

**CHAPTER -III**  
**SURROGACY: LEGAL, ETHICAL**  
**AND MORAL ISSUES**

## CHAPTER III

### SURROGACY: LEGAL, ETHICAL AND MORAL ISSUES

*“When nature lets you down, surrogacy steps in and resumes  
the process to bring you the gift of parenthood”*

...Anonymous

#### 3.1 Introduction

Infertility among married couples is a major problem affecting not only their marital life but also their social life. The assisted reproductive technologies have come to the help of such infertile couples. Until recently, they had only two options either to adopt a child or to remain childless. However, with the advent of the new reproductive technologies, infertile couples now have the advantage of selecting from a number of options, including artificial insemination, in-vitro fertilization, and surrogacy. Thus human procreation can be accomplished through a variety of reproductive technologies that do not involve sexual intercourse. Of these new technologies, surrogacy is arguably the most controversial.

In surrogacy, a woman is artificially inseminated with a man’s sperm. The woman not only bears his child in her womb but later on after the birth of the child also hands over that child to the man and his wife to be brought up as their child. In this method, the egg and sperm are united in a culture dish, where the egg is fertilized and the resulting embryo is implanted in the woman’s uterus<sup>1</sup>. Surrogate parenting is a scientific extension of the natural ability to reproduce. Surrogacy has become an attractive alternative for young couples to overcome the problems of adopting children and thereby to reduce high infertility rates<sup>2</sup>. Nevertheless, during the past

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<sup>1</sup> See, Judith Lynn Bick Rice, “The Need For Statutes Regulating Artificial Insemination By Donors”, *Ohio State Law Journal*, 1055 (1985).

<sup>2</sup> See, Steven M. Recht, “‘M’ is for Money: Baby M and the Surrogate Motherhood Controversy” 37

fifteen years, the practice of surrogacy has gained respect as an attractive reproductive alternative for infertile couples who wish to conceive a child biologically related to at least one of them<sup>3</sup>. Due to its various advantages when compared to adoption as well as other reproductive technologies, the practice of surrogacy has gained wide recognition all over the world and particularly in India. Developments in the procedures such as artificial insemination and in-vitro fertilization have made surrogacy a viable alternative means of reproduction in infertile couples<sup>4</sup>. Like any other technological advancement, surrogacy also has its own pros and cons which need to be addressed. This chapter elucidates the concept and meaning of surrogacy and traces the history and development of surrogacy from ancient to modern period. It highlights the advantages of surrogacy over other forms of ART. Further it identifies the various legal and ethical debates surrounding surrogacy and also examines the response of foreign countries. It also discusses the position of surrogacy in India and the legal framework for its regulation.

### 3.2 Surrogacy: Meaning and Definition

Surrogacy is an important method of assisted human procreation for those who cannot, or choose not, to procreate in the traditional manner<sup>5</sup>. Surrogacy, one of the most dramatic of the new reproductive technologies, is an arrangement by which a woman agrees to be impregnated by assisted conception, carries the resulting foetus, and relinquishes all parental rights of the child at birth<sup>6</sup>. This method of ART is like a boon to those married women who are unable to conceive due to various physical, genetic and medical reasons.

A woman at times may not be able to carry her own genetic offspring. For example, a woman might be unable to ovulate or carry a pregnancy, if she has lost her

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*American University Law Review*, 1013 (Spring 1988).

<sup>3</sup> Helena Ragone, *Surrogate Motherhood: Conception in the Heart*, West View Press, U.S.A. (1994), p.13.

<sup>4</sup> Lisa L. Behm, "Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States", 2 *DePaul J. of Health Care L.* 557 (Spring 1999).

<sup>5</sup> Kathryn Venturatos Lorio, "Alternative Means of Reproduction: Virgin Territory for Legislation", 44 *Louisiana Law Review*, 1641 (1984), at p.1655.

<sup>6</sup> Katherine B. Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?", 68 *Indiana Law Journal*, 205 (1992).

womb and ovaries because of cancer or if she may have never been born with them. Similarly, a woman might be able to ovulate but unable to carry a pregnancy because of high blood pressure or risky skin diseases. By using a surrogate, such women could still raise a child that is their partner's biological child<sup>7</sup>. Further, a woman who cannot retain the conceived foetus due to a history of spontaneous abortion may demand her partner to go in for this arrangement to fulfill her dream of having a biological child. Also women suffering from life threatening diseases like kidney diseases or multiple sclerosis may also opt for this method<sup>8</sup>. Likewise, in this commercial and materialistic world it is not surprising that cases have been reported in which figure conscious women have opted for this method with the desire of maintaining their beauty and hence have allowed some other woman to bear a child for them<sup>9</sup>. Career may also be cited as a reason encouraging the husband to go in for a surrogate arrangement<sup>10</sup>.

Surrogacy is traditionally defined as the procedure whereby a couple contracts with a woman (known as the surrogate) to conceive a child for them, carry it to term, and then relinquish to the couple all her parental rights<sup>11</sup>. The word 'surrogate' has its origin from a Latin word '*surrogatus*', meaning a substitute, that is, a person appointed to act in the place of another. Hence a surrogate mother is a woman who carries a child on behalf of another woman, either from her own ovum or from the implantation in her womb of a fertilized egg from another woman.

*Black's Law Dictionary* defines surrogacy as an "agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband. She agrees to conceive a child, carry the child to term and after the birth, assign her

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<sup>7</sup> Jonathan Herring, *Medical Law and Ethics*, Oxford University Press, United Kingdom (2006), p.271.

<sup>8</sup> See, L. Haberfield, "Surrogate Motherhood in Victoria: What now for Altruistic Surrogacy?", Monash University, Australia, 37 (1988), available at <[www.heiononline.org/](http://www.heiononline.org/)> Visited on 10.5. 2011.

<sup>9</sup> For example, Hollywood celebrities such as Deidre Hall and Joan Lunden, Michael Jackson, Angela Bassett, and Kelsey Grammer. See Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self*, University of California Press, California (2010), p.298; Cara Birrittieri, *What Every Woman Should Know About Fertility and Her Biological Clock*, The Carrier Press, Inc., U.S.A. (2005), p.144.

<sup>10</sup> Sidharacharyulu, "Surrogacy: Legal Implications", 3 *N. C. L. J.* 60 (1998), at p.61.

<sup>11</sup> Christine L. Kerian, "Surrogacy: A Last Resort Alternative for Infertile Women or Commodification of Women's Bodies and Children?" 12 *Wisconsin Women's Law Journal*, 113 (1997), at p.115.

parental rights to the biological father and his wife<sup>12</sup>”. This definition, however, refers only to one of the forms of surrogacy arrangements, namely, artificial insemination surrogacy (also known as traditional surrogacy)<sup>13</sup>. The *Encyclopedia Britannica* defines ‘surrogate motherhood’ as the practice in which a woman bears a child for a couple who are unable to produce children in the usual way. *Warnock Commission Report* defines surrogacy, as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth<sup>14</sup>. Another standard definition of ‘surrogacy’ is offered by the *American Law Reports* in the following manner:

“...a contractual undertaking whereby the surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural or biological father, to bear and deliver it to the natural or biological father, and to terminate all of her parental rights subsequent to the child’s birth”<sup>15</sup>.

The *New South Wales Law Reform Commission* has also defined surrogacy as ...an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer custody of the child at or shortly after birth<sup>16</sup>.

Thus a “surrogate” is “a person appointed to act in the place of another”. The word “mother”, when used as a verb, includes the meaning “to give birth to”. Thus, a “surrogate mother” is a woman appointed to give birth to a child in the place of

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<sup>12</sup> Bryan A. Garner (ed.), *Black’s Law Dictionary*, West -Thomson Reuters, U.S.A. (6<sup>th</sup> ed.- 1990), p.1445.

<sup>13</sup> *Supra* n. 4.

<sup>14</sup> See, *The Report of the Committee of Inquiry into Human Fertilization and Embryology*, 1984 (U.K.) , para 8.1, available at <<https://www.ethicshare.org/node/751750>> Visited on 10.5.2011.

<sup>15</sup> See, “Surrogacy: Is it Your Right?”, available at <[www.iskarasmith.blogspot.com](http://www.iskarasmith.blogspot.com)> visited on 10.5.2011.

<sup>16</sup> See, New South Wales Law Reform Commission, *Artificial Conception - Discussion Paper 3: Surrogate Motherhood*, Sydney (1988), p 6. A similar definition is presented in National Bioethics Consultative Committee, *Surrogacy: Report 1*, Australia (1990), p. 3, available at <[www.catalogue.nla.gov.au/Record/2622475](http://www.catalogue.nla.gov.au/Record/2622475)> Visited on 5.6.2011.

another<sup>17</sup> or a woman who is artificially inseminated and will carry the resulting child to term and then will relinquish the child to the biological father and his wife<sup>18</sup>. However, the term also applies to the technique of fertilizing an ovum either in another women's womb or in a test tube, and then transplanting the embryo into the womb of the surrogate who will carry it to term<sup>19</sup>. Thus surrogacy is the practice whereby a woman carries a child for another with the intention that the child should be handed over after its birth either voluntarily or for a fee. This carrying of a child may take different forms.

A woman who cannot bear a child for herself may commission another woman to carry a child for her. Such a woman who asks for another to carry the pregnancy for her is called '*Commissioning Mother*', and the woman who agrees to bear the child in her womb is called the '*Carrying Mother*'. The commissioning mother may provide the egg, so she is called the '*Genetic Mother*' also. The genetic father is the husband of the commissioning mother or in some cases may be an anonymous donor<sup>20</sup>.

It is to be noted here that, surrogate motherhood is not a treatment for the historical problem of infertility, but it is a means for procuring a child who is genetically related to at least one of the parents of a childless couple<sup>21</sup>. This technology can be used by any of the following category of individuals such as married fertile couples, infertile couples, single, gays, lesbians, widowed, divorced and post-menopausal women. Though the use of surrogacy as a method for procuring a biological child has become more prevalent and widely accepted in the recent decades, it is to be noted that this method is not a twenty first century innovation, but it was also known even in the ancient times.

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<sup>17</sup> Hutton Brown, Miriam Dent, *et. al*, "Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth", 39 *Vanderbilt Law Review*, 597 (1986), at p.633.

<sup>18</sup> Mimi Yoon, "The Uniform Status of Children of Assisted Conception Act: Does it Protect the Best Interests of the Child in a Surrogate Arrangement", 16 *American Journal of Law and Medicine* 525 (1990), at p.529.

<sup>19</sup> Walter Wadlington, "Artificial Conception: The Challenge for Family Law" 69 *Virginia Law Review*, 465 (1983), at p.475.

<sup>20</sup> *Supra* n.10.

<sup>21</sup> *Ibid*.

### 3.2.1 Origin and Development of Surrogacy

The concept of surrogacy has come into lime light, since the case of Elizabeth Kane in 1980. This technology focuses on fulfilling the desire and dream of individuals to have their own biological child with the help of another individual by using scientific advancements. This scientific procedure encompasses long standing concerns of human society to have an offspring to continue their legacy, name, family and property. The origin and development of surrogacy can be traced to the ancient cultures, religions, and developments all over the world which have shaped the attitude of the generations towards surrogacy and its human rights implications.

The practice of surrogate motherhood has had a long history and it was accepted in many ancient cultures. For example, the ancient Babylonian Legal *Code of Hammurabi* (18<sup>th</sup> century BC) recognized the practice of surrogacy and actually laid down detailed guidelines specifying when it would be permitted. The *Old Testament* suggests that surrogacy was accepted in early Jewish society as a legitimate way by which infertile couples could have children and create a family of their own. The National Bioethics Consultative Committee (NBCC) Report described the traditional Torres Strait Islander<sup>22</sup> surrogacy practice of a woman or couple having a child for another woman or couple<sup>23</sup>. Other societies such as the Kgatla people of Bechuanaland in Southern Africa and some traditional Hawaiian groups undertook similar practices. In these communities surrogate motherhood is seen as an act of friendship and generosity<sup>24</sup>. However, in European cultures, though surrogacy was undoubtedly being practiced in the past, it had never been formally recognized by the society or the law. Thus surrogacy was known in almost all the ancient cultures all over the world. The origin and roots of surrogacy can be traced to the major religions

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<sup>22</sup> *Torres Strait Islanders* are the indigenous people of the Torres Strait Islands, part of Queensland, Australia.

<sup>23</sup> P. Ban, *The Application of the QLD Adoption Act 1964-1988 to the Traditional Adoption Practice of Torres Strait Islanders*, Master of Social Work Thesis, University of Melbourne, (1988), p.72, quoted in National Bioethics Consultative Committee, *Surrogacy: Report 1*, Australia (1990), p 38. available at <[www.catalogue.nla.gov.au/Record/2622475](http://www.catalogue.nla.gov.au/Record/2622475)> Visited on 5.6.2011.

<sup>24</sup> Glenda Emmerson, “Surrogacy: Born For Another”, *Research Bulletin*, No 8/96, Queensland Parliamentary Library, Publications and Resources Section, Brisbane, (September 1996).

of the world. The various religious, cultural and mythological writings also provide an interesting insight into the use and practice of surrogacy.

### 3.2.2 Surrogacy in Mythology

Surrogacy is not so new as far as “new” reproductive technologies are concerned, and it is often noted that the practice dates back to Biblical times. The *Old Testament* offers the example of Abraham’s infertile wife, Sarah, who “commissions” her maid Hagar to bear her a child by persuading Abraham to sleep with her<sup>25</sup>. Similarly, Rachel, the barren wife of Jacob, commissions her maid Bilhah to have a child by convincing Jacob to sleep with her<sup>26</sup>. The class distinctions between the commissioning and surrogate women in these stories reflect modern day practices. These two stories are few of the earliest examples of surrogacy practices.

In Indian mythology there are various references to the practices which are similar to modern surrogacy. For example, in the *Bhagvata Purana*, there is a reference to the birth of Balaram, which suggests the practice of surrogate motherhood. Kamsa, the wicked king of Mathura, had imprisoned his sister Devaki and her husband Vasudeva because a prophecy had informed him that their child would be his killer. Every time Devaki delivered a child, he smashed its head on the floor. In this way he killed six children. When the seventh child was conceived, the Gods intervened. They summoned the Goddess Yogamaya and with her help they transferred the foetus from the womb of Devaki to the womb of Rohini (Vasudeva’s other wife who lived with her sister Yashoda across the river Yamuna, in the village of cowherds at Gokul)<sup>27</sup>. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kamsa that the child was

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<sup>25</sup> See *Genesis* 16.

<sup>26</sup> See *Genesis* 30:1-8; See, Angie Godwin McEwen, Note, “So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy”, 32 *Vand. J. Transnat’l L.* 271 (1999), at pp.274-75.

<sup>27</sup> Dr. Devdutt Pattanaik, “Infertility, Artificial Insemination & Surrogate Mother in Hindu Mythology” in Rachel Blatt (ed.), *Wombs For Rent? Gestational Surrogacy and the New Intimacies of the Global Market*, Submitted in partial fulfillment of the requirements for a Bachelor of Arts with Honors in Anthropology Brown University, (April 2009).

born dead<sup>28</sup>. Thus the child conceived in the womb of Devaki was incubated in and delivered through another womb i.e. of Rohini<sup>29</sup>. It is to be noted here that the present modern day developments in surrogacy allow transfer of foetus which is developed in the test tube to the womb of a women. But the above incidence in Indian mythology refers to a type of surrogacy in which the developed foetus was transferred from one womb to another womb. It reflects the level and extent of science and medical knowledge of ancient Indians.

Another popular story is that which is related to the birth of Kartikeya also called as Subramanya Swamy. Lord Kartikeya is the Commander of the army of the Gods<sup>30</sup> and he is also considered as the God of fertility by tradition<sup>31</sup>. He is the son of Lord Shiva, the father of universe and Goddess Parvati, the mother of universe. It is said that at the request of Gods for a person for the post of their army commander, Shiva gives a bija to be implanted in Mother Ganga<sup>32</sup>. In the modern times the bija can be considered as the genetic material of the father and because it is implanted in the river Goddess Ganga, she can be considered as a surrogate. However after sometime it becomes unbearable for the surrogate mother Ganga to carry the embryo<sup>33</sup>. She makes a miscarriage. Then the God of fire Agni keeps the embryo on Saravana (A kind of grass believed to have the potential of nectar) and which may be considered as modern day incubator. The Sapta matrakas who can be considered as the nurses or care takers fed the child. Thus the God Kartikeya is born<sup>34</sup>. This incidence can also be considered as a form of surrogacy in which initially the womb of a woman is used for conception of the foetus and later on the foetus is developed in incubator due to the inability of the surrogate mother to carry the foetus to the full term. At the same time this incidence also points out the various problems which may

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<sup>28</sup> Raghav Sharma, "An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India", (working paper, on file with Nat'l Law Univ., Jodhpur), available at <<http://ssrn.com/abstract=997923>> Visited on 10.5.2011.

<sup>29</sup> *Supra* n.27.

<sup>30</sup> Bharadvaja Sarma, *Vyasa's Mahabharatam*, Academic Publishers, Kolkata (2008), p.299.

<sup>31</sup> Basavaraj Naikar, *Indian English Literature*, Atlantic Publishers and Dsitributers, New Delhi (2003), p.23.

<sup>32</sup> Dr. B. R. Kishore, *Lord Shiva*, Diamond Pocket Books Pvt. Ltd., New Delhi (2001), p.23.

<sup>33</sup> See, "Murugan", available at <<http://en.wikipedia.org/wiki/Murugan>> Visited on 20.9.2012.

<sup>34</sup> *Ibid*.

arise during a surrogacy procedure like inability of surrogate mother to carry foetus to full term, or a situation where surrogate mother wants to terminate her pregnancy before the full term. Thus the ancient Indian mythology offers a solution to the present day conflicts which may arise between the surrogate mother and commissioning parents.

Another well known story is that of the birth of Kauravas. According to the *Mahabharata*, Queen Gandhari (the wife of King Dhritarashtra) suffered a miscarriage. The embryo was split into one hundred pieces by the sages (doctors of the day) and implanted in one hundred Kumbhas and subsequently hundred children were born. Some of the historians argue that these Kumbhas are equivalent to the present day anonymous surrogate women<sup>35</sup>. Thus it can be said that the glimpses of modern developments in surrogacy can be traced to the ancient mythology.

### 3.2.3 Development of Modern Surrogacy

The history of modern surrogacy methods can be traced back to 1899. It is to be noted that the various practices, customs and traditions followed by different communities all over the world have had a great impact on the development of surrogacy as a form of Assisted Human Conception. The practices followed by American Indians<sup>36</sup> can be considered as the beginning point of modern surrogacy methods. If a woman of American Indian tribe was found to be infertile, she would be sent to the medicine man. If even after his treatment, the woman was not able to conceive, the chief of the tribe had the power to grant liberty to her husband to take another woman and to have a child with that woman. Likewise, in recent European history, especially in Spain, it was common for the kings to take in several women for begetting a male child<sup>37</sup>. Modern historians may criticize this practice as adultery or

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<sup>35</sup> Nigam, M., Nigam, R., Chaturvedi, R., and Jain, A., "Ethical and Legal Aspects of Artificial Reproductive Techniques including Surrogacy", in *Anil Aggrawal's Internet Journal of Forensic Medicine and Toxicology*, Vol. 12, No. 1 (January - June 2011); See also, Dr. Mrs. Pratibha Ganesh Chavan, "Psychological and Legal Aspects of Surrogate Motherhood", available at <[www.allindiareporter.in](http://www.allindiareporter.in)> Visited on 10.5.2011.

<sup>36</sup> *American Indian* may refer to, *Native Americans* in the United States or Indigenous people of the America.

<sup>37</sup> See, Ashley Kate, "History of Surrogate Motherhood", available at <<http://ezinearticles.com/> 2458369 > Visited on 10.5.2011.

polygamy, but it is to be noted that this practice was followed only for begetting a biological child and some similarity can be drawn with modern surrogacy<sup>38</sup>. It can be seen that in these practices there is no use of technology.

The development of science and technology in the medical field gave rise to the modern surrogacy methods, which involves integration of science and technology with natural process of human conception. The successful birth of Louise Brown with the help of in-vitro fertilization in 1978 in England confirmed the thinking of the scientists and medical experts that a woman other than the genetic mother could be used to carry the foetus and deliver it<sup>39</sup>.

In 1979, Dr. Richard Levin, gave suggestion to an infertile couple to use a woman as a donor as well as to carry the resulting foetus and deliver the child. Dr. Richard Levin examined in detail the pros and cons of the issue as well as the various social, ethical, religious and legal issues. As a result, the couple reached an agreement with a woman to act as a donor and surrogate mother. The surrogate mother was artificially inseminated in the early 1980's and she conceived within the first month. She gave birth to a baby boy after nine months and handed over the baby to the couple. The right of the surrogate mother as a legal guardian was terminated and guardianship was handed over to the biological father through a legal process<sup>40</sup>. The pseudonym of the surrogate woman involved in this case was Elizabeth Kane, who agreed to give birth as a traditional surrogate mother for a financial compensation of \$10,000<sup>41</sup>. This type of surrogacy arrangement is now popularly known as commercial surrogacy. Thus this case is considered to be the world's first case of planned surrogacy.

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<sup>38</sup> For example it is similar to present day traditional surrogacy. Traditional surrogacy means that, the surrogate mother contributes genetic material to the resulting child and gives birth to it as her own child.

<sup>39</sup> For more details about the birth of Louise Brown, See, "Surrogate Motherhood", available at <<http://www.mother-surrogate.net/eng/>> Visited on 10.5.2011.

<sup>40</sup> Ivory, "The History of Surrogacy", available at <[surrogatemother.com](http://surrogatemother.com)> Visited on 10.5.2011; Also See, "Surrogacy", available at <<http://researchkathy.blogspot.com>> Visited on 10.5.2011.

<sup>41</sup> See, "The History of Surrogacy", available at <[www.fertilityproregistry.com](http://www.fertilityproregistry.com)> Visited on 10.5.2011.

In 1983, a menopausal woman at Monash University in Melbourne, Australia became the first woman to give birth to a baby by using donated eggs. It is to be noted that though this case is not a surrogate pregnancy, it is however a remarkable event which made the practice of gestational surrogacy possible. The year 1986 can be considered as a milestone in the history of surrogacy. In 1986 the world's first gestational surrogate pregnancy took place in USA. In this case the surrogate mother carried the biological child of a woman who had undergone an hysterectomy<sup>42</sup> and therefore was unable to carry a child. The identities of the couple and that of the surrogate mother were not disclosed. However Noel Keane, the lawyer who represented the couple said that surrogate mother was a 23 year old girl and she received \$10,000 for her service<sup>43</sup>.

The use of surrogacy as a procedure for procuring a biological child slowly gained acceptance. Generally, surrogacy practices were carried out in secret. However, the *Baby M Case*<sup>44</sup>, due to its peculiar nature brought surrogacy within the knowledge of public. In this case Mary Beth Whitehead gave birth to Melissa Stern as a traditional surrogate mother in 1986. However after the birth of the child, Mary Beth changed her mind and instead of handing over the child to the intended parents, she decided to keep the baby herself. As a result there was a two year legal battle with Melissa's biological father, Bill Stern, and intended mother, Betsy Stern, over custody. Finally, the Sterns were successful in getting custody of the child and Mary Beth was given a right of visitation<sup>45</sup>. This highly publicized case highlights the various conflicting legal and human rights issues involved in surrogacy and the need for a legal frame work for its regulation and control.

Along with the further developments in the field of surrogacy, there has been unprecedented increase in instances of application of surrogacy for procuring a biological child. One such instance is that of Teresa Anderson, a 54 year old woman

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<sup>42</sup> *Hysterectomy* is a surgery to remove a woman's uterus or womb. See for more, "Hysterectomy Fact Sheet", available at <[www.womenshealth.gov](http://www.womenshealth.gov)>Publications> Visited on 10.5.2011.

<sup>43</sup> See, "Surrogate has Baby Conceived in Laboratory", available at <<http://www.nytimes.com/1986/04/17/html>> Visited on 10.5.2011.

<sup>44</sup> *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

<sup>45</sup> *Ibid.*

who gave birth to five boys as a gestational surrogate mother in 2005 for a couple she had met online. In August 2007, 58 year old Ann Stopler gave birth to her twin granddaughters. Her daughter, Caryn Chomsky, was unable to conceive due to cervical cancer. Another incidence is that of 56 year old Jaci Dalenberg who became the oldest woman ever to give birth to triplets in 2008. She acted as a gestational surrogate mother for her daughter Kim, and delivered her own grandchildren. One of the landmark events in the history of surrogacy is that of a surrogate woman who gave birth to her own grandchild at the age of 61 years. This event took place in Japan in 2008<sup>46</sup>.

In India, the first gestational surrogacy took place in 1994 in Chennai<sup>47</sup>. In 1997, the first commercial surrogacy was reported in India. A woman from Chandigarh agreed to carry a child for 50,000 rupees in order to obtain medical treatment for her paralyzed husband<sup>48</sup>. Further in 1999, an Indian newspaper reported the story of a village woman in Gujarat who served as a surrogate for a German couple<sup>49</sup>. It is estimated that, in India, the number of births through surrogacy has doubled between 2003-2006<sup>50</sup>, and estimates range from 100-290 each year<sup>51</sup> to as many as 3,000 in the last decade<sup>52</sup>.

<sup>46</sup> See, "History of Surrogacy", available at <[www.information-on-surrogacy.com](http://www.information-on-surrogacy.com)> Visited on 10.5.2011.

<sup>47</sup> See, Geeta Padmanabhan, "Hope in the Test Tube", *The Hindu*, January 19, 2006, available at <<http://www.thehindu.com/thehindu/mp/2006/01/19/stories/2006011900540200.htm>> Visited on 10.5.2011.

<sup>48</sup> Sandhya Srinivasan, "Surrogacy Comes Out of the Closet", *Sunday Times of India*, July, 6, 1997, at p.1.

<sup>49</sup> Jyotsna Agnihotri Gupta, "Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies", 13 *Eur. J. Women's Stud.* 23 (2006), at p.30.

<sup>50</sup> Sudha Ramachandran, "India's New Outsourcing Business – Wombs", *Asia Times Online*, June 16, 2006, available at <[http://www.atimes.com/atimes/south\\_asia/hf16df03.html](http://www.atimes.com/atimes/south_asia/hf16df03.html)> Visited on 10.5.2011.

<sup>51</sup> See, Kritivas Mukherjee, "Rent-a-Womb in India Fuels Surrogate Motherhood Debate", *Reuters*, Feb. 12, 2007, available at <[www.reuters.com/article/latestCrisis/idUSDEL298735](http://www.reuters.com/article/latestCrisis/idUSDEL298735)>; See also, Alifiya Khan, "Surrogacy is Soaring in India", *Hindustan Times*, Sept. 18, 2008, available at <http://www.hindustantimes.com/StoryPage/>> Visited on 10.5.2011.

<sup>52</sup> See for more, Neeta Lal, "A Labour of Love", *Khaleej Times*, Feb. 29, 2008, available at <<http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/weekend/2008/Febr>> Visited on 10.5.2011.

### 3.3 Types of Surrogacy

Surrogacy is considered as a very sensitive and emotional issue which has far reaching impact on all the parties involved in it. Due to the delicate nature of surrogacy, it is vitally important that in order to be a successful procedure, all the parties are comfortable and confident with one another. There are various arrangements which are possible in surrogacy depending upon the suitability and convenience of the parties. This has given rise to various forms of surrogacy. Each surrogacy arrangement is unique, and the parties have the choice to select from several types of surrogacy, the one that is best and convenient to them<sup>53</sup>.

Surrogacy can be classified into different types on the basis of the type of agreement entered into, financial transactions and relationships involved and on the basis of the use of genetic material. One of the basic classifications of surrogacy is based on the nature of the agreement entered into by the parties. Thus surrogacy can be classified as formal or informal surrogacy. *Formal surrogacy* arrangements are those in which the nature and terms of the agreement between the surrogate and the commissioning couple are clearly specified, and are generally in writing. These arrangements are otherwise described as ‘contractual surrogacy’. This term denotes the potential legal enforceability of such agreements by a court of law. *Informal surrogacy* arrangements are ‘non-contractual’ and lack the legal requirements of an enforceable contract, in that they are often vague and uncertain. In practice, they are generally difficult to detect and control<sup>54</sup>.

Surrogacy can again be classified into two types i.e. *commercial surrogacy* and *altruistic surrogacy* depending upon the financial transactions and relationships involved between the surrogate mother and commissioning parents. *Commercial surrogacy* refers to arrangements which include payment of money or other benefits to the surrogate mother and, in some cases, her agents. *Altruistic surrogacy* refers to less formal arrangements between friends and relatives which involve no financial

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<sup>53</sup> Faith Merino, *Adoption and Surrogate Pregnancy*, Infobase Publishing, U.S.A. (2010), p.20.

<sup>54</sup> See, Jody S. Kraus & Robert E. Scott, “Contract Design and the Structure of Contractual Intent”, 84 *New York University Law Review*, 1023 (2009).

reward for the surrogate mother. However, the distinction between *commercial* and *altruistic* surrogacy can be blurred because *altruistic* surrogacy may still involve payment of medical and ‘out of pocket’ expenses. According to Meggitt, every woman involved in surrogacy is motivated by altruism, although some are paid<sup>55</sup>. Further, it is argued that money alone is insufficient to motivate a woman to become a mother in a surrogacy arrangement, and paid surrogacy just “perverts woman’s altruism”. The procedure of surrogacy involves the use of genetic material of the intended father or mother or surrogate mother and hence depending upon such use the surrogacy can be classified into two main types such as Traditional and Gestational Surrogacy.

### 3.3.1 Traditional Surrogacy or Partial Surrogacy

Traditional surrogacy is the most widely used method of surrogate pregnancy, as well as the most historically prevalent. Before the era of assisted reproductive technology and IVF, traditional surrogacy was the only form of surrogacy available. However this method was used in the ancient cultures and communities without the application of technology. The husband of the infertile woman would have access to another woman and after the birth of the child, the woman would hand over the child to the husband and his wife. The modern science and technology has made it possible for procuring a biological child with the help of another woman without sexual intercourse. In this process the woman is artificially inseminated with the semen of the husband of the ‘genetic couple’. Because it is her own egg that is being fertilized, the surrogate mother is genetically related to the foetus that she conceives. Therefore, any resulting child is genetically related to the male partner of the ‘commissioning couple’ but not the female partner<sup>56</sup>. Thus it is also known as *partial surrogacy* or

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<sup>55</sup> Meggitt, “Lessons to be Learnt in Parallels Between Adoption and Surrogacy”, *Policy Issues Forum*, (1991), p. 12, available at <210.8.42.131/documents/explore/ResearchPublications/.pdf> Visited on 10.5.2011.

<sup>56</sup> Peter Brinsden, “Clinical Aspects of IVF Surrogacy”, in Rachel Cook, Shelley Day Sclater & Felicity Kaganas, (eds.), *Surrogate Motherhood: International Perspectives*, Hart Publishing, U.K. (2003), p.101.

*natural surrogacy*, as the surrogate mother contributes genetic material to the resulting child and gives birth to it as her own child<sup>57</sup>.

Typically, insemination is performed by a doctor within a clinical setting, although some centers may perform it in the surrogate's homes based on the belief that the surrogate's comfort level should be respected. During this time, the surrogate mother agrees to refrain from sexual intercourse with any man, including her husband if she is married, from the point of signing the contract until a pregnancy is confirmed and the entire process which can take up to an year. Since the surrogate mother will be the genetic mother of the child conceived, traditional surrogacy presents a unique opportunity for contracting couples to choose the genetic heritage of their child—an opportunity that is not afforded to adoptive parents. Often, this means contracting couples can specify phenotypic characteristics that they desire in a surrogate mother and can screen for undesirable traits, such as a genetic history of mental illness or disease. Many couples also look for a surrogate that resembles either of them<sup>58</sup>.

When a surrogate is selected, she will be medically evaluated and tested for HIV as well as other venereal diseases. In some cases, the surrogate's husband is also tested for such diseases. When the surrogate has met contractual requirements for physical and mental fitness, she will be inseminated when fertile. Traditional surrogacy or partial surrogacy, though complicated by ethical uncertainty over the relationship between biological relatedness and kinship bonds, remains the most popular form of surrogacy in the world due to its high success rates and its low fees<sup>59</sup>.

### **3.3.2 Gestational Surrogacy or Total Surrogacy**

Gestational surrogacy is preferred by couples who desire a biological connection to their child, assuming the husband and/or wife have viable gametes. Gestational surrogacy, is defined as the treatment in which the gametes of the 'genetic couple', 'commissioning couple' or 'intended parents' are used to produce embryos

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<sup>57</sup> *Supra* n.24.

<sup>58</sup> *Supra* n.53 at p.17.

<sup>59</sup> *Id.* at pp.17-18.

by the process of *in vitro* fertilization (IVF). These embryos are subsequently transferred to a woman who has agreed to act as a host for these embryos. In this case, the ‘surrogate host’ is therefore genetically unrelated to any child that may be born as a result of this arrangement<sup>60</sup>. Thus it is also known as *total surrogacy* or *full surrogacy* because the foreign genetic material is implanted into a woman who gestates the child for another couple who are the genetic parents<sup>61</sup>.

In most cases, the contracting couple supplies the ova and sperm, which means the child conceived will be biologically related to them. However, in the event that one or both members of the contracting couple do not have viable gametes, the process may require donor eggs or sperm. Thus, in a gestational surrogacy, minimum three adults<sup>62</sup>, in some cases four<sup>63</sup> and in extreme cases five adults<sup>64</sup> may be involved in the conception of a child<sup>65</sup>. Due to the lower success rates and the number of individuals involved, gestational surrogacy is often more expensive than traditional surrogacy. In an interview, Helena Ragone<sup>66</sup>, a Director of one surrogacy center, referred to gestational surrogacy and IVF procedures as a “rip-off that simply prolongs the couple’s infertility while charging them outrageous sums of money per attempt<sup>67</sup>”. According to the U.S. Department of Health and Human Services (HHS), in 2004<sup>68</sup> the success rate per cycle at the average fertility clinic was 33.7 percent, by using non-frozen, non-donor eggs and embryos<sup>69</sup>.

It is to be noted that there are only two major forms of surrogacy all over the world, i.e. Traditional Surrogacy and Gestational Surrogacy. Both these forms of surrogacy have their own merits and demerits due to the differences in the procedure

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<sup>60</sup> *Supra* n.56.

<sup>61</sup> *Supra* n.24.

<sup>62</sup> i.e. Surrogate, Intended Father and Intended Mother.

<sup>63</sup> i.e. Surrogate, Intended Father and Intended Mother, Egg or Sperm Donor.

<sup>64</sup> i.e. Surrogate, Intended Father and Intended Mother, Egg and Sperm Donor.

<sup>65</sup> *Supra* n. 53 at p.18.

<sup>66</sup> An Anthropologist and the author of *Surrogate Motherhood: Conception in the Heart*, Westview Press, U.S.A. (1994).

<sup>67</sup> *Id.* at p. 33.

<sup>68</sup> U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, “Assisted Reproduction Technology Success Rates: National Summary and Fertility Clinic Reports”, (2004), available at <<http://ftp.cdc.gov/pub/Publications/art/2004ART508.pdf>> Visited on 6.8.2010.

<sup>69</sup> *Supra* n. 53 at pp.18-19.

involved and the expenses incurred. Regarding the acceptability of these two forms of surrogacy there are divergent opinions all over the world. In some countries, such as India, traditional surrogacy is considered highly a taboo, while in others, such as China, traditional surrogacy is the only legal surrogacy arrangement<sup>70</sup>. In certain countries like Israel and Ukraine, both the forms of surrogacy are allowed<sup>71</sup>. Depending upon the type of surrogacy used, the methods of surrogate parenting may also differ.

### 3.4 Methods of Surrogate Parenting

There are mainly three methods of surrogate parenting. The first method is the artificial insemination method which is the traditional method and includes three steps. In the first step, the surrogate mother is artificially inseminated with the biological father's sperm. In the second step, the surrogate mother carries the foetus in her uterus for nine months and gives birth to the child. Lastly, the surrogate mother terminates all parental rights over the child and gives it to the biological or adopting father for his custody or adoption. This procedure is commonly known as traditional surrogacy<sup>72</sup>. This method is normally used in cases where the wife is infertile and the husband is fertile.

The second method of surrogate parenting is in-vitro fertilization. It involves the following five steps. Firstly, a fertile couple desiring a child gives an egg and semen to a doctor. Secondly, the doctor fertilizes the egg with the sperm in that semen through in-vitro fertilization. Thirdly, the fertilized egg is implanted in the surrogate mother's uterus. Fourthly, the surrogate mother carries the foetus in her uterus for nine months and gives birth to the child. Lastly, the surrogate mother terminates all parental rights over the child and gives it to the couple who donated the egg and semen. This method is used when the wife has an abnormality in her reproductive organs that prevents her egg from being fertilized by her husband's

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<sup>70</sup> *Id.* at pp.17-18.

<sup>71</sup> Svitnev K., "Legal Control of Surrogacy – International Perspectives", in Joseph G. Schenker, *Ethical Dilemmas in Assisted Reproductive Technologies*, Walter de Gruyter GmbH & Co., Berlin (2011), p.162.

<sup>72</sup> See for more, Katharina Boele-Woelki, *Perspectives for the Unification and Harmonization of Family Law in Europe*, Intersentia, Oxford, U.K. (2003), p.414.

sperm or when the wife is unable to carry a child to term because she has an abnormality in her uterus. If the wife is able to conceive, but unable to carry the gestating foetus, the embryo transfer methods allow transfer of the naturally fertilized egg from the biological mother's womb to the surrogate mother's womb. This method is known as gestational surrogacy<sup>73</sup>.

The third method of surrogate parenting is a modification of the in-vitro fertilization method and known as donor surrogacy, which involves five steps. The first four steps are identical to that of in-vitro fertilization method. The fifth step, however, differs. Instead of giving the child to the couple who donated the semen and egg, the surrogate mother gives the child to adoptive parents who are not biologically related to the child. There have been no reported incidents of the use of this method, but the method could be utilized in a situation in which both the husband and wife are infertile but wish to have a child with specific traits<sup>74</sup>.

Although the above-mentioned three methods of surrogate parenting involve different medical techniques, and although the biological relationship of the couple receiving custody of the child may vary depending upon the method used, the legal consequences of contracting to perform each method are surprisingly similar. The methods are treated very much the same because most countries presume that the woman who gives birth to a child is the natural, biological mother of the child<sup>75</sup>. Thus, depending on the infertility problem involved, either Artificial Insemination or IVF may be used in a surrogacy situation<sup>76</sup>.

For surrogacy to be successful, three conditions are to be satisfied. Firstly, the parties to the surrogacy process must be able to arrange for the conception and birth of a child. Secondly, before actually doing so, the parties must reach an agreement defining what their respective rights and duties will be, both before and after the child

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<sup>73</sup> Lewis Vaughn, *Bioethics: Principles, Issues, and Cases*, Oxford University Press, U.K. (2012), pp.355-57.

<sup>74</sup> Timothy F. Murphy, "Selecting the Traits of Children Prior to Birth", *Virtual Mentor*, Vol.14, No.2, 158-161 (February 2012).

<sup>75</sup> *Supra* n.17.

<sup>76</sup> *Supra* n.6.

is born. Thirdly, the parties must have some means by which they can enforce these rights and duties so as to ensure performance.

To begin this process, a married couple identifies and contacts with a woman who is willing to act as a surrogate mother for their child. This may be as simple as convincing a family member, such as the wife's sister, or mother-in-law, husband's sister or a friend to undertake the responsibility. Increasingly, however, it is more common for a couple to hire a lawyer or private agency that specializes in locating and screening a woman who would be willing to serve as a surrogate.

The parties thereafter negotiate on the terms of their relationship. It may be an informal verbal agreement in which the surrogate agrees to serve gratuitously. More often, however a lawyer drafts a written contract in which the couple agrees to pay for the surrogate's medical expenses during pregnancy. Usually, though not always, the couple will also agree to pay the surrogate a fee for carrying the child. For her part, the surrogate generally agrees to be inseminated, to not abort the child, to seek and accept adequate medical care, and most importantly, to terminate her parental rights upon the birth of the child.

If the surrogate woman is successful in conceiving a child and carrying it to term, the contracting husband will, upon birth, acknowledge his legal paternity of the child. The surrogate then relinquishes all her parental rights over the child, after which the couple pays her. The contracting husband, as the legal father, obtains custody of the child, and the wife as stepmother, may initiate an adoption action in order to declare herself as the child's legal mother<sup>77</sup>.

In practice, a surrogate mother typically receives a fee or honorarium from the sperm donor for her services. Ordinarily, the donor also pays for all the expenses of the procedure. There can be many variations in the terms of surrogate parenting agreements (the enforceability of which have been discussed in Chapter VI), but they center on a promise that the surrogate-mother will relinquish the child to the

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<sup>77</sup> Thomas S. Bradley, "Prohibiting Payments to Surrogate Mothers: Lovers Labour Lost and the Constitutional Right of Privacy", 20 *J. Marshall L. Rev.* 715 (1986-1987), at p.718.

biological father or mother immediately after birth, renouncing all rights over the child and/or consenting to adoption. Other common provisions provide for genetic screening, medical and psychiatric evaluation, cooperation with medical directions during pregnancy, submission to amniocentesis if medically appropriate, or abstention from alcohol or other possible teratogens during pregnancy. Some persons or organizations providing surrogate mother intermediary services prefer to use married women who have had at least one healthy child. Such a requirement necessitates additional contractual provisions ensuring that the surrogate's husband will relinquish any rights he may have in the child and that adequate blood testing will be performed to confirm that the sperm donor is the biological father<sup>78</sup>.

Thus there are various methods of surrogate parenting depending upon the type of surrogacy involved. The couples or individuals can select the types of surrogacy as well as method of surrogate parenting depending upon their needs and convenience. It is to be noted that when compared to adoption as well as any other method of ART, the method of surrogacy offers various advantages to the couples or individuals who wish to beget a child.

### **3.5 Surrogacy vs. Other forms of ART**

Procreation as discussed earlier is a fundamental human drive. The image of happy parents holding a healthy baby pervades the human mind and the society<sup>79</sup>. Hence the greatest motivation to use surrogacy is that it will help a couple to have a genetically related child. Thus a surrogacy arrangement is a boon to childless couples as it gives them the greatest gift of life, i.e. a child. It is pertinent to point out here that the impact of childlessness on married couples is very grave. Surrogacy thus provides an opportunity to such couples to beget a child and gives them satisfaction and happiness. The major benefits of surrogacy when compared to other forms of ART can be classified as follows:

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<sup>78</sup> *Supra* n.19 at p.467.

<sup>79</sup> Michelle Sargent, "Regulating Egg Donation: A Comparative Analysis of Reproductive Technologies in the United States and United Kingdom", *Michigan Journal of Public Affairs*, Vol. 4, 1 (2007).

***i) Genetic Link***

The most important benefit of surrogacy is that it helps the couple to beget a child genetically related to at least one of the parent. Thus it helps to fulfill the natural instinct and desire to have a biological child. The urge to procreate, usually involves a desire to transmit one's own genetic heritage to the child and to participate in gestation and parturition<sup>80</sup>. Thus it offers greater advantage to childless couples as compared to the traditional option of adoption.

***ii) Prevention of Hereditary Diseases***

The second major advantage of surrogacy is that by using this method an individual can prevent transmission of hereditary diseases to his biological child. The individuals who have a history of genetic illness or who have given birth to children with genetic diseases can with the help of genetic screening find out whether they might transfer a harmful trait to their offspring. In cases where the individuals are likely to transmit the harmful traits to their offspring, they may prevent such transmission by selecting a surrogate mother and using genetic material from a male donor or female donor as required.

***iii) To Overcome Medical Risks***

Surrogacy is the only option available to couples who are fertile but unable to beget a child due to risk factors involved in pregnancy. It is to be noted that some pregnancies involve high risks due to medical problems of the mother and could pose serious complications of premature births leading to deformities in the child or sometimes, such pregnancies may cause danger either to the life of the mother or child, or both<sup>81</sup>. So also in case of women suffering from AIDS, conceiving a child may be risky and is also dangerous to the future child.<sup>82</sup> In these circumstances surrogacy is the best option available for the couple to beget a child. Likewise, it is

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<sup>80</sup> John A. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth", 69 *Virginia Law Review*, 3, 405 (1983).

<sup>81</sup> See, Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues*, Harvard University Press, U.S.A. (1990), p.31.

<sup>82</sup> See generally, Lawrence O. Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements", 16 *L. Med. & Health Care* 7-17 (1988), at p.9.

also the best option in case of a woman having a disability such that it is difficult to carry a child or in cases where woman is suffering from allergic reactions<sup>83</sup>. Surrogacy also offers hope to those couples who have crossed their age of natural conception<sup>84</sup> and those who have undergone tubectomy<sup>85</sup> or vasectomy<sup>86</sup>.

***iv) To satisfy the desire of Single, Divorced, Lesbians and Gay couples, etc.***

Surrogacy arrangements make possible the creation of non-traditional families. In modern times even single men and women, gays and lesbians couples may wish to beget and raise a child. The process of procreation involves the union of both male and female. But in cases of lesbian and gay couples as well as transgender couples, due to inherent biological reasons, they are unable to procreate naturally. So also single women/men, a divorced individual or in cases where one of the spouses has expired are also deprived of their right to procreate due to their societal conditions. In these situations surrogacy can be very useful to help these individuals to satisfy their natural craving for a child.

***v) An option for individuals/couples with modern life style***

Surrogacy can be used for begetting a child by those couples and individuals who are fertile and able to carry a child, but are unwilling to do so due to various reasons. The reasons can be their life style, career prospects, and profession<sup>87</sup>.

***(vi) To avoid problems related to infertility treatments***

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

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<sup>83</sup> *Ibid.*

<sup>84</sup> Peter R. Brinsden, "Surrogacy" in Peter R. Brinsden (ed.), *Textbook of In - Vitro Fertilization and Assisted Reproduction*, Taylor & Francis Publication, U. K. (3<sup>rd</sup> edn. – 2005), p.394.

<sup>85</sup> *Tubectomy* is surgical procedure for permanent contraception to prevent future pregnancies in women.

<sup>86</sup> *Vasectomy* is a surgical procedure for male sterilization and/or birth control.

<sup>87</sup> M. Humphrey, *Families with a Difference: Varieties of Surrogate Parenthood*, Routledge, U.S.A. (1988), p.157.

Thus the method of surrogacy offers new ways for infertile and other individuals/couples to become parents. It facilitates the pursuit of biological parenthood and in many cases where couples/individuals have opted for surrogacy, it has brought enormous joy into their lives by helping them to beget a child which they never thought that they would have. It might be thought that such a miraculous procedure which creates new life and produces such happiness would be accepted by all without any objections. But it is not so. The practice of surrogacy is criticized and objected on various legal, ethical and social issues that pose severe challenges to the legal systems<sup>88</sup>.

### **3.6 Surrogacy: Legal and Ethical Debates**

Surrogacy has proved to be a boon for infertile couples. At the same time the increasing use of this technology has also led to various controversies and conflicting legal issues. These conflicts have at times erupted into a fierce debate over the legality of surrogacy. A discussion on this debate is necessary in order to understand the arguments underlying surrogacy. Further, since the controversy surrounding surrogacy, has been brought to limelight by the leading surrogacy cases all over the world as well as arguments made by legal scholars and commentators, such a discussion is important in determining how surrogacy should be dealt with by the legal systems in different countries in future<sup>89</sup>. Most of the criticisms against surrogacy are based on various ethical, moral, religious and legal grounds. Admittedly, the influence of ethics, morality and religious practices cannot be ruled out in a legal discussion, as the ethics and morality have played an important role in shaping the societies attitude towards legal issues as well as the foundation of most of the legal systems of the world.

The moral, ethical and religious objections to surrogacy are based on the premise that life is a creation of God and human beings should not attempt to play God by interfering in the natural processes. Another serious objection in this regard is

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<sup>88</sup> Anonymous, "Developments –Medical Technology and the Law", 103 *Harvard Law Review* 1519 (1990), at p.1556.

<sup>89</sup> *Supra* n.11 at pp.119-120.

the fact that surrogacy procedure involves repeated trials which use either male or female genetic material or the human embryo. The wastage of human embryo is criticized as similar to murder, because according to some scholars human life begins at fertilization.

The major legal objection to surrogacy strikes at the very root of the procedure of surrogacy which is due to the need and requirement of a woman to act as a surrogate. Various scholars have criticized surrogate motherhood, as it presents intolerable risks to women, including physical risks, psychological risks, and symbolic risks such as objectification and commodification. Carl Schneider points out that “some surrogate mothers will become sick or even die”<sup>90</sup>. Some commentators assert that the chances that the surrogate will be psychologically harmed by the process are very high, analogizing it to the psychological harms felt by birth mothers giving children up for adoption. Some surrogates do regret their decision to bear a child for another couple, as is evidenced by their decision to try to keep the child<sup>91</sup>.

Further many critics of surrogacy have focused on the notion that these arrangements reduce women to the value of their wombs. Such a warning was given by both the *Royal Commission* and the *Quebec Council for the Status of Women in Canada*, which suggested that reproductive technologies risk fragmenting the reproductive process and alienating women from their own reproductive capacities<sup>92</sup>. This is because the procedure of surrogacy separates motherhood as gestational, genetic and intended motherhood. Moreover, once a woman has agreed to be a surrogate mother, she has to follow all the terms and conditions of the contract during the entire process and more importantly she has to relinquish all her rights over the child after its birth. It is claimed that the entire process of reproduction is an inherent part of a women’s existence and that transferring a child to someone else upon its

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<sup>90</sup> See Carl E. Schneider, “Surrogate Motherhood from the Perspective of Family Law”, 13 *Harv. L.J & Pub. Pol’y*, 125 (1990), at p. 125.

<sup>91</sup> See, Scott B. Rae, “Parental Rights and the Definition of Motherhood in Surrogate Motherhood”, 3 *S. Cal. Rev. L & Women’s Stud.* 219 (1994), at p.242.

<sup>92</sup> Rakhi Ruparelia, “Giving Away the ‘Gift of Life’: Surrogacy and the Canadian Assisted Human Reproduction Act”, 23 *Canadian Journal of Family Law*, 11 (2007), at p.26.

birth is unnatural and psychologically damaging<sup>93</sup>.

The symbolic harm posed by surrogacy to society is that surrogacy may be characterized as baby selling, a practice that is totally against a civilized society. Some scholars argue that surrogacy treats children as commodities that can be bought or sold for a price. Others contend that surrogacy should be prohibited for the same reasons that the sale of organs for transplantation is prohibited<sup>94</sup>. It is also argued that agreeing to participate in a surrogacy process is equivalent to prostitution<sup>95</sup> or adultery<sup>96</sup> or slavery<sup>97</sup>. Further it is argued that surrogacy will degrade the inherent human dignity of a woman.

A similar argument has been made that surrogacy should be banned because of the potential physical, psychological, and symbolic risks to the resulting children. It has been asserted that a surrogate, who will be carrying a child, that she will not later rear, will lie about her health or will not take proper care during pregnancy because she will not care about the subsequent condition of the child. In addition to the risks that the surrogate mother herself may present to the child, commentators arguing against surrogacy also allege that the child may be harmed by parents who may not have undergone previous screening with respect to their suitability for parenting<sup>98</sup>. Another major criticism which cannot be ruled out is that a surrogate child may suffer great psychological harm when the child comes to know about its parentage or origin<sup>99</sup>. The critics also point out that the symbolic risk to the child due to surrogacy

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<sup>93</sup> *Ibid.*

<sup>94</sup> *Supra* n.6 at p.213.

<sup>95</sup> See for more, Jean M. Sera, "Surrogacy and Prostitution: A Comparative Analysis", *Journal of Gender, Social Policy & the Law*, Vol. 5, Issue 2, 315 (2011).

<sup>96</sup> Michelle Ford, "The Best of Barry: Barry Student Article: Gestational Surrogacy is not Adultery: Fighting Against Religious Opposition to Procreate", 10 *Barry Law Review*, 81(2008).

<sup>97</sup> See for more, M. R. Patterson, "Surrogacy and Slavery: The Problematics of Consent in Baby M, Romance of the Republic, and Puddanhead Wilson", *American Literary History*, Vol. 8, No. 3, 449-470 (Autumn 1996).

<sup>98</sup> Lori B. Andrews, "Surrogate Motherhood: The Challenge for Feminists", 16 *Law Medicine & Health Care* 72 (1988), pp.80-81.

<sup>99</sup> See, Katherine O' Donovan, "Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights", *International Journal Law Policy Family* 21(2): 137-159 (2007).

is that it may lead to commodification of child<sup>100</sup> and selection of child with certain desirable traits<sup>101</sup>.

It is argued further that currently the biggest risk to children in the surrogacy context comes not from the actions of either set of parents but from the uncertain status of the law. In cases where surrogacy procedures or contracts are banned, it can cause the resulting children to be stigmatized as the product of a criminal act. In cases where surrogate contracts are non-enforceable, it can lead to the child being subjected to years of litigation to determine who will be considered to be his or her legal parents<sup>102</sup>.

In spite of all the arguments and criticisms against surrogacy, it cannot be denied that it offers a ray of hope to such individuals who have exhausted all possible means of begetting a child. Thus surrogacy can be considered as one of the best available means for alleviating both medical and social infertility<sup>103</sup>, thereby meeting the needs of individuals who wish to have a biological child<sup>104</sup>.

The supporters of surrogacy argue that that “if the right of individuals to procreate naturally by sexual intercourse is a protected right, then begetting a child with the help of assisted human reproductive technologies including surrogacy should also be protected”<sup>105</sup>. These supporters argue that the “liberty interests protected by the Constitution do not change definition because of the presence or absence of reproductive technology”<sup>106</sup>. The supporters of surrogacy also distinguish surrogacy from baby selling<sup>107</sup> and adoption on the basis that a surrogacy contract is entered before conception and the contracting father or contracting mother or both are often

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<sup>100</sup> See for more, Anton van Niekerk and Liezl van Zyl, “The Ethics of Surrogacy: Women’s Reproductive Labour, 21 *Journal of Medical Ethics*, 345-349 (1995).

<sup>101</sup> See for more, John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technology*, Princeton University Press, U.S.A. (1996).

<sup>102</sup> Lori B. Andrews, “Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood”, 81 *Virginia Law Review*, 2343 (November 1995), p. 2359.

<sup>103</sup> *Supra* Chapter II.

<sup>104</sup> *Supra* n. 80 at pp. 418-419.

<sup>105</sup> Eric A. Gordon, “The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology”, 6 *St. Thomas Law Review*, 191 (1993), at p.200.

<sup>106</sup> *Supra* n.11 at p.121.

<sup>107</sup> Comment, “Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements”, 90 *Dickinson Law Review* 227 (1985), at p.253.

genetically related to the child<sup>108</sup>.

Thus surrogacy is one of the hotly contested technological advancement in present times having a grave impact over the basic human rights. The various contentious and conflicting issues raised by surrogacy pose a daunting challenge to the courts as well as to the legislatures and policy makers. The manner in which these conflicts will be answered would have a profound effect on the way in which the society would view the relationship between parent and child. It would ultimately have far-reaching consequences on the reality of the relationship between parents and children of the future and the power of the state to regulate that relationship.

### **3.7 Surrogacy and the Legal Responses in Foreign Countries**

The debate generated by surrogacy and the various moral, ethical, religious and legal issues raised by it have led to the view that there should be some policy or guidelines for its control and regulation. However there is no consensus of opinion among the countries of the world with respect to the legal measures to be adopted for the control and regulation of surrogacy. Different countries have adopted different guidelines and legislations as per their social, economic, cultural, and religious needs and legal requirements<sup>109</sup>.

As an initial response to the regulation of surrogacy, various countries appointed committees for identifying the multiple issues raised by surrogacy. For example, the Warnock Committee in United Kingdom<sup>110</sup>, the Aloni Commission in

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<sup>108</sup> Irma S. Russell, "Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising From Surrogacy Contracts", 27 *Journal of Family Law*, 596 (1988 /1989).

<sup>109</sup> Surrogacy contracts are entirely prohibited in countries such as Austria, Egypt, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, and Switzerland. The countries such as Canada, Denmark, Hong Kong, and Great Britain have national laws banning commercial surrogacy. But the countries like Ukraine and India are providing very favorable conditions for commissioning couples that permit and encourage surrogacy. For a helpful graphic depiction of the States' approach to surrogacy. See, Susan Markens, *Surrogate Motherhood*, University of California, California (2007), pp. 28-29, table 2.

<sup>110</sup> This Committee was appointed in United Kingdom in 1982 to inquire into the technologies of in-vitro fertilisation (IVF) and embryology.

Israel<sup>111</sup>, the Ministerial Committee on Assisted Reproductive Technology in New Zealand<sup>112</sup>, and the Law Commission of India<sup>113</sup> have considered the pros and cons of surrogacy. The legal disputes that emerged because of the surrogacy practices in countries all over the world have led to the adoption of laws and regulations for the control and management of surrogacy in various countries.

### **3.7.1 Israel**

Israel is the first country to adopt a specific legislation for regulation of surrogacy. The Surrogate Motherhood Agreements Law, 1996 was enacted in Israel on the basis of the recommendations given by the Aloni Commission<sup>114</sup>. Thus Israel is a pioneer in regulating and facilitating commercial surrogacy agreements. The Surrogate Motherhood Agreements Law allows only for gestational surrogate arrangements, thereby implicitly forbidding traditional surrogacy. In addition, according to the Surrogate Motherhood Agreements Law, the sperm must be from the intended father.

Further, the Surrogate Motherhood Agreements Law does not give any legal status to the birth mother upon the child's birth. Legal parenthood is delegated to the intended parents almost immediately. The Surrogate Motherhood Agreements Law states that, the child shall, from its birth, be in the custody of the intended parents, and they shall bear towards it all the responsibilities and obligations of a parent to his child. Delivery of the child by the birth mother into the custody of the intended parents must be in the presence of a Welfare Officer and must be carried out as soon as possible after the birth of the child. Within seven days of the child's birth, the intended parents must apply for a parentage order. The parentage order is given to the intended parents by the court automatically, unless, after having received a report

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<sup>111</sup> It was appointed in 1994 to investigate the legal, social, ethical, and religious issues implicated in the use of reproductive technology, and it concluded that there should be no interference in the right of access of these technologies.

<sup>112</sup> It was appointed in 1994 to advice about the practice of Assisted Human Reproduction in New Zealand.

<sup>113</sup> In 2009, the Law Commission of India examined the need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy in india.

<sup>114</sup> See, Israel Ministry of Justice, *Report of The Public-Professional Commission in The Matter of In Vitro Fertilization*, July, (1994).

from the Welfare Officer, the court determines that doing so would endanger the child's welfare. The intended parents are the "default" parents and, in the absence of extraordinary circumstances, they will be given custody of the child upon its birth and full rights of parentage shortly thereafter<sup>115</sup>.

### **3.7.2 Canada**

In Canada, the Assisted Human Reproduction Act was adopted in 2004. However, it does not explicitly regulate who may or may not enter into a surrogacy arrangement. It forbids the payment of consideration to a woman to be a surrogate mother<sup>116</sup>. This is consistent with the principle, set out in Section 2(f) that 'trade in the reproductive capabilities of women and the exploitation of women for commercial purposes raises health and ethical concerns that justify their prohibition'. In addition, the Act forbids the payment to another person to arrange the services of a surrogate mother<sup>117</sup>. A surrogate mother may be reimbursed for expenditure incurred in relation to her surrogacy if a receipt is provided. She may also be reimbursed for loss of work related income incurred during her pregnancy provided certain conditions are fulfilled. It is an offence to counsel or induce a female believed to be less than 21 years of age to become a surrogate or to perform any medical procedure to assist such a person to become a surrogate<sup>118</sup>.

### **3.7.3 United Kingdom**

In the United Kingdom, the law on surrogacy is found in the Surrogacy Arrangements Act, 1985<sup>119</sup> and the Human Fertilization and Embryology Act, 1990<sup>120</sup>. The Surrogacy Arrangements Act applies to surrogacy arrangements whether or not they are lawful and whether or not they are enforceable<sup>121</sup>. No surrogacy

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<sup>115</sup> Pamela Laufer-Ukeles, "Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis", 9 *Duke Journal of Gender Law and Policy*, 91 (Summer 2002), at p.98.

<sup>116</sup> See, The Assisted Human Reproduction Act, 2004 (Canada), S. 6(1).

<sup>117</sup> *Id.* S. 6(2).

<sup>118</sup> *Id.* S. 6(4).

<sup>119</sup> Hereinafter referred to as SA Act.

<sup>120</sup> Hereinafter referred to as HFE Act.

<sup>121</sup> See, The Surrogacy Arrangements Act, 1985 (UK) S. 1(9).

arrangement is enforceable by or against any of the persons making it<sup>122</sup>. The Act defines ‘surrogate mother’ as a woman who carries a child under an arrangement which was made before she became pregnant; and this arrangement is made with a view that the child would be handed over to another person or persons who will (so far as practicable) exercise parental rights<sup>123</sup>. Section 2 (1) deals with the subject of payment. It states that no person shall on a commercial basis initiate or take part in any negotiations with a view to making a surrogacy arrangement. A person does an act on a commercial basis if any payment is, or is to be, received. The prohibition does not, however, apply to the potential surrogate mother or to an intended parent. The Act reinforces this by stating that ‘payment’ does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother<sup>124</sup>.

Although the Act does not make explicit what kind of ‘payment’ may be made to a surrogate or prospective surrogate mother, some regulation does occur, since any payment received by her will be assessed when parental or adoption orders are sought<sup>125</sup>. The subject of parentage is dealt with in the HFE Act. Section 27 provides that the woman, who is carrying or has carried a child as a result of placing in her womb an embryo, or sperm and eggs, is to be treated as the mother of the child. If the woman is married and her husband consented to the procedure, and the embryo was not brought about with his sperm, he is treated as the father of the child<sup>126</sup>. If the woman is not married, but she has accessed treatment services jointly with a man and his sperm was not used, the man is treated as the father of the child<sup>127</sup>. Section 30 of the HFE Act creates a procedure by which the commissioning parents will be treated as the parents of the child. A court may make a parental order in their favor<sup>128</sup>. In

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<sup>122</sup> *Id.* S. 1A.

<sup>123</sup> *Id.* S. 1(2).

<sup>124</sup> *Id.* S. 2(2), (3).

<sup>125</sup> See, the Human Fertilisation and Embryology Act, 1990 (UK), S.30, which states that no money (other than expenses approved by the court) must have been paid.

<sup>126</sup> *Id.* S. 28(1).

<sup>127</sup> *Id.* S. 28(3).

<sup>128</sup> Generally the court may do so only if the following conditions are satisfied: the commissioning couple are married; the gametes of the husband or the wife, or both, were used to bring about the; creation of the embryo; the application to the court is made within six months of the birth of the child; at the time of the application the child’s home is with the husband and the wife; at the time of the making of the order both the husband and wife have attained the age of 18; and the court is satisfied

situations where the Act does not apply (for example, when the commissioning couple are not married, or when neither of them is genetically related to the child), it appears that the commissioning couple would have to adopt the child under the Adoption and Children Act, 2002 (UK)<sup>129</sup>.

### 3.7.4 New Zealand

New Zealand has passed legislation in this area in 2004, i.e. the Human Assisted Reproductive Technology Act. Prior to 2004 there was no legislation on surrogacy. However there was a ban on surrogacy by the clinics because the ethics committee had refused to approve the practice of IVF surrogacy involving altruistic embryo transfer to a relative or friend. The Ministerial Committee in its 1994 report criticized this decision<sup>130</sup>. This led to the shift in policy of ethics committee and finally ten years later the Parliament enacted the law allowing surrogacy.

Section 14 of the 2004 Act declares negatively that a “surrogacy arrangement is not in itself illegal” but then states that it is not enforceable. In this Act, a “surrogacy arrangement” is one where “a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy<sup>131</sup>”. This definition is not restricted to surrogacy using assisted means but also includes arrangements that rely on natural intercourse and probably includes the Maori practice of “whangai<sup>132</sup>” where there is an understanding that a child will be handed over to another member of the family. This becomes rather more important when the remaining provisions are noted. No one, including the surrogate mother, commissioning couple and an intermediary arranging a surrogacy, may give or receive valuable consideration. The Act expressly stipulates that any reasonable and necessary expenses for professional services, including legal advice, are not caught by the ban on valuable consideration.

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that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife under the surrogacy agreement (although the court may authorize such a payment), see, John Seymour and Ms Sonia Magri, *A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review*, Victorian Law Reform Commission, Australia, (2004), pp.44-46.

<sup>129</sup> *Ibid.*

<sup>130</sup> See, Department of Justice, *Assisted Human Reproduction Navigating Our Future Report of the Ministerial Committee on Assisted Reproductive Technologies*, Wellington (1994), pp.112-114.

<sup>131</sup> See, The Human Assisted Reproductive Technology Act, 2004, S. 5.

<sup>132</sup> It is an ancient practice similar to adoption. See, *Keelan v. Peach* [2002] NZFLR 481.

Thus the Act in New Zealand allows not-for-profit surrogacy only. Whangai and do-it-yourself arrangements that do not involve cash transactions for profit are legal. Surrogacy through a regular clinic with the usual costs associated with the procedures is also legal. Anyone, including the surrogate mother, who steps outside these boundaries, may have committed an offence<sup>133</sup>.

### **3,7.5 Unite States of America**

In United States, there is no federal law on surrogacy. But many states have enacted laws dealing with surrogacy. There are great variations in the approaches adopted by different states. Some state Acts have provisions prohibiting surrogacy contracts or declaring them void or unenforceable<sup>134</sup>. Others have expressly authorized and regulate surrogacy agreements<sup>135</sup>. Altruistic, but not commercial, arrangements may be permitted. Not all states distinguish between traditional and gestational surrogacy. In states where there is no relevant legislation, there may be case law on certain aspects of surrogacy, especially on the question of parentage<sup>136</sup>. Thus, state laws on surrogacy are hardly uniform. In an effort to provide such uniformity, the American Bar Association has drafted the American Bar Association Model Act Governing Assisted Reproductive Technology<sup>137</sup>. Article 7 of this Act addresses gestational surrogacy, providing various approaches to the conditions for the enforceability of gestational agreements. Meanwhile, Article 8 permits reimbursement of expenses to the surrogate and payment of reasonable compensation. Further, Article 8 of the Uniform Parentage Act, 2000 addresses gestational agreements, their validation by court hearing of, and parentage issues.

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<sup>133</sup> See, Bill Atkin, *Regulation of Assisted Human Reproduction: The Recent New Zealand Model in Comparison with Other Systems*, Victoria University of Wellington, New Zealand, p.18, available at <<http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Atkin.pdf>> Visited on 13.6.2011.

<sup>134</sup> See, the Statutes of States such as Arizona, the District of Columbia, Indiana, Louisiana, Michigan, Nebraska, New York, North Dakota, and Utah.

<sup>135</sup> See, the Statutes of States such as Florida, Nevada, New Hampshire, and Virginia, for example, have statutorily permitted the enforceability of surrogacy contracts, but not the payment to surrogates.

<sup>136</sup> See, Margaret Ryznar, "International Commercial Surrogacy and Its Parties", 43 *John Marshall Law Review*, 1009 (2010).

<sup>137</sup> See, American Bar Association, *American Bar Association Model Act Governing Assisted Reproductive Technology* (2008), available at <[http://www.abanet.org/family/committees/art\\_modelact.pdf](http://www.abanet.org/family/committees/art_modelact.pdf)> Visited on 10.5.2011.

### 3.8 Surrogacy in India and the Legal Response

The popularity of surrogacy as a means for begetting a genetically related child has increased tremendously all over the world. However facilities offered by the countries as well as the legal regulations of surrogacy are not uniform everywhere. In certain countries the cost of surrogacy arrangements is very high while in some countries the legal regulations are very strict and in others surrogacy practices are even banned. Therefore, the couples and individuals who wish to beget a child through surrogacy often search for countries which offer surrogacy at an affordable cost and with minimum legal complications. In this context, India is considered as the most favorable nation by foreigners to beget a child through surrogacy. This is because the cost of surrogacy arrangement in India is very low when compared to other countries.

The Law Commission of India in its report points out that the surrogacy costs in India is about \$25000 to \$30000 which is around 1/3<sup>rd</sup> of the costs in developed countries like United States of America<sup>138</sup>. The Centre for Social Research (CSR)<sup>139</sup>, New Delhi in its study report given in the year 2012<sup>140</sup>, identifies that the fees for surrogates in India ranges from \$2,500 to \$7,000 and the total costs for surrogacy arrangements can be anything between \$10,000 and \$35,000. Therefore, it is a lot less than what intended parents pay in the United States, where rates fluctuate between \$59,000 and \$80,000<sup>141</sup>. Another statistics shows that, a surrogacy arrangement, including IVF, costs about \$11,000 (approximately Rs. 5,00,000) in India, while in the United States of America, surrogacy alone, excluding ART charges, costs \$15,000 (Rs 6,75,000). Likewise in United Kingdom, an IVF cycle costs about £7,000 (Rs. 5,

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<sup>138</sup> Law Commission of India, “Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”, Report No. 228, (August 2009), p.11.

<sup>139</sup> Centre for Social Research is a non-profit, non-governmental organization established in the year 1983 in New Delhi. See for more, the official website of CSR <<http://www.csrindia.org>> Visited on 10.8.2012.

<sup>140</sup> See, Centre for Social Research (CSR), *Surrogate Motherhood- Ethical or Commercial*, p.3. Report released in the year 2012, available at <[www.womenleadership.in/Csr/SurrogacyReport.pdf](http://www.womenleadership.in/Csr/SurrogacyReport.pdf)> Visited on 10.8.2012.

<sup>141</sup> *Ibid.*

00,000 approx.) and surrogacy costs about £10,000 (Rs. 7, 00,000 approx.)<sup>142</sup>. The cost of gestational surrogacy in Canada is approximately \$29,600 - \$68,500 and the cost of traditional surrogacy is approximately \$19,600 - \$ 68,500<sup>143</sup>. In Russia the minimum cost for surrogacy arrangement is about \$35,000<sup>144</sup>.

Thus it can be seen that, the cost of surrogacy arrangements in India is very low when compared to other countries. Further, the regulations that deal with surrogacy are also minimal<sup>145</sup> and there are no restrictions with respect to who can be the intended parents. As a result, the unmarried, divorced, aged, gays and lesbians who may be prohibited in their country to use surrogacy can come to India and fulfill their dream of begetting a child. Thus the strongest incentive for foreigners to travel to India is most likely to be the relatively low costs involved in the process coupled with the limited legal regulations.

In addition to the above mentioned reasons, there are many other reasons also due to which the foreign couples or individuals come to India for availing the benefits of surrogacy. Some of the key reasons are that India offers the advantages of well qualified and experienced doctors, world class private health care providers, English speaking doctors and staffs to facilitate such process, and more importantly easy access to surrogate women<sup>146</sup>. Moreover the Indians show a great commitment in handing over the new born to their intended parents immediately after birth and till now no dispute is reported regarding refusal of surrogate to hand over the baby to the

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<sup>142</sup> See, Widge A., "Socio-Cultural Attitudes Towards Infertility and Assisted Reproduction in India", in Vayenna E., Rowe P.J., & Griffin P.D. (eds.), *Current Practices and Controversies in Assisted Reproduction*, World Health Organization, Geneva (2002), pp.60-74; Sarojini *et al.*, "Globalization of Birth Markets: A Case Study of Assisted Reproductive Technologies in India", *7 Globalization and Health*, 27 (2011), at p.31.

<sup>143</sup> See, "Surrogacy in Canada" (Webpage), available at <<http://www.surrogacy.ca/services/cost-of-surrogacy.html>> Visited on 20.9.2012.

<sup>144</sup> See, "Russia – Low Cost Surrogacy Programme", available at <<http://www.ivfcostworldwide.com/russia-low-cost-surrogacy-program.html>> Visited on 20.9.2012.

<sup>145</sup> Swami M. *et al.*, "Surrogate Mother: A Legal Aspect", *A. J. P. T. R.* 2(3), 137, (2012), p.146.

<sup>146</sup> Sama - Resource Group for Women and Health, *Unravelling the Fertility Industry: Challenges and Strategies for Movement Building International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies*, SAMA, New Delhi (2010), p.47.

intended parents<sup>147</sup>. So also when compared to foreign women the Indian women have a more methodical lifestyle and most of them do not indulge in drinking, smoking, use of drugs and narcotics. Further, the cost of living in India is economical<sup>148</sup> and the foreign couples or individuals who come to India can also enjoy visiting world famous tourist destinations<sup>149</sup> and then go back with the baby once the surrogacy arrangement is over. Lastly, the success rates of surrogacy in India are also considered as very high<sup>150</sup>.

Due to all the above said reasons, India has become a favorable destination for foreign couples who look for a cost-effective surrogacy arrangement and a whole branch of medical tourism has flourished on the surrogacy practice<sup>151</sup>. As a result, the surrogacy business is well-established in India, with an estimated annual turnover of half a billion dollars<sup>152</sup>. The exact figures are not available and hard to verify. However, according to one estimate, India's reproductive tourism business is estimated to be approximately 400 million US dollars a year<sup>153</sup>. As per the CSR Report, the volume of surrogacy industry is estimated to be around \$500 million and the number of cases of surrogacy is increasing rapidly<sup>154</sup>. Thus the true extent of surrogacy practice in India is not known, but from the above two reports it is clear that, the surrogacy industry is fetching revenue from 400-500 million US dollars a year<sup>155</sup>.

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<sup>147</sup> Dr. Kiran Rai, "Law for Surrogacy: Need of the 21st Century", *International Journal of Research in Commerce, Economics & Management*, Vol.1, No. 1, 151, (2011).

<sup>148</sup> Apoorv Dwivedi, "Surrogate Mothers and Legal Complexity", available at <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1612712](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1612712)> Visited on 20.8.2012.

<sup>149</sup> *Ibid.*

<sup>150</sup> George Palattiyil, *et al.*, "Globalization and Cross-Border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work", *International Social Work*, 53 (5) 686 (2010), at p.689.

<sup>151</sup> *Supra* n.138 at p.11.

<sup>152</sup> See, The draft made by Permanent Bureau of Hague Conference on Private International Law established by the World Organization for Cross-Border Co-Operation in Civil and Commercial Matters, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, Preliminary Document No. 11, (March 2011) for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, p.7.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Supra* n.140 at p. 23.

<sup>155</sup> For more details on estimates of surrogacy turn-over in India, see, Shyantani Das Gupta & Shamita Das Gupta, "Motherhood Jeopardised: Reproductive Technologies in Indian Communities", in Jane

The places like Anand, Surat, Jamnagar, Bhopal and Indore have become the major centers for surrogacy practices. A large number of couples are travelling to these places not only from India but also from western countries and from other countries like Sri Lanka, Pakistan, Bangladesh, Thailand and Singapore to fulfill their desire for a child<sup>156</sup>. It is estimated that there are more than 600 fertility clinics established in both rural and urban areas spread over in almost all states of India. However, the state of Gujarat is particularly popular, especially among westerners<sup>157</sup>. In fact India in general and the state of Gujarat in particular is rapidly becoming the center for Child Process Outsourcing (CPO)<sup>158</sup>.

In India, though surrogacy is gaining popularity and is rapidly developing as an industry, the Government has been very slow in responding to the changing situations. In the absence of a legislative action, the Indian Council for Medical Research<sup>159</sup> has come up with certain ethical guidelines for regulating assisted human reproductive technologies in general and it also includes guidelines for surrogacy practices. In 2000, the ICMR adopted *Ethical Guidelines for Biomedical Research on Human Participants*, in which they prescribed certain guidelines to deal with ART in

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Maree Maher, *The Global Politics of Motherhood: Transformation and Fragmentation*, Routledge, U.S.A. (2010), p.138.

<sup>156</sup> *Supra* n.140 at p.6.

<sup>157</sup> *Ibid.*

<sup>158</sup> See generally, J. Brad Reich & Dawn Swink, "Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyber-Procreation Era", 14 *J. Health Care L. & Pol'y*, 241 (2011); Sharmila Rudrappa, "Making India the 'Mother Destination': Outsourcing Labor to Indian Surrogates", in Christine L. Williams & Kirsten Dellinger (eds.), *Gender and Sexuality in the Workplace (Research in the Sociology of Work, Volume 20)*, Emerald Group Publishing Ltd., United Kingdom (2010), pp.253-285; Amy Gold, "Surrogacy in India: The Latest Outsourcing Industry", available at <<http://blogcritics.org/culture/article/surrogacy-in-india-thlatest-sourcing/>> Visited on 20.9.2012.

<sup>159</sup> Hereinafter referred to as ICMR. The Indian Council of Medical Research, New Delhi, is the apex body in India for the formulation, coordination and promotion of biomedical research, and is one of the oldest research bodies in the world. This was established in the year 1911 by the Government of India under the title Indian Research Fund Association (IRFA) with the specific objective of sponsoring and coordinating medical research in the country. After independence, several important changes were made in the organization and the activities of the IRFA. It was re-designated in 1949 as the Indian Council of Medical Research. See for more, the official website of ICMR, available at <[http://www.icmr.nic.in/About\\_Us/About\\_ICMR.html](http://www.icmr.nic.in/About_Us/About_ICMR.html)> Visited on 20.8.2012.

general<sup>160</sup>. So also in the same year, “Statement of Specific Principles for Assisted Reproductive Technologies, 2000” was released by ICMR<sup>161</sup>.

Further in 2002, the ICMR submitted a Draft *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics, 2002* to the Ministry of Health and Family Welfare<sup>162</sup>. It is pertinent to point out that, this step of ICMR has been interpreted by many authors as a step of legalization of commercial surrogacy in India<sup>163</sup>. However, this Draft was not officially adopted by the Government of India in 2002, nor it was a legislative step and hence it cannot be considered as a step of legalization of surrogacy in India. In fact, this draft was later modified and adopted by the ICMR officially in 2005 after consultation with the National Academy of Medical Sciences, practitioners of ART, and the Ministry of Health and Family Welfare<sup>164</sup>.

### 3.8.1 ICMR Guidelines, 2005 and Surrogacy

The ICMR Guidelines, 2005 was adopted with the main objective to provide ethical guidelines for regulating ART clinics in India. However, these guidelines also contain certain provisions for dealing with surrogacy. The guidelines defines surrogacy as an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and

<sup>160</sup> See, Indian Council of Medical Research, *Ethical Guidelines for Biomedical Research on Human Participants*, New Delhi (2006), p.viii, available at <[http://icmr.nic.in/ethical\\_guidelines.pdf](http://icmr.nic.in/ethical_guidelines.pdf)> Visited on 10.7.2012.

<sup>161</sup> Usha Rengachary Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India”, 39 *Cumberland Law Review*, No.1, 15 (2008-2009), at pp.35-36.

<sup>162</sup> See, Erica Davis, “The Rise of Gestational Surrogacy and the Pressing Need for International Regulation”, 21 *Minn. J. Int’l L.* 120 (2012), at p.126; Mrs. Adhilakshmi Logamurthy, “Legalizing Surrogacy in India”, available at <[http://tnfwl.com/p/news\\_letter/Legalizing\\_Surrogacy\\_in\\_India.pdf](http://tnfwl.com/p/news_letter/Legalizing_Surrogacy_in_India.pdf)> Visited on 15.9.2012; Kari Points, “Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji”, available at <<http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf>> Visited on 10.7.2012.

<sup>163</sup> John Connell, *Medical Tourism*, CAB International, U. K. (2011), p.142; Wendy Chavkin & JaneMaree Maher, *The Global Politics of Motherhood: Transformation and Fragmentation*, Routledge, New York (2010), p.137; Stephanie Watson & Kathy Stolle, *Medical Tourism*, ABC-CLIO, U.S.A. (2012), p.135; Babu Sarkar, “Commercial Surrogacy: Is it Morally and Ethically Acceptable in India?”, *Practical Lawyer*, (December 2011), S-11; Cara Luckey, “Commercial Surrogacy: Is Regulation Necessary to Manage the Industry?” *Wisconsin Journal of Law, Gender & Society*, Vol. 26:2, 213 (2011), at p.226.

<sup>164</sup> *Supra* n.161 at p.31.

hand over the child to the genetic parents for whom she is acting as a surrogate<sup>165</sup>. It states that, surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term<sup>166</sup>. ART used for married woman with the consent of the husband does not amount to adultery on part of the wife or the donor. However ART without the husband's consent can be a ground for divorce or judicial separation<sup>167</sup>.

The guidelines state certain conditions to be followed by a surrogate mother such as, a surrogate mother should not be over 45 years of age<sup>168</sup> and no woman may act as a surrogate more than thrice in her lifetime<sup>169</sup>. Before accepting a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full-term pregnancy<sup>170</sup>. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate<sup>171</sup>. However, an oocyte donor cannot act as a surrogate mother for the couple to whom the oocyte is being donated<sup>172</sup>. It further mandates that, a surrogate mother must register as a patient and as a surrogate in her own name and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use/register in the name of the person for whom she is carrying the child, in order to avoid any legal issues, particularly in the untoward event of maternal death<sup>173</sup>. There must be informed consent by the surrogate and it must be witnessed by one who is not associated with the clinic<sup>174</sup>.

The guidelines also consider the interests of surrogate mother and state that, "all the expenses of the surrogate mother during the period of pregnancy and post-

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<sup>165</sup> ICMR Guidelines, R.1.2.33.

<sup>166</sup> *Id.* R.3.10.2.

<sup>167</sup> *Id.* R.3.16.2.

<sup>168</sup> *Id.* R.3.10.5.

<sup>169</sup> *Id.* R.3.10.8.

<sup>170</sup> *Id.* R.3.10.5.

<sup>171</sup> *Id.* R.3.10.6.

<sup>172</sup> *Id.* R.3.5.4.

<sup>173</sup> *Id.* R.3.5.4.

<sup>174</sup> *Id.* R.3.5.22.

natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother<sup>175</sup>. Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect<sup>176</sup>.

The guidelines also tries to protect the interests of the child and thus prohibits sex selection at any stage after fertilization, or abortion of foetus of any particular sex, except to avoid the risk of transmission of a genetic abnormality assessed through genetic testing of biological parents or through pre-implantation genetic diagnosis (PGD)<sup>177</sup>. The ART clinics are also prohibited from making an offer to provide a couple with a child of the desired sex<sup>178</sup>. Further it mandates that, advertisements regarding surrogacy should not be made by the ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, rests with the couple, or a semen bank<sup>179</sup>. The guidelines also stipulate that, the birth certificate of surrogate child shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother<sup>180</sup>. A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs<sup>181</sup>. In the case of a divorce during the gestation period, if the offspring is of a donor programme – be it sperm or ova – the law of the land as pertaining to a normal conception would apply<sup>182</sup>. Most importantly, the guidelines states that, a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with

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<sup>175</sup> *Id.* R.3.5.4.

<sup>176</sup> *Id.* R.3.10.3.

<sup>177</sup> *Id.* R.3.5.9.

<sup>178</sup> *Id.* R.3.5.10.

<sup>179</sup> *Id.* R.3.10.4.

<sup>180</sup> *Id.* R.3.5.4.

<sup>181</sup> *Id.* R.3.10.1.

<sup>182</sup> *Id.* R.3.12.4.

consent of both spouses, and with all the attendant rights of parentage, and inheritance<sup>183</sup>.

The guidelines are a positive step towards the regulation of surrogacy in India and contain provisions for protecting the interests of surrogate woman as well as the child. However, there are many drawbacks in these guidelines. As per the definition of surrogacy provided in these guidelines only gestational surrogacy can be practiced in India. Moreover, the woman can act as a surrogate only for the genetic parents. Thus the guidelines are unclear about the situation where one of the intended parents was not able to contribute the genetic material. The question arises whether they can take the help of a donor? This question is also relevant, when the gays, lesbians and single individuals want to use surrogacy for begetting a child. Further, the restriction that only gestational surrogacy can be practiced, would create hardship for the intended parents as they would have to search for egg donor also in case the female partner of intended parents is unable to provide the genetic material. The guidelines also stipulate that, the surrogacy can be availed normally by patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term. So the guidelines are impliedly prohibiting the use of surrogacy by married fertile couples. Further, the gay couples and single men can use surrogacy as it is physically/medically impossible to them to carry a child. However it is unclear regarding the issue whether a lesbian couple/ single woman can have access to surrogacy.

An important drawback of the guidelines is that, the genetic parents name will be mentioned in the birth certificate of surrogate child. This is in conflict with the right to anonymity of the donor and may deter the donor to participate in such surrogacy arrangements. Thus even though the guidelines say that the surrogate child will be the legitimate child of intended parents, the mentioning of genetic parents name in certificate will create problem for intended parents. This is because their name will not be there in the birth certificate if they have not contributed the genetic

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<sup>183</sup> *Id.* R.3.16.1.

material and if only one of them had contributed, then, certificate will carry the name of such partner and the donor.

The guidelines are silent regarding the important issues like, the minimum age for acting as a surrogate woman, the previous pregnancies, and number of children. It merely mentions that a woman can act only thrice as a surrogate. This means that a woman in her life time may undergo five or more than five pregnancies, i.e. two or more children from her marriage and acting as a surrogate thrice. Such pregnancies may cause harm to the health of the woman. Moreover, the guidelines are also silent regarding the liability issues in case of any harm caused to surrogate mother as a result of surrogate pregnancy. Likewise the guidelines do not address the situations of refusal by intended parents to accept the child after the birth.

Certain provisions in the guidelines are also conflicting with one another. On one hand the guidelines mention that there would be no bar to the use of ART by a single woman who wishes to have a child, and no ART clinic may refuse to offer its services to the above said persons, provided other criteria mentioned in this document are satisfied. The child thus born will have all the legal rights on the woman or the man. Thus a fertile as well as infertile single woman can have access to surrogacy. On the other hand, the guidelines states that, surrogacy should be allowed only to those individuals who are physically/medically unable to carry a child<sup>184</sup>. So also, the guidelines state that, a third party donor of sperm or oocyte must be informed that the offspring will not know his/her identity<sup>185</sup>. However, at the same time, as per the guidelines the genetic parents name is to be mentioned in the certificate. So it is not possible to ensure the anonymity of donor.

The ICMR guidelines thus suffer from the above mentioned defects. Further, these guidelines are non-binding and voluntary in nature and hence some of the authors argue that the ART clinics often do not adhere to these directives and thereby

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<sup>184</sup> *Id.* R.3.10.2.

<sup>185</sup> *Id.* R.3.5.1.

potentially compromise on the safety of surrogates<sup>186</sup>. Thus though the ICMR guidelines aim towards regulation of ART practices including surrogacy, they are not adequate to protect the interests and rights of all the stakeholders involved in surrogacy.

The Government of India, realising the increasing need to regulate ART practices and surrogacy in the country, took steps for establishing a binding legal framework. As a result, the Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 were drafted. This Bill and the Rules were drafted by a 15 member committee consisting of experts from ICMR, representatives from Ministry of Health and Family Welfare and ART specialists. However, the Parliament has failed to adopt it as law. The growing need to regulate ART practices and particularly surrogacy was also discussed by the Law Commission of India.

### **3.8.2 The Report of Law Commission of India**

The Law Commission of India after a detailed discussion submitted its report to the Government of India in August 2009. This report is titled as “Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”<sup>187</sup>. The Law Commission has observed:

“the legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment

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<sup>186</sup> See, Catherine London, “Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts”, 18 *Cardozo Journal of Law & Gender*, 391 (2012).

<sup>187</sup> This report was submitted to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice A.R. Lakshmanan, Chairman, Law Commission of India, on the 5th day of August, 2009, as the Law Commission Report No. 228.

of social ends and purposes which surrogacy can serve would be irrational. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones”<sup>188</sup>.

Considering, the ground realities of surrogacy practices in India, the Law Commission in its report gave the following recommendations:

1. Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.
2. A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
4. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is

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<sup>188</sup> *Supra* n.138 at pp.6-7.

resorted to if biological (natural) parents and adoptive parents are different.

5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

7. Right to privacy of donor as well as surrogate mother should be protected.

8. Sex-selective surrogacy should be prohibited.

9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act, 1971 only<sup>189</sup>.

The Law Commission thus recommended that active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto<sup>190</sup>. Similar concern has been raised by Indian Judiciary in the case of *Jan Balaz v. Anand Municipality*<sup>191</sup>.

The Gujarat High Court stated that, “the legislature has to address lot of issues like rights of the children born out of the surrogate mother; rights and duties of the donor and the surrogate; and various other legal, moral and ethical issues”<sup>192</sup>. The Court referred to the guidelines issued by ICMR as well as the ART (Regulation) Bill, 2008 and observed that, “there is an extreme urgency to adopt a legislation answering all the issues raised by surrogacy”<sup>193</sup>. Considering the pressing need for a legal framework, a draft bill was prepared by a 12 member committee including experts from ICMR, Ministry of Health and Family Welfare and specialists in the field of ART and was presented before the winter session of Parliament in 2010. However this Bill has not been yet officially enacted as legislation.

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<sup>189</sup> *Id.* at pp.25-27.

<sup>190</sup> *Id.* at p.7.

<sup>191</sup> A.I.R. 2009 Guj. 21.

<sup>192</sup> *Id.* at p.26, para.19.

<sup>193</sup> *Id.* at p. 27.

### 3.8.3 The ART (Regulation) Bill, 2010 vis-a-vis Surrogacy

The Bill was made for providing a national framework for the accreditations, regulation and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto<sup>194</sup>. The Bill defines surrogacy as, “an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate”<sup>195</sup>. The Bill provides for the establishment of a National Advisory Board<sup>196</sup> and State Boards<sup>197</sup> for exercising the jurisdiction and powers and to discharge the functions and duties conferred or imposed on the Boards by or under this Act.

The Bill legalizes the surrogacy practices in India by stating that, both the couple/ individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable<sup>198</sup>. The Bill provides that, subject to the provisions of this Act and the rules and regulations made there under, assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples<sup>199</sup>. Thus regardless of being fertile or infertile the couple or individual can avail surrogacy in India. They can obtain the service of a surrogate through an ART bank<sup>200</sup>, which may advertise to seek surrogacy. But no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy<sup>201</sup>. However, the Bill prohibits ART clinics from advertising to seek surrogacy for its clients<sup>202</sup>.

<sup>194</sup> See, The Assisted Reproductive Technology (Regulation) Bill, 2010, Statement of Objects and Reasons.

<sup>195</sup> See, The Assisted Reproductive Technology (Regulation) Bill, 2010, S. 2(aa).

<sup>196</sup> *Id.* S.3 & 5.

<sup>197</sup> *Id.* S. 6 & 8.

<sup>198</sup> *Id.* S. 34 (1).

<sup>199</sup> *Id.* S. 32(1).

<sup>200</sup> *Id.* S. 34(7).

<sup>201</sup> *Id.* S. 34(7)

<sup>202</sup> *Id.* S. 34(7).

The Bill provides the criteria for acting as a surrogate and states that, no woman of less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act<sup>203</sup>. It also states that, no woman shall act as a surrogate for more than five successful live births in her life, including her own children<sup>204</sup>. Only Indian citizens shall have a right to act as a surrogate, and no ART bank/ART clinics shall receive or send an Indian for surrogacy abroad<sup>205</sup>. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual<sup>206</sup>. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate<sup>207</sup>. Further, any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months<sup>208</sup>.

The Bill lays down certain duties for the surrogate mother. It provides that, a surrogate mother shall, in respect of all medical treatments or procedures in relation to the concerned child, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate mother, and provide the name or names and addresses of the person or persons, as the case may be, for whom she is acting as a surrogate<sup>209</sup>. In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as a surrogate<sup>210</sup>. A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy<sup>211</sup>. Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act that would harm the foetus during pregnancy and the child after birth, until the time the child is handed over to the designated

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<sup>203</sup> *Id.* S. 34(5).

<sup>204</sup> *Id.* S. 34(5).

<sup>205</sup> *Id.* S. 34(22)

<sup>206</sup> *Id.* S. 34(18)

<sup>207</sup> *Ibid.*

<sup>208</sup> *Id.* S. 34 (6)

<sup>209</sup> *Id.* S. 34(8).

<sup>210</sup> *Id.* S. 34(16).

<sup>211</sup> *Id.* S. 34(13).

person(s)<sup>212</sup>. Most importantly, the Bill states that, a surrogate mother shall relinquish all parental rights over the child<sup>213</sup>.

The Bill also provides various rights to a surrogate mother. All information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction<sup>214</sup>. The surrogate mother can receive the agreed amount as compensation for acting as a surrogate as per the surrogacy agreement from the couple or individuals seeking such service<sup>215</sup>. Further, the Bill states that, a surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them<sup>216</sup>.

The Bill also lays down certain rights and duties for the intended parents. The couples/ individuals who avail the service are entitled to receive a birth certificate for the baby born through surrogacy mentioning that such couples/individuals are the parents<sup>217</sup>. The parents of a minor surrogate child have the right to access information about the donor, other than the name, identity or address of the donor, or the surrogate mother, when and to the extent necessary for the welfare of the child<sup>218</sup>. It is the duty of persons who avails such surrogacy services to bear all expenses of the surrogate pregnancy. This expense includes those related to such pregnancy achieved in furtherance of ART as well as during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice to the biological parent or parents<sup>219</sup>. The expenses also include insurance for the surrogate mother and the child until the child is handed over to them or any other person as per the agreement and till the surrogate mother is free of all health

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<sup>212</sup> *Id.* S. 34(23).

<sup>213</sup> *Id.* S. 34(4).

<sup>214</sup> *Id.* S. 34(12).

<sup>215</sup> *Id.* S. 34(3).

<sup>216</sup> *Id.* S. 34(17).

<sup>217</sup> *Id.* S. 34(10).

<sup>218</sup> *Id.* S. 32(3).

<sup>219</sup> *Id.* S. 34(2).

complications arising out of surrogacy<sup>220</sup>. Most importantly, the Bill mandates that the person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act<sup>221</sup>. Further, the Bill states that, if the intended parents are a non-resident Indian, they should appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy, till the child/ children are delivered to the foreigner or foreign couple or the local guardian<sup>222</sup>.

The ART Bill, 2010 contains numerous provisions for the protection of interests and welfare of the surrogate child. To avoid any misuse of ART techniques, the Bill provides that, the Pre-implantation Genetic Diagnosis shall be used only to screen the embryo for known, pre-existing, heritable or genetic diseases or as specified by the Registration Authority<sup>223</sup>. It prohibits any sex selection and makes such activities as criminal offence<sup>224</sup>. Regarding the status of the child, the Bill states that, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse<sup>225</sup>. A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties<sup>226</sup>. In case of a single woman the child will be the legitimate child of the woman, and in case of a single man the child will be the legitimate child of the man<sup>227</sup>. The Bill further states that, in case a married or unmarried couple gets divorced or separates, as the case may be, after both parties consented to the assisted reproductive technology treatment

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<sup>220</sup> *Id.* S. 34(24).

<sup>221</sup> *Id.* S. S. 34(11).

<sup>222</sup> *Id.* S. 34(19).

<sup>223</sup> *Id.* S. 24.

<sup>224</sup> *Id.* S. 25.

<sup>225</sup> *Id.* S. 35(1).

<sup>226</sup> *Id.* S. 35(2).

<sup>227</sup> *Id.* S. 35(3).

but before the child is born, the child shall be the legitimate child of the couple<sup>228</sup>. A child born as a consequence of a foreigner or a foreign couple seeking surrogacy, in India, shall not be an Indian citizen<sup>229</sup>.

The child's right to know his origin is also protected under the Bill. It states that, a child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother<sup>230</sup>. However, personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother. But these personal identifications can be disclosed with the prior informed consent of the genetic parent or parents or surrogate mother<sup>231</sup>.

It is relevant to point out here that, the ART Bill, 2010 is based on the 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India' issued by the ICMR in 2005. The Bill, attempts to regulate the process of surrogacy and answer some of the issues raised by surrogacy practices. However, the Bill fails to address certain complex issues relating to surrogacy and thus suffers from various draw backs. The Bill legalizes commercial surrogacy and declares that such agreements are legal and enforceable. It is to be noted that the Law Commission of India has also recommended the legalization of surrogacy arrangements but has also stated that such arrangements should not be for commercial purpose<sup>232</sup>. Thus this provision of the Bill is contradictory to the recommendations made by the Law Commission of India.

The Bill is also silent about the various conducts which may be considered as a breach of such agreements and its remedies. The Bill has neither designated, nor authorized, nor created any Court or judicial forum to resolve issues which require

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<sup>228</sup> *Id.* S. 35(4).

<sup>229</sup> *Id.* S. 35 (8).

<sup>230</sup> *Id.* S. 36 (1).

<sup>231</sup> *Id.* S. 36 (3).

<sup>232</sup> *Supra* n. 138 at p.25.

adjudication in problems arising out of surrogacy agreements<sup>233</sup>. The absence of such a designated Court or judicial forum, would create difficulties to the parties in case of any dispute arising out of a surrogacy agreement because the parties may be from different parts of India as well as from various foreign countries.

The ART Bill, similar to the ICMR guidelines allows only gestational surrogacy arrangements. However, the prohibition of traditional surrogacy causes hardships to persons who wish to have a child through surrogacy as they need to arrange for an egg donor if the female partner is unable to contribute her egg. Moreover, compared to gestational surrogacy, traditional surrogacy is more easy, safe and successful method. A potential surrogate as per the Bill should be below 35 years of age while the ICMR guidelines states the maximum age limit as 45 years. Thus there is a conflict between the ART Bill proposed by the legislature and ICMR guidelines framed by the medical experts. Further, the Bill proposes that surrogate woman can have maximum five pregnancies including her own. However it does not specify the maximum number of ART cycles she can undergo. It is necessary to mention that the number of live births is not equivalent to the number of ART cycles because the success rate of ART procedures is low and the surrogate may be required to undergo numerous ART cycles<sup>234</sup>. Such repeated ART procedures may adversely affect the health of the surrogate which the Bill does not address adequately<sup>235</sup>. Most importantly, the Bill does not mention the circumstances in which a surrogate woman can abort her surrogate pregnancy.

The ART Bill mandates that, the persons who initiate surrogacy for begetting a child should accept the child after its birth and any refusal would amount to an offence. However the deterrent effect of this provision is reduced in case of foreign couple / individuals who avail surrogacy service because the Bill mentions that in

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<sup>233</sup> See, Anil Malhotra & Ranjit Malhotra, "All Aboard for the Fertility Express", *Commonwealth Law Bulletin*, Vol.38, No. 1, 31-41, (2012), at p.40.

<sup>234</sup> See, Imrana Qadeer, "The ART of Marketing Babies", *Indian Journal of Medical Ethics*, Vol IX, No. 3, (2012), available <<http://www.issuesinmedicalethics.org/184ar209.html>> Visited on 20.9.2012.

<sup>235</sup> See, Nivedita Menon, "The Regulation of Surrogacy in India – Questions and Concerns", SAMA, New Delhi, available at <<http://kafila.org/2012/01/10/the-regulation-of-surrogacy-in-india-questions-and-concerns-sama/>> Visited on 20.9.2012.

case of refusal by the intended parents to accept the child, the local guardian appointed by such couple will be responsible to accept the child<sup>236</sup>. Thus the real culprits, i.e. the person who initiated the surrogacy can absolve themselves from liability by simply refusing to accept the child. Moreover, though there is an offence of refusal to accept, the implementation of punishment would be difficult in such cases as the persons are in foreign countries. Thus a major lacuna in the Bill is that, though majority of persons availing surrogacy in India are from foreign countries the Bill does not contain any provision to compel the persons to stay back in India upto the birth of the child<sup>237</sup>. The Bill however is an earnest attempt towards regulating surrogacy arrangements in India. But, due to the various drawbacks as discussed above, the Bill is inadequate to deal effectively with the whole issues surrounding the surrogacy practices in India and to protect the interests of various stakeholders. In this context it is relevant to mention here that, in 2012 an application was filed under Right to Information Act, 2005 seeking clarification from Government of India about the status of ART Bill, 2008 by Mr. Hari G. Ramasubramanian, Founder of India's First Fertility Law Firm, viz. Indian Surrogacy Law Centre (ISLC)<sup>238</sup>. Reply was given by the Legislative Department, Ministry of Law and Justice on 19<sup>th</sup> July, 2012 wherein it stated that a new proposal to enact legislation titled "Assisted Reproductive Technology (Regulation), 2012" had been received from the Department of Health and Family Research, Ministry of Health and Family Welfare<sup>239</sup>. Thus at present in India, in the absence of a specific legislation the ICMR Guidelines, 2005 are the only available regulatory framework for dealing with surrogacy.

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<sup>236</sup> Sarojini N. B. & Aastha Sharma, "The Draft ART (Regulation) Bill: In Whose Interest?", *Indian Journal of Medical Ethics*, Vol. VI, No.1, 36, (2009).

<sup>237</sup> *Supra* n.234.

<sup>238</sup> Indian Surrogacy Law Centre (ISLC) is based in Tamil Nadu. It deals with surrogacy related issues and facilitates contractual relationships between the surrogates and intended parents, providing surrogates for intended parents and providing legal assistance to the parties to the surrogacy agreement.

<sup>239</sup> See, Hari G. Ramasubramanian, "Assisted Reproductive Technology (Regulation) Bill pending with the Legislative Department", available at <<http://indiansurrogacylaw.com/assisted-reproductive-technology-regulation-billpending-legislative-department-ministry-law-justice/>> Visited on 20.9. 2012.

### 3.9 Conclusion

The method of surrogacy for procuring a biologically related child is widely being used all over the world and particularly in India. Surrogacy has been appreciated as well as criticized. It has been described as “*gift of love*” or “*gift of life*” as well as termed as “*rent a womb*” depending on the particular viewpoint adopted towards it. Regardless of its benefits, surrogacy has also generated considerable legal, moral and ethical debate<sup>240</sup>. Due to the uncertainty prevailing over the various issues surrounding surrogacy, it is considered as a legal and ethical mine-field<sup>241</sup>.

In more recent years, surrogate pregnancy has ignited a maelstrom of controversy in which scholars, politicians, judges, scientists, and religious authorities debate the definition of family and kinship. Like adoption, surrogate pregnancy is not an isolated phenomenon but rather it overlaps with a myriad of other social issues, such as wealth distribution, race and color-blindness, gender equality, and children’s rights, all of which come into play when defining family bonds and relationships<sup>242</sup>.

Surrogacy raises various legal issues such as those relating to 1) the surrogate mothers; 2) women generally (by spillover effects of surrogacy; 3) the children born out of the transaction; 4) the siblings who see or later hear of the transfer of the child; 5) the hiring parents; 6) children available for adoption who might be adopted but for surrogacy transactions<sup>243</sup>; 7) other parties involved or keenly interested in the transaction, such as grandparents and other relatives, brokers, lawyers and counselors<sup>244</sup>.

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<sup>240</sup> A. Stuhmcke, “Surrogate Motherhood: The Legal Position in Australia”, *Journal of Law and Medicine*, 2(2), 116 -124 (November 1994), at p.117.

<sup>241</sup> See for more discussion, “ACT Opens Way for Surrogate Births”, *Courier Mail* (The *Courier-Mail* is a daily newspaper published in Brisbane, Australia), Mar. 5, 1996, p 3, available at <[www.couriermail.com.au/](http://www.couriermail.com.au/)> Visited on 5.7.2011.

<sup>242</sup> *Supra* n.53 at p.16.

<sup>243</sup> Richard A. Posner, “The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood”, *5 J. Contemp. Health L. & Pol’y* 21 (1989), at p.24.

<sup>244</sup> See, Michael H. Shapiro, “How (Not) to Think About Surrogacy and Other Reproductive Innovations”, *28 U.S.F. L. Rev.* 647 (1993-1994).

In the absence of a specific legislation, it is very difficult to resolve these issues. It is necessary to address these issues urgently because of the fact that India is fast becoming a hot-spot destination for surrogacy. Moreover, there are no reliable statistics on how many surrogacies have been arranged in India<sup>245</sup>. The demand for surrogacy is expected to grow due to the increasing awareness created by major media outlets like *New York Times* and *Oprah* which spotlight towns such as Gujarat, where more than fifty surrogate women are pregnant with children destined for international locales<sup>246</sup>. The episodes of *Nirmala* and *Baby Manji* brought to light the lacuna in the Indian legal system to deal with surrogacy. In the first case a woman named Nirmala sought permission from the Chandigarh High Court for renting her womb, for raising money to treat her paralyzed husband<sup>247</sup>. The case of “*Baby Manji*”, is a highly publicized custody dispute involving a Japanese father and a child conceived by an Indian surrogate mother<sup>248</sup>. The biological father faced legal complications when he divorced the child’s intended mother, but was not permitted, as a single man, to adopt the child under Indian law<sup>249</sup>. The case drew attention worldwide and resulted in a ruling by the Supreme Court of India upholding the commercial surrogacy agreement. These types of controversies and disputes generated by surrogacy make it appropriate to ask whether the current legal system in India is adequate to deal with the complicated legal and ethical questions raised by surrogacy arrangements. Thus India’s minimal regulation of surrogacy agreements raises a bundle of concerns from both legal and ethical standpoints. These concerns can be categorized under four major heads. The first three concerns are clustered around the key participants in the transaction such as: the intended parents (commissioning parents), the surrogate mother, and the surrogate child and the fourth

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<sup>245</sup> See, Amelia Gentleman, “India Nurtures Business of Surrogate Motherhood”, *N.Y. Times*, Mar. 10 (2008), available at < <http://www.nytimes.com/2008/03/10/world/asia/surrogate.html>> Visited on 5.7.2011.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Supra* n.10.

<sup>248</sup> *Baby Manji Yamda v. Union of India & Another*, A.I.R. 2009 S.C. 84. Also see, Harmeet Shah Singh, “Japanese Girl Born to Indian Surrogate Arrives Home”, *CNN*, Nov. 2 (2008), available at < <http://www.cnn.com/2008/WORLD/asiapcf/11/02/india.baby/index.html>> Visited on 5.7.2011.

<sup>249</sup> See, “Reproductive Alternatives Blog”, available at <<http://reproductive-alternatives.com/>> Visited on 5.7.2011.

concern is clustered around the legality of the surrogate contracts. These concerns have been examined in detail in the subsequent chapters.

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