**SURROGACY LAWS: NATIONAL AND INTERNATIONAL PERSPECTIVE**

Submitted in the partial fulfilment for the degree of B.Com. Ll.b(H)

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**PREFACE**

*The present project “Surrogacy Law: National and International Perspective” gives careful and accurate treatment to the various topics discussed under it. The authorities, both Indian and foreign, that have been relied upon and used as a source material, have been referred to and acknowledged in foot–notes.*

*I have studied several works and then stated the principles related to surrogacy with care and understanding in simple, accurate language.*

*I express my grateful thanks to my mentor Mr. Ajay Raj*

*for his valuable suggestions and contributions in incorporating some of very important points.*

*I sincerely hope that this project would be found very useful*.

**Declaration by Student**

I declare that the dissertation entitled **“Surrogacy Laws: National and International Perspective”** is outcome of my own work conducted under the supervision of Mr. Ajay Raj at Amity Law School, Noida, Amity University AUUP.

I further declare that to the best of my knowledge the dissertation does not contain any part of the work, which has been submitted for the award of any degree either in this University or in any other University/ Deemed University without proper citation.

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**CERTIFICATE OF THE SUPERVISOR**

This is to certify that the research work entitled **“Surrogacy Laws: National and International Perspective”** is the work done by student name under the guidance and supervision for the Partial Fulfilment of the requirement of B.Com. Ll.b (H). degree of Amity University, Noida (UP).

To the best of my knowledge and belief the dissertation/ Legal Writing Project:

* Embodies the work of the candidate herself;
* Has been duly completed; and
* Is up to the standards both in respect of the contents and language for being referred to the examiner.

Name of the Faculty

Mr. Ajay Raj

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1. AID………………………………….……… ARTIFICIAL INSEMINATION DONOR
2. AIH………………………………. ARTIFICIAL INSEMINATION HOMOLOGOUS
3. ART……………………………….………………………………ARTICLE
4. AIR…………………………………………………….…………… ALL INDIA REPORTER
5. ART………………………………. ARTIFICIAL REPRODUCTIVE TECHNOLOGY
6. CAL…………………………………………….…………… ……………………. CALIFORNIA
7. CARA……………………….……… CENTRAL ADOPTION RESOURCE AGENCY
8. CEDAW………………………………….………… CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATIONS AGAINST WOMEN
9. COTS……………. CHILDLESSNESS OVERCOME THROUGH SURROGACY
10. CRC…………………………………….……. CONVENTION OF RIGHTS OF CHILD
11. ECHW………………………….…………………ENGLAND & WALES HIGH COURT
12. ECR……………………….……………………………… EUROPEAN COURTS REPORT
13. EHRR………………….…………..………. EUROPEAN HUMAN RIGHTS REPORT
14. ACR…………………………………….…….……… ALBUMIN/CREATININE RATION
15. FRRO/FRO………………………... FROM OF RESIDENTIAL RECEIPT ORDER
16. FAM…………………………………………………………….…………. FAMILY DIVISION
17. FLR…………………………………………….……………….. FEDERAL LAW REPORTS
18. HEFA…………………. HUMAN FERTILIZATION AND EMBROYOLOGY ACT
19. HIV……………………………………….……HUMAN IMMUNODEFICIENCY VIRUS
20. HICA………………………….….. HEALTH INSURANCE CLAIM ASSESSMENT
21. HCCC….…. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
22. HCPC…….……….………………. HEALTH & CARE PROFESSIONAL COUNCIL
23. HRC…………….……………… HUMAN RIGHTS COMMISSION/COMMITTEE
24. HCS……………………………….………….………….. HEALTH CARE SURROGATE
25. ICCPR…………………..………… INTERNATIONAL CONVENTION CIVIL AND POLITICAL RIGHTS
26. ICESCE………………….. INTERNATIONAL CONVENTION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
27. ICMR……….………………… INDIAN COUNCIL OF MEDICAL RESEARCH
28. ICSI………………………………. INTRACYTOPLASMIC SPERM INJECTION
29. INT’L………………………..……………………………………. INTERNATIONAL LAW
30. IFAFA…………………….… INDIAN FEDERATION OF ADOPTIVE FAMILIES ASSOCIATION
31. ICJ…………………….………………….. INTERNATIONAL COURT OF JUSTICE
32. IMSI……………………. INTRACYTOPLASMIC MORPHOLOGICAL SPERM INJECTION
33. IVF………………………………………………….……. IN-VITRO FERTILIZATION
34. IUI………………………………………………….. INTRA-UTERINE INJECTIONS
35. IHRL……………………………….. INTERNATIONAL HUMAN RIGHTS LAW
36. MWCD………….. MINISTRY OF WOMEN AND CHILD DEVELOPMENT
37. NAMS………………….. NATIONAL ACADEMY OF MEDICAL SCIENCES
38. NGO……………………………... NON-GOVERNMENTAL ORGANIZATIONS
39. NRI’S…………………………………………………. NON-RESIDENTS OF INDIA
40. OHSS…………………..……….OVARIAN HYPER-STIMULATION SYNDROME
41. OCI………………………………………………………OVERSEAS CITIZEN OF INDIA
42. PIO………………………………………………..…….PERSONS OF INDIAN ORIGIN
43. PRIV……………………..………………………………………………………………..PRIVATE
44. RIPAS……………………………………….…. RECOGNIZED INDIAN PLACEMENT AGENCY
45. ACSA………………………………..……ADOPTION COORDINATING AGENCIES
46. LAPAS………………………. …. LICENSED ADOPTION PLACEMENT AGENCY
47. SCC………………………………………………….……. SUPREME COURT CASES
48. SCI…………………………………………..…………….. SUPREME COURT INDIA
49. UNO…………………………….……………. UNITED NATIONS ORGANIZATION
50. U.S.A………………………………………….…………UNITED STATES OF AMERICA
51. U.K…………………………………………………………………………… UNITED KINDOM
52. VCLT……………………....................VEINNA CONVENTION LAW TREATY
53. WLR…………………………………………………..…………….VEEKLY LAW REPORTS

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 ***ABSTRACT***

*The advent of advanced reproductive technologies has sparked a number of ethical concerns regarding the practices of reproductive tourism and commercial gestational surrogacy. In the past few decades, reproductive tourism has become a global industry in which individuals or couples travel, usually across borders, to gain access to reproductive services. This marketable field has expanded commercial gestational surrogacy - defined by a contractual relationship between an intending couple and gestational surrogate in which the surrogate has no genetic tie to fetus—to take on transnational complexities. India has experienced extreme growth due to a preferable combination of western educated doctors and extremely low medical costs. However, a slew of ethical issues has been brought to the forefront: the big ones manifesting as concern for reducing the worth of a woman to her reproductive capabilities as well as concern for the exploitation of third world women.*

*This project serves primarily as a call for cultural competency and understanding the circumstances that gestational surrogates are faced with before implementing policy regulating commercial gestational surrogacy. The paper argues that issues of exploitation and commodification hinge on constructions of motherhood. It is critical to define and understand definitions of motherhood and how these definitions affect a woman's approach to reproduction within the cultural context of a gestational surrogate. From the narratives of various surrogate mothers, I find that the surrogates construct the practice of surrogacy so that it fits into cultural comprehensions of Indian motherhood in which motherhood is selfless, significant, and shared.*

**Objectives of the Study**

The main objectives of this study are as follows:

Conduct a situational analysis of surrogacy cases, provisions available at the National and International levels.

Surrogacy commercial or ethical.

Rights of surrogate mother and the child.

To highlight the need and importance of Artificial Human Reproductive Technologies in general and surrogacy arrangements in particular.

To identify the legal and human right issues relating to the intended parents, surrogate woman and surrogate child in India.

To examine the legality of surrogacy contracts and the various legal and human rights controversies relating to surrogacy contracts.

To evaluate the effectiveness of existing legal system for the regulation of surrogacy practices in India.

To suggest modifications in the existing laws, if required and to propose a model law for the regulation of surrogacy practices in India.

**CHAPTER 1: INTRODUCTION TO SURROGACY**

**INTRODUCTION**

Every woman in the world has been blessed with the ability to give birth to a new life and to experience the beautiful phase of motherhood. But, unfortunately some of them are not blessed with this wonderful experience because of medical and psychological complications. Every woman in the world dreams to be called as “mother, maa, mummy” filled with love and softness. In this scientifically advanced world there are alternative reproductive treatments are available for all those unfortunate ladies who desires to be a mother. Medical facilities like adoption, surrogacy, and artificial insemination. In medical terminology, these methods are known as Alternative Reproductive Treatment, In-Vitro Fertilization and Intra-Uterine Injections, these medical facilities bring the hope of having their own child.

Surrogacy is one of the most common medical practice adopted by the desiring parents to have their own child. Basically, surrogacy means to substitute, where a mother act as a substitute where a mother act as a substitute for the genetic-biological mother of a child. The birth other is hired by commissioning parents to bear their child in her womb for nine months and in lieu of this birth mother receives a valuable consideration. The whole practice or process in carried on the contractual basis or the employer-employee agreement.

According to Artificial Reproductive Technique (ART) Guidelines, “surrogacy is an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or to her husband, with the intention of carrying it to term and handling over the child to the person or persons for whom she is acting as a surrogate, and a surrogate mother is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents.”[[1]](#footnote-1)

Practice of surrogacy works on two main perspectives: whether it is an ethical deed or working on the principle of commercialization and making huge profits out of it. In earlier times, kith and kin or the close relatives used to come forward to serve their womb to bear the child of desired parent, to act as surrogate mothers and perform the virtuous deed. It was also done to keep the secret among the family members, keep the blood line pure more sense of belongingness and due to lower financial arrangements. With the passage of time surrogacy has developed. The surrogacy is now practices not only among the family members but, also at national and international level. The concept of surrogacy has turned a normal biological function of a woman’s body into a commercial contract. Surrogate services are advertised. Surrogates are recruited, and operating agencies make huge profits.

The commercialization of surrogacy has raised fears of a black market and of baby selling and breeding farms, turning impoverished women into baby producers and the possibility of selective breeding at price. “Surrogacy degrades a pregnancy to a service and a baby to a product.” Experience shows that as with any other commercial dealing, the consumer lays down his/her conditions before purchasing the goods. India is becoming a great hub for the surrogacy market because of the availability of medical facilities at cheaper rates, availability of renting wombs at lower costs, there is no strict regulatory framework in order to keep a check on it and the last and foremost reason is the socio-economic condition of India. The other highlighting point is that India is becoming a hub of surrogacy because of the racism followed by the commissioning parents as they prefer Indian mothers more fair and healthy in comparison to poor, dark African women.

Surrogacy is changing the traditional role of parenthood. If the mother undertakes the surrogacy for her daughter/mother-in-law takes for daughter-in-law rocking the relationship between the child and its parents, it is socially questionable. Marital status is not pre-condition for getting child through surrogacy.

With the entry of the financial arrangements in exchange of the surrogate child, surrogate motherhood has raised difficult ethical, philosophical, and social question. Surrogacy arrangements have made child a saleable commodity, and complications have arisen regarding the right of a surrogate mother, the child, and commissioning parents. As there are no legal provision regarding the safeguard the interests of the surrogate mother, the child or commissioning parents in India, looking at such an issue from commercial or business point of view has complicated the matter further. She has no right whether to abort the baby or keep it and continue with pregnancy even if it is her womb which is carrying the baby. There have been instances where, the contracting individuals has specified sex of the baby as well as even, refused to take the baby if it was born with defects and filed a suit against the surrogate saying she has broken the contract.

With the increase in number of problems arising during the practice of surrogacy, where the birth mother is exploited on the grounds of psychological and medical, there is no clear law to protect the rights of a child and a mother and the duties of medical practitioner involved and of the commissioning parents towards the mother and the child. Government came up with the following legislations like introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines have been issued by Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India.

The study reveals that, the surrogate mothers in fact, voluntarily renders services to carry out the child of another woman with specific intentions of helping the childless parents to fulfil the desire of parenthood, lineage and self fulfilment. In surrogacy, there are number of issues related to technological, medical, physical, moral, ethical, emotional, biological and socio-legal etc., are involved. Through, artificial insemination or non-coital procreation is against the order of the nature, but, it is boon to the childless parents to satisfy their desire of parentage with the help of the latest technology. The irony is that, the certain unfair practices are accompanying surrogacy resulting in its misuse. In fact, it is a matter of Human Rights issue, where the interest of women and children is involved. The increasing demand of ART resulted in mushrooming of infertility clinics in India.

The Government of India has drafted the legislation in 2008 and finally framed an ART regulation draft bill in 2010. The bill is still pending and is not presented in Parliament. The proposed law needs the proper discussion and debate in the context of legal, social, and medical aspects. The Government must consider it seriously while enacting a law to regulate surrogacy in India in order to protect and guide couples seeking such options. Without a foolproof legal framework implementation couple will invariable be misled and the surrogates will be exploited.

**LITERATURE REVIEW**

According to a medical research it is stated that Infertility affects about 1 out of every 6 couples. This does not include only those who are unable to conceive after 12 long months of trying but, also those who cannot carry the pregnancy to that term. The number of infertile couple has increased since 1970’s. According to the Medical Research experts believe that women now-a-days postpone childbearing because of career prospects and contraception. Consequently, women are older once they start trying to conceive a baby. After a certain age women become less fertile because of age related and biological factors.[[2]](#footnote-2) Due to several reasons, such as change in sexual practices, more use of intrauterine devices, most of the women suffer from pelvic inflammatory diseases, which is leading cause of female infertility. Being unable to bear a child has led to several emotional and psychological consequences. Under this condition women often feel guilty and experience a loss of self-worth and confidence. For this reason, infertility is regarded as major health problem. Also, it becomes clear why people who cannot have their own child through the natural way looks for artificial method to become parent. In the past, couples unable to conceive were expected to turn to adoption to achieve their parenthood dreams. Now-a-days there are many options available for infertile couples, as well as single parent and homosexuals who want their own child. The need of parenthood leads them to seek alternative solutions including Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF), and Intra-Uterine Injections (IUI). According to Medical Science there have been a great advancement in the field of ART but, on social and legal base these practices have number of short comings.

India, is becoming a great hub of surrogacy in the world because of the social-economic facet, cheap medical facilities and low-cost investment for renting womb.

Practice of surrogacy has now just become a medium of earning huge profits.

Medical and legal complications faced by surrogate mothers during and after the pregnancy because, there are no clear laws existing in India on the rights of the surrogate mother.

As there is no legal enforceability of the agreements between the parents and the surrogate mother there, is continuous exploitation of surrogate mother by the parents, doctors and the middleman involved.

The bill was drafted in the year 2008 named as ART bill, the bill was further drafted in the year 2010 but, still there is no implementation of the bill. The bill still possesses many shortcomings.

In India, there has been continuous efforts put by Centre for surrogacy to discuss the procedure of surrogacy in depth and highlight the key areas like procedure adopted in surrogacy, grey areas, benefits of surrogacy, need of legislation and regulatory framework as to support and promote the practice of surrogacy in India.

Eminent scholar Amrita Pandey has published many books and research papers regarding routine and lifestyle of surrogate mothers, treatment given to them, protecting their rights and making them aware about their rights and responsibilities. The issues related to the health of surrogate mother are also highlighted in the research paper. In some cases, like child born with specialty, sex determination, twins or triplets etc. has also been discussed in the books and research papers.[[3]](#footnote-3)

In the case of Baby Manjhi the Hon’ble Supreme Court has also given interpretation. Judgements are also given by foreign courts to interpret the ambit of the surrogacy.

Drafting of ART bill and Guidelines, Child Protection Guidelines 2005.

**CONTRIBUTION IN THE FIELD OF PROPOSED WORK**

 **SCHEME OF STUDY**

**Statement of problem**

Surrogacy is one of the most prominent practice adopted by desired parents who cannot have their own child. With the passage of time the ethical practices of surrogacy is turning in a big market of earning huge profits. In India, states like Bengaluru, Gujarat, Hyderabad are the topmost states which provide the catering needs of commissioning parents at a low cost, and thus, surrogacy hostels, medical clinics and banks are growing like mushrooms in various cities of these states. Following are the problem evolved while adopting the practice of surrogacy in India:

There is no legislation to protect the interest and rights of the surrogate mother.

There is no proper legal framework and legislation to govern and regulate the practice of surrogacy.

There are no codes available for the transnational surrogacy and the applicability of laws of adoption.

Surrogate mothers are exploited in many a was like physically, financially, and psychologically as they are not aware of their rights and, they are exploited by medical practitioners, rich commissioning parents and the middleman involved.

Protection of the rights of surrogate mother and the child on the grounds of international and human rights law.

**Hypothesis**

Hypothesis basically refers to the assumptions drawn while having an initial reading of the topic researched. In the present scenario, the hypothesis established is that the practice of surrogacy is well established in India and now, it has transmitted from ethical practice to a big market of earning huge amount of money. The Indian Government does not have any strict regulatory law regarding surrogacy. As there is no proper law regarding the procedure of surrogacy, surrogate mothers are exploited on both socio and economic facet. Surrogate mothers are not able to enjoy any legal status in respect of their child and also, they are not aware about the complications faced before and after the surrogacy.

**Methodology**

The methodology adopted in order to conduct research and prepare the dissertation is “Doctrinal Research”. Doctrinal Research means a practice where a person refers books, published papers, websites, legislations and landmark judgments in order to develop assumptions and on the basis of such assumptions drafts the conclusion with the recommendations and suggestions. In Doctrinal Research, one establishes the conclusions on the basis of secondary data and sort the available data as per needs and the demand. The procedure basically involves preparing an updated research work from the secondary data available in the form of books, research papers, legislations, guidelines and case laws.

 **EXPECTED OUTCOME OF THE WORK**

The research work which is undertaken should possess some aim and objective and the research work must end with some fruitful and beneficial result in order to upgrade the existing scenario by introducing some measures and recommendations and try the best to eliminate the loop-holes that are existing in the present scenario. In the present situation, the research work is developed on the subject of surrogacy highlights the number of shortcomings present and the practice adopted. Thus, in the end of research work, the researcher would try level best to bring the following changes:

Proper medical support should be available to surrogate mother before and after the pregnancy.

Proper legislations should be available to regulate and govern the practice of surrogacy.

Rights of surrogate mother should be protected. Eradications of exploitation of surrogate mother by medical practitioner, middleman, and the commissioning parents. Surrogate mothers should be treated as human and not as machine to reproduce child.

Laws and ethics for medical practitioner should be strict and effective.

Role of UNO, International Agencies and NGO’s to uplift the condition in this sector both socially and economically.

ART Guidelines and ART Bill, 2010 should be soon implemented.

**Surrogacy: Why and How?**

Surrogacy is generally defined as an arrangement in which the surrogate or birth mother agrees to bear a child and permanently hand over the responsibility for the rearing of that child to another person or couple, referred to as the intending parents. In most of the surrogacy arrangements the intended parents contribute the genetic material and the child is carried by the surrogate. In certain cases, the surrogate woman may contribute the genetic materialand in very rare situations both the egg and sperm may be taken from donors and the resultant embryo is implanted in the surrogate.

Surrogacy arrangements can be formal on the basis of a contract or can be informal based on mere understanding between the parties. Further, surrogacy arrangements can be altruistic or commercial. An altruistic surrogacy is one in which the birth mother does not receive any financial or material gain from the arrangement. In contrast, commercial surrogacy is where the birth mother receives a fee or some other monetary gain in return for acting as the surrogate and may also involve the presence of a broker who receives a fee for arranging the surrogacy.

Surrogacy though not in the present form has been practiced since ancient times and instances of surrogacy can be found throughout history where a family member or servant may have stepped in for a woman who could not become pregnant. The advancements in technology have made this method more popular and convenient for the parties. Surrogacy has not only brought with it relief for the infertile married couple, but also provided an opportunity for a wider group of socially infertile people to beget a child. Earlier, childless couples alone sought the help of surrogacy, that too during the prime child bearing years. But now single and even post-menopausal women who want to have children seek the help of this method. In the past, surrogacy arrangements were generally confined to kith and kin of close relatives, family, or friends, usually as an altruistic deed. But, with the introduction of financial arrangements in the process, surrogacy has extended its network beyond family, community, state, and even across the country. Surrogacy is also gaining popularity because of its use in recent times by various celebrities like Deidre Hall and Joan Lunden, Michael Jackson, Angela Bassett, Kelsey Grammer, Amir Khan, etc. However, the increased use of surrogacy has generated a great controversy regarding its legality due to the involvement of various human rights and legal issues. The practice of surrogacy has also been questioned on ethical, moral and social grounds.

Surrogacy has also been criticized on the ground that, it violates the human rights and

dignity of surrogate womenand it would lead to commodification of women, exploitation, prostitution and slavery. Further, it is said that surrogacy would have an adverse impact on the rights of the child and lead to baby selling, sex selection and creation of designer babies. However, the proponents of surrogacy argue that right to procreation is a basic human right and it includes the right to procreate with the help of another. So also, every individual has the right to benefit from the developments in science and technology. Further, every woman has a right to reproductive autonomy which includes the right to act as a surrogate for another. Therefore, any restriction on the practice of surrogacy would violate the basic human rights of intended parents as well as the surrogate woman.

The various human rights issues and legal controversies surrounding surrogacy have come up for discussion in numerous cases before the courts in different countries. The issues relating to surrogacy have received the attention of various Commissions and Professional Societies all over the world. For example, in Great Britain the Warnock Committeein Canada the Ontario Law Reform Commission; in Victoria, the Waller Committee; in New South Wales the Law Reform Commission; in Spain the Congress of Deputies’ Special Commission, in West Germany the Benda Commission, in the Netherlands the Dutch Health Council, as well as in the United States the American Fertility Society and Office of Technology Assessment, etc.

The approach of various countries towards surrogacy also differs depending upon their social, economic, cultural, religious and political views. As a result, the law relating to surrogacy all over the world also differs. Hence there is no consensus among the countries who have adopted specific legislations or legal provisions to deal with surrogacy. For example, some countries like South Africa, India, Georgia (Country), Russia, Ukraine, Armenia, Iran, Bahrain, New Zealand, Lebanon, Saudi Arabia, etc. and some of the states in USA, allow both commercial and altruistic surrogacy. In other countries like Canada, Hungary, Hong Kong, United Kingdom, Greece, Denmark, Netherlands, Belgium, Philippines, Queensland, New South Wales, Western Australia, etc. and some of the states in USA, only altruistic surrogacy is allowed. In some countries like Austria, Germany, Sweden, Norway, Switzerland, Italy, Iceland, Japan, Spain, Vietnam and some of the states in USA, all forms of surrogacy are prohibited. Due to this varying approach towards surrogacy and strict regulations in certain countries, the couples or individuals who wish to beget a child through surrogacy prefer to travel across countries and avail such services from a country which either does not have a legal prohibition or has the minimum restriction for surrogacy. Thus, the concept of procreative tourism has emerged and is becoming very popular.

India is rapidly developing as a major destination for surrogacy practices. This is due to the fact that, India offers such services with modern technologies and medical expertise at low-cost, along with a permissive regulatory climate. Further, the easy availability of surrogate women at low cost compared to other countries has also contributed to the country’s rise in popularity as a top destination for individuals/couples seeking surrogacy services. The Law Commission of India in its report stated that, the usual fee for surrogacy arrangements is around $25,000 to $30,000 in India which is around 1/3rd of that in developed countries like the USA. According to a study report given by Centre for Social Research (CSR), New Delhi in the year 2012, the fees for surrogates are estimated to range from $2,500 to $7,000 and the total costs for surrogacy arrangements can be anything between $10,000 and $35,000. Therefore, it is considered less than what the intended parents will have to pay in the United States, where rates fluctuate between $59,000 and $80,000. Thus, the strongest incentive for foreigners to travel to India is most likely to be the relatively low costs involved in the process. This has made India a preferred destination for foreign couples who look for a cost-effective treatment for infertility and thus a whole branch of medical tourism has flourished on the surrogacy practice.

As a result, the surrogacy business is well-established in India, with an estimated annual turnover of half a billion dollars. The exact figures are not available and hard to verify. However, according to one estimate, India’s reproductive tourism industry is estimated to be approximately 400 million US dollars a year. As per the CSR Report, the volume of surrogacy industry is estimated to be around $ 500 million and the numbers of cases of surrogacy are increasing rapidly. However, the extent of surrogacy practice in India is not known exactly, but from the above two reports it is clear that, the surrogacy industry is ranging from 400-500 million US dollars a year. In India, the places like Anand, Surat, Jamnagar, Bhopal and Indore have become the major centres for surrogacy practices. Large number of couples are travelling to these places not only from India but also from western countries and also from other countries like Sri Lanka, Pakistan, Bangladesh, Thailand and Singapore to fulfil their desire for a child. It is estimated that there are more than 600 fertility clinics established in both rural and urban areas spread almost all states of India. However, the state of Gujarat is particularly popular, especially among westerners.

In fact, India in general and the state of Gujarat in particular is rapidly becoming the centre for Child Process Outsourcing (CPO). Despite this growing prominence of the Indian surrogacy industry in recent years, it is strange but true that the surrogacy practices in India remain largely unregulated. This lacuna in the legal system creates a myriad of problems not only for the intended parents, surrogate woman and surrogate child but also poses new challenges before courts and government.

**HISTORICAL BACKGROUND OF SURROGACY**

The history of surrogacy goes back to the dawn of time. But, now-a-days surrogate pregnancy got its big start in the late1970’s. infertility is not a new problem faced by women. Women in all times till now are have problem in conceiving, and the other alternative way through which they are able to start their family is surrogacy. The very first case of documented case of surrogate pregnancy comes from bible. The existence of surrogacy can also be traced out from the Hindu mythology and legends, where the females of same family used to act as surrogate mother for their other relative to help them to enjoy the blessing of the child. In the ancient times adoption and surrogacy were complimentary to each other and there was no clear distinction between the two practices.

In 1976, lawyer Noel Keane (of Baby M fame) brokered the first legal agreement between a set of commissioning parents and a traditional surrogate mother. The surrogate mother did not receive any compensation for this. Keane created a fertility centre, arranging for hundreds of surrogate pregnancies per year. Keane was also involved in several high-profile cases and lawsuits over some of the arrangements made. The very first documented pregnancy of surrogacy was recorded in 1976, from that moment until 1988, approximately 600 babies were born via surrogacy. From 1988 to 1992 the number of surrogacy arose from 600 babies to 5000 babies. On 25th July,1978 Louise Joy Brown was the first test Tube (IVF) baby born.

While this was not a surrogate motherhood arrangement, this historic event paved the way towards gestational surrogacy in the future.[[4]](#footnote-4) The number of surrogate births arose significantly between 1988 and 1992, to over 5000 births. Recently, in August 2007. A 58 years old woman, Ann Stopler gave birth to twin granddaughters. Her daughter Caryn Chomsky was not able to conceive as she was suffering from cervical cancer. Moreover, a 56-year-old woman in 2008 gave birth to triplets and became the oldest woman to give birth, she acted as a gestational surrogate mother foe her daughter Kim, and deliver her own grandchildren. The 61-year-old woman in Japan is the oldest surrogate mother who gave birth to her own grandchildren in the year 2008. Her daughter didn’t have uterus, but the doctors were able use her eggs. Surrogacy is generally frowned upon in Japan, but this unusual case made headlines.[[5]](#footnote-5)

It is the matter of fact that the surrogate motherhood has come a long way in the history of surrogacy. From traditional surrogacy of past centuries, to family members being surrogate mother carries and commercial surrogacy of today, the road has been long and many miracles and hardships have been faced along the way. It will be a quite fascinating to see that what will happen to the history of surrogacy in the next 20, 50 or 100 years.

**CHAPTER: 2**

**CONCEPT OF SURROGACY: ISSUES AND CHALLENGES**

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**CONCEPT OF SURROGACY: ISSUES AND CHALLENGES**

This chapter introduces the readers with the concept of surrogacy it gives a wide spectrum to understand the various issues and challenges involved in the process of surrogacy. In addition to the definitions of vital term, the chapter also discusses the categories of surrogacy. The author has also discussed the various moral and ethical issues involved in surrogacy contract.

**PROS AND CONS OF SURROGACY**

 **PROS OF SURROGACY**

It is very famous proverb that “every coin has two sides” and the similar rule applies in the case of surrogacy. It is a boon on one side and also serves some disadvantages too. On one hand, it fulfils the deepest desire of parents to have a “beautiful- happy complete family”, on the other hand it ends into a horrible act of separating birth mother from the infant.

**A good alternative to adoption:** Proving to be a wonderful alternative option for the parents to have their own biological child, the process of surrogacy is often awarded. One does not have to worry about the linage, background or family history of the child, who has your own flesh and blood[[6]](#footnote-6).

**Cells of parents used for conception:** It is one of the most important stipulation of surrogacy that the cells of the intended parent have to be used for the conception of the child. There are certain other stipulations which needs to be adhered to and help in safeguarding the interest of intended parents. This also avoids legal complications.

**Confidential and Protected:** surrogacy is protected and is legal. There are several licenced agencies that provide assistance to desiring parents intending to go in for surrogacy. They are reliable and serves to maintain the highest levels of secrecy and confidentiality, factors which are important for the success of an agreement for surrogacy.[[7]](#footnote-7)

 **CONS OF SURROGACY**

**Cumbersome and complex:** Finding a surrogate mother can be tedious and complicated process for intended parents. Ranging from legal processes and medical procedures to financial concerns, the act of finding the correct persons for surrogacy can be cumbersome and demanding. It also requires a lot of initial research and information about surrogacy.

**Expensive:** Surrogacy can come at high cost. One has to meet a never-ending spate of medical fee, medications, fees for attorneys and payments to the surrogate mother.

 **TYPES OF SURROGACY**

Surrogacy is divided into three broad categories depending upon whether the embryo was created through traditional means or by using new technology. It can also be divided on the basis of whether monetary compensation was involved in such process. Different countries have different approach to it.

**GESTATIONAL SURROGACY AND TRADITIONAL SURROGACY**

According to the Black Law dictionary surrogacy is divided into two classes: “Gestational Surrogacy and Traditional Surrogacy”. The former is a king of surrogacy in which one women provides the eggs, which are fertilized and another woman carries the foetus and gives birth to the child. In the latter case a woman provides her own eggs which are fertilized by artificial insemination, and carries the foetus and gives birth to a child for another parent. In the case of Traditional Surrogacy, the birth mother or the surrogate is also the genetic mother of the child.

In cases of Traditional Surrogacy often the surrogate refuses to deliver the child to intended parents because she has both gestational and genetic linkage with the child whom she has given birth. Such cases also attract public sympathies and make the process of surrogacy more complex. One such case was the birth of baby M[[8]](#footnote-8) in New Jersey, where the surrogate refused to deliver the child to the intended parents as her won eggs were used to form the embryo. Whether or not commissioning parents would be able to enforce an agreement to hand over a child would be able to enforce an agreement hand over a child would probably depend on the jurisdiction where the birth of surrogate child take place.[[9]](#footnote-9) Transnational Surrogacy results in often complex and conflicting rules concerning basic family laws issues of maternity, paternity, custody, visitation, and children’s rights.[[10]](#footnote-10)

Therefore, today the intending couples favours Gestational Surrogacy over Traditional Surrogacy. Since 1990’s scientific advances and IVF have enabled gestational surrogacy to be used as replacement for the traditional method. Under gestational surrogacy the surrogates carry a child that she is not genetically related to create from eggs and sperm deriving from either the intended parents or the donors.[[11]](#footnote-11)

**TOTAL SURROGACY AND PARTIAL SURROGACY**

‘Gestational Surrogacy’ is total in the sense that an embryo created by the process of IVF is implanted into the surrogate mother. In Gestational Surrogacy only acts as the gestational carried for the baby. She has no biological ties with the child she conceives. The new technology creates additional complexity as three women are involved in the birth of a child, the intended mother, the egg donor and the surrogate who carries and gives birth to the child.[[12]](#footnote-12)

Traditional Surrogacy may be called partial or genetically contracted motherhood because the surrogate mother is impregnated with the sperm of the intended father making her both the genetic and the gestational mother, the child shares make-up of the commissioning father and the surrogate mother.[[13]](#footnote-13) Since the embryo of the child is formed using the eggs of the surrogate mother, surrogate child is genetically related to her.

**COMMERCIAL SURROGACY AND ALTRUISTIC SURROGACY**

 Surrogacy is commercial or altruistic depending on whether or not the surrogate receives financial reward for her pregnancy or the relinquishment of the child she conceives under the agreement.[[14]](#footnote-14) Several countries for example Germany, France, Japan, China ban surrogacy agreements altogether, even if it is purely altruistic and no commercial elements are involved. A report by permanent bureau at The Hague Conference on Private International Law noted that commercial surrogacy has been banned in many nation states.[[15]](#footnote-15) Others such as New Zealand, Israel, Australia, United Kingdom, and Holland allow altruistic surrogacy only. In these countries either the commercial surrogacy is illegal or unenforceable or a criminal offense. In only few notable exceptional countries commercial surrogacy is allowed and is legally enforceable. The countries where it is legally enforceable are Russia, Ukraine, India and some American states notably Florida and California.

The surrogate mother in commercial surrogacy agreement enters into an agreement with the commission parents or a single parent to bear the burden of pregnancy in return of her agreeing to carry the terms of pregnancy.[[16]](#footnote-16) Surrogate mother is paid by commissioning parents for her services.

 **Surrogacy Contracts: Meaning**

A surrogacy arrangement between an intended parent/parents and the surrogate woman requires clear understanding between them regarding their rights and duties towards each other. Such an agreement may or may not be reduced into writing. When the arrangement between the parties is reduced formally into writing, to give effect to the intention of the parties, it may be termed as a contract. Generally, every contract exists to enforce promises and protect the parties’ expectations in a transaction[[17]](#footnote-17). However, with respect to surrogacy arrangements, there is a debate regarding whether the agreement between the parties in a surrogacy is a contract or not. Hence it is essential to determine the legal status of a surrogacy agreement. In this context, it is necessary to understand the meaning and nature of a contract as recognized in legal terms in general and in India in particular.

A contract is a [voluntary,](http://www.businessdictionary.com/definition/voluntary.html) deliberate, and [legally binding](http://www.businessdictionary.com/definition/legally-binding.html) [agreement](http://www.businessdictionary.com/definition/agreement.html) between two or more [competent parties.](http://www.businessdictionary.com/definition/competent-party.html) A [contractual relationship](http://www.businessdictionary.com/definition/contractual-relationship.html) is evidenced by an [offer,](http://www.businessdictionary.com/definition/offer.html) [acceptance](http://www.businessdictionary.com/definition/acceptance.html) of the offer, and a [valid](http://www.businessdictionary.com/definition/valid.html) [(legal](http://www.businessdictionary.com/definition/legal.html) and valuable) consideration[[18]](#footnote-18). According to Sir Frederick Pollock, “every agreement and promises enforceable at law is a contract[[19]](#footnote-19).” As per Sir William Anson, a contract is an “agreement enforceable at law made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.” Each party to a contract acquires rights and duties relative to the rights and duties of the other parties. However, while all parties may expect a fair benefit from the contract (otherwise courts may set it aside as inequitable) it is not necessary that each party will benefit to an equal extent. Contracts are normally enforceable whether or not in a written form, although a written contract protects all parties to it. The object of contract law is to deal with the situations in which the parties are breaking their promises or due to unwarranted circumstances are unable to fulfill their promises and thereby violate the contract.

In India, the legal principles governing contracts are codified in the Indian Contract Act, 1872. According to this Act, „a contract is an agreement enforceable by law’[[20]](#footnote-20). An agreement consists of reciprocal promises between the two parties.[[21]](#footnote-21)Therefore to create contractual obligations there must be both a proposal and acceptance[[22]](#footnote-22). The most common way of making a contract is through a proposal by one party and its acceptance by another party. A contract creates rights and obligations between the parties entering into a contract. Refusal by any one party to a contract to honor a contracted obligation gives a right of action to another party[[23]](#footnote-23).

It is to be noted that in every surrogacy arrangement there is an agreement or understanding arrived between the intended parents/parent and the surrogate woman. There is an offer from intended parents/parent and an acceptance by the surrogate woman. Thus the agreements between the intended parents/parent and the surrogate woman can also be termed as a contract within the meaning of the Indian Contract Act, 1872.

A surrogacy contract can be defined as a private contract based on which a woman (single or married), acts as a surrogate, agrees to become pregnant through artificial reproductive techniques, carry the foetus to term, give birth to the baby, and relinquish her rights over the baby and hand it over to his/her intended parent/parents.[[24]](#footnote-24) In a surrogacy contract the parties to the contract are the intended parents/parent, the surrogate woman and in certain cases the husband of the surrogate woman.

Most infertility clinics require a contract between the intended parents and the surrogate. The object of such a contract is to avoid any dispute between the intended parents/ parent and the surrogate woman in future. Disputes may arise in issues like payment of medical expenses, payment of compensation to surrogate, liability of intended parents in cases of any harm to surrogate, liability of surrogate in case of non-fulfillment of the obligations, biological parenthood, parental rights[[25]](#footnote-25), and custodial aspects of the child to be born. A standard surrogacy contract will remove ambiguities and provide a clear answer in cases where a dispute arises between the parties in relation to the matters mentioned in the contract78. Thus, every surrogacy is usually preceded by some form of an agreement or contract between the surrogate mother and the intended parents/parent79.

A surrogacy contract can be between family members or between total strangers22. It can evolve out of purely altruistic reasons such as love and affection or it may be due to economic reasons23. Depending upon the nature of payments involved, the surrogacy contracts can be classified into two types, viz. “commercial" and “non-commercial (altruistic)" surrogacy contracts24. A commercial surrogacy contract is one in which the intended parents agree to pay an amount to the surrogate for her service. These types of contracts are also known as compensated surrogacy contracts25. In case of a non-commercial or altruistic surrogacy contracts, the surrogate woman agrees to act as a surrogate without any compensation for the service. However, the intended parents may agree to provide for the medical expenses incurred during the surrogacy process. This type of contract is also called as uncompensated surrogacy contracts.

A surrogacy contract usually defines the rights and duties of the intended parents and the surrogate woman. Such contracts typically provide that the surrogate woman will be artificially inseminated, and carry the resulting foetus to term, and then relinquish her parental rights to the intended parents. Some of the contracts may also require the surrogate to undergo physical and psychological testing before the artificial insemination takes place[[26]](#footnote-26).

The contracts may require the surrogate to refrain from the use of alcohol, drugs or tobacco during pregnancy. In addition, some contracts may require an amniocentesis test and if it reveals any defect in the pregnancy, the intended parents may have the contractual right to demand an abortion. Many contracts forbid the surrogate mother from aborting the foetus unless it is necessary for the surrogate’s physical well-being. In exchange for these services, the intended parents agree to pay all medical and health-related expenses associated with the surrogate’s pregnancy. Contracts may also provide that the intended parents pay for the living expenses of the surrogate during the period of pregnancy. Further, the intended parents may agree to pay health insurance connected with the pregnancy. So also the contracts may provide for the fee to be paid to the surrogate in consideration for her services[[27]](#footnote-27).

**Object and Purpose of Surrogacy Contracts**

The object and purpose of every surrogacy contract is to protect the rights and interests of all the stake holders involved in the surrogacy arrangement, i.e. the intended parents/parent, surrogate woman and the surrogate child. Therefore, the surrogacy contracts must clearly lay down the rights and duties of the parties involved. Further it must also consider the interest and welfare of the surrogate child which would be born as a result of such contract. Thus every surrogacy contract may have the following objectives:

To confirm an agreement between the intended parents/parent and the surrogate woman that the surrogate woman agrees to become pregnant through ART and carry the child to the full term. This is because every surrogacy contract is based on the desire of the individuals to beget a child.

To establish the paternity and maternity of the surrogate child. The intended parents enter into surrogacy arrangement with the desire to beget a child of their own and bring it up. The surrogate woman and her husband generally are not interested to assume any parental obligations. So also the anonymous sperm or egg donors are also not interested to have any parental obligations. Therefore, a surrogacy contract can clearly establish the paternity and maternity of the child. Usually it is the intended parents, as they have entered into contract with the intention to have a child to assume parental responsibility. Such a declaration prior to the birth of the child would help to resolve any disputes at a later stage.

The surrogate agrees to relinquish her parental rights over the child immediately after its birth and hand it over to the intended parents. This is because if the surrogate woman changes her mind after the birth of the child and refuses to hand over the child to intended parents, it would defeat the very object of a surrogacy arrangement. Hence the surrogacy contracts expressly terminate parental rights of the surrogate woman so as to ensure that the surrogate child is placed under the custody of intended parents.

The surrogacy contract seeks to provide compensation to the surrogate woman for acting as a surrogate as well as for medical expenses incurred during surrogacy process. However in case of commercial surrogacy contracts, the surrogate is provided with both compensation for acting as a surrogate as well as medical expenses. In case of altruistic surrogacy contracts, there is provision only for providing medical expenses during the surrogacy process.

Every surrogacy contract attempts to regulate the conduct of the surrogate woman during pregnancy by imposing certain duties[[28]](#footnote-28). This is to ensure the normal development of the foetus as well as to prevent the surrogate woman from entering into any activity that may adversely affect the safety of the child to be born.

Finally, every surrogacy contract seeks to take care of any unwarranted situation which may arise in a surrogacy process. Such unwarranted situations may arise due to the fact that every pregnancy carries risks and may cause harm to the health and life of surrogate woman or the child in the womb. Therefore, the surrogacy contract provides for liability of intended parents in case the surrogate suffers any harm or if the surrogate child suffers from any birth defects. Therefore the surrogacy contract attempts to deal with the situations where there is divorce or dispute between the intended parents or death or injury to such parents or any refusal by intended parents to accept the child[[29]](#footnote-29).

**Essentials of Surrogacy Contracts**

A contract is an agreement enforceable by law. Thus, every agreement is not a contract but only those agreements which are enforceable by law are contracts. Therefore, in order to be an enforceable contract, the agreements should satisfy the essential elements of a valid contract. In India, the essential ingredients of a valid contract are provided under Section 10 and 56 of the Indian Contract Act, 1872. According to SectionlO, “all agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void”. Section 56 provides that an agreement to do an act impossible in itself is void. It is to be noted that the surrogacy agreements between the intended parents/parent and the surrogate woman are also a form of contract and therefore to be considered as a valid contract they must also satisfy the essential conditions of a valid contract. In this context, it is necessary to examine the surrogacy contracts in the light of essential ingredients of a valid contract.

 **There must be an agreement**

 An agreement either oral or in writing is very essential condition of a contract. Every promise and every set of promises forming the consideration for each other is an agreement[[30]](#footnote-30). There must be at least two parties to an agreement, one party makes a proposal and the other accepts the same. A contract arises only if the other party accepts the proposal. A proposal from one party to do or abstain from doing a particular act and its acceptance by the other party are the two essential conditions of an agreement. In every surrogacy contract there is a proposal from the intended parents/parent asking the woman to act as a surrogate and carry their child for full term and hand over the child to them after its birth. If the woman accepts this proposal there comes into existence an agreement between the intended parents/parent and the surrogate woman.

**Consensus-ad-idem (meeting of minds) and Free Consent**

To constitute a valid contract, there must be meeting of minds i.e. consensus-ad- idem. The parties should agree to the same thing in the same sense and at the same time. Section 13 of the Indian Contract Act provides that two or more persons are said to consent when they agree upon the same thing in the same sense. Thus when it is said that there should be meeting of minds, it only means that the offer and acceptance must correspond. It is the sense of both of them but not the sense of one of them that constitutes consent. In a surrogacy arrangement when the surrogate woman accepts the proposal of intended parents/parent it means that she has understood the intention and purpose of the surrogacy and has agreed to fulfill the same[[31]](#footnote-31). To be a valid contract, the consent must be free[[32]](#footnote-32). According to Section 14, “consent is said to be free when it is not caused by Coercion, Undue influence, Fraud, Mis­representation, or Mistake.

In a surrogacy contract if the surrogate woman agrees to act as a surrogate without any Coercion, Undue influence, Fraud, Mis-representation, or Mistake, it may be considered that there is a free consent to such agreement. The nature of a surrogacy arrangement is such that it requires the surrogate woman to undergo various medical tests and procedures and become pregnant through ART and carry the baby to full term. Thus if after knowing these terms and conditions if a woman agrees to act as a surrogate must be considered that she has given her free consent.

 **Competency of the Parties**

The parties to an agreement must be competent to contract. The capacity to enter into a contract is mentioned under Section 11 of the Indian Contract Act, 1872. According to this Section, every person is competent to contract who is of age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. It means that the following three categories of persons are not competent to contract: (a) Minors, (b) Persons of unsound mind, and (c) Persons disqualified from contracting by some law to which they are subject[[33]](#footnote-33).

The parties to a surrogacy contract are the surrogate woman, her husband if she is married, and the intended parents/parent.[[34]](#footnote-34) It is to be noted that every individual has the right to procreation and is entitled to beget a child with the help of another[[35]](#footnote-35). Thus if the intended parents/parent and the surrogate woman are major; are not of unsound mind; and are not disqualified from entering into such surrogacy arrangements[[36]](#footnote-36); they are competent to enter into a valid contract of surrogacy.

 **Lawful Consideration**

Another important element of a contract is the presence of consideration which can be said to be the price for the promise[[37]](#footnote-37). Consideration can be defined as the price of a promise, a return or quid pro quo, something of value received by the promise as inducement of the promise[[38]](#footnote-38). Section 25 of the Indian Contract Act, 1872 declares that an agreement made without consideration is void. Further this consideration must be lawful. The Act also states the circumstances under which consideration of the contract is treated unlawful[[39]](#footnote-39).

A contract of commercial surrogacy similar to other contracts involves consideration and the intended parents agree to pay some amount of money to the surrogate woman. However, in case of altruistic surrogacy contract there is no monetary consideration and the surrogate may agree to the contract due to love and affection. It may be argued that, altruistic surrogacy contracts are void because they do not involve monetary consideration. In this context it is pertinent to point out that Section 25 of the Indian Contract Act, 1872 provides three exceptions to the general rule that an agreement without consideration is void. One of the exceptions is that, the contract is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other[[40]](#footnote-40). It is to be noted here that in case of altruistic surrogacy, the surrogate woman may generally be a near relative i.e. a woman in the status of sister or sister-in-law provided it is gestational surrogacy[[41]](#footnote-41).

Thus, an altruistic surrogacy contract also comes within the ambit of exceptions mentioned under Section 25 because in such cases the surrogate is acting as a surrogate out of love and affection. Hence an altruistic surrogacy can also be considered as a valid contract. It may again be argued that an altruistic surrogacy contract is invalid in case a total stranger acts as a surrogate without any consideration. However it is to be noted that such a possibility is very rare and even if it occurs the contract should be protected under Section 25 (1) due to the nature of service rendered by a surrogate. Hence, an exception should be added to Section 25 of Indian Contract Act, 1872 to include altruistic agreements including surrogate and intended parents.

 **Lawful Object**

The object of an agreement must be valid. The object of the agreement would be unlawful if it is forbidden by law or if permitted it would defeat the provisions of any law or is fraudulent or causes injury to the person or property of any other or where it is immoral or opposed to public policy[[42]](#footnote-42). Every agreement in which the object is unlawful is void[[43]](#footnote-43). It is to be noted that the object of every surrogacy contract is to beget a child. The right to beget a child is a basic human right and is recognized by national and international human rights law[[44]](#footnote-44). This right is an expression of the right to procreation and includes right to beget a child through surrogacy also[[45]](#footnote-45). Thus the object of surrogacy agreement which is to beget a child is in consonance with the national and international human rights provisions cannot be said to be unlawful. It does not defeat the provision of any other law nor is it fraudulent in nature. Further in India, there is no legal provision that prohibits the getting of a child through surrogacy. Hence the surrogacy contracts can be considered lawful in India. However various authors have argued that all types of surrogacy contracts are immoral and opposed to public policy. It is submitted that surrogacy contracts are not immoral and are not opposed to public policy[[46]](#footnote-46) and in fact such contracts are aiding the individuals to exercise their right to beget a child.

**Not Declared to be Void or Illegal**

A contract may satisfy all the essential conditions of a valid contract and may still be void or illegal if it is declared to be void or illegal by any law. Therefore the agreement though satisfying all the conditions for a valid contract must not have been expressly declared void by any law in force in the country[[47]](#footnote-47). The Indian Contract Act, 1872 expressly declares agreements mentioned in Section 24 to 30 as void.

According to Section 24 and 25 an agreement devoid of a lawful consideration or a lawful object is void. It is already discussed above that a surrogacy contract includes a lawful consideration and lawful object. Further Sections 26, 27 and 28 provide that those agreements which are in restraint of trade, marriage, and legal proceedings respectively are void. A surrogacy contract does not involve any such restraint of trade marriage or legal proceedings. Section 29 of Indian Contract Act states that, “agreements, the meaning of which is not certain or capable of being made certain are void”. The meaning of a surrogacy agreement is certain and the purpose of such agreement is capable of being made certain. Further Section 30 provides that agreements by way of wager are void. An agreement is said to be a wager if the parties have opposite views regarding an uncertain event, and if there are chances of gain or loss to either of the parties on the determination of the event one way or other and if the parties have no other interest except winning or losing of bet[[48]](#footnote-48).

Thus, it is promise to give money or money’s worth upon the determination of ascertainment of uncertain event[[49]](#footnote-49). Every surrogacy contract depends upon the surrogate woman becoming pregnant through ART and carrying the child for full term and giving birth to the child. It may be argued that due to this peculiar nature of surrogacy the surrogacy contract is equivalent to a wagering contract and is void. It is submitted that though a surrogacy procedure involves numerous experiments to initiate a successful pregnancy through ART, it is not uncertain and in fact the surrogacy arrangement becomes certain as soon as a surrogate woman becomes pregnant through ART. Further a surrogate woman is selected only after various clinical tests to determine whether she is capable of becoming pregnant through ART and is able to deliver a child. Therefore a surrogacy contract cannot be equated with a wagering contract.

 **Possibility of Performance**

An essential ingredient of a valid contract is that the obligations created through the contract are not impossible to perform. The Indian Contract Act, 1872 provides that, an agreement to do an impossible act is void[[50]](#footnote-50). It is submitted that the agreement in a surrogacy arrangement is not impossible to perform and therefore a surrogacy contract cannot be held to be void on ground of impossibility of performance. A surrogacy contract thus fulfils all the essential ingredients of a valid contract as per the provisions of the Indian Contract Act 1872.

**ARGUMENTS FOR GESTATIONAL SURROGACY**

Proponents of surrogacy believe that surrogacy should be protected as a procreative choice. It allows infertile individuals and couples the ability to have children, elevating their freedom, specifically their reproductive choices. They believe that fears of potential harms—commodification, exploitation—are outweighed by the potential benefit of surrogacy, the birth of a wanted child. Surrogate mothers give a “gift of life” to infertile couples in return for monetary compensation that they generally need creating a mutually beneficial relationship. Surrogacy then is not necessarily about commodification and exploitation of children and women. It can exist as a mature decision between rational human beings.

Women participating as gestational surrogates are able to use the act of reproduction as a means to remove herself from the traditional female role of caretaking and mothering by making the choice to gestate a child and gift it to a couple who is unable to reproduce themselves. As such, the Indian surrogate transcends the traditional reproductive duties by achieving validation in that she is employed and that she is able to help provide life for another.

**PROPONENTS OF SURROGACY**[[51]](#footnote-51)

Following are the advantages of surrogacy according to the proponents / advocates of surrogacy:-

A Right: Surrogacy is an exercise of reproductive choice and the "freedom to contract." Surrogacy promotes a women's right to privacy and procreation, and advocates economic autonomy. Making surrogacy illegal would be seen as a patriarchy that believes women are incapable of making their own decisions.

A hopeful future: Infertile women are now capable of having children, an obstacle that in some societies may make family members extremely unhappy. For surrogate mothers, they now have the money to buy a better home or even provide an education for their children.

An Act of Altruism: For some women, their sympathy towards childless couple’s makes surrogacy an act of altruism, allowing her to part with the child easily.

Step Forward in Gender Equality: One of the major obstacles in gender equality is the fact that women must bear children. However, surrogacy gives woman who are busy running their own lives the opportunity to have their baby, while they are capable of continuing to work. By having enough money to provide an education for their children, surrogate mothers are widening options for their daughters so that they may not need to choose surrogacy as a way to earn money.

**SURROGACY: COMMERCIAL OR ETHICAL**

(Protection of interests of surrogate mother as well as that of a child)

Originally, surrogacy happened within families and friend, known surrogates would give birth for infertile family members or friends. This was an altruistic deed as these surrogates were generally not paid for it. Over the last few decades however, there is a noticeable trend of the commercialization of surrogacy. It is a saying that this process is an undesirable development as giving birth to a child should not be regarded as production of a commercial product. They say that the surrogacy is similar to baby and that a law comparable to the one prohibiting the sale of human organs should apply to the sale of childbearing.

Others argue that surrogacy arrangements are a win-win situation. On the one hand, the intended parents benefit from finally having what they have desired for so long. At this same time, surrogate mother make profit from the agreement with the opportunity to increase their economic solvency and thus, are able to take better care of their families. Therefore, the needs of two women are both met in one surrogacy transaction.

Some claim that the right to procreate is an important right. For example, in The United States of America this right is protected by the Constitution Field,1990. The couple may exercise this right in the most practical way available to them given their infertility. However, Cline (2008) states this right is not literally spelled out in the constitution. Margaret Jane Radin argues that if men are to donate sperm and receive money for that transaction, then surrogacy should also be allowed as an analogous transaction for women. This constitutional argument can be used as an argument against surrogacy.

Surrogacy raises fundamental issues regarding the nature of personhood the attribute of human dignity, individual autonomy and the parameters of choices. The difference between what can be made to an object of commerce, what must remain in the domain of gift, and what ought not to be transferred. This includes the criticism that surrogacy leads to commoditization of the child, it breaks the special bond of mother and the child, it also interferes with nature and leads to the exploitation of poor women in developing or underdeveloped countries. Overall, the ethics behind the commercial surrogacy is that it is mostly helpful to those women who by natural default in their body cannot become mother. It helps them to enjoy their motherhood. But, the point is that the ethical issues are that many argue that surrogate arrangement depersonalize reproduction. Others argue that there is a change in the motives for creating children according to them children are not conceived for their own sake, but for another’s benefits.

**IT’S LEGAL POSITION IN INDIA**

Commercial surrogacy is a form of surrogacy in which a surrogate mother is paid to carry a child to the term in her womb. The payment is made to the surrogate mother on an understanding that she shall carry the child to the term and then hand over the child to the Intended Parents. This understanding arises out of a contract between the surrogate and the Intended Parent. All commercial aspect with regard to surrogacy is best to be decided between the surrogate and the Intended Parents.

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| --- | --- |
| The Indian Council for Medical Research has in its guidelines held commercial surrogacy to be legal and has established guidelines on how it should be performed. Moreover, The Supreme Court of India has in the Manji case held Commercial Surrogacy to be legal in India. This has been a great encouragement to surrogacy in India.  |   |

*Do Surrogacy contracts amount to sell the babies***?**

This is one of the most crucial question while determining the validity of such contracts in relation to the argument of autonomy of women while rendering her services in terms of child bearing. This question can be answered from only two angles, first one, surrogacy arrangements that do amount to baby selling and which can be termed as Commercial surrogacy; second one, surrogacy arrangements that do not amount to baby selling, and known as Altruistic Surrogacy. In cases of commercial surrogacy, the payment of the surrogate mother constitutes baby selling and thus is morally wrong and illegal. Such arrangements can be considered to be exploitative in nature as they are not only encouraging baby selling but also diminish the dignity of women’s reproductive capacities and the inherent value of the children by commodifying them. The jurisprudential argument supportive of commercial arrangements is that in a right based society a woman has a right to procreate and can in furtherance of that right claim monetary compensation for the gestation period from the adoptive parents. However, such an argument cannot stand valid in the eyes of law because commercial surrogacy arrangements are not only concerned with the rights of the surrogate mother but due consideration is also to be given to the interests of the child, who in such a case is treated as a commodity and thus his/ her value is undermined by such an approach to fulfil the desire of parenting and that his/ her value cannot be determined in terms of pecuniary limits.

Other Issues Relating to Surrogacy Which Have Been Resolved by the Draft Bill 2008

The Bill provides that single persons may also go for surrogacy arrangements.

The Bill provides that a foreigner or foreign couple not resident in India or a non-resident Indian individual or couple, seeking surrogacy in India, shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after pregnancy till the child is delivered to the foreigner or foreign couple or the local guardian[[52]](#footnote-52).

 It is further provided that the commissioning parents or parent shall be legally bound to accept the custody of the child irrespective of any abnormality that the child may have, and the refusal to do so shall constitute an offence[[53]](#footnote-53).

A surrogate mother shall relinquish all parental rights over the child[[54]](#footnote-54).

The birth certificate in respect of a baby born through surrogacy shall bear the name(s) of genetic parents/parent of the baby[[55]](#footnote-55).

The Bill provides for constitution of a National Advisory Board for ART and State Boards for ART for laying down policies, regulations and guidelines, and Registration Authorities for registering ART clinics, procedure for registration of ART clinics, duties of ART clinics.

 One of the duties is to make couples or individuals, as the case may be, aware of the rights of a child born through the use of ART.

The Bill also makes provisions for sourcing, storage, handling and record-keeping for gametes, embryos and surrogates, research on embryos, rights and duties of patients, donors, surrogates and children. A separate chapter deals with offences and penalties. This legislation is intended to be in addition to, and not in derogation of, other relevant laws in force.

The Bill also makes provisions regarding psection 20(14)ter visions for pppre-implantation genetic diagnosis[[56]](#footnote-56). It says that Pre-implantation Genetic Diagnosis shall be used only to screen the embryo for known, pre-existing, heritable or genetic diseases or as specified by the Registration Authority and destruction or donation (with the approval of the patient) to an approved research laboratory for research purposes, of an embryo after Pre-implantation Genetic Diagnosis, shall be done only when the embryo suffers from pre-existing, heritable, life-threatening or genetic diseases

It also makes an important provision about sex selection. The Bill provides that no assisted reproductive technology clinic shall offer to provide a couple with a child of a pre-determined sex and it shall be a criminal offence and it is prohibited for anyone to do any act, at any stage, to determine the sex of the child to be born through the process of assisted reproductive technology[[57]](#footnote-57).

The Bill provides that no woman less than twenty-one years of age and over forty-five years of age shall be eligible to act as a surrogate mother under this Act and no woman shall act as a surrogate for more than three successful live births in her life[[58]](#footnote-58).

Section 35 makes provisions for the determination of status of the child. A child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couples, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse. A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall bethe legitimate child of both parties. In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man. In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple.

 Section 42 provides that any offence to be cognizable, non-bailable and non-compoundable under this Bill.

**Following are some of the ethical issues concerning surrogacy: -**

**Exploitation vs. Empowerment:**

Question: Is surrogacy an act of dehumanization or empowerment for the poor women who agree to the procedure?  Is this exploitation or opportunity?

Arguments: Critics of outsourcing surrogacy argue that payment for bodily services dehumanizes the surrogate mother and exploits her reproductive organs and capability for personal gain of the wealthy.  Books such as Aldous Huxley’s Brave New World and Margaret Atwood’s The Handmaid’s Tale depict dystopic worlds where child-making is performed by mass incubators (Huxley) and subjugated hand servants (Atwood).  Dr. John Lantos from the Center for Practical Bioethics in Kansas City is one of strongest opposers to outsourcing surrogacy: he argues that the practice only raises the risk of baby farms in developing countries, compounded by the possibility that increasing competition among clinics will compromise safety measures for these Indian women. [[59]](#footnote-59)

Supporters of surrogacy, however, highlight the overwhelming economic opportunities for these women in light of their educational background and social circumstances.  Interviews with these women generally result in optimistic correspondences, with women expressing positive outlooks on buying a home, educating their children, or paying off debt.

 If surrogacy contracts are transparent and surrogate mothers are protected by adequate laws, then one could argue that shifting the income generation to mothers does lead to empowerment.  Evidence for this viewpoint could stem from the case of microfinance and Mohammad Yunus, where microloans to female heads of families resulting in a positive case of general community development.

**Reproductive Autonomy vs. Coercion:**

Question: How much control do these women have over their bodies and reproductive capacities?  Is there evidence of coercion by family members or in-laws?

Arguments: Feminists might argue that equal rights for women means giving women autonomy to choose for themselves, to choose their lifestyle, sexual, and reproductive freedom.  With that premise in mind, telling a woman that hosting a surrogate pregnancy dehumanizes her just imposes a new form of paternalism.  Why not let each woman choose for herself?  In addition, arguments based on democracy emphasize on the need for reproductive freedom and procreative liberty, of the negative right of interference by government on matters of personal choice. Along these lines, the silence of the Indian government is in line with values of democracy, with ethical guidelines advocating for a woman’s autonomy to choose her own reproductive rights.

The counter-argument to this construct dwells on the concept of choice.  How much choice does a poor woman in India really have?  With four or five children, an absent husband, elders to care for, and limited educational opportunities, does this woman really embody the feminists’ idea of choice?  How can we know whether or not her husband or intimate partner forced her to “volunteer” her services?  The patrilineal marriage system in India may grant substantial influence to mother-in-law’s in pressuring these women to undertake surrogacy arrangements. Currently, community stigma against surrogate mothers forces many women to live in temporary apartments or keep their pregnancies secret. [[60]](#footnote-60)

**Religious vs. Cultural Concerns**

The ethical debate on surrogacy has often looked to religious roots and cultural backgrounds in search of an answer.  One of the first ancient references to infertility occurs in Genesis, when Jacob’s wife, like many of her Biblical peers, was unable to bear a child.  After praying to God and begging her husband, she sends Jacob “unto” her maid and then adopts the resulting child as her own.  Sara did likewise, sending Abraham to her maid Hagar, saying, “I shall obtain children by her.” [[61]](#footnote-61)

It is often difficult to disassociate the influence of distinctly religious factors from other cultural conditions affecting women’s reproductive health.  Further, religious groups often exert influence on civil authorities in matters of reproduction.  Joseph Schenker has studied some of the religious differences towards ethics in surrogacy, and his findings are quite interesting.  In Jewish law, a childless couple falls within the category of personal suffering and there exists a clear obligation to assist them in every permissible way, as long as no one is harmed in the process. [[62]](#footnote-62)

The Catholic Church’s statement on assisted reproduction is clear: assisted reproduction is not accepted.  The Eastern Orthodox Church supports medical and surgical treatment of infertility, and the Baptist, Methodist, Lutheran, Mormon, Presbyterian, Episcopal, United Church of Christ, Christian Science, Jehovah’s Witness, and Mennonite religions all have liberal attitudes toward infertility treatments.  Islamic law encourages attempts to cure infertility, but only to the extent that IVF technologies involve the husband and wife.

Dr. Anand Kumar, Ph.D., Chairman of Hope Infertility Clinic and Research Foundation, explores the Hindu perspective on surrogacy in his paper “Ethical Aspects of Assisted Reproduction – an Indian viewpoint.”  He explains that there is no conflict between Hinduism and assisted reproduction, which is generally accepted as a form of treatment and not an infringement on religious beliefs.

If done properly, Dr. Malpani of the Malphani Infertility Clinic believe that “surrogacy meets all three pillars of medical ethics: autonomy (allowing people to decide for themselves); beneficence (doing well); and non-malfeasance (doing no harm).”

**Some other ethical issues w.r.t. surrogacy are as follows: -**

Can the rights of women and children be bartered?

What are the pros and cons of using unused embryos for medical research?

Is there anything wrong with disposal of unused embryos …leaving them on the counter to unthaw and degenerate?

What if the surrogate decides to maintain her privacy?

What if the surrogate and the spouse violate the abstention clause?

What if the surrogate decides to keep the baby?

What if the surrogate with genetic ties demands to visit her child?

Is there anything wrong with a surrogate giving her unused embryos to someone else?

Who should make a decision to unthaw frozen embryos?

Is handing over a child after delivery for a fee “baby-selling”?

Do women participate in surrogacy to save their marriage?

Is it wrong for a surrogate to abort?

Whether the welfare of the child is of paramount importance in surrogacy agreements?

These are some of the questions which need to be answered before we drape the new law. Let us pour into our hearts and with introspection decide carefully. Is surrogacy a bane or a boon?

**Surrogacy: Legal and Ethical**

Surrogacy has proved to be a boon for infertile couples. At the same time the increasing use of this technology has also led to various controversies and conflicting legal issues. These conflicts have at times erupted into a fierce debate over the legality of surrogacy. A discussion on this debate is necessary in order to understand the arguments underlying surrogacy. Further, since the controversy surrounding surrogacy, has been brought to limelight by the leading surrogacy cases all over the world as well as arguments made by legal scholars and commentators, such a discussion is important in determining how surrogacy should be dealt with by the legal systems in different countries in future[[63]](#footnote-63). Most of the criticisms against surrogacy are based on various ethical, moral, religious and legal grounds. Admittedly, the influence of ethics, morality and religious practices cannot be ruled out in a legal discussion, as the ethics and morality have played an important role in shaping the societies attitude towards legal issues as well as the foundation of most of the legal systems of the world.

The moral, ethical and religious objections to surrogacy are based on the premise that life is a creation of God and human beings should not attempt to play God by interfering in the natural processes. Another serious objection in this regard is the fact that surrogacy procedure involves repeated trials which use either male or female genetic material or the human embryo. The wastage of human embryo is criticized as similar to murder, because according to some scholar’s human life begins at fertilization.

The major legal objection to surrogacy strikes at the very root of the procedure of surrogacy which is due to the need and requirement of a woman to act as a surrogate. Various scholars have criticized surrogate motherhood, as it presents intolerable risks to women, including physical risks, psychological risks, and symbolic risks such as objectification and commodification. Carl Schneider points out that ―some surrogate mothers will become sick or even die[[64]](#footnote-64). Some commentators assert that the chances that the surrogate will be psychologically harmed by the process are very high, analogizing it to the psychological harms felt by birth mothers giving children up for adoption. Some surrogates do regret their decision to bear a child for another couple, as is evidenced by their decision to try to keep the child[[65]](#footnote-65).

Further many critics of surrogacy have focused on the notion that these arrangements reduce women to the value of their wombs. Such a warning was given by both the Royal Commission and the Quebec Council for the Status of Women in Canada, which suggested that reproductive technologies risk fragmenting the reproductive process and alienating women from their own reproductive capacities[[66]](#footnote-66). This is because the procedure of surrogacy separates motherhood as gestational, genetic and intended motherhood. Moreover, once a woman has agreed to be a surrogate mother, she has to follow all the terms and conditions of the contract during the entire process and more importantly she has to relinquish all her rights over the child after its birth. It is claimed that the entire process of reproduction is an inherent part of a women‘s existence and that transferring a child to someone else upon its birth is unnatural and psychologically damaging[[67]](#footnote-67).

The symbolic harm posed by surrogacy to society is that surrogacy may be characterized as baby selling, a practice that is totally against a civilized society. Some scholars argue that surrogacy treats children as commodities that can be bought or sold for a price. Others contend that surrogacy should be prohibited for the same reasons that the sale of organs for transplantation is prohibited[[68]](#footnote-68). It is also argued that agreeing to participate in a surrogacy process is equivalent to prostitution[[69]](#footnote-69)or[[70]](#footnote-70) adultery or slavery. Further it is argued that surrogacy will degrade the inherent human dignity of a woman.

A similar argument has been made that surrogacy should be banned because of the potential physical, psychological, and symbolic risks to the resulting children. It has been asserted that a surrogate, who will be carrying a child, that she will not later rear, will lie about her health or will not take proper care during pregnancy because she will not care about the subsequent condition of the child. In addition to the risks that the surrogate mother herself may present to the child, commentators arguing against surrogacy also allege that the child may be harmed by parents who may not have undergone previous screening with respect to their suitability for parenting[[71]](#footnote-71). Another major criticism which cannot be ruled out is that a surrogate child may suffer great psychological harm when the child comes to know about its parentage or origin[[72]](#footnote-72). The critics also point out that the symbolic risk to the child due to surrogacyis that it may lead to commodification of child[[73]](#footnote-73) and selection of child with certain desirable traits[[74]](#footnote-74).

It is argued further that currently the biggest risk to children in the surrogacy context comes not from the actions of either set of parents but from the uncertain status of the law. In cases where surrogacy procedures or contracts are banned, it can cause the resulting children to be stigmatized as the product of a criminal act. In cases where surrogate contracts are non-enforceable, it can lead to the child being subjected to years of litigation to determine who will be considered to be his or her legal parents[[75]](#footnote-75).

In spite of all the arguments and criticisms against surrogacy, it cannot be denied that it offers a ray of hope to such individuals who have exhausted all possible means of begetting a child. Thus, surrogacy can be considered as one of the best available means for alleviating both medical and social infertility[[76]](#footnote-76), thereby meeting the needs of individuals who wish to have a biological child.

The supporters of surrogacy argue that that ―if the right of individuals to procreate naturally by sexual intercourse is a protected right, then begetting a child with the help of assisted human reproductive technologies including surrogacy should also be protected[[77]](#footnote-77). These supporters argue that the ―liberty interests protected by the Constitution do not change definition because of the presence or absence of reproductive technology[[78]](#footnote-78). The supporters of surrogacy also distinguish surrogacy from baby selling[[79]](#footnote-79)and adoption on the basis that a surrogacy contract is entered before conception and the contracting father or contracting mother or both are often genetically related to the child[[80]](#footnote-80).

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

**COMMODITIZATION OF SURROGATE CHILD**

It is true that International and the Jurisprudence of numerous courts reflect the notion that dignity prohibits the commoditization of the human body independently of the will of the individual whose commoditization is at issue.[[81]](#footnote-81) To put it simply surrogacy is a European Convention on Human Rights and Biomedicine, “the Human Body and its parts shall not, as such, give rise to financial gain”.[[82]](#footnote-82) The South African Constitutional Court opined: “ Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither it is something to be commoditized. Our Constitution requires that it be respected”.

Germany and Switzerland also explain their opposition to commercial surrogacy by referencing its reduction of the gestational carrier and the child she bears to objects of contract.[[83]](#footnote-83) CEDAW recognizes maternity as “a social function,” rather than a commercial function.[[84]](#footnote-84)

The ethical implications of surrogacy arrangements remain highly controversial because of the commercial nature of International Surrogacy and the high value society places on bearing children and motherhood.[[85]](#footnote-85) The major concern that arises the issues relating to Human Rights is that of commoditization of child in commercial surrogacy because it places the reproductive capacity of woman in front of market. This is because of the removal of the physical activities of childbearing from the notion of motherhood treats women as “objects of reproductive exchange”[[86]](#footnote-86) by effectively “renting” wombs and devaluing childbearing.

**EXPLOTIATION OF SURROGATES**

 There are diverse ethical and moral issues in relation to legal issues surrounding surrogacy which have implications on Human Law. The lack of rules and regulations in this field has resulted into the exploitation of surrogate mothers and has denied the rights of identity and citizenship to the surrogate child. Surrogacy is a process where the wombs of ‘non-valuable’ women are used as “breeders” for the embryos of ‘valuable-women’.[[87]](#footnote-87) Sandra Harding in the context of her observations, has observed that, “Baby M case could be the forerunner of the use of poor women and the third world women’s womb to produce children for economically advanced American and European Couples”.[[88]](#footnote-88) Rich Couples from North America, The Middle East, and The Europe travel to fertility clinics in India, Thailand, South Africa, Malaysia, Ukraine, Russia, and Guatemala because services in these countries are comparatively less expensive.

The Gujarat High Court has also raised the question about the exploitation of the Indian Surrogate Mothers through surrogacy. Instances of exploitation of surrogate mothers is more in case of International Surrogacy. In International Commercial Surrogacy, surrogate mothers from poor background of the society are often forced by their in-laws to give consent to such procedure so that they can earn livelihood for the whole family. This particular step raises the question that whether, surrogate mothers are free to give their consent or not, or, whether a lack of economical alternatives gives surrogate mother no other feasible option.

Surrogates lacks the legal and medical knowledge and in fact they are offered sum of money, which is very less but, to them it means a lot and it makes for them difficult to have equal bargaining power against the wealthy and powerful clinics and the commissioning parents they contract with.

Commissioning parents and the fertility clinics take care of the surrogate mother only till the time she is having their child in her womb not after the pregnancy. None of them take care of the mental and physical health of the surrogate mother in the long run. In a documentary, Google Baby a surrogate mother was captured crying after giving birth to ab baby, the surrogate says that giving away the child is the hardest thing they have ever done. Some also argue that, the free consent cannot be given in case of surrogacy contract prior to the birth of surrogate child because a surrogate mother cannot feel how she would feel carrying the baby in her womb for nine long months. Though the surrogate other only acts as a gestational carrier of the surrogate baby, they do not have any genetic linkage with the child but, still they have a biological relationship with the child. Since, the surrogate mother has nurtured the child in her womb for nine long months which though may be rented, but it creates a bond between the surrogate and the child and play an important factor in the identity of the child.

Some commentators have gone as far as to call International Commercial surrogacy “reproductive trafficking” because “it creates a National and International Traffic in the women in which women become moveable property, objects of reproductive exchange and brokered by go between mainly serving the buyer.” There is a popular propensity to describe this travel as “reproductive tourism” and such practices should only be practiced by professionals.

Commercialization of surrogacy creates many social conflicts. Given the extreme vulnerability, one third of the Indian Surrogate Mothers due to poverty, exclusion from the marginalization in labor and job market, patriarchal social and family structure and low educational levels, the financial gain through surrogacy become a key push factor. Since, most of the surrogate mothers are not from the well to do families and their motive is only earning money so they are easily exploited by the agents working for commissioning parents. Secrecy and anonymity creates a negative environment that affects the relations within and outside the families.[[89]](#footnote-89)

**CHAPTER:3**

**PARTIES, STATUS AND PARTICIPATION**

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In this particular chapter, we will highlight the number of parties involved in the process of the surrogacy and the role and function performed by each party at the different stages of the surrogacy. This chapter highlight the legal status of birth mother, commissioning parents, child born out of surrogacy both at the pre-and-post surrogacy period. This chapter also deals with the role and responsibility of the medical institutions involved in the process.

**BIRTH MOTHER**

As surrogate motherhood in technical terms has been defined in many ways, before proceeding to the analysis of the data collected from the three areas of the study in Gujarat, it is important to outline exactly what the term surrogate mother means and how it has been defined in different contexts. Surrogate Mother as defined by the Collins English Dictionary is, “a woman who bears a child on behalf of a couple unable to have a child, either by artificial insemination from the man or implantation of an embryo from the woman”.*[[90]](#footnote-90)* The Oxford Dictionary defines surrogate mother as, “a woman who bears a child on behalf of another woman, either from her own eggs fertilized by other woman’s partner or from the implantation in her womb of a fertilized egg from the other woman.”*[[91]](#footnote-91)*

Whereas , the ART Regulation Bill, 2010 defines the “surrogate mother” as: “a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple/ individual that had asked for surrogacy”.

**ABUSES TO SURROGATE MOTHERS**

Renting out their wombs may ease financial problems for poor women in India, but new research suggests surrogate mother there are unaware of the risks and often left out of key medical decision about their pregnancy. The women in India who become surrogate mothers are mostly poor and uneducated. The $3,000 to $7,000 they typically earn can mean a vastly improved living situation, education for their children or the chance to start a small business.

Yet large payment to fertility clinics and lack of regulation raises worries that surrogate mothers are being exploited. The business of surrogacy not only reinforces the gender stereotype that women are commodities, but also leads to exploitation of surrogates who often do not understand what they are signing up for.[[92]](#footnote-92)

Ranjana Kumar quoted, director of the Centre for Social Research, a gender right think-tank. “Surrogacy is going totally unregulated and any activity like this which involves a lot of money changing hands tends to go underground and into an informal sector where irresponsible people get involved.”*[[93]](#footnote-93)*

Surrogates don’t have any say in the process of surrogacy, while going through a medical treatment, nor they have any right to decide to abort the child in case of any complications. In case, of married woman the consent of husband is necessary, so in de facto she don’t have any independent say while signing the contract.

None of the provisions talks about the death of surrogate mother during the time of pregnancy, or after giving birth to the child. Bill does not even clarify either family will get compensation or not, if yes, who will be entitled for compensation.

In case, of miscarriage nothing is mentioned in the bill regarding this, do surrogate mothers will be compensated, any extra services like counselling sessions or how clinic will help to come out from psychological and mental agony.[[94]](#footnote-94)

**RIGHTS OF SURROGATE MOTHER**

A woman can act as a surrogate only for fie successful lives birth including her own children. The child born will be the responsibility of the person availing the facility of a surrogate mother, they are legally bound to accept the custody of the child. If not accepted, it will be an offense according to the bill proposed.

No mother who less than 21years and not more than 35 years act as a surrogate mother according to this bill, in case if the transfer of embryo gets failed woman will be paid financially on mutual consent between the parties, she cannot act for more than three embryo transfers for the same couple.[[95]](#footnote-95)

All the information about the potential surrogate mother or the surrogate mother shall be kept confidential. If the surrogate mother wants to hide her identity from the potential parents she can do so, in this scenario ART clinic will have to take care about the confidentiality of the surrogate mother.

In case once the baby is born and if the female parent doesn’t wish to administer the kid to the authorization oldsters, it's clearly within the bill that female parent relinquishes all her rights on baby moment she enters into the agreement. She would have got to relinquishment the baby to couple UN agency contractile her to act as female parent.

ART clinics will have to issue a certificate to woman which will state that, she acted as surrogate for so and so person. In case, of foreign couples seeking surrogacy in India, it is mandatory to appoint a local guardian who will take care of the surrogate mother during and after the pregnancy. Child born will handed over to the foreign couple or the local guardian.

**STATUS OF SURROGATE MOTHER**

The ground reality is that surrogate mother has to go through the miserable condition, woman to agrees to act as a surrogate mother for commissioning parents belongs to a rural background, she is unaware about the medical complications and laws related to surrogacy. She does only that what is instructed to her, who are generally guided by baby broker, even the family are not aware about the all the rules and regulations and about the legal implications. The surrogate women are treated as bovine to produce baby, in reality ART clinic pays more attention to the person who wants a surrogate mother as they are going to churn out money from them. Rarely, the women acting as surrogate are provided with all the information, nor the clinic help them to understand and make them familiar with the process through which they have to undergo.

 The surrogate women only get 1 to 1.5% of the total money charged by commissioning parents. The infertility clinics don’t provide any accommodation charges to the surrogate mother while she is going through the process of insemination and other medical examination. The clinics doesn’t hold any responsibility if the surrogate mother is not accepted back by her family members, right after the birth of the baby, they are left alone to struggle.[[96]](#footnote-96)

**BENEFITS TO SURROGATE MOTHERS**

In countries like The United States of America, India, and Ukraine, many women’s decision to become gestational surrogates stems primarily from the corresponding financial benefits.[[97]](#footnote-97) The income generated through surrogacy is 10 times the income of the whole family. They are readily utilizing the process for earning their livelihood, sending their children to schools or colleges, for paying the medical expenses and much more. International Commercial Surrogacy promotes the well-being of the surrogates by generating income, spurring a revaluation the worth of pregnancy, and sometimes offering fringe benefits.[[98]](#footnote-98) The surrogate relationship could be framed as a job, whereby the surrogate mother is an employee of the surrogacy agency and, by extension, the intended parents.

**COMMISSIONING PARENTS**

The commissioning parents are sometimes also called the intended parents they are the couples, who are unable to produce children naturally or with medical help and thereafter, decide to acquire a child through a surrogacy arrangement. The intended parents or the commissioning parents opting for surrogacy can be Indians, Non-Resident Indians or Foreigners.

In India, surrogacy is increasingly becoming a popular and well accepted practice amongst couples who cannot produce the children most of such commissioning parents hail from the creamy layer of the society who can bear the huge cost of surrogacy. India is emerging as a leader in International Surrogacy and a destination in surrogacy-related fertility tourism. Indian Surrogates have been increasingly popular with fertile couple in industrialized nation because of the relatively low cost. Indian clinics are also becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge exorbitant amount for the complete package, including fertilization, the surrogate’s fee, and delivery of the baby at the hospital, including the costs of flights tickets, medical procedures and hotels.[[99]](#footnote-99)

**RIGHTS AND DUTIES OF THE COMMISSIONING PARENTS**

Surrogacy practices are based on the agreement between surrogate mother and the intended or commissioning parent. For the successful completion of the surrogacy practices both the parties i.e. intended parents or commissioning parents and the surrogates have to show their sincerity and respect towards the surrogacy agreement. Both the parties enjoy certain kinds of rights towards each other in order to execute the surrogacy agreement successfully.[[100]](#footnote-100)

**Rights of the Surrogate Mother vis-à-vis Duties of the Intended Parents**

Jurisprudentially speaking, the law consists of certain types of rules regulating human conduct and the administration of justice is also concerned with enforcing the rights and duties created by law. If we talk about ‘rights’, it implies in conformity with ‘morality’. The word ‘right’ is equivalent to the Latin term ‘rectus’ from which we derive words such as rectify, rectitude etc. ‘Right’ is also used as equivalent of the Latin term ‘jus’ from which are derived words such as just, justify etc. therefore, in this sense ‘right’ means that which is just, a just law, a just deed. ‘Rights’ are in the words of Hobhouse, ‘what we may expect from others and others from us.’[[101]](#footnote-101) All these words can be understood only in the context of society and social life, without which a person cannot develop his own personality, nor can he properly discharge his social responsibilities. When a man is said to have a right to do anything or to be treated in a particular manner, what is meant is that public opinion would see him do the act or make use of the thing or he be treated in a particular manner with approbation but he would reprobate the conduct of any one who shall prevent him from doing the act or making use of the thing or would fail to treat him in that particular way.

A civilized society is only concerned with such kind of rights as are recognized by law and enforced by the power of the State. So, a ‘legal right’ can be explained in its strictest sense as a capacity of controlling the actions of others, which resides in one man, with the assent and assistance of the State. Thus, every right, whether moral or legal, implies the active or passive furtherance by others of the wishes of the party having the right. Wherever any one is entitled to such furtherance on the part of others, such furtherance on their part is said to be their ‘duty’ and if it is enforced by the power of the State to which they are amenable, it is their ‘legal duty’.

Therefore, in this context, where the surrogate mother has certain rights to be exercised by her against the intended parents, the intended parents also have certain duties to be exercised for the benefit of the surrogate mother. It is also a duty of the surrogate mother to carry a child for nine months; it is a right of intended parents to have such child. In other words, to assign a right to intended parents is to imply that surrogate mother is under a corresponding duty. The rights and duties of the parties can be fixed by entering into a ‘surrogacy agreement’[[102]](#footnote-102), which would be legally enforceable in the courts of law. Here, the legal machinery has the power to compel the intended parents to carry out through the performance of their act, the legal rights of the surrogate mother.

 On the other hand, a ‘duty’, which is casted on the intended parents, is roughly speaking an act which one ought to do, an act the opposite of which would be wrong. It consists in positive acts, not in mere abstaining from doing. For example, a duty not to reveal the conception through IVF is a negative way of describing a positive duty to keep it secret.

 With duties, we may contrast obligations. Duties, like wrongs, are of two kinds, being either moral or legal. When law on surrogacy will recognize an act as a duty, it will commonly enforce the performance of it, or punishes the disregard of it. In strict sense, duty is something owed by one person to another. Correspondingly, the latter has a right against the former. If it is a duty of the surrogate mother to carry a child for nine months, it is a right of intended parents to have such child. In other words, to assign a right to intended parents is to imply that surrogate mother is under a corresponding duty.

 Legal rights of one set of parties to the surrogacy in strict sense constitute the correlative duties of other set of parties. So far as surrogacy arrangement is concerned, we will consider the legal rights in a wider sense. In this generic sense, a legal right may be defined as any advantage or benefit conferred upon a person by rule of law.

 **Legal rights in a wider sense include: -**

Rights (in the strict sense),

Liberties,

Powers, and

Immunities

 Each of these has its correlative, namely,

Duties,

No rights,

Liabilities, and

Disabilities[[103]](#footnote-103)

 These four pairs of correlatives with reference to parties to the surrogacy arrangement may be arranged in the following table. The correlative being obtained by reading downwards:

|  |
| --- |
|  Right Liberty (no duty)  Duty No Right |

|  |
| --- |
|  Power Immunity (no liability)  Liability Disability (no power) |

The analysis of the table of legal correlatives shows that the four terms in the first rectangle are related to each other in precisely the same way as the other four items in the second rectangle. In the above diagrams, vertical arrows connect the jural correlatives. Thus, right of surrogate mother to have proper medicines, vitamins and diet is the presence of duty of intended parents and the liability of intended parents to ensure the life of surrogate mother is the presence of power in surrogate mother.

Similarly, the diagonal arrows connect jural contradictions. Thus, no right over the child by surrogate mother is the absence of right in her and disability is the absence of power in her. The horizontal arrows connect the contradictories of correlatives. Thus, liberty (not) of intended parents is the absence of right in surrogate mother. Similarly, immunity is the absence of power in another.[[104]](#footnote-104)

The rights and obligations of the parties to surrogacy can be classified as under: -

 **Rights of the Surrogate Mother**

This category includes following rights:

* Right of the husband of Surrogate Mother to give consent for Surrogacy
* Human Rights of the Surrogate
* Right of Surrogate to health
* Right to have legal advice for entering into Surrogacy Arrangement
* Right to resolve the disputes arising out of Surrogacy Arrangement at Pre-Litigation Stage
* Right to resolve the disputes arising out of Surrogacy Arrangement by Arbitration and Conciliation
* Right to companionship/visiting rights of surrogate mother to the child
* Right to have correct information about the parties to surrogacy arrangement
* Right to have careful and unemotional decision for entering into surrogacy arrangement
* Right of voluntariness for entering into surrogacy arrangement
* Right to be explained the content of surrogate agreement in the mother tongue or local language of the parties
* Right to have surrogacy agreement in effect during pregnancy
* Surrogate mother to retain part payment given to her on failure to conceive inspite of three IVF procedures
* Right of surrogate mother to be aware of the psychological and medical risks involved in the surrogacy arrangement
* Right of surrogate mother not to refund any funds paid by the intended parents in event of miscarriage or abortion at the instance of the intended parents or by the attending expert physician
* Right of surrogate mother to fair compensation

 **Corresponding Duties of the Intended Parents**

 This category includes following obligations:

Obligation of intended parents to bear all costs of surrogate mothers’ medical examination

Obligation of intended parents to undergo medical examination under the direction of the expert treating physician so as to determine their satisfactory health (HIV+ and AIDS etc.) prior to IVF procedure

* Duty of intended parents to bear the cost of any miscarriage or abortion.
* Duty of intended parents to pay fair compensation to surrogate mother and to pay all expenses of surrogacy arrangement to the concerned doctor or pathological, laboratory etc.
* Duty of the intended parents to pay forthwith the obstetrical, nursing, hospital and maternity care, pharmaceuticals and paediatric care or other medical cost and charges.
* Duty of intended parents to remembrance the lost wages of the surrogate mother, child care expenses, transportation expenses in accordance with the agreement.
* Duty of intended parents to pay a fixed sum of money to surrogate mother as a support for the unborn child and consideration to compensate her for her pain, sufferings and inconveniences suffered by her and her family.
* Duty of intended parents to pay the above-mentioned compensation to the surrogate mother in time bound instalments beginning from the time of embryo transfer in her womb till the custody of child is given by the surrogate to the intended parents.
* Duty of intended parents to confirm in writing their parentage after the pregnancy by signing a declaration or affidavit .
* Duty of all the parties to facilitate and cooperate in a timely manner with the legal proceedings to establish the parental rights of the intended parents and to terminate any parental rights of the surrogate to the child.
* Duty of each party to facilitate the obtaining of birth certificate, citizenship certificate or any other document requested by the government.
* Duty of the parties not to intervene in each other’s life after delivery of custody of the child
* Duty of the parties not to disclose child’s conception and birth.
* Duty of intending parents not to disclose the fact of surrogate parenting including surrogate’s identity.
* Duty of the parties not to provide any information to the public, news media or any other individual regarding their involvement in surrogacy arrangement.
* Duty of parties not to violate the agreement and perform it specifically.
* Duty of parties to amend or modify their agreement only by a subsequent written agreement signed by all parties.
* Duty of parties to treat the final agreement as ultimate between them, integrating all previous talks, agreements, covenants, representations (express, implied, written or oral).
* Duty of parties to abide by the remaining agreement if any of its clause(s) are deemed invalid or unenforceable .
* Duty of parties that their agreement shall be governed by all laws in force in India
* Duty of parties to abide by jurisdictional clause .
* Duty of intended parents to get the life of the surrogate mother insured for a sum mentioned in the agreement.

 **Rights of Intended Parents**

 This category includes the following rights:

* Right of Intended Parents to have a Child
* Right to Hire a Sperm
* Right to Hire an Egg
* Right to Hire a Womb
* Right of Unmarried Male to enjoy the facility of Surrogacy
* Right of Unmarried Female to enjoy the facility of Surrogacy
* Right of Gay persons to enjoy the facility of Surrogacy
* Right of Lesbians to enjoy the facility of Surrogacy
* Right to have Visa for enjoying the facility of Surrogacy
* Right to have Passport for enjoying the facility of Surrogacy
* Right to have Legal Advice for entering into Surrogacy Arrangement
* Right to Resolve the Disputes arising out of Surrogacy Arrangement at Pre-Litigation Stage
* Right to Resolve the Disputes arising out of Surrogacy Arrangement by Arbitration & Conciliation
* Right of Commissioning Parents to have a Health Surrogate Mother capable of carrying and bearing healthy and normal children
* Right of Intended Parents to conceive a child by IVF into the Surrogate Mother
* Right of Intended Parents to have the child morally, legally and contractually
* Intended Parents right to take care and maintain the newly born child
* Right to have correct information about the parties to surrogacy arrangement
* Right to have fully informed decision for entering into surrogacy arrangement
* Right to have careful and unemotional decision for entering into surrogacy arrangement
* Right of voluntariness for entering into surrogacy arrangement
* Right of intending parents to place reliance on surrogate mother
* Right to be explained the content of surrogate agreement in the mother tongue or local language of the parties
* Right to have fair mutual promises for surrogacy arrangement
* Right of parents to the surrogacy arrangement to know the implications and issues of conceiving a child through surrogacy
* Right to have IVF procedure performed by an expert treating physician selected by the intending parents and approved by the surrogate
* Right of the intending parents to receive the immediate and absolute custody of the child upon birth irrespective of any congenital or mental abnormality of the child
* Right of intending parents to take all decisions concerning the child’s health in utero and after delivery
* Right of the intending parents to have all testamentary and inheritance rights from the child
* Right to have surrogacy agreement in effect during pregnancy and atleast two years after the birth of the child
* Intending fathers’ right to use his sperms
* Intending mothers’ right to use her egg
* Intending father’s right to borrow sperms of a third party
* Intending mother’s right to borrow eggs of a third party

Right of intended parents to stop further payments to surrogate mother on failure to conceive in spite of three IVF procedures

 **Corresponding Duties of Surrogate Mother**

 This category includes the following obligations:

Surrogate mothers’ obligation not to be lawful parent of the child

* Duty of surrogate mother not to interfere with the upbringing of the child after birth
* Duty of surrogate mother to surrender all her rights upon the surrogate child
* Obligation of Surrogate Mother to carry the child for full term and give birth to a child for Intended Parents
* Duty of surrogate to sign necessary affidavits, consents and/or wavers in accordance with law applicable and to attend all necessary court proceedings in connection with intended parents’ parentage, either prior to or after the child’s birth
* Obligation of surrogate mother to relinquish parental rights, custody and/or control over the child
* Obligation of surrogate mother to cooperate in any legal proceedings for the purposes of declaration of a parental relationship between child and intended parents
* Obligation of surrogate mother to undergo medical examination under the direction of the expert treating physician prior to IVF procedure, so as to determine that her health is satisfactory (HIV and AIDS etc.) to conceive and deliver a child
* Obligation of surrogate mother to undergo minimum three IVF procedures for intended pregnancy
* Obligation of surrogate mother to sign an informed consent regarding the possible psychological and medical risks involved in surrogacy arrangement and medications to be administered to her
* Obligation of surrogate mother to comply with all medical instructions given by the expert treating physician
* Duty of surrogate mother to abstain from sexual intercourse from the time of first medical examination till the time of delivery of the child or upto certain period as advised by the expert treating physician
* Duty of surrogate mother not to engage in any activity in which there is a possibility of semen being introduced into her body so as to avoid possibility of any pregnancy other than contemplated by surrogacy arrangement
* Duty of surrogate mother not to abstain from any sexual activity including intercourse with any person who has not been tested by the expert treating physician so as to avoid transmission of sexually transmitted disease
* Duty of surrogate mother to remain monogamous after her first medical examination for IVF
* Duty of surrogate mother to take medicines and vitamins as prescribed by the expert treating physician
* Duty of surrogate mother to submit herself to a medical test or procedure deemed necessary after confirmation of pregnancy to detect any potential genetic or congenital defects in the foetus
* Duty of surrogate mother not to smoke cigarettes, cigars, or not to consume marijuana or any other drug or psychotropic substance or drink alcoholic brewages from the time of commencement of cycle meditations until the end of pregnancy
* Duty of surrogate mother to limit her consumption of caffeinated brewages up to one cup of coffee a day
* Duty of surrogate mother to submit herself to drug, alcohol, nicotine testing
* Duty of surrogate mother to submit herself to testing for sexually transmitted and infectious diseases including HIV and AIDS as requested by the intending parents
* Duty of the intended parents to pay all costs of all medical examination of the surrogate mother
* Duty of surrogate mother to execute and deliver a written consent form to administer such testing
* Duty of surrogate mother not to use any prescription, non-prescription or to undergo any medical procedure during and through the end of her pregnancy without express consent of the intending parents
* Duty of surrogate mother to take vitamins and to maintain a healthy diet as recommended by her obstetricians
* Duty of surrogate mother not to participate in dangerous sports or hazardous activities, strenuous physical activity
* Duty of surrogate mother not to allow herself to be exposed to radiation, toxic chemicals or communicable diseases during the term of surrogacy agreement
* Duty of surrogate mother to allow the intended parents to attend all doctors visit including ultra-sound examination with the approval of surrogates’ obstetrician
* Duty of surrogate mother to inform the intended parents the progress of pregnancy at least once a week
* Duty of surrogate mother to waive her doctor-patient privileges and to sign any release form required to allow intended parents to communicate with all treating or attending medical personnel’s, and review medical records pertaining to surrogates’ pregnancy or health
* Duty of surrogate mother to notify intended parents the onset of labour pain
* Duty of surrogate mother to allow intended parents to remain present in the delivery during the delivery of the child with due respect for the surrogate’s privacy. Surrogate to sign a consent form necessary for this purpose
* Duty of surrogate mother to use all reasonable efforts to deliver the child in the selected hospital under medical supervision
* Duty of surrogate mother to deliver the child by a caesarean section, if necessary
* Duty of surrogate mother to remain at a particular place as agreed with intended parents during the pregnancy and two months after the birth of the child
* Duty of surrogate mother to remain in contact 24 hours a day from the date of execution of surrogacy agreement till two months after the custody of the child is handed over to the intended parents
* Duty of surrogate mother not to abort the child once conceived
* Duty of surrogate mother to abide by the decision of expert treating physician and intending parents in event of a risk that the child will be physically or physiologically abnormal, in a manner that could seriously affect the childs’ quality of life, the decision to abort or not to abort
* Duty of surrogate mother to attend on time all scheduled doctors’ appointment
* Duty of surrogate mother to present to intended parents proper evidence or bills about the expenses which the surrogate has incurred during the pregnancy and the birth of the child and to recover the same from intended parents
* Duty of surrogate mother to agree timely to confirm in writing the parentage of intended parents and the lack of surrogates’ maternity after verification of pregnancy
* Duty of all the parties to facilitate and cooperate in a timely manner with the legal proceedings to establish the parental rights of the intended parents and to terminate any parental rights of the surrogate to the child
* Duty of each party to facilitate the obtaining of birth certificate, citizenship certificate or any other document requested by the government
* Duty of surrogate mother not to seek contact with the child unless otherwise agreed by the intended parents in writing
* Duty of surrogate mother to submit herself, if requested by intended parents or directed by a court to a DNA or any other scientific test to confirm the genetic parentage of the child
* Right of intended parents that their name will be mentioned on all the medical tests/bills and not that of surrogate
* Right of intended parents to name the child so that it may be inserted on the child’s birth certificate
* Right of intended parents to choose the nationality of the child
* Duty of the parties not to intervene in each other’s life after delivery of custody of the child
* Duty of the parties not to disclose child’s conception and birth
* Duty of the parties not to provide any information to the public, news media or any other individual regarding their involvement in surrogacy arrangement
* Death of intended mother prior to the birth of the child, not to alter any terms of the agreement and the child to be placed in the custody of intended father
* Death of intended father prior to the birth of the child, not to alter any terms of the agreement and the child to be placed in the custody of intended mother
* Death of both intended parents prior to the birth of the child, not to alter the terms of the agreement. The child shall in such event be placed in the custody of local guardian appointed by intended parents
* Separation or divorce of the intended parents will not give any parental right to the surrogate mother upon the child. In case of divorce the custody of the child will be decided by the intended parents or by a court of competent jurisdiction
* Duty of parties not to violate the agreement and perform it specifically
* Duty of parties to amend or modify their agreement only by a subsequent written agreement signed by all parties
* Duty of parties to treat the final agreement as ultimate between them, integrating all previous talks, agreements, covenants, representations (express, implied, written or oral)
* The words and expressions surrogate mother, intended parents and surrogate child shall be deemed to include their respective heirs, legatees, devisees, administrators, executors, successors and assigns who shall abide by this agreement to their benefit
* Duty of parties to abide by the remaining agreement if any of its clause(s) are deemed invalid or unenforceable
* Duty of parties that their agreement shall be governed by all laws in force in India
* Duty of parties to abide by jurisdictional clause.

 **STATUS OF COMMISSIONING PARENTS**

In earlier times, the status of the commissioning or intended parents was kept secure, as they used to enjoy the maximum benefits out of the surrogacy arrangement and the laws related to it. The commissioning parents used to enjoy a win-win position because they were financially strong and on the other hand the las were silent on such processes. Commissioning parents had the free wish whether to carry forward the process or not, if the child born through surrogacy was of their desire then they used to keep the child with them otherwise they used to keep the child with the surrogate mother only. But, with the passage of time and the growth of business of surrogacy, there is also the development of vigilant laws to govern the process of ART and to check that there is no exploitation of the surrogate mother.

On the other hand, government has also made the laws and provisions to protect and safeguard the rights and interests of commissioning parents, as they should not be harassed by infertility clinics and the surrogate mothers for money. The government has also passed the laws and the provisions to ensure that the status of the surrogate child who is born through the process of surrogacy is clear and affirmative and at no stage it is hampered.

**BENEFITS TO COMMISSIONING PARENTS**

The market for the industry has found the customers for the commissioning parents who can’t or will not carry their own children, same-sex make couple, single parents or others who are willing to pay for the surrogacy services.[[105]](#footnote-105) The practice of surrogacy is beneficial to those couples who cannot bear a child through natural process.

Sociology literature suggests that commissioning parents fare well in the current system of international surrogacy, as parents are able to have their child and can sometimes escape the legal and financial constraints of national surrogacy programmes.[[106]](#footnote-106) There is a growing trend among the infertile patients to seek fertility services abroad because they are unlawful or legally restricted in their own countries, or because services are simply unavailable, or are significantly less expensive or more quickly available abroad.

 **Status of the child**

Article 7 of the U.N. Convention on the Rights of the Child requires that a child be registered immediately after birth and have, inter alia, the right to know and be cared for by his or her parents. This right does not appear to be given effect by the Bill, which contains an anomaly.

Clause 34(10) states that the birth certificate shall be in the name of the genetic parents of the baby. The role of the surrogate mother is considered to be purely gestational, she is required to contract out her parental responsibilities toward the child prior to commencement of the pregnancy, agreeing to hand over the child as soon as permitted after delivery. Likewise, a donor of genetic material is required to contractually relinquish all parental rights to the child [clause 35(6), Form L and Form K]. This means the baby of the surrogacy arrangement may not be genetically related to either commissioning parent, cannot be genetically related to the surrogate mother and the donors of the genetic material have contractually agreed that his or her personal identity will not be disclosed to the recipient or to the child born through the use of my gamete. [Form K and Form L]

According to clause 35, the child is presumed to be the legitimate child of the commissioning parents, with no requirement for adoption. Clause 35 refers only to the use of assisted reproductive techniques, making no reference to the genetic parentage, the surrogacy arrangement or the surrogate mother.[[107]](#footnote-107)

The birth certificate is issued in the name(s) of the parent(s) who sought the use of the assisted reproductive technology. This appears to be the case irrespective of the potential for neither of the commissioning parents to have contributed their genetic material to the pregnancy (and in the current environment, the surrogate mother contributing her ova). There is no requirement that the genetic or gestational parents be recorded on the birth certificate and for the child to be subsequently adopted by the commissioning parents. This approach represents a departure from that recommended by the Indian courts.

The Gujarat High Court ruled in an interim order in April 2008[[108]](#footnote-108) that the birth certificate of children born of a surrogate mother to a German couple, using the sperm of the German father, should bear the name of the surrogate mother, not the commissioning German mother. The source of the ova is unknown. The couple came from Germany to commission the baby but moved to the UK. The UK Consulate refused to grant a visa to the twin boys because the birth certificate bore the name of their commissioning German mother, requiring the German parents to file a petition with the Court to have the birth certificate amended. The situation was not finally resolved until May 2010 when the Supreme Court of India ordered that they be granted an exit permit.

On the submission amicus curiae of Bhaskar Tanna, Justice CK Buch noted the Guidelines and stated that there were areas within them that required addressing, particularly in relation to the legal issues involved concerning parentage.

The 2010 Bill attempts to remedy this fault with an attempt to address concerns arising from the above case by requiring commissioning parents to show proof that their country of residence allows the adoption of children born of commercial surrogacy arrangements. This is given effect through visa requirements.

A child is legitimate in common law if its parent were married at the time of his conception or at the time of his berth.[[109]](#footnote-109)

In Strand v. Strand,[[110]](#footnote-110) the husband has been given visitation rights in divorce petition, but the wife later tried to have these rights rescinded on the ground that she has undergone AID and because she had consented for AID, the child was not legitimate. According to the decision of the Court the child had been “potentially adopted or semi- adopted” by the husband, thus, he was entitled to the same rights as those acquired by a foster parent who has formally adopted a child. A little later, in Doombos v. Doombos,[[111]](#footnote-111) on a wife’s petition for divorce and custody of the child born to her consequent to AID, consented to by the husband one of the question before the court was: whether such a child is legitimate and belongs to the mother only. The court held that a child so conceived was not a child born in wedlock and therefore illegitimate. As such it was the child of the mother alone and the husband had no right or interest in the child, not even that of visitation. In another case of Gursly v. Gursky,[[112]](#footnote-112) the Supreme Court of New York ruled that a child born as a result of AID, consented to in writing by the husband, was legitimate. It held that husband responsible for the support of such child on the basis of and implied contract on his part on the doctrine of equitable- estoppels.[[113]](#footnote-113)

**INJURY TO THE SURROGATE CHILD**

The process of International Commercial Surrogacy is not regulated as per the law. It is the favouring reason behind the success of the industry. Though the process is beneficial to infertile couple who cannot become parents through the natural process. Some countries restrict the process of surrogacy, on the other hand the same process violates the rights of the surrogate child.

Conflicts among the legal framework have placed the children born at risk of being “marooned, stateless, parentless.”[[114]](#footnote-114) This problem arises mainly in case of cross border surrogacy, where one country permits the process of surrogacy but, the country of commissioning parents refuses to recognises the surrogate child as their legal child and therefore, also refuses to grant them citizenship or identity. Conflicting laws between jurisdictions on citizenship, parentage and surrogacy mean that the surrogate child can end up with no legal parents or nationality.[[115]](#footnote-115)

**INTERNATIONAL COMMERCIAL SURROGACY: STATUS OF SURROGATE CHILD**

Historically, the legal treatment of non-material children has been unkind. Conflicts among the framework have placed the children born at risk of being “marooned, stateless and parentless.”[[116]](#footnote-116) There are many cases of International Commercial Surrogacy where there is a complex legal issue involved in cross border surrogacy which leaves the child in no legal status. Such surrogate children are born with no definite identity or nationality. This problem arises in case of cross border surrogacy where, one country permits the International Commercial Surrogacy and the country of commissioning parents doesn’t allow the surrogacy, and they refuse to give citizenship to such surrogate babies. Conflicting laws between jurisdictions on parentage, surrogacy and citizenship means that the surrogate child can end up with no legal identity or nationality.[[117]](#footnote-117)

The birth of the surrogate child with intended parents or genetic from the other country creates many legal hurdles which is often not anticipated by the parties at the time of entering into such agreements. The issue of statelessness of the surrogate child is a major concern and the state should either individually or collectively find the solution to such major problem.

The preliminary research by HCCH suggests that the highest number of cross border surrogacy involves the problem related to legal parentage is International Surrogacy cases.[[118]](#footnote-118) Nothing has been done at the International Level to protect the rights of the surrogate children. Countries have taken Ad Hoc and Temporary measures when faces with such issues. The difficulty with these partial solutions is that the surrogate child is left with what has been referred to as ‘limping’ legal parentage which refers to fact that one parent may not be legally recognised as the child’s parent.[[119]](#footnote-119)

Moreover, such cases take place with the support of agencies facilitating International Surrogacy. These institutions instead of creating awareness among the commissioning parents about the legal complications involved in cross border surrogacy, are encouraging them to ignore their domestic or local law which is in opposition to such practices.[[120]](#footnote-120) For example, on The United States of America based surrogacy website completely minimizes the legal and immigration issues associated with International Surrogacy.

**OBLIGATIONS OF COMMISSIONING COUPLE/INDIVIDUAL**

Surrogacy exposes not only parenthood, not as a biological fact, but as legally and socially constructed status with responsibilities and obligations as well as benefits.[[121]](#footnote-121) The problem with International Commercial Surrogacy is that the infertile couple only acquires about the benefits which they could reap out of such agreements. They are not at all concerned with the rights and obligations that is attached with the process. Every process has benefits as well as burden attached to it. The case of identity and nationality of the surrogate child could be avoided if the commissioning parents inquire about the following facts:

Whether their country allows commercial surrogacy

Whether the surrogate child born in another country is allowed to enter their own country

Whether the intended couple would be recognised as the legitimate parent of the child born overseas through commercial surrogacy

Whether a child would be granted citizenship by their National Government.

**SURROGATE CHILD: RIGHT TO PARENTHOOD AND NATIONALITY**

 The right to birth certificates and acquiring nationality are of fundamental concerns under International Surrogacy. Children born under International Commercial Surrogacy arrangement often are denied of these rights and have been rendered stateless and parentless because of the country where surrogacy has taken place and the country which is the habitual place of resident if intended parents. In such a situation, even the country which permits surrogacy and where surrogacy has taken place also denies citizenship to the child born on its own land.

**RIGHTS OF SURROGATE CHILD UNDER IHRL TREATIES**

The commissioning parents who were unaware of the legal consequences involved in International Commercial surrogacy have to fight legal battle to in two different jurisdictions to give identity and citizenship to such surrogate child. Granting parenthood is not a matter of single right but, it is the genesis of unremunerated rights. Having legal parents grants children several rights and protections including: Right to Citizenship, Access to Medicare and medical benefits, Access to medical treatment, Applications for passport and anything requiring a birth certificate, Inheritance rights, A child’s rights to workers compensation for by his or her parents.” Clause II states” States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”

There are two difficulties with this provision, both grounded in its presumptive incorporation of national law. If national law provides that a mother is person giving birth, the child’s status is unclear. Furthermore, if national law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation. Either problem can be rectified by reforming domestic law or as proposed in the pending Indian legislation on surrogacy, by requiring the intending parents to prove, before entering into a arrangement, that the resulting child will be granted citizenship in the state where her intending parents live, and that they, in fact, will be legally recognized as her parents in that state.

The three important Human rights treaties are: The International Covenant on Economic, Social and Cultural Rights, 1966; The Convention on the Elimination of All Forms of Discrimination against Women, 1979; The Convention on the Rights of the Child, 1989. Though these International Instruments do not address surrogacy directly, they do address rights crucial in the context of Surrogacy. These are the right to health,the right to support the right to know one’s origins,and the right to a family.

**RECOGNITION OF RIGHTS UNDER INDIAN DRAFT BILL**

The Bill expressly mentions that “The birth certificates issued in respect of a baby born through surrogacy shall bear the name(s) of individual/individuals who commissioned the surrogacy, as parents” Surrogate must relinquish all the parental rights over the child to intended parents.Further if embryo if formed using gametes from the donor, then in such cases “the donor shall relinquish all parental rights over the child who may be conceived from his or her gamete.”

In order to protect the interest of the child born through surrogacy, the bill makes the commissioning parents legally bound to accept the custody of the child. This is done to prevent cases like where the intended mother unable to secure travel documents for the surrogate child had left him untended in the waiting room of the passport office in Hyderabad.

Finally, the most remarkable step taken under the bill is to prevent the surrogate child born in India from being parentless and stateless is taken under clause 19 of section 34. This clause imposes two obligations upon the commission parents in order to secure the rights of surrogate child. The first obligation is a “a foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy as per clause 34.2, till the child/children are delivered to the foreigner or foreign couple or the local guardian.”

The second obligation casted by the Bill is that the party seeking the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child/children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party’s origin or residence as the case may be.

The draft Bill has taken step to satisfy its obligation under the CRC. The child who is temporarily and permanently deprived of the family environment shall be entitled for the protection and assistance by the state.

For some jurisdiction, what matter the most is public policy over the interest of the child. They refuse to grant citizenship and identity to child born though cross border commercial surrogacy agreement. Thus, notwithstanding the virtually universal concern for the children produced through surrogacy, some states prohibiting surrogacy refuse to grant such children citizenship, because they fear that doing so would only encourage the prohibited practice.

They should carry out the obligation under the CRC since they are party to it. Judgment should be made in the best interest of the child. On the other hand, some countries bypass their own domestic legislation prohibiting surrogacy or commercial surrogacy in order to protect the interest of the child. Securing the interest of the child born through cross border surrogacy to their own citizen becomes the primary concern of some jurisdiction and they grant nationality and identity to such children.

**THE HAGUE CONFERENCE ON PRIVATE INTERNATIONL LAW**

At present, there is no international regulation determining the status of the child born through cross border surrogacy. First such step in this direction has been taken by The Hague conference on private International Law. The primary focus of this conference is to determine the status of surrogacy agreement under private International law and also to ascertain the status of child born through transnational surrogacy.

In April 2010, the Council and General Affairs on Policy for Hague Conference invited the Permanent Bureau to provide a note to the Council on Private International Law issues relating to the status of children born of surrogacy arrangements. The council has acknowledged that complex issues of private international law are involved in international surrogacy arrangement. And such a practice has raised issues relating to protection of surrogate child born under cross border surrogacy agreement. The Hague Conference on Private International Law (“HCCH”) is looking into the issue of international surrogacy. One of the issues of great concern which it has indentified is the status of children and the establishment or recognition of the child’s legal status which has important consequences for the child including nationality, immigration status and parental responsibility. The issues concerning the status of children have shifted from being about illegitimacy of some children to focusing on issues of legal parentage.

**OBSERVATIONS OF SPECIAL COMMISSION**

The issues relating to transnational or global surrogacy have been dealt in a meeting of the Special Commission on the practice and operation of The Hague Child Protection Convention (HCPC) 1993. At the meeting, the Special Commission noted that the number of cross border surrogacy agreement has increased tremendously. This is primarily because this industry is unregulated in various jurisdiction and also there is no international regulation dealing the same. The commission also noted that 1993 Child Protection Convention is not an appropriate instrument to deal with international surrogacy cases. It recommended that The Hague Conference on Private International Law to carry out a further study of the legal, especially the Private International Law issues surrounding international surrogacy.

On the 10th March 2011, the Permanent Bureau of The Hague Conference produced a preliminary document on the Private International Law issues surrounding the status of children, including issues arising from International Surrogacy arrangements. The Hague Conference has indentified the basic criteria that would need to be covered by any comprehensive international and multinational agreement: Uniform rules on the jurisdiction of Courts or other authorities to make decisions as to legal parentage, uniform rules on the applicable law governing the surrogacy arrangement, corresponding rules providing for the recognition and enforcement of parental decisions relating to the legal parentage, Uniform rules on the applicable law as to the establishment of legal parentage by way of operation of law or by agreement, Uniform rules on the principles of recognition concerning the establishment of parentage by voluntary acknowledgment (i.e. with certificates).

The Permanent Bureau has also recommended that such International Instrument should contain necessary safeguards to protect children born through international surrogacy agreements. Such measures may include assessment of commissioning parents and gestational mothers. Licensing and control of agencies and authorities providing surrogacy services is also needed. A global accord capable of imposing uniform regulations on the transnational surrogacy market is therefore difficult to envisage, but a bifurcated regime, based on the reciprocal acknowledgment of a permissive and a prohibitionist “treaty zone”, seems more likely.

**CHAPTER 4:**

**LEGAL SCENARIO OF SURROGACY IN INDIA**

**CHAPTER-4**

**LEGAL SCENARIO OF SURROGACY IN INDIA**

 **INTRODUCTION**

Although the number of surrogate births in India is not known, anecdotal evidence indicates that the number continues to rise as the numerous assisted reproductive technology (ART) facilitators continue to streamline the process for prospective commissioning parents. India has never prohibited surrogacy, but in recent years India has increasingly recognized the need to regulate the industry. Regulation to date has taken the form of non-binding guidelines promulgated by the medical industry, but it is expected that more formal regulation will be enacted at the national and state levels. Given the number of problematic cases that continue to be reported with respect to cross-border surrogacy arrangement where the child’s citizenship and parentage status are undefined, and given the concerns about adequate protections for surrogate mothers, the need for regulations is evident.

**JUDGEMENT GIVEN BY SUPREME COURT OF INDIA IN BABY MANJI CASE**

**Baby Manji Yamada vs Union of India & Anr AIR, 2008.**

“1. This petition under [Article 32](https://indiankanoon.org/doc/981147/) of the Constitution of India, 1950 (hereinafter for short 'the Constitution') raises some important questions.

2. Essentially challenge is to certain directions given by a Division Bench of the Rajasthan High Court relating to production/custody of a child Manji Yamada. Emiko Yamada, claiming to be grandmother of the child, has filed this petition. The Writ Petition before the Rajasthan High Court was filed by M/s. SATYA, stated to be an NG0, the opposite party No. 3 in this petition. The D.B. Habeas Corpus Writ Petition No. 7829 of 2008 was filed by M/s. SATYA wherein the Union of India through Ministry of Home Affairs, State of Rajasthan through the Principal Secretary, The Director General of Police, Government of Rajasthan and the Superintendent of Police Jaipur City (East), Jaipur were made the parties. There is no dispute about Baby Manji Yamada having been given birth by a surrogate mother. It is stated that the biological parents Dr. Yuki Yamada and Dr. Ikufumi Yamada came to India in 2007 and had chosen a surrogate mother in Anand, Gujarat and a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. It appears from some of the statements made that there were matrimonial discords between the biological parents. The child was born on 25th July, 2008. On 3rd August, 2008, the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat and she was being provided with much needed care including being breastfed by a woman. It is stated by the petitioner that the genetic father Dr. Ifukumi Yamada had to return to Japan due to expiration of his visa. It is also stated that the Municipality at Anand has issued a Birth Certificate indicating the name of the genetic father.

3. Stand of respondent No. 3 was that there is no law governing surrogation in India and in the name of surrogation lot of irregularities are being committed. According to it, in the name of surrogacy a money-making racket is being perpetuated. It is also the stand of the said respondent that the Union of India should enforce stringent laws relating to surrogacy. The present petitioner has questioned the locus standi of respondent No. 3 to file a habeas corpus petition. It is pointed out that though custody of the child was being asked for but there was not even an indication as to in whose alleged illegal custody the child was. It is stated that though the petition before the High Court was styled as a "Public Interest Litigation" there was no element of public interest involved. Learned counsel for respondent No. 3 with reference to the counter- affidavit filed in this Court had highlighted certain aspects relating to surrogacy. The learned Solicitor General has taken exception to certain statements made in the said counter affidavit and has submitted that the petition before the High Court was not in good faith and was certainly not in public interest.

4. We need not go into the locus standi of respondent No. 3 and/or whether bonafides are involved or not. It is to be noted that the [Commissions For Protection of Child Rights Act](https://indiankanoon.org/doc/506243/), 2005 (hereinafter for short 'the Act') has been enacted for the constitution of a National Commission and State Commissions for protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto. [Section 13](https://indiankanoon.org/doc/1203423/) which appears in Chapter III of the Act is of considerable importance. The same reads as follows:

"13. Functions of Commission.

(1) The Commission shall perform all or any of the following functions, namely:-

(a) examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;

(b) present to the Central Government, annually and at such other intervals, as the Commission may deem fit, reports upon the working of those safeguards;

(c) inquire into violation of child rights and recommend initiation of proceedings in such cases;

(d) examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures.

(e) look into the matters relating to children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures;

(f) study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children;

(g) Undertake and promote research in the field of child rights;

(h) spread child rights literacy among various sections of the society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminars and other available means;

(i) inspect or cause to be inspected any juvenile custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organisation; where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;

(j) inquire into complaints and take suo moto notice of matters relating to, -

(i) deprivation and violation of child rights;

(ii) non-implementation of laws providing for protection and development of children;

 (iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities; and

(k) such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions

2) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force."

5. Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

 The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.

6. In "traditional surrogacy" (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh of frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra cervical insemination) which is performed at a fertility clinic. '

7. In "gestational surrogacy" (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e. g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

8. "Altruistic surrogacy" is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

9. "Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

10. Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a healthy condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

11. Alternatively, the intended parent may be a single male or a male homosexual couple.

12. Surrogates may be relatives, friends, or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies, the amount a surrogate receives varies widely from almost nothing above expenses to over $ 30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.

13. In the present case, if any action is to be taken that has to be taken by the Commission. It has a right to inquire into complaints and even to take suo motu notice of matters relating to, (i) deprivation and violation of child rights (ii) non-implementation of laws providing for protection and development of children and (iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities.

14. It appears that till now no complaint has been made by anybody relating to the child, the petitioner in this Court.

15. We, therefore, dispose of this writ petition with a direction that if any person has any grievance, the same can be ventilated before the Commission constituted under the Act. It needs no emphasis that the Commission has to take into account various aspects necessary to be taken note of.

16. Another grievance of the petitioner is that the permission to travel so far as the child is concerned including issuance of a Passport is under consideration of the Central Government; but no orders have been passed in that regard. The other prayer in the petition is with regard to an extension of the visa of the grandmother of the child requesting for such an order.

17. Learned Solicitor General, on instructions, stated that if a comprehensive application, as required under law, is filed within a week, the same shall be disposed of expeditiously and not later than four weeks from the date of receipt of such application. If the petitioner has any grievance in relation to the order to be passed by the Central Government, such remedy, as is available in law may be availed.

18. The writ petition is accordingly disposed of without any order as to costs. All proceedings pending in any High Court relating to the matter which we have dealt with in this petition shall stand disposed of because of this order.”

...........................................J. (Dr. ARIJIT PASAYAT) ...........................................J. (Dr. MUKUNDAKAM SHARMA) New Delhi:

September 29, 2008

**ASSISTED REPRODUCTIVE TECHNOLOGY**

Assisted Reproductive technology is a new technology of creating embryo for infertile couples. It is result of scientific development. The definition and the historical development of the process have been discussed below.

In the past, surrogacy arrangements were generally confined to kith and kin of close relatives, family, or friends, usually as an altruistic deed. But, with the introduction of financial arrangements in the process, surrogacy has extended its network beyond family, community, state, and even across the country. The concept of surrogacy has turned a normal biological function of a woman’s body into a commercial contract. Surrogate services are advertised. Surrogates are recruited, and operating agencies make huge profits. The commercialization of surrogacy has raised fears of a black market and of baby selling and breeding farms; turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a services and a baby to a product. Experience shows that as with any other commercial dealing, the ‘customer’ lays down his/her conditions before purchasing the goods.

Slowly but steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners’. Cheap medical facilities, advances reproductive technological know-how, coupled with poor social-economic conditions, and a lack of regulatory laws in India, in this regard combined to make India an attractive option.

**DEFINING ART**

“Assisted reproductive technology”, with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo into the reproductive tract. 125 In Texas, ‘assisted reproduction’ is defined as a method of causing pregnancy other than sexual intercourse.126 In state Virginia ‘assisted conception’ means: a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as a means of conception.127

Surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a, surrogate mother is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full terms and deliver the child to its biological parents(s)”

**HISTORICAL DEVELOPMENT OF TECHNOLOGY**

In 1978 Louise Brown, the first child was given birth through the technique of in vitro fertilization by Robert G Edward and Patrick Steptoe.This was a path breaking step in control of infertility which is seen as a social impediment in the society. In fact, this scientific advancement is considered as one of the most important medical advances of the last century. The last 20 years have witness and exponential growth of infertility clinics that use techniques requiring treatment of spermatozoa or the occyte outside the body, or the use of a surrogate mother. 129 With the massive advances in the field of medicine and technologies, today 85 percent of the case of infertility can be taken care of through marriage, procreation, motherhood, child bearing and education among other matters. 130 Two broad interpretations could be appended to the above mentioned right. Firstly, the commissioning parents have the right to adopt any procedure for procreation. Secondly, the surrogate has the right to use her reproductive capacity in a way she prefers.

Now, if we draw analogy from the above decisions we may say that since reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection. A similar view has been opined by the Law Commission of India in its 228th Report on Surrogacy, 2009.

At the federal level, several versions of surrogacy bills have been proposed but legislation has not yet been enacted. Currently, the Assisted Reproductive Technologies (Regulation) Bill 2010 (‘Draft Bill’) is pending with the Parliament of India. The 2010 Bill grants rule-making authority to the Central Government of India. The Central Government has developed the Assisted Reproductive Technologies (Regulation) Rules 2010 (‘Draft Rules’).

One State also has a bill pending. The Maharashtra Assisted Reproductive Technology (Regulation) Act 2011 was recently introduced in the state legislature of the State of Maharashtra. The draft of the bill has not been publicly released, but it is reported to include the following provisions:

A surrogate would have to register as a patient at a state government-run ART clinic in order to establish transparency;

Only a married woman (25-35 years) may become a surrogate;

Surrogacy would be prohibited for women who have more than five children;

The state government will certify the medical fitness of women serving as surrogates; and

International clients would have to obtain a letter from their embassy stating that surrogacy is accepted in the country concerned.

Currently in place are non-binding National Guidelines for Accreditation Supervision & Regulation of ART Clinics in India, promulgated by the Ministry of Health and Family Welfare, Government of India, and the Indian Council of Medical Research and the National Academy of Medical Sciences (India) in 2005 (‘Guidelines). Most provisions of the Guidelines mirror the provisions of the Draft Bill discussed below. Also in place are Ethical Guidelines for Biomedical Research on Human Subjects, which provide a number of protections to surrogate mother not contain in the Guideline or the Draft Bill and Draft Rules, including that:

Surrogacy should be resorted to only when it is coupled with authorized adoption wherever applicable;

(b) It should be rebuttable presumed that a woman who carries the child and gives birth to it is its mother;

(c) The intending parents should have a preferential right to adopt the child subject to six weeks post-partum delay for the necessary maternal consent;

(d) The contract for surrogacy, despite permitting reasonable payment of compensation on completion of adoption, is valid subject to the surrogate’s right to retain the baby if she so desires;

(e) The only remedy for the genetic parent is to make a claim for custody on the grounds of the best interest of the child; and

(f) Abortion under the abortion law on medical grounds should be the inviolate right of the surrogate, and in that event, the adopting parents have no claim over the amounts already paid.

In addition, on July 9, 2012, the Ministry of Home Affairs sent a letter to the Ministry of External Affairs which sets forth the procedure for granting visas to foreign nationals who visit India for the purpose of engaging in surrogacy arrangements; the only type of visa available for this purpose is a medical visa and not a tourist visa which is considered a violation of visa condition.134 The visa guidelines indirectly regulate surrogacy by setting forth the conditions on which foreign indirectly regulate surrogacy to ensure that the surrogate mother is not cheaged. Specifically, a medical visa for purpose of surrogacy may only be granted if:

The foreign man and woman are married and have been married for at least two year;

The Visa application must include a letter from the Embassy of the foreign country in India or the Foreign Ministry of that country stating that (1) the country recognize surrogacy, and (2) the child/children born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the commissioning couple;

The commissioning couple furnish an undertaking that they will take case of the child/children born through surrogacy;

Medical treatment will be performed only at a registered ART clinic recognized by ICMR; and

The commissioning couple must produce a notarized agreement between the couple and the prospective Indian surrogate mother.

For purpose of drawing up the surrogacy contract, the commissioning couple may enter India on a tourist visa, but they cannot provide any samples to any clinic during this preliminary visit.

The remainder of this section will discuss specific provisions of the Draft Bill and Draft Rules.

1. **Requirements of the Parties Involved with Surrogacy**

The Draft bill contains restrictions on any woman undergoing an ART procedure, which would include surrogate mothers, intended mothers and egg donors. No ART procedure may be performed on a woman younger than 21 years. In addition, no woman may be treated with gametes or embryos originating from the gametes of more than one man or one woman during any one treatment cycle.

**i. Requirements Specific to Gamete Donors**

Under the Draft Bill, man donating sperm must be between the ages of 21 and 45.There is no proscription on the number of times a man may donate sperm, but a woman cannot donate eggs more than six times in her life, with an interval between egg retrieval no shorter than three months.Eggs from a single retrieval may be shared with only one semen sample from an ART bank may be used for only one recipient. In no event may the donor learn the identity of the recipient.

**ii. Requirements Specific to Surrogate Mothers**

The Draft Bill requires that a surrogate mother must be Indian citizen between the ages of 21 and 35.A woman may not be sent abroad to act as surrogate.A woman who is married requires the consent of her spouse to be a surrogate.A relative, a person known to the commissioning party or a stranger may serve as a surrogate, but if she is a relative, she must belong to the same generation as the commissioning mother.

A surrogate mother may not also donate her eggs to the intended party seeking surrogacy (nor may her husband’s sperm be used).A woman may not serve as a surrogate for more than five successful live births in her life, including her biological children, and she may not undergo an embryo transfer more than three times for the same couple.

A surrogate mother is required to be medically used and declare that she has not received a blood transfusion or product in the previous six months.She is bound to not engage in any act that would harm the foetus during pregnancy or the baby after birth.The surrogate mother must register at the hospital in her own name, and must clearly disclose that she is a surrogate mother and provide the names and addresses of the persons for whom she is acting as a surrogate.

**iii. Requirements Specific to Commissioning Parties**

Commissioning parties must be unable to carry a baby to term.It is entirely clear whether surrogacy for commissioning gay and lesbian parties is permitted. The Draft Bill provides that ART shall be available to all persons, including single persons, married couples and unmarried couples. The Bill defines couple as two persons living together and having a sexual relationship that is legal in India, which suggests that gays and lesbians may be unable to engage in surrogacy arrangements. However, the Bill defines as unmarried couple as two persons, both of marriage of able age, living together with mutual consent but without getting married, in a relationship that is legal in the country/countries of which they are citizens.

Although the surrogate may be known to the commissioning couple, gametes may not be donated by a relative or known friends of the commissioning parties. However, the retrieval of gametes of a person whose death is imminent is permissible if the dying person’s spouse intends to avail himself or herself of ART to have a child.

Commissioning parties cannot use the services of more than one surrogate mother simultaneously. Neither can the commissioning parties have embryos transferred simultaneously to both a surrogate mother and the commissioning mother. The commissioning parties must provide the surrogate mother with a certificate stating clearly that she has acted as a surrogate for them.

Consistent with existing India law proscribing sex selection, the Draft Bill prohibits ART clinics from offering a couple a child of a predetermined sex. 162 Determining the sex of the child to be born through ART is considered a criminal offence.

**B. Enforceability of Surrogacy Arrangements**

Surrogacy in India is permissible because no Indian law prohibits it. 164 The Indian Contract Act would apply with respect of the legality or surrogacy agreement.165 Under section 10 of the Contract Act, all agreements are contracts if they are made with the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are into expressly declared void. It is possible that a court could find a surrogacy contract unenforceable on public policy grounds or unconstitutional under Article 23 of the Constitution of India, which prohibits forces labour and trafficking in human being.166 No Indian court has declared a surrogacy contract unenforceable.167

The draft Bill specifically provides that surrogacy agreements are legally enforcable168 The Draft Rules contain forms of agreement for:

 (a) Surrogacy;

 (b) Consent for donation of eggs;

 (c) Consent for donation of semen/sperm;

(d) Information on the semen donor, oocyte donor and surrogate mother;

(e) Contracts (including the financial arrangements) between the ART Bank, on the one hand, and the semen donor, oocyte donor, surrogate mother, patient or the ART clinic, on the other hand; and

**C. Payments in Surrogacy**

The Draft Bill contemplates that gamete donors and surrogates may be compensated financially by the ART Bank.However, compensation for the surrogate mother is generally a matter between the surrogate mother and the commissioning parties.The Model Contract between the ART bank and the Surrogate appended to the Draft Rules provides that:

The surrogate clearly understands that the consideration for the surrogacy is to be paid by the parents and the Bank will not be responsible for any demand by the surrogate in the form of compensation. The Bank shall also not be responsible for payment to the surrogate for any expenses incurred during the surrogacy period.

The Model Contract between the surrogate mother and commissioning parties sets forth a payment plan for the surrogate mother’s compensation.A first instalment of at least 5 per cent of the total agreed compensation is payable when the embryo transfer occurs; a second installment of at least 5 per cent is due when the surrogate becomes pregnant; a third instalment of at least 5 per cent is due at the end of the first trimester; a fourth instalment of at least 10 per cent is due at the end of the second trimester and the remaining 75 per cent is due just after delivery. If the first embryo transfer does not succeed, for each subsequent embryo transfer within six months of the first, the surrogate is to receive an additional 50 per cent of the total initial price paid in the preceding instalments.

The Commissioning parties must ensure that the surrogate mother is appropriately insured until the child is handed over and until the surrogate mother is free from all health complication arising from the surrogacy.

**D. Legal Parenthood/Nationality of the Child**

In the light of several publicised cases concerning the parentage and citizenship of children born through surrogacy, the Draft Bill contains relatively extensive provisions on these matters.

It spells out that a child born to a married couple through ART is presumed to be the legitimate child of the couple, born in wedlock with the consent of both spouses, and shall have the same legal rights as a legitimate child born through sexual intercourse.A child born to an unmarried couple through ART shall be considered the legitimate child of both parties.A child born to a single parent will be considered the legitimate child of that parent.176 If the married or unmarried couple separate or divorce after consenting to ART but before the child is born, the child shall still be considered the legitimate child of the couple.The birth certificate issued with respect to the child born through surrogacy will bear the names of commissioning parties as the child’s parents.

Commissioning parties from countries other than India must ensure and establish to the ART clinic through proper documentation (i.e., a letter from either the embassy of the relevant country in India, or from the foreign ministry of the country), clearly and unambiguously, that:

 (a) That country permits surrogacy; and

 (b) The child born through surrogacy in India will be permitted entry into that country as a biological child of the commissioning couple/individual.

Non-residents of India must appoint a local guardian, who will be legally responsible for taking care of the surrogate during and after the pregnancy until the child is delivered to the commissioning parties or the local guardian.The commissioning parties are legally bound to accept the custody of the child, regardless of any abnormally of the child.

Refusal to take delivery of the child is considered an offence, punishable by imprisonment for up to three years, or a fine or both.If the foreign commissioning party fails to take delivery of the child born to the surrogate mother, the local guardian will be legally obligated to take custody of the child, and is free to hand the child over to an adoption agency if the commissioning party or their legal representative fails to claim the child within one month of the child’s birth.During the transition period, the local guardian is responsible for the well-being of the child.

Children born through surrogacy to foreign commissioning parties shall not be Indian citizens even though they are born in India.However, in cases where commissioning parties refuse to take delivery of the child and the child is adopted or is raised by the legal guardian, the child will be granted Indian citizenship.

**E. Advertisement**

Under the Draft Bill, an ART Bank may advertise for gamete donors and surrogates on a commercial basis, but advertisements may not contain any details relating to the caste, ethnic identity or descent of any of the parties involved in the surrogacy.No ART clinic is permitted to advertise for surrogacy for its clients.

**E. Rights of the Child Born Through a Surrogacy Arrangements**

The Draft Bill prohibits the child born through surrogacy from learning the identity of the gamete donor or surrogate mother.The trail of secrecy begins with the ART Bank. The ART Bank must obtain necessary information about the gamete donor or surrogate, including their identities and addresses, but must promise the donor or surrogate that their identities will remain confidential.The ART Bank must obtain a written agreement from the ART clinic that in no circumstances (except if asked by a court) will the ART clinic reveal the identity of the donor to the recipient couple or anyone else.The identity of the gamete donor or surrogate donor may be released only in cases of life threatening medical conditions which require physical testing or samples of the gamete donor or surrogate mother, but only upon the prior informed consent of the gamete donor or surrogate mother.In addition, the identity of gamete donors or surrogate mothers may be disclosed to central database to be maintained by the Department of Health Research.Divulging the identity of donors/surrogate mothers in violation of the Draft Bill is a punishable offence under the Act.

Other than the identity of the gamete donor or surrogate mother, the parents or legal guardian of a minor child have the right to access other information about the donor, ‘when and to the extent necessary for the welfare of the child’.The commissioning parties are entitled to information about the donor including the donor’s height, weight, ethnicity, skin colour, educational qualification and medical history.When the child reaches age 18, he or she may request information about the donor or surrogate mother, except their personal identity.

**G. Right of the Surrogate Mother**

Donor and surrogate mothers are required to relinquish all parental rights over the child.198 Pursuant to the Model Surrogacy Agreement appended to the Draft Rules, the surrogate agrees to hand over the child after delivery.199 She must agree to foetal reduction if asked by the party seeking surrogacy, if she is carrying more than one foetus. The surrogate mother has the right to terminate her pregnancy at will pursuant to the Medical Termination of Pregnancy Act of 1971.If the surrogate mother terminates her pregnancy, unless the pregnancy is terminated on the basis of expert medical advice.

**H. Requirements of ART Clinics**

Under the Draft Bill, all ART facilities (including ART banks and research organizations) are required to register with a registration authority.Clinics performing certain enumerated ART functions must also receive a certificate of accreditation issued by a state board.

The use of individual brokers or paid intermediaries to obtain gamete donors or surrogate is considered on offence punishable by imprisonment for a term up to three years and a specified fine.

**ICMR GUIDELINES ON SURROGACY**

To regulate and supervise the ART clinics, the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) have come out with National guidelines for Accreditation, Supervision and Regulation of ART Clinics in India. These Guidelines have been evolved after detailed discussion and debate by experts, practitioners of ART and public. The Guidelines in respect of surrogacy are mentioned as:

Clinics involved in IVF AIH AID ART AND SURROGACY should be registered supervised and regulated by the States Accreditation Authority.

Any information about Clients, Donors must be kept confidential.

No treatment should be given without the written consent of the couple.

The ART clinic must not be a party to any commercial element in donor. Programmes or in gestational surrogacy.

A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name.

While registering, surrogate mother must mention that she is surrogate mother and provide all the necessary information about the genetic parents such as names addresses, etc.

Surrogate mother must not use/register in the name of the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death (in whose name will the hospital certify this death?)

The birth certificate shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother.

All the expenses of the surrogate mother during the period of pregnancy and postnatal care relating to pregnancy should be borne by the couple seeking surrogacy.

The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother.

An oocyte donor cannot act as a surrogate mother for the couple to whom the occyte is being donated.

 A third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa.

No ART procedure shall be done without the spouse’s consent.

The provision or otherwise of AIH or ART to an HIV- positive woman would be governed by the implications of the decision of the Supreme Court in the case of X-v. – Hospital Z (1998) 8 SCC p 269 or other relevant judgment of the Supreme Court, or law of the country, whichever is the latest.

Gametes produced by a person under the age of 21 shall not be used. The accepted age for a sperm donor shall be between 21 and 45 years and for the donor woman between 18 and 35 years.

Surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/undesirable to carry a baby to terms.

Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect.

Advertisements regarding surrogacy should not be made by ART clinic. The should rest with the couple, or a semen bank.

A surrogate mother should not be over 45 years of age. Before accepting a woman as a possible surrogate for a particular couple’s child, the ART clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full-term pregnancy.

A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.

A prospective surrogate mother must be tested for HIV and shown to be seronegative that (a) she has not had a drug intravenously administered into her through a shared syringe, (b) she has not undergone blood transfusion; and (c) she and her husband

(d) to the best of her/his knowledge) has had no extramarital relationship in the last six months. (This is to ensure that the person would not come up with symptoms of HIV infection during the period of surrogacy.) The prospective surrogate mother must also declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank.

No woman may act as a surrogate more than thrice in her lifetime.

DNA tests are compulsory to determine that the intended parents are indeed the genetic parents. If this is not the case the child must be adopted instead.211

Surrogacy should normally only be an option for patients for whom it would be physically or medically impossible/undesirable to carry to baby to term.

The payments received by the surrogate mothers should be documented and cover all genuine expenses associated with the pregnancy.

The responsibility of finding a surrogate mother should rest with the couple, or a semen bank, not the clinic.

A surrogate mother must declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank.

A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple.

**NATIONAL GUIDE LINES 2005 AND CHILD PROTECTION.**

A child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child as born to a couple with the help of sexual intercourse.

Children born through the use of donor gametes and their “adopted” parents shall have a right to available medical or genetic information about the genetic parents that may be relevant to the child’s health.215

Children born through the use of donor gametes shall not have any right whatsoever to known the identity (such as name, address, parentage etc. of their genetic parents(s). A child thus born will, however, be provided all other information about the donor as and when desired by the child, when the child becomes an adult. While the couple will not be obliged to be provided the above “other” information to the child on their own, no deliberate attempt will made by the couple or others concerned to hide this information from the child as and when asked for by the child.

In the case of a divorce during the gestation period, if the offspring is of a donor programme-be it sperm or ova-the law of the land as pertaining to a normal conception would apply.

 **GUIDELINES ISSUED BY THE MINISTRY OF HOME AFFAIRS**

Vide letter no.25022/74/2011-F.I dated 9th July 2012 regarding foreign nationals intending to visit India for commissioning surrogacy. 217

It has come to the notice of this Ministry that some foreign national are visiting India on Tourist Visa for commissioning surrogacy. This is not the appropriate visa category and such foreigners will be liable for action for violation of visa conditions. The appropriate visa category will be a medical visa. It will also be necessary in such cases to ensure that the surrogate mother is not cheated. Therefore, such as visa may only be granted if the following conditions are fulfilled: -

(i) The foreign man and women are duly married and the marriage should have sustained at least for two years.

(ii) A letter from the Embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed with the Visa application stating clearly that (a) the country recognises surrogacy and (b) the child/ children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/ children of the couple commissioning surrogacy.

a. The couple will furnish an undertaking that they would take care of the child/ children born through surrogacy.

b. The treatment should be done only at one of the registered ART clinics recognized by ICMR (the list of such clinics will be shared with MEA from time to time).

c. The couple should produce a duly notarised agreement between the applicant couple and the prospective Indian surrogate mother.

2. If any of the above conditions are not fulfilled, the visa application shall be rejected.

3. Before the grant of visa, the foreign couple need to be told that before leaving India for their return journey, ‘exit’ permission from the FRRO/FRO would be required. Before granting ‘exit’, the FRRO/FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child/children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement. A copy of the birth certificate(s) of the surrogate child/ children will be retained by the FRRO/FRO along with photocopies of the passport and visa of the foreign parents.

4. It may be noted that for drawing up and executing the agreement cited at para 1 (v) above, the foreign couple can be permitted to visit India on a reconnaissance trip on Tourist Visa, but no sample may be given to any clinic during such preliminary visit.

**TYPE OF VISA FOR FOREIGN NATIONAL INTENDING TO VISIT INDIA COMMISIONING SURROGACY AND CONDITIONS FOR GRANT VISA FOR THE PURPOSE**

Foreign nationals intending to visit India for the purpose of Commissioning Surrogacy are required to hold Medical Visa. In such cases the surrogate mother is generally an Indian national. It has been noticed that some foreign nationals visit India for commissioning of surrogacy on Tourist visa which is not the appropriate type of visa for the purpose.

2. The ministry of Home Affairs has decided that foreign nationals intending to visit India for the purpose of Commissioning Surrogacy shall be issued Medical Visa subject to the fulfillment of following conditions:

(i) The foreign man and woman are duly married and the marriage should have sustained at least for two years.

(ii) A letter from the Embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed with the visa application stating clearly that (a) the country recognizes surrogacy and (b) the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning surrogacy.

(iii) The couple will furnish an undertaking that they would take care of the child/children born through surrogacy.

(iv) The treatment should be done only at one of the registered Assisted Reproductive Technology (ART) clinics recognized by ICMR. (The list of such clinics will be shared with MEA from time to time).

(v) The couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother.

3. If any of the above conditions are not fulfilled, the visa application shall be rejected.

4. The foreign couple would be required to take exit permission from the FRRO/FRO before leaving India for their return journey. Before granting “exit”, the FRRO/FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact the child/children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement. A copy of the birth certificate(s) of the surrogate child/children will be retained by the FRRO/FRO along with photocopies of the passport and visa of the foreign parents.

5. It may be noted that for drawing up and executing the agreement cited at para 2(v) above, the foreign couple can be permitted to visit India on a reconnaissance trip on Tourist Visa, but no samples may be given to any clinic during such preliminary visit.

Provisions applicable to OCI/PIO card holder for commissioning surrogacy in India226

OCI/PIO Cardholders coming to India for commissioning surrogacy will not require a separate Medical Visa. However, on arrival to India and before commissioning surrogacy, they will have to obtain a special permission from the FRRO/FRO concerned. Such permission may be granted by the FRRO/FRO concerned subject to the following conditions: -

 (i) The foreign man and women are duly married and the marriage should have sustained at least for two years.

 (ii) A letter from the Embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed with the visa application stating clearly that(a) the country recognizes surrogacy and (b) the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning surrogacy.

 (iii) The couple will furnish an undertaking that they would take care of the child/children born through surrogacy.

 (iv) The treatment should be done only at one of the registered Assisted Reproductive Technology (ART) clinics recognized by ICMR.

 (v) The couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother.

Before granting exit to the child/children born through commissioning of surrogacy in such cases, the FRRO/FRO concerned will ensure the following

(a) The OCI/PIO Cardholder has obtained the requisite prior permission from the FRRO/FRO concerned for commissioning surrogacy as mentioned above.

(b) The OCI/PIO Cardholder is carrying a certificate from the ART clinic concerned regarding the fact that the child/children have been duly taken custody of by the OCI/PIO Cardholder and the liabilities towards and Indian surrogate mother have been fully discharges as per the Agreement.

 (c) A copy of the Birth Certificate(s) of the surrogate child/children will be retained by the FRRO/FRO along with photocopies of the passport and OCI/PIO card of the OCI/PIO cardholder. Document to be submitted by the foreign nationals to FRROs/FROs for exit permission in case of Surrogacy cases: -

 **1. Photo:** Applicant’s photo

**2. Infant’s passport:** Infant’s new Passport or Emergency traval document issued by the concerned Mission.

**3. Passport & Visa of foreign parents:** Foreign Parents’ passport and visa copy (Photo page, page indicating validity, page bearing arrival stamp of Indian Immigration, Visa-with endorsement.)

**4. Residence Proof:** Form C copy from Hotel or Lodge/Electricity bill/Landline Telephone/ Municipal Bill of the landlord in case of staying in a house of a relative or friend along with a letter and photo-id-card of the landlord. In case of rented accommodation copy of the lease and license agreement.

**5. Surrogacy agreement:** Notarized agreement between the commission parents, surrogate mother and doctor treating the case.

**6. NOC:** No objection Certificate (NOC) from surrogate mother.

**7. Embassy letter:** Embassy letter indicating the issuance of new passport.

**8. Recognition letter:** Letter from the Embassy of the foreign country in India surrogacy and (b) the child/ children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/child of the couple commissioning surrogacy.

**9. Discharge letter:** Discharge letter from the hospital where child is born.

**10. No dues certificate:** Copy of no dues certificate from ART Clinic where child is born.

**11. Certificate from the ART Clinic:** Certificate from the ART Clinic concerned confirming that the child/children have been duly taken custody by the foreigners and that liabilities towards the Indian surrogate mother have been fully discharged as per the agreement.

**12. Embryology letter:** Copy of embryology letter from ART Clinic.

**13.** **Undertaking letter:** Undertaking from the commissioning parents that they would take care of the child/children born through surrogacy.

**14. Birth Certificate:** Birth Certificate(s) of the surrogate child/ children.

**DOMESTIC CASES**

1. There have been a few reports of surrogate mothers suffering extreme medical complications from surrogate pregnancy. For example, after being pressured by her husband to become a surrogate for money, one young woman died after giving birth in Coimbatore in 2009.In Ahmadabad, a woman died in 2012 during her eighth month of pregnancy allegedly due to negligence of a clinic.

2. Another woman who agreed to become a surrogate mother lost her uterus, developed other health complications and was divorced by her husband after being three times. The woman began serving as a surrogate after she had been approached by an agent who said she would be paid Rs.2.25 lakh. Her first surrogate pregnancy attempt failed after 45 days, for which she got Rs.10,000, of which the agent took Rs.2,000.

The second pregnancy failed after 50 days. She attempted to decline a third attempt, but the woman said that the agent demanded that she pay Rs.25,000 to decline, so she felt she had no other choice. For the birth of the child, the woman suffered placenta previa, placenta afcreta, and gestational diabetes and had to undergo a hysterectomy.

3. There have been isolated report of surrogate mothers demanding additional monies from Indian commissioning parents. One commissioning mother reported that a surrogate mother threatened to abort the baby if an additional sum of Rs.1,00,000 was not paid. In another case, a surrogate mother insisted on keeping one of the twins she was carrying for a commissioning couple unless the couple paid an additional Rs.1 Lakh.

4. In August 2008, an Indian couple were detained at Mumbai airport and jailed when they attempted to take a 16-month-old child to Canada to visit relatives. The couple were charged with carrying a frequently obtained passport for the child, which listed the couple as parents instead of the child’s biological mother. The baby was handed over to the child’s biological mother, who was the couple’s neighbour and who had agreed to bear

Them a child since they had been childless for a long time. Fraudulent documents are also a factor in a case where an Ahmadabad gynaecologist has been charged with arranging fake surrogacy documents and incorrect birth certificates in the case of an infant that was sold to a Rajkot-based couple. Cases such as these may be indicative of widespread rackets being investigated in Ahmadabad, Anand, Nadiad and Saurashtr.

5. Legal parentage and related issues with respect of Indian citizen who have children born through a surrogate have also been questioned. For example, in 2005 a single man in Kolkata commissioned a pregnancy with a surrogate using a donor egg and his sperm. The Juvenile Welfare Board indicated it had not encountered such as a case before, and it was not clear to the Board what the status of the child would be.

**CHAPTER 5**

**INTERNATIONAL SURROGACY**

**POSITION OF SURROGACY IN U. K., AUSTRALIA, ANDASIAN COUNTRIES –(CHINA, JAPAN, PAKISTAN, AFGHANISTAN, INDIA ETC.)**

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| **UNITED KINGDOM**Surrogacy arrangements have been legal in the United Kingdom since 2009. The main proviso is that no money other than ‘reasonable expenses' should be paid to the surrogate. While there is no strict definition as what constitutes ' reasonable expenses ' it is left up to the individuals involved in a surrogate arrangement to come to an agreement regarding these expenses. Any costs incurred by a surrogate that are as a result of the pregnancy would be regarded as expenses. Whilst it is illegal in the UK to pay more than expenses for a surrogacy, the relationship can be recognized under Section 30 of the Human Fertilization and Embryology [HFE] Act, 1990 under which a court may make parental orders similar to adoption orders provided they meet various criteria designed to ensure that the arrangement in question is non-commercial and that everyone involved consents. It should also be noted that, at present, the law does not recognize surrogacy as a binding agreement on either parties. There is very little the intended parents can do to secure their position prior to the birth, even in the case of gestational surrogacy where the baby is genetically related to both intended parents and not the surrogate. |
| Once the child is born and if the intended father's name goes on the birth certificate, then he automatically has equal rights over the child with the surrogate. If not a Parent Responsibility Agreement can be entered into by the intended father with the surrogate mother, which gives them equal rights over the child, this only applies in certain cases, see link above. After six weeks the 'parents' can apply for a Parental Order that will give them full and permanent parental rights over the child. At this stage the surrogate relinquishes all her rights over the child. The HFE Bill extends the parental order rules so that unmarried and same sex couples can apply as well as married couples. These changes are very welcome (though it makes no sense to continue to exclude single people who conceive their own genetic child through surrogacy, particularly now that the law is being changed to make it clear that single women should not be discriminated against in the provision of donor insemination) |

Problems related to surrogacy in UK – “International surrogacy arrangements”

First, the lack of recognition of the intended parents as legal parents at birth causes very significant problems, particularly in the context of international arrangements. It is increasingly common for patients to travel abroad for fertility treatment, and many foreign jurisdictions have a more permissive approach to surrogacy than the UK. Countries such as the Ukraine and India permit commercial arrangements under which the intended parents are registered as the legal parents at birth.

What many patients do not realize, though, is that if they are domiciled in the UK, UK law applies to them regardless of where the conception occurs. This can result in the unfortunate situation where, at birth, neither the surrogate nor the intended parents are legal parents under their own home systems of law and the child is born an orphan. Any foreign birth certificate naming the English parents as the legal parents cannot be relied upon for UK legal purposes.

There is then no straightforward way for the English parents to apply for entry clearance to bring their child into the UK under the immigration rules, and in many cases the child will be 'stateless' which means he or she cannot even obtain a passport. If a commercial agreement has been made in the foreign jurisdiction, this will also prevent the English intended parents obtaining a parental order or an adoption order in the UK to become the legal parents. Commercial agreements are legal in the foreign jurisdictions and UK patients may enter into them quite innocently.

Ultimately, a biological child of two English parents may be left parentless and stateless in a foreign country, with the parents unable to secure a right to raise their own child or to bring him or her into the UK.

Secondly, surrogacy patients suffer discrimination in the storage of their embryos and gametes. Fertility patients are currently permitted to store embryos for five years (which will be increased to ten after the HFE Bill becomes law) and gametes for ten years. However, in certain special circumstances in which patients are storing gametes/embryos to create their own family and are, or will become, infertile (for example as a result of cancer treatment), they are permitted to store for an extended period, until the female partner is approximately age 55.

But surrogacy patients in most cases are excluded from these regulations. This unfair discrimination must be reviewed. It seems utterly arbitrary that a woman who has her ovaries removed following cancer can store her embryos until she is 55, but a woman who has a hysterectomy (and so needs the help of a surrogate to carry her child) can only store her embryos for 5 years.

Finally, surrogacy patients currently have no right to time off work (paid or unpaid) to look after their newborn children. The statutory framework for maternity pay is closely tied in with documentation received during pregnancy, and this excludes intended mothers in surrogacy cases (while benefiting the surrogate mother). Similarly, statutory maternity leave is limited to birth mothers and does not provide leave or associated employment protection rights for the intended mother in surrogacy situations. Adoption leave is also not available because it only applies where a child is newly placed by an adoption agency, and this does not apply in surrogacy cases.  There cannot be any possible justification for excluding families created through surrogacy from employment protection and maternity leave.

This remains the case even where the surrogate mother is a foreign national residing abroad, because the interpretation of the Immigration Rules is in accordance with UK law and so it is UK law that will govern the definitions used. Even if the surrogate mother’s home country sees the commissioning couple as the “parents” and issues documentation to this effect, UK law and the Immigration Rules will not view them as “parents”. Only where the surrogate mother is single is there a chance of UK law viewing the sperm donor/commissioning male as the legal “father”.

As the surrogate mother is recognized as the legal mother, Section 30 of the Human Fertilisation and Embryology Act 1990 (HFE Act 1990) provides a procedure by which the commissioning couple can acquire parental rights. The surrogate mother and the “legal” father must give full and free consent for the parental order. Such consent is not effective until the child is at least six weeks old, (see: section 30(6) of the HFE Act 1990), and exists to ensure that the surrogate mother is sure she has made the correct decision. There are other limits contained in section 30 in relation to obtaining parental orders.

These include: that the commissioning couple are married; the child was conceived by IVF, (in vitro fertilization), GIFT, (gamete intra-fallopian transfer), or DI, (donor insemination); the child is living with the commissioning couple; and no payment other than reasonable expenses has been made.

Where a male commissioning adult has provided the sperm to the surrogate mother, (and can demonstrate this by way of a DNA test by an accredited company), he will be the genetic father unless he is a sperm donor. Section 28 of the HFE Act 1990, (and part 2 of the Human Fertilization and Embryology Act 2008), deems the husband of a woman treated with donor sperm to be the father of the child and designates any man treated together, (or having a fatherhood agreement with), with the woman as the father if the couple are not married. In surrogacy, if the surrogate is married, her husband will be treated as the child’s father, unless it can be shown that he did not consent to the treatment services.

The surrogate’s husband will be required under section 30 to give his consent to the grant of a parental order to the commissioning couple. If the surrogate is not married, and is treated in a licensed clinic, it has been held that section 28 (or Part 2 in the 2008 Act) does not apply to the commissioning father, in order to deem him the legal father. If partial surrogacy is established by self-insemination, however, the commissioning father is the child's legal father. He could with the surrogate’s agreement, simply seek a residence order but the commissioning woman would have no legal relationship with the child. Where the child is handed over and the commissioning parents wish to become recognized as the parents, they have two main options: adoption or parental orders.

**Parental orders under Section 30 of the HFE Act 1990 are discussed below:-**

**Domestic Law: Regulations & Offences: Surrogacy Legislation**

The Department of Health holds the lead responsibility for making law and policy on Surrogacy in the United Kingdom. The Human Fertilization and Embryology Act, (HFE. Act 1990) [24] applies to all of the United Kingdom and is the Act which regulates parental orders. Other aspects of Surrogacy are regulated by the Surrogacy Arrangements Act 1985. There are no international agreements or Conventions which regulate how surrogacy should be managed between countries so anyone considering entering into an inter-country surrogacy arrangement must remember that if they reside in the United Kingdom, they are subject to United Kingdom law and the definitions which underlie it. This is of vital importance as the definition of who constitutes “a parent” for the purpose of United Kingdom law affects whether a child born abroad as the result of a surrogacy arrangement, may be brought into the United Kingdom under the Immigration Rules.

Surrogacy is a difficult area of law due to the ethical, legal and social issues that arise from it. The Department of Health has two basic principles which underpin surrogacy arrangements: that there should be no financial inducement to encourage surrogacy arrangements and third parties should not profit from making such arrangements, and the surrogate mother cannot be[[122]](#footnote-122).

Section 2 makes it a criminal offence to make surrogacy arrangements on a commercial basis. No criminal offence is committed by either the surrogate mother or the commissioning couple if, between them, it is agreed that payments will be made to the surrogate mother. However, any other person, company or agency that for payment negotiates makes or otherwise assists in a surrogacy arrangement commits the offence.

Section 3 makes it a criminal offence to carry advertisements about surrogacy in any newspapers etc… and to distribute such advertisements.

Section 4 deals with offences. On conviction for an offence under section 2, a person is liable to a fine and/or imprisonment; and to a fine for conviction under section 3.

The Surrogacy Arrangements Act 1985 was amended by Section 36 of the Human Fertilisation and Embryology Act 1990 and Section 59 of the Human Fertilisation Act 2008 (not yet in force).

“The Human Fertilization and Embryology Act 1990”

The 1990 Act gave legal effect to the wider recommendations in the Warnock Report and followed a consultation paper in 1986 and a White Paper in 1987. It contains two provisions in respect of surrogacy:-

Section 30 - allows the courts to make an order providing for a child to be treated in Law as the child of a couple if certain conditions are met as follows:

the child is genetically related to at least one of the commissioning couple;

the surrogate mother has consented to the making of the parental order (or is incapable of doing so or cannot be found) no earlier than six weeks after the birth of the child;

the commissioning couple are married to each other and are both aged 18 years or over4;

the commissioning couple have made the application within six months of the child's birth;

no money other than reasonably incurred expenses has been paid in respect of the surrogacy arrangement unless authorized by the court;

the child is living with the commissioning couple; and

the commissioning couple are domiciled in the United Kingdom, the Channel Islands or the Isle of Man.

In other words, provided that all these conditions are met, this provision enables the court to order that the commissioning couple in a surrogate arrangement is to be treated in law as the parents without their having to adopt the child. A court considering an application for a parental order will be assisted by a detailed written report from an independent specialist social worker.

Section 36 - introduced section 1A into the 1985 Act to provide that 'no surrogacy arrangement is enforceable by or against any of the persons making it', i.e. surrogacy contracts are unenforceable in the courts. This means that the surrogate mother cannot be required by the commissioning parents under any contractual provision to hand over her child, nor can the commissioning parents be required to hand over any money, or recover any money paid to the surrogate mother under the terms of such a contract, or take responsibility for the child.

Section 27 - in respect of treatment which is regulated by the Act, "the woman, who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child". This is relevant where IVF or donor inseminations (which are regulated by the Act) are involved.

Parental responsibility

Where the commissioning couple wishes to assume parental responsibility they may seek a Parental Order under section 30 of the 1990 Act. Any such order made by the court confers parental responsibility on them and extinguishes it in respect of anyone else. Until the making of the order, the surrogate mother remains the legal mother of the child. The 1990 Act also contains complex provisions relating to the paternity of the child.

Introduction to Surrogacy, Nationality and the Immigration Rules

This section explains how the different possible Surrogacy scenarios can be linked to whether a child born as the result of a surrogacy arrangement will become a British citizen by birth, or may be allowed to enter the United Kingdom under the Immigration Rules, or under EU law, or may have to apply outside of the Rules. There are three main possible scenarios in a surrogacy arrangement, (depending upon the genetics involved), and there are three legal routes whereby a child born as the result of a surrogacy arrangement may be brought into the United Kingdom, (depending upon the recognized legal connection between the commissioning couple and the resulting child). However, the possible scenarios and the immigration routes do not always equate to each other and therefore the leaflet first outlines the three “surrogacy scenarios”, (“A”, “B” & “C”), and the three routes or processes which allow for the entry of a child, (“Routes a, b, & c”). Inter-country surrogacy is complicated, but once you have identified which surrogacy scenario describes your situation (or most likely future situation), you will then be able to see which nationality or immigration route(s) or processes are relevant to you.

**The three main possible scenarios are:**

**Scenario A**

Where the situation is as described in scenario A, i.e. the male of the commissioning couple provides the sperm, (and thus has genetic connection with the child), and the surrogate mother is unmarried, the male who provides the sperm will be considered for immigration and nationality purposes, as the resultant child’s father, so long as he is so identified on official documentation and can prove his connection by way of accredited DNA evidence. He may be able to establish his paternity to the extent that he can pass on British citizenship to the child, (obviously only if he is himself a British citizen), or be able to sponsor the child’s entry to the United Kingdom under the Immigration Rules. (The latter is only possible where the surrogate mother gives up Parental Responsibility for the child.)

If the child is brought to the UK and application made to the courts for a Parental Order under Section 30 of the HFE Act within six months of the child’s birth (but excluding the first six weeks of the birth and all the other requirements of the Act are fulfilled), a Parental Order may be made in respect of the commissioning couple thus conferring parental responsibility on them. At present, it is not legally possible for unmarried couples, same-sex partners or civil partners to gain parental responsibility under section 30 of the HFE Act. Once the provisions contained in the Human Fertilisation and Embryology Bill 2008 are commenced, parental orders may be accessed by these couples. Readers must therefore take care to check the up to date position on this.

**Scenario B**

Where the situation is as described in scenario B, i.e. the male of the commissioning couple has a genetic connection with the child and the surrogate mother is married, the male who provides the sperm will not be considered as the resultant child’s father if the child was conceived as a result of artificial insemination or the implantation of an embryo, unless it is shown that the surrogate mother’s husband did not consent to the treatment. This is because for the purposes of immigration and nationality, UK law views the woman who carries and bears a child as the child’s mother and her husband as the father.

Although under UK law regulating Human Fertilisation and Surrogacy, this presumption of fatherhood is rebuttable where the child was conceived as a result of sexual intercourse, this is not the case for nationality purposes. Section 50(9) of the British Nationality Act 1981 provides that the surrogate mother’s husband will be the father of the child, irrespective of the details of conception. Therefore, the commissioning couple are advised that they must not rely on any future rebuttal of the surrogate mothers’ husband being the child’s father as a means of establishing that the child has British citizenship, and should expect to have to apply for an Entry Clearance in order to bring the child into the United Kingdom under the Immigration Rules, not by way of the child automatically acquiring British citizenship and coming in on a British passport.

The man who provided the sperm will not be able to establish his paternity if the surrogate mother is married and the child was not conceived through artificial insemination or the implantation of an embryo, unless it can be shown that the surrogate mother’s husband did not consent. The commissioning man will be unable to pass on his British citizenship to the child, nor be able to sponsor the child’s entry to the United Kingdom under the Immigration Rules. (This will remain the case even after the relinquishing of parental responsibility by the surrogate mother and her husband.) In order to bring the child to the UK, the surrogate mother and her husband will have to give up their parental responsibility and an application will have to be made for entry clearance to bring the child to the UK outside the Immigration Rules. If this is successful and the child is brought to the UK and application made to the courts for a Parental Order under Section 30 of the HFEA within six months of the child’s birth, (but excluding the first six weeks after birth, and the other requirements of the Act are fulfilled), a Parental Order may be made in respect of the commissioning couple, i.e. the man who provided the sperm, (and who can demonstrate this by way of DNA evidence – and his wife.

**Scenario C**

Where the situation is as described in scenario C, i.e. the female of the commissioning couple has a genetic connection with the child, no matter what the surrogate mother’s marital status, the female who provides the egg will not be considered as the resultant child’s mother. In order to bring the child to the UK the surrogate mother and, if she is married, her husband, will have to give up their parental responsibility and an application will have to be made for entry clearance to bring the child to the UK outside the Immigration Rules. If this is successful and the child enters the UK and an application made to the courts for a Parental Order under Section 30 of the HFEA within six months of the child’s birth, (but excluding the first six weeks after birth, and the other requirements of the Act are fulfilled), a Parental Order may be made in respect of the commissioning couple, i.e. the woman who provided the egg and her husband.

The legal routes for bringing a child, born as the result of a Surrogacy arrangement, to the United Kingdom under the Immigration Rules: Because of the different scenarios that can arise in inter-country surrogacy and the restrictions they impose, the way that a child born as the result of a surrogacy arrangement may be brought into the United Kingdom will depend on individual circumstances. The routes are:

Route a: If the child gains British citizenship automatically, he/she will not require entry clearance at all, but may freely enter the UK once a British citizen passport has been obtained on his/her behalf.

Route b: If the male of the commissioning couple meets the definition of “a parent” for the purpose of the Immigration Rules, there is a route of entry for the child under paragraph 297 of the Immigration Rules as a dependent child.

Route c: If either of the commissioning couple has a genetic connection with the child, entry outside the Rules at discretion may be possible, on condition that application to the UK courts for a Section 30 Parental Order is made within 6 months of the birth.

Here is a brief description of the provisions of the proposed law in United Kingdom:

No contract or agreement is legally binding. All expenses must be justified to the courts, which can intervene and ask for proof if the expenses incurred by the genetic parents are too high.

In surrogacy cases, birth certificates carry the name of the surrogate mother, rather than that of the genetic mother.

Only married couples can take part in a surrogacy agreement.

There is no age limit for surrogate mother.

**AUSTRALIA**

In all the states of Australia, the surrogate mother is regarded / considered by the law to be the legal mother of the child and any surrogacy agreement giving custody to others is void and unenforceable in the courts of Law. In addition in all states and the Australian Capital Territory arranging commercial surrogacy is a criminal offence, although the Northern Territory has no legislation governing surrogacy at all and there are seems no near future plans to introduce laws on surrogacy into the NT Legislative Assembly.

Usually couples who make surrogacy arrangements in Australia must adopt the child rather than being recognized as birth parents, particularly if the surrogate mother is married. After the announcement, Victoria changed their legislation since January 1st, 2010, under the Assisted Reproductive Treatment Act, 2008, to make altruistic surrogacy within the state legal, however commercial surrogacy is still illegal.

Since June 1st, 2010 in Queensland, altruistic surrogacy became legal under the Surrogacy Act, 2010. Recently North South Wales (NSW) has come up with Surrogacy Bill, with it being passed by the Legislation but the Proclamation of the same is yet to take effect and it seems that the same will happen by February, 2011 thereby prohibiting commercial surrogacy and making Altruistic Surrogacy the Law of the day.

Similarly, in both New South Wales and the Australian Capital Territory, altruistic surrogacy is legal under the Surrogacy Act 2010 No 102 and the Parentage Act 2004, respectively.

In Western Australia (under the Surrogacy Act 2008) and South Australia (under the Family Relationships Act 1975) altruistic surrogacy is only legal for couples consisting of the opposite sex (single people and same sex couples are banned from altruistic surrogacy). In 2011, Tasmania lawmakers after a review of the laws and a community consultation process introduced the Surrogacy Bill 2011 and the Surrogacy (Consequential Amendments) Bill 2011to the lower house and passed the lower house by a vote of 22-3.Now it is yet to pass the conservative upper house of 15 members (12 of them being independent members, 2 Labor and 1 Liberal).

In the case of Kirkman Sisters[[123]](#footnote-123), this sparked great controversy in community and legal arena. Soon, the states in Australia attempted to settle the legal complications in surrogacy. Now, in Australia, commercial surrogacy is illegal, contracts in relation to surrogacy agreements are unenforceable and any payment for soliciting a surrogacy arrangement is illegal.

**CHINA**

Commercial surrogacy is banned in China, but goes on through underground agencies. There are no firm statistics on how many surrogate cases are arranged there. It has quietly emerged as one of the most active countries in the world when it comes to [surrogacy](http://news.xinhuanet.com/english2010/indepth/2010-08/17/c_13448451.htm).

In fact, wombs-for-rent businesses are thriving in the world’s most populous country, where some studies indicate an estimated one in eight couples face fertility problems. Reports of a secretive surrogate pregnancy service, operating in a legal “gray area,” were widespread in early 2006 and intermediary websites were recruiting volunteers despite a government crackdown. Now, there are signs the authorities are starting to crack down by forcing some surrogate mothers to abort their fetuses.

China has no law pertaining to the surrogacy. In 2001, the Health Ministry issued the Administrative Measures for Human Auxiliary Reproduction Technology, banning all forms of trade in fertilized eggs and embryos and prohibiting medical institutions and medical staff from performing any form of surrogacy procedures.

It also stipulates that the use of reproduction techniques must conform to China’s family planning policy, ethical standards and laws. The ban forced intermediary agents to arrange surrogacy procedures secretly in private and public hospitals where they had good personal connections with the doctors.

The industry in China is based on gestational surrogacy, whereby a woman agrees to become pregnant via embryo transfer. She is not the biological mother of the child and relinquishes it to its biological mother or father after its birth. No official statistics are available on the number of surrogate pregnancy agencies in China, but the Guangzhou-based Southern Metropolis Weekly newspaper estimated in April last year that around 25,000 surrogate children had been born in China in the past three decades.

In the southern Chinese city of Guangzhou, three young surrogate first-time mothers were discovered by authorities hiding in a communal flat.

Jiang Lei, who has been introducing childless couples to surrogate volunteers for two years, estimates surrogate mothers give birth to about 500 to 600 babies on the Chinese mainland annually. He reckons no more than 50 such agencies exist on the Chinese mainland, mostly in the cities of Beijing, Shanghai, Wuhan, Guangzhou and the country’s northern Hebei Province. A surrogate costs about 300,000 yuan (US$44,320) to hire in Beijing, says Jiang, who claims his agency, accounts for about more than 80 percent of the market in the capital. The agency’s website, daiyunguke.com, breaks down the cost as: fetus implantation 60,000 to 95,000 yuan; brokerage fees for the agency 140,000 yuan; surrogate mother 100,000 yuan; monthly apartment rent 3,000 yuan; and maternal care 2,000 yuan.

The intermediary charges clients 30,000 to 40,000 yuan in “connection fees” for doctors who carry out the fertilization procedures, says Jiang. Jiang, 27, says his agency helps up to 200 couples to find surrogate mothers each year, with a successful in-vitro fertilization rate of just over 50 percent.

Most would-be surrogates come from small or medium-sized cities or rural areas and almost all have financial problems, but only about one in five applicants are accepted. “Applicants are preferably aged 22 to 35, have a clean medical record and a good healthy body, and most important, they must be mentally stable and unlikely to withdraw midway.”

But the validity of the contract is still subject to dispute. Surrogacy contracts are not included in the Contract Law, which has no specifications regarding surrogacy. In some cases, new born have been abandoned or surrogate mothers have refused to give babies to the biological parents. Both biological parents and surrogates are reluctant to admit it, but the contentious issue of who is actually the “mother” remains. Genetically, the child inherits the features of the biological parents, but they are nurtured by the blood of a surrogate mother. Despite the risks and expense, surrogacy still has a huge market in China given the number of infertile parents, Surrogacy challenges the cultural beliefs and ideals regarding the mother-infant relationship and China’s laws and attitudes have a long way to catch up.

**JAPAN**

In March 2008, the Science Council of [Japan](http://en.wikipedia.org/wiki/Japan) proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements.[[124]](#footnote-124)

Japan has not yet regulated assisted reproductive technology by law. This lack of rules and regulations leaves to the courts the solution of numerous controversies, and puts patients in a situation of considerable uncertainty about their rights

**PAKISTAN**

In Karachi and Lahore, many hospitals are doing this business; government of Pakistan has not yet defined any policy on Surrogacy.

**AFGHANISTAN**

It does not yet have any law regulating surrogacy

**INDIA**

Commercial surrogacy is legal in India, as recognized by the [Supreme Court of India](http://en.wikipedia.org/wiki/Supreme_Court_of_India) in 2002. India is emerging as a leader in international surrogacy and a destination in surrogacy-related [fertility tourism](http://en.wikipedia.org/wiki/Fertility_tourism). Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients between $10,000 and $28,000 for the complete package, including fertilization, the surrogate's fee, and delivery of the baby at a hospital. Including the costs of flight tickets, medical procedures and hotels, it comes to roughly a third of the price compared with going through the procedure in the UK. The Honorable Supreme Court of India has given the verdict that the citizenship of the child born through this process will have the citizenship of its surrogate mother.

Surrogacy in India is relatively low cost and the legal environment is favorable. In 2008, the Supreme Court of India in the Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force.

**CANADA**

Commercial Surrogacy is prohibited under the Assisted Human Reproduction Act, 2004. Altruistic surrogacy remains legal.

**FRANCE**

In France, since 1994 any surrogacy arrangement whether it is commercial or altruistic is illegal, unlawful and prohibited by the law. In France, since 1994, any surrogacy arrangement that is commercial or altruistic, is illegal or unlawful and is not sanctioned by the law (art 16-7 of the Code Civil).

The French Courts the Cessation already took this point of view in 1991. It held that if any couple makes an agreement or arranges with another person that she is to bear the husband's child and surrender it on birth to the couple, and that she is choosing that she will not keep the child, the couple making such an agreement or arrangement, is not allowed to adopt the child. In its judgment, the court held that such an agreement is illegal on the basis of articles 6 & 1128 of the Code Civil, together with article 353 of the same code.[[125]](#footnote-125)

**HONG KONG**

Commercial surrogacy is criminal under the Human Reproductive Technology Ordinance 2000. The law is phrased in a manner that no one can pay a surrogate, no surrogate can receive money, and no one can arrange a commercial surrogacy (the same applies to the supply of gametes), no matter within or outside Hong Kong. Normally only the gametes of the intended parents can be used.

In October 2010, Peter Lee, the eldest son and one of the presumed heirs of billionaire [Lee Shau Kee](http://en.wikipedia.org/wiki/Lee_Shau_Kee) obtained three sons through a surrogate mother, reportedly from California. Since the junior Lee is single, the news attracted criticism on both moral and legal grounds. A [vicar general](http://en.wikipedia.org/wiki/Vicar_general) of the [territory's Roman Catholic diocese](http://en.wikipedia.org/wiki/Roman_Catholic_Diocese_of_Hong_Kong) was critical. In December, the case was reportedly referred to police after questions were asked in [Legco](http://en.wikipedia.org/wiki/Legislative_Council_of_Hong_Kong).[[126]](#footnote-126)

**HUNGARY**

Commercial surrogacy is illegal in Hungary.

**ICELAND**

All surrogacy arrangements (both commercial and altruistic) are illegal.

**ISRAEL**

In March 1996, the Israeli government legalized 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.[[127]](#footnote-127)

A state-appointed committee permits surrogacy arrangements to be filed only by Israeli citizens who share the same religion. Surrogates must be single, widowed or divorced and only infertile heterosexual couples are allowed to hire surrogates. The numerous restrictions on surrogacy under Israeli law have prompted some intended parents to turn to surrogates outside of the country. India is the preferred destination because of its low costs. Then Intended Parents also turn to US surrogates where an added bonus is an automatic US citizenship for the new-born.

**ITALY**

All surrogacy arrangements (both commercial and altruistic) are illegal.

**SAUDI ARABIA**

Religious authorities in Saudi Arabia do not allow the use of surrogate mothers instead suggested medical procedures to restore female fertility and ability to deliver. To this end, Saudi authorities sanctioned the world's first [uterus transplant](http://en.wikipedia.org/wiki/Uterus_transplant) in an infertile woman.[[128]](#footnote-128)

**SWEDEN**

Surrogacy is not clearly regulated in Swedish law.[[129]](#footnote-129) The legal procedure most equivalent to it is making an adoption of the child from the surrogate mother. However, the surrogate mother thereby has the right to keep the child if she changes her mind until the adoption. Yet, the biological father may claim right to the child. It is illegal for Swedish fertility clinics to make surrogate arrangements.

**NETHERLANDS AND BELGIUM**

Commercial surrogacy is illegal in Belgium and the Netherlands.

**Hague convention**

Although there are many critiques of The Hague Convention on Inter-Country Adoption, the most common proposed solution is more stringent international legislation, not laxer regulations.173 In the case of surrogacy, there is no international body or document that can even be considered as a starting point for any resolution of international surrogacy disputes. Even a weak surrogacy convention is better than none at all. The Hague Convention seems to be in the best position to facilitate international regulation in the developing global market for surrogacy. 174 A Preliminary Report by the Hague "calls for such regulation, particularly for the sake of children ..some of whom have been left 'marooned, stateless and parentless' because of conflicting legal approaches to Inter-Country Surrogacy in different countries."'175 Similar to the Hague Convention on Inter Country Adoption, a proposed Hague Convention on International Surrogacy would insure that surrogacy arrangements are recognized in the state where the child is born, as well as the state in which the child will live. 176 The Convention on Intercountry Adoption satisfies these objectives, while still remaining neutral about states actually accepting inter-country adoption.177 It would be appropriate for a convention on Inter-Country Surrogacy to adopt this same approach of neutrality. Using this approach, the two states involved in an international surrogacy arrangement could agree to the process without necessarily supporting Inter Country Surrogacy, though for some countries, even a document mentioning surrogacy legitimizes the practice.1 78 Because a proposed Convention should not "favor the one way of forming a family with children over the other .... ,,179 and could actually explicitly have anti-surrogacy countries as signatories, some of the hesitation about such a document may dissipate.

**Limited Scope**

Because international surrogacy implicates ethical concerns that vary by viewpoint across countries, a regulation of all of the issues raised in international surrogacy is not currently feasible, especially as a first step.180 Surrogacy involves numerous areas of law, both domestic and international, and it is therefore unlikely that a comprehensive, single instrument would gain enough political support to pass, especially if it takes a pro-surrogacy position. 81 If the surrogacy convention is drafted to define surrogacy and propose best practices for those countries that allow surrogacy, there may be more likelihood of such a document being adopted by several countries. If the document tries to address too many issues, it is unlikely that enough countries could come to an agreement on all of the questions involved to make the uniform regulation of international surrogacy possible. 1 82 Although ideally an international convention would address all the different aspects of citizenship, parentage, and protection of surrogates I have discussed throughout the article, I acknowledge that this may be too ambitious a goal as a first step. Instead, an international document that agrees on the definition of commercial surrogacy may be the realistic first step, with the Palermo Protocol as an acceptable model. The main international instrument addressing issues with transnational organized crime is the United Nations Convention against Transnational Organized Crime, adopted by the UN in November 2000 in Palermo, Italy. 183 The Convention is supplemented by three Protocols, commonly referred to as the "Palermo Protocols.,"' 84 including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which became effective in December 2003.185 This Protocol became the first international, legally-binding document that defined trafficking in persons.1 86 The definition provides that:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. 187 The stated intent behind the definition is "to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases."188 Additionally, the Protocol seeks to protect the victims' of human trafficking basic human rights.189 Although the goals may be modest, the mere agreement of a definition of surrogacy and the convergence in national approaches with regard to the establishment of domestic surrogacy regulation that would support efficient international cooperation in cases of stateless or parentless babies borne of surrogacy would be a vast improvement compared to the black hole of international law that exists today. Some critics of the Palermo Protocol on human trafficking state that it "primarily serve(s) law enforcement goals, without sufficient provision for long-term protection of the victims." 190 This could be a concern for a value neutral surrogacy provision that includes anti-surrogacy countries. Advocates of a convention would want to ensure that it does more than criminalize surrogacy in anti-surrogacy countries and instead, actually helps prevent stateless and parentless babies. One issue to deal with in international surrogacy is that there may be conflict with existing international law. For example, the definition of trafficking has been interpreted differently by various jurisdictions, and few have incorporated the Palermo Protocol's actual definition of "trafficking in persons" into legislation.' 9' Thus, jurisdictions that forbid surrogacy arrangements could seek to use existing international legislation such as the Palermo Protocols to criminalize surrogacy as a form of human trafficking.' 92 However, alternate routes are available for countries that disallow surrogacy, such as promoting agreements with states that do allow surrogacy by requiring the permissive states to actively prevent transactions by its citizens.

**Legal Representation of the Surrogate:**

In addition to the definition of surrogacy, an international document on surrogacy should delineate the best practices for commercial surrogacy in countries in which it is legal. Commercial surrogacy raises concerns about the commodification of the pregnancy, the surrogate, and the resulting child.194 Moreover, there is a real risk of abuse with coercive conduct, exploitation, and human trafficking.' 95 A problematic example is India, where under most surrogacy contracts, the fetus' health explicitly comes before the health of the mother.1 96 Further, in India, surrogates often live in group homes during their pregnancies to monitor their health and progress, which may not include medical concerns, but does raise ethical and legal questions. 197 The entire life of the surrogate becomes gestating the child to complete the contract with the intended parents.1 98 An international convention on surrogacy should address surrogate health and decision making, and should require that countries that allow commercial surrogacy require legal representation of the surrogate paid for by the intended parents. Such legal representation would ensure that the surrogate was in a position of understanding about what she had agreed to and the terms of her arrangement. In many current international surrogacy situations, the surrogate is the victim of a fertility clinic and middlemen recruiters, or even her own family. There are many states in the United States that require that surrogates have legal representation and even a mental health evaluation prior to undertaking a surrogate pregnancy. It may be difficult to require a mental health evaluation in countries where mental health services are often lacking. However, legal representation can help ensure that surrogates are cognizant of the arrangement they are entering into, and are willingly a part of it. Legal representation may ensure that the financial and physical health of surrogates is being protected. Surrogates are often more vulnerable than birth mothers in inter-country adoption, because surrogates are being paid to carry a child for another and are separated from their support system while pregnant in some countries like India.

**Parentage:**

Another issue raised is the legal confusion caused by situations like those in India, in which there is no regulation establishing legal parenthood in the context of surrogacy. 199 India bases its citizenship rules on the biological parents' citizenship, not birth citizenship. Therefore, there have been many scenarios where a baby borne to an Indian surrogate and foreign intended parents through donor gametes has been left stateless. Without better domestic rules to regulate surrogacy and an umbrella international convention to ensure parentage and citizenship are established, a child can be left without responsible care; a stateless, parentless baby.20 ° Implementation of an international surrogacy regulation that could cause a conflict of an international law with current domestic laws, the unlikely reform of domestic conflicting laws, and the possibility of political backlash will be difficult.20 1 However, this should be the paramount goal of an international surrogacy convention. Some scholars have suggested that existing international organizations such as the World Trade Organization (WTO) or the International Labor Organization (ILO), may be good vehicles for regulating surrogacy. 202 Under the WTO, surrogacy arrangements could be regulated as "trade," through which a "surrogacy service instrument" could be formed that would require the enactment of domestic laws regarding surrogacy. 203 Alternatively, under the ILO, surrogacy could be regulated as "labor," because "legalized surrogacy is, indeed, paid labor (in the truest sense of the word)." 2°4 Although such arrangements are theoretically workable, a separate convention on surrogacy seems the most comprehensive and appropriate answer. Much of the dilemmas in surrogacy arise due to conflicts of laws issues.205 International surrogacy has effects on several fields of domestic law,2 0 6 and rather than change domestic law, an international convention could address the relevant issues.20 7 This could result in countries changing their surrogacy laws, or even cause intended parents to avoid the jurisdictions that would likely result in a struggle for citizenship or parentage. Many doubt the feasibility of having an international uniform set of rules to regulate the commercial surrogacy industry. Although difficult, it may be possible for countries offering surrogacy services to adhere to guiding principles set forth via treatises.2 °c A multilateral agreement may be the only effective way to resolve the issues concerning international surrogacy, because it leaves the power with those who have authority to change the contractual relations-the states.209 It may be possible, although not ideal, to address surrogacy via existing international treaties. There are three current human rights treaties that could incorporate surrogacy-the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). None of these currently address surrogacy, but each of these treaties incorporate some of the same protections that are needed in surrogacy. Although there is much doubt that there can be absolute agreement on all of the issues surrounding international surrogacy, such agreement is not necessary. For example, in the CRC, due to controversies between states about when life begins, "the drafters defined only an end-point of childhood (eighteen years), leaving the question of its beginning-whether at conception, birth, or some other stage-to each signatory's discretion.' For a provision on surrogacy, an agreement on the key issues- such as citizenship, parentage, and protection of surrogates would be satisfactory, Although some have suggested creating an agreement that delineates the relations between states and the acceptance of parentage documents, such a document would be even more difficult to negotiate. This could be done through current international agreements, even though they are not specific to surrogacy. Amending existing treaties may work, but a separate convention on surrogacy would likely be more able to address all of the key issues related to surrogacy.Because I propose that the international convention on surrogacy be value-neutral, anti-surrogacy states would also be able to be party to the convention. Antisurrogacy states can make clear their domestic law and position on citizens that circumvent their surrogacy laws and seek surrogacy abroad. This will serve two purposes; first, the convention would serve as notice to prospective intended parents and protect intended parents from false assurances by clinics or other middlemen. Second, such declarations would serve as a test for anti-surrogacy states which are forced to admit that the babies borne of surrogacy may gain citizenship of their state (as in the case of France). This may be a first step in motivating countries to change their domestic surrogacy laws to be more consistent. This will avoid issues of abandonment because the agreement about the birth is enforceable and determined prior to conception. In countries where commercial surrogacy is legal, an international convention could deem that those countries will ensure that their domestic laws will allow intended parents to be given parental rights at the time of the written surrogacy contract. This would help safeguard that before the birth of the child, the surrogate and intended parents have accounted for the child's citizenship or nationality to prevent statelessness. Another issue that should be addressed by a convention on surrogacy is requiring countries that allow surrogacy arrangements to create a central agency that is designated to monitoring the surrogacy process. Such agencies would give security to intended parents, surrogates, and the country where the surrogacy arrangement takes place to ensure that stateless or parentless babies are not born.

**Preventing Trafficking**

As the Convention on Adoption expressly prohibits the sale and traffic of children, the Convention on Inter-Country Surrogacy should contain similar language. Specifically, with regard to commercial surrogacy, a surrogate should be compensated regardless if her pregnancy results in a live child. Births begin to resemble a sale of children, instead of a contract pregnancy, when is paid only if there is a live child in the end. This should be prohibited by a Hague Convention on International Surrogacy. Compensation of Surrogates

The question of what level of compensation should be allowed in an international convention is controversial. In comparing the current Hague Convention on Adoption language, some scholars suggest that subsection (1) and (2) should be used in the Convention on International Surrogacy. They suggest that the language should be amended to prohibit payment offers that are coercive. In the context of International Surrogacy, subsection (4), and the second half of subsection (3), arguably present the most difficulty, as these sections involve withdrawal of consent.227 Although I do not disagree with scholars who advocate such language and issues, I think more modest goals would result in an actual international convention. I believe that the international convention should be silent as to the payment to surrogates and withdrawal of consent. However, it is worthwhile to have countries who allow commercial surrogacy change their domestic laws to ensure that women be paid for their services in all circumstances, whether the surrogate pregnancy results in a live birth or not.

**Additional Issues**

Just because The Hague Convention on Intercountry Adoption has a parental vetting requirement, does not mean the proposed Convention on International Surrogacy should adopt the same position. Although some scholars disagree, there is sufficient concern that parental vetting will discriminate against non-biological parents, LGBTQ parents, economically diverse parents, or non-married or single parents, just as it has been used in adoption. Criminal law and international law adequately deal with concerns about child trafficking. Too many people who would otherwise be good parents will be left out of the opportunity to choose a surrogacy arrangement if a parental vetting requirement exists in any proposed convention. Many commentators have suggested that any surrogacy convention must deal with the issue of whether anonymous gamete donations are allowed. Controversially, in adoption, there is a movement towards open adoption, and in many parts of the world, a trend towards "open ART" is also emerging. I take the position that although open ART may be a laudable goal, it will hinder the availability of donor gametes for infertile families and other intended parents that need to seek donor gametes. Thus, I suggest that the convention remain silent on whether donors need to be known. There are numerous other issues that any international convention has the potential to address. However, it is urgent to develop some sort of international convention that can attract the most countries as signatories in order to protect the parties in commercial surrogacy transactions. It is not beneficial to forego any international agreement just because not every issue is dealt with. Although my proposed model may not be overly ambitious, it is pragmatic and realistic, especially because I propose that anti-surrogacy countries can and should be parties to the convention.

**CROSS BORDER CASES**

Problems with cross-border surrogacy arrangements have involved commissioning parties from multiple countries, primarily owing to the restrictiveness of the commissioning parties country with respect to the legality of surrogacy.

**Japan**

The 2008 Baby Manji case involved a child conceived with the gametes of a Japanese man and an anonymous Indian egg donor. The man, Ikufumi Yamada, and his wife elected to try to have a baby using a surrogate mother.[[130]](#footnote-130) The couple travelled to India in November 2007 and arranged for the surrogacy with Dr. Nayna Patel at the Akanksha Infertility Clinic in Anand, India.[[131]](#footnote-131) The baby was born on 25 July 2007 and named Manji.However, earlier that month the couple had divorced. The man’s ex-wife chose not to make any claim to Manji, and that factor is most likely what led to Manji’s case being given special scrutiny.[[132]](#footnote-132)

Initially there was a delay in issuing Manji’s birth certificatebecause of doubt as to how to address a mother for Manji on the certificate. After receiving guidance from the chief registrar, the Anand municipal office 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 pursuant to Japanese and Indian laws and obtain an Indian passport. Government and in obtaining a visa from the Japanese Due to bomb blasts in Gujarat, Yamada moved his daughter to Jaipur to remain in the care of his mother who had travelled from Japan. In Jaipur, a non-governmental organization (NGO) called Satya filed a petition in Rajasthan Hight Court, seeking to prevent Yamada from taking Manji to Japan. Satya’s petition alleged that in the absence of a surrogacy law in India, the legitimacy of the baby could not be claimed by anyone, thus the NGO claimed custody could not be assumed by Manji’s grandmother. The petition also challenged the legality of commercial surrogacy, and alleged that Dr Nayna Patel and her clinic were engaged in an illegal trade in the infants and selling them to foreigners. The Rajasthan High Court issued notices to the Union Home Ministry and Department of Home of the state government to produce Manji within four weeks. In response, Manji’s grandmother filed a writ petition on Manji’s behalf in the Supreme Court of India. On 14 August 2008, the Supreme Court granted Manji’s before the Rajasthan High Court, and sought the assistance of the Solicitor General of India to examine surrogacy and nationality issues resulting there from in India.

In an order disposing of the case dated 29 September 2008, the Supreme Court of India stated that the commission organized under the Protection of Children Act, 2008 was the appropriate authority to hear complaints of the type made by Satya. On that basis, the Supreme Court disposed of Satya’s proceedings in the Rajasthan High Court. With respect to commercial surrogacy, the Court effectively validated the procedure in India.

“Commercial surrogacy is legal in several countries including India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charges and potentially offensive terms wombs for rent, outsourced pregnancy or baby farms”.

With respect of Baby Manji’s travel, the Supreme Court noted the Solicitor General’s statements that if a comprehensive application for travel document for Baby Manji was filed, the application would be disposed of expeditiously and not later than four weeks. After the Supreme Court’s judgment was issued, the Jaipur passport office gave special dispensation and issued a certificate of identity to Manji. Thereafter, the Japanese Embassy in New Delhi issued her a one-year visa on humanitarian grounds, and Manji arrived in Japan with her grandmother on 2 November 2008.

**Germany**

Another surrogacy case, this time involving German commissioning parents, has also reached the Indian Supreme Court. The petitioner, Jan Balaz, a resident of Germany, and his wife, Susanne Anna Lohle, entered a surrogacy arrangement with Dr Nayna Patel’s fertility clinic in Anand. The twins were conceived with Balaz’s sperm and an egg from an Indian citizen. The suit commenced at the Gujarat High Court and stemmed from the couple’s difficulty in securing a visa for the twins.

After the twins birth on 4 January 2008, the Anand Municipality listed Jan Balaz and Susane Lohle as the twins parents on their birth certificate, although this did not conform with the names in the birth register maintained by the hospital. It was explained that the names of the commissioning parents were given to the Anand Municipality pursuant to the parents’ wishes, and no attempt [was] made by either of the parties to play a foul game or [that] the same has been done with any ulterior motive.

In an interim order dated 2 April 2008, the Gujarat High Court expressed a desire that the Assistant Solicitor General of India appear for Respondent No.4, Regional Passport Office, and that the Assistant Solicitor General and two other learned counsel assist the court as amici curiae, considering certain larger issues found in the matter366.Bacause ‘there [were] a number of areas that may be required to be addressed, the Gujarat High Court decided to keep the case open but grant interim relief with respect to the petitioner so that the twins could travel with Balaz out of India. The surrogate mother, whole was also named in the petition, gave her consent that if the substantive relief prayed for by the petitioner was granted, she would cooperative with the petitioner in having the children taken out of India.

The Gujarat High Court directed that the twins birth certificates be changed to reflect the name of the surrogate mother as the mother of the twins and remove Susanne Lohle’s name. The Gujarat High Court noted that a legal professional in Germany said it would be more convenient for both infants to have the correct names of their surrogate mother in the birth register, as German law recognises the woman who has actually delivered the child, like that of ours. The Gujarat High Court further stated that:

“The hospital authorities should not have mentioned the name of the wife of the petitioner as the mother of the said babies. Sometimes, the professional will have to prevail over the wishes of the client or consumers”.

Finally, the Gujarat High Court ordered the petitioner on the next hearing date to update the court about the progress in the matter, and further requested that the state government and central Government.

Express their views as some important issues are involved in the matter where as policy decision of both the respective Government obviously shall pay an important role.

Notwithstanding the Gujarat High Court’s order, Balaz reportedly continued to encounter difficulty in obtaining Indian passports for the twins. He subsequently had to approach the Gujarat High Court to have the twins’ birth certificates further modified to remove all references to the court case so that the passport office would agree to issue the passport. Balaz was also obliged to seek a declaration from the Gujarat High Court that he had sole custody of the twins. The Gujarat High Court declared unequivocally that absolute and exclusive custody already lay with Balaz and continued with him, such that Balaz is entitled to take the children wherever he wasn’t to go and settle down and may determine the

domicile of the children. The Gujarat High Court specifically directed the Union of India to create no obstruction of any nature with respect to Balaz’s intention to take the twins out of India.

However, Balaz continued to encounter troubles. The twins were initially issued Indian passport reflecting Jan Balaz as the father and the surrogate mother’s name as the mother. However, by a letter dated 6 May 2008, the Government of India, Ministry of External Affairs, and Regional Passport Office requested a surrender of the Indian passport until the High Court handed down a final decision. Balaz surrendered the Indian passport under the direction of the Gujarat High Court.

After further involvement of the Gujarat High Court, the Indian Passport Office issued the twins identity certificate and they were given a provisional visa from the British Government. The German couple had relocated to the UK, reportedly because they could not bring the twins into Germany due to Germany’s surrogacy laws. After surrendering the Indian passports, Balaz moved the Gujarat High Court to get the passport back in order to be able to bring the twins to Germany. Balaz alleged that the denial of the passport violated Article 21 of the Constitution of India.

The position of the Regional Passport Officer at Ahmadabad was that the surrogate mother could not be treated as the mother of the children, and the children born of surrogacy in India cannot be treated as Indian citizens within the meaning of section 3 of the Citizenship Act, 1955. Thereafter, the children, as non-Indian citizens, could not apply for Indian passports under section 6(2) (a) of the Passport Act, 1967. In contrast, counsel for Balaz asserted that the twins were Indian citizens by birth under section 3 of the Citizenship. Balaz pointed out that since the children were not born in Germany they would not get German citizenship, especially because Germany does not recognize surrogacy.

At the outset, the Gujarat High Court pointed out that citizenship issue was as momentous question had no precedent in India. In addition, the Gujarat High Court noted that there were many legal, moral and ethical issues arising for its consideration in the case, also

Without precedent. The Gujarat High Court stated that its primary concern lay with the rights of the two innocent babies more than the rights of any of the others involved, although it did recognize that the emotional and legal relationship of the babies with the surrogate mother and the donor of the ova were also of vital importance:

“Surrogate mother is not the genetic mother or biologically to the baby, but, is she merely a host of an embryo or a gestational carrier? What is the status of the ova (egg) donor, which in this case is an Indian national but anonymous. It the ova donor the real mother or the gestational surrogate? Are the babies motherless, can we brand them as legal orphans or Stateless babies? So many ethical and legal questions have come up for consideration in this case for which there are no clear answers, so far, at least, in this country. True, babies conceived through surrogacy, encounter a lot of legal complications on parentage issues, this case reveals. Legitimacy of the babies is therefore a live issue. Can we brand them as illegitimate babies disowned by the world?

Throughout the Gujarat High Court’s opinion were repeated exhortations for comprehensive legislation to be enacted to define the rights of the respective parties.In the absence of such legislation, the Gujarat High Court stated that it was more inclined to view the gestational surrogate as the natural mother, not the anonymous egg donor or the wife of the biological father, who had neither donated the ova nor conceived or delivered the children:

“Reluctantly, the only conclusion that is possible is that a gestational mother who has blood relations with the child more deserves to be called as the natural mother. She has carried the embryo for the full 10 months in her womb, nurtured the babies through the umbilical cord. Even if we assume the egg donor is the real natural mother, even the she is an Indian national so revealed before the learned Single Judge, we are told. Both the egg donor as well as the gestational surrogate is Indian national[s], and hence the babies are born to an Indian national.”

Therefore, the Gujarat High Court concluded that the children, were citizens by birth pursuant to section 3(1)(c)(ii) of the Citizenship Act, 1955.Thus, the twins were entitled to Indian

Passports, and in the opinion of the Court, denial of these would violate Article 21 of the Constitution of India.

After reaching its decision, the Gujarat High Court went on to express its hope that its views would pave the way for legislation to address surrogacy. The Gujarat High Court went on to opine that under the Indian evidence Act.

No presumption can be drawn that a child born out of a surrogate mother, is the legitimate child of the commissioning parents, so as to have a legal right to parental support, inheritance and other privileges of a child born to a couple through their sexual intercourse.

Thus, in the Gujarat High Court’s view, the only remedy was the enactment of proper legislation:

“Whether the babies born out of a surrogate mother have any right of residence in or citizenship by birth or mere State orphanage and whether they acquire only the nationality of the biological father has to be addressed by the legislature”.

Despite the Gujarat High Court’s order directing the passport authorities to release the twins’ passport, the regional passport office still refused to issue the twins Indian passports without consultation with the Union Home Ministry.

Balaz approached the Gujarat High Court again, claiming that the passport office was in contempt of court by not following the Gujarat High Court’s order.

On the heels of a notice issued by the Gujarat High Court demanding an explanation of why contempt of court proceedings should not be initiated against the passport office for not issuing passport, the central Government challenge the Gujarat High Court’s ruling at the Supreme Court of India in November 2009. The Government questioned whether could be treated as a parent under the Citizenship Act, 1955, especially in light of the Law Commission’s recommendation that birth certificates of surrogate children should contain only the names of commissioning parents. The Government also asked if a surrogacy contract executed within India would be upheld among the contracting parties in the absence of legislation. Lastly, the Government asked the Supreme Court to decide whether the

Surrogate mother has nay parental rights to the surrogate child, notwithstanding a valid surrogacy contract stipulating to the contrary.

The Supreme Court stated that it considered the issues to be of grave importance, stayed the Gujarat’s High Court’s order and stated its view that the issues raised in the petition needed the earliest consideration.

The Supreme Court had yet to rule on the substantive issues raised in the central Government’s petition. Instead, the Court spent several months, through a series of hearing, concerning itself with figuring out a mechanism by which the children could travel to Germany. Initially, the Government indicated that it would issue travel document within 48 hours of an application from Balaz, and suggested that Balaz could apply for a German visa. The Supreme Court directed Balaz’s return if the visa was refused.

The Solicitor General subsequently made his position opposing Indian citizenship clearer, by asserting that Indian citizenship should not be used as a temporary step to get acceptance in another country and that citizenship for the purpose of transit should not be permitted. The Solicitor General also expressed the view that such issues do not present themselves if the commissioning parties are Indian, but when it comes to foreign nationals the Indian Government was concerned about exploitation of the children and whether India is perceived as a country where people are going to enter into a contract to buy or sell children.

According to press reports, the Supreme Court made a number of significant comments concerning the twins’ citizenship status at a subsequent hearing.

“Statelessness cannot be clamped upon the children. There must be some mechanism country after an assurance of their citizenship has been given”.

The Supreme Court also affirmed its own role in the debate by stating:

“We want to know since this matter has been debated in public or even in the media. We are on a side issue of judicial activism. In such matters, the People’s representatives should step in to preserve the interest of the people as this involves largely poverty-stricken people. But is this area remains unoccupied with both the legislature and executive having not stepped in, under the Constitution, who should step in”

At the next hearing, the Supreme Court instructed Balaz to submit an appropriate undertaking to assure his full compliance with any directions given by the Supreme Court or any other Court in India. The undertaking was to consist of Balaz’s pledges to continue to abide by all orders of the Supreme Court, as the issue involved was the safety of the children, to use the travel document only for the purpose of taking the children to Germany, to carry out an adoption in Germany and to produce a document from a suitable agency from Germany certifying that the children were in good condition. It was at this stage that Balaz informed the Court of a pending appeal he had filed with the High Administrative Court in Berlin which was deciding the issue of whether the twin’s cold be allowed to be brought into Germany for a paternity test and subsequent adoption.

Balaz filed the affidavit pursuant to the Supreme Court’s order. As part of the undertaking, Balaz agreed to deposit his passport with the Indian Consulate in Berlin and provided the details of an NGO in Berlin which would report back to Indian authorities and the Supreme Court periodically about the well-being of the children.

The Solicitor General’s next suggestion in January 2010 was to purpose an inter-country adoption. Through an inter-country adoption, we Solicitor General reversed his previous objection to limited citizenship with a view to travel, by indicating that the Indian Government could consider granting Indian citizenship to the twins under section 20 of the Citizenship Act, 1955 for a limited purpose to travel and gain entry into Germany as the adopted children of the couple. The Solicitor General asked Balaz to approach the Central Adoption Resource Authority (CARA), the agency under the Ministry of Women and Child Development charged with regulating adoption, for an inter-country adoption, and pledged that all possible measures would be taken to expedite the adoption process.

With respect to an inter-country adoption, the German Embassy submitted a letter on 14 January that stated in part:

“Contestation in court of paternity by the mother and her husband is not permitted according to Section 1600(5) of the German Civil Code, if the child was conceived by means of artificial insemination with the consent of the mother and her husband.

 Thus, under German law, a child born by an Indian woman who is married to an Indian National has no legal relationship with the German commissioning parents”.

Though it expressed its inability to issue visas to the twins on the ground of the paternity suti by Balaz, the German Embassy said:

“Issuing the children with a visa for the purpose of adoption in Germany could be considered. For this purpose, an application filed to the concerned agency in Germany would be considered in line with the 1993 Hague convention on the Protection of Children and cooperation in respect of Inter-country Adoption”.

Balaz’s counsel raised the concern that inter-country adoption is normally a cumber some and time-consuming process. The Supreme Court agreed with the concern and said that the Government needed to act speedily, since the children had been in India for nearly two years. In light of the above, the couple’s counsel suggested that the Indian Government help the couple by initiating the adoption procedure.

In February 2010, the Indian Government stated that it was in discussion with CARA. It was represented that normally a surrogate child is not subject to adoption, but keeping in view the facts of the case, the Supreme Court said CARA might consider the issue of adoption in this case with sympathy. The Government told the Court that it was willing to waive some of the restrictions on adopting children born through surrogacy. The Supreme Court therefore asked the Government to file an affidavit on its willingness to relax these adoption norms.

By the next hearing in march 2010, CARA had not filed the requested affidavit. The Solicitor General suggested that the Court direct CARA to process the adoption of the twins as a special case, even if it was not treated as a precedent in the future. At first, Balaz’s counsel opposed the proposed adoption because she was concerned that nothing tangible would happen. The Supreme Court proposed that it consider the merits of the petition the following day. However, the following day Balaz’s counsel submitted that she had second thoughts, because she felt that the offer made by the Solicitor General was reasonable and deserved consideration, because it might finally resolve the controversy, at least in part.

Process the case of adoption of the children and take appropriate action, including consultation within the authorities of the Government of Germany, within a maximum period of four weeks, keeping in view the peculiar facts of the case.

Finally and somewhat unexpectedly, in May 2010, the Government of India provided identity documents for the children, the Ministry of External Affairs issued an exit permit and the twins were cleared for travel from the Indian side. Despite its prolonged refusal to issue a visa, the German Government relented and made a one-time exception by granting the twins visas. Balaz travelled with the twins to Germany with a view to adopting the children in Germany, which would be a precursor to their obtaining German citizenship. The Supreme Court said: ‘We can only wish good luck to them. The Supreme Court case has been converted to a civil appeal which is still pending, to address the substantive issues raised in the case.

The long-running saga of the Balaz case has not deterred other German citizens from pursuing surrogacy in India. A court on Berlin ruled in 2011 that the German Embassy in India was within its rights to refuse to issue a German passport to a child born in December 2010 in Indian through surrogacy, even though the child’s biological father is a German citizen, where the birth certificate for the child listed the commissioning parties as the child’s parents and the place of birth was listed as an ART clinic. The court rules that doubts about the child’s German citizenship were appropriate grounds for denying the passport application, and the German father’s citizenship was not legally relevant. The commissioning couple are able to appeal the decision.

**United Kingdom**

Immigration issue also arose with respect to infants born at Dr Nayna Patel’s Akanksha Fertility Clinic in Anand in 2004. The twins were conceived with the gamete of a Birth commissioning couple and the surrogate mother was the twins’ genetic grandmother.The twins were initially denied passports by the British High Commission because they were born in India and their surrogate mother was an Indian citizen; the British High Commission opined that visas were necessary for the twins return410. After waging a six-month legal battle, the commissioning couple were able to secure the twins entry into the country on a fixed-term entry visa for one year. It was speculated that the British parents would have to obtain a parental order under the Human Fertilization and Embryology Act 1990 or legally adopt the children, with citizenship becoming obtainable only thereafter.

British citizen engaging in international surrogacy may seek parental order under the Human Fertilization and Embryology Act 1990, as amended by the Human Fertilization and Embryology Act 2008, provided they pay the surrogate mother only expenses reasonably incurred. More recently, the Family Division of the High Court ruled that who earned 3,000/- as compensation for lost wages to each of two surrogate mothers, one of whom earned 130 per month as a housekeeper and the other who earned 160 a month as a maid, were not disproportionate. In total the couple paid the fertility clinic about 27,000. In the court’s view, although the payments exceeded reasonable expenses, It was plainly in the best interests of the two children born through surrogacy that they be brought up by the commissioning couple, where the couple were acting in good faith with no attempt to defraud the authorities.

The Human Fertilization and Embryology Act 2008 also require that the woman who carried the child consents of the making of the parental order.413 In one case, a gay couple could not obtain the consent of the Indian surrogate mother because she vanished after delivering twin boys for the couple. The High court who heard the case granted the parental order despite the lack of consent, finding that the couple had taken all reasonable steps to obtain the woman’s consent. The couple had given the clinic involved a deadline to provide the surrogate’s consent and they hired an inquiry agent to try to locate the woman. The Judge relied on the provisions of the Human Fertilization and Embryology Act 2008 which provides that the surrogate mother’s consent is not required where she cannot be found or is incapable of giving agreement. The judge believed it was the first time this provision was used by a court in England or Wales.

Another case was decided on equitable grounds in the case of a British couple who applied for a parental order which was not granted before the genetic father’s death from liver cancer. The commission mother was not believed to be genetically related to the child. The judge in the case allowed a parental order to be made in favour of both commissioning parents because, inter alia, no other order would recognize the child’s status as the child of both parties, the identity of the child would be protected and it was in the

child’s best interest.As in the case discussed above, the court also found then payment of 4,500 to the surrogate mother likely exceeded expenses reasonably incurred, but concluded that there was no evidence the couple acted in anything other than the utmost good faith or that the payments could have been said to have overborne the will of the surrogate mother.

**CHAPTER 6**

**CASE STUDY**

**Case Study I:**

Surrogate Mother Number 1: Mrs. Hansha Christian (Name Changed)

Age-44 yrs

How many times have you opted for surrogacy: Twice-2007, 2010

1. When and how did you learn about surrogacy?
2. ‘I work in Dr. Patel’s Clinic in Anand. There I used to see women coming to become surrogate mothers and couples coming from all over the world to get a child. I didn’t see any harm in this and so I requested Dr Patel’s to take me as a surrogate mother if she finds a couple suitable for me. ‘
3. What were the main factors behind choosing to act as a surrogate mother?
4. ‘I belong to a very poor family; my husband works as a driver in Dr Patel’s house and we had no other source of income. I didn’t have money to send my son to school and we didn’t even have a house of our own. So, I decided to become a surrogate mother.’
5. How has this changed your life?
6. ‘I have become a surrogate twice now and it has completely changed my life. Now I have a house of my own, my son has completed his schooling and is now pursuing higher studies. I continue to work in Dr Patel’s Hospital and encourage more women to step forward as there is no harm in this and it fulfils our needs.’
7. During the 9 months of the pregnancy does it ever feel like it’s not your own child and that you’re doing it for someone else?
8. ‘You know it is not your child and that you’ll have to give him away to its real parents but as long as it’s there with you, for those 9 months it doesn’t feel like it’s not your own child. It’s in you and you take care of it like it’s your own baby.’
9. How difficult is it to give away the child to its real parents?
10. ‘The separation is always the most difficult part of this. You always knew you had to give away the child but when you really have to do it, it does hurt but then we don’t really have a choice. The first baby that I had was for a US based couple. The couple couldn’t come to take the baby for 2 months after the delivery due to some visa issues so I had to take care of the child for those two months, I did the feeding and everything so it became all the more difficult to let go of the child but even we know we have to one day give the child to its real parents who need him more than we do.’
11. Do you need to stay away from your family for the duration of pregnancy?
12. ‘It’s our own choice whether to stay at home or in the hostel. I stayed at my own house with my husband and son. I didn’t face any problems like staying away from family and all.’
13. Do you think you get enough for the services rendered by you?
14. ‘I come from a very poor household so whatever I got was sufficient to fulfill my needs and I’m completely satisfied with whatever I got as it was enough to send my son to school and allowed me to buy my own house.’
15. What is the reaction of the people around you, your family when you told them about your decision to become a surrogate mother?
16. ‘My husband was very supportive throughout the process, apart from him my family like my parents and my brother everyone knew about it. But my in-laws don’t know about this. We chose not to tell them as they may not like it.’
17. Would you go in for surrogacy again?
18. ‘I have already become a surrogate mother twice and my age doesn’t permit me to do it again so I won’t be able to do it but if I could then I definitely would’ve done it again.’

**Case Study II:**

Surrogate Mother Number 2 – Mrs. Pushpa (Name Changed)

Age-34 yrs.

How many times have you opted for surrogacy – 2009, 2012

1. When and how did you learn about surrogacy?
2. ‘I got to know about this through a friend who was already a surrogate mother. I had accompanied her to Dr. Patel’s Hospital for the delivery; while I was waiting outside the room an NRI couple approached me and requested me to be the surrogate for their child.’
3. What were the main factors behind choosing to act as a surrogate mother?
4. ‘I come from a very poor family, I didn’t have money to educate my children and we didn’t even have a house of our own. So, I decided to become a surrogate mother.’
5. How has this changed your life?
6. ‘I have become a surrogate twice now and it has completely changed my life. Now I have a house of my own, both my children are going to school and my daughter wants to be a doctor when she grows up. All this has been made possible because of my decision to become a surrogate.’
7. During the 9 months of the pregnancy does it ever feel like it’s not your own child and that you’re doing it for someone else?
8. ‘You know it’s not your child and that you’ll have to give him away to its real parents but as long as it’s there with you, for those 9 months it doesn’t feel like it’s not your own child. It’s in you and you take care of it like it’s your own baby.’
9. What was your family’s reaction when they learnt about your decision?
10. ‘My family, my parents don’t know about this. I have never told them that I’ve become a surrogate mother. Now that I’m married and have my own family only my husband knows about this and that is enough.’
11. How did the society; your neighbours treat you when they got to know about your surrogacy?
12. ‘Initially when people got to know about my decision to become a surrogate mother and that I’ve started visiting Dr. Patel’s Hospital for this their reaction was very negative. They stopped inviting me over for the gatherings, I had to go through a lot of criticism for doing this because there was no awareness about this process. But I knew once they will learn about this even they would want to go in for this.’
13. Would you go in for surrogacy again?
14. ‘Right now, I don’t have plans for it but in the future I may do it again as there’s no harm in it’
15. Do you encourage other women too for surrogacy?
16. ‘Yes, I totally support it and encourage all women who are capable of becoming a mother to at least do it for the happiness it brings into someone else’s life. It is not something to be ashamed of; when you are helping someone, you should be proud of it.’

**CHAPTER 7**

**CONCLUSIONS AND RECOMMENDATIONS**

**CONCLUSIONS AND RECOMMENDATIONS**

The study reveals that, the Surrogate mother in fact voluntarily render service to carry the child for other woman with specific intention of helping the childless parents to fulfil their desire of parenthood, lineage and self-fulfilment. In surrogacy, there are number of issues related to technological, medical, physical, moral, ethical, emotional, biological, and socio-legal etc., are involved. These aspects need a scientific investigation in an interdisciplinary approach. Though, artificial insemination or non-coital procreation is against the order of the nature, but it is boon to the childless parents to satisfy their desire of parentage with the help of technology. The irony is that, certain unfair practices are accompanying surrogacy resulting in its misuse. In fact, it is a matter of Human Rights issue, where the interest of woman and children is involved. The increasing demand for ART resulted in mushrooming of infertility clinics in India. The National Guideline as well as the Draft Bill on ART are not in a position to solve the real socio-legal problems of surrogacy.

In India, surrogacy is purely a contractual understanding between the parties so care has to be taken while drafting agreement so that it does not violate any of the laws like, e.g., points to be taken into consideration why does the intended about paternity in the agreement, the creation of registry for biological father of children in an adoption cases, rules set forth on how and when genetic testing can be done to determine paternity, compensation clause, unexpected mis-happening to the surrogate mother, child’s custody, regarding the jurisdiction for the disputes arising out of agreement.

Indian government has drafted legislation in 2008 and finally framed an ART regulation draft needs proper discussion and debate in the context of legal, social and medical aspects. The recommendations drawn out from the present study on surrogacy are the following:

There should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. that 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 expense is a crime (like in some counties) or not. In case it is recognized as crime and one pays extra charges than it should prevent the adoption from being approved.

There should be a substantial and transfer of parenting rights

It is crucially important to maintain and monitor the anonymity of the surrogate mothers.

The surrogate mother should not undergo more than 3 trials 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 massage 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 price 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 a undesired relationship after the birth.

The citizenship right of the surrogate baby is also of crucial importance. The Indian government need to take a stand in terms of conferring the surrogate baby Indian citizenship as she is born in the womb of an Indian (the surrogate mother) and in India.

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

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

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 need 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.

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.

The court in India cannot enforce surrogacy agreements since these are not enforceable by the provisions of the Indian Contract Act, 1872.

It is to noted that, the very concept of surrogacy and its wide spread prevalence in many part of the world, pose a challenge to inventive creativity of socio-legal policy makers. Certain amount of commercialization in inevitable in the nature of the things because of the anxiety of rich commissioned parents to have children, the readiness of the poor and needy surrogate mothers to rent their womb for monetary consideration and the role of predominantly private commercialized fertility clinics.

However, while it is impossible to resist the waves of technological changes, ushered in by the concept of surrogacy, the society should adapt itself to the changes and manage the change in term of the prevailing social values. A line of demarcation between commercial and non-commercial aspects of surrogacy should be drawn by the lawmakers of the respective countries by drawing inputs from the social values prevailing in those countries. Every care should be taken to eliminate the role of touts and brokers in surrogacy cases. Fertility clinics should also come under the Government scanner to have a check in respect of specific methods, used for fertilization, medication, pre-natal and post-natal care.

**CHAPTER 8**

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