

CHAPTER - I

INTRODUCTION

Time has been playing a significant role in the evolution of human society and changed lives of mankind in various ways. The process of evolution involves a series of natural changes that cause species to arise, adapt to environment, which also affect its society. People adapted to and attempted to change their environments according to their suitability. Before the introduction of agriculture and industries, humans typically lived in small groups and hunted and foraged for food. Because of ever increasing social changes, the human societies from simple hunter gathered societies to agrarian societies to industrial societies to global information society come into existence. Apart from these, in the same time our society has also originated through a process of biological evolution.

Biological evolution of human is the transformation of inherited qualities over succeeding generations in populations. In human that reproduce sexually, the term society refers to a group of human beings whose adult members regularly interbreed through the institution of marriage, resulting offspring. Reproduction is a biological process by which new entity of organisms “offspring” are created from their “parents”. Sexual reproduction of human naturally involves sexual intercourse between a man and a woman. Throughout the process of sexual intercourse, the communication between the male and female reproductive systems followed by fertilization of the woman’s ovum by the man’s sperm and finally a person is born. The close domestic

group of people from which a person is born, it is known as family. It is the fundamental unit of the society.

With the advancement of science and technology, changing cultural norms, new priorities, and new forms of communication fuelled by the internet, it is a natural to wonder that what the importance of family is. The family is just as relevant as it ever was, and no matter how much life changes in the future, it will certainly continue to be needed in one form or another. Though the concept of family has evolved, but its importance remains as always.

The earlier notion of family was one man and one woman, who were married, and their children. The modern notion of family is somewhat open and comprehensive. A family might be two parents of any gender, married or not. Some people even make a family with more than three parents. The children may have been born to one of the parent, both parents, or adopted.

Every married couple has a distinctive posterity to have a natural offspring for continuation of their family. The reasons are numerous to adore and to be cherished, for playing out the custom at funeral pyre, for conveying the practice of a family, to safeguard a specific community etc. The importance of and need of a child is additionally underscored practically, in all the religions of the world. Generating and bringing a child is not basic only for satisfying the individual yearnings of the people but also for continuation of the society. The longing is cultivated by the manifestation of reproduction which is a characteristic cycle by which the weeded couple can have

their own off springs. However, unfortunately a large number of people due to various reasons remain shunned from this magnificent gift of God.

According to the World Health Organization, India has an estimated 19-20 million infertile couples.¹ Infertility is a common and is rapidly increasing worldwide. The conventional picture of family would not be complete devoid of children. Many couples also face a breakdown of their marriage due to their incapacity to procreate.

To overcome this problem, earlier, those who not capable to conceive had only one choice either to change his/her spouse, if they are couple or develop extra-marital relations to conceive a child and for those are who are single, adoption was the only method to get parenthood. Here it is also mentionable that though in western nations the adoption law is all inclusive, in India the corresponding law is not common but applies to Hindus only. Of late, the procedure of adoption in India has also become universal irrespective of the religion of the adopter and adoptee as per adoption regulation as framed by the Central Adoption Resource Authority (CARA).²

Revolution in Human Reproduction is one of the miraculous achievements of the past half century. Nowadays, infertility is not a bar to conceive the child both for the couples and for the individuals. There is now advance fertility industry developed which actually provides all possible measures to avoid infertility and make conception possible mostly on all circumstances. It also creates the chances of pregnancy through use of ovulation predictor kits, fertility-enhancing hormone treatments and surgical

¹ Ghena Vaishnavi and Navneet Takkar, *Surrogacy: Medico-Legal Issues* 5 (Jaypee Brothers Medical Publishers, New Delhi, 1st Ed. 2015).

² A Statutory body of the MW&CD, formed through Section 68 of the JJA 2015, notified by the Government of India on Jan. 15, 2016.

interventions in case of sexual intercourse; at the same time with the help of advances in Assisted Reproductive Techniques such as donor insemination and, embryo transfer methods, in-vitro-fertilization, surrogacy have revolutionized the reproductive environment without sexual intercourse. Among all these methods surrogacy is considered as most efficient and acceptable method to overcome both medical as well as social infertility and replace adoption.

Surrogacy is a method of assisted reproduction here by a woman agrees to carry a pregnancy for another person or persons, who will become the parent(s) of the new born child after birth. Surrogacy is often noted that the practice dates back to biblical times.³ The most important and mentionable consideration is the genetic linkage in between the intended parent with the surrogate child. And only for this reason surrogacy become more and more acceptable than any other method of assisted reproduction. In surrogacy arrangements, monetary compensation may or may not be involved. The legality and cost of surrogacy varies widely between jurisdictions, sometimes resulting in problematic international and interstate arrangements. It is seen that for surrogacy arrangement, couples from the country, where surrogacy arrangement is banned used to travel a jurisdiction that permits it. This practice is known as “Fertility Tourism or Reproductive Tourism”. In the past two decades, it has become a global phenomenon.

There are no precise figures on how many children are involved but as far back as 2012 the industry around surrogacy was worth an estimated \$6bn a year and in

³ Aneesh V. Pillai, *Surrogacy under Indian Legal System: Legal and Human Rights Concern* (2013) (Unpublished Thesis, Cochin University of Science and Technology)

the UK alone, the number of parental orders made following a surrogate birth has tripled from 121 in 2011 to 368 in 2018.⁴ Considering the threat which is going to face as a consequences of practicing surrogacy, most of the European nations have understood the menace of surrogacy arrangement, adopted enactment to forbid or carefully manage surrogacy⁵, and treated it is against the public policy of those countries. Commercial surrogacy has been banned in several countries.⁶ India, surreptitiously, has become a booming centre of fertility market with its “Reproductive Tourism” industry reportedly estimated at Rs.25,000 crores today (US Dollar 5,000 million).⁷ The lower cost of surrogacy arrangements, less restrictive laws, lack of regulations of ART clinics, availability of surrogate mothers, well qualified and experienced doctors, world class health care providers and English speaking environment are the factors which responsible for surrogacy market in India. The Government of India drafted the 2005 National Guidelines of Indian Council of Medical Research (ICMR)⁸ for the Accreditation, Supervision and Regulation of ART Clinics in India, through which surrogacy business has become legitimate. However, these guidelines are not legally binding. Therefore, India has become a favoured destination for surrogate children to childless couples across the World. As stated in the ICMRs Guidelines, although there are no exact official figures available, an

⁴ Claire Fenton-Glynn, *Surrogacy: Why the World Needs Rules for Selling Babies*, BBC NEWS (April 25, 2019), available at <http://www.bbc.com> (accessed on May 30, 2019)

⁵ Germany, Austria, France, Switzerland, Sweden, Norway, Italy, and Bulgaria

⁶ United Kingdom, Finland, Canada, France, Hungary, Italy, Pakistan, Serbia etc.

⁷ Anil Malhotra & Ranjit Malhotra, *Surrogacy in India : A law in the making - Revisited 2* (LexisNexis, Haryana, 2nd Edition, 2016)

⁸ The Indian Council of Medical Research (ICMR) is India’s highest rule making authority on medical research.

expected 2, 00,000 centers across the nation over offer Artificial Insemination, In-Vitro Fertilization and Surrogacy. And India engaged in US\$500 million to US\$2.3 billion year commercial surrogacy business.⁹ In US, the surrogacy package costs from US\$40,000 to US\$150,000 and in India it costs from US\$25,000 to US\$30,000.¹⁰ The practice has become more popular due to publicized surrogacy births sought by Bollywood celebrities like Amir Khan, Shahrukh Khan, Tusshar Kapoor, Karan Johar, Ekta Kapoor and very recently by Shilpa Shetty etc.

It is true that though, surrogacy is accepted largely by the infertile couples, homosexuals, single parent to fulfill their instinctive desire of having a child linked genetically; but at the same time it is also clubbed with indefinite complex ethical, social, legal, medical and economic issues.

1.1. Surrogacy in India

Surrogacy in India and Indian surrogates became increasingly well known amongst intended parents in industrialized nations, and now it is a part of medical tourism industry. Since 2003, the Government of India has adopted various measures to promote the country as a ‘global health destination’. India’s medical tourism sector geared up to provide cheaper, yet high proficiency medical treatments for individuals, including infrastructural improvements, special incentives for hospitals that treat foreign patients and the introduction of a medical visa scheme.

⁹ Sreeja Jaiswal, “Commercial Surrogacy in India: An Ethical Assessment of Existing Legal Scenario from the Perspective of Women’s Autonomy and Reproductive Rights” 16(1) GENDER, TECHNOLOGY AND DEVELOPMENT, 1-28 (2012)

¹⁰ Ibid.

Consequently, the number of persons coming to India for medical services increased from an estimated 180,000 in 2005 to 650,000 in 2009, and now India ranks second in the world after Thailand, in the number of foreign patients treated. In 2003, Dr. Nayna H. Patel of Anand, Gujarat enabled a local grandmother to become the gestational surrogate for her daughter residing in Britain and as a result in January 2004, Lata's mother gave birth to her own grand-children, a twin boy and girl. And since then the phenomenon of Indian surrogates gestating babies for Indian as well as foreign couples gained international attention and Akansha Infertility Clinic, Anand, Gujarat become famous for global surrogacy capital of India. Throughout the early decades of 21st century, thousand of foreign couples travelled to India each year to take benefit of commercial gestational surrogacy. As a result of the huge demand for fertility services, the number of providing ART treatment has grown openhandedly and is now estimated to be around 500, or even 1,000. However, it is also difficult to find out accurate data regarding the numbers of birth through surrogacy. A fertility consultant of Mumbai's Centre for Human Reproduction, Yashodhara Mhatre stated that each year around is 100-150 surrogate babies were born in India and around 500-600 surrogate babies were born throughout the world.¹¹

It is also mentionable that surrogates in India are usually belonging to the poorer sections of the society and offer their services at relatively low cost, compared to other countries and with little education or no education. Financial reward is the primary motivation for most Indian surrogates. Some surrogates are pressed into the

¹¹ Krittivas Mukherjee, "Rent-a-womb in India fuels surrogate motherhood debate" in Aneesh V.Pillai, *Surrogacy under Indian Legal System: Legal and Human Rights Concern* (2013) (Thesis, Cochin University of Science and Technology)

industry by their husbands and families, as a quick way to make money. The Law Commission of India in its Report stated that the cost of surrogacy in India is about \$25000 to \$30000 which is around 1/3rd of the costs in developed countries like USA.¹² Though India's surrogacy market provides Indian surrogates with a significant source of income; this benefit is blatantly outweighed by the commodification, exploitation of India's poor uneducated women and by various other harms associated with commercial surrogacy.

In absence of strict and comprehensive laws in relation to surrogacy, India becomes the main destination for both intra and international gestational surrogacy. In addition to these, in 2008 without any law deals with the complicated issues of surrogacy, in the famous *Baby Manji Yamada v. Union of India & Another*¹³ case the Supreme Court of India has held that business of surrogacy is allowed in India, which has again amplified the global certainty for surrogacy in India.

In 2005, the government of India approved the 2002 draft of the National Guidelines for the Accreditation, Supervision and Regulation of ART Clinics, drafted by a committee formed by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS). The guidelines establish a procedure for state governmental bodies to oversee all matters relating to accreditation, supervision and regulation of ART Clinics. After that the Law Commission of India submitted the 228th Report in 2009 on ART procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements. In the

¹² Law Commission of India "Need for legislation to regulate Assisted Reproductive Technology clinics as well as Rights and Obligations of parties to a Surrogacy" Report-228 (August 2009)

¹³ AIR 2009 SC 84

meantime to regulate the surrogacy industry in India, in 2008, 2010 and 2014 the government of India introduced bills for legalizing commercial surrogacy, however, nonetheless were become law. Since 2013, under New Medical Visa Regulation 2012, enforced by the Government of India, surrogacy by foreign homosexual couples and single parents, gay couple and unmarried parents was banned. It permit only duly married foreign couples and whose marriage should have sustained for at least 2 years to visit India on medical visa for commissioning surrogacy. To regulate commercial surrogacy in India, thereafter in 2016, the Surrogacy (Regulation) Bill 2016 was introduced and passed by Lok Sabha proposing to permit only heterosexual Indian Couples married for at least five years with infertility problems to access altruistic surrogacy. However the Bill lapsed owing to the adjournment *sine die* of the parliament session. Again the Bill was reintroduced and passed by Lok Sabha in 2019 as the Surrogacy (Reg.) Bill, 2019.¹⁴ Very recently, the Union Cabinet has approved the Surrogacy (Regulation) Bill, 2020 after incorporating all the suggestions forwarded by the Select Committee of Rajya Sabha on the Surrogacy (Regulation) Bill, 2019. This is the present unclear picture of surrogacy which is prevailing in India and it is the demand of time to balance individual rights with public policy considerations through an appropriate comprehensive legislation.

1.2. Quandary and Debates

Surrogacy is often represented by the fertility industry as a win-win situation for the commissioning parents as well as the surrogate mother. The commissioning parent gets the child they desperately want and the surrogate receives the amount of money that might not be possible her or her family otherwise. However, the quandary

¹⁴ The Surrogacy (Regulation) Bill (No. 156), 2019

of this win-win situation needs to be discussed in the light of socio-political context and in the light of the legal, medical and ethical issues that clubbed with surrogacy. Considering the issues associated with surrogacy and more especially regarding commercialization of surrogacy, has stimulated various responses from various segments of the society in both national as well as international level in favor and against. Recently, much of the debate on commercial surrogacy has risen on exploitation of women, commoditization of children, different identity of motherhood, free and informed consent of surrogates, health hazards and risks associated social stigmatization of surrogates, statelessness of surrogate children, and situations of surrogate children when they were rejected by intended parent(s) etc. In this context, it is also mentionable that irrespective of monetary consideration in surrogacy arrangement and probable involvement of the mental element of pressure and coercion of family members and/or friends, within altruistic surrogacy arrangements cannot be disregarded. Moreover the element of informality of contract in terms of monetary compensation is also another important factor which to be addressed in relation to altruistic surrogacy.

To regulate the surrogacy industry in India, in 2008, 2010 and 2014 the government of India drafted Bills, however, all these were never passed as law. Lately, the Government of India has decided to come out with a law to regulate the business of IVF and Surrogacy in the country i.e. the Surrogacy (Reg.) Bill, 2016. This bill seeks to impose a ban on commercial surrogacy to check the exploitation on poor women, and permitting only altruistic surrogacy. It outlaws altruistic surrogacy for unmarried, foreigners, single parents, live-in-partners and homosexuals. Only Indian couples who have been legally married for minimum 5 years can avail the help of

surrogacy through their close relatives or friends. However this bill had been passed by last Lok Sabha but lapsed *sine die* after dissolution of the House. After that the new Surrogacy (Regulation) Bill, 2019 was again presented by the MH&FW, Dr. Harsh Vardhan in Lok Sabha on 15 July, 2019 and has approved by a voice vote on 5 August, 2019 during monsoon session. However, Rajya Sabha referred the Bill to the select committee for further deliberation in this session on 21 November, 2019.

On 5 February 2020, the Selection Committee has presented its Report before the Rajya Sabha on the Surrogacy (Regulation) Bill, 2019 with many suggestions. Thereafter, following the suggestions again the Union Cabinet on 26 February 2020, approved the Surrogacy (Regulation) Bill, 2020. Therefore it is need of the hour to study how surrogacy is currently practiced in India, whether prohibiting and criminalizing of commercial surrogacy is a good step for a welfare state like India, which may deprive a large section of the society from a basic human right i.e. right to procreation, how far altruistic surrogacy will be practically acceptable from the socio-legal point of view as proposed by the new Surrogacy (Regulation) Bill, 2020.

To bring clarity on the topic by avoiding confusion about the various terms used in this study, the Researcher has mentioned below the different types of Assisted Reproductive Technology used for human reproduction along with concepts related thereto.

1.3. Concepts

Assisted Reproductive Technology (ART)

Assisted Reproductive Technology (ART) refers to treatments of infertility and procedures that aim to achieve pregnancy. The most common techniques involved

with ART, including Artificial Insemination (AI), In-Vitro Fertilization (IVF), Intra-Cytoplasmic Sperm Injection (ICSI), Surrogacy, Pre-implementation genetic diagnosis (PGD) etc.

Artificial Insemination (AI) and In-Vitro Fertilization (IVF)

This method is considered as the simplest and common form of ART through which semen is injected into the woman's reproductive tract for the purpose of procreation. Artificial insemination is practiced in three ways- firstly woman is impregnated with semen from either her husband¹⁵ secondly from a donor¹⁶ thirdly in extreme cases a mixture of semen from her husband and the donor.¹⁷

In-Vitro Fertilization is a process of fertilization where an egg is combined with sperm outside the female body. The process involves hormone monitoring and stimulating a woman's ovulatory process, removing an ova or egg from the woman's ovaries and letting sperm fertilise them in a liquid in a laboratory. After that the fertilised egg (zygote) undergoes embryo culture for 2-6 days, and thereafter it is implanted in the same or another woman's uterus for successful pregnancy. In-Vitro Fertilization is also practice in three ways- firstly IVF with egg donor,¹⁸ secondly IVF with Donor Embryo,¹⁹ and thirdly IVF with Surrogacy Arrangement.²⁰

¹⁵ Homologus Artificial Insemination (AIH)

¹⁶ Heterologus Artificial Insemination (AID)

¹⁷ Combined or Confused Artificial Insemination

¹⁸ It is useful for women with established Premature Overian Failure, natural menopause or who are carrier of genetic diseases.

¹⁹ It is a successful form of ART where both partners are sub-fertile.

²⁰ It is such a form of ART where woman act as a temporary mother, who carry a pregnancy for another parent(s).

Gamete Intra-Fallopian Transfer (GIFT) and Zygote Intra-Fallopian Transfer (ZIFT)

Gamete Intra-Fallopian Transfer is a newly developed non-coital assisted reproductive procedure. GIFT requires straight inserting an unfertilized blend of sperm and egg into fallopian tubes of sterile women.

Zygote Intra-Fallopian Transfer is also a newly developed method of ART. ZIFT involves transfer of fertilized egg (zygote) to the woman's fallopian tubes instead of her uterus. For practicing this method, firstly the sperm and egg are letting fertilized, after that zygote is placed in the woman's fallopian tubes to travel to uterus.

Intra-Cytoplasmic Sperm Injection (ICSI) and Oocyte Cryopreservation

Intra-Cytoplasmic Sperm involves injecting a single sperm directly into a mature egg in order to fertilize. ICSI is mainly used for those couples, which have been sufferings from serious problems with sperm.

Oocyte Cryopreservation is a recently developed process in which women's eggs are extracted, frozen and stored to preserve reproductive potential in women of reproductive age and enable women to postpone pregnancy to a later convenient time.

Gametes (Sperms and Ova) and Embryos Donation

Gametes and Embryos Donation is using eggs, sperms, or embryos from someone else in order to help an intended parent(s) have a child.

Surrogacy, Surrogate Mother, Surrogate Child, and Commissioning Parent or Intended Parent

Surrogacy is another alternative for infertile couples, who cannot procreate naturally. It involves a woman, who agrees to carry a pregnancy for another person or

persons, who will become the parent(s) of the new born child after birth. Intended parents use surrogacy to start or grow their family when they cannot do so on their own. Intended parents who use surrogacy includes-

- Heterosexual couples who have struggled with infertility,
- Intended mother who are unable to carry a child,
- Intended parents who have a genetic defect or health condition they do not want onto the child, and
- Homosexual intended parents who want to have a genetic link to their offspring.

Surrogate motherhood may spark notions of advanced scientific dealings and technology, has transformed the life of human beings. Surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg fertilized by the other woman's partner, or from the implementation in her uterus of fertilized egg from other woman through IVF.

Surrogate child is a child who is carries and delivers by a surrogate mother, through artificial impregnation. In surrogacy practice, the surrogate has to hand over the surrogate child to the commissioning parents after the birth and also has to renounce all parental rights over the child. In traditional surrogacy, the surrogate is the child's biological mother and in gestational surrogacy, the intending mother or the donor is the child's biological mother, the surrogate mother is only birthing mother of the child.

Commissioning Parent or Intended Parent is the couple who are intending to parent a child resulting from surrogate pregnancy. Commissioning parents do not gestate or give birth to the baby, they only commission, as this is the job of surrogate mother. Commissioning mothers are generally women who cannot bear a pregnancy to term for social reasons or medical reasons of infertility. Commissioning fathers are men who are in a relationship with a woman, who cannot bear a pregnancy for term due to social reasons or medical reasons of infertility. However, all commissioning individuals or couples are not infertile, some of them are voluntarily does not want to carry pregnancy for various reasons. But, commonly commissioning couples are having genetic relationship with the surrogate child.

Altruistic Surrogacy and Commercial Surrogacy

Altruistic Surrogacy indicates to those surrogacy agreements where the surrogate mother does not receive financial reward. Generally, in altruistic surrogacy arrangement, the surrogate mother is a close relative i.e. family member or close friend, of the intended parents. In Altruistic Surrogacy only real expenses are covered by the intended parents, no additional compensation. It is a voluntary and gratuitous act.

Commercial Surrogacy indicates to those surrogacy agreements where a surrogate is paid for carrying a surrogate child. In Commercial Surrogacy, surrogate mother is compensated for her services beyond reimbursement of medical expense. It is a complicated and often controversial topic, raises many debates. Presently the

proposed legislation on surrogacy seeks to ban Commercial Surrogacy and only close relatives will be permitted to act as surrogate.

Traditional Surrogacy and Gestational Surrogacy

In Traditional Surrogacy, the egg of surrogate mother is used and is artificially fertilized by using sperm from the intended father or a donor. A traditional surrogate mother is baby's biological mother and genetically linked with surrogate child.

In Gestational Surrogacy, the embryo is created via in-vitro fertilization (IVF), using the eggs and sperm of the intended parents or donors, and is then transferred to the surrogate. In case of gestational surrogacy, the child is not biologically related to the surrogate mother as there is no such contribution of genetic material. Therefore surrogate mother is often referred as a "Gestational Carrier."

Surrogacy and Adoption

Adoption is a process whereby a person lawfully assumes the parenting of a child from that child's biological or legal parent(s). It transfers all rights and responsibilities from biological parents. It is established and accepted practice in the societies from the ancient times.²¹ It is true that adoption is the way to satisfy the one's desire to nurture a child, but it cannot satisfy the natural desire to have a genetically child. In India, the adoption process is monitored and regulated by a statutory body, called, Central Adoption Resource Authority (CARA). It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions.

²¹ Hindu laws of Manu, Bible, and Babylonians Code of Hammurabi in 2285 B.C.

The biggest difference between surrogacy and adoption is genetic linkage. Surrogacy is a treatment of infertility, its aim is to obtain a pregnancy or a baby for the infertile parents; in adoption the aim is to obtain a family for the baby or child. In surrogacy, the sperms and eggs are collected from the biological parents respectively and after that they are fertilized outside the body and finally implanted in the uterus of the surrogate mother. The inclination towards biological children has persuaded mankind to take help of such alternatives for begetting a biological child.

Surrogacy and Human Organ Donation

Human organ donation implies the transplantation of an organ from a living person to a patient suffering from different diseases. It is an old medical technology in which a healthy person donates his live organ such as kidney or liver to other. It is restricted to a non-commercial transaction by the Human Organ Transplant Act, 1994. In organ donation, organ donor selflessly sacrifices his/her body for the good of another.

In case of surrogacy, the fertilized egg produced in a test tube is implanted in the uterus of a woman, who neither provided her egg and nor intended to grown up the child. However, gestational surrogacy is generally compensated with money, altruistic surrogacy is rare one as surrogacy, and itself become a huge commercial industry. There are various arguments regarding similarities and dissimilarities in between organ donation and surrogacy. In India, the Human Organ Transplant Act, 1994, bans the sale of human organs, loaning human organs and commercialization of the trade of human organs but surprisingly, the hiring of wombs is allowed. Furthermore,

commercial surrogacy is a self-claimed new kind of 'labour' in India. The desire of having biological child of one's own flesh and blood with help of advanced medical science and technology has help in budding the surrogacy industry.

1.4. Scope of the Study

More significantly, lately, surrogacy has become a different happening due to the ways it has crossed borders in the highly globalized contexts of the world. In the present study, the researcher would like to examine the socio legal prospect of surrogacy in international as well as in national level. In the absence of any kind of regulatory framework and monitoring mechanism of commercial surrogacy, it creates various complexities to the parties concerned to the surrogacy. To regulate commercial surrogacy recently, government of India has proposed a policy whereby it seeks to impose ban on commercial surrogacy and only allows altruistic surrogacy. The important thing is that irrespective of contribution of monetary consideration the other issues social, emotional, psychological, biological, ethical and legal issues will exist with altruistic surrogacy also. One more important thing is that one cannot ignore the possible involvement of family members and/or friends within altruistic surrogacy of pressure and coercion. In the present study, it would like to examine the socio legal prospect of surrogacy in international as well as in national level especially in relation to altruistic surrogacy. The research study concentrates on proposed policy of imposing a blanket ban on commercial surrogacy without addressing the actual issues especially on socio-legal dimension.

1.5. Objectives of the Study

The urge of parenthood, rights of procreation and right to use new technological advancement have introduced incredible potential in the reproductive arena. The practice of surrogacy is a most widely accepted phenomenon of assisted reproductive technology as it have made possible for individual to beget a genetically related child. Though ironically, the practice seems to be a gift for the infertile couples but in reality it is not untouched from various complexities. Earlier, surrogacy arrangements were generally confined within four walls but gradually it became a profitable business industry. And more surprisingly, commercialization of surrogacy has made India as most popular destination of surrogacy without any comprehensive legal frameworks for regulating reproductive technologies. Both Commercial Surrogacy and Altruistic Surrogacy has numerous complex implications in ethical, social, legal, emotional, psychological, financial, and biological forms. The present study is to consider the socio-legal dimension of surrogacy especially altruistic surrogacy in India. Therefore, the present research has been conducted with the following objectives:

- i. To examine the concept of Altruistic Surrogacy and Commercial Surrogacy.
- ii. To conduct a comparative study of Altruistic Surrogacy vis-a-vis Commercial Surrogacy.
- iii. To study legal positions of surrogacy arrangements in international as well as national level.

- iv. To analyse the socio-legal issues involved in altruistic surrogacy.
- v. To make a study of compatibility of the current policy and proposed legislation in present socio-legal context.

1.6. Limitation of the Study

The study of all issues associated with surrogacy is not the subject of the study. The objective of the study to analyze only socio-legal issues arises from the altruistic surrogacy arrangements and how far the proposed legislation will be able to resolve all those issues. It is not possible to go through the entire issues associated with surrogacy practices within a limited time, for which the study has been limited to socio-legal issues. Besides these social and legal issues are seems to be the most significant problems and flaws, which have required a continuous and sincere study to evaluate the legality and effect of the practice of surrogacy upon society at a large.

Surrogacy and Fertility Centre was a necessary part of this study even though the researcher did not get opportunity to approach to the clinics beyond a brief meeting initially in relation to research work. The authorities concerned were not very dedicated to access to clinics, patients, and queries related to surrogacy arrangements, However, during the progressed of fieldwork the researcher had recorded responses to the queries through interactions with doctor, sister and counselor.

1.7. Review of Literature

Review of Literature is the most important part of all scientific research to gather existing knowledge and facts and finally to find conclusions and predict the future in relation to a particular subject matter. It adds value and legitimacy to the

research work through interpretation of existing literature in the light of latest developments in the field and by identifying the gaps in the particular subject. Therefore, it has made through study of scholarly articles, books, reports, journals and other sources relevant to the topic of research. Some of important literatures have been mentioned below--

The book authored by Anil and Ranjit Malhotra “*Surrogacy in India: A law in the making – Revisited*”²², explore how the various law struggles with technology to keep up surrogacy. It talks about the inflexibility of adoption existing in Indian legal system. Through this work the authors draws a complete picture on the present position of surrogacy in India. The situation in India is exceptional as neither it is banned nor completely regulated. It discussed about the attempts those have been made in the form of guidelines in 2005 and visa regulations in 2012 and legal emptiness which leaves it open to abuse and misuse. It offers insight into the draft Assisted Reproductive Technology (Regulation) Bill, 2010 and 2014 and to the various lacunas. This book also provides additional material, various discussions on surrogacy.

The book authored by Anindita Majumdar “*Transnational Commercial Surrogacy and the (Un)making of Kin in India*”²³ – maps the way in which in-vitro fertilization (IVF) specialists, Surrogacy Agents, commissioning couples, surrogate mothers, and egg donors contribute to the understanding of interpersonal relations in the process of commercial surrogacy. This book from a situation that is entangled in

²² Universal law publishing, Haryana, 2nd ed, 2016

²³ Oxford University press, New Delhi, 1st ed, 2017

the local-global politics of reproduction and the ways in which the transnational commercial surrogacy arrangement has led to an ongoing debate regarding ethics and morality in the sphere of reproductive rights. It explains the diverse and often conflicting experiences of individuals and families. Here also describes how transnational commercial surrogacy arrangement came into existence as a process reflecting larger societal anxieties with special reference to technological interventions in intimate relationships. This book addressed various anxieties, dilemmas associated with transnational surrogacy, intention and parentage in commercial surrogacy, assisted conception, nurturance and kinship in surrogate pregnancy, nations, citizens and negotiations thereto.

The book authored by Gehna Vaishnavi and Navneet Takkar “*Surrogacy: Medio-Legal issues*,”²⁴ it contains the judicial pronouncement around the globe in relation to surrogacy and reflects the medico legal issues affecting surrogacy and its impact on society. It points out the legal loopholes, which are needed to be cured. The book includes foreign judgment and Indian Judicial Precedents on issues relating to surrogacy. It also highlights the pain of families struggling to have children without being bothered about the consequences. It includes ICMR Guidelines regarding surrogacy in India, draft ART Bills, adoption laws in relation to surrogacy and surrogacy legislation in Abroad and Judicial trends in surrogacy at International and National level.

²⁴ Jaypee Brothers Medical Publishers (p) Ltd., New Delhi, 1st ed, 2015

The book authored by Gita Aravamudan “*Baby makers: The story of Indian Surrogacy*,”²⁵ is about surrogacy in India and how it got changed from a marginalized and socially unacceptable procedure to a multimillion –dollar industry. It is an open-minded enquiry into surrogacy laws where the author uses journalistic research and compelling personal narratives to draw a clear picture. Here the author contented that the baby makers are many such as the couples who supply the genetic material, the embryologist who create test-tube babies, the gynecologists who insert embryos into wombs and deliver the babies and the surrogates. Then there are the agents who supply surrogates, organize fertility tourism packages and even arrange for babies to be ordered over the internet using frozen genetic material supplied by the intending parents. The author states how eggs, sperm and viable embryos can be bought and sold like any other commodity. This book also discusses surrogacy as a complex phenomenon and the thorny ethical issues involved.

The book authored by Amrita Pande “*Wombs in Labor: Transnational Commercial Surrogacy in India*,”²⁶ in this book describes surrogacy in India as a new form of outsourcing because couples from all over the World hire Indian women to bear their children for a fraction of the cost of surrogacy elsewhere. The author visits clinics and hostels and speaks with 52 surrogates and their husbands and in-laws, 12 intending parents, 3 doctors, 3 brokers, 3 hostel matrons and several nurses in order to know the burgeoning business and the experiences of the laborers within it. The Author’s research focuses on how reproduction meets production in surrogacy and

²⁵ Harpercollins publication, 2014

²⁶ Colombia University Press, Newyork, 1st ed, 2014

how this reflects characteristics of Indian labor system. Through interviews the author examines the strategies deployed by surrogates to retain control over their bodies and reproductive futures. Here it is stated that some women are coerced into the business by their families, others bargain with clients and their clinics to gain access to technologies and networks. In this book, the Author advocates for a better understanding of this complex labor market, visualizing an international model of fair-trade surrogacy founded on openness and clearness in all business, medical, and emotional exchanges.

The book authored by Dr. Aneesh V. Pillai “*Surrogate Motherhood and the Law: International and National Perspectives*,”²⁷ it discusses the importance and need of surrogacy. It also discusses the contradictory legal and human rights issues raised by the practice of surrogacy in present times. It further examines the competency of existing legal provisions in India and seeks to provide realistic solutions for regulating surrogacy practice by defending the interest of various stakeholders.

The book authored by Jhon A Robertson, “*Legal and Ethical Issues in Human Reproduction*,”²⁸ it states that though egg donations and gestational surrogacy are both potential techniques for infertility management, but they are lack of legal infrastructure. It further highlights that with comprehensive legislation, judicial decision and organized practice will finally deal with these loopholes.

²⁷ Regal Publications, New Delhi, 2015

²⁸ JD Dartmouth Publishing Co. Ltd., England, 1999

The book authored by Nancy S. Jecker, *et al.* “*Bioethics: An Introduction to the History, Methods, and Practice*,”²⁹ this book provides a refined introduction to the field of bioethics. It describes the history of bioethics, the methods, and the practice of bioethics. The practice of Bioethics on ethical topics at the beginning of life, abortion, reproductive technologies, genetics, surrogate decision making are very elaborately discussed in this book. It also forwarded the feminist ethics in relation to IVF.

The book authored by Purosottam Behera “*Medical Law and Ethics*”³⁰ this book explores moral, ethical and legal issues of medical procedures and technologies. It also makes a comprehensive analysis of the legal provisions currently with respect to medicine.

An another exceptional collection of essays edited by Donald Evans, Neli Pickering “*Creating the child : the Ethics, law and practice of Assisted Procreation*,”³¹ this volume of essays emphasises on the theoretical and practical problems presented by the new technologies in assisted human reproduction in eastern, central & western Europe as mentioned by clinicians, lawyers and philosophers .

The book authored by Kamini Rao “*Principles and Practice of Assisted Reproductive Technology*,”³² this three volume set is a comprehensive guide to Assisted Reproductive Technology for clinicians. Volume 1 is comprises of introduction to infertility, description of physiology, endocrinology and infertility in

²⁹ Jones and Bartlett India Pvt. Ltd., New Delhi, 1st ed. 2010

³⁰ Mittal Publications, New Delhi, 1st ed., 2007

³¹ Springer Netherlands, 1996

³² Jaypee Brothers, New Delhi, 1st ed., 2014

both men and women. The 2nd volume is dedicated to IVF and related procedures and volume 3 is an atlas of embryology.

Another book authored by David K Gardener, *et al.* “*Textbook of Assisted Reproductive Techniques*,”³³ this book is also a set of two separate volumes on ART Techniques, volume 1 includes Laboratory Perspectives and volume 2 includes Clinical Perspectives of ART. It gives information about IVF Techniques and reproductive medicines.

The book edited by Paula Gerber and Katie O’Byrne “*Surrogacy, Law and Human Rights*.”³⁴ This book is on the developing field of surrogacy laws, across a number of jurisdictions. It presents critical analysis of the current regulation of surrogacy via domestic law in Australia, India and the USA, and the international law in the form of the UN Convention on the Rights of the child.

An interdisciplinary collection of articles edited by Sayantani Dasgupta and Shamita Das Dasgupta “*Globalisation and Transnational Surrogacy in India: Outsourcing Life*”³⁵, explore transnational commercial gestational surrogacy and how its practice is changing concepts of parenthood across the globe.

Another book authored by Dr. G.K. Goswami “*Assisted Reproduction and Conflict in Rights*,”³⁶ a socio-legal study on complex issues of reproductive rights, in the contexts of forensic medical jurisprudence and theories of justice. It broadly

³³ CRC Press, New York, 4th ed, 2012

³⁴ Routledge, 2016

³⁵ Lexington Books, 2014

³⁶ Satyam Law International, New Delhi, 2017

incorporates contents of equitable justice between reproductive rights of parents and child's right to know parentage under Assisted Reproduction.

The book authored by Rishika Taneja and Sidhant Kumar "*Privacy Law: Principles, Injunctions and Compensation*,"³⁷ it contains the fundamental principles and legal framework of privacy in India as it stands today. It also too contains privacy in international law and human rights. It is a guide to obtaining privacy relief in Indian courts when invaded by the state subject and by a private individual.

One another book authored by Shaun D. Pattinson "*Medical Law and Ethics*,"³⁸ it provides coverage of the topics of medical law and ethics. It discuss about the details of reproductive technologies along with statutory guideline

After going through the stated literatures, it has observed that the reproductive freedom is recognized and protected every corner of the world, and the judiciary of almost countries has been playing a significant role for the protection and promotion of reproductive rights. It is true that most of the people whether motivated by biology, emotional needs, or social pressures, longing for children at a particular point of life. But unfortunately many of them are not lucky enough to have a child due to medical or social infertility. Infertility is a barrier to the right to procreation and parenthood. Though, adoption is a substitute to get a legal heir, but the stigma of infertility kept haunting the infertile couples and individuals. It is true that advancement of medical science of technology of human reproduction has worked as a means of achieving pregnancy. It is fact that on one hand ART have radically changed human

³⁷ Eastern Book Compay, Lucknow, 2014

³⁸ Sweet & Maxwell, 3rd ed., 2013

reproduction , but on the other hand it complexes various personal issues, more especially uncertainty in parentage determination due to scientific interventions and a serious need has emerged for balancing the sociology and the biology of human affairs otherwise the growth of society may be exaggerated. Another important matter observed that whether the body of women should be treated as property or not in assisted reproduction. Beside these, issue arises whether the parent's right to privacy and autonomy of reproduction undermines the right of the child to know genetic truth of his/her birth. It has witnessed that with no specific international code of conduct on surrogacy practice, the emerging and conflicting laws of surrogacy practice different as per different legal jurisdiction. More significantly it has seen that surrogacy has become one of the most contentious techniques of ART as numerous ethical, physical, psychological, economical, social, legal and religious issues are associated with it. And some social and legal issues are often left unaddressed. Such as, what happens, if during the pregnancy or before giving birth of the surrogate child, the intended parents die or divorce and subsequently, none of willing to take delivery of the child, can the intended parents require the surrogate to terminate the pregnancy, when the fetus or surrogate mother has serious health problems as per the Medical Termination of Pregnancy Act, 1971, what are the remedies for the surrogate mother if intended parents abandon the surrogate child etc...so to resolve all those problems, a deliberate discussion on such issues is very imperative and desirable. Apart from these considering India's recent legislative action, it became essential to examine the probable issues which may arise out of surrogacy arrangements. Most significantly, when the surrogacy is widely accepted and involvement of the Government is

necessary to protect the interest of the surrogate mother through the process provided in Private International Law, the response of Indian authorities is invariably unenthusiastic, whereby it seeks to impose blanket ban on commercial gestational surrogacy. In this context, it is felt that legalizing altruistic surrogacy is not only answer to protect the rights and interests of the parties concerned to the surrogacy arrangements. So the present study demands to analyses how far the practice of altruistic surrogacy is acceptable from socio-legal dimension.

1.8. Research Methodology

Methodology is a pre-requisite in scientific inquiry. Different methods are applied to different research work. Research Methodology is a systematized investigation to gain new knowledge about the problem or phenomena in question. In its wider sense, methodology includes the philosophy and practice of the whole research process. It provides the standards which the researchers use for integrating data and reaching conclusion. The nature of legal issues and the subject matter of law are radically different in many respects from some other fields of study. Therefore, the content of the prepositions and explanations may also differ.

The methodology of legal studies involves their own rules, interpretations and criterion for admissible explanations as well as research design, data process routine. In most of the legal investigations, qualitative data has to be analyzed. One needs to seek access to adequate data for one's investigation, and analyze the same on the basis of the study of related literature.

Legal research for issue of surrogacy is not a straight process; it is twisted and touched every aspects of the society at some particular point. Hence, in this work, the research methodology consists of both doctrinal and non-doctrinal study. Both primary and secondary sources of data have been used to conduct the study. Primary sources include the Constitution of India, International treaties and instruments, different statutes and various judicial pronouncements of the courts and secondary sources adhered to include books, journals, periodicals, law reporters and internet sources to find out various fact-situations of the subject and the researcher judiciously analyzed the available data by studying the related literature.

For the purpose of review of existing literature the researcher visited library of Indian Law Institute, New Delhi, library of the Secretariat, Govt. of Assam, library of Administrative Staff College, Khanapara, Guwahati, library of Gauhati University, library of Dibrugarh University, library of Assam Medical College, Dibrugarh and library of Gauhati High Court, Guwahati. The additional sources include authentic books, relevant publications, articles and materials from past research work in the related field are utilized whenever found relevant. This study is descriptive, comparative and analytical of existing literature.

To conduct non-doctrinal study whereby gather a clear concept on entire treatment of infertility and to know various modern developments in the field of ART, the researcher have visited three significant hospitals in Guwahati. These three hospitals were selected for this study only because, they are known for providing treatment of infertility in Assam. To conduct the study, unstructured interview method

was used. During the study researcher had recorded some responses to the queries made to the medical personnel on infertility managements. And the researcher has used this method to examine the opinion of medical personnel on surrogacy in India and the acceptability of the proposed altruistic surrogacy.

In this study no hypothesis is formed to be proved or disproved as the researcher did not have any necessity to formulate any hypothesis or research question during the period of study.

1.9. Chapter Plan

CHAPTER-I of the research work is INTRODUCTION. This Chapter deals with the introduction of the thesis, which contains the preliminary introduction of the concept of Assisted Reproductive Technologies and Surrogacy as one of the most popular form of ART. It focuses how time has been playing a significant role in the evolution of human society, the significance and need of a child in a family, the problem of infertility and how the problem of childlessness is overcome through Adoption and various methods of ART including Surrogacy. It also emphasizes on the picture of Surrogacy in India and dilemma and debate related to surrogacy. To bring clarity on the topic by avoiding confusion, it also contains the concepts of the various terms used in this study. It also contains the scope of the study, objectives of the study, limitation of the study, review of the literature, research methodology and chapter plan.

CHAPTER-II of the research work is HISTORICAL DEVELOPMENT OF SURROGACY. This chapter is basically deals with the historical development of

Surrogacy and it is required to understand and follow the entire process of development of surrogacy and surrogacy arrangements. It mentions the approach and methods provided in Manu Smriti in relation to procreation of a child when a husband dies childless or incapable of fatherhood. The study of history of Surrogacy is carried out in two parts, first one is Indian Perspective and second one is International Perspective. In Indian perspective, it describes various incidents of occurrence of surrogacy in Indian Mythology and also describes how the Modern development of medical science and human reproductive technology has brought India to the front position among other countries after the born of World's second and India's first IVF baby Durga in Kolkata on 3rd October, 1978. In International Perspective, it describes about the references of Surrogacy found in Biblical times and in the history of Mesopotamia's Hammurabi Code, and the journey from Traditional Surrogacy to Gestational Surrogacy through various phases of development caused by the advancement of ARTs. It also mentions some monumental milestones in relation to Surrogacy Arrangements occurred in various countries. It also focuses on the development of a global phenomenon i.e. International Commercial Surrogacy Arrangement, where commissioning parents in one country directly or indirectly hire a woman in another country to bear a child on their behalf. It also focuses how there is gradual rise of Single Parent and Homosexual couples and transgender person families through ARTs around the World.

CHAPTER- III of the research work is RIGHT TO PROCREATION AND RIGHT TO ASSISTED REPRODUCTIVE TECHNOLOGY-LEGAL PROVISIONS, POLICIES AND LEGISLATION CONNECTED TO SURROGACY. This chapter

seeks to elucidates the recognition of need for a child as a basic human right and its incorporation as right to procreation including right to use ART at international as well as national level. It focuses on various International Human Rights Conventions, such as UDHR, ICCPR, ICESCR, CEDAW, ICPD, IPPF, Hague Adoption Convention etc. It also discusses the existing legal frameworks for regulating surrogacy in international as well as national level. It also focuses on constitutional and various existing legislative provisions applicable to Surrogacy in India such as, ICMR Guidelines, 228th Report of Law Commission of India, draft ART Bills, Surrogacy (Reg.) Bill, 2016, 2019 and the Surrogacy (Reg.) Bill 2020 and other laws applicable to surrogacy arrangements in India in absence of specific legislation.

CHAPTER-IV of the research work is SURROGACY–TYPES AND TECHNIQUES. This chapter deals with different types of surrogacy arrangements and scientific techniques and procedures used for Surrogacy. It elucidates the concept of different types of Surrogacy Arrangements considering contribution of monetary compensation and genetic materials. It describes stepwise procedures have to observed to get a child through IVF surrogacy such as, Ovarian stimulation, Preparation of the surrogate, Ovum pickup, ART for male factor infertility, IVF of gametes, Cryopreservation of embryos, Embryo transfer into the womb of surrogate, IVF success and failure and Complications of ART treatments. And it also mention about the basic procedures required to be followed for AI and IVF Surrogacy, namely, counseling for surrogacy, medical test for various diseases, surrogacy arrangement .

CHAPTER-V of the research work is SOCIO-LEGAL ISSUES OF SURROGACY: ALTRISTIC SURROGACY VIS-A-VIS COMMERCIAL SURROGACY. This chapter conducts a comprehensive study on Altruistic Surrogacy and Commercial Surrogacy. It discusses how ARTs techniques used for assisted reproduction creates a complex relationship among genetic mother/father, gestational mother, and legal mother/father and a child born out of ART. It focuses on socio-legal issues involved in Altruistic surrogacy and Commercial surrogacy and especially issues involved in International Gestational Commercial Surrogacy Arrangements as surrogacy being controversial form of ART raises issues like interference with nature, commoditization of child, exploitation of surrogate women etc. It has made attempt to throw light over some other social and legal issues, those are often left unaddressed. This chapter also critically evaluated that how the lack of comprehensive legislation has become a responsible factor for growing unethical practices of ARTs clinics in surrogacy arrangements which has lead to commercialization of Surrogacy and socio-economic exploitation of surrogate mother.

CHAPTER-VI of the research work is JUDICIAL FINDINGS. This chapter makes an effort to study various judicial findings relating to surrogacy of various jurisdictions. It analyses the interpretation made by the judiciary on various issues of surrogacy arrangements for a better prospects of surrogacy in both international and domestic level.

CHAPTER-VII of the research work is DISCUSSION. This chapter critically discussed all the forgoing chapters. It further discusses how the lack of comprehensive

legislation on surrogacy has lead to socio-economic exploitation of the surrogate mother and commodification of the surrogate children. And it also discusses to what extent is it wise for the society to accept altruistic surrogacy to allow women to make surrogacy arrangements about the use of their bodies. It also discusses an inconclusive challenge and controversy posed by unjustified bar on single, married and unmarried persons from entering into surrogacy arrangements. In addition to these, it also discusses the legality of the new Surrogacy (Regulation) Bill 2020 and how far it is acceptable in the proposed form.

CHAPTER-VIII of the research work is CONCLUSION. In this chapter the researcher has made reasonable attempts to emphasize that the Assisted Reproductive Technology is to be considered as necessity for the modern society. Further, it has discusses surrogacy as beneficial in comparison to other methods of Assisted Reproductive Technologies. It further contains the findings of the present study and provides suitable recommendations thereof for minimizing the problems associated with surrogacy.