CHAPTER 6

CONFLICT OF LAWS AND PRACTICE OF SURROGACY IN INDIA

6.1 LEGAL COMPLEXITIES INVOLVED IN SURROGACY

The concept of commercial surrogacy is in prevalence in India from the inception of advancement in Medical Science in the late 20th century. Despite of social as well as legal Complexities involved in the concept the practice is gaining popularity all over the world and growing rapidly day by day and becoming a business industry in India. As the practice of commercial surrogacy is practiced on a large scale in India, but there is no law to handle or to regulate the practice which may result into the misuse of this practice which is of worrying concern.

In India legal complexities are more due to the absence of adequate law and many more by laws taking into place. The legal aspects surrounding a surrogacy are complex, diverse and unsettled which results into hardships regarding defining the legality of surrogacy contracts, determining the status of surrogate child, commissioning parent, settling disputes regarding custody, citizenship and parentage of surrogate child. Though there are certain guidelines of ICMR which are providing few directions to settle all these issues but have no binding effect and existing law is also not sufficient to meet the situation.
The primary objection to surrogate motherhood is the absence of legal framework to address its dimensions. The status of the child as well as of others involved is at risk until the rights and responsibilities of all parties are legally defined and enforced. What will happen if the surrogate mother wants to keep the baby? Can she be enjoy from doing so by the overriding legal right of the biological father who has contracted with her? If the intended couple gets divorced or separate, who will be awarded custody of the child? Are they both free to change their minds in that event? What if either become widowed? Who is responsible if the baby survives an abortion attempt? These are some of the issues related with surrogacy which creates some legal problems and needs answers.

6.2 LEGALITY OF SURROGACY CONTRACTS

Surrogacy arrangements made through contracts between the two parties or more than two parties. Whole the arrangement are based on a contract between the parties as there is no law to regulate these type of contracts, though it is stated by the law commission in its 228th report that these contracts should be regulated under the Indian Contract Act 1872, but whether these contracts re-enforceable is debatable. In India, under Section 23 of the Indian Contract a surrogacy contract may be declared void on the consideration being immoral or against public policy. Section 23 of ICA States, what considerations and objects are unlawful and what not, the consideration or object of an agreement is lawful, unless it is Forbidden by law; or is of such nature, that if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; the court regards it as Immoral, or opposed to
public policy. But as for the legality of the surrogacy contracts are concerned it would be worthwhile to mention that article 16.1 of the Universal Declaration of Human Rights says, that men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family. The judiciary in India too has recognized the reproductive right of human as a basic right. For instance in B.K. Parthasarthi Vs Government of Andhra Pradesh, the Andhra Pradesh high court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy and agreed with the decision of the US Supreme Court in Jack T. Skinner Vs State of Oklahoma, which characterized the right to produce as 'one of the basic civil rights of man'. In Javed Vs State of Haryana, though the supreme court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained from stating that the right to procreation is not a basic human right. Now if reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection. Furthermore these contracts can be defenced on the ground of autonomy. There need aid two variants of the case that surrogacy agreement ought to make perceived crazy from claiming deference to the self-sufficiency about ladies.

The first appeals to the importance of procreative liberty. If persons are to be free to implement their chosen conception of the good, then they must be

\[135\] Indian contract Act, 1872
\[136\] Law commission’s report on surrogacy at www.Lawcommissionofindia.nic.in.
\[137\] AIR 2000, A.P. p, 156
\[138\] 2003, 8, section 369.
\[139\] Supra Note 1
have the right to decide without interference whether and under what circumstances they will become parents. Including whether, they will do so for financial remuneration. Secondly the autonomy appeals to freedom of occupational choice. The choice to become a surrogate mother is sufficiently like any other job to be accorded the same legal protection. As Thomas Hobbes opines that an individual has a property in his person. He may utilize it to at most. This freedom stops short of only self destruction. Man is entitled to the fruits of his labour\textsuperscript{140}. So the commercial surrogacy contracts should also be made legal and should be enforceable. It is further submitted that the Ambit of right to life is wider than mere animal existence and goes on to include all aspects of life which makes it worth living. Procreative liberty and right to reproduction have been recognized as a part of right to life, specifically under article 21 of the constitution. Article 21 has a positive content encompassing the quality of life and the right to carry on such functions and activities as constitute the bare minimum expression of the human self\textsuperscript{141}. Thus surrogacy in this sense provides an alternate to have a child which is genetically related to the couple, which help the couples to form their family and provides with a status in the society and on the other hand the surrogates are able to raise their living standard or to provide their families with basic needs. So it is required to enforce these contracts rather than prohibiting. Furthermore it is argued that the reproductive rights of a woman are considered to be elemental to the development and empowerment of women.

It is widely conceived that, reproductive health and freedom, woman cannot fully

\textsuperscript{140} Jyoti Bhakare, surrogacy- a reality edepsed by statically social legal issues Indian perspectives, Indian Journal of Law and Justice, vol 2(1), March.

\textsuperscript{141} Raghav Sharma, An international, moral and legal perspective: The call for Legalization of surrogacy in India. All India High Court Cases, 2008, p109
exercise their fundamental human rights. The Argument on women’s empowerment basically stands from the liberty to decide on how to exercise her reproductive rights. An option wherein a woman can bargain and enter into contracts for carrying a baby looks emancipator (free from restraint)\(^\text{142}\). Thus surrogacy is believed to be one of the channeling sources of empowerment of women. Surrogacy contracts ends in placing the parties to the agreement at a better position; and therefore it needs to be enforceable\(^\text{143}\). Moreover, the Indian judiciary in the case of baby Manji has recognized the practice of commercial surrogacy as valid in India and considered it legal as the court did not debar the case of public policy\(^\text{144}\). So surrogacy contracts should be enforceable keeping in view the demand for this practice by those who are unable to procreate child by natural way.

**6.3 LEGITIMACY OF SURROGATE CHILD**

Another concerned about the practice of surrogacy is about the legitimacy of surrogate child where the law creates conflicts. The law in India recognize this relationship by blood or marriage and adoption is included in the category by the legal presumption of the adopted child being at par with the natural born child\(^\text{145}\). Children are said to be related to each other by full\(^\text{146}\), half\(^\text{147}\)

\(^{142}\) Sapna Raheem, freedom of trade and commerce and reproductive markets in India: ART bill,2010

\(^{143}\) Ibid


\(^{145}\) Full blood when they have same parents.

\(^{146}\) Half Blood when they have the same father but different mother.

\(^{147}\) Uterine blood when they have same mother but different father.
and uterine blood\textsuperscript{148} The status of children in a family is established by reference to the marital status of their parents. They are classified as legitimate when either conceived or born during the subsistence of marriage. Children born outside the wedlock are illegitimate.\textsuperscript{15} Surrogacy challenges both the principles. As far as legal problems are concerned, one relates to the legitimacy of the child so born. For legal purposes, paternity is a question based on the genetic factor. Use of the husband’s sperm for inseminating the wife either in-vitro or in uterus (through artificial insemination) does not pose any problem to the question of paternity of the offspring\textsuperscript{149}. However, the situation becomes problematic or conflicting when these techniques are used in third lady that is other than the wife, or when there is involvement of a third person as happened in donated sperm are donated ova or eggs.

In India legitimacy issues is governed by section 112 of the evidence act, where under the child would be legitimate child of the woman and her husband, and the artificiality of the process would make no difference\textsuperscript{150}, which means that when the techniques of artificial reproduction is used with the wife then, child born out with the result of these techniques is presumed to be born out of as the child is naturally born within a legitimate wedlock. Simultaneously in India legitimacy of children is also governed by the personal laws.

The Hindu Marriage Act, 1955 and Special Marriage Act 1954 confer legitimacy to children of void marriages numerated under those Acts alone and deny legitimacy to children of other void marriages which fall outside the purview

\textsuperscript{148} Supra Note10.
\textsuperscript{149} Ibid
\textsuperscript{150} Ibid
of these Acts. And an ART child will not came under the provisions enumerated under any of the Acts mentioned above. Hence they will be illegitimate in the absence of any legislation legitimating the ART children. And according to ICMR’s guidelines the child has to be adopted by the intended parents or the parenthood should be established by DNA testing, and cover if the intended parents fails to adopt the child or does not establish their parenthood by DNA testing then the child comes under the preview of section 112 of Indian Evidence Act,1872. Section 112 of IEA deals with law as to the proof of legitimacy of child. It say that if a child was born during the continuance of a valid marriage or within 280 days after the dissolution of marriage but before the women remarried someone else is it still a conclusive proof that the person to whom the mother of child was married is the biological father of the child, but this is a rebuttable presumption which can be rebuttable by the husband of a woman by proving that he could not possibly have had sexual intercourse with the mother at any time during which she could have conceived the child born. Once it is proved that the husband of the mother is not the biological father of the surrogate child then the child is deemed to be a illegitimate as the child is not born out of a legitimate wedlock. So in the order to provide with a legitimate status to the child the intended parents has to be established their paternity either through DNA testing or by adoption otherwise the child remains an illegitimate.

151 Ibid
6.4 CUSTODY OF SURROGATE CHILD

In surrogate birth, there are three entities the intending mother\textsuperscript{152}, the biological mother\textsuperscript{153} genetic mother\textsuperscript{154}. There may be overlap between the three in certain cases. If the ovum of the intending mother is used then she becomes that genetic mother, if the biological mother provides her own ovum then she becomes the genetic mother. And this is where the moral and legal question arises, that is out of these who should be the legal mother\textsuperscript{155}. In India, in the absence of law of the situation becomes more Complex. Due to lack of law on the issue, guidelines of ICMR are the guiding rules for the couples who asks for surrogacy and according to these guidelines A tyke conceived through surrogacy must be embraced Eventually Tom's perusing those hereditary are expected folks unless they cam wood made through hereditary (DNA) fingerprinting that the type may be there business with the goal. Selection will be necessary to Building an legitimate status of the surrogate type alternately DNA test will be needed. In these circumstances the situation becomes avertable if the genetic material is provided by other person then the intending parents and the person who provides the material also sets out for the parentage through DNA test then the question arises as who what should be the legal mothers or father of the surrogate child? And another situation may also arise, when the intended party refuse to take the baby due to some reasons such as physical disability of the child, and the surrogate mother also denies to take the child, then the question arises as whom

\textsuperscript{152} Mother who wants the child.
\textsuperscript{153} Mother who gives birth to child.
\textsuperscript{154} Who provides Ovum
\textsuperscript{155} Reetu and Basudatta, surrogate birth, AIR vol,96 (147) July,2009 p.108
should the child be given as both the parties rejects to take the child? Undoubtedly, the basis of genetics and DNA fingerprinting, the mother is the woman whose ovum has been fertilized. But biologically, in terms of the intimate relationship between a baby developing in a Womb and the woman carrying it, the surrogate mother is the real mother. Disputes over the custody of the baby have already arising in this regard. The current position of Law is biological mother is considered to be the legal mother and genetic mother needs to adopt the child to call it her own. But the complications are not just confined to the biological and genetic mother but it extends much beyond. A child may be born to a surrogate in different ways which might involve a genetic mother, genetic father, intended mother and father, and biological mother and father. For these instances may be the greater part, however overlook parenthood ended up additional questionable Concerning illustration the type will be destined by surrogate mother, wanted Eventually Tom's perusing planned mothball yet all the need the genes of hereditary mothball (where those ovum will be utilized of a donor). So there are some of the situations which create confusion or where the law is conflicting to overcome with these conflicts a comprehensive legislation is needed to answer all these questions associated with the practice of surrogacy.

In India the custody of the child is covered under the Hindu Minority and Guardianship Act, 1956 by which the woman who gave the birth to the child is presumed to be the 'natural guardian' of the illegitimate child, hence the custody is being given to her. What will happen if there is a dispute regarding the custody of surrogate child and the surrogate mother refuses to handover the child to

\[supra\text{ note 10}\]
intended parents? And what will be the fate of intended parents; or other hand situation may arise, where both the parties refused to take the custody of the child in that situation whom should the child's custody to be given? Or in case of custody dispute, whom should the custody be given till the battle remains or till the dispute resolves?

6.5 RIGHTS OF SURROGATE MOTHER, SURROGATE CHILD AND COMMISSIONING PARENTS

In the absence of any specific law on the issue of surrogacy, the existing laws are conflicting and are not adequate or sufficient to deal with the all related issues regarding the rights of the surrogate child, surrogate mother and the intended parents. The existing guidelines of ICMR are also not clear on various issues, such as:

If those appointing guardians can't with take the authority of the surrogate child, then what will happen, should it be given to the surrogate mother? And another situation may arise, when the surrogate also deny taking the child then what will be the fate of the child? Then what will be the right of the child? Whether he should be regarded as the legitimate child or illegitimate? If he be regarded as legitimate children then who should be given the custody of the child as both of the parties are unwilling to take the child or the surrogate mother has to bear the burden compulsorily? And if the child be regarded a illegitimate then what about her inheritance right? As per Indian law if a child is born in a legally wedlock then the child is presumed to be the legitimate child of the couple, who were living as husband and wife and in case of surrogacy, if the surrogate mother
is married then the child born to be surrogate mother is deemed to be the child of the surrogate mother and her husband, in this situation if the surrogate does not want the child then should she be compelled to take the child and should the child (surrogate child) is entitled to inherit the property of the surrogate mother and her husband? And on the other hand if the surrogate mother is a unmarried or a single women i.e divorce or widow when the child is regarded as a illegitimate as the child is not the outcome of a valid marriage, So in these situation if the intended couple denied to take the child then again the question arises should the surrogate mother be compelled to take the child, if she also refuse to take the child and the child be liable to inherit the property of the surrogate mother? In turn issue in regards to those greater parts, however overlook the surrogate child, the place the law is not reasonable is over those citizenship What's more parentage for. the child. If the intended parents are from outside India and surrogate is Indian, then what is the citizenship of child? Whether the child is by birth Indian? As it might have been held in jan Bala's case that those nationality of the surrogate mother, will choose the citizenship of the tyke. Previously, An point of interest judgment\textsuperscript{157} those Gujarat high official need held that those surrogate mother Concerning illustration those characteristic mothball Also her nationality choose the citizenship of the infant babies regardless of the father tan. Upholding the citizenship rights of the boys the court said: We in the present legal system, have no other go but to hold that the babies born in India to the gestational surrogates are citizens of the country\textsuperscript{158}. Though the citizenship is decided by the court but

\textsuperscript{157} Jan Balaze V. Anand Munciplaity and otherd, 2009,Guj.HC
\textsuperscript{158} M.Thakkar, Irvi H.,IS Surrogate Motherhood Moral?, Cr.L.J.,2011 p.93
what will happen if nobody claims for the citizenship on behalf of the surrogate child and the surrogate mother also abandoned the child should it be conferred automatically on the surrogate child?

6.5.1 Parentage And Citizenship Issues with Respect to Surrogate Child For Foreign Couple.

As there is no specific law to determine the parentage of a surrogate child and there are certain guidelines which will be applicable to handle these issues. Therefore, the guidelines provide that a birth certificate will be issued in the names of the genetic parents. In India under the registration of birth and death Act the medical officer or a hospital or health center designee is charged with providing information to register about birds occurring in its facility\(^\text{159}^\) and should also provide with details of father and mother's name in data sheet. The legal dilemma that arise in case of surrogate child is as to who should be the legal mother under the birth certificate, as there are three persons who could possibly claim, surrogate mother, genetic mother(who provides the material or eggs) and commissioning mother (who hired a surrogate mother)\(^\text{160}^\) and in India the practice is that the birth certificate should hear the name of the woman who actually gives birth to the child and according to ICMR’s guidelines the birth certificate shall we are the names of genetic parents (who provides the genetic material that is sperms and eggs) and in case the Commissioning parents are not the genetic parents then they have to adopt the child to be the legal Parents of the surrogate child. Those circumstances got that's only the tip of the iceberg

\(^{159}\)8(1) of Registration of Birth and Death Act,1969

problematic /conflicting At the appointing guardian need aid starting with outside countries, those inquiry arises Similarly as what ought be those nationality of the surrogate kid. As it was happened in the case of Jan Balaz Vs Anand municipality and before Gujarat High Court. In this case, Mr Balaz who was a German National and his wife Susana Lohle came to India to seek Dr. Patel’s help as Sussane could not produce ova and could not conceive a child therefore they hire a Indian surrogate to deliver a baby for them and the eggs were received from a donor and might have been treated for those Balaz's sperms Also might have been planted On surrogate's whom named Concerning illustration Martha Khristi. She offered conception of the twins with respect to 4th January, 2008. Mr. Balaz so as will take back as much children with UK connected Indian passports to as much young men. The passports were initially issued but later he was asked by the Ahmadabad Passport office to surrender the passport on the ground that the column of mother's name carried that of Sussane who did not conceived and deliver the children's and violated the Birth and Death Registration Act, 1969, according to which, the name of the women who delivered the child should be entered in the birth certificate of the child as mother, but in the present case the name of the intended mother was in the High Court of Gujarat in letters patent appeal no.2151 of 2009 in special civil application no.11364 written on the certificate. Then Mr Balaz after surrendering the passports moved to High Court Gujarat to get them back, so that he could take the boys along with him. 162. At this the Honorable Court observed that a lot of legal, moral and ethical issues

161 Ibid
162 Irvi H. Thakkar, is Surrogate Motherhood Moral? Cr.L.J.,2011, p.92
arises for consideration, which has no precedents in this country. The court also observed that the main concern is about the two newborn babies much more than the rights of the biological parents, the surrogate mother or the donor of ova. Upholding the citizenship rights of the boys, the court said, "we in the present legal framework, have no other go, to hold that the babies born to India to the gestational surrogate are citizens of this country and therefore direct the passport authorities is to release the passports withdrawn from them forthwith." In this landmark judgment, the Gujarat High Court has held the surrogate mother as the natural mother and her nationality to decide the citizenship of the new born babies irrespective of the father. The same difficulties arises in an another case while getting the child to their intended parents country. In this case i.e. of Baby Manji’s case and the substantial issue of surrogate child citizenship status was presented before the Supreme Court of India, However the supreme court did not considered the citizenship, visa and passport issue rather the case is considered with dust custody of the child Yamada given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement with her entered into bye Dr. Yuki Yamada and Dr. Ikufumi Yamada of Japan. The couple traveled to India in November, 2007 and hired a surrogate. The sperm had come from Dr. Ikufumi Yamada father but egg from a doctor not from intended mother (Dr. Yuki Yamada) thereafter a matrimonial dispute

163 Ibid
164 Manji Yamada vs. Unionof India, SCC(13),2008, p.518
165 Supra note 29
166 Law Commission Report on surrogacy at www.lawcommissionofindia.nic.in
167 Supra note 32
occurred between the couple and had divorced before the birth took place and the baby was born July 25, 2008 and the man's ex-wife did not make any claim to Manji but the intended father wants the child. Initially there was a delay in issuing Manji’s birth certificate because of doubt as to how to address a mother for Manji on the certificate. After receiving guidance from the Registrar, Anand Municipality Officer issued a provisional birth certificate with only the father’s name on it. Apparently, difficulties with citizenship first arose because the Japanese Foreign Ministry told Yamada that in order to bring the baby to Japan, he would have to adopt Manji in pursuant to Japanese and Indian laws and obtain an Indian passport. Yamada encountered difficulties in getting travel documents from the Indian Government and in obtaining a visa from the Japanese Government as he was told by the Japanese Embassy to get a document from an Indian Court to get custody of the child. In the meanwhile the genetic father has to return to Japan due to expiration of his visa. And the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat. Then the grandmother of the baby Manji flew from Japan to take care of the child. In Jaipur a NGO called Satya filed a petition in Rajasthan High Court that in absence of a surrogacy law in India, the legitimacy of the baby could not be claimed by anyone and seeks to prevent Yamada to take the child to Japan. And the NGO claimed that the custody could not be assumed by Manji's grandmother.

168 supra note 34
169 Supra note 32
170 Ibid
171 Supra note 34
172 Supra note 32
Those appeal to Additionally tested those lawfulness from claiming business surrogacy. The Rajasthan High Court then issued notices to Union Home Ministry and Department of Home of the State Government to produce Manji within 4 weeks. In response Manji's grandmother filed a petition on Manji's behalf in the Supreme Court of India. On admirable 14, 2008 the preeminent court conceded Manji's grandmother impermanent authority Also controlled the police from bringing any venture to prepare Manji in front of Rajasthan high official What's more done an request disposing of the instance the preeminent court stated that the requisition sorted out under the security. children's Act 2005 was the appropriate authority to hear complaints of Satya's on the basis supreme Court has disposed of the case in Rajasthan High Court. And the respect to commercial surrogacy, the court effectively validated the procedure in India\textsuperscript{173} with respect to baby Manji’s travel after the supreme court's judgement, the jaipur passport office gave special dispensation and issued a certificate of identify of Manji (which was granted in case of where the people is stateless or who cannot get a passport from their own country and was the first one issued by Jaipur passport office in case of Manji). Thereafter, the Japanese Embassy in New Delhi issued here 1 year visa on humanitarian grounds and Manji arrived in Japan with her grandmother on November 2, 2008. So in this case law remains unclear as to whether a child born to an Indian surrogate is a citizen of India and issues are raised as to whether a gestational surrogate, who is an Indian citizen is considered a parent of the child born through surrogacy\textsuperscript{174}. Thus all these issues

\textsuperscript{173} Manji Yamada v union of india, SCC(13),2008, p.518
\textsuperscript{174} Supra note 32
are answered in Jan Balaz's Case\textsuperscript{175} but the question arises as the judgment given in this case is a precedent to handle like these cases in future as there is no law on the subject of surrogacy in India to decide the citizenship of the new born babies irrespective of the father’s nationality. The division bench of the HC comprising Justice K.S. Radha Krishnan and Dave, in a landmark judgment on November 11, 2011 had conferred Indian citizenship on the two boys as their surrogate mother is an Indian\textsuperscript{176}. In this case the court directed that the twins birth certificates be changed to reflect the value of the surrogate mother of the twins and remove Sussane’s name\textsuperscript{177}. This was a case of first impression for the Gujarat High Court and the scope of the legal issues, the intends to examine with respect to international surrogacy were not publicly identified\textsuperscript{178}. The court appeared to accept the surrogacy arrangements and dispose of the issue of modifying the twin’s birth certificates promptly to enable them to obtain travel documents to leave the country. However, the actions taken by the court were likely due to the reality that that solicitor might have been additionally that hereditary father and the surrogate mother willingly relinquished her rights. But the situation may not be the same if the surrogate laid claim to the children. Hence the court observed that a comprehensive legislation is needed for defining the rights of a child born out of surrogacy agreement, rights and responsibilities of surrogate and rights of the commissioning parents.

\textsuperscript{175} Jan Balaz Vs Anand Muncipality & 6 in the High Court of Gujarat in Letters Pantent Apeal No. 2151 of 2009 in Special civil application no.11364 of 2009.
\textsuperscript{176} Ibid
\textsuperscript{177} USHA, Rengachary Smerdon, crossing bodies, borders international surrogacy between US and India, at www.childtraffic.com/docs/smerdon.08-cross.borders.1009.
\textsuperscript{178} Ibid
6.5.2 Rights of Surrogate Mother and Commissioning Parents.

Rights of surrogate mother and of commissioning parents are some issues which are also to be considered. But the Indian Law is also conflicting regarding these rights and ICMR had also says nothing on these issues in the guidelines. They remain silent on such type of conflicting interests. Regarding the surrogate's right to keep the baby. As being a natural mother of the infant should the surrogate mother be regarded as the legal mother, and have a right to keep the baby with whom she is biologically related? Because the Indian Law grants the custody of the infant child to the natural mother. Should this right be waived by the surrogate mother in the absence of any law? The right of surrogate mother is available or not or to abort the child without the consent of the intended parents whether she is allowed or not. Or if the child dies in the mother’s womb, should she paid with full compensation as agreed upon or is paid with half or of nothing? Thirdly should a surrogate be compelled to take the child in case the intended child dies before the delivery of the child? These are some of the issues which need some consideration to avoid the conflicts regarding the rights of the surrogates and regarding the commissioning parents. Further, what will be the fate of commissioning parents if the surrogate breaches the contract and refuse to handover the baby to the commissioning parents, should they have the Correct should suede those surrogate mother for those authority of the surrogate child, At the appointing folks doesn't hereditarily related for their child? in such kind about particular circumstances the thing that will a chance to be those cure for them?. Another situation may arise when the surrogate mother dies before the delivery and have given with some money, should they be liable to take back money from
the other members of the surrogate’s family or the baby dies before delivery should the surrogate be hired again and should be compensated again for another delivery? These are some of the issues which are not adequately answered in the absence of an independent law on the subject of surrogacy in India and the existing law in India is also incompatible to deal all these issues so there is a need for an independent law to answer all these questions. And the intervention of the third party in reproduction gave rise to the question of legal status of the parentage which is more important for providing certain rights to the child and parents.

### 6.5.3 Status of Commissioning Parents

The status of commissioning parents is also unsettled as that of a surrogate child in India. Though ICMR’s guidelines have some provision to deal with such problems, but these are also conflicting one and are not clear on some points. As per C1 3.10.1 of the guideline the commissioning parents has to adopt the child to become the legal parents of the child or they have to establish the current age by DNA fingerprinting, otherwise the parents could not be treated as legal parents of the child and under the Indian legal system the legal parents of the child are those within whose wedlock the child has born out. The presumption under 112 of Evidence Act is with the couple who gave birth to the child whether they genetically related to the child or not. On the other hand if the genetic material is provided by the third party either the sperm or eggs and established their parents by DNA fingerprinting then they will be treated as the legal parents and the commissioning parents cannot take the child as they were not genetically
related to the child. To provide with the legal status to commissioning parents they have to adopt the child or establish it by DNA testing.

6.6 LOOPHOLES OF THE SURROGACY (REGULATION) BILL, 2016
(Availability On Law Integration Web Scenario)

The surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha on November 21, 2016. Some issues in the Bill presented below:

1. Purpose for conducting surrogacy procedure and eligibility criteria of intending couples maybe further specified through regulations.

Class 4(ii) of the bill: No surrogacy procedure shall be conducted, undertaken, performed or availed of, except for the following purpose namely:-

(a) when either or both members of the couple is suffering from proven infertility;
(b) when it is only for altruistic surrogacy purposes;
(c) when it is not for commercial purposes or for commercialization of surrogacy or surrogacy procedures;
(d) when it is not for producing children for sale, prostitution or any other form of exploitation; and
(e) any other condition or disease as may be specified by regulations made by the board.

Clause 4(iii) (c) of the bill and eligibility certificate for intending couple is issued by the appropriate authority on fulfillment of the following conditions, namely:-

(i) the age of the intending couple is between 23 to 50 years for the female and between 26 to 55 years for the male:
the intending couple are married for at least 5 years and are Indian citizens;

(iii) the intending couple have no surviving child (biological or adopted or surrogate); with the exception of a child who is mentally or physically challenged or suffers from a life threatening disorder, certified by a District Medical Board;

(iv) such other conditions as may be specified by the regulations.

Clause 48(a) of the bill: The national surrogacy board with the prior approval of the central government may make regulations to provide for the fulfillment of any other condition under which the eligibility certificate for intending couples may be issued by the appropriate authority.

**Issue:** Clause 4 of the bill specifies the purposes for which a surrogacy procedure may be undertaken and the eligibility conditions that need to be fulfilled by the couples intending to Commission A surrogacy. Further, the bill allows the national surrogacy board to specify (i) other conditions or disease as grounds for allowing a surrogacy procedure, and (ii) other eligibility conditions that need to be fulfilled by the couple intending to Commission a surgery procedure. It could be argued that the qualifying conditions for surrogacy should be specified in the bill and not to be delegated to regulations.

2 - Close relative' not defined

Clause 4(iii)b(ii) of the Bill: No person, other than a close relative of the intending couple, shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this act.

**Issue:** The bill specifies various conditions that need to be fulfilled by a surrogate mother in order to be eligible for a surrogacy procedure. Upon fulfilling these
conditions, the surrogate mother may obtain an eligibility certificate from an appropriate authority appointed by the government. One of the conditions to be proved by the surrogate mother is that she is a 'close relative' of the intending couple who commissions the surrogacy. However, the Bill does not define the term 'close relative.

3- Review process for application for surrogacy not specified.

**Issue:** The bill specifies that in order to initiate a surrogacy procedure, the surrogate mother and the couple intending to Commission the surrogacy may required to obtain certificates of eligibility and essentiality from the relevant appropriate authorities at the centre or state. However, the bill does not specify a time period by which the appropriate authority will grant these certificates. Further, the bill does not specify a review or appeal in case the application for the certificates is rejected.

6.7 Current Scenario of Commercial Surrogacy in India

Surrogacy has become huge business in recent years cover not only nationally but cutting across National boundaries also. It is estimated that the surrogacy business alone is worth $445 million in India. Due to growing demand, this practice of surrogacy is rampant in India\(^\text{179}\). Because of high infertility rate cover good infrastructure and technologies in India which creates a hope to many infertile couples to have a child genetically related.

In India cost of this practice is very cheap in comparison to other countries, people of other countries attract and visited India to fulfill their dream.

\(^{179}\) [http://economictimes.indiatimes.com](http://economictimes.indiatimes.com)
Show the commercial is on hike. There is no official estimate about the cases of commercial surrogacy in India, but the cases reported by media and by the clinics who offer these services and other authorities shows that the cases of commercial surrogacy is on increase. Commercial surrogacy varies from clinic to clinic so there is no reliable data. There is an estimate of ICMR and National Commission for Women there are 3000 clinics offering ART surrogacy services in India. India's medical tourism trade has grown in dramatically in recent years with physicians here overseeing an estimated 1500 surrogacy birth for domestic and Overseas couples in 2010, 50% jump in 2 years. Confederation of Indian industry predicts that commercial surrogacy will grow to a $2.3 billion industry in coming years. Low cost surrogates, flexible law and regulations, loopholes in the present legal system fuels into the demand for India. Surrogacy services and more and more foreign couples are approaching to India to fulfill their dreams. Anand a small town in India has now become the hub of the surrogacy.

This shows that there are increasing number of cases of commercial surrogacy in India providing these services. On 24th August, the cabinet clear the draft surrogacy bill in order to make process of surrogacy in India more transparent. Thus far, surrogacy in which another woman carries and gives birth to a child for a couple who want to have a baby but are unable to do so has been the grey legal area in India.

180 www.mothergagette.com
182 Usha Ranjacharyasmerdon, crossing bodies.
The surrogacy(regulation) bill, 2016, came after India emerged as a surrogacy hub for couples and the increased number of incidents reported on unethical practice. The bill prohibits commercial surrogacy, which includes stopping foreigners from Commissioner surrogacy in India while making it illegal for single parents, gay couples and those in live in relationship to opt for surrogacy.