

# **SOCIO-LEGAL DIMENSION OF ALTRUISTIC SURROGACY IN INDIA : A CRITICAL STUDY**

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## **CHAPTER-VIII**

### **CONCLUSION**

All living beings including human beings are mortal. Reproduction or procreation prevents all living beings from becoming vanished. Human procreation is also meant to search prospect for further mindful evolution to be proceeded on human being. It is a continuing process, which requires joint support of two persons with diverse sex structures for the act of procreation. So the society developed the concept of marriage, to control procreative love through a stable social institution that provides for the orderly bearing and rearing of the next generation.

Marriage is the foundation of family and is a life-long promise. It is a specific relationship between two persons of opposite sex intended to accomplish the social, psychological, biological and religious purposes within societies and cultures. Since ancient times almost in all civilizations, the procreation, bearing and rearing of children has been assigned to the institution of family through marriage. And the all major religions of the world such as Hinduism, Christianity and Islam have been giving supreme importance to reproducing a child by individuals. Hindu marriage is a religious sacrament in which a man and woman are bound in permanent relationship of physical, social and spiritual purposes. Whereby, it aims at begetting a son to save the father from going to hell. The Bible's theology of marriage speaks that marriage is a creation ordinance, God's

way of organizing human life in families. In the first chapter of Genesis, God tells Adam and Eve to “be fruitful and increase in number”<sup>1</sup>, which is considered as the first command of God to people to procreate children. In Islam, marriage is a religious duty, a moral safeguard and social commitment. It is considered that having children is one of the blessings of Allah. Though sexual orientation and procreation are natural phenomenon but have firm socio-legal control under the aspects of personal laws guided by various religions.

With the evolution of societies and considering the needs of the time, the concept of human right has also acknowledged right to procreation as also basic human right under international documents such as the UDHR, the ICCPR, the ICESCR, and the CEDAW etc. Besides, these various regional human right documents also acknowledged right to procreation, such as European Convention on Human Rights, 1950 and the American Convention on Human Rights, 1960. Furthermore, the right to procreation is explicitly mentioned under the African Charter on Human and People’s Rights, 1998 and the CRPD, 2006.

Likewise, the right to procreation is though not explicitly provided in the Constitution of India and it has been developed by the judiciary through various judicial interpretations. Some of famous cases in this regard are—*C.B. Muthamma v. Union of India*,<sup>2</sup> *Air India v. Nargesh Meerza*<sup>3</sup>, *B.K. Parthasarathi v. State of*

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<sup>1</sup> Genesis 1:28.

<sup>2</sup> (1979) 4 SCC 260

<sup>3</sup> (1981) 4 SCC 335

*Andhra Pradesh*<sup>4</sup>, *Suchita Srivastav and Anr. v. Chandigarh Administration*<sup>5</sup> etc...

It is also mentionable here that India is also a state party to various significant UN treaties such as the ICCPR, 1966; the ICESCR, 1966; the CEDAW, 1979 and the Convention on the Rights of the Child.

The right to procreation is one of the basic human rights of an individual and naturally takes place for begetting a child. However, unfortunately a large section of people is incapable to persuade this right due to medical or social infertility. For such infertile couple, the inherent desire of begetting a child remains unfulfilled and disappointed as a result of that they stay childless. Especially, in Indian Patriarchal society, childless women have to face the problems of social disgrace and as a result of what infertile woman ends her life or get separated or give consent for husband's second marriage. Childlessness has grave impact on personal, family as well as on social life. Nowadays the rate of cases of childlessness increasing day by day due to present hectic life style and career oriented late marriage. .

To defeat the problem of childlessness, various attempts have been made since ancient times. Earlier, couple had adopted only one alternative either to change his/her spouse or develop extra-marital relations to conceive child.

In ancient India, there existed a practice known as *Niyog Partha*, which was mainly followed by young widows, who did not have children when their husbands were not alive but wanted motherhood, and infertile women and women whose

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<sup>4</sup> AIR 2000 AP 156

<sup>5</sup> (2009) 9 SCC 1

husbands were impotent. The various instances of *Niyog Partha* is described in the *Mnusruti* and the *Mahabharata*. Apart from these *Mahabharata* and *Bhagavat Purana* also mentioned about various instances of today's IVF and Embryo Transplantation. There are also several more examples from scriptures that provide evidence of artificial insemination, administration of oral agents to induce ovulation, surrogacy, in vitro fertilization, embryo transplantation, and related artificial reproductive techniques were followed in ancient India.

In medieval India, there are several sculptures from temples that give a picture of the several stages of development of the embryo. Besides these, *Garbhpanishad* describes in detail the complete fertilization process and everything associated with child birth, pre and post birth care without any invention like microscope or ultrasound. Thus, it can be say that India was highly developed in every field in ancient times also.

In the meantime, the growth of civilization and legal system led to the appearance of adoption as a means for overcoming the problem of childlessness. However, it couldn't satisfy the intrinsic desire of an individual to beget a biologically related child. For which the exploration and experiments for suitable method in the field of human reproduction has been continuing. As a consequence, the Assisted Reproductive Technologies have developed to fulfill the desire of an individual to beget a child biologically related to the parent(s).

Artificial insemination (AI), In-Vitro Fertilization (IVF) and Surrogacy are most commonly used methods of Assisted Reproductive Technology to fulfill the

urge for begetting a biological child. But these are being criticizing on the ground of human rights, legal, ethical and moral. Among these available methods of ARTs, surrogacy is the most popularized and broadly accepted methods of human reproduction. Though, it is popular but at the same time it is also considered as most controversial from of ART.

Surrogacy is a form of third party reproduction in which a woman agrees to maintain a pregnancy for another person or couple to beget a biologically related child without sexual intercourse. The surrogate mother conceives, gestates and delivers a baby to the intended couple either for monetary compensation or love and affection. Usually, in surrogacy arrangements, the intended parents who desire to have a child may contribute their genetic material. Occasionally, genetic material may be contributed by the surrogate mother or by the gamete donor(s). Considering the involvement of monetary compensation and contribution of genetic material in surrogacy arrangements, there are different types of surrogacy arrangements exist.

In commercial surrogacy arrangements, surrogate mother is compensated for her services beyond payment of medical expenses.

In altruistic surrogacy arrangements, surrogate mother is not paid for her services and is perform only on the ground of love and affection as a gratuitous act.

In traditional or partial surrogacy arrangements, the surrogate mother contributes the genetic material and thereby she became biological mother of the surrogate children. In gestational or total surrogacy arrangements, the intended

parents or donors contribute the genetic material and the surrogate mother is only referred as gestational carrier not biologically related to the child.

The practice of surrogacy offers a variety of advantages in contrast to the other methods of ARTs and adoption of children. The advantages are-- it helps the individual or couple to beget a genetically related child to at least one of the parent, it can prevent transmission of hereditary diseases of intended parents to their biological child, it overcome the medical risks of the woman whose pregnancy involve high risks, complications of premature birth and is unable to carry a baby to full term, it breaks traditional family system whereby socially infertile, single person can beget a child, it avoid problems of mental and physical sufferings caused to infertile couples by prolonged treatment along with these it is an better option for people habituated with modern life style and willing to beget children through surrogacy due to their life style, career, profession etc... Under such circumstances, surrogacy has been emerging as a best and eye-catching alternative for couples who desire to beget a child since few decades across the globe.

In this context, it is felt that though ethical and moral values are important in social life but the immorality or unethical practice is not only the sole and justified ground for ban of surrogacy. The famous theory of Utilitarianism on the principle of the greatest happiness for the greatest numbers of people as forwarded by Philosopher Jeremy Bentham, could be applied in this regard. It states that whatever is beneficial to the greatest number of people is considered to be good, at the same time as whatever is beneficial to the least number of people is considered

to slightest good. From the perspective of this principle, surrogacy can be perceived as morally right because the intended parents get a much desired child and in case of commercial surrogacy, the surrogate mother is pleased with a handsome amount of payment. In case of altruistic surrogacy, the surrogate mother gives the utmost gift of new life with her satisfaction. Likewise, the harm principle of Jhon Sturat Mill, there is higher and lesser pleasures and the people for all time favor for the higher one.<sup>6</sup> From this context, though it is a controversy that whether surrogacy is moral or immoral but the popular acceptance of surrogacy practice reflects the will of the society where surrogacy practice can be considered as demand of the present society.

In relation to surrogacy practice, there is no accord among the international society. Countries has dissimilar legal framework, some of them have banned all forms of surrogacy practice, whilst some countries permits only for altruistic surrogacy practice and some other countries allowed all types of surrogacy. Most significantly, the divisive approaches in law and regulation in relation to surrogacy in various countries have led the appearance of cross border surrogacy practice in surrogacy welcoming countries.

The popular practice of surrogacy has been giving rise to a massive debate and controversy due to various issues such as social, ethical, legal, medical etc. associated with it. The conflicting interest of the parties concerned to the surrogacy

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<sup>6</sup> The goal of Jhon Stuart Mill's ethical theory of Utilitarianism is to justify the utilitarian principle as the foundation of morals. According to this principle, actions are right in proportion as they tend to promote over all human happiness.



arrangement is very complicated. Though it has various advantages, in the same time it is not free from criticism too such as, it is against the public policy, it amounts to exploitation of surrogate mothers and surrogate children, it amount to commoditization of women's body and children, it amount to trafficking of children, it amount to destruction of family structure of the Indian society etc... Thus, a section of people against the practice of surrogacy has advocated that the practice of surrogacy should be prohibited in India.

In India, surrogacy has industrialized as a million dollar business and become a major destination for commissioning surrogacy by foreigners also. Modern sophisticated technology and medical expertise, easy accessibility of surrogate women, low medical cost in comparison to other countries, and lack of strict regulation/legislation are the factors responsible for the growth of this business. There is also no comprehensive legislation to deals with such social, legal and moral issues in national as well as in international level. Here, in India, the ICMR National Guidelines is the only regulatory non-binding framework available to deal with ART Clinics. After that in 2009, the Law Commission of India has submitted its 228<sup>th</sup> Report, which has recommended the want for adopting a sensible approach for regulating surrogacy in India. To deal with ARTs including surrogacy the government of India has published the drafts of the Assisted Reproductive Technology (Reg.) Bill, 2008, 2010, 2014 but these are never became law due to inadequacy found thereon.

In the meantime, the Government of India enforced the new medical visa Regulation 2012<sup>7</sup>, whereby restricts foreign single parents, gay couples and unmarried partners to come India for Surrogacy arrangements. It permitted only duly married foreign couples, whose marriage should have continued for at least two (2) years to visit India on medical visas, not on tourist visas for commissioning surrogacy in India.

After that, the government of India issued one notification<sup>8</sup> on 4<sup>th</sup> November 2015, regarding instructions for commissioning of surrogacy. Under this notification, instruction issued for prohibiting import of human embryo for offering surrogacy; visa should not be issued to foreign nationals by the Indian Mission to visit India for commissioning surrogacy, permission should not be granted by the Foreigners Regional Registration Officers (FRROs)/ Foreigners Registration Officers (FROs) to Overseas Citizen of India (OCI) cardholders for commissioning surrogacy in India.

With an intention to banning commercial surrogacy and exploitation of surrogate women, the Surrogacy (Reg.) Bill, 2016 was approved; however the bill was lapsed *sine die* due to dissolution of 16<sup>th</sup> Lok Sabha.

Again, the Surrogacy (Reg.) Bill, 2016 was reintroduced in Lok Sabha on 15 July, 2019 and the Lok Sabha without delay passed it. However, Rajya Sabha

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<sup>7</sup> Published by the Government of India, Ministry of Home Affairs vide F.No. 25022/74/2011-F.I dtd-9<sup>th</sup> July, 2012

<sup>8</sup> Published by the Government of India, Ministry of Health and Family Welfare (Department of Health Research), vide No. V.25011/119/2015-HR dt-4<sup>th</sup> November 2015.

referred the Bill to the Select Committee for further deliberation on 21 November, 2019. After, the Selection Committee has presented its Report before the Rajya Sabha on the Surrogacy (Reg.) Bill, 2019 with many suggestions, on 26 February 2020, the Union Cabinet again has approved the Surrogacy (Reg.) Bill, 2020, incorporating the 15 major recommendations suggested by the Select Committee of the Rajya Sabha made on the Surrogacy (Reg.) Bill, 2019.

If the Surrogacy (Reg.) Bill, 2020 is became law in the proposed form, it will create more dilemma than ever. Through this, the government, in contrary to providing smooth regulation on surrogacy, only seeks to puts the cover ban on commercial surrogacy. It will also create a subversive market of surrogacy silently in one hand and the huge business of surrogacy will shift to other country from India, in other hand. Then again, the rich couples of India will fled away to other country for commissioning surrogacy. Thereby it will also create another threat which will disgrace the surrogacy business, as a result of which the rights of surrogate will not be protected from reproductive rights perspective. The main reason behind to come forward to act as a surrogate mother by women is money to meet their dire necessities of families, in such circumstances ban on commercial surrogacy will led rejection of deliberate form of labor. Apart from these, it is also under doubt how many of Indian women willfully come forward to act as surrogate from without anything in exchange. It also creates hardship to intended couple, who may not able to find out woman, who will willfully come forward to act as surrogate. Since the right to procreation is a fundamental human right and also inclusive to the fundamental right under Article 21 of the Constitution of India,

from this context, it is the duty of the state to uplift and protect it for each and every individual.

Again, exclusion of single parents (except widows and divorcees), same sex couples, foreigners, live-in-couples are seen to be unjust, unfair, unreasonable and discriminatory. While Indian law allows single parents to adopt a child and inter-country adoption, at the same time it seeks to restrict commissioning surrogacy for such person is unreasonable at all. While the Hon'ble Apex Court of India decriminalized homosexuality under Section- 377 of the Indian Penal Code,<sup>9</sup> at that time excluding them from commissioning surrogacy is not fair and reasonable.

Besides, all these, one important thing is that without bringing the law regarding regulation of ART Clinics beforehand, making the law for regulating surrogacy have no value. For performing IVF, ART Clinic is the place where the manipulation of gametes is required to be done.

The surrogacy arrangements are generally associated with the conflicts regarding parental rights, nationality, and custody of the surrogate children. Ever-increasing use of surrogacy practices has also raised various other issues like sex-selection, creation of designer babies and founding of non traditional families. These problems are not confined within the boundary of a nation; these are problems of international community. It is the duty of the state to make the adequate legal provisions to protect the rights and interests of the parties concerned to the surrogacy arrangement.

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<sup>9</sup> Navtej Singh Johar v. Union of India W.P.(CrI.) No.76 of 2016

Thus, the study discloses that, surrogacy is a fortunate thing to those persons or couples who desire to beget a genetically related child. Irrespective of the hardships and conflicts involved in surrogacy practices, it has been accepted globally. And India has become the fertility hub for individuals/couples seeking genetically linked child without any binding legislation in this respect. It is not possible to answer in one single sentence regarding acceptability of a particular form of surrogacy without understanding it very clearly. From the study and discussion has been carried on, certain comments, finding observations, innovations and recommendations required to put forward below for organizing the practice of surrogacy in a more acceptable way and streamlining the subject mainly in India.

### **8.1. Findings**

- i. Concept of Altruistic surrogacy and Commercial surrogacy:  
Altruistic surrogacy and Commercial surrogacy are two classes of surrogacy, classified on the basis of financial transaction between the surrogate mother and the intended parents.

Altruistic surrogacy refers to surrogacy arrangements in which the surrogate does not receive compensation for her services except medical compensation and other pregnancy related costs. It is a generous commitment to the interests of other. It deals only with fondness and care as consideration which is an important condition. In this surrogacy, the surrogate mother is a woman of close relation

to the intended parents. As per the new Surrogacy (Regulation) Bill, 2020, altruistic surrogacy means such surrogacy arrangements where no charges, costs, fees, compensation or financial incentives, are paid except medical and practical expenses and the insurance coverage for the surrogate mother.

Commercial surrogacy refers to surrogacy arrangements in which the surrogate mother receive compensation for her services along with medical expenditures. In this arrangement, gestational carrier is hired and made payment to carry a child in her womb for entire period of pregnancy. It is usually restored by rich infertile couples or individuals. In absence of slandered specific payment structure, the payment made to the surrogate mother is differs from case to case considering their profile. As the Surrogacy (Reg.) Bill, 2020, commercial surrogacy means such surrogacy services or procedures where surrogate motherhood is obtainable by giving payment, remuneration, benefit, fees, compensation or financial incentive in cash or kind. It also including selling or buying, trading in the sale or purchase of human embryo or gametes.

The public outcry in relation to the rights of conflicting interest, exploitation of surrogate women, legal tussle without any comprehensive law, following the transnational commercial gestational surrogacy, led to proposed the Surrogacy (Regulation) Bill, 2020 which widened the definition of commercial surrogacy by

banning selling or buying of human embryo, trading in the sale or purchase of human embryo or gametes for the purpose of surrogacy and contraventions of its provisions would attract imprisonment and fine.

- ii. Comparative study of Altruistic surrogacy vis-a-vis Commercial surrogacy: Basically, Altruistic surrogacy refers to those surrogacy arrangements where the surrogate does not accept monetary reimbursement. Only medical expenses are paid by the intended parents including travelling expenses for the purpose of surrogacy. It might be traditional or gestational.

Commercial surrogacy refers to those surrogacy arrangements where the surrogate mother is remunerated for her services further than medical reimbursement. The surrogate mother makes money from such kind of surrogacy arrangements. It is extensively considered by the rich and it is also seen that a considerable number of famous bollywood personalities (couples/single parents) have been fulfilling their desires to begetting child through commercial surrogacy as a fashion.

The Government of India seeks ban commercial surrogacy including cross-border surrogacy on the basis of moral, financial and emotional exploitation of poor needy women. It is mainly criticized on the reason that it allows poor fertile women to rent their womb for rich infertile couples and some have even termed as

modern-day slavery and a mockery of motherhood. In the context of financial exploitation, it is also not easy to say that whether it is bad in true sense as it is a possible source of income which is higher than their regular income. On the other hand, it needs a constructive discussion where social situation compels women, unwillingly to become sex worker or sale their organs for poverty.

Though these two types of surrogacy arrangement are there, but in fact there is hardly few numbers of cases where surrogate mothers were acted on purely altruistic basis. The worldwide incidents of surrogacy arrangements have taught us that surrogates are rarely 100% altruistic or 100% commercially motivated; very often there is a mixture of the two. It is very unfortunate that the sum received by a altruistic surrogate mother of UK in the name of 'reasonable expenses' is equivalent to that received by a surrogate mother in a commercial surrogacy arrangement, but the just difference is how being the payments are categorized and communicated.

After all, surrogacy is surrogacy, irrespective of the sums concerned. It is remarkably multifaceted in its social, biological, cultural and psychological implications. It is admissible that across the globe the surrogacy practice, both altruistic and commercial in forms are not free from loopholes. Both practices have need of strong regulation, the practicability of implementing such



burdensome regulations needs a strong measure of pragmatism in Indian context. A so called ban does not concentrate on an actual need and it could merely run the black market of surrogacy, which will make it more worsen than prevailing condition.

- iii. Legal position of surrogacy arrangements in international as well as in national level: As instances of commercial surrogacy have risen very rapidly, so its regulation is a matter of great concern. From this ever increasing market of surrogacy industry, clinics and personnel engaged in third party reproduction make huge profits. To deal with surrogacy practices, presently, there is no uniform approach available, a verity of approaches are practicing globally. The conflicting national laws give rise to inadequacy and uncertainty regarding safeguards for surrogates and commissioning parents.

In international level, due to lack of effective international laws to deals with surrogacy practices has given rise to issues of exploitation, violation of procreative autonomy, stateless children, conflicting parental rights, custody of surrogate children, and several other issues. To resolve such problems and organize the uncertainty and ambiguity created by various national laws a Hague Convention on inter-country surrogacy arrangements has been proposed but this convention has not attained conclusiveness till now. In some countries such as china, France, Germany, Switzerland etc...

surrogacy arrangements are expressly prohibited by law. In some countries such as Argentina, Belgium, Brazil, Ireland, Japan etc... it is largely unregulated legal status of child born out from such an arrangement will be determined by the general laws concerning legal parentage. Again there are some countries, where it is expressly permitted but are conducted in accordance with the local laws, 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 different approach existing in countries has produced a vulnerable situation in inter-country surrogacy arrangements where there are no legal safeguards for the parties concerned to the surrogacy arrangements.

In India, except the ICMR National Guidelines there is no any regulatory framework to deals with surrogacy. It is the only regulatory non-binding framework available to deal with ART Clinics. After that the 228<sup>th</sup> Report of Law Commission of India has submitted in 2009, which has suggested the crave for adopting a reasonable approach for regulating surrogacy in India. Thereafter, to deal with ARTs including surrogacy the government of India has published the drafts of the Assisted Reproductive Technology (Reg.)

Bill, 2008, 2010, 2014, 2016 but these are never became law due to insufficiency found thereon. Very recently, the Surrogacy (Reg.) Bill, 2020 was approved by the Union Cabinet on 26 February 2020 with an intention to banning commercial surrogacy and exploitation of surrogate women. However, it is yet to be passed by Rajya Sabha. And to regulate the ART services, the Union Cabinet has approved the ART (Reg.) Bill, 2020 to monitor medical procedures used to assist people to achieve pregnancy. And it is very wise to bring the ART Bill before the Surrogacy (Reg.) Bill, 2020.

- iv. Socio-legal issues involved in altruistic surrogacy: It is true that India has emerged as international hub for commercial surrogacy due to various reasons. For which the government of India has seeks to ban commercial surrogacy on the grounds of exploitation of poor and needy women. But one cannot deny that except financial transaction all other issues involved in commercial surrogacy are associated with altruistic too. Sometimes it is more worsen than commercial surrogacy under the demanding patriarchal families' structures, where women are hardly to make any decision. Till now, majority of women in India within their home has been suffering from physical cruelty, mental cruelty and domestic violence. Under such circumstances, how can it make sure that altruistic surrogacy with willing woman without compensation is free from abuse?

News was reported on August 2, 2014 about death of an Indian Surrogate R Lal (29).<sup>10</sup> It was reported that irrespective of her consent, she was compelled by her husband and in-laws to act as surrogate mother for her sister-in-law in order to compensate the shortage of dowry brought by her. Very unluckily on July 26, 2014 at a hospital in Ranchi, Jarkhand, she was passed away due to a massive heart attack while delivering a baby boy. This is just one of the examples, it is not known how many of such cases being cramped within the home non- reported. In such situation, no one can deny about forceful emotional, socio-psychological coercion and patriarchal forces to make them surrogate mother for the in-laws family without her wilful consent. Thus, altruistic surrogacy within close relative would not ensure non-exploitation of surrogate mother rather than it will run more secretively from the legal preview as private household agreement.

Likewise, it is too very difficult to ensure the willingness of a woman, as in Indian patriarchal family no one can easily deny the probable coercion and violence of in-laws families on women to become a surrogate.

In the context of altruistic surrogacy, it is necessary to know, Can a close relative or friend or willing woman, viewed as a

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<sup>10</sup> The Telegraph, August 2, 2014

prospective surrogate mother, provide genuine informed consent? Is she conscious about the emotional collision of giving up the baby immediately after birth that she has carried for nine months? Can the prospective surrogate mother be informed of the process and understand the details of the pregnancy difficulties, risks associated with ART, psychological consequences for herself, the child and others? Can she be informed of the terms and conditions of a surrogacy contract and its implications on relational complexities in future? Can the prospective surrogate mother foresight the ethical inferences for the community, about which she may have a genuine interest?

There can be various problems may be raise due to breach of contract by either party of the surrogacy arrangement, what would be the remedies for intended parents, while the surrogate mother voluntarily abort without the consent of the intended parents? What would be the remedies for either party to the contract whilst other not willing to continue with the terms and conditions of the agreements?

- v. Compatibility of current policy and proposed legislation: It is true that the legislative intent always focused to maintain the societal values and norms existing in a particular society. Since law is an tool of social transformation, it required to be legislating as per the need of the time and demand of the contemporary world. Thus, it is an

important matter to discuss to know the compatibility of current existing policy and proposed legislation to resolve the problems associated with practice of surrogacy in the present Indian society.

Non-mandatory ICMR National guidelines, 2005: The National Guidelines, 2005 of ICMR for regulating the conduct of ART Clinics offering surrogacy services in India is the only existing regulation. It is only recommendatory, not mandatory one. The guidelines are directive in nature and there is no definite roles and responsibilities which to be observed by the ART Clinics, for what these are frequently violated by the ART Clinics.

Limiting reproductive choices: The proposed Bill, 2019 permits ‘only the close relatives’ of the intended couple to act as surrogate mother. However, it does not state clearly who are the close relatives and to whom included. It limiting the availability of women to be act as surrogate mother and thereby it restricts surrogacy. It strikes at the right to procreate and procreative autonomy of a couple to found a family. It is also a very unrealistic provision that all such infertile couple must get a married willing woman between age group of 25 to 35 years with one child, to act as surrogate without any compensation.

No procedural mechanism: There is any prescribed procedure of entering into the altruistic surrogacy arrangement in the proposed bill or rules on the administrative legal compliance.

Non applicability of contractual legal remedies under the Indian Contract Act, 1872: It is urged that surrogacy arrangement should be comprehensive and legally binding. Though commercial surrogacy is being banned in most of the countries, as it raised the questions of validity and enforceability of such contracts; but the same is linked with altruistic surrogacy also. If the surrogate changes her mind and refuses to continue with the pregnancy, can she be forced to go through it or refuses to hand over the child after birth? Again if adversely, the intended parents refuse to accept the child after birth for any reason, what would be the remedies available for the breach of such agreement? Though surrogacy agreement is sought to be governed by the Indian Contract Act, 1872 but there is limitation in application of contractual remedies for breach of contract.

## **8.2. Recommendations**

1. The right to procreation is a basic human right. It is required to be defined explicitly as aspect of the right to personal liberty and privacy under national laws and as well as under international law. And to provide clear and specific provisions to give true effect towards the right of individual to found a family and to decide on the number of spacing

children. Additionally, it is also necessary to ensure the right to enjoy the profit of scientific and technological advancement as documented by the international documents.

2. The extent of the right to procreation ought to be comprehensive to embrace the right to admittance to ARTs for having a genetically related child for individuals experiencing medical and social infertility.
3. Since the right to procreation is basic human rights of all individuals, hence the practice of surrogacy is requiring comprehensive and explicit legal protection to bring uniformity in surrogacy arrangement at international level. Due to a mesh of conflicting national laws and the absence of effective international law in relation to cross border surrogacy arrangements creates the problem parentless and stateless children. So, there is an urgent need of international law on surrogacy.
4. Though various international instruments has recognized that the right to reproduction and right to reproductive health of individuals, but unfortunately the medical infertility is a problem of reproductive system, for which couples or individuals unable to achieve and maintain a desire pregnancy. WHO has describes infertility as a global public health issue. So to protect the reproductive right and right to reproductive health of individual, it is necessary to treat infertility as a disease and need it to be treated as any other disease. Hence, it should be the duty of the state to provide treatment in for all needy individuals and inclusion of the same in National Health Scheme in government



hospitals. The treatment of infertility including surrogacy is an expensive one and practiced by private hospitals; only rich people can go for it though right to found a family is a basic human right of each individual. Thus, the government should make necessary arrangements to provide the treatment of infertility including surrogacy to poor in government hospitals.

5. The right to commission for surrogacy and the right to become surrogate mother for the intended parent(s) must be recognized as a component of right to personal liberty and privacy. Nevertheless the state could be imposing reasonable restrictions on the exercise of these rights by the individuals. Though, the practice of surrogacy is being criticized as unfair or unethical, but across the globe it is widely accepted and popular. Therefore, to give effect and protect the right to procreation including the right to use Assisted Reproductive Technology, it needs to be settled through a proper and comprehensive legislation. Accordingly, after various consecutive approach, the Government of India has introduced the Surrogacy (Regulation) Bill, 2020 which instead of regulating the practice of surrogacy in a democratic and organized way seeks to ban commercial surrogacy completely, which is practically not possible too.
6. Before passing the Surrogacy (Regulation) Bill, 2020, it is very indispensable to brought forth the ART Bill, 2020. Because before going for commissioning surrogacy, it need embryos, and embryos are

cultured in various assisted reproductive clinics. ART Bill primarily deals with technical, scientific and medical aspects, including the storage of embryos, gametes, oocytes etc. as contained in the Surrogacy Bill. So regulation and supervision of all assisted reproductive clinics and assisted reproductive technology bank must be preceded by law on Assisted Reproductive Technology (ART).

7. It is true that commercial surrogacy raises a number of very serious issues. Because this practice is structured as a free market motivated commercial venture which can give rise to abuse of surrogate mother as well as her rights. To regulate the same the Surrogacy (Regulation) Bill, 2020 is being introduced to legalize ethical altruistic surrogacy. However, practically it is also doubtful through the provisions states whether it will make surrogacy exploitation free. Hence, for bringing flexibility to the rigorous provisions of the proposed bill, it is recommended that instead of recognizing purely altruistic or commercial surrogacy should recognize a professional model of surrogacy, combination of both altruistic and commercial surrogacy, namely altruistic cum compensatory or gratuitous cum compensatory surrogacy. Because only unpaid surrogacy cannot prevent exploitation of surrogate mother whilst many of the other issues relating to commercial surrogacy are associated with altruistic surrogacy too. To keep away from exploitation and objectification of women and children, it is propose that surrogacy should be prearranged according to the norms of

professions such as nursing, teaching, and social work. Like these professions, the good surrogate mother would be always provoked by care for her clients with a desire to do something meaningful and in such case it would also be reasonable and just to compensated for her labor. If altruistic cum compensatory or gratuitous cum compensatory surrogacy could be recognized, it will provide two options to the intending couple, firstly they may either avail the service of surrogacy from close relative with/ without payment of compensation or they may avail the service of surrogacy from the registered surrogacy clinics with payment of compensation. It is also required to fix a standardized amount of compensation for service of surrogacy.

The notion of 'ethical altruistic' should also be viewed broadly, as the Bill seen it as a narrow view of breeding, what constitutes a family- only a heterosexual married couple.

8. The proposed Surrogacy (Regulation) Bill, 2020 should be altered like flexible model of altruistic surrogacy practicing in foreign jurisdiction instead of the proposed strict rigorous model of altruistic surrogacy limited to insurance and medical expenses. In popular altruistic jurisdictions practicing countries such as in UK under the Human Fertilization and Embryology Act (HFEA) 2008 and in Canada, under the Assisted Human Reproduction Act 2004. In those countries, altruistic surrogacy permits for a compensated model altruistic

surrogacy arrangements. It allowing “reasonable compensation” to the surrogate mother in relation to surrogacy, including a collection of costs as lost wages, child care, crèche and local travel.

9. Infertility is generally defined as the inability of a couple to get pregnant despite having unprotected sex for at least a year. The WHO and previous ART Bills also mentioned the period of infertility of one year only. However, the definition of infertility as provided under the Surrogacy (Reg.) Bill, 2019 refers the incapability to conceive after five years of unprotected sexual relationship. Such unjustified limitation would not spoil only the chances of parenthood to many couples who get late marriages, women whose uterus is removed, early menopause but it also violate their basic human rights i.e. the right to procreation.

But the proposed Surrogacy (Regulation) Bill, 2020 now substituted the term ‘infertility’ with cruel terminology ‘a medical indication’, which at first look includes more comprehensive medical conditions in addition to infertility. In reality, it is seems to be keeping the stigmatic classification for both parties to a surrogacy arrangement. Hence, it could also be argued that the difference remains unclear.

10. The proposed Surrogacy (Regulation) Bill, 2020 permits willing woman in the place of only the “close relatives” of the intending couples to be act as surrogate mother. However, it is too difficult to affirm that how many of woman come forward wilfully to act as a surrogate mother

without any compensation. It is a barrier in access to procreative autonomy of couples to have genetically linked child through surrogacy. Besides these, this provision curtailing the accessibility of women to be act as surrogate and restrictive the scope of surrogacy. It is also impractical that all intending couples would get a wilful woman between age group of 25 to 35 years, who has had one child earlier and is willing to act as surrogate without any compensation. Therefore, surrogacy is restricted to the willing woman is not justifiable and reasonable and it needed to be review. The government cannot hinder the rights and privileges of individuals from choosing the mode of obtaining motherhood or fatherhood.

11. The proposed Surrogacy (Regulation) Bill, 2020 is necessary to reconsider again because it creates dissonance with the provisions of the Constitution of India. It excludes the single parents (except widows and divorcees of certain age group), homosexuals, live-in-couples, foreigners, from commissioning surrogacy. Having a child is a basic human right recognized by various international instruments. And India is a signatory to most of the international human rights conventions which acknowledges the procreative rights and autonomy to all the individuals and inter-country adoption to all irrespective of nationality including single parents, so, this provision undoubtedly amounts to discrimination. It also violation of Article 14, 15 and 21 of the Constitution of India on the ground of nationality, marital status, age

and sex etc. The Judiciary of India has also recognized it as basic human right. Therefore, it is required to allow the service of surrogacy for all without discrimination. Besides these, the Hon'ble Supreme Court of India recognized the transgender as the third gender<sup>11</sup>, so the service of surrogacy is also need to provide to the transgender persons without any discrimination on gender identity. And for protection of rights of transgender persons, their welfare and other related matters, the Government of India has already passed the Transgender Persons (Protection of Rights) Act, 2019, which is commenced from January 10, 2020. One more thing required attention that though government banned surrogacy for foreigners, some foreigners who were earlier had put some embryos in deep freeze for future use, subsequent to the ban they asked for embryos; but the Bill 2020 restricts the export and import of embryos anymore, which would jeopardize the entire effort made by the gamete donors. Therefore, the government should take care of it reasonably and required to dispose the matter amicably.

12. Though the Surrogacy (Regulation) Bill, 2020 provides for the certificate of eligibility of the surrogate mother and the certificate of essentiality of the intending couple for initiating the procedure of surrogacy from appropriate authority, however it is quiet on the procedure of surrogacy arrangement or rules on the administrative observance including attestation, stamp value, requirement of witness

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<sup>11</sup> *National Legal Services Authority v. Union of India*, WP © No. 400 of 2012

etc... to make responsible the parties. Therefore, there should be systematic procedure for entering into surrogacy arrangement. Hence, rather than penalizing surrogacy, the woman providing a womb must be secured with a contract, ensuring proper insurance and medical checks.

13. Counselling and medical test of the intending couple and the surrogate and her husband, are two important steps before starting the scientific procedure of surrogacy. Counselling is imperative to both the parties to understand the procedure of surrogacy and challenges such as physical, legal, psychological etc... associated to it. Likewise, medical test of the surrogate, her husband, intending couple, gamete donor, if any of various diseases especially for sexually transmitted diseases such as HIV/AIDS. However, in the proposed Bill, 2020 requires only medical fitness certificate of the surrogate and written informed consent of the surrogate in her language. Therefore, there in the bill, should have specific provision for counselling and medical test of the stakeholders before initiation of the surrogacy procedure.

14. In the process of surrogacy, after completion of IVF, the embryos are transfer to the womb of the surrogate mother to achieve pregnancies. And to achieve successful pregnancy the doctors transfer as many embryos into the womb of the surrogate mother, which would lead to multiple pregnancies and treating with it to foetal reduction, is very risky to the surrogate mother and unborn child. However, the proposed Bill, 2020 does not prescribe any provision regarding the numbers of

embryos transfer in one sitting. But as per the ART Bill 2010 not more than three embryos can be transferred in one sitting except exceptional circumstances. Therefore, it should be need to clearly specify what numbers of embryos will transfer in one sitting and also to numbers of cycles for transfer of embryos into the womb of surrogate irrespective of the result.

15. The process of surrogacy is a very complicated and associated with various complexities of health of the surrogate mother. During and after completion of the process, the surrogate mother has to suffer various pregnancy related complications. And simultaneously, risk of birth defects has also been common in case of ART infants in comparison to naturally conceived infants. However, to deal with future protection and security of the surrogate mother and surrogate children, there is no sufficient provision. The proposed Surrogacy (Regulation) Bill, 2020 only speaks about insurance coverage to the surrogate mother for a period of thirty-six (36) months only covering postpartum delivery complication from an insurance company or agent recognized by the Insurance Regulatory and Development Authority (IRDA) under the Insurance Regulatory and Development Authority Act, 1999. . Therefore, it is need to insured properly by insuring the surrogate mother for life time covering all after effects of surrogacy upon her health. And similarly, the surrogate child has to be required to insure if any he or she born with any congenital disability or abnormality.



16. To avoid abandonment of the surrogate child in case of unwanted situation such as death or separation of the intending couple, there should be a specific provision in the surrogacy legislation who will take the custody of the child and about the compensation required for bringing up the child. Though the Surrogacy (Regulation) Bill, 2020 provides for the imprisonment of minimum 10 years and fine up to ten (10) lakh rupees to the intending couple, if they will abandon the surrogate child, whatsoever may be the reason. Therefore to deal with such problems, there should be provision for regarding custody of the surrogate children, who will take care of the child. As it is very essential for the welfare and protection of the best interest of the children, which has been recognized by the Convention on the Rights of Child (CRC). An unclear and uncertain picture of future of would lead the innocent surrogate children to a very worse position, whose consequences cannot be foreseen from a particular point of view.
17. The Surrogacy (Regulation) Bill, 2020 has empowered the Metropolitan Magistrate or Judicial Magistrate First Class (JMFC) to deal with the matters relating to surrogacy. However, considering the sensitivity, emotion and multifaceted issues relating to formation of a family, it is necessary to provide speedy justice in such matters in the interest of justice. Therefore, it is recommended to provide provision for establishment of the special Surrogacy Fast Track Court at District, State and National level.

18. To ensure the protection of the surrogate women from exploitation by the intending couple, surrogacy clinics and mediators and to protect the right of reproductive autonomy over her body, it is need to be protect expressly through surrogacy legislation with a view to protect from exploitations and to enable her to take decision freely over her body as her wish. Though the Surrogacy (Reg.) Bill, 2020 provides for penalties for exploit or cause to be exploited the surrogate mother in any manner, it is important to mention from what kinds of exploitation the surrogate mother will be protect. To provide appropriate protection of rights of surrogate women and for the welfare of the surrogate children, it is felt necessary to set up a separate authority under surrogacy legislation such as CARA under the Juvenile Justice Act, 2015 to deals with entire process of adoption including inter-country.

### **8.3. Recommendations for Amendments in Existing Laws**

Along with the foregoing recommendations, to strengthen and to avoid difficulties, conflicts and challenges which are arising out of surrogacy practices, it is need to amend certain provisions of existing other laws too. These are ---

1. Birth registration is an important process, provides the legal recognition of the child by recording child's birth in the civil register by the government. Therefore, it is require amending of the Registration of Birth and Death Registration Act, 1969 to avoid the problem of legal recognition of the surrogate children, in order to register the birth of

surrogate children and the name of intending parents as the legal parents of the surrogate child born out of surrogacy arrangements.

2. To avoid needless query regarding legality and enforceability of surrogacy agreement, it is need to amend the Indian Contract Act, 1872 by inserting specific provision in relation to surrogacy contract. Since, the purpose of surrogacy agreement is to have a child which is a fundamental human right, perceived by national and international laws. Thus, it is submitted that the object of surrogacy agreement is lawful as it has consonance with the national and international human rights laws. Next if came to the matter of consideration of surrogacy agreement, in commercial surrogacy, the compensation is the consideration and in case of altruistic surrogacy, though there is no consideration but the surrogate mother acted for love and affection, which is fall under Section 25 of the Indian Contract Act, 1872. Therefore, there is need a clear provision for declaring all surrogacy agreements fulfilling the essential ingredients of a valid contract shall be considered as contract for all purposes. And the provision regarding remedies for breach of surrogacy contract are also need to be included in the Indian Contract Act and the Specific Relief Act, 1963.
3. The Surrogacy (Regulation) Bill, 2019 under relevant provision vests the parentage of the surrogate children in the intending couple who commission for surrogacy and also provides that the names of the intending couple to be mentioned as the legal parents in the birth

certificate. But the provision conceptualized regarding parentage under this Bill creates inconsistency with the established rule of parentage and presumption of legitimacy of birth for all legal purposes provided under the Indian Evidence Act, 1872. Under Section 112, it states that a child born during the continuation of marriage, the husband of the woman giving birth is presumed to be father of the child. So, as per this the surrogate mother and her husband may be legally presumed as legal mother and father of the surrogate child. Now it led to more complications regarding legal parentage of the surrogate child. Therefore, the particular provision is needs to be amended and resolve the matter by providing some exception to it.

4. To establish the rights of the surrogate children in relation to inheritance as natural and legitimate children, the Indian Succession Act, 1925 and the Hindu Succession Act, 1956 are need to be amending to help the surrogate children to succeed the property of the intending parents as Class- I heirs.
5. For the welfare of children, it is required to bring the surrogate children within the scope and ambit of the JJ Act, 2015. This Act only provides guidelines for governing adoption procedure of orphan, abandoned and surrendered children only. Therefore, to provide protection from abandonment and exploitation of the innocent children it is necessary to include the surrogate children under the Guidelines of CARA.

6. To protect the close relatives of intending couple from acting as surrogate mother in the name of altruistic surrogacy, on compulsion or forcefully by the family members or her husband from harassment and exploitation, it is required to amend the Domestic Violence Act, 2005 by inserting it as violation too.
7. Law has a protean face. It is dynamic and changes with the needs of the changing society. Thus, due to occurrence of changing nature of offensive activities in relation to surrogacy, it is needed that the Government of India by way of amendment of the Indian Penal Code, 1860 could recognize Forced Surrogacy, Abandonment of Surrogate child and Cruelty for Surrogacy as offence.
8. The Maternity Benefit (Amendment) Act, 2017 introduces twelve (12) weeks of maternity leave to commissioning mothers who uses her egg for the creation of embryo and has a child through surrogacy while for natural biological mother it is twenty-six (26) weeks. Hence, it is suggested that the maternity leave should be granted for at least 18-20 weeks in case of intended mother also to take proper care of the surrogate child. Besides this, the maternity leave should be granted to the intending mother who uses the donor egg too as the aim of providing this leave is to ensure the proper care towards new born babies.

Likewise, it is suggested that the proposed Paternity Leave Bill also to include intended father under the ambit of this legislation who beget a child through surrogacy.

9. To establish the basic human right to have a child by the transgender persons through ART procedures, it is suggested to amend the Transgender Persons (Protection of Rights) Act, 2019 in order to include provide clear provision regarding use of ART services.

This research work is mainly focused on the study of social and legal aspects of altruistic surrogacy in India as well as legal provisions, policies and legislation available on surrogacy in various nations and in India along with the judicial findings on different issues relating to surrogacy of different jurisdiction and in India. This study also critically discussed about the acceptability of altruistic surrogacy in India in the proposed form.

All the previously mentioned recommendations might be integrated explicitly in the proposed specific legislation for regulating surrogacy in India. Mere removal of the commercial aspects in the current surrogacy arrangements does not remove the chance of exploitation. It requires dealing with efficiently the larger social, legal, economic, physical and psychological issues that continue to challenge the wellbeing and protection of both the surrogate mother and the surrogate child. So, in the proposed legislation, the rights of the parties concerned to the surrogacy arrangements must comprehensively be formulated to cope up with all the difficulties raised in such arrangements before it became law.