Gift of child is the most precious one for a couple. Those who are deprived of this wonderful gift always feel inferior and frustrated. There are thousands of couples across the world facing humiliation because of not having any child. Surrogacy is a wonderful gift that would bring the big smile on their face. The development in medical science and increased social awareness and acceptance has made it popular and more and more couples are getting benefitted by it every year. The number is ever increasing and countries like India are becoming a major centre for surrogacy due to availability of surrogate mothers and legal flexibility.

Technological breakthroughs in science and medicine have reintroduced the ancient practice of surrogate motherhood into the modern age. Twice in the early chapters of the Old Testament the Bible speaks of barren women being provided with sons by surrogate mothers. Abraham's wife, Sarah, said to her husband, "Behold now, the LORD has restrained me from bearing: I pray thee, go into my maid; it may be that I may obtain children by her. Similarly, Rachel, the barren wife of Jacob, said to her husband, "Behold my maid Bilah, go into her; and she shall bear upon my knees, that I may also have children by her." Today, the procedure is less personal than in Biblical times, but the objective, impregnation of a surrogate to bear a child for the natural father and his wife rather than for herself, has not changed.

Nowadays, we are lucky that due to technological breakthroughs in this field of science a woman can feel safe knowing that even though another woman is carrying her child, the surrogate mother never actually had any relations with her spouse. Such things have, in the past, caused battles and feuds between the people involved and it is quite understandable. The technological solution has saved an awful lot of heartache for many families, and this solution has become a blessing for many families now.

Intended parents may arrange a surrogate pregnancy because of female infertility or the medical issues which may make the pregnancy or the delivery risky. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy due
to many reasons for example career reasons, reasons of convenience or a simple fear of or distaste for pregnancy. Many homosexual male couples turn to surrogacy, as their only option for becoming parents, because in many places it is not yet legal for gay couples to adopt children. Alternatively, the intended parent may be a single male or a single female who is unable to bring a pregnancy to full term.

A ‘surrogate mother’ is a woman who agrees to be artificially inseminated with the sperm of a man whose own wife is incapable of conceiving or carrying a child to term. In the typical case, the surrogate mother conceives, carries the child for nine months, gives birth, and then releases her parental rights, giving up the child to the infertile couple for adoption. The agreement between the surrogate mother and the natural father or couple is embodied in a contract, which usually provides for the surrogate mother to receive all medical and living expenses associated with the bearing of the child in addition to a substantial fee.

A couple might choose to use a surrogate for any of a variety of reasons, the most common of which is the wife's infertility. A second reason that couples might seek a surrogate mother is to avoid having the wife's genetic defects passed on to their child. A third instance is where pregnancy poses too great a danger to a woman's health or well-being. Finally, a woman might choose to have a child using a surrogate instead of bearing one herself for convenience or carrier constraints rather than for any medical reason.

Use of a surrogate mother to obtain a baby has distinct advantages over regular adoption. For most couples, adopting a desirable infant is generally a long and arduous process. An infertile couple that approaches an adoption agency is likely to encounter a long wait and complex selection process before succeeding in receiving a child. With a surrogate mother arrangement, the couple need to wait only nine months, the normal period of gestation, and can better plan when it would like the child to arrive. A further advantage to surrogate motherhood is that the child is biologically related to the natural father, whereas in regular adoption the child is not related to either parent. Moreover, the parents can choose the surrogate, selecting one with particular features or characteristics they desire. The inability of couples to become parents is often tragic. New technologies and the desire for biologically related children will continually draw some infertile couples towards surrogate motherhood.
However, the concept of surrogate motherhood is accompanied by a great deal of moral and ethical controversy. The variety of legislative responses to enforcement of the surrogate mother contracts suggests that there are no easy answers.

Surrogacy arrangements have different implications on different societies having distinct culture, social values, religious and social set up etc. But human rights issues relating to surrogacy arrangements have universal character. These issues can be addressed by effectuating the basic human rights through legislation. The human rights instruments should be translated in tune with the current pace of assisted reproductive technologies.

Outsourcing is a commonly used word today. Corporations outsource many of their functions and process to developing countries, especially India, to cut costs and improve efficiency. Clinical trials were thus outsourced to India, and now it appears that children are being produced by outsourcing surrogate motherhood to India. Consequently, a new and unique enterprise known as ‘reproductive outsourcing’ is a rapidly expanding business in India.

It is possible that due to poverty or some other reason, family members may compel a woman to act as a surrogate mother. The woman who enroll for such procedures are mainly from poor socio-economic background. The surrogate mother is paid by the couple who want child, and it is possible that the mother may not be adequately paid which may lead to exploitation.

Although a large number of surrogacy success stories are reported yet there are some problems associated with surrogate motherhood in India involving ethnic factors. Pregnancy is fraught with risks at all stages and puts a huge mental and physical strain on the surrogate mother. The surrogacy laws of western countries may not be compatible with those in India. Negligence of the health of the mother and child by the fertility clinics can lead to the complete wastage of the entire procedure.

Efforts to construct legislative policy in response to developments in assisted reproductive technologies are stymied by lack of societal consensus. Concerns over the commodification of reproductive practices and changes to natural family relations must be balanced against empathy for those who desire to have children and support of reproductive freedom. These cultural tensions are equally evident in feminists’ responses
to surrogate motherhood, which ranges from supporting regulation to calling for a ban on all surrogacy contracts. One view of feminists, pessimistically appraises new reproductive technologies/practices in general and surrogacy in particular, as indicative of male attempts to control and regulate women. They assert that assisted reproductive technologies exploit women’s bodies, including, in the case of surrogacy, using women’s wombs as empty vessels. They draw links between prostitution and surrogacy; some envision the practice of surrogacy resulting in “reproductive brothels”. For this camp of feminists, the only acceptable response by the state to the practice of surrogacy is to ban it i.e., make all surrogacy contracts invalid and thus legally unenforceable.

Another feminist’s perspective maintains that surrogacy reflects class exploitation, an arrangement by which upper-class men and women take advantage of poor women. This is seen as further evidence of the commodification of social life, in this case the commodification of children and women’s bodies. Furthermore these feminists argue that as the use of a woman to gestate a foetus that is not genetically hers becomes more feasible, poorer women of colour and women from third world will be sought as surrogates, thus increasing the exploitative potentials of surrogacy arrangements. Consequently, this group of feminists also advocates the banning of commercial surrogacy arrangements.

However, not all feminists oppose surrogacy. For instance, liberal feminists and their supporters defend a woman’s right to use her body as she chooses, even if that means being surrogate. For these feminists, to prevent women from entering into surrogacy contracts is to deny them both democratic and reproductive freedom. This perspective casts surrogate parenting as no different from any other wage labour contract. Therefore, according women special treatment in this area would only undermine their autonomy and equality as citizens. At the same time, liberal feminists recognise the problems of confusions that can arise when surrogacy is handled under existing adoption laws that were not written to deal with particular nuances of surrogate parenting (e.g., intentional conception). Therefore, while such feminists advocate making surrogacy legal, they also endorse regulating the practice.

A final group has argued for a more complex and less polemical understanding of surrogacy. This approach recognises the simultaneously reactionary (e.g., privileging the
heterosexual nuclear family) and radical (e.g., making parenthood feasible for gay and lesbian couples and for single man/woman) potentials of surrogacy and new reproductive technologies for redefining what family, women, motherhood, and responsibility to children mean. As they are aware of both the liberating and oppressive potentials of surrogacy, these feminists advocate regulating surrogacy so that its worst aspects are eliminated and its best ones retained.

Many people who have no objections to the current use of modern reproductive techniques to bring happiness to childless couples would nonetheless be alarmed by some of the possibilities that the new technology offers. Current ethical objections to surrogacy reflect a reasonable prediction that the means we are now using to make the traditional family possible for those who cannot otherwise achieve it carry with them the seeds of destruction of the concept of family as we know it. Of course our views will undoubtedly change as practices change and future generations will see these issues very differently. It is reasonable to expect that such fundamental views as the merits of genetic manipulation, our notions concerning family and even what it means to be human will develop and change. It seems inevitable that without regulation modern technology will take this course, and that if we leave technology and individual initiatives unchecked, it will be difficult to contain the revolution that will follow.

Given the potential that procreative technologies have to create and redefine families, responses to these techniques and to surrogate motherhood resonate with larger debates about women, gender and family, from the changing roles of mothers to the commercialisation of family relations. Different interpretations of these issues contribute to diverse policy responses to surrogate parenting. However, one of the key and unexpected findings presented here is that advocates and opponents of surrogacy, rather than holding distinct worldviews or engaging one another in a cultural war of diametrically opposed values, generally are in ideological agreement on the sanctity of family. This unexpected overlap in ideology is revealed through a careful examination of the familiar frames and overlapping discourses that shaped the politics of reproduction surrounding surrogate motherhood legislation.

This prognosis has led to a perceived need to develop rules to contain or at least to regulate modern reproductive techniques, including surrogacy. Rules are needed both for
the short term and the long term, and the choices that are made may have profound implications for how society will develop. But the unusual and difficult aspect of devising regulations for these subjects is that society is largely ignorant of the subjects to be regulated. Eliminating the new technological choices, even if that could be accomplished, would cut off our knowledge and prevent the society from learning what technologies can accomplish and what social problems they will actually involve. Jurisdictions cannot decline to have any policy, because a choice of no regulation also has consequences. If the law remains silent, the resulting uncertainty may slow down modern reproductive techniques; on that theory proponents of surrogacy have supported explicit legalisation and regulation. But the absence of regulation also could encourage reproductive technologies, because it allows all reproductive techniques to develop unchecked.

Surrogacy arrangements pose many legal questions as well. Some involve only one particular phase of the process; others question the procedure as a whole. For instance, the legality of artificial insemination, a pre-requisite to any surrogate mother arrangement, must be established before the legal problem of surrogate motherhood can be addressed. Questions of contract law may arise as to the legality and enforceability of a surrogate mother contract or as to remedies for its breach. Broad questions of constitutional law, such as whether surrogate mother arrangements are protected by the right of privacy, due process, or equal protection, also need to be addressed in assessing the procedure as a whole.

Even so, surrogate motherhood contracts should not be banned outright. Declaring surrogacy contracts illegal or contrary to public policy is not effective. The individuals will continue to enter into surrogacy contracts whether they are legitimated or not.

Courts and many commentators do not view a surrogate motherhood contract as a contract for services and do not recognise that surrogacy provides an ideal reproductive alternative to many infertile couples. It is an alternative that provides these couples with the constitutionally protected freedom of procreation and the joy and love that comes with parenthood.

Notwithstanding the sufficient support to find that the surrogate motherhood contracts are valid, the enforceability of these contracts remains questionable. Many
factors impede the enforcement, including the unique nature of the contract, the limited control the surrogate has over performance of the bargain, and the emotional nature of transaction.

The enforcement of surrogate motherhood contracts also presents unanswerable remedial questions. Courts have no workable remedy upon breach of the surrogacy contracts as no traditional remedy completely takes into account the unique human element bargained for in the surrogacy contract.

These problems exist because surrogacy contracts are often not clear and hold no legal value. Furthermore, some countries lack specific surrogacy legislation. Those that do have these laws often fail to implement or enforce them. An explanation for this lies probably in the assumption that until now, medical technology, especially reproductive technology, needed no justification. Its 'benevolent' nature was taken for granted. However with the commercialisation of surrogacy, social, demographic, ethical, legal and philosophical issues have been raised. As the debates have shown, these developments have the ability to alter not only the face, but the very soul of human civilisation. It might bring about the restructuring of society on lines of a 'reproductive brothel model' in which women can sell reproductive capacities the same way old time prostitutes sold sexual ones. Currently, in the US, due to the fact that few states have developed legislation, disputes over surrogate parenting often go to court. Therefore, clear and enforceable laws should be implemented.

With the advent of new scientific reproductive technologies, novel and seemingly intractable normative debates about bioethics and contemporary values in the field of family law have been evoked. Surrogacy, incontrovertibly, is the most controversial of them all. In recent times, India is witnessing a spurt in cases of commercial surrogacy due to two factors: a medical tourism boom fuelled by low medical costs and a status-conscious middle class seeking to fulfill its financial needs. Commercial surrogacy, however, is against public policy enshrined in Article 23 of the Indian Constitution and section 23 of the Indian Contract Act, 1872. The courts are still to grapple with the legal implications of surrogacy agreements and the state of law, as a whole, remains inadequate due to complex ethical and moral questions involved. Thus, there is a need for the legislature to shed its \textit{odious inertia} and balance individual rights against public
policy considerations through legislation.

The Government is active promoting India as a medical tourism destination, but the exchange of money for babies is making many people uncomfortable. There are no reliable statistics on how many surrogate births are being arranged in India for foreigners, but anecdotal evidence suggests a sharp increase.

Surrogacy is a worldwide phenomenon. Some of the countries have banned surrogacy as a money-making profession; it has been legal in India. India is the favoured destination for the childless couples because it has an advanced medical system and English versatile doctors. The treatment and other service in India work out to be much cheaper than in the developed countries.

Despite the growth in international surrogacy, there is no international regulation of surrogacy or minimum standards to which nations must adhere. Moreover, there are no international conventions, or reciprocal arrangements for the recognition of the legal parentage of a child.

Jurisdictions in various countries have held different views regarding the legalisation of surrogacy. In England surrogacy arrangements are legal and the Surrogacy Arrangements Act, 1985 prohibits advertising and other aspects of commercial surrogacy. In U.S. also, commercial surrogacy seems prohibited in many states. In famous Baby M case, New Jersey Supreme Court, though allowed custody to commissioning parents in the “best interest of the child,” came to the conclusion that surrogacy contract is against public policy. It must be noted that in US, surrogacy laws are different in different states. In Australia, commercial surrogacy is illegal, contracts in relation to surrogacy arrangements are unenforceable and any payment for soliciting a surrogacy arrangement is illegal. In some states in Australia, arranging commercial surrogacy is a criminal offence and any surrogacy agreement giving custody to others is void. However the legislation is not uniform, each state distinguishes between the concepts of paid and unpaid surrogacy. In the majority of jurisdictions, the legislation treats paid surrogacy more punitively, attaching criminal sanctions to its practice while leaving unpaid surrogacy unregulated. In Canada and New-Zealand, commercial surrogacy has been illegal since 2004, although altruistic surrogacy is allowed. In France, Germany, Sweden, Norway and Italy, surrogacy, commercial or not, is unlawful. In Israel, law only accepts
the surrogate mother as the real mother and commercial surrogacy is illegal. In March 1996, the Israeli government legalised gestational surrogacy under the “Embryo Carrying Agreements law”. This law made Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state. In Iceland law does not approve surrogacy. According to Icelandic laws, the surrogate mother’s husband is child’s father. In Iran Gestational surrogacy as a treatment for infertility is being practiced in some well-known medical institutions in Tehran and some other cities in Iran. In Japan, the latest position is that the mother who gives birth to the child is the legal mother and the intending parents need to adopt the child to gain the legal status of parents. This was upheld by the Ministry of Justice in a 2003 Supreme Court decision by reiterating the stand laid down in a 1962 decision by Supreme Court of Japan. In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements.

Some countries demand evidence that at least one parent of the child has a genetic relationship with the child, usually by DNA testing, while other countries insist on seeing the legal release of the child by the husband of any married surrogate (which makes the use of a single surrogate mother more attractive). Where surrogacy follows a gifted embryo and neither new parents are genetically linked obtaining citizenship and travel document becomes far more difficult and protracted, even into U.S. In any event, compliance with numerous regulations and formalities takes months and greatly adds to the stress of the intended parents.

No country has taken the position that surrogacy contracts should be enforceable over the objection of the birth mother, just as no state in the United States has. To this extent there appears to have developed an international consensus as to how to treat surrogacy contracts. There is much less unanimity on other important questions, however, especially the central issue of how to proceed to determine parental rights once the contract is set aside.

What then prompts India to enact a proposed law to make surrogacy agreements legally enforceable is the need to protect the genetic parents, surrogate mother, and the child. Surrogacy in commercial forms is legal in India with the landmark Supreme Court
judgment and later the Guidelines published by Indian Council of Medical Research (ICMR) in 2005 which prescribed conduct and use of ART procedures or treatment by fertility clinics.

The ICMR guidelines provide for an agreement between the surrogate mother and the couple desiring the child regarding payment. But, since we are dealing with often illiterate and powerless women, the agreement may not be a fair one. The mandatory clauses that are to be included in the agreement are not spelt out nor is any specific format provided in the guidelines. In the absence of such a requirement, clauses favourable to the couple and not the surrogate mother may be incorporated.

However, the government is unable to decide whether fertile women who want to avoid pregnancy and its aesthetic side-effects should be allowed to hire a womb or not. The question is still unanswered in the case of working women, as well, who may consider pregnancy harmful for their careers. As the new Assisted Reproductive Technology (Regulation) Bill and Rules 2013 seeks to legalise commercial surrogacy and the 228th Report of the Law Commission of India recommends banning commercial surrogacy and legalising only altruistic surrogacy, now it is time for the government to come up with a legislation to regulate the surrogacy in a proper way.

The initiative taken by the Health Ministry and ICMR can be appreciated as they are dealing with such a complex and many-sided issue. It is certainly not easy to design a law that will regulate commercially driven clinics and curb the exploitation of vulnerable parties, while at the same time enabling childless people to experience the joys of parenting. Recently ICMR and Union Ministry of Health and Family Welfare (MOHFW) have come up with the draft Assisted Reproductive Technologies (Regulation) Bill & Rules 2010 and 2013 respectively.

The draft bill of 2013 is not circulated or placed in public domain whereas draft bill of 2010 was extensively circulated for public opinion besides being sent to State Governments, institutions, statutory bodies, NGOs, Medical professionals and other stakeholders.

Despite the legal, moral and social complexities that shroud surrogacy, there is nothing stopping people from exploring the possibility of becoming a parent. Women who may choose to ‘rent’ their womb for a surrogate pregnancy are slowly shaking off
their inhibition and fear of social ostracism to bring joys to childless couples. However, India’s Assisted Reproductive Technologies (Regulation) Bill & Rules, 2010, has legal lacunae, lacks the creation of a specialist legal authority for adjudication and determination of legal rights of parties by a judicial verdict, and fall into conflict with existing laws. These pitfalls may be the graveyard of this proposed new law. New Indian Medical Visa Regulation, 2012 have restricted commissioning of surrogacy arrangements in India for foreign men and women, only whose marriage should have sustained for at least two years. Single parents, gay couples or unmarried partners can no longer commission surrogacy on tourist visas to India. Recognising the advances in assisted reproductive technology and the fact that surrogacy was already taking place in the country, draft bill, is still awaiting debate in the Indian Parliament. The draft bill would provide for the regulation and supervision of assisted reproductive technologies and would legalise commercial surrogacy. Under the bill’s provisions, the parties would enter into an enforceable surrogacy agreement and the surrogate mother would receive monetary compensation as well as health care treatment expenses during pregnancy. A surrogate mother is to be aged between 21 and 35 years old and should have no more than five children, including her own. The child would be regarded (in India, at least) the legitimate child of the commissioning married couple. Once the agreed payment has been made, the surrogate would relinquish all parental rights and these would vest in the commissioning party or couple whose names(s) would appear on the child’s birth certificate. The child would not be an Indian citizen and foreigners seeking fertility treatment in India would be required to demonstrate that they had registered with their own Embassy and that they would be able to take the child to their country of origin or residence. Foreigners would also require to appoint a local guardian to take care of the surrogate during the pregnancy and of the child, should the commissioning party or couple be unable or unwilling to receive the child. Whilst the bill has still not become a law, the Indian Council for medical Research Guidelines, 2005 provide the only non-statutory provisions which are neither justiciable nor enforceable in a Court of law.

Whatever its intentions, the draft bill of 2010 does not seriously engage with minimising misuse and malpractice on the part of service provider, nor does it protect the health and well-being of the most vulnerable parties—the surrogate mother and the baby born of such arrangements. The comments here on the different aspects concerning
surrogacy are meant to stimulate a wider debate, which should form a basis for more
detailed critiques of the proposed law. Because assisted reproductive technologies
amplify deep-seated notions of “blood”, now bolstered by genetics, it tends to
overshadow safer, cheaper and more progressive options like adoption. ART clinics do
not provide reliable information about low rates of success, the probabilities of multiple
pregnancies and the high possibility of fetal abnormalities—instead they promote false and
unethical claims to lure clients. Though the draft bill prohibits clinics from advertising, it
neither foresees the newer forms that publicity will take nor specifies what kinds of
information should be made public by the regulatory agencies proposed. One can
therefore expect that the unreliable and even false promotional advertising currently in
evidence will continue.

The starting point of tackling the question of surrogacy lies in recognising that
this new technology splits up older notions of natural reproduction into three parts—
“social” parents, a gestational mother, and the genetic matter that links the first two. While it is usually the case that one or both of the subsequent social parents are also
donors of gametes, the possibility cannot be ruled out that both egg and sperm donation
are from other sources. There is already considerable literature on the risks of egg
donation for women, and their potential exploitation within ARTs more generally, but the
bill does little to protect such oocyte donors. The draft bill is quite clear, though, in
prohibiting the surrogate from being an egg donor (which would open up the possibility
of artificial insemination and therefore make procedures much simpler, safer and
cheaper), even in a situation where the future mother cannot provide them. Do we see this
as a means to reduce the surrogate mother’s “rights” to the baby, or rather as a way to
promote the role of the clinics? Why not permit genetic surrogacy? Clearly, the current
mode of advancing surrogacy arrangements increases the number of “stakeholders” and
their possible conflicts of interest—the commissioning parents; the surrogate mother; her
family, if any; the new baby; and the commercial sperm banks and ART clinics.

Today, ART markets as well as the state emphasise relationships of blood and the
genetic basis of paternity, marginalising the essential social and biological contribution of
nurturing children in an enabling environment. Is it ethical to use prevailing social
constraints that prevent open surrogacy arrangements to promote the business of
surrogacy and ART? The amount of compensation given to the surrogate mother is
another particularly different aspect when what is involved is the creation of life—a baby no less. Its value has to be universally uniform as a product of the procreative power of women and not of social labour that varies in value and creates commodities. It is said that in west up to 50% of the total cost goes to the surrogate mother while in India most of the money is appropriated by sperm banks, ART clinics and Lawyers. The bill leaves the amount of compensation to the private contract between the surrogate and commissioning parents—two unequal parties. It also ignores the role of sperm banks and the clinics in the matter till date and offer no mechanism of legal support to the surrogate mother in getting a fair contract. Given the surrogate’s relative socio-economic vulnerability, the absence of safeguards is glaring in a situation governed by India’s relative “cheapness” and the search for profits by the agencies involved.

Surrogacy is both a threat and an opportunity. On the one hand it gives infertile couples and surrogate mothers the possibility to fulfill their desires: a child and the opportunity to take better care of their family respectively. On the other hand there is a risk that with the commodification of children and parenthood, women are exploited and turned into baby producers. Several reasons for and against surrogacy have been given and one cannot easily decide what is morally right and what is wrong. However, both opponents and supporters of surrogacy agree that surrogacy poses a series of social, ethical and legal issues. Although there are now some rules and regulations in place, not enough is done at a national level to protect the interests of Indian women who serve as surrogate mothers, the children they bear, or those intended parents who travel considerable distances to commissioning pregnancies.

It is submitted that there is legal vacuum in this area of Medical advancement and adequate measures has to be taken in these medico-legal issues specifically to regulate surrogate motherhood in India. In this process due consideration should necessarily be given on all the social, ethical and legal issues inherent in surrogate motherhood by engaging an expert committee representing scientists, medical practitioner, lawyers, legal academicians, sociologists and psychologists. So that the procreative liberty and social welfare may be balanced.

Legal provisions existing under various laws in India which when interpreted does not hold good in the interest of an surrogate child and there is a lot of confusion
regarding the legal implications of artificial insemination, especially surrogacy since it is a device which brings hope to thousands of childless couple it is bound to be more and more popular and in fact popular. In order to avoid complications and unpleasant situations, a comprehensive legislation should be enacted taking into consideration various existing legislations wherein the question of validity of surrogacy overlaps. Otherwise a surrogate child becomes illegitimate and declaration of a surrogate child as illegitimate deprives it of all rights and puts the child to great hardship which is quite unjust. Undoubtedly the existing Indian laws are totally incompatible with modern medical advancement. May we all hope that the Indian parliament will soon realise the importance of enacting a comprehensive law dealing with intricacies of surrogacy.

At a glance, surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long-desired biologically related baby and in case of foreign commissioning couples the country earns foreign currency, but the real picture reveals the bitter truth. Due to lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. There is no transparency in the whole system, and the chance of getting involved in legal problems is there due to unpredictable regulations governing surrogacy in India.

Legislation, carefully drafted with an awareness of the impact with future medical technology may have on the concept of surrogate motherhood, is necessary that will respect procreative liberty, protect parties to surrogate contracts from exploitation, and effectively guide the courts in adjudicating surrogacy related disputes. Legislation ignoring surrogate mother contracts endangers the individual in whom society has the greatest interest in protecting, the unborn child.

Very few really acknowledge and understand the utter seriousness of this issue that is gaining such widespread notoriety. It is important to note the problem with all of the issues raised for and against surrogacy is that the principles do not apply generally. People involved in surrogacy arrangements are individuals and they may or may not be affected or influenced by each of the factors related to surrogate motherhood. There is a strong need for Indian research on the effects of surrogacy on commissioning parents and surrogate mothers and its impact on the emotional, social and intellectual development of
children born from a surrogacy arrangement.

A survey in this regard was conducted in various states of India. The methodology adopted for this study was exploratory research of the social and legal aspects involved in surrogate motherhood through the means of a survey. The tools included two separate structured questionnaires to be filled by legal experts and medical experts. The sample size consists of one hundred legal experts and fifty IVF clinics including doctors. The final report aims to highlight the major findings and suggests recommendations for future policy implications. Followings are the major findings based on this survey.

The survey shows that majority of legal experts and doctors see surrogacy as a boon for infertile couples. Very few legal experts consider it as immoral practice. 23 per cent legal experts and 32 per cent doctors favoured the best interest of the child to be born should be considered in a surrogacy arrangement. It was found in the survey that the women who engage in surrogacy are usually poor. It is important to understand that these women generally do not have many career prospects as they are predominately uneducated. It was observed in the survey that purpose of the surrogacy was primarily commercial as the women who are acting as surrogates come from economically and socially weaker sections of the society. They perform surrogacy to meet the immediate and pressing demands of their family like food, shelter, education for their children and wellbeing of the entire family. Usually the young women are preferred to perform surrogacy so as to avoid any medical complication. Generally these women are married and they require her husband’s consent before going ahead with a surrogacy arrangement. The draft of Assisted Reproductive Technologies Bill, 2010 permits three surrogate pregnancies for a woman apart from her own children. According to 8 per cent of medical experts, a normal woman of good health can become surrogate mother for three times. Whereas 52 per cent of them were of the view that a woman can undergo surrogacy twice as they think that such women should not compromise with their health in greed of earning easy money. There are very few incidences where a surrogate mother has refused to give the custody of the child because of her emotional attachment with the child and refusal on the part of intended parents for taking the custody of the child due to some reasons like separation of intended parents; any physical impairment in child; child is not of preferred sex etc. According to survey, 64 per cent IVF clinics are regulated under Pre-Conception and Pre-Natal Diagnostics Techniques (Prohibition of Sex Selection) Act,
2003, 14 per cent clinics are regulated by Guidelines issued by Indian Council of Medical Research whereas 22 per cent of the clinics have their own rules and policies for the regulation of their clinics. The majority of IVF clinics told that they require a contract to be signed by both the parties (i.e. intended parents and surrogate mother) before entering in a surrogacy arrangement. Most of the IVF clinics pay surrogate mothers between Rs. 1 lakh to 3 lakhs for carrying a pregnancy. Surrogate mothers are often negotiated to enter in a surrogacy contract on a cheaper deal. Due to lack of proper legislation, both surrogate mothers and sometimes intended parents also are somehow exploited and the profit is earned by middlemen and commercial agencies. In the absence of any legal framework, the condition of surrogacy in India is that of ‘legality without legislation.’

Based on this Survey Report, it can be concluded that this matter should be debated in public or in media. It is submitted that the people’s representatives should step in to preserve the interest of the surrogate mother, intended parents and child to be born. The legislature should also take into account the loopholes which were pointed out in the Draft Bill of Assisted Reproductive Technologies, 2010 discussed in the previous chapter. But if this area remains unoccupied with both the legislature and executive having not stepped in, under the constitution then the judiciary should come forward to address the issue of surrogacy in larger public interest.

From the above discussion it is seen that our assumptions are proved to be correct and thus the hypothesis so formulated is accepted to be true.

SUGGESTIONS

Childlessness is a very real and tremendous problem for infertile couples in all over the world. Sympathy as well as a search for a solution is necessary. Solutions to difficult problems, however, do not appear in an instant. Courts must scrutinise solutions to decide the potentially grave ramifications of their results. A review of surrogate motherhood as a solution to the problem of childlessness reveals that its costs outweigh its benefits. The baby selling laws, and public policies prescribing the sale of human beings, promoting the family, preventing the exploitation of women, and preventing class distinctions, demand that courts and legislatures declare surrogate mother contracts void. Although gratuitous surrogate motherhood may still negatively affect public policies, the offensive baby selling aspects are resolved when the biological father does not pay a fee
to the surrogate mother.

Detecting and effectively prohibiting under-the-table payments would of course remain problems—but those problems would also exist even if all surrogacy were outlawed and the whole practice driven underground. For those worried about surrogacy’s potentially harmful effects on society, it would be advantageous for the law to prohibit at least commercial surrogacy. And courts can interpret baby selling prohibitions to accomplish this result even without enactment of any additional statutes.

Making only paid surrogacy illegal would, however, lead to an odd result if unpaid surrogacy contracts were enforceable: those few surrogates who actually agreed to perform without compensation would be the most vulnerable to losing their child if they changed their mind. Although it certainly makes sense not to treat unpaid surrogacy as baby selling, it would be extremely strange to force the volunteer mother to give up her child while allowing the paid mother to keep hers, if she changes her mind, because her contract is illegal and therefore unenforceable. Although it makes sense for unpaid surrogacy to be legal when paid surrogacy is not, it makes no sense for it to be enforceable when paid surrogacy is not. Nonetheless, a bill introduced in the district of Columbia in March 1987 by Democratic council member John Ray would have mandated exactly that result: it would have prohibited payment but made the surrogacy contract binding. The New Jersey Supreme Court, however, avoided the problem in its *Baby M* decision by holding that unpaid surrogacy contracts, though legal, are not enforceable against the natural mother. This argument suggests that it is improper to enforce unpaid surrogacy contracts when paid surrogacy is illegal, but does not speak to the desirability of enforcing surrogacy contracts in general.

Notwithstanding the determination as to contract validity, custody is a separate issue. Because children's rights are the most important, vulnerable, and forgotten rights connected with the surrogate mother contract, a state's *parens patriae* interest in protecting children should not and cannot be submissive to any contractual arrangement between parents. Thus, when a child is born to a surrogate mother, the best interests of the child should govern a court's determination as to that child's custody and as to the termination of the surrogate mother's parental rights. The judiciary should involve itself in surrogate parenting only to the extent that custody determinations need to be made.
Although surrogate mother contract may be one factor in determining custody and termination of the surrogate mother's parental rights, the best interests of the child should prevail.

Ethical practice must take its cue from the experiences of surrogate mothers, who-motivated primarily by a shortage of personal income—often endure the social stigma associated with surrogacy. They may leave their homes, lie about the parentage and claim the death of the baby after it has been handed over. It should go without saying that in such a stigmatised environment, it is not easy to again access to surrogate mothers or their families. We must imagine for ourselves the complex psychological and emotional implications where the surrogate mother already has children. Since this is the most likely scenario. Difficulties are bound to be created by the absence of transparency. Where surrogate pregnancies are treated differently from normal ones.

Given this situation, the state must strive to help create an environment free of secrecy and anonymity. As equality and volunteerism may be rare in surrogacy agreements, arrangements to ensure informed consent, proper counseling and legal assistance for drawing up contracts for safe procedures, as well as total health care insurance and compensation, must be ensured through the state regulatory institutions. A surrogate mother should not only have the right to abortion but also to keep the baby if she cannot part with it. Her name should be on the baby’s birth certificate and parents legally transferred to the new parents later. Her family should be aware of the contracting parents and be included in healthcare arrangements. In its current form, the draft does not ensure that the future parents recognise and agree that a surrogate mother must have all the rights of autonomy, privacy and bodily integrity that are legally available to women both locally and internationally. Instead, the draft consent forms demand not just the written agreement of a surrogate mother and her husband, but the declaration that neither of them has engaged in extra-marital sexual relations in the last six-months.

The following measures are being suggested on the basis of the present study:

- There should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child.
There is a need of right-based legal framework for the surrogate mothers, as far as the ICMR guidelines are not enough.

A clearly defined law needs to be drafted immediately which will pronounce in detail the Indian government’s stand on surrogacy; so that discrete activity leading to exploitation of the surrogate mother can be stopped.

Although it is not a crime to bear a child for another, and then relinquish it for adoption, it is not regulated by law and may raise a number of confusions. It has to be regulated whether paying the mother a fee for adoption beyond medical expenses is a crime (like in some countries) or not. In case it is recognised as crime and one pays extra charges then it should prevent the adoption from being approved.

There should be a substantial regulation designed to protect the interests of the child.

Legal recognition of termination and transfer of parenting rights.

Right to privacy of donor as well as surrogate mother should be protected. It is crucially important to maintain and monitor the anonymity of the surrogate mothers.

The surrogate mother should not undergo more than 3 trials for a pregnancy and it has to be monitored.

The surrogate mother should be provided by the copy of the contract as she is a party in the agreement and her interests should be taken into account. It happens that very often decision is taken by the intended parents and clinic, while surrogate mother does not have any say in this matter.

There should be an interpreter (other than doctor) for the communication linkage between the surrogate and intended parents in order to convey the message from surrogate mother time to time. As far as often doctors speak on behalf of surrogate mothers, but there is no guarantee that their interests are conveyed without any misinterpretation.
Typically, after the birth the surrogate mother is left without any medical support, it is recommended that there should be a provision of intensive care and medical check-ups of their reproductive organs during the 3 months after pregnancy.

In case surrogate mother gives birth to twins she should be paid double amount or at least 75% of the charges for the second child.

The commissioning couple should try to establish a relationship of trust with the surrogate, yet such a relationship creates reciprocal rights and duties and might create demands for an undesired relationship after the birth.

In case of foreign commissioning parents the citizenship right of the surrogate baby is also of crucial importance. The Indian government needs to take a stand in terms of conferring the surrogate baby a dual citizenship as he/she is born in the womb of an Indian (the surrogate mother) and in India, but commissioning parents belong to a foreign country.

The rights of the child should be protected and in case he/she is not taken by the foreign commissioning parents, then the child should be given Indian citizenship.

A guarantor should be appointed to take the custody of the child in case commissioning patents fail to do so.

Health Insurance for both the surrogate mother and the child is essential to ensure a healthy life.

A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

There is a need of debate and discussion of the stance that public policy and the law should take toward surrogate mothering. Actually, there exists a range of choices from prohibition and regulation to active encouragement.

The government needs to monitor the surrogacy clinics, which generally charge arbitrary prices for surrogacy arrangements. Regulations would enable the government to ensure that the clinics charge fair prices.
Surrogacy arrangement should be governed by a 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.

The contract signed between the commissioning parents and the surrogate mother should mention something about insurance and emergency needs that the surrogate mother may require during the pregnancy; it has to mention something about her future after relinquishing the baby.

A specialised court called “Surrogacy Court” can be created. It can comprehensively look at all the problems relating to surrogacy arrangement for adjudicating disputes.

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.

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

Legislation itself should recognise 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.

The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Sex-selective surrogacy should be prohibited.

- Surrogacy Arrangements brokered by commercial or profit agencies should be outlawed. It emphasises the greatest possible regulation and prevention of commercial arrangements with the goal of diminishing exploitation of the statutory scheme and the parties involved.

- Foreigners visiting India for commissioning surrogacy must apply for medical visa and not tourist visa.

- A letter from the embassy should be enclosed with visa application stating that the country recognises surrogacy and the child born thereof will be treated as a biological child of the couple.

- The treatment should be done only at registered ART clinics recognised by Indian Council for Medical Research.

Modern Reproductive Technology, with or without regulation, may sharply transform our future. Once technology has developed the capability of doing something that will add to the happiness of some people, it is likely that the new technological arts will be pursued. Even if we as a society tried to prevent the transformation that the new technology is bringing, we might not be able ultimately to stave it off. As long as some governments permit surrogacy or reproductive technologies, some people can travel to where they are available. Moreover, they can use the technologies from afar by simply transporting their sperms, egg or embryo. Accordingly, it is likely that in time the new technology will bring the opportunity to many more people to become a biological parent. And for fertile women, conventional childbearing will become only one choice available out of many. Singles and couples will be able to choose whether to parent, whether to donate the genetic material for the child, and whether to undergo pregnancy, and those options will exist independently of one another. Conceivably, at some future time people will have very different attitudes towards childbearing than we do today, and they will consider it suitable for the law to recognise a contract that binds all parties at the outset to a custody determination that they, represented by counsel, have agreed to in advance. But even if this future is inevitable, there is no need to hasten it by enforcing
surrogacy contracts today. Regulating and even limiting the new reproductive possibilities may mold the form they take and perhaps even substantially slow down the transformation they will bring.

At the end it can be said that even if surrogacy oversteps the natural ways of procreation, only those who have been able to get children from it know the value of legitimacy of surrogacy. At times, in a society like India, where barrenness is considered incompleteness for a woman, people have no option, but to resort to it to live peacefully in society. We cannot consider it against the unity of marriage, as even adoption is legally permissible then why not surrogacy.

*Let us Regulate Technology and not Human Lives…*