

CHAPTER - V

SOCIO-LEGAL ISSUES OF SURROGACY: ALTRISTIC SURROGACY VIS-A-VIS COMMERCIAL SURROGACY

Surrogate motherhood represents an increasingly widespread method of human reproduction to overcome successfully the obstacles of infertility. However, surrogate motherhood, due to indefinite legal regulation and multifaceted nature, entails many controversies. The science which deals with research in human reproduction is a new branch of medicine and it can be freely called “a post-industrial miracle” which has emerged due to an extremely rapid growth of high technologies, biochemistry, microsurgery and genetic engineering.¹ At this phase of scientific and technological development, human reproduction has taken the course of a very rapid development, ethics and law are trying to keep peace with it and set certain social acceptable boundaries. In surrogacy, a woman receives the fertilized ovum in her uterus, nurtures it inside her body and produces a baby that more often, is genetically not her own. So, in relation to such a phenomenon, it is become very necessary to provide frameworks for medical procedures to greatest possible extent, so that mankind could benefit from them and prevent their abuses.

Surrogate motherhood is a very divisive method of reproduction which is subject to criticism in many countries, including India. And practically, in the

¹ DL Spar, “The Baby Business: How Money, Science And Politics Drive The Commerce Of Conception” in SR Vidilicka, D Hrstic *et. al*, “Bioethical And Legal Challenges Of Surrogate Motherhood In The Republic Of Croatia” 3 *JHR* 39 (2012).

countries where this method is regulated, through legislation, is not sufficiently reliable against issues with consideration of the pain inherent in infertility. Infertility is a widespread global medical mutilation, which is considered as a divine annoyance culminating in series of socio-economic discriminations and psychological suffering among the barren couples and individuals.² Sterility may lead to extra-marital relationship, domestic violence, divorce, witchcraft, depression, suicide, and other social stigmas including ostracism.³ Though, mankind has sought answer to the question of fertility since time immemorial, but it was only during the 20th century that medical community started treating infertility as a disease.⁴ According to Modern Medical Standards, Infertility is considered as a disease of reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.⁵ Therefore, treatment of infertility as well as other diseases must be provided to those affected as there is a cry out in societies of the world to get help in making babies. The right to health is a basic human right and is as such guaranteed by the Constitution of India,⁶ the ICESCR⁷ and by the Health Care Law.⁸

² Dr. G.K. Goswami, *Assisted Reproduction and Conflict in Rights 2* (Satyam Law International, New Delhi, 2017)

³ Ibid.

⁴ Ibid.

⁵ ICMART & WHO, Revised Glossary On ART Terminology; Fertility And Sterility, Vol. 92, No. 5, November, 2009

⁶ Article 2

⁷ Article 12

⁸ Article 3

5.1. Debate over Surrogacy Arrangement

Surrogate motherhood has both advocates and detractors, each with strong arguments in their favour. And it is also important to discuss both sides of the argument to get, understand the actual picture of surrogacy arrangements. Actually, it is very hard to visualize the child as subject matter of trade. Children are after all the fruit of an intimate experience of love, not of money, which is occurs far away from any commercial activity. Though, poor parents across the time and place have viewed their children as possible economic assets, weighing their ultimate economic contribution in rice field or factory, against the costs of carrying them through childhood.⁹ On the same way, surrogacy has become a global trade in countries like India, which has given rise to many queries leading to continuous political debate from last many years.

The globalizations of ARTs have overwhelmingly transformed women's reproductive lives and motherhood itself. ARTs have brought women's reproductive bodies into the public techno-scientific domain and bringing not only pregnancy and delivery, but also conception under the preview of medical control, sexuality and maternity are separated and motherhood becomes fragmented into genetic, gestating, and nurturing segments.¹⁰ Considering all those factors, surrogacy has now become an assemblage of numerous genuine social, legal and ethical challenges, which is being

⁹ Dr. SS Das and P Mout, "Commercialization of Surrogacy in India: A Critical Analysis" available at <http://www.researchgate.net/publication/281710247>.

¹⁰ S Dasgupta and SD Dasgupta, "Business or Usual? The Violence of Reproductive Trafficking in the Indian Context" in S Dasgupta and SD Dasgupta (ed) *Globalization and Transnational Surrogacy in India: Outsourcing Life*, Lexington Books 183 (2014).

closely examined by feminists, anthropologists, sociologists and law maker alike.¹¹ Moreover, feminists have denounced surrogacy as ultimate form of medicalization, commodification and technological immigration of female body and as a prostitution and slavery resulting from economic and patriarchal exploitation of women.¹² Surrogacy arrangements are termed as either commercial or altruistic, considering the financial involvement in the respective arrangement. All opponents of surrogacy mainly prefer their contention on surrogacy as ethically disgusting practice, especially when it practices like a commercial deal. Though, monetary transaction is the main criticism associated with commercial surrogacy, which centered on ‘buying’ and ‘selling’ of the child. But, one cannot ignore the helpful action of altruistic surrogacy, while it in reality opens the door to all kinds of possible abuse. Many of the opponents forwarded their views on religious grounds, whereas others judge it using rational, legal or political criterion. It also pleaded that surrogacy is tending towards to a critical and complex child-parent relationship that which finally harm the tradition of family. On the other hand, some feminists oppose surrogacy because of its political and economic context. Hence, they disagree with the view that women liberally choose to become surrogates. They argue that coercion at the societal level, rather than the personal level, causes poor women to become surrogate mothers for rich.¹³ Some feminists also prefer to termed surrogacy as reproductive prostitution. Further the

¹¹ Dr. S. Bhat & S. R. Sastry, “Legal and Policy Challenges to Surrogacy in India” in B.S. Bhat (ed), *Reflections on Medical Law and Ethics in India*, Eastern Law House 82 (2016)

¹² M Banode, “Critical Appraisal Of Legal Spectrum Regulating Surrogacy Contract: A Comparative Study With Special Reference To India” 2 *SAJMS* 2 (201)

¹³ MK Sarkar, “ Surrogate Motherhood: Empowerment or Exploitation” 1 *ASIO-JHMSSI* 2 (2015), available at <http://www.albertscience.com>. (accessed on May 6,2018)

antagonists of surrogacy practice consider that it is a menace to the health of surrogate, due to unaware of risk to her health and also the kindheartedness of giving away the child while making agreement.

However, advocates in favour of surrogate motherhood propose it as an empathetic solution to the problem of infertility. It is seen that infertility affects about 10-15% of couples in the reproductive age group.¹⁴ They note that infertility is common and affecting almost one out of every six couples who wish to have children to whom they are genetically related.¹⁵ Besides this, they assert commercial surrogacy contract is a contract to bear a child, not to sell a child and payment to a surrogate is considered as a fee for gestational services, just like any other fees paid to professionals like lawyers and doctors for their services. Surrogacy is also supported on the ground that society is served best when the liberties of individuals is maximized and also mention that in a successful surrogacy arrangement, all parties concerned are benefited.¹⁶ Through which the intended parent(s) get a child and the surrogate receives a monetary reward with the great satisfaction of helping someone needy. One more argument is that though adoption is a means to have a child; but it does not adequately fulfill the desired needs of infertile couples who wish to have a genetically linked baby. In favour of surrogacy arrangement, liberal feminists and their supporters forward their views as a woman's right to use her body as she chooses, and to prevent

¹⁴ Ghena Vaishnavi and Navneet Takkar, *Surrogacy: Medico-Legal Issues* 21 (Jaypee Brothers Medical Publishers, New Delhi, 1st Ed. 2015).

¹⁵ Supra note 13

¹⁶ Ibid.

women from entering into surrogacy contracts implies is to deny them both autonomy and reproductive self-determination.

Every country in the world has a different standpoint on surrogacy. One thing is very clear that traditional surrogacy involves the union of the sperm of the intended father and the egg of the surrogate mother and both the intended father and the surrogate mother of home country, the intended father would be the surrogate child's legal father and the surrogate mother would be the child's legal mother. But the complex problems of parentage, custody, nationality etc. arises while the gestational surrogacy arrangement involves gametes of the donor, done through AI or IVF and parties concerned are from different jurisdictions. The Indian society and legal system differs from the rest of the world. The concept of surrogate mothering in India raises a broad host of concerns from both legal and social standpoints in the practice among three stakeholders the commissioning parent, the surrogate mother, and the surrogate child.

5.2. Social Issues Relating to Surrogacy

The concept of society is itself a dynamic one; it changes quickly as per the demand of the time and needs. And the surrogacy is also a result of such dynamisms of the society. Basically, the basic idea behind surrogacy is a righteous one, as it is based on the altruistic principle of doing well to others i.e. one woman serving other woman. However, gradually surrogacy arrangement became a lucrative business and huge financial transaction playing the most significant role on it. Though surrogacy has given new life and smile to childless family, but it has been suffering from various

issues irrespective of monetary contribution. Because, when a society changes, it obviously challenged the ethical norms prevailing in the society and created contradictions with the prevailing social practices. Hence, in India, surrogate mothers face high levels of social stigma and ostracism. Single parents like gay and lesbian, or gay and lesbian couples may also opt for surrogacy.¹⁷ Many surrogates are spending their term of pregnancy away from their families and communities.

As we know that reproduction is the rule of nature and basic for the furtherance of any species including human being. Right to reproduction is also considered as a human right; this right is in existence since the evolution of mankind. While the process of reproduction is not able to achieve naturally, then intervention of medical treatment is required to make it possible. In such circumstances, desired couple(s), single parent(s) always taking helps of Assisted Reproductive Technologies such as surrogacy, which gives raise to various socio-ethical objections. That human agency and ARTs are opposed to the rule of natural environment and it confront to the institution of marriage. It is argued that as marriage is *sine quo non* for reproduction and it has been acknowledged by almost all society. Every society with cultural variance has intrinsic mechanism for regulating pregnancy and child birth although these are innate biological processes.¹⁸ However by the introduction of advance medical science and technology on human reproduction has creates a big question on the conventional concept of marriage. Nowadays we have witnessed that the matter of reproduce a child is not necessarily involves only with married couples. Though

¹⁷ New Reproductive Techniques and New Parental Issues, available at <https://www.etax.byu.edu/wardel/fundprinsfam/11newpro.htm> (accessed on January 10, 2019)

¹⁸ Supra note 2, p. 2

surrogacy is considered as a means to infertile married couple to beget a child but practically it is seen that fertile married couples, single individuals, same sex couples, gays, lesbians all are fulfilling their dreams of parenthood through surrogacy. This varying picture threatens the traditional understanding of families as grounded in love, marriage, and sexual intercourse and also challenges the assumption of a pure and complete maternal role that the genetic mother giving birth to and raising the child.¹⁹

The laissez-faire approach to surrogacy in India raises questions about its impact on participants in surrogacy and the wider community.²⁰ However, edge of all questions and confusions, there is an increasing acceptance of the surrogacy arrangements around the world. Some of the social issues relating to surrogacy are as follows:

5.2.1. Surrogacy as Violence against Women

The perception that gestational surrogacy is a form of violence against women tends to meet with serious conflict from intended parents, surrogates, and many scholars and activists.²¹ The argument varies from surrogacy as extraordinary financial opportunities for poor women, to protect women's autonomous ownership of their own bodies.²² In surrogacy arrangement, there is every possibility of making profits by the clinics, physicians and various persons of medical industry rather than surrogates.

¹⁹ Amrita Pande, "The Power of Narratives" in S Dasgupta, SD Dasgupta, (editors.) *Globalization and Transnational Surrogacy in India*, 87-88 (Mayland, US: Lexington Press, 2014).

²⁰ Normann Witzleb, Anurag Chawla, "Surrogacy in India: Strong Demand, Weak Laws" in P Gerber, K O'Byrne, editors. *Surrogacy, Law and Human Rights* 187 (2016)

²¹ Supra note10, p.190

²² Ibid.

Additionally, it is also true that poor Indian women cannot make decisions alone about their bodies. Hence, the decision to become surrogate mother is always under doubt and more likely, it is to be influenced by family economic need, and at the worst, by incidents of physical and mental violence. The majority surrogates have to bear the trouble of concealing their choice of surrogacy and pregnancy from family and friends and sometimes keep them separately in hostel or rented house. Though the physical needs of the surrogate are met but their emotional wellbeing is at risk by being separated from their family and their children and most sadly giving up the baby they just birthed. Besides, these surrogates are not generally rewarded yet for late miscarriages, as their agreement stipulates that they have to deliver a living child.

And in case of altruistic surrogacy the problem is more worsen, altruism, gift, and sisterhood are the terms constructed by the buyers of the service and managed and political power.²³ Husbands may also play an important role in compelling women to employ in surrogacy to immediate change the financial status of the family. So collectively it can be submitted that it is not less than violence against women.

5.2.2. Exploitation of Women through Surrogacy

The foremost issue associated with surrogacy is exploitation of women. And it is argued that through surrogacy arrangements, intended parents and ART clinics always taking benefit of surrogate mother not necessarily only in the case of commercial surrogacy. In the case of altruistic surrogacy also exploitation is common. Here, it is occur due to close personal relationship between the intended parents and

²³ Supra note 13, p.1

the surrogate mother rather than financial contribution, where women are natural and selfless nurturers. It ignoring all the risks such as psychological, health etc. connected with surrogacy and assumes that the women have innate instincts to perform their services as surrogates purely on love. It is also mentionable that the exploitive effects of surrogacy on surrogate mother often not clear until the relinquished of baby is made. After that many women experience emotional anxiety over relinquishing the child.

5.2.3. Economic Exploitation of Women through Surrogacy

Most significantly, the commercial surrogacy arrangement transforms women's labor into a commodity, by replacing the parental norms which usually govern the practice of gestating children with the economic norms which govern ordinary production processes.²⁴ Commissioning couples who look to other nations for a surrogate tend to do so because the costs are significantly less than that in the United States.²⁵ The estimated cost of a surrogacy in India is approximately \$47,350.00, and the cost is directly paid to the clinic.²⁶ The compensation receives by the surrogate mother is often decided arbitrarily the clinic.²⁷ ART is a growing business, which is united with the strong needs of the intended parents and large income for third parties

²⁴ Elizabeth S. Anderson, "Is Women's Labor a Commodity?", 19 PHIL. & PUB. AFF. 71, 80 (1990), available at <https://www.ncbi.nlm.nih.gov/pubmed> (accessed on December 22, 2018)

²⁵ Ibid.

²⁶ Darlena Cunha, "The Hidden Costs of International Surrogacy", THE ATLANTIC (Dec. 22, 2014), available at <http://www.theatlantic.com/business/archive/2014/12/the-hidden-cost-of-international-surrogacy/382757/> (accessed on January 9, 2019)

²⁷ Aditi Malhotra and Joanna Sugden, "India's Surrogacy Industry Needs Regulation, Not a Ban, Say Women's Right Groups", WALL ST.J., (Non.5, 2015), available at <https://blogs.wsj.com/indiarealtime/2015/11/17/indias-surrogacy-industry-needs-regulation-not-a-ban-say-womens-right-groups> (accessed on December 26, 2018)

such as brokers and ART clinics to influence the surrogate mother and gamete donor. So, there is likelihood of exploitation of surrogate mothers, who are economically susceptible.

5.2.4. Stigmatization of Surrogacy

In our society both infertility and surrogacy are associated with social stigmatization. Infertility describes the inability of a man or woman to conceive a child or inability of a woman to carry a pregnancy to term. Human fertility is greatly valued and children are recognized as source of happiness and social security during old age.²⁸ Barren females are victimized and are usually held responsible more than male counterparts in the most of the cultures.²⁹ Apart from the emotional challenges and anxiety, there is also social stigma connected with barrenness which may lead to serious concern of breakdown of marriage also. So, the intended parents commissioning surrogacy usually maintain secrecy of this fact from the society to avoid the social stigma associated with infertility.

The advancement of ARTs, transformed the process of procreation from natural, confidential, personal acts of husband and wife to artificial manipulations in a laboratory, many times involving third/fourth party also in process.³⁰ Such manipulation is not unanimously accepted by our traditional value based society and religions. There is an intrinsic apprehension in between the intended parents and the surrogate, entered into surrogacy arrangement that this management might not be

²⁸ Supra note 2, p.20

²⁹ Ibid.

³⁰ Supra note 2, p.21

accepted by the family members and society in the true spirit. Surrogate who consented herself to become surrogate mother also has to face social stigma as they received money in exchange of their services similar to a prostitute. More often, the surrogate is forced to hide her decision and work from others in the family and neighborhood due to its implication of sexual relations outside marriage.³¹ To control the surrogates' conduct, the clinics segregate them from their families and house and used to keep them in hostel.

5.2.5. Commoditization of Motherhood and Surrogate Children

The surrogacy industry has transformed the understanding of motherhood, whereby it creates three mothers, commissioning mother, genetic mother and surrogate mother. It compromises with the majesty of the surrogate mother and the child by merely treating her as 'womb for rent' and making the child as the object of a contract i.e. a commodity respectively. Apart from these children of surrogacy are subjected to sex selection or abandonment for disability or simple change- of- mind. And while someone invests a significant amount of money in a transaction, always expectations would be there. So before entering into a surrogacy arrangement, it is a step to make the intended parents knows about all aspects of life of a woman, who is going to be act as surrogate mother, such as, colour of skin, hair and eyes, quality of hair, height, weight, age, education, occupation, religion, sexual life and entire background of her and her family. It is only because of that they wanted good looking child with high academic potentialities and thereby turning children into commodities. The combining

³¹ Supra note 10, p.191

use of genetic engineering technologies with ART has emerged the issue of creation of designer babies.

5.2.6. Abandonment of Surrogate Children after Birth

It is also one of the important social issues that non acceptance of child birth from surrogacy arrangement. As we know, in surrogacy, the sperm and the egg fertilized in laboratory and after that the embryo implanted at the womb of surrogate mother. Subsequently the growth of the fetus takes place within the womb as in normal pregnancy. Sometime unfortunately, the surrogate mother delivered defective child, twin, triplets etc. In such situation, there is every possibilities of denial on the part of intended parents may be occurred as unwanted.

5.2.7. Surrogacy as Globalized Labor and Reproductive Trafficking

The World Vision Report 2009 stated that US media headlines always compare Indian surrogacy to other forms of Indian “tech support” as US jobs are being outsourced to India, from telemarketing to computer programming and now one more service can be added to that list, i.e. child bearing and some childless couple in Europe and the US are hiring Indian women as surrogate mother.³² This outsourcing mainly based on accessibility of scientific skills for surrogacy and wants only the natural structure of her body to work at this deal. The physician and clinic staff are responsible for attracting customers through websites, for media coverage, for keep in touch with their clients through emailed ultrasounds and progress reports.³³ Actually

³² Supra note 10, p.187

³³ Ibid.

women engaged in surrogacy arrangements are unskilled and undervalued labor and it provides resources to those poor women with economic opportunities to meet their financial necessities for families quickly in comparison to other forms of work. The picture of satisfaction on earnings of one's, who acted as surrogate is very clearly upheld in the documentary film *Google Baby* (Frank 2009), and in this film, unfolds the story of Indian surrogacy around an Israeli, Doron Mamet, and explains the motivation for surrogates in similar terms.

Surrogacy industry is a result of the very profitable reproductive technology, through which intended can getting children. It has created the trafficking of women for use of their wombs not only within the country, it traffics babies from one to another country. As defined by UN, trafficking involves transporting and selling of vulnerable persons across the state and country borders, and it involves deception, coercion, violence, and exploitation of one set of people by another for the purpose of making profit.³⁴ Trafficking in women feeds both the global sex industry and the labor needs of business. The surrogacy industry not only split away the connection between motherhood and reproduction, but undermines the welfare of trafficked women and babies.

5.2.8. Problem of legitimate Parenthood

This is another issue that who can be the legitimate parent of surrogate children is highly conflicting as numerous couples or individual are opting for surrogacy for

³⁴ Supra note 10, p. 185

begetting a child and which has lead to the problem regarding welfare of the child. As we have witnessed that different persons, who receiving a child through surrogacy..

- A married hetero sexual infertile couple
- A married hetero-sexual fertile couple
- Same sex couple
- Single individual etc.

The changing concept of family has automatically raised various problems, such as if the relationship between couple, same sex couple breaks down after entering into surrogacy agreement or after birth of the child, who will take the responsibilities of the child, what will be the future of the child etc.

5.3. Legal Issues Relating to Surrogacy

Surrogacy describes such an arrangement in which a woman who is, or is to become pregnant, agrees permanently to surrender the child born of that pregnancy to another person or couple.³⁵ Earlier issue arose basically on whether commercial surrogacy commodifies women and children, and whether the surrogate mother should be required to relinquish the child, should she change her mind and considering what, the majority of countries decide to ban commercial surrogacy and made surrogacy contracts void and unenforceable, and some instances acknowledged altruistic arrangements subject to fulfillment of definite criteria.³⁶ But the problem become more

³⁵ S Allan, "The surrogate in commercial surrogacy: legal and ethical consideration" in P Gerber, K O'byrne (ed.), *Surrogacy, Law and Human Rights* 113 Routledge, New York (2016).

³⁶ Ibid.

critical and rising more complex issues, when the commissioning parents travelling overseas to enter commercial surrogacy arrangements in countries where allows commercial surrogacy by law or where have no regulation. Apart from these due to want of uniform standard for monetary compensation the payment to the surrogate mother varies and it is based on their fair complexion, caste, education, background of her and family. Some important legal issues are discussed as follows:

5.3.1. Right to use Surrogacy and Surrogate Mother's Right to Self-Determination

The right to reproduction is an essential human right and the principle of self-determination is frequently invoked as a good reason for allowing surrogacy. The Principle of self-determination implies that the people have the freedom to decide what to do with their bodies provided that no harm is caused to others. And accordingly, the decision of a woman to conceive or to have a child is well and good in the eye of law but rather the decision to hand over the child to someone else is the issue. The ever growing nature of medical science and human reproductive technology raises one important question as to whether surrogacy can be used as a right within the ambit of right to procreation and who are eligible to avail this right. Earlier, surrogacy was considered as last option available for having a child by married infertile couples. However it become a controversial issue due to use of surrogacy by other persons like divorcee, widow, single parent, same sex couples, aged, disabled etc., who are interested to have a child. However the proposed Surrogacy (Regulation) Bill, 2019 provides that only married couple

can commission for surrogacy.³⁷ Unmarried individuals are barred from commissioning surrogacy. For what, again it is considered as an outright discrimination against a particular section of the society based on marital status.³⁸ So, it required more attention regarding the use of surrogacy by whom to beget a child would have a great impact on the social structure, meaning of family, institution of marriage and it is affecting the social norms, morals and ethics of the society along with the issues of maintenance and welfare of the children.

In India, from the ICMR Guidelines and ART Bill 2010, it can be understood that they actually do not address the issue of rights to bodily autonomy of the surrogate mothers. Surrogacy contract should not render the surrogate mother to give up her right to self-determination with regard to her body. Since most of the women who act as surrogate mothers in India are uneducated, so it must be obliged through law that the doctor who actually hire them as surrogates should make sure under the contract that they would not give up the right to self-determination of their body. Many of surrogate mothers even have not heard of IVF, what it is, what are the complications associated with it including health hazards. India's gestational surrogacy market offered thousands of dollars to surrogate mother to gestate a fetus and due to their dire socio-economic situations; they are unable to refuse such a huge sum of money and thereby rendering their

³⁷ Section 4(iii)(c)

³⁸ Girish Murugesh, "Critical Analysis of The Surrogacy (Regulation) Bill, 2016" 4 *IJLDAI* 175 (2018)

decision to participate less than truly voluntary.³⁹ So, controlling influences, such as extreme financial pressure, family pressure, and pressure from medical professionals are the elements, what would undermine the principle of self-determination or autonomy of a gestational surrogate mother. However the Surrogacy (Reg.) Bill, 2020 provides explicit provision for written informed consent of surrogate mother, who undertake the procedure of surrogacy arrangement.⁴⁰

5.3.2. Legitimacy and Enforceability of Surrogacy Contract

The laws relating to surrogacy is not standardized, different country have diverse laws with respect to the legitimacy and enforceability of surrogacy contract. Somewhere surrogacy contracts are considered as illegal and somewhere legal. In surrogacy arrangement, a contract has to be made between the commissioning parents and the surrogate, whereby the commissioning parents has promise to compensate the surrogate mother and the surrogate mother has to hand over the child to the commissioning parents after the birth of the child. A standard surrogacy arrangement involves a contract of three elements---- (i) surrogate to be artificially inseminated, (ii) surrogate carry a fetus to term, and (iii) surrogate relinquish her parental rights over the child once born. In India, a legal issue

³⁹ Jennifer Rimm, “Boombing Baby Business: Regulating Commercial Surrogacy in India”, 30 U. PA.J. INT’L 1445, available at <https://scholarship.law.upenn.edu/jil/vol30/iss4/1>

⁴⁰ Section 6 states - No person shall seek or conduct surrogacy procedures unless he has –

- (i) Explained all known side effects and after effects of such procedures to the surrogate mother concerned;
- (ii) Obtained in the prescribed form, the written informed consent of the surrogate mother to undergo such procedures in the language she understands.

involving surrogacy contract is whether surrogacy contracts are in opposition to public policy. In absence of specific legislation relating to surrogacy in India, the Indian contract Act 1872 is applies to deal with such issues.

Therefore, in the light of section 10 of the ICA, if we analyze the position of surrogacy arrangement, found that, any surrogacy arrangement which is arrived at by the free consent of the parties, who are competent to contract and who have entered into agreement for a lawful consideration as also with a lawful object, which is not expressly declared to be void, would be a contract.⁴¹ And under Section 23 of the ICA states,

“The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy, in each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void”.

Since money is a crucial factor that prompts women to be surrogates, which is considered as consideration for services of the surrogate. However, forbearance⁴² can serve as consideration in the context of surrogacy contract. Even if the contract is altruistic; it will serve as a consideration as a result of love and affection towards

⁴¹ Section 10

⁴² Forbearance means refraining from doing something, such as asserting a legal right.

intended parents⁴³. In relation to this, one thing is important to discuss, should surrogate motherhood arrangements be viewed as illegal on grounds that they violate existing baby selling prohibition?

It is mentionable that, there is no law in India, which forbids surrogate mothering contract, as it is not directly declared as unenforceable by law, it deemed to be enforceable and fully valid. The ICMR Guidelines and the 228th Law Commission Report has also recommended the enforceability of surrogate mothering agreement India and in this regard an another doubt arises--- is it morally right for a woman to offer herself for a fee, procreate and relinquish the child after birth to another? Under prevalent law in India, if the consideration or object of an agreement is regarded by the court to be immoral, is generally confined to sexual immorality only. Immorality depends on the norms accepted by the society at a particular point of time. Recently, advancement of reproductive science and technology through AI or IVF, surrogate mothering arrangement does not requires any illicit cohabitation even though they have ended up selling their bodies for reproductive purposes, which is not to considered as immoral. Moreover surrogacy agreement is also not considered as against public policy. The notion of Public policy plays an important role in interpretation of law by the judiciary. The decision of the court would depend upon the recognized notions of interest of the community at a particular time; it could vary from time to time. The idea of public policy is itself an ever-changing and dynamic, it has been described to be illusive,

⁴³ Sec-25(1)

varying and uncertain⁴⁴; variance being not only from generation to generation but also from within a generation⁴⁵. Infertility is often the cause of marital discoordination, whereas the birth of an offspring brings a couple together. Stability and harmony of marital relation is a part of public policy⁴⁶. The Judiciary, therefore, have a responsibility in determining the need and acceptability of surrogate mothering arrangements in India.

In Surrogate mothering arrangement, the act of intentional parenthood create a situation in which as many as five people can claim a parental status over the resulting child; the intended parents, the genetic father and mother and the surrogate. Without comprehensive legal regulation in India, the rights and interests of surrogate mother can't be protected. Though India's surrogacy market provides Indian surrogates with a significant source of income that they could not otherwise obtain in such a short amount of time, however this benefit is a matter of concern which starkly outweighed by the harms associated with commercial surrogacy---the commodification and exploitation of India's poor uneducated women on the basis of an inter-contractual failure of both justice and consent. Therefore, it is difficult to evaluate clearly whether surrogacy arrangements are abusive or not and whether it is a valid reason for prohibiting surrogacy arrangements.

Unfortunately, presently, it is felt that, altruistic surrogacy as proposed under the Surrogacy (Reg.) Bill, 2020 will create more pressure upon women by

⁴⁴ *Ghurelal Prakh v Mahadeo Das Miya*, A.I.R. 1959 S.C. 781(India)

⁴⁵ *P. Rathinam v Union of India*, (1994) 3 S.C.C. 419

⁴⁶ *Manica Gounder v Munimmai*, A.I.R. 1968 Mad. 392

the family members in the name of willing women, where they have to compromise with their fundamental dignity, without any compensation in exchange.

The situation of surrogate mother is unethical and their problems are worst. Poverty, illiteracy and exploitation of family members, agents or the middle man for the easy money are the major issues of surrogacy. Some women give their consent to be surrogate mothers against their will without understanding the psychological and physical burdens that they may face in the process and they don't have choice to take decision about their own life and body; for whom surrogacy is not truly a free choice of poverty, but is a compulsion. In India, there is no provision of psychological screening and legal counselling, which is mandatory in developed countries. The surrogacy arrangements also promote inequality as only couples who enjoy a higher financial status are likely to have access to this option. Thus, it leads to yield an inequitable distribution of medical resources and gestational surrogacy arrangement ultimately could result in the exploitation of lower income women. Though altruistic surrogacy may avoid the commodification of women but it would put Indian surrogate in an economically worse position, as they typically don't have other employment opportunities.

5.3.3. Constitutionality of Surrogacy Arrangements

The right to procreate is a fundamental human right and comes within the ambit of Article 21 of the Constitution of India. The surrogacy contracts entered into in India mainly involve women from the lower strata and who are uneducated unlike the commissioning parents who are educated and have a better

understanding of contractual implications.⁴⁷ Thereby giving rise to the problem of uninformed consent of the surrogate mother, who do not understand the all terms and complications involved in the agreement. So, there is every possibilities of partiality may be caused in favour of the commissioning parents, as it is fact that parties arranged in the contract are actually paid by the commissioning parents and they have a better say in the contract.⁴⁸ But the surrogate mothers without separate and uninfluenced assistance are exposed to manipulation, and may be exploited for an unfair price due to pressure or due to lack of proper understanding of the contractual terms of the contract.⁴⁹ India's surrogacy market fails to comply with autonomy of surrogate women. So, it is important to discuss, whether surrogate mothers always freely involve in surrogacy transaction or due to compulsion. Apart from these, a surrogate woman's daily actions may be controlled by the surrogacy clinic as per the surrogacy contract.⁵⁰

Thus, it is important to recognize the surrogate mother as an independent person who is given the special right to decide whether she will enter into or not to contract. And if the prospective surrogate mother has a family, then the consent of her family must be obtained.

5.3.4. Commodification and Exploitation of Women's Labor

The majority women who become gestational surrogates in India are poor, uneducated, and often have families of their own to support. In commercial surrogacy arrangements, payment is made to the gestational women for her

⁴⁷ Supra note 11

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Supra note 39, p.1448

services, and may also be made to a third party broker or agent who brought the commissioners and gestational women together.⁵¹ Several arguments were advanced by academics that India's Gestational Surrogacy market commodifies women because it creates strictly commercial arrangement.⁵² Though Non-commercial surrogacy is more commonly accepted worldwide, the surrogate mother's non-commercial motivations are taken advantage of, without offering anything. Altruistic surrogacy is accepted because it avoids the dangers of commodification of women, but at the same time it would also put Indian surrogates in an economically worse position. In India, from a single pregnancy a surrogate mother can earn up to ten times the annual income of her husband.⁵³ In such a situation, the consent is not free, but constrained by economic necessity.

Indian surrogate mothers are subjected to two norms, (i) the social norms governing motherhood compel her to experience parental love for her child, and (ii) the commercial norms governing contracts compel her to uphold her to relinquish the child after birth.⁵⁴ The norms of respect⁵⁵ and consideration⁵⁶ are violated by this commodification in three ways:⁵⁷

⁵¹ Supra note 39, p. 1436

⁵² Ishika Arora, "Wombs for Rent: Outsourcing Surrogacy to India", PROS.J. (Jan.12, 2012), available at <http://prospectjournal.org/2012/01/10/wombs-for-rent-outsourcing-surrogact-to-india-2> (accessed on February 7, 2019)

⁵³ 2011 Note of the Hague Conference

⁵⁴ Elizabeth S. Anderson, "Is Women's Labor a Commodity?", 19 PHIL. & PUB. AFF. 71, 80 (1990), available at <https://www.ncbi.nlm.nih.gov/pubmed> (accessed on December 22, 2018)

⁵⁵ To respect someone is to treat her in accordance with principles she rationally accepts.

⁵⁶ To treat someone with consideration is to respond with sensitivity to her, refraining from manipulating or denigrating these for one's one purposes.

⁵⁷ Supra note 54

- a. Alienation:** The surrogate is required to repress whatever parental love she feels for the child. Her labor is alienated and she must suppress her emotional ties with her own child.
- b. Degradation:** The surrogate mother's standpoint on her pregnancy are manipulated and denied legitimacy. The commercial surrogacy industry has a strong motivation to suppress, influence, and underestimate the surrogate mother's perspective.
- c. Exploitation:** The surrogate mother's non-commercial motivations are taking advantage of exploitation, without offering anything to her, what the norms of commerce demand in return. The surrogate mother is exploited because her emotional needs and vulnerabilities are not treated as characteristics which call for consideration.

The most cruel effects of surrogacy experienced by the surrogate mother is emotional anxiety over the child, which is often do not clear to them until the baby is relinquished. So, once the commissioning couple gets the child from the surrogate, the motivation to care for surrogate disappears.⁵⁸

Though the surrogacy (Regulation) Bill, 2019 seeks to regulate the rising menace of commercial surrogacy by putting a ban and allows altruistic surrogacy, but on one can strongly established that how far the surrogate mother is in reality

⁵⁸ The Iona Institute, Paper: "The Ethical Case Against Surrogate Motherhood: What We Can Learn From The Law of Other European Countries", available at <http://www.ionainstitute.ie> (accessed on March 2, 2018)

not subjected to any emotional blackmail, even to commitments or threats concerning her job.

5.3.5. Human Trafficking of Women and Children

Surrogacy poses question over the dignity of the child by making the child the object of a settlement commodity and over the dignity of the surrogate mother too, even though her participation is voluntary, through simply treating her as a “womb for rent”.⁵⁹ There is no doubt that in the global commercial surrogacy market poor and vulnerable women have been trafficked for use as surrogates for the profit of agents and brokers.⁶⁰ During the visit and interaction of the researcher with the Director of the Institute of Human Reproduction and the Clinical Psychologist, they said that in case of commercial surrogacy, the main factor is finance, what persuading a woman to be a surrogate mother as most of them are belongs to poor socio-economic group and in case of altruistic surrogacy, tendency towards service of humanity, persuading a woman to be a surrogate mother.

There are numerous cases of human trafficking of women to work as surrogates have been reported for decades in various places, such as, In 1995, young Polish women were recruited to travel to Holland, Belgium and Germany to work as surrogates, in 2009 women from Myanmar were sold to Chinese men to work as surrogates, in 2011, several Taiwanese, Chinese and Burmese people were

⁵⁹ FM Abdullah, “Legal and Ethical Aspects beyond Commercial Surrogacy: Modern Form of Human Trafficking” 22 *JLERI* 4(2019).

⁶⁰ Supra note 35, p.122

arrested for allegedly running surrogacy ring in Thailand.⁶¹ In 2014, three individuals in the United States were convicted of criminal charges relating to paying ‘surrogate’ mothers to be sent to the Ukraine for implementation with embryos, without any surrogacy arrangements in place.⁶² In 2013, the Bangladesh Country Report on combating human trafficking also mentioned surrogacy as a form of human trafficking in Bangladesh.⁶³ Hence, we cannot disagree with such genuine risks and practices of the commercial surrogacy have been enduring into the recent day in both developing and developed countries.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children⁶⁴ define Trafficking in person as:

*“The recruitment, transportation, transfer, harbouring 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”*⁶⁵

⁶¹ Supra note 35, p.123

⁶² Ibid.

⁶³ Ibid, p.123-124

⁶⁴ It is a protocol to the United Nations Convention against Transnational Organized Crime. It was adopted by the United Nations General Assembly in 2000 and entered into force on December 25, 2003.

⁶⁵ Article 3, Para. (a)

Again Article 21 of the Council of Europe's additional Protocol to the Convention for the protection of Human Rights and Dignity of the human being with regard to the application of Biology and medicine on the prohibition of the cloning of human beings defines that the human body and its parts can't be a source for acquiring financial gain.⁶⁶ Hence, from this point of view carrying and giving birth to a child for another man or woman, solely for the reason of financial benefit, is immoral and illegal and the commission of the same would lead to human trafficking.

5.3.6. Commodification of children

It is a relevant and extensively discussed issue that surrogacy exploits women, who are paid to bear children and thereby makes surrogacy conceived children as an object of contract. Along with it surrogate children are subjected to sex-selection or abandonment for disability or merely due to change of mind of the commissioning parents. In surrogacy, women are used as breeders and ignoring the importance of maternal-child bond, which turns women into commodities and babies as products. Some also argues that commercial surrogacy is impossible to differentiate from the buying and selling of children.

There has been international recognition that the sale of children is ethically and morally repugnant as it counters principles of human dignity, respect for persons, and the common good.⁶⁷ In 1984, the United Kingdom Warnock

⁶⁶ Supra note 59

⁶⁷ Supra note 35, p.115

Committee⁶⁸ said that a surrogacy agreement is degrading to the child who is to be the outcome of it, since, for all practical purposes the child will have been brought for money.⁶⁹ The CRC requires that States parties shall have to take all appropriate national, bilateral and multilateral measures to prevent the ...sale of or traffic in children for any purpose or in any form.

Further, Article 2 of the OPCC, 2000⁷⁰ defines the sale of children as ‘any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration. Hence, it has been seen that commercial surrogacy fall within the definition of sale of a child as it is an act or transaction whereby a child is transferred by any person or group of persons (the surrogate, the clinics, the brokers) to another (the commission person(s)) for remuneration or any other consideration.

Nevertheless, this analysis is not acceptable by all. Some argued that surrogacy move away from issues of the sale or commodification of children by framing the surrogate’s connection to the child in meticulous ways. It argued that there is no sale or commodification implicated in gestational surrogacy because the surrogate carries only the genetic child of the commissioning parent(s). There is no genetic/biological connection in between the surrogate mother and the surrogate

⁶⁸ The UK Government convened the Warnock Committee in 1978 to consider recent and potential developments in medicine and science related to human fertilization and embryology and to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations.

⁶⁹ Supra note 35, p.116

⁷⁰ It was adopted by the General Assembly of United Nations on May 25, 2000. This Protocol took effect on January 18, 2002

child. Rather here payment is projected to be for services rendered by the surrogate in giving the commissioning parent(s) 'their' child. But reversibly, it is also claimed that regardless of genetic connection, the gestational mother provides many biological resources during the term of pregnancy. Throughout the pregnancy, there is a physical link provided by the placenta, an organ built of cells from both the woman carrying the pregnancy and the foetus, which serves as a medium for the exchange of nutrients, gases and wastes. There are also major physical and emotional changes take place within the pregnant woman's body that cause her to bond with, and connect to the baby as it grows in uterus. Hence, it is seen that gestational commercial surrogacy does not able to resolves the issue of commdfication simply by refusing a link between the child and the surrogate.

5.3.7. Legitimacy of the Surrogate Children

Legitimacy of surrogate children is the most controversial and important issues adversely affect the interest and welfare of the child. Surrogacy separated the gestational and genetic component of motherhood. In some surrogacy arrangement, there is three different mother, female gamete donor (genetic mother), for gestation (gestational mother) and intended mother (legal mother). And in case of father, is generally the husband of the mother of the child. However, in surrogacy there may be an inference of another male as a sperm donor and the child can have two fathers, one is who intended to have the child and the other who donated the sperm and is genetically related. And in some cases, both the intended parents have contributed genetic material, but the embryo is implanted in the womb

of surrogate mother, then the child will have two mothers and one father. Again in some cases, there may be three mothers and one father. So where only one intended parent has contributed genetic material and when the surrogate is not genetically related to either one of the intended parents, the issue regarding legitimacy of the surrogate child is unavoidable. Hence, it became very difficult and complicated to define a parent and status of the surrogate child in surrogacy arrangement. In most of the societies and legal systems of the world, the concept of legitimacy of children is the direct outcome of the concept of marriage and the child born outside of the lawful wedlock are considered as illegitimate.⁷¹

In this regard, it is necessary to analyze the legal framework existing in other countries as well as in India. Most of the legal systems provide that the gestational mother is the legal mother of the surrogate child at the time of its birth. In USA⁷² and UK,⁷³ intended parents do not automatically become the legal parents of the surrogate child after its birth without a parental order by the appropriate authority constitute as per statute. In India, in absence of any specific law in relation to surrogacy, the ICMR Guidelines provide that a child born through assisted reproductive technologies shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses and the child have a legal right to parental support, inheritance, and all other privileges of a child as born through sexual intercourse; sperm/oocyte donors shall have no parental

⁷¹ Paras Diwan, *Muslim Law and Modern India* 115 (Allahabad Law Agency, Faridabad, 9th ed. 2004)

⁷² Section-807 of the Uniform Parentage Act, 2002

⁷³ Section-54 of the Human Fertilization and Embryology Act, 2008

right or duties in relation to the child.⁷⁴ The position in India differs from that of USA and UK, as there is no law for parental order.

5.3.8. Problem of Custody and Identity of the Surrogate Children

Problem of custody and citizenship of the surrogate child is one of the most sensitive issues which is also harmful to the interest and welfare of the surrogate child. In surrogacy arrangement, custody dispute is mainly in between the surrogate mother and intended parents. Though, as per the arrangement surrogate mother agrees to relinquish all her parental rights over the child after birth, but we have witnessed various instances in which she refuses to hand over the child. It may also raise a situation where the dispute is between the intended parents themselves due to separation or divorce during the period of pregnancy. And when the intended parents are from another country, it also creates another issue of nationality and citizenship of the surrogate child. It becomes more complicated when the country of intended parents does not recognize surrogacy as lawful.

The CRC, 1992 states that state parties shall have to undertake the rights of the child to preserve his/her identity, including nationality, name and family relations as recognized by law without unlawful interference.⁷⁵ But the surrogacy arrangement involves interference of third party/parties, whereby a surrogate child may have two or three mothers and fathers. The surrogacy arrangements usually

⁷⁴ Rules-3.12.1 & 3.16.1 of the ICMR Guidelines

⁷⁵ Article 8.1

contain a clause that the intended parent(s) will be the legal parent of the child and the surrogate mother does not have any right over the child.

In *Jan Balaz v. Anand Municipality*,⁷⁶ the question before the Gujarat High Court was whether a child born in India to an Indian surrogate mother, whose biological father is a foreign national, would get citizenship in India by birth? The Gujarat High Court has held that the surrogate children are entitled to get Indian citizenship by birth, because the surrogate mother is an Indian national. And the court directed to the Government to release the passport of the minors. However, the Government of India challenged this decision in *Union of India & Anr. v. Jan Balaz & Ors.*⁷⁷

5.3.9. Children's right to inheritance

Though, the assisted reproductive technology has on one hand providing relief to the childless couples or to the person intending to have genetic children, on other hand it challenged inheritance laws, particularly when a child is conceived after the death of a parent posthumously. It is an important issue to discuss and requires being dissolve expressly by the concerned legislation.

The National Guidelines of ICMR recognizes the surrogate child as a legitimate child and briefly deal with legal rights of the surrogate child to paternal support, inheritance etc. So likewise, the proposed Surrogacy (Regulation) Bill would need to extensively deal with aspects of inheritance, successions,

⁷⁶ AIR 2010 Guj. 21

⁷⁷ It is pending before the Supreme Court of India in Civil Appeal No. (S). 8714/2010

maintenance etc., most importantly, while the bill allows only the close relative to be a surrogate mother, in such case, the issues of parental control and other legal rights requires to be expressly dealt with to avoid any future claims and demands likely to be arise.

5.3.10. Children's Right to know his Origin and Right to be cared by his or her Parents

The CRC, 1992 provides for the right to information to a child about his/her origins and it also provides that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and the right to be cared by his or her parents.⁷⁸ From this point of view, every surrogate child is also entitled to know the details of his/her origin. But in surrogacy arrangement the identity of donor and identity of surrogate mother are kept anonymous to protect the right to privacy of them. Therefore, the right to know one's genetic information would create conflict with the rights of donor and surrogate mother to remain anonymous. Furthermore, wherever surrogacy is facilitated by the use of donor gametes, the child will be automatically deprived of the opportunity of being cared by his or her parents.

In India, the ICMR Guidelines provides that children born through the use of donor gametes shall not have any right whatsoever to know the identity of their genetic parent(s). However a child born will be provided all other information

⁷⁸ Article 7.1

about the donor as and when desired by the child, when the child becomes an adult.⁷⁹

5.3.11. Maternity and Paternity leave of the commissioning parents

It is an important right for employees to avail themselves of leave in order to fulfill their parental duties. Parental leave benefits lay down the entitlements how an organization accommodates for parents of children to take care of them. But now the issue is that whether the commissioning parents are eligible to claim paternal leave and benefits. In connection to this issue, in 2015, the Delhi High Court has issued a verdict on a plea by a Kendriya Vidyalaya teacher who had twins through a surrogate mother but she was denied maternity leave as she was not biological mother. The Delhi High Court held that a female employee, who is the commissioning mother, would be entitled to apply for maternity leave. So, all women employees of the central government who have child through surrogacy will be entitled to maternity leave of 26 weeks (about 180 days), according to an official order of the personal ministry.⁸⁰ Recently, the Punjab Government has decided to provide maternity leave with full pay upto 180 days or 26 weeks to female employees who want to have child through surrogacy as well as to those female employees who would bear child for another.⁸¹

Under the Maternity Benefit Act, 1961, only women are entitled to certain benefits and facilities to raise their children. There is no such provision for father

⁷⁹ Rule 3.12.3, ICMR Guidelines

⁸⁰ The Hindu, February 8, 2018

⁸¹ The Times of India, January 22, 2020

in order to get benefit or facilities. But in the Maternity Benefit (Amendment) Act, 2017 provides paternity leave of 15 days for all workers, including those in the unorganized and private sector, which is extendable up to 3 months as it is a necessity to provide equal paternal benefits for both the mother and the father. The amendment Act is hailed as inclusive and progressive as it has extended maternity leave benefits to adoptive and commissioning mothers and provides that adoptive and commissioning woman will be given 12 weeks of maternity leave. Though still there is no provision for paternity leave for adoptive and commissioning father.

It is true that surrogacy is a miracle in the world of scientific and technological developments in relation to infertility. In this process woman receives the fertilized ovum and reproduce an offspring which is genetically belong to other and thereby indirectly reduces many social and marital stigmas, like- extra marital relationship, domestic violence, depression, suicides, etc. due to infertility.

Surrogacy arrangement is both acclaimed and criticized. Many cannot visualize children, which are regarded as fruit of an intimate experience of love to be made a commodity through ART, wherein motherhood becomes fragmented into genetic, gestating and nurturing segments. However, advocates in favour of surrogate motherhood propose it as an empathic solution to the problem of surrogacy and liberal feminist and their supporters opines that a woman has the right to use her body as she chooses.

The concept of surrogacy therefore has put forward mass of social and legal issues among the commissioning parents, the surrogate mother and the surrogate

child. At times, problem related to jurisdiction arises too when the surrogacy arrangement involves gametes of the donor, done through AI or IVF are from different places or in some cases, different part of the world.

Nevertheless, right to reproduce is a human right and when process of producing own offspring is not possible naturally then desired couples, and with some new dimension of the society, like- single parents, lesbian and homo-sexual couples (LGBT) can fulfill their dreams to become parents through surrogacy and ART. Hence, surrogacy is accepted throughout the world. The surrogacy industry has commoditized motherhood and it has created three mothers, i.e. commissioning mother, genetic mother and surrogate mother. It is a result of the profitable reproductive technology which has resulted into trafficking of women for use of their womb and begetting child. The surrogate mother is expected to be beautiful, healthy and intelligent. Besides these, unfortunately, if the surrogate mother delivers a defective child, twin or triplets, there are every possibilities of denial on the part of intended parents.

Likewise, some legal issues are also attached with surrogacy, such as, a woman's right to 'self-determination' with her body, render her the fundamental right to hire surrogate, womb for surrogacy. However, it becomes a controversial issue due to use of surrogacy by persons like divorcee, widow, same sex couples, aged, disabled etc. to have child. In India, under ICMR's Guidelines and ART Bill, 2010, right to self-determination of the surrogate mother are kept intact. Under the Indian Contract Act, 1872, surrogacy contract is not directly declared as

unenforceable by law. The constitutionality of surrogacy is under Article 21 of the Constitution of India becomes relevant as 'liberty' of women under surrogacy comes under lens doubt, as most of women are from economically lower strata and do not understand the conditions and terms of the contract made between commissioning parents and gestational mother. Such contract has every chance to commodify the mother's womb and exploit the women's labor. On the other hand, the surrogate mother is compelled to suppress her emotions for the child she bears, and her parental love is taken into account. Though, the proposed Surrogacy (Regulation) Bill, 2020 seeks to restrain the danger of commercial surrogacy by allowing altruistic surrogacy, but no one can strongly condemn the possibilities of undue influence, coercion in taking or determining consent fairly within surrogacy arrangements.

Additionally, surrogacy raises controversy regarding legitimacy of the child. In some surrogacy arrangements, likewise three mothers, there are three different fathers too. In such instance, question arises who is actual want to be the parent. In most of the countries gestational mother is the legal mother. In India, in absence of any specific regulation, a child born through ART shall be considered to be the legitimate child of the couple and shall be eligible to inherit the property of the parents. The CRC, 1992 explicitly provides for the right to information about the origin of the child. From this point of view, every surrogate child is entitled to know about the identity of the sperm donor and the surrogate mother. But in contrary to that such identities are kept anonymous to protect privacy of the commissioning parents. In India, as per ICMR's Guidelines, such information shall

be provided when the child attain the age of eighteen (18) years. Furthermore, under the Maternity Benefit (Amendment) Act, 2017 has extended the maternity leave benefits of 12 weeks to adoptive and commissioning mothers also.

To settle down various legal issues relating to surrogacy arising from time to time, the judiciary of different jurisdictions has been playing a very important role and also it helping the way of development of law on surrogacy.