\textsuperscript{340} The application must be supported by report of independent counselor.\textsuperscript{341} The report of counselor must be based on the understanding of social and psychological implications for the parties involved, voluntary consent of the parties, care arrangements, parental capacity of the applicant.\textsuperscript{342} The Act requires that the age of birth mother in case of pre conception surrogacy arrangements must be at least 18 yrs and in case of post conception 25 yrs. and age of the intended parents must be at least 18 yrs at the time of entering in to the contract.\textsuperscript{343} The arrangement must be based on medical or social need and applicants must be residing in the state only along with the child.\textsuperscript{344} It is further required that the agreement must be in writing and signed by both the parties.\textsuperscript{345} The Act provides that intended parents can be single or couple.\textsuperscript{346} If the child is having sufficient maturity of understanding then the Act provides that regard

\textsuperscript{334} Id., section 7 (1).
\textsuperscript{335} Id., section 7 (2) (3).
\textsuperscript{336} Id., section 7 (4).
\textsuperscript{337} Id., section 8.
\textsuperscript{338} Id., section 10.
\textsuperscript{339} Id., section 14.
\textsuperscript{340} Id., section 16.
\textsuperscript{341} Id., section 17.
\textsuperscript{342} Id., section 30-32.
\textsuperscript{343} Id., section 28.
\textsuperscript{344} Id., section 17 (3).
\textsuperscript{345} Id., section 34.
\textsuperscript{346} Id., section 25.
must be given to his wishes. The court will issue the parentage order after the satisfaction of all the requirements and best interest of the child.

2.4.3 Queensland: The present law in relation to surrogacy in the state is Surrogacy Act, 2010. The Act repealed the Surrogacy Arrangements Act, 1988. The present Act is enacted in order to regulate the matters relating to surrogacy. It aims at ensuring overall well being and best interest of the child born out of the surrogacy arrangements. The Act coins the term ‘Birth Mother’ for the surrogate. The Act defines surrogacy arrangement as an agreement which is entered into by a woman and other persons with an intention that the child will be child of the other person and other person will have all rights including custody relating to the child. Under the Act the surrogacy arrangements are declared as unenforceable. However, the obligation to pay or reimburse the surrogate’s reasonable cost is made enforceable but it does not cover a situation where a child is born or surrogate refuse to relinquish the custody of the child. The term ‘reasonable cost’ involves birth mother reasonable medical cost, premium payable for health, reasonable cost of counseling, and actual loss of earning because of leave taken for pregnancy.

The Act also provides for parental orders in order to declare the intended parents as the legal parents of the child. The court can order the parentage if it is in the best interest of the child. For grant of order it is required that child has resided with the applicants at least 28 consecutive days before the date of the application and is still residing with the applicants. It is further required that there was medical or social need to carry out surrogacy arrangements. It also includes the requirements of

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347 Id., section 26 (2).
348 Id., section 18.
349 Id., section 22.
350 Id., part 1 Section 61.
351 Id., section 5 (1).
352 Id., section 6.
353 Id., section 8.
354 Id., section 7.
355 Id., section 15 (1).
356 Id., section 15 (2).
357 Id., section 11.
358 Id., section 21.
359 Id., section 22 (2) (a).
360 Id., section 22 (2) (b).
361 Id., section 22 (2) (d).
counseling and legal advice. In order to get the parentage order the parties must be at least 25 yrs on the date of entering in to the contract. For intended parents it is further required that they should be residents in the state. There is further requirement of production of documents and information in the form of copy of birth certificate, surrogacy contract, affidavit of parties, lawyer giving legal advice and legal counselor. The Act also prohibits any kind of advertisement and other published matter in relation to surrogacy and provides penalty up to 100 penalty units or 3 yrs imprisonment. It also provides the same penalty to a person for entering into commercial surrogacy contract or for providing any medical, technical or professional services.

2.4.4 South Australia: The present law in the state to deal with surrogacy contract is Family Relationship Act, 1975. The Act defines the surrogacy contract in which a person agrees to become pregnant, agrees to transfer the custody of child to another. The present Act also defines the term ‘procuration’ as agreement to negotiate or arrange or introduce prospective parties to surrogacy contract. The Act declares surrogacy as well as procuration agreement as illegal and void. The Act also makes it an offence to receive valuable consideration, inducing the person for entering in to the contract or publish an advertisement relating to entering, seeking surrogate or negotiating in surrogacy contract with a fine of $4,000 or imprisonment for 12 months. However, the illegality is not applicable in case of recognized surrogacy agreements. The recognized surrogacy contracts are those contracts in which some conditions are to be satisfied by the parties. It is required for these contracts that only surrogate, her husband and the commissioning parties must be party to surrogacy contract. Further it is required that the commissioning parents must be legally

362 Id., section 22 (2) (e).
363 Id., section 22 (2) (f) & (g) (i).
364 Id., section 22 (2) (g) (ii).
366 Id., section 55.
367 Id., section 56-58.
368 The Act has been amended by Family Relationship (Surrogacy) Amendment Act, 2012 assented and commenced on 7.6.2012.
369 Id., section 10 F.
370 Id., section 10 G (1) (2).
371 Id., section 10 H.
372 Id., section 10 G (4).
373 Id., section 10 HA (2).
374 Id., section 10HA (2) (i) (A) (B).
married and cohabited as husband and wife for the period of 3 yrs immediately preceding the date of agreement.  

2.4.5 Tasmania: The law in the state is governed by Surrogacy Contracts Act, 1993. The surrogacy agreements are declared as void and unenforceable under the Act. The Act defines the surrogacy contracts as agreement or arrangement with or without payment or reward in which woman agrees to become pregnant and surrender the custody of child. The Act is further amended by Surrogacy (Consequential Amendments) Act, 2012. Apart from making the contract as unenforceable, it also provides penalties for a person who either introduces or agrees to introduce the parties to the surrogacy agreements. It also provides penalty for inducing any person to enter into the contract or arranging the contract on behalf of another person and making or receiving any kind of reward in lieu of surrogacy contract. The Act also provides penalty for providing technical and professional services knowing fully well that the pregnancy is to be carried for the purpose of surrogacy contract. The Act further prohibits the publication of any advertisement, notice or any document regarding surrogacy contract. However, the Act permits recognized surrogacy arrangements after satisfaction of certain requirements. The commissioning parents must be resident of the state and surrogacy agreement is carried only if the female is infertile or there is a risk to child or female or any other medical ground is there which unable her to carry pregnancy.

The Act also prescribes certain requirements for the surrogate mother. It is required that she is assessed and approved by counseling service as a surrogate mother. The counseling service is required to issue a certificate to the commissioning parents as well as surrogate regarding the fulfillment of the conditions. It is required that the

375 Id., section 10HA (2) (ii).
377 Id., section 3.
378 Id., section 4.
379 The Act prescribes the penalty of fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months.
380 Supra note 376, section 5.
381 Id., section 6.
382 Supra note 368, section 10HA (2) (iv).
383 Id., section 10HA (2) (vi).
384 Id., section 10HA (2) (vii).
genetic material is provided at least by one commissioning parent.\textsuperscript{385} Further it is required that the agreement must be in writing and signed by all the parties to the contract.\textsuperscript{386} It is provided that if the child is born through recognized surrogacy contract, the commissioning parents can make an application for declaring the child as their legal child.\textsuperscript{387} The application can be made only when the child is between the age of 4 weeks and 6 months.\textsuperscript{388} Before making the order the court will satisfy itself that the conditions of recognized surrogacy agreements are satisfied by the commissioning parents.\textsuperscript{389} If after taking in to account all the requirements the order is made by the court, then the commissioning parents will be treated as legal parents and birth parent will have no parentage rights over the child.\textsuperscript{390}

\textbf{2.4.6 Victoria:} In the state the infertility treatments are regulated by Infertility Treatment Act, 1995. It establishes treatment authority to administer licenses and approval to the hospitals and clinics for providing services.\textsuperscript{391} It further provides that the ART can only be performed by approved doctors at licensed hospitals or day procedure centers or licensed research institutes.\textsuperscript{392} The law in the state which deals with the surrogacy arrangements is Assisted Reproductive Treatment Act, 2008. All the provisions of infertility treatment Act are also applicable under the present Act. The main purpose of the Act including other is to make provisions with respect to surrogacy arrangements.\textsuperscript{393} The Act defines the surrogacy arrangement as arrangement where formally or informally a woman agree to bear the child so that child can be treated of as another and custody is transferred so that right to care for the child is permanently surrendered to the other person.\textsuperscript{394}

The Act provides that a registered ART provider can carry treatment procedure on a woman under surrogacy arrangement if the arrangement has been approved by patient

\textsuperscript{385} Id., section 10HA (2) viii) (B).
\textsuperscript{386} Id., section 10HA (6).
\textsuperscript{387} Id., section 10HB.
\textsuperscript{388} Id., section 10HB (5).
\textsuperscript{389} Id., section 10HB (9).
\textsuperscript{390} Id., section 10HB (13).
\textsuperscript{391} Infertility Treatment Act, 1995, section 121.
\textsuperscript{392} Id., section 3.
\textsuperscript{393} Assisted Reproductive Treatment Act, 2008, part 1 Section 1 (d).
\textsuperscript{394} Id., section 3.
review panel. In order that the arrangements have been approved by review panel, certain conditions are required to be fulfilled. The panel will approve the arrangement only when the doctor is of the opinion that commissioning mother is unable to become pregnant or if she carries the child, there is a danger either to the child or the mother concerned. It is further required that surrogate will not provide for the gamete. It is essential for the surrogate to have previously carried pregnancy. She must not be less than 25 yrs of age. It is required that counseling and legal advice has been received by the parties to the surrogacy arrangements as well as the husband of the surrogate. The parties must be prepared to bear the consequences like if the commissioning parents refuse to accept the child or surrogate refuse to hand over the child to the commissioning parents. While formulating the decision for approval of surrogacy arrangement, the panel must take in to account a report from counselor and acknowledgment by the parties to the fact that they have undergone counseling and legal advice has also been obtained. The Act also provides that in case of exceptional circumstances, the surrogacy arrangements can be approved if these requirements are not fulfilled.

The Act allows the reimbursement of cost actually incurred by surrogate as a result of entering in to the contract. However, if more cost is involved than prescribed, the arrangement will be void and unenforceable and parties are liable to 240 penalty units or 2 yrs imprisonment or both. The Act also prohibits the publication of surrogacy arrangements by any means and prescribes same penalty in case of default. The Act further makes an amendment in the Status of Children Act, 1974. It provides that the commissioning parents can file an application for

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395 Id., section 3.
396 Id., section 40.
397 Id., section 40 (1) (a) (i) (ii).
398 Id., section 40 (1) (ab).
399 Id., section 40 (1) (ac).
400 Id., section 40 (1) (b).
401 Id., section 40 (1) (c).
402 Id., section 40 (1) (e) (i) (ii).
403 Id., section 40 (2).
404 Id., section 41.
405 Id., section 44 (2).
406 Id., section 44 (3).
407 Id., section 44 (1).
408 Id., section 45.
substitute parentage order provided that child is conceived as a result of the procedure adopted in the state and the parents live in the state of Victoria at the time of making of the application.\textsuperscript{410} If the substitute parent order is passed by the court, then the commissioning parents will be treated as the legal parents of the child.\textsuperscript{411} The court can make the order only if some of the requirements are satisfied.\textsuperscript{412} The court will take into account the best interest of the child.\textsuperscript{413} The court will also consider that the surrogacy arrangements are carried on with the help of registered ART providers and approved by patient review panel.\textsuperscript{414} The court will satisfy itself that surrogate or her husband has not received any material benefit and surrogate freely consents for passing of the order.\textsuperscript{415} The Act provides additional requirements in case the surrogacy arrangements are carried on without the assistance of the registered ART provider.\textsuperscript{416} Apart from the conditions mentioned, certain other requirements are required to be fulfilled like surrogate must at least be 25 yrs of age, there must also be receiving of counseling, social and psychological etc. by the surrogate.\textsuperscript{417} The Act also provides about the provisions for dispensing with the consent of surrogate and her husband.\textsuperscript{418}

\textbf{2.4.7 Western Australia:} The present law governing surrogacy in the state is Surrogacy Act, 2008. The present Act defines surrogacy arrangements as arrangements between birth mother and arranged parents to raise the child and hand it over to the arranged parents.\textsuperscript{419} The Act permits the reimbursements of reasonable expenses which include reasonable medical expenses not recoverable under any health insurance,\textsuperscript{420} expenses of psychological counseling\textsuperscript{421} and value of earning during the period of leave taken for a period of not more than 2 months.\textsuperscript{422} The surrogacy arrangements are enforceable only up to this extent and not otherwise

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{410} \textit{Status of Children Act, 1974} Section 20 inserted by Section 147 \textit{Assisted Reproductive Treatment Act, 2008}.
\item \textsuperscript{411} \textit{Id.}, section 21.
\item \textsuperscript{412} \textit{Id.}, section 22.
\item \textsuperscript{413} \textit{Id.}, section 22 (a).
\item \textsuperscript{414} \textit{Id.}, section 22 (b).
\item \textsuperscript{415} \textit{Id.}, section 22 (d) (e).
\item \textsuperscript{416} \textit{Id.}, section 23.
\item \textsuperscript{417} \textit{Id.}, section 23 (2).
\item \textsuperscript{418} \textit{Id.}, section 24.
\item \textsuperscript{419} \textit{Surrogacy Act, 2008}, section 3.
\item \textsuperscript{420} \textit{Id.}, section 6 (3) (a).
\item \textsuperscript{421} \textit{Id.}, section 6 (3) (c).
\item \textsuperscript{422} \textit{Id.}, section 6 (3) (b).
\end{itemize}
\end{footnotesize}
The Act makes it an offence to undertake surrogacy arrangements for reward with a fine of $24,000 or imprisonment for 2 years. It is also an offence to introduce parties to the surrogacy arrangements and it is punishable with a fine of $12,000 or imprisonment up to the extent of one year. The publication of surrogacy arrangements are also penalized with the amount of fine $6,000. The Act also covers the provisions where services are provided for undertaking surrogacy arrangements up to 5 yrs. imprisonment and if summary conviction is imposed, then the person will be liable for a fine of $12,000 or imprisonment for one year.

The Act gives the power to court to transfer the parentage of the child born out of surrogacy arrangements from birth mother to the arranged parents. In order to approve the surrogacy arrangements, it is required that the surrogacy arrangements are approved by the Western Australian Reproductive Technology Council. There are certain requirements for approving the surrogacy arrangements by the council. It is required that birth mother should be at least 25 yrs. of age. It is further required that the agreement must be in writing and signed by all the parties including arranged parents, birth mother and her husband, donor of egg or sperm. It is further essential to undertake counseling, assessment by clinical psychologist, independent legal advice at least 3 months before the approval. It is required that the birth mother has not become pregnant before the approval by the council. The court can make the parentage order keeping in mind some circumstances like the arranged parties are residing in the state and at least one arranged parent is 25 yrs. of age. If the court approves and grants parentage order, then it will have the effect of transferring the right of child from birth mother to the arranged parents.

423 Id., section 7.
424 Id., section 8.
425 Id., section 9 (1).
426 Id., section 11.
427 Id., section 12.
428 Id., section 15 and 16.
429 Id., section 17.
430 Id., section 17 (a) (i).
431 Id., section 17 (b).
432 Id., section 17 (c).
433 Id., section 17 (e).
434 Id., section 19.
From the analysis of different states and territories it is clear 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 aspect 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.

2.5 Canada: Surrogacy arrangements were unregulated before 2004 in Canada. In 1985 some efforts have been made in this direction in the form of establishment of Ontario Law Commission. The Commission has recommended the legitimization and regulation of surrogacy arrangements. The Commission has rejected the arguments that surrogacy arrangements are immoral and emphasize the enacting of comprehensive legislation in this regard. However, the report was not considered seriously and no action was taken in relation to surrogacy arrangements. In 1993 Royal Commission on Reproductive Technologies was appointed to give its recommendations on surrogacy. In 1995, some of the recommendations were found problematic by the ministry of health. The Advisory Commission was appointed in order to monitor the compliance with the recommendations. Then in 1996 Bill C-47 was introduced and approved by House of Commons standing committee. However, it died due to dissolution of parliament in 1997. In 2002, the Canadian

435 Id., section 26.
government after due consideration presented another Bill C-56 and finally it is approved by the senate in the form of Bill C-6 in 2004 which is at present law in Canada in the form of Assisted Human Reproduction Act. The legislation has maintained the difference between the commercial and altruistic surrogacy arrangements as it is silent on the altruistic surrogacy but prohibits and even criminalizes commercial surrogacy. As far as the states are concerned, it is only the state of Quebec that has prohibited both kinds of surrogacy; otherwise the arrangements in other states are governed by the Assisted Human Reproduction Act, 2004.

2.5.1 Assisted Human Reproduction Act, 2004: Surrogacy arrangement in the country at present is governed by Assisted Human Reproduction Act, 2004. The Act defines the surrogate mother as a female who carries the fetus or embryo through assisted reproduction derived from genetic material of the donor with the intention of surrendering the child to the donor or other person after birth. The Act prohibits the payments or offering of payments to the surrogate. It also prohibits any person from acting as intermediary or to give payments or consideration of intermediaries for the arranging of surrogacy contracts. The Act provides that if the surrogate is under 21 yrs of age then no person will counsel or induce her to enter in to the surrogacy arrangements. However, the Act provides that if under the provincial law any agreement is made with the surrogate, then it will not be invalid under the present Act. By applying this provision the state of Quebec has declared all the surrogacy arrangements as unenforceable.

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447 Id., section 6 (1).
448 Id., section 6 (2) & (3).
449 Id., section 6 (4).
450 Id., section 6 (5). While applying this section it is only the state of Quebec which has framed the law in relation to surrogacy arrangements and it renders all the arrangements as unenforceable. For Details See Quebec Civil Code, Chapter 64 Article 541.
The Act further provides for the reimbursement of expenses for the loss of work or earnings.\textsuperscript{451} However, it prescribes that it can only be provided to the surrogate if the qualified medical practitioner certifies in writing that work can not be undertaken by the surrogate as it poses a health risk to the surrogate as well as the child.\textsuperscript{452} The Act prescribes the penalty of fine not exceeding $500,000 or imprisonment not exceeding ten years or both in case the payment, inducement, arranging etc. is made by any person or intermediary.\textsuperscript{453} In case there is summary conviction, the person can be made liable for fine up to $250,000 or imprisonment not exceeding 4 yrs. or both.\textsuperscript{454} Apart from the provisions of the Act and state of Quebec, two more states have made efforts in this direction for making surrogacy at their state level. However, these enactments are still not enforced by the concerned states.\textsuperscript{455}

Thus the law in Canada does not expressly regulate who can or can not enter in to the surrogacy arrangements. The law neither prohibits altruistic surrogacy arrangements nor 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.

### 2.6 Conflicts and Issues in International Surrogacy:

International surrogacy arrangements usually come to attention of the authorities when either the consular authorities are approached to get passport, travel documents of the child etc. or when parentage order is filed by the intended parents for the return of the child to the country of intended parents.\textsuperscript{456} The countries where the surrogacy arrangements are not regulated or where the surrogacy arrangements are valid have become hub for international surrogacy arrangements. The intended parents from all over the world...

\textsuperscript{451}Id., section 12 (1) (c).
\textsuperscript{452}Id., section 12 (3).
\textsuperscript{453}Id., section 60 (a).
\textsuperscript{454}Id., section 60 (b).
\textsuperscript{455}For Further Details See Section 29 of Family Law Act, 2011 (British Columbia) and Family Law Statute Amendment Act, 2010 (Alberta).
\textsuperscript{456}Id., at 19.
are being attracted towards these countries. However, these countries might face difficult situation as the legal parentage of child might not be recognized in their home country. The applicability of law could involve another controversy. The conflicts could also involve issues regarding nationality and citizenship of the child born through international surrogacy arrangement. Yet another issue could be consideration of the welfare of the child and the surrogate. The various issues and challenges which could be faced by the parties to the surrogacy contract and the child born out of international surrogacy can be enumerated as follows:

2.6.1 Applicability of Law: In case of international surrogacy the main issue is in regard to applicability of law. In case of surrogacy it has to be seen whether it will be the law of the host country or country of origin that must be applied. Further it can not simply be assumed that the law of forum will be applicable as law of other country can not be undermined. The complications arise due to applicability of different laws of two countries with regard to surrogacy. For example in a country it may be possible that surrogate is the legal mother whereas in other country it may be possible that intended mother is treated as the legal mother. In such a case if surrogacy arrangements are undertaken, then conflicts of law would arise due to different applicability of law as happened in the case of Re: X and Y (Foreign Surrogacy). In this case the surrogate was from Ukraine where intended parents were the legal parents and the intended parents were from UK where surrogate and her husband were treated as the legal parents. The children became stateless as Ukraine authorities had not granted nationality to them and the applicants were not in a position to get British nationality for children as they had no right to bring them in the country. In Western Australia it is criminal offence to enter into surrogacy for reward which could result in inflicting imprisonment for 2 yrs. or fine to tune of $ 24,000. If a national of Western Australia undertake surrogacy in a country where surrogacy is

459 [2008] EWHC 3030 (Fam).
460 Id., para 9.
461 Section 8 *Surrogacy Act, 2008* (Western Australia).
permitted then problem could arise due to criminality of surrogacy arrangements in Western Australia.

Further complications arise if there is change in the rules and regulations of a country in between the surrogacy process especially in those countries where there is no enacted law. One such example is that of India where the government issued two notifications in 2012 with regard to surrogacy arrangements by the foreigners. These regulations made surrogacy by gay, single men and women, non married couples from other country as illegal.462 The regulations have made it compulsory to get medical visa for the purpose of surrogacy in India by foreigners, which was not applicable before the issuance of notifications. The notifications resulted in creating a fear for children becoming stateless. For example, the Australian Department of Immigration and Citizenship refused to issue citizenship to children born in breach of the Indian Law.463 A Sudan national had moved against these guidelines and also for allowing single parents to undertake surrogacy in India. However, the Punjab and Haryana High Court refused to accept his plea.464 These situations represented a conflict of laws applicable in different countries.

2.6.2 Legal Parentage: In case of international surrogacy there is also problem of legal parentage of the child as different countries have different laws for determination of legal parentage.465 In some countries the intended parents are treated as the legal parents and in other countries the surrogate and her husband is treated as the legal parents. In case of Re G (Surrogacy: Foreign Domicile)466 a couple from Turkey entered in to altruistic surrogacy agreement with an English woman and sought to take the child from England to Turkey. However, the law required that the intended parents must be domiciled in U.K. for the getting parental orders in their favour. This requirement was not fulfilled in this as the intended parents were not

465 Re L (2010) EWHC (Fam) 3146.
domiciled in U.K. However, the court had to provide responsibility to intended parents under U.K. adoption legislation.\textsuperscript{467}

Another case involved a couple from Victoria who entered into a surrogacy contract under which a woman in California agreed to bear the child for them.\textsuperscript{468} The contract was valid and enforceable in California where it was made and performed, but illegal in Victoria where intended parents were resident. Afterwards the parents applied for the parenting orders. The court granted the parentage to the couple with caution that these kinds of surrogacy arrangements represent a danger to fully justified laws and policies of other nations. Another case involved U.K. couple who hired surrogate from India. The birth of the child took place and the surrogate signed the document of exit permit after receiving all dues. The couple after arriving in U.K. filed for parental order. However, for the purpose of parental order, consent of the surrogate was required. But she could not be found as she disappeared and her whereabouts were also not known as she had given wrong address. However, the court had to give the parentage order keeping in mind the interest of the child.\textsuperscript{469} Thus these kinds of conflicts are arising out of international surrogacy where legal parentage has become a controversial issue and the courts have to ignore the provisions of law in order to resolve the matter.

\textbf{2.6.3 Nationality and Citizenship:} The acquisition of nationality and citizenship operates under two principles Jus Soli, \textit{i.e.}, right of soil and Jus Sanguins, \textit{i.e.}, right of blood. In first case the citizenship is conferred if the child is born in the country and in other case citizenship is conferred on the basis of blood relation.\textsuperscript{470} In case of international surrogacy if the two countries have different operating principles of citizenship, there will be lot of complications in getting citizenship for the surrogate child. The children might also become stateless.\textsuperscript{471} For instance there were 22 babies in Ireland who were born through surrogacy and whose citizenship and nationality

\begin{footnotes}
\item[466] (2007) EWHC 2814 (Fam).
\item[467] \textit{Id.}, at 37.
\item[468] \textit{Re Mark (an application relating to parental responsibilities)} (2003) 31 Fam LR 162.
\item[469] “Surrogacy: The Mysterious Case of the Disappearing Mother”, 1\textsuperscript{st} October 2012 (Monday), Available at \url{http://www.marilynstone.co.uk/2012/90/01/surrogacy-the-mysterious-case-of-the-disappearing-mother-mother-and-the-gay-male-parents/}.
\item[471] \textit{Id.}, at 556.
\end{footnotes}
was decided by the court on case to case basis as there is no legislation in Ireland for surrogacy. Moreover, the constitution of Ireland provides that the woman who gives birth to the child is to be treated as mother.472

In a case Partrice and Aurelia Le Roch, French citizen traveled to Ukraine for hiring a gestational surrogate as law in France made surrogacy arrangements illegal. The surrogate mother was arranged and she delivered twins. As the law in France was not recognizing the citizenship of the children born through surrogacy arrangements, the couple followed the suggestion of the agency who hired the surrogate that they should not disclose the fact of surrogacy before the authorities. Thus without disclosing, the couple file for the French passport at French embassy and claimed that the babies were naturally born.473 The French embassy however, suspected surrogacy and requested medical records and documents. When Le Roch could not produce these, the French embassy rejected the issuance of passport and entry of the twins in France. Thus babies become stateless as the French authorities had declined them entry and as per Ukrainian law it is the intended parents only who could be treated as parents in case of surrogacy.474

Another case involved a child named Samuel who was born to surrogate mother in Ukraine for a gay couple in Belgium. However, the bureaucratic hurdles and non issuance of passport by the Belgium authorities kept the baby away from parents.475 The child had to spend first 16 months in the foster care family in Ukraine without citizenship and nationality of any country.476 Another case involved a Norwegian woman who approached Rotunda Fertility clinic in Mumbai, India for commissioning surrogacy. She was suffering from premature ovarian failure. The arrangement was

undertaken whereby sperm was taken from the donor of Scandinavian origin and egg from Indian donor. The twins were conceived and delivered. However, the Norwegian woman was not genetically related with the children. On this pretext, the consul general of Norway rejected her application for travel and citizenship for children as the law conferred motherhood on birth mother and required that it must be shown on the birth certificate.\textsuperscript{477} However, it could not be possible as guidelines given by Indian Council of Medical Research in India provides that only the name of the intended parents must be mentioned on the birth certificate. It resulted in making the children stateless. Thus in number of cases legal hurdles emerged due to conflicts in citizenship and nationality law of different countries in international surrogacy.

2.6.4 Illegal Trafficking of Surrogate and Children: The trafficking of surrogate and children is quite rampant in cross border surrogacy. There had been number of cases which involved the trafficking of both surrogate and children. For example a case in Thailand exposed the illegal trafficking of the Vietnamese women for the purpose of surrogacy. In this case fourteen Vietnamese women were recovered by Thai authorities from an illegal company named as Baby 101.\textsuperscript{478} The recovery took place after information is given by one of the women serving as surrogate through email to Vietnamese embassy. The information from the surrogates revealed that false allurement of job was given to them. Their passports were confiscated and they were forced to undertake surrogacy.\textsuperscript{479} In another case the child welfare committee in Gumla Jharkhand (India) disclosed that a girl was forcibly trafficked to New Delhi at an age of 8 where she was forced to undertake pregnancy ten times as a surrogate.\textsuperscript{480}

\textsuperscript{477} Sumitra Deb Roy, “Norwegian Stuck in Limbo with Twins not Genetically her Own”, The Times of India, 21st July 2010 (Wednesday), Available at http://www.lexisnexis.com.


Another girl named Phulmani from the same district was sold in to slavery to act as surrogate forcibly. She was also trafficked to Delhi on false pretext of a job.\textsuperscript{481}

Further the Australian authorities had specifically revealed that surrogacy is being used as a measure to traffic children to Australia specifically from India, Thailand, China, Malaysia and Ukraine.\textsuperscript{482} In another report which was presented by Hispan TV and Venzuela’s Telesur networks broadcast depicted that 25 babies were taken to Israel from Nepal. Out of them 15 were brought through Tanmuz, an Israeli surrogacy company which provides services to couples especially homosexual couples who were unable to bear children.\textsuperscript{483} The suspicion regarding cross border human trafficking also arose in a Japanese case where a Japanese man kept nine surrogate children. The lawyer of man claimed that the children were his children. However, neither the names of the children were known nor there was availability of birth certificates of the children. Moreover, suspicion arose more when one of the baby sitter revealed before the police authorities in Condo that 27 year old Japanese woman had a plan to take one of the children.\textsuperscript{484} These instances depicts that illegal trafficking is undertaken at global level in case of international surrogacy.

\textit{2.6.5 Fraudulent Practices:} A number of fraudulent practices are also carried on at international level in relation to surrogacy arrangements. One such case involves K. T. Gurumurthy who belonged to Banglore, India against whom a case was filed by Dhan Bosco. The facts of the case showed that Gurumurthy was running Srushti Global Trust. He promised Dhan Bosco for providing the services of the child so that the couple could get a child as they were unable to give birth.\textsuperscript{485} The sperm of the man was taken in 2008 and after the expiry of 7 months he was informed that a baby girl was born to the surrogate. But Gurumurthy did not justify early birth. Later on child

\begin{itemize}
\item \textsuperscript{481} Sarah Zagorski, “13 Year Old Girl Sold into Slavery: Forced to Conceive Children and Deliver Babies for Sale”, 26\textsuperscript{th} February 2015, Available at www.lifenews.com/2015/02/26/13-year-old-girl-sold-into-slavery-forced-to-conceive-children-and-deliver-babies-for-sale/.
\item \textsuperscript{483} “Is Israeli Aid to Nepal a Cover for Baby Trafficking?” 11\textsuperscript{th} May 2015, Available at http://www.albawaba.com/editorchoice/isreali-aid-nepal-cover-baby-trafficking-692858.
\item \textsuperscript{484} “Human Trafficking Suspected in Thai Nine Baby Discovery”, The Japan Times, 7\textsuperscript{th} August 2014, Available at http://www.japantimes.co.jp/news/2014/08/07/national/thai-lawyer-claims-nine-babies-surrogate-kids-japanese-father/#.VZTBwDLJTsN.
\end{itemize}
suffered some ailment and due to this the mother got depressed and died. Then Dhan Bosco undertook DNA for some purpose where by it was revealed that the girl was not genetically related to him. From this incidence he came to know that fraud was practiced on him by Gurumurthy.486

Another case involves Jeanine and Robert Salomon siblings in France. They traveled to U.S. in order to get IVF and surrogacy and misrepresented them as husband and wife to the hospital authorities. The little girl was born as result of sperm of Robert and egg of an American woman which was implanted in the womb of an American surrogate mother.487 Not only the common people but the professionals are also involved in this illegal surrogacy rackets. For example a leading attorney Erickson in San Diego was sentenced by Federal court for five years imprisonment for running illegal surrogacy business.488 In this case attorney Erickson along with attorney Hilary Nerman and surrogate Carla Chamber had recruited American and Canadian women between the years 2005 and 2011 to act as surrogates. They used to take them to Ukraine for embryo implantation. Then the surrogates were made to carry fetuses up to second trimester for which there used to be no intended parents. Thereafter the advertisements depicting that the child is available due to unsuccessful surrogacy arrangements were put in order that the children could be sold on high prices by following the process of adoption by parents in which these attorneys used to provide help.489 These fraudulent practices resulted in exploitation of the parties in surrogacy arrangements in general.

2.6.6 Welfare of the Surrogate and the Child: Another issue in case of surrogacy is regarding securing the welfare of the surrogate and the child. There could be chances of exploitation of the surrogate and the child born through international surrogacy.


488Julie Watson, “Theresa Erickson to be Sentenced for Baby Trafficking Ring”, Available at http://www.huffingtonpost.com/2012/02/24/theresa-erickson-sentenced\ n\ 1299434.html?ir=India&adSite=Verride.

Moreover, in a country like Ukraine where surrogacy is valid as per law but there is no mention about the rights of the surrogate to claim motherhood for the child born out of surrogacy could lead to further exploitation of the surrogate.\textsuperscript{490} A survey was conducted in India in the states of Mumbai and Delhi in which it was found that surrogates were kept in the rented accommodation where they were closely monitored and were not permitted to meet the family members.\textsuperscript{491} The extent of exploitation of the surrogate could be analyzed through the case of one Premila from Ahmedabad, India who died due to unexplained complications in the process of surrogacy carried for US based couple.\textsuperscript{492} However, the child was saved. It raised suspicion that why surrogate could not be saved. One possible reason could be that child was more expensive than the surrogate. In case of surrogacy the women could also be exploited physically like the incident which happened in Meerut India in which a girl was raped by the house owner when she refused to serve as surrogate.\textsuperscript{493}

Apart from the exploitation of the surrogate, international surrogacy also involved exploitation of the child. Like in a case an Australian couple arranged for a surrogate in Thailand. The surrogate conceived. However, prenatal test diagnosed that the child is suffering from down syndrome which means his brain would not be functional and he would never be able to take care of himself.\textsuperscript{494} The couple asked the surrogate to abort the child but the surrogate refused to do so. On her refusal, the couple broke all the ties with the surrogate and denied taking custody of the child.\textsuperscript{495} Thus the child was left to be born without parents. Another incident of such kind happened in India where twins were conceived by Indian surrogate for Australian couple. A boy and girl was born subsequently. The couple took away girl after delivery and left the boy in India on the pretext that they already had a boy and just want to complete the family

\textsuperscript{490} Supra note 473 at 432.
\textsuperscript{491} “Surrogate Mothers Exploited, Made to Live in Secrecy: Study”, The Indian Express, 18\textsuperscript{th} July 2013 (Thursday), Available at http://www.indianexpress.com/news/surrogates-mothers-exploited-made-too-live-in-secrecy-study/1143245.
\textsuperscript{492} “Surrogate Mother Dies of Complication”, The Times of India, 17\textsuperscript{th} May 2012 (Thursday), Available at http://timesofindia.indiatimes.com/city/ahmedabad/Surrogate-mother-dies-of-complications/article13181592.cms.
\textsuperscript{494} Elizabeth Cohen, “Surrogate Offered $10,000 to Abort Baby”, 6\textsuperscript{th} March 2013 (Wednesday), Available at http://edition.enn.com/2013/03/04/health/surrogacy-kelley-legal-battle/.
by taking girl home. They had also been successful in showing before the authorities that the boy had been adopted by the close friends. However, the boy was left destitute in India.\textsuperscript{496}

Thus from the analysis it is clear that as different countries have differently regulated the surrogacy arrangements, it 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 make surrogacy arrangements in the countries where surrogacy laws either are favourable to them or where there are no regulations for undertaking this process. Thus 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.\textsuperscript{497} 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 could 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. 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 could arise regarding the ratification of the international regulation by all the countries. However, this issue could be solved by making efforts in this direction like social pressure for requiring the countries to adopt same practices at international


\textsuperscript{497} 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.
level. Another option could also be bilateral agreements between the countries and surrogacy to be allowed in between those countries that have made agreements for the same. As these arrangements might take a number of years to come in to existence, timely help could 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{498}\

\textsuperscript{498} 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.