

## **CHAPTER -VII**

### **DISCUSSION**

The discussion part is the most important part of a research work. Its purpose is to interpret and describe the significance of findings of the research. Through discussion it is possible to express critically about the issues connected, solutions to the problems considering findings and understanding. It is also important to fill the gaps exists in the literature that had been unaddressed earlier. Thus, this chapter of the research work is the golden chapter of the entire thesis as it discusses the forgoing chapters critically.

In **Chapter-II**, worked on Historical Development of Surrogacy in India and as well as in international level. It is found that the instinct of parents for procreation is the most powerful physiological happening. According to ancient Indian philosophy, the natural idea of life is to spread once own traits to the next generation as it is the way of survival of the offspring. Manusmriti describes the importance of procreation and speaks about 'Niyoga' for wife whose husband expired childless or incapable of fatherhood.

It is found that though the considerable role of surrogacy has been noticed in the contemporary period but taking into account of all the well known incidences, it is seen that the practice of surrogacy has been in subsistence in the world since time immemorial. The example of such instance is found in the story of Sarah and Abraham and in the Hindu scriptures and historical chronicles.

Besides these references regarding surrogacy is also found in Mosaic Law and Hammurabi code. And the present position of surrogacy is not only a sole product of modern science and technology; it has been growing through a continuous process of development which is gradually become popular and acceptable to the society.

It is mentionable that in this journey, operating from the mythological era to the present periods is really a matter of great satisfaction and pleasure that the world's second test tube baby Durga was born in India on 3<sup>rd</sup> October, 1978 through IVF and the credit goes to Dr. Subhas Mukhopadhyay. However he was not allowed to carry out further work on IVF by the Government of West Bengal. As consequence of which, he finally quit the world on 19<sup>th</sup> June, 1981 and it is really a great loss to the mankind. Though lately in 2002, the ICMR recognized Dr. Subhas Mukhopadhyay's work due to Dr. TC Anand Kumar's effort. Since then the reproduction through ART became very popular and among all those methods of ART, surrogacy is accepted more extensively by the society. And very recently India has emerged as a favourable destination for commercial surrogacy for Indian as well as for outsiders without any legal framework.

Likewise in Abroad, Robert Edwards recognized IVF as a treatment for infertility in early 1950. However, it was not until the late 1970's surrogacy became a viable option and more accepted as well as better documented. The modern surrogacy came into being in mid 1970. Amid of late 1970 to early 1980, Noel Keane had formed the first surrogacy agency in America. In the mean time,

the world's first test tube baby Louise Joy Brown was born and it has paved the way towards gestational surrogacy. Thereafter the first paid traditional surrogacy was conducted in 1980. Subsequent to this the first gestational surrogacy was done in 1985. In 2001, an oldest surrogate mother gave birth for her own daughter and in 2005, 58 years old surrogate mother has gave birth of twin for her daughter. Since then he had carried out the revolutionary research on reproduction through IVF which leads to gestational surrogacy.

In **Chapter-III**, it has worked on Right to Procreation and Right to Assisted Reproductive Technology—Legal provisions, Policies and Legislation connected to Surrogacy. Procreation is the most fundamental and significant function of a family by which women gives birth to a child. It is crucial for formation of societies and social improvement. It has felt that the plan of procreation gives attention on the conceiving and bearing of offspring not necessarily only from sexual intimacy in the era of advance medical science and technology. Though earlier, the individual's rights to marriage, sexual orientation, procreation, family were predominantly dealt under personal laws.<sup>1</sup> Gradually, the developed concept of Human Rights has also acknowledged that right to have children as a fundamental right and included it as right to marry and procreate for starting a family and too protected under various international instruments such as UDHR, ICCPR, ICESCR, CEDAW, ICPD, FWCW, IPPF etc. Though the right to procreation is recognized as a fundamental human right but for the women, who

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<sup>1</sup> Dr. G.K. Goswami, *Assisted Reproduction and Conflict in Rights* 28 (Satyam Law International, New Delhi, 2017)

are infertile for them begetting a child would not be possible without medical intervention.

It has found that, in the present period, the number of infertile couple has become greater than before due to various problems, such as- uncured diseases, poor health, mal-nutrition, more use of intra-uterine devices, pelvic inflammatory diseases, postponing child bearing for career, over age etc. and earlier the desire to fulfill the dream for a child of infertile couple was being satisfied by the practice of adoption.

During the visit and interaction of the Researcher with Dr. Deepak Goenka, Director of the Institute of Human Reproduction, Bharalumukh, he said,

“First of all, society is itself a dynamic concept, it is growing gradually, its demands and needs are changing day by day; along with it, the problems of human beings also increasing due to the changes of lifestyle adopted by the people, e.g. infertility, either medical or social. Apart from these the availability of treatment for management of infertility and development of medical science and human reproductive technologies are also the factors responsible for increasing demand rate of infertility treatment.”

As per the description provided by a Sister engaged in infertility treatment at Pratiksh Hospital, the causes of increasing demand rate of infertility treatment are—

- a) Social trend of postponing pregnancy,

- b) Smoking and other substance abuse,
- c) Increased awareness amongst people for treatment modalities,
- d) Increased survivability of people with cancer and other chronic disease,
- e) Wanting of pregnancy without risk for transmission of a sexually transmissible diseases,
- f) Wanting to preserve fertility due to social reasons,
- g) High infertility amongst tribal population,
- h) Doctors individual efforts by spreading awareness amongst populations by their talks etc. on mass media.

The Clinical Psychologist of IVF Centre, Dispur Polyclinic, Guwahati, Dr. Kankan Sarmah has said that to talk about the increasing demand rate of infertility treatment, he has mention it from both male and female, as they are suffering numerous problems, such as-

In case of male—

- a) Immune system factors
- b) Hypogonadism
- c) Varieocele
- d) Systemic disease
- e) Sexual factors
- f) Uro-genetal infection
- g) Undescended testicles
- h) Unexplained infertility and

In case of female—

- a) Ovulatory dysfunctions
- b) Diminishing ovarian reserve
- c) Endometriosis
- d) Tubal factor
- e) Uterine factor
- f) Unexplained infertility etc.

But modern science and technology on human reproduction has provided new alternatives to overcome adoption and to beget a genetically related child through ART. Among various methods of ART, surrogacy is considered as advantageous one for infertile couple to have their own child. The right of a married couple to take part in collaborative techniques such as surrogacy arrangement is constitutionally protected. Surrogacy is one of the new reproductive techniques involving a woman bearing the child of another woman. Thus it is logical to use medical treatment for infertility management and accordingly those infertile must be allowed to avail the help of ARTs for begetting a child. In this context, the Supreme Court of US has repetitively upheld the individual right to make personal decision relating to procreation, conception and the nurture of children free from governmental intervention.<sup>2</sup> Likewise, in India, in the Andhra Pradesh High Court in a famous case<sup>3</sup> has recognized the right to reproductive autonomy. Again through liberal interpretation of Article 21 of the Constitution of

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<sup>2</sup> 316 US 535 (1942)

<sup>3</sup> AIR 2000 AP 156

India in *Suchita Srivastava v. Chandigarh Administration*,<sup>4</sup> the Hon'ble Supreme Court of India held that woman's right to take reproductive decision is also come within the ambit of Article 21 which includes women's right to refuse participation in sexual activity, refuse to use contraceptives etc... The researcher has observed that there is always an inclination towards the protection of reproductive autonomy and towards use of ART.

Though India has become the suitable destination for commercial surrogacy but there has no comprehensive legislation to deal with it. India has adopted a very permissive approach to surrogacy arrangements. The ICMR has for the first time made National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India. After that the ART Bill in 2008, 2010 and 2014 were drafted but never passed by the parliament. In the mean time the Law Commission of India submitted its 228<sup>th</sup> Report in 2009 with recommendation for allowing altruistic surrogacy only. After that in 2017, the Parliamentary Standing Committee on Health and family welfare in its Report suggested for bringing ART Bill first since there are no separate surrogacy clinics and generally ART Clinics offer the services of surrogacy. However, the government ignored it and now trying to putting the cart before the horse. Till 2016, India has never proposed for prohibition of commercial surrogacy, and the industry of surrogacy has been regulated by non-binding national guidelines of ICMR. In absence of specific legislation on surrogacy, the Supreme Court of India in 2008, in famous case of *Baby Manji*

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<sup>4</sup> (2009) 9 SCC 1

*Yamada v. Union of India*<sup>5</sup> held that commercial surrogacy is not prohibited in India. Subsequently, in 2015, the Supreme Court of India held that commercial surrogacy for foreign couples was not recognized under Indian laws.<sup>6</sup>

In 2019, the Government of India as per recommendations of the 228<sup>th</sup> Report of Law Commission of India has reintroduced the Surrogacy (Reg.) Bill, 2016 and is passed by Lok Sabha, but the Rajya Sabha has referred the Bill to the Selection Committee for consideration on 21 November, 2019. Consequently, on 5 February 2020, the Selection Committee has presented its Report before the Rajya Sabha on the Surrogacy (Regulation) Bill, 2019 with many suggestions.

On 26 February 2020, the Union Cabinet again has approved the Surrogacy (Regulation) Bill, 2020, incorporating the 15 major recommendations suggested by the 23 member Select Committee of the Rajya Sabha made on the Surrogacy (Regulation) Bill, 2019.

The bill proposes for constitution of Surrogacy Boards at the National and State/UT levels and appointment of appropriate authorities for regulating surrogacy. It seeks to ban commercial surrogacy and also too sale and import of human embryo for the purpose of surrogacy.

It allows only ethical altruistic form of surrogacy to heterosexual infertile Indian married couples, Indian-origin married couples and Indian single woman subjected to fulfillment of certain conditions.

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<sup>5</sup> (2008) 13 SCC 518

<sup>6</sup> 2015 4 RCR (Civ.) 881



Now this Bill allows a willing woman to be a surrogate mother in the place of close relative of the intended parents having a child of her own is allowed to act as surrogate mother.

It seeks to regulate the functioning of surrogacy clinics. All surrogacy clinics in the country need to be registered by the appropriate authority in order to undertake surrogacy or its related procedures. And contravention of the provisions of the bill would attract imprisonment and fine.

It also provides that intending couples should not abandon the child born out of surrogacy under any condition. The new born child shall be entitled to all rights and privileges that are available to a natural child.

Most significantly, for commissioning surrogacy, embryo is needed and embryos are cultured in IVF laboratories/clinics. So for proper monitoring to ART clinics for ensuring a just and fair process within the clinics, we should have ART Bill first than Surrogacy (Regulation) to protect the surrogate mother and the intended couple from defrauding. However, the ART Bill has been lying for years without any action.

The Bill also provides safeguards to surrogate mothers through insurance coverage.

During the visit and interaction by the researcher with Dr. Deepak Goenka, Director of the Institute of Human Reproduction on ICMR,s Guidelines, he said that any infertility center recognized by the ICMR, must has to follow the

guidelines of ICMR strictly. And he also stated that to deals with areas left uncovered by ICMR's guidelines, in their institute, they followed guidelines of the European Society of Human Reproduction and Embryology (ESHRE), the American Society for Reproductive Medicine (ASRM) and the Human Fertilization and Embryology Act (HEFA).

In Pratiksha Hospital also, the ICMR's Guidelines followed strictly. However, in some cases, they have followed some guidelines other than ICMR, these are -

- a) The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 (PCPNDT),
- b) The European Society of Human Reproduction and Embryology (ESHRE),
- c) The American Society for Reproductive Medicine (ASRM),
- d) The Human Fertilization and Embryology Act (HFEA),
- e) The Clinical Establishment (Registration and Regulation) Act, 2010

According to Dr. Kankan Sarmah, Clinical Psychologist of IVF Centre of Dispur Polyclinic, "Actually ICMR is as a whole discipline for ART. However, some areas are not covered by ICMR. And in such areas guidelines of ESHRE are followed.

It has also found that in absence of surrogacy regulation in international level, there has been an extensive effect of individual surrogacy laws in national level and it is responsible for bringing various outcomes in every country involving

issues of custody, legal parentage, immigration and stateless children etc...Several nations have introduced surrogacy related legislation recently, and several others have prepared draft bills, some pending approval in their parliaments.<sup>7</sup> Several laws and policies at the state level led to vagueness and ambiguity at international level while interpreting the conditions of International Surrogacy Arrangement (ISA). In some countries, surrogacy arrangements are expressly prohibited by law and entering into it will attract criminal sanctions for the parties involved in it such as china, France, Germany, Switzerland etc... And if any child born out of such an arrangement, the general rules concerning legal parentage will apply and gestational mother will be considered as the legal mother. In some countries it is largely unregulated such as Argentina, Belgium, Brazil, Ireland, Japan etc... legal status of child born out from such an arrangement will be determined by the general laws concerning legal parentage. However all countries are not same and interpreted surrogacy arrangement differently. Again there are some countries, where it is expressly permitted but are conducted in accordance with the local laws, somewhere such as Australia only altruistic surrogacy arrangements are permitted and somewhere such as Greece, Israel, entering surrogacy arrangements in local laws can amount to a criminal offence. Again there is also some other countries where commercial surrogacy allow to be practiced because of nation's economy, public policy, culture or for lack of legal framework. Thus such a divergent approach prevailing in countries has created an indefensible situation in inter-

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<sup>7</sup> Rutuja Pol, "Proposing an International Instrument to address issues arising out of International Surrogacy Arrangements" 48 *GJIL* 1315-16 (2017)

country surrogacy arrangements where there are no legal safeguards for the parties concerned to the surrogacy arrangements regarding payments, threat of exploitation, parental rights conflicts, nationality etc. It has observed that international surrogacy is a problematical matter and require immense support from all concerned in order to protect all parties and to minimize regulatory differences across the globe. To introduced international regulatory framework a separate convention under The Hague Conference on Private International Law (HCCH) designed on the existing Hague Adoption Convention of 1993. In 2012, HCCH Preliminary Report on the issues arising from ISA stated about the need of a multilateral instrument which would put in place structures and procedures to enable states to ensure that these obligations are being met in the context of this transnational phenomenon. The researcher also found that though there are a few multilateral conventions exists on Adoption, but these are ineffective to deal with ISAs as parenting and begetting a child are two different phenomenon. It is therefore essential to establish a system to uniformly regulate IASs.

In **Chapter-IV**, the researcher has worked on Surrogacy- Types and Techniques. Since the learning of scientific aspects of surrogacy is indispensable to know how the medical science and technological development works for achieving pregnancy with the help of third party reproduction. It introduced a new possibility for infertile couples to have genetically linked child across the globe. To understand the modern scientific development of ARTs and to know about the entire treatment of infertility, the researcher had visited to three (3) significant hospitals in Guwahati, namely Pratiksha Hospital, Hengerabari, Borbari, Dispur

IVF & Fertility Clinic, Ganeshguri, Dispur and the Institute of Human Reproduction, Bharalumukh.

It has established that considering the involvement of intended parent(s) to create an embryo, surrogacy can be divided into two types- Traditional Surrogacy and Gestational Surrogacy. In traditional surrogacy, surrogate mother's egg is fertilized with the sperm of the intended father to produce the embryo. Here, the surrogate mother is the genetic mother of the surrogate child,. Before advent of modern technology, it was practiced to beget a child. But presently, the use of this type of surrogacy is not in practice as is actually not in favour of law, which requires the sexual relationship between surrogate mother and the intended father. Gestational surrogacy is now a well accepted type of surrogacy, it allows surrogate mother only to carry the embryo up to the full term and give birth to the child. In this case the surrogate mother is not genetic mother of the child and it provides protection to both intended parents and the surrogate mother.

Furthermore, considering the monetary contribution, surrogacy is of another type- Altruistic Surrogacy and Commercial Surrogacy. In Altruistic Surrogacy, a woman agrees to be act as a surrogate without being compensated except medical reimbursement. It is typically a help to someone on love and affection. In Commercial Surrogacy, a woman agrees to act as a surrogate in exchange of monetary compensation and other benefits along with medical expenditure. This practice also commonly known as 'rent a womb' was legalised in India 2002 in order to promote medical tourism. It is also an issue that has many multifaceted

social, legal, moral and ethical involvements as it compromises with lots of moral values of the society. Considering the issues associated with it now the picture is yet not clear how India will deal with Surrogacy in coming days, the proposed bill seeks to ban commercial surrogacy, it is a matter of serious concern to stop a grown up multibillion dollar industry very easily.

It observed that surrogacy is something different from spermatozoa management like IUI. People most commonly preferred for AI and IVF surrogacy. And to avoid ethical and social complication, generally people accepted AI and IVF than traditional surrogacy. The research has felt that surrogacy is a long and very sensitive passage from very beginning to the end, full of inquisitiveness. And for commissioning commercial gestational surrogacy the intended parent must be in a sound financial position. Before act as a surrogate mother, she requires to undergo various medical and psychological evaluations. For begetting a child through surrogacy scientifically requires to proceed through various procedures, these are—

- Firstly, counselling to both the prospective intended parents and the prospective surrogate mother to make them aware about the techniques for achieving pregnancies, cost of the treatment, chances of success, medical risks, challenges and complexities they have to face during the entire period

- Secondly, required to undergo required medical examinations for diseases and the prospective surrogate mother also has to undergo psychological screening.
- Thirdly, entering into surrogacy agreement among three (3) or more parties which involves the intended parents, the surrogate mother, the gamete donor and the hospital concerned whereby the surrogate mother expressly agrees to relinquish all the parental rights after delivering the child for a monetary consideration.
- Fourthly, some couple preferred for AI as it is simple and low cost procedure. After preparation of semen of the male partner of the intended parents or from donor is utilized for IUI of the surrogate mother for achieving pregnancy. Here, the surrogate mother has to undergo ovulation stimulation and human gonadotropin injection is administered to her for follicle rapture. Then the manipulated spermatozoa is withdrawn by using a syringe and attached to an IUI catheter and the semen is injected daily.
- Fifthly, in IVF Surrogacy the egg of intended mother and the sperm of intended father are fertilized in a petri dish to form an embryo in the laboratory condition and after that the embryo is implanted at the womb of surrogate mother. In this process the intended parents can also be able to decide who will be the genetic mother and father of the child. There are numerous steps are involved in IVF Surrogacy, such as ovarian stimulation, preparation of surrogate, ovum pickup,

ART of male factor infertility, IVF of gametes, cryopreservation of embryos, embryo transfer into the womb of surrogate mother.

It has also observed the success rate of IVF Surrogacy and other methods of ARTs, which is depends on the factors like age of surrogate, quality of embryo etc... In US, the success rate is of about 75%. In Assam, while the researcher had visited to the Institute of Human Reproduction, Bharalumukh, Guwahati, the authority concerned informed that the success rate is 50-60%, in Pratiksha Hospital, Hengerabari, Borbari and Dispur IVF & Fertility Clinic, Ganeshguri, Dispur, the success rate is recorded as 40-45%. Along with success one more important thing has to observe in relation to infertility treatment that is health hazards arising out of ART treatments. Major health hazards are, OHSS, risk of multiple pregnancies, complications during ovum pickup, spontaneous abortion, ovarian cancer, ectopic pregnancy and risk of birth defects etc.

Apart from these, during the visit of the researcher to the hospitals, also able to know that ART has under gone various recent development, these are— Frozen Embryo Transfer (FET), Pre-implementation Genetic Screening (PGS), Pre-implementation Genetic Diagnosis (PGD), Oocyte Cryopreservation (OC), Blastosis Transfer, Robotic Surgery, 3D Laparoscopic Surgeries, Vaginal Incubator, Embryoscopic etc...

**Chapter-V** of this work is done on Socio-Legal Issues of Surrogacy- Altruistic Surrogacy vis-a-vis Commercial Surrogacy. In relation to surrogacy practice, it has become very clear that surrogate birth is very divisive both socially



and legally. It is true that surrogacy is a great contribution towards mankind provided by modern science and technology. And in the present position, though it is a most widely accepted medical procedure, one thing is very important to know whether surrogacy practice is ethically right or wrong. In India this practice has been gaining more popularity due to admirable medical infrastructure, high global demand, lack of firm law/regulation and easy accessibility of poor surrogate mother. The method of hiring a womb and having a child through surrogacy is like outsourcing pregnancy; in any jurisdiction tend to centre few legal questions irrespective of financial contribution-

- Whether surrogacy agreements are legally enforceable or not?
- Does it make a distinction on the basis of payment or simply reimbursed fee expenses for surrogate pregnancy?
- Conflicts regarding paternity, maternity, biological paternity, guardianship, inheritance of property.
- What happens if the surrogate mother changes her mind and refuses to relinquish the child after birth?
- Who will look after the child if the commissioning parent refuses to accept the child?
- What would happen if the surrogate child is born disabled?
- Is there any option to post-birth adoption for the acknowledgment of intended parents as the legal parents either before or after the birth?

- What happens, if the intended parent die or divorce or there is no one willing to take delivery of the child, during the period of pregnancy or previous to birth of the surrogate 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?

Surrogacy has extremely difficult effects in the society as whole including social, biological, cultural and psychological forms. Considering the prevailing position of surrogacy in India, it has observed that there is no harmony in between surrogacy arrangement and inadequacy exist in both form of surrogacy i.e. altruistic and commercial. It is mentionable that problems are not only with commercial surrogacy, it is persisting with altruistic too. Imposing a cover ban on commercial surrogacy in the name of protection of surrogate mother and surrogate children from exploitation will not address the actual problem associated with surrogacy. Additionally, it will practically create high probability of a secretive surrogacy market through illegal traffic and which will worsen the situation more. It is also not possible to ensure that non-payment will always lead to non-exploitation. Social reality is totally different from what is presuming ironically. No one can firmly promise that in altruistic surrogacy, woman will be never being forced and coerced to act as surrogate mother. Though the State is stepping ahead in favour of altruistic surrogacy only through close relatives, it will certainly create one more problem relating to bonding between the surrogate child and the

surrogate mother as they will stay in close propinquity. Many may not come forward for this. The another part of exploitation, irrespective of altruistic or commercial is that the medical procedure adhered for conceiving, dignity of reproductive labour, after effects of surrogacy arrangements including psychological and physical well-being of the surrogate mother engaged in the process.

During the visit of the research scholar to the Institute of Human Reproduction, Dr. Deepak Goenka, Director has forwarded his opinion regarding altruistic surrogacy as follows-

“I have to consider the present position of laws on surrogacy, which is itself creating a lot of confusion and unclear picture of surrogacy, such as-

- a) As for altruistic surrogacy, only close relative of intended parents can act as surrogate mother; however, it is not clear that who is a close relative to become a surrogate and practically the matter of emotional detachment of surrogate child and surrogate mother is totally ignored, while they are being members of a same family.
- b) Our society is not an Ethiopian one, so it is also doubtful that whether surrogate mothers are voluntarily comes forward to become a surrogate mother only on a humanitarian ground on altruistic basis.
- c) For the female who have no uterus or have removed uterus, in such cases, it is useless and unreasonable to wait for two (2) years after their marriage.”

He also asserted that apart from all these things, the proposed legislation, additionally totally ignored the medical perspective of surrogacy.

Dr. Kankan Sarmah, the Clinical Psychologist of IVF Centre, Dispur Polyclinic, Dispur has also forwarded his view regarding altruistic surrogacy as follows,

“The present position of law on surrogacy is not satisfactory at all. In altruistic surrogacy, the practical emotional detachment is not possible as it allows only close relatives to act as surrogate mother. This may give rise to various family issues than we presume now. Apart from these, the proposed legislation is also silent on proper procedure of documentation.”

Hence, it can be concluded that altruistic surrogacy is not supported by medical personnel, who are playing an important role in the practice of surrogacy arrangements.

In **Chapter-VI**, the researcher has worked on Judicial Findings. Judicial findings are functional parts of the judiciary to interpret legislation to decide the disputes as best according to legislative intent.

It has witnessed the rising and conflicting laws among parents in case of surrogacy practice as per different legal jurisdictions. Surrogacy is such a practice, in which, normally various legal issues are associated with irrespective of arrangement done within the country or outside of the country. Additionally, due to lack of uniform comprehensive law to deal with issues arising out of surrogacy

arrangement in international level and conflicting national laws of various countries are the most difficult and challenging factor to determine the rights and obligations of the parties concerned to the surrogacy arrangements. Gestational commercial surrogacy arrangements and International commercial surrogacy arrangements are very complicated in nature, which may lead to conflicts of parentage determination, nationality, and custody of surrogate children. Though surrogacy is an opportunity to fulfill the dream of begetting an own child, but one cannot avoid the complexities arising out of it after giving birth of the child. So to resolve the disputes the concerned party has to approach before the judiciary to call upon various inventive solutions for protecting rights and interest of the parties. The findings of the judiciary in various famous cases on issues relating to surrogacy have also been playing an important role in the process of progress of law on surrogacy by setting guidelines in this regard.

It has discussed eight (8) famous cases on various legal issues of various jurisdictions including India in Chapter-VI. The issues associated with surrogacy are become very complicated when the intended parents of one nation where surrogacy is prohibited, commissioned for surrogacy in any foreign nation where surrogacy is permitted. When there is ambiguity, confusion and law is quite, the judiciary always applied the general principle of welfare and best interest the children to decide the conflicts of rights among the stakeholders of the concerned surrogacy arrangement.

### **Prevailing Condition of Surrogacy and Legality of the Surrogacy (Regulation) Bill, 2020**

Motherhood is a great pleasure. Surrounding what scientific, medical and technological innovations have providing a ray of hope in the gap between the unattainable and attainable. These also keep away the difference between infertility and motherhood. AI, IUI and surrogacy have brought satisfaction to millions of barren couples. But now the problem is that while the barren couples are lawfully allowed to opt for IUI and IVF to beget child, surrogacy is not in such a position and always clubbed with indefinite numbers of issues. Though it has been practicing but due to lack of appropriate and inclusive legislation, judiciary has to interpret each and every case considering the fact and circumstance along with best interest of the surrogate children. Ever since commercial surrogacy was legalized in India, it has grown to become a big industry and considered as surrogacy capital of the world.

To deal with surrogacy already there have been, numerous bills were prepared but none of them become Act. Considering the consequences arising out of surrogacy arrangements, the Government of India has introduced and approved the Surrogacy (Reg.) Bill, 2016. The main intention of the bill is to completely abolish commercial surrogacy; however the bill was lapsed *sine die* due to dissolution of 16<sup>th</sup> Lok Sabha. Very recently, the Surrogacy (Regulation) Bill, 2016 was reintroduced in Lok Sabha on 15 July, 2019 and the Lok Sabha without delay passed it. But, Rajya Sabha referred the Bill to the Select Committee for further

deliberation in this session on 21 November, 2019 and yet to be passed by Rajya Sabha. Off late, fifteen (15) main changes proposed by the Select Committee of Rajya Sabha and presented its report in the Upper House on 5 February 2020.

Very recently, the Union Cabinet again has approved the Surrogacy (Regulation) Bill, 2020, incorporating those recommendations suggested by the Select Committee of the Rajya Sabha made on 26 February 2020.

The Surrogacy (Regulation) Bill, 2020 seeks to impose a total ban on commercial surrogacy in any form. But it allows only ethical altruistic surrogacy, where surrogate mother will not get any monetary compensation for carrying and giving birth to the child. The bill aims to issue a conventional political message about what kind of families are racially acceptable in India. It is a selfless arrangement where only medical expenses and insurance cover are provided to the surrogate mother.

The earlier bill provided prohibition of single male parents, homosexuals, couple live-in-relationship from becoming commission parents. But this Bill allows commissioning of altruistic surrogacy to heterosexual infertile Indian married couples, Indian-origin married couples and Indian single woman subjected to fulfillment of certain conditions.

The commissioning couple must establish their infertility before the concerned appropriate authority. The bill also prohibits surrogacy for producing children for sale, prostitution or other form of exploitation.

It is mentionable that though the Bill has some logical flows, which may rather make the problem more unpleasant than existing. As banning of commercial surrogacy is itself constitute certain problems. These are as follows:

First of all if this bill became law, it will create a major financial shake before the surrogacy industry which is budding in India. Already surrogate mother engaged in this industry would not receive any incentive for their pain and sufferings. Though financial involvement in surrogacy arrangement is criticized as economic exploitation, but the altruistic surrogacy will take away the prospect of earning of surrogate mother, who herself and families of whom are suffering from serious financial emergency. Apart from these to act as surrogate mother willingly by a woman in altruistic basis, how far it is acceptable practically, it is a big question. It would lead to another invisible coercion and further exploitation of women due to family pressure to act willingly, and gives rise to social, legal, emotional and ethical issues. And it is also mentionable that bearing a child for nine (9) months for another in exchange of money is a very honest and splendid way of earning in compression to prostitution or any other criminal activities.

Secondly, through this blanket bar on commercial surrogacy, it would lead to create an underground market for commercial surrogacy in India like the market which is running in case of organ donation. It is a well known fact that bans do not automatically bring to an end the act but serve the idea of approaching things into the black market. Illegal acts always demand more and cause more exploitation too. Such ban can create another avenue for human trafficking and illegal trading



of young women, capable of bearing a child. Hence, the proposed bill will rather lead to giving away their wombs under harsh and unfair conditions to the seedy clinics. This is a grave concern of human rights violations.

Thirdly, the ban on commercial surrogacy is honestly against the reproductive rights of women. The right to reproduction and parenthood has already been recognized by the judiciary under the right to reproductive autonomy. So an approach to ban commercial surrogacy will be violative of Article-21 of the Constitution of India, because in 2017, the Supreme Court of India upholds the right to privacy as a essential right under the Constitution of India in the famous *Puttaswamy's*<sup>8</sup> judgement.

Fourthly, the bill prohibits surrogacy for homosexual couples. On the other hand, the Supreme Court of India called for equality and condemned discrimination, stated that the protection of sexual orientation lies at the core of the fundamental rights and that the rights of LGBT population are real and founded on constitutional doctrine.<sup>9</sup> But the Hon'ble Supreme Court of India has recently, in *Navtej Singh Johar v. Union of India*,<sup>10</sup> on 6 September 2018, ruled unanimously that Section 377 of the IPC was unconstitutional "in so far as it criminalizes consensual sexual conduct between adults of same sex. It decriminalized Section 377, the 158 year old colonial law and the LGBT community has been accepted as the part of ordinary. Hence, it is very clear that the every one whether a

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<sup>8</sup> *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1

<sup>9</sup> *Ibid.*

<sup>10</sup> W.P. (CrI.) No. 76 of 2016 D. No. 14961/2016.

transgender, a lesbian, a gay or a divorcee has the right to reproduce, or not to reproduce, as per their wish to make their reproductive choice. If in this present form the bill became law, it will certainly creates a conflicting situation.

Fifthly, the bill provides surrogacy for heterosexual Indian married infertile couples, Indian origin infertile couples and single women (widow and divorcee). It also seeks to restrict foreigners, and couples in live-in-relationships from commissioning surrogacy. From this perspective, it is seen that it is a violation of Article 14 of the Constitution of India as it discriminating people on the ground of their age, nationality, marital status and orientation of sex. It is a settled principle that a rational nexus needs to be exists between the object of such law and the actions employed through the means of such discrimination.<sup>11</sup> But in regard to this, there appears unreasonable rational nexus between preventing a particular class of people from exercising their rights to use surrogacy and prevention of exploitation of women.

Sixthly, the Bill primarily proposes ethical altruistic surrogacy to allow altruistic ethical surrogacy to intending infertile Indian married couples only between the ages of 23-50 for women and 26-55 for men. Single parents cannot opt for surrogacy arrangements, though exception has carved out for widows and divorcees aged between 35 and 45 years to be a single commissioning parents. Couples should be citizens of India, or non-resident Indians, persons of Indian origin or overseas citizens of India. However, there are caveats for a couple of

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<sup>11</sup> (2009) 9 SCC 1

Indian origin opting for surrogacy arrangements that they cannot have a surviving child, either biological or adopted, except when they have a child with a mental or physical disability, or who suffers from a life-threatening disorder with no permanent cure. This unfortunate position must be confirmed by the appropriate authority with a due medical certificate from a District Medical Board. This really very shocking and culturally more insensitive than the previous phrase ‘infertility’ as used in the 2019 Bill, which is now substituted by the term ‘a medical indication’.

Seventhly, the bill also contradicts with the provisions of the Juvenile Justice (Care and Protection) Act, 2015 which allows foreign parents including single parent to adopt a child. It is also an unreasonable restriction seeks to put whereby preventing foreigners, single male parents from commissioning surrogacy to beget a child but the same categories of persons are allowed to adopt a child through CARA.

Law being an instrument for societal change, it has very significant role to play in every sphere of human life. A human life is full of dignity which has been recognized by the international documents, the Constitution of India and by the Hon’ble Supreme Court of India in various occasions. Changes to the existing legislative policy and proposed policy, according to the time and need of the society is also another important matter which requires more attention. Hence, considering the seriousness of the issues associated with surrogacy, which affects the whole society at some particular point, it needed to be handling with especial

care and protection. After incorporating enormous efforts and deliberations in the previous Bill of 2019, there are still many suggestions to be advanced and incorporated to produce a practically beneficial legislation to avoid practical shortcomings. .