CHAPTER- 3
ETHICAL AND SOCIAL ISSUES IN SURROGACY

3.1 Introduction: The need to have a baby is an internal drive, and specifically in case of infertile patients who are emotionally vulnerable and highly motivated. They are easily carried away by promises of the latest technology.\(^1\) It also provides a ground for unethical practices. Technology is treated as a saviour by many infertile couples as it helps them to fulfil their dream which can not be possible otherwise.\(^2\) It has been emphasized over the time that there is a direct causal relationship between technological development and improvement in the women’s health. However, not all the technological developments carry benefits for women. The developments of new technologies and decisions about their use have always been embedded in social and cultural contexts. Thus it can be possible that technology as such is in the interest of the women but may not be acceptable in the context of social and cultural arrangement.\(^3\)

With the technological developments, the role of mother has been made discounted. In ancient times, motherhood was most valued.\(^4\) However, with the advent of reproductive technology, the value of motherhood has reduced its impact on women as well on the society. The modern world is unable to appreciate the nobility, strength and fitness about the role of the mother. In the modern world the role of women as a worker has gained more importance and it is further complimented by use of new reproductive technologies which provide more option of pregnancy for couples. However, these technologies along with providing more assurance for the birth of a

\(^2\)Kelli Buzzard, “Considering Gestational Surrogacy: Medical Marvel or Parent Trap?” *Perspectives Magazine*, Volume 8, Number 17, 1-16 at 7 (23rd-29th April 2006).
healthy baby, also entails health hazards, uncertainty and potential conflict of values and risks.\textsuperscript{5}

Assisted reproduction is one such technology which helps the infertile couple to get the child. In case of assisted reproduction, a number of embryos are selected and implanted. If the treatment is successful or the parties do not want to proceed further, then the spare embryos are destroyed. It is believed by religious protractors that embryo also possess life.\textsuperscript{6} From this angle further it becomes controversial that whether there should be destruction of the excess embryos or not. Assisted reproduction is also treated as unnatural as it is believed that it is interfering in the nature’s activity of creating of life.\textsuperscript{7} It has further raised debate about the status of fetus and rights of women specifically in case of In Vitro Fertilization (IVF), which is a technique for assisted reproduction. This issue has also been a concern that in this process as embryo is placed after some time in woman’s uterus, whether the women would have control over it as a right of procreation or not when it is outside the womb.\textsuperscript{8} While criticizing reproductive technology, women centered studies have provided issues for focusing on informed consent, truth telling and confidentiality. In addition to calculating health and safety risk and ensuring full information, these technologies have impact upon human relationship, ability of families as well as communities to foster maturity of the members.\textsuperscript{9}

New reproductive technologies are thus controversial because they touch upon the issues of sexuality, genetics, parenting and family. They often raise the question of limit of biology, provoke the debate about issues that were determined biologically in


\textsuperscript{7} \textit{Ibid}.


the past, social control of science and technology and limits of state intervention. Health and safety risk are yet another consideration that arose in regard to the application of new technologies. Technology in case of reproductive medicine has also made it possible to adopt new ways to make babies. Renting womb has been regarded as such new option. In this case wombs are provided by the surrogate mother. It has become an easy and cheap option in a country like India. Relatively low cost of medical services, easy availability of surrogate wombs, abundant choices of donor with similar racial attributes and lack of any law to regulate these practices is in fact attracting foreigners and NRI’s to hire surrogate mothers.

Surrogacy is carried through assisted reproduction process. It is the most complicated of the new reproductive technologies as it adds dimension of genetic motherhood between biological and social parenthood. It separates a mother’s function of pregnancy from rearing of a child. Further it raises a question that whether babies should be allowed to be born through the arrangement or not.

Surrogacy is a controversial concept as it represents conflict between family, motherhood and role of gender. Surrogacy is just a social arrangement between the parties. It can not be termed as medical technology. Surrogacy arrangement is mutually undertaken in case of infertility. There are two type of infertility, functional and structural. Functional infertility is when a man or woman is unable to reproduce due to medical grounds, while structural infertility is a term used for those who require other’s biological assistance for reproduction like gay, lesbian couples.

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12 Supra note 2 at 7.
13 Anil Malhotra, “Legalizing Surrogacy: Boon or Bane”, The Tribune, at 9, 14th July 2010 (Thursday).
14 Supra note 11 at 3.
16 Supra note 11 at 4.
19 Ibid.
arrangement of surrogacy is being used in both cases of infertility. Apart from infertile couples, surrogacy has now-a-days become option for single men and women and even fertile couples who on the basis of one reason or another are interesting in adopting these arrangements.20

There is further a dilemma that which form of surrogacy should be made enforceable, commercial or altruistic. If the surrogate is not paid, no women will be willing to enter in to surrogacy arrangement.21 It will also increase under table payments. Moreover, if the unpaid surrogacy is made enforceable then the surrogate who is serving for the intended parents will be most vulnerable as she is not taking money on the one hand and on the other hand she also have to hand over the child to the intended parents.22 It would further enhance the option to choose surrogate for giving birth for career reasons, medical reasons, for the sake of convenience, simple fear or distaste for pregnancy etc.23

Another repercussion of this arrangement can be racial classification of children to be born. It is generally believed that few choices matter more while selecting a life partner and the same is also involved in carrying children by way of surrogacy arrangement. A couple acting as intended parents might be more interested in particular physique, disposition or value of the child. Yet there can be other intended parents to whom race matters more than anything else. It is often seen that in case of donor insemination, sperm bank provides all the facilities including cataloging sperm donors on racial grounds.24 This racial classification raises question of identity of multiracial democracy. It in fact serves as a threat to preservance of racial solidarity.25

3.2 Ethical and Social Arguments in General: Surrogacy is on the one hand an example of scientific progress, while on the other hand it has been criticized on moral

22 Id., at 23.
23 Supra note 21 at 30.
24 Twenty-three of the twenty-eight sperm banks operating in the United States provide aspiring parents with information about donor skin color, and the largest banks organize sperm donor directories into discrete sections on the basis of race.
and ethical grounds.\textsuperscript{26} There is no single moral issue in surrogacy as moral worries of people vary on the basis of type of surrogacy in question, the relationship of one party with another or exchange or no exchange of money.\textsuperscript{27} Surrogacy has the potential both to exploit and liberate women. The feminist view on surrogacy is divided. Some are of the opinion that surrogacy is exploitative and others are of the opinion that the arrangements are a kind of protection for personal autonomy of women.\textsuperscript{28} The criticism is mainly surrounded around harm to society on the one hand and harm to the surrogate individually on the other hand.\textsuperscript{29} The ethical and social issues generally can be divided in to following sub headings:

\textbf{3.2.1 Moral Aspect of Enforceability of Contract:} The first and foremost thing to be considered in surrogacy contract is that whether these contracts are morally enforceable or not and if it is so, whether surrogate is having right to avoid the contract or not. If surrogacy contracts are not enforceable, the unborn child will be at risk. The surrogate will not take as much care as is required to ensure the birth of a healthy child due to non enforceability of contract. This situation can be possible even if she is socially aware, educated or serving on the basis of altruistic intention. When contracts are unenforceable, couples will not be interested in paying even for her care during pregnancy. Further surrogate in such situation will more be interested in payment for her care rather than care of the child.\textsuperscript{30} Moreover, with the unenforceability of contracts, the demand of quality surrogates will also go up. It will further increase the exploitation of women.\textsuperscript{31} Moreover, if the surrogate found her attached to the child and wants to keep him then whether she will be able to do so or not also depend on the enforceability of the contract. Further, if the intended parents refuse to take the custody of the child then surrogate will not be able to force them for taking custody due to non enforcement of the contract. Thus all these controversial issues can be resolved only when the contracts are made enforceable.

\textsuperscript{26} Derek Morgan, “Enigma Variation: Surrogacy, Rights and Procreative Tourism”, in Rachel Cook, Shelly Day Sclater and Felicity Kaganas (Ed.), Surrogate Motherhood: International Perspectives, 75-92 at 90 (2003).
\textsuperscript{27} Id., at 81.
\textsuperscript{29} Id., at 493.
Surrogacy is often compared with adoption and issues are raised that whether the surrogacy parentage agreement should also confirm to the restrictions that are applicable to adoption or not. Like in case of adoption the payments are banned, so the question is whether it should also be made applicable in case of surrogacy or not. However, surrogacy is different from adoption. The agreement of surrogacy can not be acquainted with the adoption as in case of adoption an agreement is undertaken when already a child is born and the mother has to terminate the relations with the child. However, it is not in case of surrogacy arrangements. In case of surrogacy contract, the surrogate mother conceives the child without any intention to raise him. In case of adoption there are pre natal adoption restrictions for protecting the destitute pregnant woman. However, in case of surrogacy, the surrogate signs the contract before conceiving. In this situation she is not destitute and hence there is no need of restrictions. Moreover, surrogacy has number of advantages as compared to adoption. In case of surrogacy, the intended couple has more information about the natural mother, the surrogate knows from the beginning of the process that she has to relinquish the custody of child. Thus the moral aspect of enforceability demands that the equal weightage should be given to the rights of both surrogate and intended mother in regard to this issue. Thus along with making it morally enforceable, there is no need to ban the payments exchanged between the parties.

3.2.2 Harm to Human Dignity and Reinforcement of Gender Hierarchy: It is argued that surrogacy reinforces the gender hierarchy. It reproduces the stereotype of patriarchal society that used to exercise control over the bodies of woman and reproductive capacities. It is further argued that surrogacy arrangement makes the status of women as subordinates and it also explicit the gender stereotypes. It is also

31 Id., at 271.
36 Id., at 132.
presumed as against human dignity as the surrogate is used as a means for the end of the intended parents.\textsuperscript{38}

The opponents of surrogacy argue that it is a form of slavery and servitude as the human beings are not objects who can be traded for financial gains.\textsuperscript{39} It is further argued that surrogacy often restricts the autonomy of a woman. In case of surrogacy it appears as if it is liberating women but in reality it is oppressive.\textsuperscript{40} The Feminist are also of the opinion that from the ancient history men are controlling the bodies of women and through surrogacy an effort will again be made to establish their control over the bodies of women.\textsuperscript{41} It is argued that surrogate pregnancy contracts are similar to slavery contracts as certain type of behaviour is expected from the surrogates. They are required to maintain distance from the child as they are not allowed to develop any attachment with the child. It is more specifically relevant to Indian surrogate who often spoke of these arrangements not individually but collectively as a team work to improve the financial situations of their family.\textsuperscript{42} This in fact, violates her autonomy in a situation especially where she develops some kind of attachment with the child which is treated as a betrayal of faith. Further this type of her act is also treated as immoral.\textsuperscript{43} It is further argued that it will also harm dignity of women. It is believed that if the surrogacy arrangements are allowed to continue then the women serving as surrogate will be valued only on the basis of her age, history, health etc.\textsuperscript{44}

However, on the other hand it is believed that serving as a surrogate is a kind of reproductive choice. It also fulfills biological and emotional need of couple who are in desperate need of the child.\textsuperscript{45} It is believed that the argument which states that the surrogate is reduced to subordinate position of a slave has ignored the aspect of other

\textsuperscript{38} Denise Meyerson, “Surrogacy Agreements”, \textit{Acta Juridicta}, 121-145 at 129 (1994).
\textsuperscript{39} Supra note 37 at 153.
\textsuperscript{40} Ayesha Hasan, “Surrogacy: Enhancement or Restrictions of a Woman’s Autonomy?” \textit{6 VCL Juris Rev.}, 101-122 at 120 (1999).
\textsuperscript{44} Supra note 42 at 673.
\textsuperscript{45} Ruth Macklin, “Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis”, \textit{16 L. Med. & Health Care}, 57-64 at 57 (1988).
woman involved in the surrogacy arrangement who has also allowed her husband to carry with the arrangement.\textsuperscript{46} Further, it represents contractual freedom of a woman serving as surrogate. It is argued that all the women have freedom to contract, so they must be allowed to enter in to surrogacy contract also.\textsuperscript{47} The supporters of surrogacy are of the opinion that as long as the surrogacy contract is entered in to voluntarily, it can not be treated as violation of autonomy and dignity of a surrogate. On the other hand they believe that if she will be prevented from entering in to the contract, then it will be against her autonomy and personhood.\textsuperscript{48} It will also deprive the woman of her right to privacy and self determination.\textsuperscript{49} There are feminist also who criticizes that the notion of natural and biological bond between the parents and children seems highlights only the traditional, patriarchal kinship and family structures and further confine women to patriarchally define maternal roles. On the other hand surrogacy gives new choices and greater control over their bodies. It also frees woman and entire human species from the biological relationship with the child.\textsuperscript{50} It is also helpful in changing the attitude of society that only woman is responsible for child rearing if with its use it will be shared by couples equally.\textsuperscript{51} The feminist are of the opinion that biology should not be destiny. The equal treatment of sexes requires that decisions about men and women should be made on other than biological grounds.\textsuperscript{52} Thus according to the supporters of surrogacy there is no harm to the dignity and integrity of the surrogate as a woman.

### 3.2.3 Conflicting Motherhood Status

The legal status of a mother is perhaps one of the most troublesome areas surrounding surrogacy.\textsuperscript{53} In case of surrogacy arrangements, there is conflict of motherhood. It means that who will be the legal

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\textsuperscript{48} Supra note 43 at 22.


\textsuperscript{51} Supra note 47 at 326.


the real mother. Surrogacy arrangement confuses the status of mother especially where the surrogate is genetically or biologically related to the child or in other words where partial surrogacy exists. It raises a question that in such a case who should be treated as the natural mother and if the surrogate is treated as a mother, then what would be the status of intended mother i.e. the mother for whom the baby is delivered by surrogate. Further it has also to be considered that in case married or unmarried woman donate her ovum which is later fertilized and implanted in to other woman’s uterus, the question would be whether the child belongs to the woman, who donated the ovum or to the woman who delivered it. The case becomes more complicated when the older woman carry children for their daughters. In case the egg is donated by the surrogate herself, she is genetically and gestationally related with the child and in case the egg is given by the intended mother, then even though there is no genetic relation of the surrogate, yet gestationally she is related with the child. So it becomes very important to determine the maternity.

When IVF and gestational surrogacy was not in existence, woman giving birth to the child was treated as natural mother and it includes both genetic link as well as gestation. However, with the advent of new technologies these processes can be performed by two separate women. Thus assisted reproduction especially surrogacy depersonalizes reproduction and creates a separation of genetic, gestational and social parenthood. In order to establish maternity both genetic and gestational bonding has to be looked in to. The genetic link is an important component of motherhood as it establishes and determines traits, intelligence, characteristics etc of a child. On the other hand, gestational link also creates an emotional and biological connection with the child as far as the mother is concerned. The body of a mother plays an important role in the development of the fetus. Thus both can not be over or under

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57 Id., at 529.
59 Supra note 56 at 527.
60 Id., at 528.
emphasized. There are number of theories regarding the concept that who can be a parent. In this case genetic link, social parenthood, intended parent’s intention and causing the production of the child is taken in to account.\textsuperscript{61} However, in all these theories, social parenthood is regarded as the most important. In such a situation an intent test can be considered as the basis for determining parentage as it is followed by the different courts of different countries. It is based on the proposition that as it is the intended parents who have intended the birth of the child and for that purpose entered in to surrogacy arrangements, so they must be treated as legal parents of the child.\textsuperscript{62} There can be other way of solving this problem of maternity that the custody of child should be given to the fit mother who is mentally and emotionally stable to support the child.\textsuperscript{63} If both the mothers are fit enough, then the method of social parenthood i.e. the mother who first intended to bring the child in to world must be followed.\textsuperscript{64}

\textbf{3.2.4 Disintegrating Family System:} Surrogacy raises serious questions regarding the nature of the family unit and particular relationships with in the family unit.\textsuperscript{65} According to religious and social conservations, surrogacy arrangements lead to threat to traditional family and more particularly the role of women as wives and mothers.\textsuperscript{66} It is believed that these arrangements are a kind of threat to the traditional family norms as it introduces a third party in to the family which is unconventional.\textsuperscript{67} It is further believed that this arrangement fragments the inherent social and moral bonds of kinship.\textsuperscript{68} It is believed that the biological links with in the family weakens more in case of traditional surrogacy agreements.\textsuperscript{69} Moreover, surrogacy challenges the assumptions of maternal bonding which is based on the concept of a natural and instinctive link between the mother and her child during the process of pregnancy and

\begin{thebibliography}{10}
\bibitem{61} Supra note 6 at 371.
\bibitem{62} Supra note 18 at 358.
\bibitem{63} Supra note 56 at 522.
\bibitem{64} Supra note 32 at 11.
\bibitem{68} Supra note 37 at 165.
\bibitem{69} Michelle Ford, “Gestational Surrogacy is not Adultery: Fighting the Religious Opposition to Procreate”, 10 \textit{Barry L. Rev.}, 81-102 at 98 (2008).
\end{thebibliography}
birth.\textsuperscript{70} Thus it includes the denial of maternal instincts. It is due to this reason that surrogacy is treated as objectionable.\textsuperscript{71} It promotes disconnection for at least one person. It calls for woman to carry a baby for 9 months and then requires that she should relinquish the child.\textsuperscript{72}

It does not fit easily with current values or conventional notions of family which never recognizes the use of payments in getting a child.\textsuperscript{73} It is also not according to current values of society.\textsuperscript{74} The other concerns also include the physical and mental consequences of being born to a surrogate as well as potential family breakup due to unfavourable approach of the courts in case of dispute.\textsuperscript{75} It also include the situations where surrogate mother decides to keep the baby, a change in the circumstances of the intended parents where in they become incapable of taking custody of the child, or the situation where they decide not to proceed with the agreement as the child is diagnosed with some problem, or the situation where intended parents simply have a change of heart and decide that they will not proceed with the arrangement. In these circumstances uncertainty prevails over the welfare of the child. It is further argued that surrogacy should be prohibited as it poses a danger to sanctity of marriage and integrity of family.\textsuperscript{76} It is based on the assumption that traditionally it is believed that procreation must be within the family i.e. between the couple and third party or person must not interfere as it would change the nature of the family.\textsuperscript{77}

However, on the other hand there are arguments which refute all the opponent believes in relation to surrogacy. It is argued that the opponent arguments have failed to see the breaking up of family ties due to the infertility of the woman. It can be up to the extent of ending relationship with the intended woman in case she is unable to bear the child especially in the society like India.\textsuperscript{78} In these societies children are

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\textsuperscript{70}L. Van Zyl and Avan Niekerk, “Interpretations, Perspectives and Intentions in Surrogate Motherhood”, \textit{Journal of Medical Ethics}, Vol. 26, No. 5, 404-09 at 405(2000).
\textsuperscript{71} Sheela Saravanan, “Transnational Surrogacy and objectification of Gestational Mothers”, \textit{Economic and Political Weekly}, Vol. XLV, No. 16, 26-29 at 27 (17\textsuperscript{th} April 2010).
\textsuperscript{72} Supra note 2 at 9.
\textsuperscript{73} Supra note 21 at 33.
\textsuperscript{74} Supra note 21 at 34.
\textsuperscript{76} Supra note 20 at 546.
\textsuperscript{77} Supra note 38 at 124.
\textsuperscript{78} Supra note 38 at 125.
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always considered as desirable and necessary. In fact childlessness is treated as greatest threat to relationship of marriage.\textsuperscript{79} It is believed that instead of disintegrating family system, surrogacy helps in building more close relationship with in the family due to the child. Moreover, more close association is formulated between the couple due to endless efforts made by them jointly for getting a child through surrogacy.

Further there is another important question that is required to be considered that whether the information regarding the surrogacy should be disclosed to the child or not. It is due to the fact that non disclosure of information can damage the family relationship and can also disturb the deep rooted societal values of family.\textsuperscript{80} The advocates of the disclosure are of the opinion that if it is not disclosed then it can be destructive for the family as secrecy over the birth of the child can become a stigma for the child and cause emotional harm to the child parent relationship.\textsuperscript{81} It is not only necessary for a child to know the biological parents to fulfil psychological needs, but also required for medical necessity as well as for attaining trust of the child.\textsuperscript{82} Although limited research have been made on the personal narrative of children born through assisted reproductive technology, the clinical experience regarding family secret has shown that if the biological origin of the child is not disclosed, it can result in greater psychological upheaval for child as well as family.\textsuperscript{83} It is also found that the children who are told about the biological origin at an early age do not show any adverse reaction as compared to grown up children as in their case it has become part of their identity.\textsuperscript{84} Thus there is no harm in disclosing the fact to the resultant child.

\textbf{3.2.5 Destruction of Parent Child Relationship:} It is argued that surrogacy arrangement destroys the parent child relationship. In case of pregnancy even through surrogacy it is evident that a deep attachment or bond develops in the course of the prenatal and postnatal relationship between mother and child. It can adversely affect


\textsuperscript{82} \textit{Supra} note 79 at 534.

\textsuperscript{83} \textit{Supra} note 81 at 435.

\textsuperscript{84} \textit{Id.}, at 436.
the child psychologically at the time of separation from mother.\(^{85}\) In this way the children born to surrogate mothers can be at high emotional risk.\(^{86}\) It is generally believed that the association with genetic parents has a positive effect on psychological development. If it is true then children born of surrogacy will be affected by the loss of genetic mother.\(^{87}\) It is believed that if a child attachment relationship is severed by one parent, the child suffers emotional and psychological harm.\(^{88}\)

Further it is asserted that the arrangement can cause harm to the child psychologically due to fact of exchange of fee. In such a situation, the love of the parent for the child will not be unconditional but depend upon whether the child is a good product or not.\(^{89}\) The child can also suffer identity crisis because he may not be able to decide about his real mother. The question becomes more important during adolescence.\(^{90}\) On the other hand apart from the separation from birth mother, the proximity can also cause problems. It also has adverse impact on the psychology of child when he came to know about his gestation. It might be possible that he is eager to meet his gestational or carrying mother. This again weakens the family ties between intended parents and resultant child.

However, the supporters of surrogacy argues that all these arguments against surrogacy have no support of facts and data analysis as limited data is available in regard to psychological impact on the child.\(^{91}\) Social science research has also shown that children develop attachment relationship with parents in their early life and that is quite essential for the well being and development of the child. It includes physical, emotional care, stability and security.\(^{92}\) It also has neurological effect on the development of the child’s brain. If the development is secure and bonds are strong, then it provides emotional security, ability to cope with stress and increase of self

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\(^{86}\) Supra note 37 at 133.

\(^{87}\) Supra note 30 at 271.


\(^{89}\) Supra note 37 at 161.

\(^{90}\) Supra note 37 at 162.

\(^{91}\) Supra note 6 at 350.

\(^{92}\) Supra note 88 at 249.
A child develops attachment with a person who on daily basis fulfil the physical as well as psychological needs of the child. Thus it is believed on the other hand that all the problems can be resolved if the child is brought up in a healthy and careful environment.

3.2.6 Devastating Effect: The long-term effects of surrogacy contracts are not actually known, but there is a fear of the same among the opponents of surrogacy. They are of the opinion that it will have adverse impact on the child who learns that her life was bought, that she is the offspring of someone who gave birth to her only to obtain money. It also have adverse impact on the natural mother who served as surrogate as she has to bear the burden of isolation along with the sale of her body. When the custody of the child is given to the intended parents, the child is relinquished for the sake of money. It is believed that it can result in moral degradation of child on attaining majority.

Arguments are also raised regarding the prospective harm to the child and the chances of exploitation are high if the child is born with any kind of deformity. It is also feared that if the surrogacy arrangements are allowed then the parents will prefer surrogacy arrangements in comparison to adoption as the child in that case will have a genetic link with the intended parents. Issues are also raised regarding the suitability of the intended parties. There is involvement of moral risk in case of surrogacy arrangements. It may be possible that during the course of pregnancy the surrogate may become ill or die. The doubt regarding the situation is that whether in such a case the intended parents will be bothered about the situation at all or not as they will be able to take the plea that she has consented for the surrogacy arrangement. It is further argued that the arrangement has adverse impact on surrogate's own child as it is often required that the surrogate must have previous pregnancy.

However, on the other hand there are arguments which consider all the allegations as baseless. Those who favour surrogacy are of the opinion that the arguments of

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93 Supra note 88 at 250.
95 Supra note 32 at 50 & 51.
96 Supra note 67 at 236.
opponent fail to understand that if the surrogate is not well during pregnancy, then it will also affect the health of the child. On this pretext the parents will be rather more careful towards surrogate in order that there is no harm to the child. Moreover, in case the parents are not the intended parents, there is no absolute guarantee that they will give same care and protection to the child of their own as is expected from the infertile couple.\textsuperscript{98} Further the empirical evidence suggests that children born through other assisted reproductive technologies are functioning well in spite of their conception through donated gametes.

The evidence which is available suggests that extent to which the child will be at risk would depend upon the quality of life he is being given by the intended parents.\textsuperscript{99} As far as the fear to child is concerned, that is ill founded because from the moment of birth of the child, he will be under the custody of intended parents who have made all the efforts to bring him in to the real world.\textsuperscript{100} According to them, mere existence of the genetic link with the child will not ensure the emotional bond. It will also not ensure that the child will never be subject to sale by the natural parents. As far as impact on surrogate’s own child is concerned, if the surrogate fully and honestly explain to the children that what she is doing and what are the consequences, the child will automatically understand and there will be no problem in this regard.\textsuperscript{101} As far as risk to the child is concerned, it can be minimized by undertaking home study or home condition of the intended parents.\textsuperscript{102}

\textbf{3.2.7 Inadequate Bargaining Process:} In case of surrogacy arrangements it is argued that there is inadequate bargaining power between the contracting parties.\textsuperscript{103} It is believed that the surrogate mothers who are usually poor and unsophisticated have unequal bargaining power as compared to the infertile couple who are at least well-off, if not rich. This imbalance leads to contracts that are unconscionable for poor

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\item \textsuperscript{97} Supra note 15 at 136.
\item \textsuperscript{98} Supra note 38 at 128.
\item \textsuperscript{100} Supra note 41 at 217.
\item \textsuperscript{101} Supra note 85 at 687.
\item \textsuperscript{102} Supra note 41 at 228 & 229.
\item \textsuperscript{103} Catherine London, “Advancing a Surrogate Focused Model of Gestational Surrogacy Contracts”, 18 Cardozo J. L. & Gender, 391-422 at 392 (2011-12).
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women. In yet another case where the women are on the verge of destitution, they choose to enter into such an agreement to ensure their bare necessities, i.e. food and shelter. It is argued that they engage in an activity that they deem as immoral, exploitative and inhuman, because it is their only option. They are so desperate that they agree to do anything for money. In a country like India, women who are poor, illiterate village inhabitants fall a prey to economic pressures to serve as a surrogates. Thus it is the economic and social pressures that compel the underprivileged woman to act as surrogates.

However, on the other hand it is argued that the low payment also makes a contract oppressive. There is another possibility that if the payments are made illegal, then it may be possible that it is not shown directly in order to make the surrogacy arrangements valid though actually it is paid to the surrogate. Surrogacy contracts are deemed as inadequate even if the surrogate is paid financially as the benefit to the commissioning party is so great that any payment will not do justice to the act done. It is argued that these problems can be overcome by establishing good relationship between the parties to surrogacy. Its can be ensured by determining post birth surrogacy relationship of the parties. It must be pre decided that even though surrogate is giving birth to the child, she will not be interfering in raising the child. It is further argued that the contract should also address about the establishment of parentage. All the parties should consult a physician, psychiatrist or psychologist to discuss the repercussions which can arise in surrogacy contract.

3.2.8 Success Rate is Very Less: It has been estimated that in a general population of women having regular intercourse, 60 out of 100 ovulatory cycles show evidence of

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105 A related argument has been voiced by many feminist writers, emphasizing that women will be converted into breeding stock against their will.
106 Supra note 103 at 397.
107 Supra note 103 at 405.
108 Supra note 99 at 7.
109 Supra note 15 at 129.
111 Id., at 432.
pregnancy. In case of surrogacy, the process of IVF is followed. In case of treatment through IVF, the first time conception is a rare event. It is believed that it does not guarantee a successful conception or pregnancy. It can also cause a number of problems to the surrogate as well as the child. As far as the women are concerned it can result in hypertensive disorders, anemia, hemorrhage, heart failure and ovarian cancer. In case of child it can lead to death and if the child survives then there are medical and developmental problems.

According to a study by Shady Grove Fertility Centre in Maryland US, only 8 percent of the couples adopting IVF succeed in getting a child. All the IVF cycles were reviewed between 2004 and 2008. Out of 110,000 fertilized egg cells, only 31,437 resulted in viable embryos. Usually just one or two embryos are implanted at a time and other are frozen. The report highlights that even if it is assumed that all the frozen embryos are used, 8,366 babies will theoretically be born, just 7.5 percent of all the fertilized eggs, which is quite less in number. According to the other study carried by Human Fertilization and Embryology authority in United Kingdom, it has been suggested that only 23% of IVF treatments results in a baby. Although thousand of babies have been born out of this procedure, yet a study reveals that in 1986 in over 120 IVF programs were carried in United States. However, most of the program has not had a pregnancy and even on best of the programs the success rate was 20%. It further evidenced that if the treatment is successful, then further there are other risks involved like multiple pregnancies etc. Women who undergo IVF treatment are subjected to hormonal stimulation, which results in super ovulation that

113Supra note 21 at 35.
114Gracy Andrews, “Issues are Complex and Need Innovative Solutions”, Indian Journal of Medical Ethics, 2 (4) at 126, (October- December 2005), Available at www.ijme.in/issues134.html.
115IVF Children at Higher Risk of Cancer”, The Indian Express, at 7, 21 July 2010 (Wednesday).
116Stephanie Saul, “Most In Vitro Kids are Twins, Carry Special Risk”, The Hindustan Times, at 7, 12th October 2009 (Monday).
118“Conception is a Rare Event, Fertility Study Shows”, The Indian Express at 14, 30th October 2010 (Saturday).
119Supra note 6 at 350.
120Supra note 21 at 37.
121Supra note 6 at 351.
enhance the chances of getting more than one embryo for implantation for increasing the likelihood of a successful pregnancy.\(^{122}\)

The thinkers who favour surrogacy on the other hand believe that there is no applicability of such situations in case of surrogacy. One example is cited in this regard which depicts the practical experience of Bourn Hall Clinic, United Kingdom which is associated with IVF surrogacy from 10 years that no clinical or legal problem have arisen apart from certain minor issues like poor quality oocytes, difficulty for coping up with the failure of successful pregnancy or miscarriage. The clinic is of the opinion that treatment works and is successful, complications are rare and of minor nature.\(^{123}\) Moreover, in other study it was found that approximately 29\% of the cycles performed on women under the age of thirty-five resulted in live births, as compared to only 8.7\% of those performed on women thirty-nine and older. Medical professionals believe that egg quality decreases with age and this accounts for the dramatic decrease in fertilization and live births per cycle for older women.\(^{124}\)

As far as the ill effects of multiple pregnancies are concerned, it can be regulated by way of fixing a cap on the number of embryos transferred to the fetus.\(^{125}\) The same measure was adopted in Sweden where only single embryo transfer is permitted and as a result of it in 2004 only 5.6\% of all births are multiples as compared to 35\% in U.S. Moreover, the researchers in U.S. have developed a formula that can predict whether the fertility treatment will succeed more accurately or not. This new test according to the researchers would increase the success rate of IVF from 20\% to 40\%.\(^{126}\)

### 3.3 Ethical and Social Issues in relation to the Surrogate:

Various kind of ethical and social issues are raised that surrogacy has become a trade or business in spite of the fact of reproduction involved in this arrangement. Surrogates are assisted reproductive technology service providers who undertake risk and perform a critical

\(^{122}\) Supra note 10 at 159.
\(^{125}\) Supra note 117 at 495.
\(^{126}\) “New Test Developed to Predict the Success of IVF”, *The Indian Express*, at 14, 24\textsuperscript{th} July 2010 (Saturday).
job of gestating a child for making profit. As far as the motive of women who are serving as surrogates are concerned, they have different attitude towards surrogacy. Some have guilt over their past adoption, some need to re enact their own childhood, some are reported to enjoy being pregnant, some want to experience perfect birth. In most case altruistic or other consideration play an important role, but money also serve as an important part of decision to act as a surrogate. It is treated as an attractive option for the poor surrogate mother for their need for money as well as for an infertile to get a child who is biologically related. However, on the other side it also has the tendency to exploit surrogate as the profit is earned by the commercial agencies or middlemen who act as intermediaries in this arrangement. In both cases of surrogacy, arguments are advanced in relation to exploitation, physical and psychological impact on the surrogate on the one hand and autonomy, freedom, economic gain on the other. These can further be divided in to different sub points:

3.3.1 Exploitation of Women: Exploitation could be described as a situation where a person is under coercive pressure to make a certain decision. Financial consideration is often regarded as coercive. Surrogacy arrangements are often deemed as exploitative. In case of surrogacy it is argued that whether it is commercial surrogacy or altruistic surrogacy arrangements it results in exploitation of the surrogate. Surrogacy is exploitative in three ways, Firstly, it uses the people as a means to an end, secondly it treats the reproductive labour as any other right, and thirdly it violates the respect of women. The exploitation is more in the poverty stricken and traditional societies. In this case the family members can coerce the women to act as surrogate for getting money. In case the money is exchanged between the parties i.e. the commissioning parents and the surrogate, it can not be

128 Supra note 21 at 20.
129 Supra note 21 at 21.
132 Supra note 20 at 551.
133 Supra note 66 at 24.
134 Supra note 131 at 184.
135 Supra note 42 at 671 (2012).
compared with the risk taken by the surrogate or her self sacrifice in the form of devoting attention towards child whom she knows that it does not belong to her. If on the other hand, no money is exchanged i.e. surrogacy is altruistic, then also the intended parents gain more than the surrogate in the form of a child without giving anything in lieu of that.

The different requirements to be fulfilled by a surrogate for the procedure of pregnancy further raise apprehensions about the exploitation of women.\(^\text{137}\) For carrying out the surrogacy arrangement, a woman is required to deliver the baby for the intended couple. It further requires the involvement of some agency in order to find out a suitable woman who can act as surrogate for the intended parents. This process will again require some kind of advertisement, which as such is not allowed by law anywhere. However, there are several instances, which reflect the giving of advertisement by clinics and agencies without any authority from government. This use of unlawful means can exploit the women acting as surrogates as these agencies can fix up their own commissions for arranging surrogate and deducting same money from the expenses of surrogate who gets it from intended parents.\(^\text{138}\) Thus the surrogate is also exploited by intermediaries who take advantage out of surrogacy contracts.\(^\text{139}\)

The surrogate mother is paid by the couple who want the child, and it is possible that the mother may not be adequately paid by intended parents.\(^\text{140}\) Thus this arrangement can result in exploitation of the needy women.\(^\text{141}\) Even in a particular instance it is mutually advantageous transaction i.e. both parties have gained from the procedure, then also it is exploitative of the surrogate as it is treated as an immoral act.\(^\text{142}\) Moreover, the condition in which the surrogate lives during pregnancy is also exploitative of her self-respect, privacy and autonomy. There is a study conducted in

\(^{137}\)Rajesh Bardale, “Made in India: Ethics of Outsourcing Surrogate Motherhood to India”, Indian Journal of Medical Ethics, Vol. 1 Issue 1, 56-57 at 56 (2009).
\(^{139}\)Supra note 66 at 30.
\(^{140}\)Correspondence”, Indian Journal of Medical Ethics, Vol. 6 Issue 1, 2009 at 1, Available at www.ijme.in/issues.html.
\(^{142}\)Supra note137 at 56.
India which reflects that many surrogate clinics have dormitory like group homes where number of surrogates are kept together. They are not allowed to go outside except for the day of appointment with doctors or meeting or visiting family members. They are reported as missing their own children. They do it mainly for money as in most of the cases the money received by the surrogate is four or five times more than their annual household income.  

On the other end there are arguments which prove that surrogacy is not exploitative rather it involves a sense of gratitude for the couple who are infertile. As per these arguments if the agreement undertaken between the parties is of the altruistic nature, then the surrogate is not exploited rather she does an act of kindness and charity by giving birth to a child for a couple who were having no chance to get a biological child. Moreover, even if the transaction is undertaken on commercial basis i.e. money is exchanged between the parties, then also it does not lead to exploitation of the surrogate as she is paid for the services she is rendering or has rendered for bringing up a child to the living world. The payment is to appreciate the time, energy given by the surrogate during the process of carrying of the child.

The thinkers who support surrogacy contend that surrogacy is not exploitative of women. According to them, it is not the only motive for a woman to serve as a surrogate. She can also serve as a surrogate for helping the infertile couple for raising a child. It is contended by different authors and nations that surrogacy arrangements in which payment are exchanged must be banned. However, even in case of altruistic arrangements, there are chances of exploitation of women as the arrangement will go underground. In case of altruistic surrogacy also exploitation is possible as the woman can be coerced to assist physically or emotionally to an infertile relative. Thus limiting the payment to such a woman will again be

146 Supra note 99 at 4.
147 Supra note 131 at 192.
Moreover, it is argued that people always look for their own interest and will never enter into the contract which is mutually exploitative rather they will only be interested if the contract is mutually advantageous. Surrogacy arrangement in any way is not exploiting the poor woman. Rather it is giving an opportunity to the woman to get employed for better living standards.

The data compiled on surrogate shows that they are not economically exploited. Even the doctors opine that exploitation is a norm in case of surrogacy arrangement, but even then it can not be termed as exploitative as the surrogate is not forced to undertake this arrangement. It can not be termed as coercive as the proposal to make some one better off does not restrict or reduce the freedom, rather it increases different options. It is argued that even if exploitation in this regard is applicable sometimes, it can be overcome if short waiting period is given to the surrogate for decide about the relinquishment of the custody of child without infliction of penalty. Moreover, there can not be chances of exploitation as the interest of the intended parents is to protect the health of the surrogate because if her health will be in a good condition then only health of baby can be assured. It is only by caring the surrogate that they will be able to get a healthy child. Thus in this way it is beneficial for the surrogate. Thus surrogacy is not exploitative as it does not make the surrogate worse off.

3.3.2 Commodity of Women: Another issue regarding surrogacy is that it leads to commodification of women. Commodification is ethical and cultural rather than a legal concept. It may be possible that legally concept is not acquainted with the sale, but it will commodify the child if it replaces the pre natal norms with that of market

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148 Supra note 99 at 17.
149 Supra note 46 at 2313.
150 Supra note 85 at 684.
151 Supra note 94 at 1235.
152 Supra note 71 at 27 where an IVF doctor in Mumbai has given his opinion in regard to surrogacy arrangements.
153 Supra note 38 at 131.
155 Supra note 42 at 676.
157 Supra note 18 at 361.
norms. In particular, many feminist scholars argue that women who serve as surrogates and rent their womb for giving birth to a child, not their own in fact commoditize their reproductive capacity. There is a fear among the feminist that as a result women will be hired as surrogates on the basis of their beauty, intelligence, or race. It further raises the fear of black marketing, breeding farms which will turn impoverished women in to baby product and there is also possibility of selective breeders at a price. It is argued that there is exchange of money between parties. It commodifies body of a woman. It permits the surrogate mother to exchange an inalienable right i.e. her quasi-parental right for money. It is also argued that in case of surrogacy arrangements, reimbursement is for the relinquishment of the child which is another form of commodification.

On the other hand, it is believed that if these arrangements are banned, it will cause more harm to parties as interest of no party will be protected. In this situation some argue that the benefit of the transaction outweighs the alienation of labour by the surrogate. Surrogacy is a unique service as it permits surrogate to get honoured for her work. Thus there should be giving of financial return to the surrogate for making use of the reproductive capacity. Giving birth to the child is the most valuable service which must be compensated. As far as the commodification argument is concerned, it can not be acquainted with it as there is no compulsion either on the couple or on the woman to enter in to the contract. In case of surrogacy arrangements no one wants to commodify the child so that she is treated as a good which can be sold and consumed in the ordinary course of business. Moreover the psychological

158 Supra note 43 at 20.
159 Supra note 94 at 1233.
160 Supra note 145 at 688.
162 Supra note 49 at 420.
163 Commodification describes in monetary terms all things of value to the person including personal attributes and relationships; they are considered fungible and commensurable; their only value is their exchange value.
164 Supra note 43 at 21.
165 Supra note 103 at 398.
166 Supra note 85 at 674.
167 Supra note 38 at 131.
168 Supra note 42 at 678.
169 Supra note 85 at 675.
170 Supra note 46 at 2328.
and intentional aspects of personhood are more important morally than material and physical which is also reflected in case of surrogacy.\textsuperscript{171}

### 3.3.3 Comparison to Prostitution:

Surrogacy is further compared to prostitution as in both the cases the payment induces the woman to give free intrusion in to their body.\textsuperscript{172} In case of surrogacy contract, a woman is contracting her body and herself, when she agrees to carry a child for unknown persons. From this perspective surrogacy is regarded as new form of female prostitution in a way that in the past, women used to sold their bodies for sex and now for reproductive purposes in case of surrogacy.\textsuperscript{173} Feminists in this context argues that surrogacy is a form of reproductive prostitution where mostly woman do not want to become surrogates, but are forced especially in country like India under economic pressure to serve as surrogate for rich couples.\textsuperscript{174} Most feminist argued that surrogacy is a form of prostitution or slavery where the surrogate is enticed for money and if money is not exchanged between the parties then also she is exploited on the basis of social expectation of self sacrifice. It is feared by the feminist that in some period of time if surrogacy is allowed to continue then the surrogates will emerge as a class of breeders and it will further result in emergence of reproductive brothel.\textsuperscript{175}

However, the supporters of surrogacy are of the opinion that surrogacy is different from prostitution as it is a generous act on the part of woman to give birth to a child for other.\textsuperscript{176} It can be compared with child care or day care services but not with the prostitution.\textsuperscript{177} In case of prostitution, prostitute sells their sexual services for a fee and surrogate sell their reproductive services for a fee.\textsuperscript{178} They are of the opinion that surrogacy is different from prostitution as the purpose of both the arrangements is concerned. In case of surrogacy, the purpose is to bring a child in to the real world, which is desperately wanted by the infertile couple. In case of prostitution on the

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\textsuperscript{171} Supra note 33 at 69.
\textsuperscript{172} Supra note 103 at 404.
\textsuperscript{173} Supra note 47 at 323.
\textsuperscript{174} Hasina Parvin, “Surrogate Mother: Legalize Surrogacy in India”, Civil Services Chronicle, Vol. xix, 22-26 at 25 (December 2008).
\textsuperscript{175} Supra note 41 at 213.
\textsuperscript{176} Supra note 47 at 325.
\textsuperscript{177} Supra note 47 at 341.
\textsuperscript{178} Supra note 37 at 160.
other hand, the objective is solely to have physical pleasure.\textsuperscript{179} Moreover, prostitution includes an intimate act between the persons and allows a man to have control over body of a woman. However, in case of surrogacy, surrogate is not selling physical control over her body and the intended father is not contracting to manipulate her body directly.\textsuperscript{180} The supporters further argue that those who compare surrogacy with prostitution fails to understand the involvement of infertile woman apart from the surrogate.\textsuperscript{181} Further surrogacy contracts are less like prostitution and more like other service contracts that individuals enter into for purely financial reasons.\textsuperscript{182} In surrogacy one person gives one or two other people a lifetime of joy, not just a few moments of physical enjoyment. This is a benefit both to society and to individuals. In surrogacy, one woman gives the gift of a child to one or two people who otherwise could not be able to have one. The surrogate herself gains money; she may also gain intrinsic benefit knowing that she has helped someone.\textsuperscript{183} Hence it can not be compared with prostitution.

\textbf{3.3.4 Comparison to Adultery:} Doubts are often raised by scholars that the practice of surrogacy is contrary to the unity of marriage and to the dignity of the procreation of a human.\textsuperscript{184} It is believed that the use of third-party genetic material in case of surrogacy violates the sanctity and covenant the marriage covenant and amounts to adultery. It is believed that in case of surrogacy as third person is involved; it will result in the dissociation of husband and wife which is gravely immoral. It also infringes the rights of child who is to be born of a father and mother who are bound by marriage.\textsuperscript{185} However, on the other hand, it is argued that these arguments fail to understand that the basis of adultery is tied to sexual relationship which is not applicable to the surrogacy arrangements. In case of surrogacy the relationship is plainly a reproductive relationship with the surrogate who is a third party outside marriage. It can not in any sense be treated as sexual relationship.\textsuperscript{186}

\textsuperscript{179} \textit{Supra} note 94 at 1238.
\textsuperscript{181} \textit{Supra} note 156 at 27.
\textsuperscript{182} \textit{Supra} note 33 at 67.
\textsuperscript{183} \textit{Supra} note 47 at 321.
\textsuperscript{184} \textit{Supra} note 69 at 97.
\textsuperscript{185} \textit{Supra} note 69 at 98.
3.3.5 **Harmful to Individual Surrogate:** It is further argued that surrogacy arrangements are harmful to the individual surrogate as it is impossible for a woman to grant the necessary informed consent in order to become a surrogate mother. An informed consent has been defined as an autonomous action by subject or patient that authorizes the professional either to involve the subject in research or to initiate the medical plan for the patient or both. An informed consent is given when the patient with substantial understanding or in substantial absence of control by other or intentionally or expressly authorize either for a medical plan or research involvement.\(^ {187}\) Thus harm to the surrogate in this case is based on two reasons; first, her consent is never informed because the hormonal changes that accompany pregnancy make it impossible for a surrogate to predict how she will feel when she relinquishes the child at birth.\(^ {188}\) A woman cannot give informed consent until she has the experience of giving birth as each pregnancy is different from the other.\(^ {189}\) If it is presumed that surrogate is carrying the child for the first time, then definitely she is unaware of the physical and psychological risks associated with surrogacy. Other situation can be when she had already given birth to the baby, in this situation also as every pregnancy differs, it cannot be ascertained that same feeling will be undertaken by the woman as of her first pregnancy.

The consent of the surrogate can not be considered as voluntary and informed as it is taken prior to the birth of the child. In this situation she can not give consent for surrendering the child before the child is actually to be surrendered. The feminist are also of the opinion that she can not give voluntary and informed consent before actual pregnancy.\(^ {190}\) Thus informed consent is not applicable in case of surrogacy arrangements.\(^ {191}\) This argument is based on the assumption that it is unnatural for a mother to give up her child under any circumstances.\(^ {192}\) Secondly the critics argue that consent to become a surrogate is never fully voluntary because surrogates only enter


\(^ {188}\) *Supra* note 28 at 496.

\(^ {189}\) *Supra* note 41 at 216.

\(^ {190}\) *Supra* note 41 at 217.

\(^ {191}\) *Supra* note 103 at 400.

into these agreements out of economic necessity.\textsuperscript{193} The involvement of money further makes the consent involuntary.\textsuperscript{194} Even if it is presumed that the child will be surrendered by the surrogate, then also questions can be raised regarding voluntarily giving up the child keeping in mind the physically weak and emotionally vulnerable status of the surrogate.\textsuperscript{195}

On the other hand the supporters of surrogacy argue that the relinquishment of the child by the surrogate is voluntary as there is absence of pressure when the decision regarding it is made before the birth of the child.\textsuperscript{196} It is believed that a number of arrangements have already been undertaken by different couples in relation to surrogacy and hundred of babies are born out of these arrangements. However, very few arrangements have been litigated and newspapers and magazine interviews are confirming these facts and figures.\textsuperscript{197} Surrogacy arrangements are treated as involuntary. However, as the most surrogates already have pregnancy, so they know about all the risk and feelings relating to carrying of pregnancy. Moreover, it is argued that the risk of involuntary consent can further be reduced if improved information regarding the experience of surrogate is given to the woman who has to serve as surrogate.\textsuperscript{198} It is further argued that so far as the argument of involuntary nature of relinquishing the custody or rights over the child after birth is concerned, it contravenes the general meaning of informed consent. The law can not support this presumption that a party to contract can retract from the agreed terms if she has not experienced it.\textsuperscript{199}

\subsection*{3.3.6 Psychological Impact on Surrogate:} It is argued that there are negative psychological effects of serving as a surrogate.\textsuperscript{200} Psychological trauma is applicable to both kinds of surrogacy whether it is commercial or altruistic. In case of altruistic surrogacy the woman can be coerced to assist the infertile relative.\textsuperscript{201} It is argued

\begin{footnotesize}
\begin{enumerate}
\item Supra note 21 at 20.
\item Supra note 32 at 34.
\item Supra note 67 at 243.
\item Supra note 154 at 109.
\item Supra note 75 at 1030.
\item Supra note 99 at 7.
\end{enumerate}
\end{footnotesize}
further that the surrogate mothers are at greater risk of psychological problems after the relinquishment of the child.\textsuperscript{202} During the implantation of embryos through the technologies like IVF, there is a possibility of transferring more than one embryo at one time which is risky for women. Further when more than one fertilized ova is transferred and all survive, then doctors generally abort the excessive.\textsuperscript{203} This process of IVF treatment is extremely stressful.\textsuperscript{204} Responses to IVF treatment and its failure are also linked to psychological vulnerability of women.\textsuperscript{205} Further if the treatment is successful and surrogate carries the fetus to term, then also it has psychological impact on the surrogate at the time of relinquishment of the child.

A study was carried on over 32 surrogates in the state of Michigan and California in order to know the psychological impact on the surrogate mother. The result of this study was that the problem is in the screening process which lays more emphasis on legal and medical aspects as comparison to psychological and mental health of the surrogate.\textsuperscript{206} It was found on the basis of study that there is always a bias in the surrogacy programme. It is also found through study that a surrogate who has large network and more people in whom she can repose the confidence experience less grief while relinquishing the child.\textsuperscript{207} In England, Royal College of obstetricians and gynecologist have advised against the surrogate motherhood as according to them the mother can suffer emotionally due to the forcible surrender the child.\textsuperscript{208} It is further argued that surrogacy arrangements have impact on the surrogate’s own child. In case of commercial surrogacy, when the child after delivery is handed over to the intended parents, it can raise the anxiety of surrogate child that he can also be sold by her parents. That will have negative impact on child.\textsuperscript{209}

However, on the other hand there are enough studies which found that there is no psychological impact on the surrogate even after giving custody of child to the intended parents. According to a report, fewer than 1\% of surrogate change their

\begin{thebibliography}{99}
\item 203 \textit{Supra} note 21 at 39.
\item 204 \textit{Supra} note 5 at 114.
\item 205 \textit{Id.}, at 115.
\item 206 \textit{Supra} note 202 at 313.
\item 207 \textit{Id.}, at 315.
\item 208 \textit{Supra} note 67 at 245.
\item 209 \textit{Supra} note 34 at 55.
\end{thebibliography}
mind. The percentage of women regretting child bearing or undertaking surrogacy arrangements is same.\textsuperscript{210} According to American Medical Association, the risk of psychological detriment to surrogate is small and it is outweighed in case there is lack of genetic tie to the fetus and where there is mutually beneficial arrangement.\textsuperscript{211} According to the association in order to reduce the psychological risk in traditional surrogacy arrangements, the surrogate mother should be given the opportunity to avoid the contract.\textsuperscript{212} The purpose of the contract is not to destroy the rights of a mother, but to induce a woman to become mother.\textsuperscript{213}

It is argued that the relationship between surrogate and child is not having any psychological impact over the surrogate as she knows from the very beginning that she has to give the custody of child to the intended couple.\textsuperscript{214} Another research also shows that majority of surrogate experience little difficulty in relinquishment of child and there is no existence of maternal bond.\textsuperscript{215} Further it is argued that from the very beginning the surrogate is clear that the child is not her own, she never treats her previous pregnancy as similar to pregnancy by way of surrogacy.\textsuperscript{216} There is further evidence that 75\% of biological mothers change their heart, however only one percent of surrogates have similar change of heart and that too is applicable in case of gestational mothers.\textsuperscript{217} Another empirical study of surrogate mothers indicates that surrogates evidence low levels of maternal-fetal attachment. In a study of 14 surrogates both traditional and gestational surrogacy, it was found that surrogate were more affected by the relationship with the commissioning couple than with the child born of the surrogacy, and that they had formed bonds with the couple rather than with the child.\textsuperscript{218}

\begin{footnotes}
\item[210] Supra note 52 at 2343 & 2344.
\item[212] Id., at 635.
\item[213] Supra note 156 at 29.
\item[214] Supra note 35 at 134.
\item[217] Supra note 85 at 687 & 688, See also Supra note 52 at 74.
\end{footnotes}
A study was conducted by the Family and Child Psychology Research Centre at City University, London, UK in 2002 and it concluded that surrogate mothers rarely had difficulty in relinquishment of a surrogate child. It was also found that the intended mothers showed greater warmth to the child than mothers conceiving naturally. Anthropological studies of surrogates have shown that surrogates engage in various distancing techniques throughout the surrogate pregnancy so as to ensure that they do not become emotionally attached to the baby. Moreover if there is some possibility of psychological impact, there are ways of avoiding it. Only that woman who has previously delivered a child can be allowed to carry the child. Further the counseling process can be followed at regular intervals in order to remove the distress of the surrogate. It is believed that the exclusive counseling will abstain her from not forming any bond with the child. It is also seen that many surrogates intentionally try to foster the development of emotional attachment between the intended mother and the surrogate child. Further it is argued in respect of impact on surrogate’s own child that according to a new research, which was presented at the annual meeting of the British Fertility Society it is proved that surrogacy arrangements do not have negative impact on surrogate’s own children. Thus it is clear that surrogacy arrangements have no psychological impact on the surrogate.

3.3.7 Health Risk for the Surrogate: It is argued that the drugs and medical procedures which are used in surrogacy to stimulate the production of eggs, for oocyte retrieval, foetal reduction and embryo implantation are associated with a wide variety of complications. The result of these medications can be fatigue, dizziness, mood changes including manic depression and serious allergic drug reactions. Weight gain and Oedema are other side effects. The drugs are also known to increase the chances of ovarian cancer and life threatening ovarian hyper stimulation syndrome. Surrogate has also to undertake prenatal screening and diagnosis which on the one hand gives information to the intended parents regarding the fetus, on the other hand

220 Supra note 99 at 16.
carries physical and psychological risk to the surrogate as well as the child. There are different techniques which are utilized in order to carry this diagnosis which includes first trimester screening and chorionic villi sampling (CVS), amniocentesis. These methods can result in physical harm to fetus as well as surrogate. Amniocentesis can result in bleeding, infection, early labour, injuring fetus umbilical cord or brain, increases the chances of miscarriage while CVS can also lead to increase the birth defects and chances of miscarriage. Moreover, if these tests reveal some kind of complications or defects in the child to be born, then the intended parents will be more interested in not carrying away with the fetus and it might be possible that surrogate is not ready for miscarriage as she wants to continue with the child. Thus it can raise a set of problems between the parties.

Researchers have found that intended parents are interested in termination of pregnancy if the screening, diagnosis etc. shows disorder or defect in the fetus. Further studies have also shown that women who become pregnant via IVF have twice the risk of an ectopic pregnancy which can require surgery or cause death. However there are still other studies which depict that chance of ectopic pregnancy is more if the women already have problems affecting their tubes. However, on the other hand it is argued that these problems can be overcome if such an arrangement is implemented where the surrogate herself is given the choice for conducting of test or other kind of diagnosis on her which is not so necessary or not based on any complication or not suggested by the physician or the doctor.

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3.4 Ethical and Social Issues in relation to the Child: In order to see the interest of the child some of the things are to be considered which among other includes psychosocial, medical and material requirements. Psychosocial requirements are related with need for identity of the child and his personal security and stability. Medical interest involves health risk. Those who are born with high order, multiple pregnancies have increased risk of being born with congenital illness. Material interest includes interest in the form of food, clothing, shelter, education, needs etc. The social ethical perspective in relation to the child to be born can be categorized in to following sub headings:

3.4.1 Commodification of Children and Amounts to Baby Selling: It is argued that the widespread availability of reproductive technologies has created a sense in the society that child can be produced. Thus they are treated as commodities rather than a gift of God. In the past, the children were generally conceived by loving and intimate act starting from the conception itself. However, with the result of technology, the child is easily viewed as a product which can be manufactured by parents by adopting expensive technological techniques. These viewpoints are also applicable in case of surrogacy. Involvement of money component in case of surrogacy contracts raises the question of the potential harm that money transactions can cause to the child. In case of surrogacy a womb of a woman is treated as commodity, which can be rented for a few months for a stipulated amount of money to carry the fetus for a term. It is further argued that the child is literally exchanged between complete strangers for the purpose of satisfying needs of the adults. The relation between the surrogate and the child is thus commercial rather than emotional. Thus there is a fear which surrounds this argument is that if surrogacy will be allowed, then babies, like pedigreed dogs and fresh produce, will become commercial products that can be bought and sold at market prices.

230 Supra note 80 at 38.
231 Id., at 39.
232 Supra note 2 at 13.
234 Supra note 43 at 20.
236 Supra note 71 at 26.
Moreover, it is believed that if the payments are allowed in the case of surrogacy arrangements, then the children will become a commodity in the market place where they will be sold like other things of value depending upon their colour, race, and religion etc. raising higher prices for better children.\textsuperscript{237} Further it is argued that even in those cases in which there is no specification of money or compensation; it is difficult to believe that no compensation is decided between the parties. It rather raises doubt about non specification for the purpose of avoiding the charges of baby selling.\textsuperscript{238} The situation becomes more complicated when the intended parents refuse to take the custody of the child especially when the child is born with deformity. In such a situation, both the parties will try to excuse themselves from liability and child will then be treated as unwanted commodity.\textsuperscript{239} The intended parents will only require a perfect child as they have given value for the child. On the other hand, surrogate is gestating child only to hand it over to the couple. She is having no intention to keep the child.\textsuperscript{240} Moreover, there can be tendency of causing harm to the child by the surrogate in case she has to keep the child as she may treat the child as unwanted thing in her family.\textsuperscript{241}

On the other hand, it is argued that even enough arguments are available that surrogacy leads to commodification of child, it is not so. Surrogacy does not commodify the children as they are not properties which can be a subject matter of sale and purchase. It can only be acquainted with buying of services of surrogate or the agency undertaking agreements with the commissioning couple. The payment to the surrogate can be considered as a payment for refraining from pursuing a parental or custody claim to the child.\textsuperscript{242} The payment is given to the surrogate for her services for carrying child to the term.\textsuperscript{243} It is often argued that the commodification do not devalues human life. It can not be asserted that children who are born out of surrogacy arrangements are not humans as compared to the children born through traditional

\textsuperscript{237} Supra note 38 at 128.
\textsuperscript{238} Supra note 21 at 19 (1990)
\textsuperscript{239} Supra note 20 at 557.
\textsuperscript{240} Supra note 37 at 157.
\textsuperscript{242} Id., at 97.
\textsuperscript{243} Supra note 154 at 109.
arrangements. The contract of surrogacy can not be acquainted with the baby selling as all the parties have deep concern about the well being and health of child. Both the parties have mutual interest. The interest of parents is involved in getting healthy child, so they will also take care of the surrogate by establishing good relations with her.

Surrogacy agreement can not be acquainted with the commodification as in case of gestational surrogacy agreement, the embryo belongs to the parents so it can not be treated as baby selling as the surrogate can not sell that thing over which she has no right. It is argued that the surrogate is just selling her gestational services as is undertaken by woman in other services like in case of wet nurses, athletes, models etc. Further the surrogacy agreement can not be acquainted with baby selling as the arrangement is entered in to before the conception of the child. The gestator is not avoiding an unwanted pregnancy or there is no fear of rearing of the child. After the child is born, he will be put up in the custody of the intended parents who will provide the best care to the child. Thus in any way it can not be treated as any form of baby selling. The term commodity can not be used for the children as commodity is typically meant for consumption and do not have unique subjective value. But the child is unique and thus it is inappropriate to describe the relationship of parent to the child as commodification. It is asserted that surrogate is not abandoning the child rather she is agreeing to surrender the custody of child to a couple because of whom she has entered in to the arrangement. Moreover, it is morally right to contract the production of the child for other whether it is on the basis of altruistic or commercial arrangements. It can not be acquainted with the child selling as the intended parents are going to rear up the child and for that purpose they will also be making personal sacrifices.

3.4.2 Psychological Harm to the Child: It is believed that surrogacy harm children psychologically as well as affect the social welfare of children. The children born

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244 Supra note 210 at 631.  
245 Supra note 46 at 2317.  
246 Supra note 49 at 420.  
247 Supra note 85 at 683.  
248 Supra note 94 at 1237.  
249 Supra note 50 at 733.  
250 Supra note 33 at 66.
through surrogacy are treated as manufacturing products. It will further enhance the chances of social stigma. It is feared by the opponents that the child born through surrogacy will be at risk if his custody is given to the intended parents. However, on the other hand the supporters of surrogacy argue that the children who are conceived through normal means run a far greater risk as compared to children born of surrogacy. For e.g. risk to the child is more when their parents divorced or there is birth of an illegitimate child. These arguments are further refuted by the opponents through a controlled study which represents that no distinction was found with family relationship of natural born child and child conceived through assisted conception. According to them the fear that babies born to surrogate mothers may suffer psychological harm is unfounded according to the first study into the long-term effects of donor children.

Researchers found that parents show more warmth to surrogate children and are more emotionally involved than the parents of traditionally conceived babies. The study also revealed that surrogate babies show no difference in temperament and behaviour as compared to non-surrogate babies and virtually all surrogate mothers have no problems handing over babies. There is another study which examined the impact of surrogacy on mother child relationship and child psychological adjustment. The study found that there is no difference on basis of child adjustment, maternity positivism or negativity as far as naturally born or surrogate child is concerned. It further suggests that warmth, communication and conflict are better predictors of adjustment of child than family structure.

251 Supra note 46 at 2321.
253 David Derbyshire, “Surrogate Babies Suffer No Ill Effects, Says Study”, Available at www.telegraph.co.uk. A study led by Prof Susan Golombok, director of the Family and Child Psychology Research Centre at City University, London, looked at 43 families with a child born through surrogacy arrangements. It compared them with 51 families with a child conceived through in vitro fertilisation with donated eggs and 86 families with a naturally conceived child. The first phase of the study looked at the families when the child was aged between nine and 12 months. Two fifths of the surrogate families involved full surrogacy, where the commissioning mother and father are the genetic parents and the conception is through IVF. The rest were partial surrogacy, where the surrogate mother is also the genetic mother.
255 Id., at 1588.
mother, intended parents and the child. The surrogacy children does not differ form naturally conceived children with respect to social, emotional or cognitive development.256 Thus the study concludes that there is no negative development on the child in families.257

3.4.3 Serious Health Risks to Children: It is often argued that surrogacy carries health risk to children. These risks are more in case of child born through In Vitro Fertilization (IVF). In case of surrogacy IVF technique is often used. The reports show that the twins born out of IVF go home without serious complications; however government statistics show that 60 percent are born prematurely. It increases their chances of death in first few days of life, as well as other problems including mental retardation, eye and ear impairment and learning disabilities.258 According to another report, the children conceived by IVF are forty two percent more likely to develop cancer in their early years.259 However, it is represented by the supporters that no controlled study has incorporated or monitored actual determination of physical disorders to children born using IVF procedures.260 Moreover, the association between IVF and birth defects is controversial. Some of the studies found that the IVF is safe as far as the birth defects are concerned.

On the other hand, there are studies which provide that there is an increase risk to the child.261 The study was conducted to determine the risk of birth defects in children conceived after infertility treatment as compared with risk of defects in naturally conceived children born in the state of Iowa.262 It was found through the study that although IVF has statistically significant increase in major birth defects as compared to control children, multiple gestations are mainly associated with the birth defects in

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257 *Id.*, at 220.
258 *Supra* note 116 at 12.
259 A team of Swedish scientists arrived at the conclusion after analyzing the records of over 26,000 children born after IVF treatment and linking them to the registers of cancer diagnosis. The researchers found that 53% children developed cancer ranging from a very young age up to 19 years old against expected number of 38. The cancer included Leukamia, cancer of eye and nervous system, solid tumours.
260 *Supra* note 252 at 20.
262 *Id.*, at 1310.
children. The study has further found that another possible reason for increase in birth defects with IVF is the genetic defect inherent in either or both of the parents leading to infertility and subsequent birth defect in the child. The study concluded that there is a need to determine by further studies that birth defects or health related problems are only due to the technique of IVF or it is just secondary to the health problems in child.

There is yet another study which was carried in Finland on children born through IVF from 1996-99 and these children were monitored till 2003 to examine the post natal health of these children. The study found that although the health of most of IVF children was good, yet these children have more problems than naturally conceived children. However, the study reveals that this is due to multiple births as the singleton children born out of same procedure have fewer problems in comparison. Further there is also a tendency of poor pre natal health in these children. However, that is dependent on the infertility, its treatment and varying health problems during pregnancy rather than IVF. Thus there is a need to consider the pre natal and post natal reasons to exactly know about the health problems of the children. The technique of IVF alone is not a reason for health risk to the children.

Thus after considering the social ethical perspectives of surrogate motherhood arrangements in relation to child and the surrogate, it can be concluded that these socio ethical challenges can be overcome if some things are carefully considered and analyzed by the parties. First is that at the time of entering in to the contract, the parties must be made clear about all the risks involved and consequences that can follow from the surrogacy contracts. Secondly, in order to minimize the harm to the women, the reproductive rights of women must be recognized. More emphasis must be paid to psychological counseling or evaluation of the surrogate. It must be part of the surrogacy contract for whole of period of pregnancy so that the surrogate does not feel psychological and emotional distress on relinquishing the child. Thirdly, the

263 Id., at 1311 & 1312.
264 Id., at 1313.
265 Id., at 1308.
267 Id., at 1825.
268 Id., at 1826.
primary focus should be on the potential impact on children. The development and well being of a child is more important as compared to the question that how he was conceived.\textsuperscript{269} If the surrogacy arrangements are not enforceable, the unborn child will be at risk. If the contract is unenforceable, then couple will not pay the surrogate as compared to the care and attention she is giving to resultant child. There is need for counselors who can guide and provide correct information about all the queries of the parties involved.\textsuperscript{270} Moreover, in case of child it must be taken in to account that it was intended parents who intended the birth of the resultant child. The majority of problems arise only when the arrangement goes unsupervised and counseling is not provided to the intended parents. Thus in order to make the arrangement a success more emphasis must be on the overall supervision and counseling needs of the parties rather than considering legal and financial basis.

\textsuperscript{269} Supra note 17 at 38.
\textsuperscript{270} Id., at 39.