

SURROGACY AND HUMAN RIGHTS.
Dissertation under the guidance of Ms Kavya Salim.

SURROGACY AND HUMAN RIGHTS

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**This dissertation is submitted in partial fulfillment of the degree of
B.B.A., LL.B. (Hons)**



College of Legal Studies

University of Petroleum and Energy Studies

Dehradun

2015

CERTIFICATE

This is to certify that the research work entitled **‘Surrogacy and Human Rights ’** is the work done by Ashima Das under my guidance and supervision for the partial fulfilment of the requirement of B.B.A., LL.B. (Hons.) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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DECLARATION

I declare that the dissertation entitled, **‘Surrogacy and Human Rights’** is the outcome of my own work conducted under the supervision of Ms. Kavya Salim, at the College of Legal Studies, University of Petroleum and Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

ASHIMA DAS

Date

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ABBREVIATIONS

- ICMR- Indian Council of Medical Research
- ART- Assisted Reproductive Technique
- UN- United Nations
- IVF- In Vitro Fertilisation
- NRI- Non Resident India
- PIO- Persons of Indian Origin
- MoHFW- Ministry of Health and Family Welfare

TABLE OF CASES

- Jan Balaz v. Anand Municipality, AIR 2010 Guj 21.
- Baby Manji Yamada v. Union of India, (2008) 13 Supreme Court Cases 518
- Rex and Y (Foreign Surrogacy), 2008 EWHC 3030 (Fam) U.K.
- Johnson Vs. Calvert, 1961 CAL. Appl.4th 1410 (1998)
- Buzzanca v. Buzzana, (1993) 5 CAL 4th 484
- Re Baby, 537 A.2d 1227 (NJ.02/03/1988)

ACKNOWLEDGEMENT

This Dissertation titled **‘Surrogacy and Human rights’** has been one of the most significant experiences in my life. I would like to thank **Ms. Kavya Salim** for guiding me very patiently in the course of the completion of this work. Her knowledge and patience were of great help.

Mentorship under her has been a great learning experience both academically and other wise.

In addition to that, I would like to thank all the sources without whose references this work wouldn't have been complete.

Lastly, I thank my College and University for providing me with an opportunity to research on a topic like this which is of immense international importance.

INTRODUCTION

“When money is exchanged for pregnancy, some believe, surrogacy comes close to organ selling or even baby selling.” - Thomas Frank

For defining Surrogacy, the Warnock Committee gave the definition as “a practise whereby one woman carries a child for another woman with the intention of handing over that child after birth to the other woman.” This itself implies that the carrying woman acts at the request of the other woman who usually is unable to have a child herself.

A woman who conceives, carries on the gestation period and then subsequently on the term ending gives birth to child, all done on behalf of the woman seeking to have a child via other means other than herself carrying the child in her womb and is seen as the “social and legal ”and to whom subsequently the child’s custody is handed over.¹⁾

Commercial surrogacy has been legal in India since 2002.

Commercial surrogacy can be said to be the process in which an individual or couple pays a fee to a woman in exchange for her carrying and delivering a baby. After birth, the child is handed over to the commissioning couple or individual, either privately or via a legal adoption process. It is usually resorted to by couples with fertility problems, same-sex couples, and single people who wish to be parents seeking surrogate mothers. Partial surrogacy would be a case when the surrogate mother inseminates herself with the sperm of the commissioning father. On the other hand, a full surrogacy is when the embryo is produced “in vitro ”by means of the commissioning couple's egg and sperm and is relocated to the surrogate mother's uterus.

India is fast emerging as a favourite destination for international surrogacy and a sought after choice in surrogacy-related fertility tourism. Indian surrogates have been

¹⁾ For reference “Boon for Paid Mothers ”Or “Human Rights Violations ”: An Exploratory Study On Commercial Surrogacy In India, available at www.legalservicesindia.in [accessed on March 20, 2015].

more and more popular with in-fertile couples in industrialized nations because of the relatively low costs. Also Indian clinics are also at the same time becoming more competitive, not only just in the pricing, but also in the hiring and retention of Indian females as surrogates. These Surrogacy Clinics charge patients roughly a third of the price as compared with the going prices in the UK and other European countries.

Surrogacy in India is relatively low costing and the legal environment is favourable to the people seeking a child born out of such arrangement.

In 2008, the Supreme Court of India in the Manji's case (Japanese Baby) held that commercial surrogacy will be permitted in India with a bearing to the Legislature to pass an appropriate Law governing Surrogacy in India. Currently, the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics Guidelines are the guiding force for the same. Acknowledging and giving due cognizance to the Indian apex court directions, the Legislature enacted the ART BILL²⁾, 2008 which unfortunately is still pending. The law commission of India has specifically reviewed the lack of Surrogacy Laws keeping in mind that in India that India is an International Surrogacy destination.

Also recently the Surrogacy Law has been singly drafted and presented in the Parliament by a member.

HISTORY IN INDIA

Surrogacy can be said to be continuing in India since ancient times. Ever since Kanupriya also called Durga, the world's second and India's first In Vitro Fertilisation

²⁾ Assisted Reproductive Technology Bill, 2008

(IVF) baby was born in Kolkata on Oct. 3, 1978; the field of assisted reproductive technology (ART) has developed rapidly.

But legally the laws in India that relate to surrogacy are still in the nascent stage. At present the agreement between the parties based on the ART Guidelines are the guiding force. The codified law is still to be adopted and enforced. With the recent growth in the quantity of the Recipients or Intended parents opting for surrogacy here, India is fast emerging the much sought after surrogacy destination.

With the recognition and acceptance of same sex marriages/union and the recognition of the basic human rights of all to have family and children, the need for surrogacy has increased manifold. However, at the same time nations all across the world are reproachful to commercial surrogacy as it is believed to result in commercialization of human reproductive system and co-modification of children. For reasons of its various socio-ethical reasons, surrogacy has become a topic of profound interest amongst the government of different nations, medico-legal luminaries as well as the public at large.

Reasons For Surrogacy:

The intended parents/Commissioning Couple may enter into a surrogacy arrangement because of:

- Infertility: male impotency or female infertility which may hamper the pregnancy or create risks in delivery.
- Same sex couple: many couple that are of the same gender may resort to surrogacy due to obvious reasons of not being able to conceive a child by themselves.
- Complications in adoption process: the process of adoption is very complicated and requires time and a lot of clearances from the child welfare authorities. The costs and limitations in adoption are also huge.
- Single parenting: people who wish to have a child without the partner resort to surrogacy as it is more convenient than adoption.

Parties Involved:

Surrogacy is a multi-faceted issue, involving many individuals whose beliefs, expectations and interests are not always aligned. The primary individuals are:

- The Intended Parents
- Surrogate
- Fertility specialists
- Lawyers, and
- Surrogacy agencies.

To enumerate few reasons why India is a favourite option between people/ couples opting to have babies via surrogacy:

In India, the cost of surrogacy is comparatively lower than other Western or European countries. In India the whole process may cost up to a third of what it would be priced at in the Western countries nearing Rs 4 to 23 lakhs. In some western states, the costs can go upto \$120,000. It depends on the clinic conducting the IVF procedure.³⁾

India is deficient in having a concrete domain specific legislation due to which the parties are allowed to interpret the existing peripheral laws as per their convenience.⁴⁾ Smoking, drug abuse, drinking habits are known to harm the child in the womb and such habits are lesser known in the Indian Women.⁵⁾

The finalising of the documents, the filling up of forms and other processes are completely taken care of by the clinic staff or doctors naming the whole procedure less cumbersome for the Recipients.⁶⁾

³⁾ Supra 2.

⁴⁾ Ibid.

Moreover due to the set up of the Indian society, the women are considered capable of attaining motherhood and taking care of a child from a young age. As a result most of these women are below the age of 35 years and already with a child. This has an immense effect on the minds of the foreign nationals that seek a child through surrogacy.⁷⁾

TYPES OF SURROGACY

What is Surrogacy?

Surrogacy is a method of reproduction wherein a woman (usually referred to as the

⁵⁾ Ibid.

⁶⁾ Ibid.

⁷⁾ Ibid.

surrogate) agrees to carry a pregnancy and give birth as a substitute for the Recipients or the contracted party/ies.

Now, Surrogacy may be Natural (traditional / Straight) or Gestational.

(a) *Natural (Traditional/ Straight) Surrogacy:*

In traditional surrogacy the surrogate is pregnant with her own biological child, but the child is conceived with the real intention of being relinquished by the surrogate and hence raised by the Recipients or the biological father and (possibly) his spouse or partner and so the child that results is genetically related to the Surrogate mother.

This child may be conceived via sexual intercourse, home artificial insemination using fresh or frozen sperm or impregnated via the IUI method⁸⁾, or the ICI method⁹⁾, which is generally performed at a fertility clinic.

Sperm from the male partner of the 'commissioning couple¹⁰⁾' may be used, or alternatively, sperm from a sperm donor can be used. Donor sperm may, for instance, be used if the 'commissioning couple' are both females and/or where the child is commissioned by a single woman.

(c) *Gestational Surrogacy:*

In gestational surrogacy, the surrogate is only a carrier/female host and is not genetically or biologically related to the child born therein. An embryo that is not

⁸⁾ Intrauterine Insemination

⁹⁾ Intracervical Insemination

¹⁰⁾ Commissioning couple is the couple that approaches the Surrogate due to infertility issues or otherwise. Also known as the Recipients.

genetically or biologically hers is implanted in the Surrogate and the Surrogate subsequently gives birth to a child to which she is not the biological mother to. After birth, the surrogate relinquishes this child to the biological mother and/or father to be raised, or to the adoptive parent(s)¹¹⁾. The surrogate mother can also be called a gestational carrier.

(d) Commercial Surrogacy:

Commercial Surrogacy is a form of surrogacy wherein the gestational carrier is paid to carry a child to maturity of the delivery date in her womb and is usually resorted to by (generally the higher income) infertile couples who can afford the costs involved. This procedure is legal in several countries including India. Commercial surrogacy is also known as 'wombs for rent', 'outsourced pregnancies' or 'baby farms'¹²⁾.

(e) Altruistic Surrogacy:

Altruistic surrogacy is an arrangement where the surrogate receives no financial compensation for her pregnancy or the subsequent relinquishment of the child¹³⁾.

LEGAL ASPECT

¹¹⁾ In which case, the embryo would have been a donated embryo

¹²⁾ *J Med Ethics, Commercial Surrogacy: How Provisions Of Monetary Remuneration And Powers Of International Law Can Prevent Exploitation Of Gestational Surrogates*, 2013;39:6 397-402, Accessed on 01 February 2015.

¹³⁾ Although generally all the expenses related to the pregnancy and birth are given by the intended parents such as medical expenses, maternity clothing, accommodation, diet and other related expenses

All over the world, in whichever nation surrogacy is allowed/ recognized, the principal condition is that at least one of the Intended parents must be biologically related to the child born out of surrogacy. Thus, a scenario where either of the Intended parents is not biologically related is not sanctioned.

It was in Manji's case in 2002 that Supreme Court of India held that commercial surrogacy was legal in India.

The Indian courts have granted citizenship to the offspring born out of surrogacy.¹⁴⁾ The Supreme Court of India, through the Manji Yamada Case, held that commercial surrogacy was legal in India. In this Landmark case Baby Manji Yamada v. Union of India¹⁵⁾, a couple of Japanese origin, Dr. Ikufumi Yamada and his wife, entered into a surrogacy contract with an Indian woman in Anand district, a city in the state of Gujarat where this practice was pioneered. The couple went through matrimonial conflict but the father still insisted on obtaining custody of the child. Soon after the birth the surrogate and the baby became focus of legal as well as diplomatic crisis. Her genetic parents i.e. the intended parents had annulled their marriage few months before the birth. The genetic mother refused to accept the child, while the father and grandmother were keen on having the child. The court sought the review of the National Commission for Protection of Child Rights Act, 2005¹⁶⁾. A petition was filed by the Father's side. The Government seemed to be helpless in this matter as there were no laws governing the effect of surrogacy. Justice Arijit Pasayat and Justice Mukundakan Sharma of the Supreme Court ruled that the father was the genetic father

¹⁴⁾ *Jan Balaz v Union of India* AIR 2010 Guj 21, the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district in Gujarat.

¹⁵⁾ (2008) 13 Supreme Court Cases 518

¹⁶⁾ This Act had been enacted for the charter of a National Commission and a State Commission for the defence and protection of child rights and also for the constitution of children's courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith and incidental thereto.

of the child and he was to be given custodial rights of the child. Moreover, the Supreme Court held that the Surrogacy Agreement to be valid in India. This showed that the Indian Judiciary is pro surrogacy. The contract pertaining to the surrogacy was held to be legitimate.

Also in *Jan Balaz v. Anand Municipality*¹⁷⁾, a German couple entered into a contract with a surrogate mother named Marthaben Immanuel Khristi. Twin children were born and the family required Indian passports to travel back to UK. Their passports were being held by the Passport authorities who refused to recognize the children as Indians. The Bench headed by Justice G.S. Singhvi and Justice C.K. Prasad said that no surrogate child should undergo the difficulties faced by Nicolas and Leonard who were already two years of age by the time this decision was made and had still not been granted citizenship in any country. It was held that the children will still be considered as Indian citizens. Although their Passports were given back and they were considered citizens of the country but they eventually had to forego their Indian citizenship as dual citizenship is not allowed in India. The parents intended to get German citizenship for the children. Eventually, they sought the citizenship for the children through the means of Adoption as Germany does not recognize surrogacy.

It is apparent from the case of *Jan Balaz* that the contract proved to be inadequate for demarcating and laying down the rights of the parties and deficit in providing relief for the grievance party and it also brought out residual issues such as citizenship and identity for those born out of such agreement which are matters of critical for these children but sadly do not in general, find any place in the surrogacy agreement.

This led to the government drafting a bill which is called the Assisted Reproductive Technology (Regulation) Bill 2008. But the draft of this Bill is still pending with the Union Ministry, whose approval will take the same to the Union cabinet before being presented in the Indian parliament.

¹⁷⁾AIR 2010 Guj 21.

The Indian Council For Medical Research (ICMR)

In 2005, *The Indian Council for Medical Research (ICMR)* and *National Academy of Medical Sciences* declared guidelines in order to regulate Assisted Reproductive Technology procedures in the country for the ‘accreditation, supervision and regulation’¹⁸⁾ of Assisted Reproductive Technology clinics formulated by the Indian Council of Medical Research and are used as a basic platform for conducting surrogacy in India:

- A child born via surrogacy is to be adopted by the genetic (biological) parents and it has to be establishing through genetic (DNA) fingerprinting that the child is theirs.
- Surrogacy using the method of assisted conception should by and large be considered only for patients for whom it is found to be physically or medically not possible/ undesirable to carry a baby to term.
- Payments to surrogate mothers must cover all genuine expenses connected with the pregnancy term. Documentary evidence of the financial arrangement for surrogacy must be made available.
- The responsibility of finding a woman as a surrogate mother, through advertisements or otherwise, is to be the Intended Parents’ responsibility, or a semen bank. Advertisements on the subject of surrogacy are not to be made by the ART clinic.
- The woman being chosen to be a surrogate mother should be aging less than 45 years of age. The candidate for surrogacy must be medically checked to be able to comfortably sustain the pregnancy term.
- A relative, a known person, as well as a person unknown to the couple may be

¹⁸⁾ Dhar M.L., *Need to Regulate Indian Surrogacy Industry*, Press Information Bureau, Government of India, RTS/VN SS-75/SF-75/13.05.2011, [accessed on 03 February 2015].

allowed to act as a surrogate mother for the couple. Such relative must hail from the same generation as the woman desiring the surrogate.

- A woman who is or might be the prospective surrogate mother must be medically tested for HIV and unauthorised blood transfusion, etc.
- No woman is allowed to act as a surrogate more than thrice in her lifetime.

These suggestions focus on ensuring that the surrogacy process does not ‘tax the [intended] couple’s endurance physically, emotionally, or economically.’¹⁹⁾

From Law Commission

The *Law Commission of India* submitted its 228th report on *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy* and on *Assisted Reproductive Technology Procedures* examining the significance and necessity for surrogacy, and also the steps that should be taken to regulate surrogacy arrangements and prevent exploitation of either party. The following observations were made by the Law Commission:

- a. Surrogacy arrangement will be governed by a contract signed by both the parties, which will hold all the provisions entailing the consent of the surrogate mother to bear the child, conformity of her husband and other family members for the same, and also the medical procedures and expenses of artificial insemination, reimbursement of all reasonable and necessary expenses for carrying the child for the full term, willingness to hand over the child born to the commissioning parent(s) after delivery, etc. But such an arrangement should not be for solely commercial purposes.
- b. A surrogacy arrangement should provide for financial support for the surrogate child in the occasion of death of the commissioning couple or individual (to act as his/her guardian) before the birth of the child, or divorce between the Recipients/

¹⁹⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, Tuftscope: The Journal of Health, Ethics and Policy.

intended parents and subsequent willingness of none to take delivery of the child.

c. A surrogacy contract is to be termed such that it essentially takes care of the life insurance cover for the surrogate mother.

d. One of the intended parents should preferably be a donor as well, because the human bond of love and affection with a child mainly emanates from a biological relationship. This can help in reducing the instances of child-neglect and child-abuse in the cases of children who are adopted but later on those parents are not able to cope up the responsibilities of being a care take/ parent. In cases of a single intended parent, it is best suited if he or she is a donor so as to be able to have a surrogate child.

e. Legislation should by itself give cognizance to the legitimacy of the surrogate child without creating a need for some kind of declaration of the guardian or adoption.

f. The birth certificate of the surrogate child is to contain the name(s) of the commissioning parent(s) only.

g. The privacy of the donor and the surrogate mother should be respected.

h. Checking of the sex of the foetus is not to be entertained by the clinics or any of the parties so involved. Also Sex-selective surrogacy should be banned.

i. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only so as to regulate chances of corruption and coercion.

There are specific sections of the document are dedicated to ensuring the protection of the unused embryos, the children born of surrogacy, and the intended parents, but there is no such section for protection of the surrogate mothers.²⁰⁾

The Report by and large supports Surrogacy in India, and highlights the appropriate way of conducting surrogacy in Indian conditions. Exploitation of these women who agree to be surrogates through surrogacy is another worrying factor, on which the law needs to focus.

The Assisted Reproductive Technologies Bill

²⁰⁾ For Reference see Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, Tuftscope: The Journal of Health, Ethics and Policy.

The Indian Council of Medical Research (ICMR) working under the patronage of the Ministry of Health and Family Welfare released the National Guidelines for 'Accreditation, Supervision and Regulation of ART Clinics in India' in the year 2005²¹⁾ after a wide spread discussion and brain storming expanding all over the country and looking at each stake holder's interests and duties.

Under these guidelines of 2005, the each person was entitled to opt for surrogacy including the gay couples or other homosexual couples or single men and women even unmarried persons and could avail the benefits of Assisted Reproductive Technology.

After this soon the first draft of Assisted Reproductive Technology (Regulation) Bill was put on the table in the year 2005. After this some changes were made and it was again put up for assessment in 2010. Currently the draft of 2013 lies pending before the Parliament which shall be changed and revised as per the recommendations and directions of the Ministry of Law and Justice.

The Union Ministry of Health and Family Welfare i.e. the MoHFW through its initiative of drafting the Assisted Reproductive Technologies Bill has tried to control and regulate the growing surrogacy industry and the ART industry. This also includes commercial surrogacy. It gives significance and due regard to the practises but it is found to be lacking and adequate in consolidating the rights and obligations of the surrogates, children born and all the other parties involves in the surrogacy set up.

It is criticised to be lacking in scope for remedy for unknowing surrogates and standards for medical procedures and doesn't give due diligence to third party agents who have a crucial role in the execution of the contract like arranging for the appropriate surrogate for the appropriate Recipient, and surrogacy home operators and tourism operators.

As demanded by the women activists the Bill should be able to efficiently monitor

²¹⁾ For reference see Dhar M.L., *Need to Regulate Indian Surrogacy Industry*, Press Information Bureau, Government of India, RTS/VN SS-75/SF-75/13.05.2011, [accessed on 03 February 2015].

and regulate the surrogate agents, the operators and consultancies and private agencies and all other firms so involved.²²⁾

It is advocated by many jurists that such a Bill on this matter should be formulated in a manner that is simpler, easily understood, invasively less and not just accessible by just those belonging to the higher bracket of income.

Its best for everyone if such procedures are less complicated, affordable.

It is encouraged for the the Bill to stipulate or specify the maximum number of cycles that a woman is allowed to undergo as a surrogate. Also it should clearly state the number of cycles as the number of ART cycles are not to be equalised with number of live births that she is allowed to undergo. As the risks are high and percentage of success in such procedure this Bill must clearly enlist the diverse health risks and undesirable outcomes of such technologies.

The Sama Health group also pointed out²³⁾ that although the current draft requires the ART procedure to carry out screening for health risks that can be faced by the mother and the child, there is as discussed above no existing listing of such adversities and risks and grave outcomes that can be the result of the technologies.

The draft Bill stipulates that pre-natal testing, or sex-detection, foetal diminution or abortion shall not be done by the intended parents without the due permission of the surrogate.

In addition, the intended parents cannot insist or compel her to tag on a particular diet, way of life or religious rituals or lifestyle during the term of pregnancy.

The pattern of payment to surrogates should be clearly explicit within the Bill and will be within the best interests of the surrogate. The current Draft stipulates on

²²⁾ Quoted by Sama Resources Group for Women and Health in article *Gaps in Surrogacy Bill*, www.thehindu.com [accessed on 01 December 2014].

²³⁾ Ibid.

payment by the agent which is passing unbalanced and unfavourable towards the surrogate.

While there are some definitions that have been put in current draft, certain changes are made necessary in relation to the eligibility of right to use of the ARTs.

The previous draft seeks to define "Couple" as a relationship connecting a male person and female person who co-habit in a collective household in the course of a relationship in the character of marriage. This shows that the Bill was confined to provisions of ARTs within a heterosexual framework. This shows that it excluded those couples which have homosexual preferences from ART technologies.

The current draft has amendments to the definition of a "couple" and now gives attention to gay couples and lesbians opting for surrogacy.²⁴⁾

Sama claims²⁵⁾ that the current clauses of the Draft Bill are discriminatory, baseless, and a violation of rights to equality, freedom, and reproduction, claims Sama.

The basic feature of the Bill that has been under scrutiny has been how it restricts surrogacy to only the Indian married couples that are facing infertility issues. In such a case, Although, NRIs²⁶⁾ or PIOs²⁷⁾ or OCIs²⁸⁾ are allowed but foreigners until unless married to an Indian citizens aren't eligible. But on the other the good point would be that it aims to safeguard the rights of the Indian surrogates and prevent their exploitation and tempt them to become surrogates by making them dream of financial freedom.²⁹⁾

²⁴⁾ Clause 2(h): "couple", means two persons living together and having a sexual relationship that is legal in India.

²⁵⁾ Supra 1.

²⁶⁾ Non Resident Indian

²⁷⁾ Persons of Indian Origin

²⁸⁾ Overseas Citizen of India

²⁹⁾ Clause 34 *Rights and Duties in relation to Surrogacy*:

The Law needs to be drafted keeping in mind the doctrine of checks and balances and the necessary safeguards for the stake holders.

It is believed that in order to make sure the new law does not contradict with the existing one pertaining to adoption, it is desirable to bring forth a system that would instead of debarring, encourage the people coming from foreign lands to India for Surrogacy.³⁰⁾

The functions and mechanisms in the legal world that can be made in India with the

A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy as per clause 34.2, till the child / children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence as the case may be. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally obliged to take delivery of the child and be free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one month of the birth of the child. During the transition period, the local guardian shall be responsible for the well-being of the child. In case of adoption or the local guardian having to bring up the child, the child will be given Indian citizenship.

³⁰⁾ For reference Malhotra A., *Rewriting Surrogacy Laws*, June 2014, <http://lawyersupdate.co.in/LU/1/1629.asp> [accessed online on 24 January 2015]: "...The appropriate and desirable method would be to create a mechanism to judge the suitability of proposed surrogate parents rather than to debar all single and foreign persons totally. This would also avoid any conflict with existing laws of adoption wherein foreign persons including single parents are allowed to adopt through a strict and rigorous mechanism provided by CARA and overseen by Indian Courts. Simply trying to shut out surrogacy for foreign nationals and single persons may not be the ideal way to stamp out the hopes of persons wishing to be a parent. Whether Indians or foreign nationals, law treats persons as individual parents when so required. "

interweaving of different aspects of the society keeping in mind the adoptions that can also be inter-country by in fact allowing the foreign nationals and not creating a legal barrier for them. Also the same barrier concept should be kept in mind while formulating laws for the existing ones that are stake holders in this whole set up.³¹⁾

The vast and pretty strong medical hold and state of art technology and medical facilities in India have been existing for a long time now as a result of the infrastructure clinically and having a strong hold and good logistics, a medical tourism or facilities or abundant opportunities that are funded by the aristocrats and the State and a huge percentage of people jobless, uneducated and unaware of their own potential.³²⁾

When the Assisted Reproductive Technology Bill was furnished by the MoHFW with the intention of collaborating all concerns and guidelines related to ART, it got India in the clan of those small number of countries that have laws on this topic.³³⁾ This was much needed as the industry is expanding and enlarging and garnering millions of dollars with many entangling legal complications mushrooming day by day. In doing

³¹⁾ Malhotra A. , *Rewriting Surrogacy Laws*, June 2014, <http://lawyersupdate.co.in/LU/1/1629.asp> [accessed online on 24 January 2015]: The celebrated view of the Apex Court in widening the horizons to prevent discrimination on grounds of sex or gender identity is a new thought process based on international covenants of human rights.....We cannot now permit our thinking to be retrograde simply because of the problems which come with surrogacy. Administrators cannot usurp law making functions to be a law unto themselves....This is the function of the Parliament. Mandarins cannot take over. The more apt approach would be to find solutions to handle and curb these problems.

³²⁾ As discussed in *India's Assisted Reproduction Bill and the Maternal Surrogacy Industry*, *International Review of Social Sciences and Humanities* Vol. 4, No. 1 (2012),: Any discussion of ART, especially as it concerns maternal surrogacy, is necessarily a meditation on the role and empowerment of women. India's reproductive tourism industry is built upon three important pillars: her extensive clinical infrastructure, her state-supported medical tourism infrastructure, and her reliance upon the cooperation of economically and socially disadvantaged women.

³³⁾ Deonandan R. Bente A., *India's Assisted Reproduction Bill and the Maternal Surrogacy Industry*, *International Review of Social Sciences and Humanities* Vol. 4, No. 1 (2012), pp. 169-173 www.irssh.com ISSN 2248-9010

so, India joined a small group of countries, including Canada and the UK (but excluding such key service providers as the USA), which have federal ART laws.³⁴⁾

The Bill states in its provisions as:

1. Those persons who generally are fit to carry out the pregnancy term are not entitled to the opportunities that surrogacy offers.
2. The Bill talks about the legal implications and enforceability of the surrogate contract?
3. The husbands need to offer their consent for their wives to become surrogate. This clause can be subjected to exploitation as many times it is the husbands that compel the unwilling women to become surrogates as it gets them money.
4. The surrogate is to be allowed the embryo transfer for a maximum of three chances.
5. The privacy and the name and identities of the donor is to be protected from being exposed.
6. There has to occur proper screening and certification to be given to the surrogate and also the semen banks and clinics.
7. A centralised Registry is to be constituted and maintained by the government. This shall house the surrogate details both medical and otherwise.
8. The new draft seeks to change the old meaning of couples that extends simply to heterosexuals and now include homosexual couples too.
9. For a foreign national couple to have child out of the surrogate agreement, it is important for the couple to have a certified permits for surrogacy.

India is a golden pot for the fertility sector and assisted reproduction due to the ever growing demand for surrogate children and the low costing in India and such expansion call for a legal framework that is not missing out on any aspect.³⁵⁾

³⁴⁾ Malhotra A. , *Rewriting Surrogacy Laws*, June 2014, <http://lawyersupdate.co.in/LU/1/1629.asp> [accessed online on 24 January 2015]

³⁵⁾ As discussed in D. Pet, *India Moves Toward Regulation Of Assisted Reproduction And Surrogacy*,

The Issues In The ART³⁶⁾ Bill

The proposed Bill needs to take cognizance of the incident of death of the intended parents before the delivery and the subsequent status of the child. This needs to be seen not only in domestic surrogacy but also transnational surrogacy.

By restricting the ART process to only the Indian citizens and the NRIs and PIOs etc, the meaning of the word "person" has been limited by the Bill.³⁷⁾

1. In the words of the Bill, same sex couples or homosexual persons are not entitled to receive ART services and this in a way limits the scope of the usage of surrogacy from being used by the "socially fertile" women.³⁸⁾

2. If we look at the existing Bill the risks, emotional and social are not given due importance and so exposing the surrogate's vulnerability and also of her family. The physical risks which can range from the process of egg retrieval to injecting hormones in the surrogate's body haven't been mentioned. Also the Bill does nothing to elucidate the measure for removing the social disapproval and filial tensions of the surrogate's family due to this decision of hers.³⁹⁾

3. A major aspect that the drafting of the Bill missed out on was how to provide for the health and welfare of the surrogate with the use of current policies and technologies.

Psychology Today, (2011), <http://bit.ly/KOmA3L>.

³⁶⁾ Assisted Reproductive Technology Bill

³⁷⁾ Lin Tina, Born Lost: Stateless Children in International Surrogacy Arrangements, *Cardozo Journal of International & Comparative Law*; Winter 2013, Vol. 21 Issue 2, p545 : A restrictive meaning to the word "person" cannot qualify or change the definition by restricting it to an Indian national.

³⁸⁾ Soo Camelia, *Babies For The Socially Infertile: How Conceivable Is It?*, :The socially infertile category includes those who are homosexual (gays and lesbians) and those who are single.

³⁹⁾ N. Sarojini, V. Marwah and A. Sheno, *Globalisation of birth markets: A case study of assisted reproductive technologies in India*, *Globalization and Health*, 7(27)(2011).

4. The surrogate as per the contract between the clinic and her, is not allowed to annul the contract or refuse to hand over the child. But the contract between the clinic and Recipients does cater for the annulment of the contract if the intending parents wish to in case the child is born with some deformity or due to some other reason. This is a serious issue as it is the basic marker for the exploitation of the surrogate. The surrogates are uneducated and naive when it comes to technical and legal issues and the law needs to be sensitive towards their needs. This aspect of the contracts needs to be corrected as India has seen enough cases⁴⁰⁾ wherein the child was abandoned and/or abused.

5. In the wake of these factors the law recognises a dire need for the setting up of homes and shelters for such children.

6. The law doesn't stipulate the citizenship of these children⁴¹⁾.

7. The surrogate needs to be given equal rights as of the Recipients during the formulation of the contract and also should be sufficiently compensated for her nine month term.

8. If we look superficially the ART Bill strives to safeguard the rights and dignity and welfare of the stake holders in this industry. It is imperative for a nation's legislations to be in tandem with the ever occurring changes in the society. This shows a lot about the intent to capitalise the economic and cultural changes all over.

⁴⁰⁾ Deonandan R. Bente A., *India's Assisted Reproduction Bill and the Maternal Surrogacy Industry*, International Review of Social Sciences and Humanities Vol. 4, No. 1 (2012), pp. 169-173 www.irssh.com ISSN 2248-9010

⁴¹⁾ BBC News, *India-Japan Baby in Legal Wrangle*, (2008), <http://bbc.in/Me79SB>.

PREVALENCE AND SUCCESS OF SURROGACY IN INDIA

It can be said that surrogate motherhood has come a long way in the history of surrogacy. From rarely spoken of traditional surrogacy of centuries past, to family members acting as surrogate carriers and commercial surrogacy of today, the road has been long, and many miracles and hardships have been faced along the way.⁴²⁾

The most commonly known surrogates are the commissioning couple's friends, sisters, or other family members. Approximately, the majority of all surrogate mothers are primarily not known to the commissioning couple. The Surrogate users might be single men looking to have a baby without resorting to adoption or gay couples with the same intention or even women who are able to carry a child but choose surrogacy due to convenience.

It is hard to predict the prevalence of surrogacy in India due to lack of concrete figures and specialised centres to cater solely to surrogacy.

Nevertheless, the success rate of surrogacy is approximately 45% with fresh embryos and 25% with frozen embryos.

The package for surrogacy in India can be approximated to cost 50% less as compared to other countries and can fluctuate between Rs 8,00,000 to 15,00,000 approximately.

The price package for surrogacy covers doctor fees, the legal fees, surrogate work up, antenatal care, delivery charges, surrogate consideration/ compensation, the egg donor, drugs/ medicines and consumables, & IVF costs.

On the other hand, this speedy growth of the surrogacy industry in India raises serious apprehensions of global gender justice, particularly regarding if the option is enormously alluring for women who lack other feasible remunerable options and

⁴²⁾ Mukherjee S., *Legal And Ethical Issues Of Commercial Surrogacy*, NUJS Law Review

whether the conditions are adequate and whether the compensation fair.

The mounting demand for surrogacy in India has also raised questions, including those of child rights.

Women for whom other forms of ART have proven ineffective, who cannot find a friend or relative willing to act as an altruistic surrogate, and/or who cannot afford the rates charged by

American clinics are turning in growing numbers to the global surrogacy market. India in particular has become a transnational hub for reproductive tourism, with the city of Anand in the Western state of Gujarat as its nerve centre.⁴³⁾

Surrogacy can be said to be marred by complex, diverse and unsettled legal aspects. In majority of the countries world over, the woman giving birth to a child i.e. the Surrogate is taken to be the Child's legal mother. However, in very few countries, the Intended Parents are recognized as the legal parents right from the time of birth by virtue of the fact that the Surrogate has contracted to give the birth of the Child for the commissioned Parents and after hand over the child to them.

India is one country amid the few countries in the world, which recognizes the Intended/ Commissioning Parent/s as the legal parents of the Surrogate baby. In order to remove any misrepresentation or misleading instances and confusion in the minds of the Surrogate, Commissioning/Intending Parents, the child and the law; many states have now started to issue proper pre-birth orders through the courts placing the name(s) of the intended parent(s) i.e. the Commissioning Parents on the birth certificate from the start. In other countries the possibility of surrogacy is either not recognized⁴⁴⁾, or is prohibited.

⁴³⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 –343.

⁴⁴⁾ All contracts specifying different legal parents are void.

As far as the Indian perspective is concerned; there can be no doubt that Indian surrogates have been more and more popular with infertile couples in the industrialized nations thanks to the relatively low costs put up by the Indian clinics. At the same time, Indian clinics are now becoming more competitive with various clinics mushrooming, not only in the matter of pricing, but also in the subsequent hiring of Indian females as surrogates and their retention and continuation. Actually, surrogacy in India is much simpler than other nations as well as less costly when compared to other States. So, people from European countries and also other countries are flocking to India get a baby of their own genes using a Surrogate mother.

INTERNATIONAL SCENARIO

“Women who agree to be surrogate mothers lie to themselves for nine months to avoid cognitive dissonance.” - Dr. Jacky Jones⁴⁵⁾

This section aims to look at the international scenario for surrogacy and the human rights issues that come up along with it.

Although Commercial Surrogacy entails for the surrogate to be compensated for her expenses with respect to her diet and travel her clothing and other health and medical costs.

But certain countries like the U.K., France, , Italy, Canada, Norway have considered commercial surrogacy to be criminal acts although the above provisions do get carried out.

This means that it is illegal if the surrogate is paid for her nine month term⁴⁶⁾

Now, looking at this aspect it brings forth a question that if such commercial surrogacy is actually having some defence on the moral regard. The rights of adults of sound mind with full information of the contract and the wish to fulfil the contractual obligations and reimburse for the services they’ve taken, for such persons their rights need also to be looked into.

An argument for commercial surrogacy is that it provides a chance for those women of the developing nations, a chance to be financial independent keeping in mind the

⁴⁵⁾ Head of Irish Health Services and Author for *Second Opinion: The Current Model Of Hospital Services Is Simply Unsustainable*, The Irish Times, March 16, 2015.

⁴⁶⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 –343, available at <http://dx.doi.org/10.1080/17449626.2013.818390>.

conditions from where they come from, allowing enough leeway for economic development and also social.

From another perspective it can be seen that it is a some kind of social and psychological liberation for those women who are medically and socially infertile releasing them from the stigma of not being able to any offspring.⁴⁷⁾ Its for those women who may be legally or biologically or even economically barred from exercising what makes them a mother.

But then at what cost??

At the cost of the psychological damage and physical risks of the developing nation's women. It is exploiting the reproductive labour of these women.⁴⁸⁾

For some countries like Australia or USA, there are different regulations for different states.

While surrogacy is totally acceptable in places like New South Wales, or Western Australia and the capital territory, it is not so in Tasmania or Victoria or the South Australia. Infact it is heavily regulated/ controlled and illegal with grave penalties.⁴⁹⁾

So is the case with USA as shall be discussed further on.

Now in the European Union, there is slight disparity between the States. UK, Belgium, Holland and Finland approve surrogacy, while Germany, Sweden, Norway, Italy donot legalise surrogacy. Certain countries and states of USA only recognise altruistic surrogacy.⁵⁰⁾

⁴⁷⁾ Ibid.

⁴⁸⁾ Ibid

⁴⁹⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 –343, available at <http://dx.doi.org/10.1080/17449626.2013.818390>.

⁵⁰⁾ Ibid.

There are certain bilateral issues which necessitate the uniformity of laws or equal standing at a platform when it comes to International Surrogacy to cater to all the parties' interests, wishes and concerns. Not doing so in issues and claims not getting resolved and hence leading to full-fledged commercialisation of the Assisted Reproductive Technologies.

It is in this way that surrogate get treated like a commodity and the rights of the children born out of International Commercial Surrogacy Arrangement.⁵¹⁾

The Law Commission Report on *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy* and on *Assisted Reproductive Technology Procedures* has looked into the international scenario with regard to surrogacy and all its types and aspects:

Australia

The law, in most states of Australia, recognises the rights of a surrogate mother and considers the surrogate to be the legal mother of the child and if a contract of surrogacy gives the custodial rights to any other person, such a contract is held unenforceable instantly.⁵²⁾

Also along with that, the states of the Australian Capital Territory declare commercial surrogacy to be illegal.

Most times couples resort to the process of adoption. Even though the Northern Territory of Australia has no concrete legislation for this topic but the territory/ state of Victoria recently in 2010 declared altruistic surrogacy legal through their act of

⁵¹⁾ Brinsden P., *Gestational Surrogacy*, Human Reproduction Update, Vol.9, No.5 pp. 483

⁵²⁾ Gautum Pooja., "Rent A Womb Capital- A Comparative Critical Study" available at <http://www.academia.edu/8373303/Abstract1> [accessed 02 February 2015]

2008 i.e. the Assisted Reproductive Treatment Act 2008.⁵³⁾ But commercial surrogacy is still not accepted.

Queensland in 2010 declared in their Surrogacy Act 2010 to legalise altruistic surrogacy. In its footsteps North South Wales drafted s Surrogacy Bill.⁵⁴⁾

Canada

The Canadian State legalises altruistic surrogacy but like other states prohibits commercial surrogacy. They have a specified act called the Assisted Human Reproduction Act. Infact contracts that have surrogacy for some consideration are considered void and not valid.

France

Any surrogacy contract since the year 1994 has been considered invalid and void even if commercial or done for altruistic means.

Hungary

Also considers commercial surrogacy illegal.

Germany

With reference to the decision of the High Court of Justice, the Family division in *Rex and Y (Foreign Surrogacy)*⁵⁵⁾ Germany stands at par with Sweden, Norway, Italy,

⁵³⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 –343, available at <http://dx.doi.org/10.1080/17449626.2013.818390>.

⁵⁴⁾ Ibid.

⁵⁵⁾ 2008 EWHC 3030 (Fam) U.K.

Belgium and all those countries that do not legalise surrogacy.

The German laws prevent any procedure of egg donation rather encourages embryo procreation. It considers artificial insemination and embryo donation as criminal offences whereby such practitioners can be penalised.

This again results in infertile couples flocking to countries which accept surrogacy leading to blooming of international surrogacy.⁵⁶⁾

Ukraine

The laws of Ukraine relating to surrogacy are very liberal and accommodating in their stance.

To control, oversee surrogacy practise Clause 123 of the Family Code of Ukraine and Order 771 of the Health Ministry of Ukraine is referred.⁵⁷⁾ These laws allow the commissioned parents to opt for gestational surrogacy and to decide upon the ova, sperm donor, the programmes for the same and also adoption. For such activities no prior state permission or clearance is required.

These laws also allow for contracts of surrogacy between parties. And the regulations bend towards the commissioning parents as the child born out of such agreements are belonging legally to the Recipients and the surrogate mother cannot keep the child.

Japan

As per a case of 2007, the Apex Court of Japan barred the genetic parent of twins from seeking parenthood giving the reason that they born to a surrogate mother who was national of USA. The Civil Code of Japan observes that only the woman who gives birth to a child will be the legal mother to that child.⁵⁸⁾

⁵⁶⁾ As in the case of Jan Balaz v. Anand Municipality, AIR 2010 Guj 21

⁵⁷⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 –343, available at <http://dx.doi.org/10.1080/17449626.2013.818390>

Although there are no specific laws stating parent-child relationship in the spectre of artificial insemination, these judgements are based on the facts of delivery.

So the Science Council of Japan in the year 2008 declared a ban on surrogacy and have projected such acts of the doctors the clients and the agents to be criminal and penalising in nature. ⁵⁹⁾

Also due to such circumstances the citizenship of these children is not yet given to them, this gives rise to many complications. As the commissioning parents aren't given custodial or parental rights on the child.

Netherlands

Any kind of surrogacy is prohibited in the State.

Belgium

Surrogacy is considered illegal.

United Kingdom

Since 2009, when surrogacy was made legal in UK, the relationship between the surrogates and the commissioning couple can be scrutinized under the Human Fertilization and Embryology Act 1990.

The law allows surrogacy but with the rider that payment of excess expenses will be considered illegal.

The 1990 Act allows adoption too and the courts to issue parental orders.

⁵⁸⁾ Samson Charisma, *Legal Issues concerning Sex Reassignment Surgery*, AUSL Tech & Law, 27/09/2012, SY2009-2010 [accessed on 01 february 2015]

⁵⁹⁾ Ibid.

Israel

The first nation to constitute a surrogacy network although state controlled i.e. the state needs to approve the contract for it to be implemented. By the "Embryo Carrying Agreements Law" the Israeli government ended up legalising gestational surrogacy in the year 1996.

But the terms and conditions for that are that such contracts are permitted only to the citizen that follow the same religion i.e. have the same faith.

The terms for the choosing of the surrogates entail that the women auditioning to be surrogates must be either single women, or divorcees or widows.

The Israeli laws limit the benefits of surrogacy only to infertile couples and who are heterosexuals. Homosexual partners cannot hire the surrogates.

Such restrictions and constraints direct the people to opt for international surrogacy. And then India comes into picture, mainly due to its lack in strict legislation in surrogacy and also due to low expenses.

Another preferred country in such times is the US as it offers automatic US citizenship for the baby.

United States

As discussed above, different states of USA have their separate laws regarding surrogacy and surrogate parenting.

The laws of California and Florida are more welcoming and so most couples tend to stay there.⁶⁰⁾ Many do so to "supplement" the salary of their partners as it is a military base.⁶¹⁾

Embryonic transfers and surrogacy in all kind is declared illegal by the State of New

⁶⁰⁾ As discussed in *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme* by Leora Gabry available at Columbia Journal of Law and Social Problems.

⁶¹⁾ Dr Ajay Kumar, *Science, Society And Human Rights*, Chotanagpur Law Journal, Vol:7-8 No:7-8, ISSN-0973-5858, 2013-2014.

York. Pennsylvania and Delaware have accommodating specific domain related laws on Surrogacy.⁶²⁾

California is one of the other states that allows surrogacy agreements although it doesn't have a domain specific statute. There are court precedents⁶³⁾ that show the state's reaction to this industry. The Uniform Parental Act is relied on usually. In Johnson Vs. Calvert⁶⁴⁾ the court rules that no parental rights could be given to the gestational surrogate as the contract signed before is a legal document and hence enforceable by law. This makes the Recipient mother as the natural mother in the eyes of the law.

Also in cases where in the recipient mother herself donates her egg but the term is carried out by some other woman then also the natural mother shall be the Recipient as the surrogacy contract is the document which is the main instrument.⁶⁵⁾

In Buzzanca v. Buzzana⁶⁶⁾, traditional surrogacy agreement was dealt with. That was a case here the surrogate was artificially inseminated that was done by using her ova and some other anonymous sperm of some other donor. Hence, there partial genetic linking with the Intended parents. The court held that since this married couple had used a surrogate for carrying out the pregnancy term while donating their egg, there was genetic nexus between the offspring and the recipients and would be lawful parents of the child even if they would have used unrelated sperm and egg.

In a 1998 case⁶⁷⁾, the case involved an intended father and a surrogate mother and was rewarded parental rights.

⁶²⁾ Dr. Madhu Sudan Dash, *Surrogacy: The Socio-Legal Issues*, Indian Journal of Applied research, Volume : 5 Issue : 4 April 2015 ISSN - 2249-555X

⁶³⁾ California Supreme Court in Johnson v. Calvert, Buzzanca Vs. Buzzanca.

⁶⁴⁾ (1993) 5 CAL 4th 484

⁶⁵⁾ Ibid.

⁶⁶⁾ 1961 CAL. Appl.4th 1410 (1998)

⁶⁷⁾ Re Marrijo Moschetta

The New Jersey Supreme Court in *Re Baby*⁶⁸⁾, the child's natural father was given parental rights relying on the fact that it was an unrelated gestational surrogate mother. But the court granted her visitation rights although she wasn't allowed adoption chances.

India and US are two most favoured destinations for people seeking children through surrogacy due to good technology and medical facilities, low cost of surrogates and good inter country diplomatic relations too.

Most times the surrogates start off on this line of work due to good pay packets although many times they aren't even involved in the process of the contract drafting or negotiations. Such is the case in India.⁶⁹⁾

But contrary to India, the US and its states have specific laws to deal with surrogacy and to provide equal opportunities to the surrogates and Intending Parents to raise their questions and get their claims addressed. The pay packet in US is way higher than what is offered in India. Although the surrogates in India do get their financial independence from the compensation paid but it isn't enough to alleviate them from their economic misery.⁷⁰⁾

As discussed by Cornwell in his paper⁷¹⁾, "The differences between jurisdictions has led to a rise in 'reproductive tourism', as potential surrogates, donors and parents look for the most favourable legal, social and commercial environments. "

⁶⁸⁾ 537 A.2d 1227 (NJ.02/03/1988)

⁶⁹⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, *TuftsScope: The Journal of Health, Ethics and Policy*.

⁷⁰⁾ Palattiyil, G. et al. "Globalization And Cross-Border Reproductive Services: Ethical Implications Of Surrogacy In India For Social Work." *International Social Work*, (2010 v.53) p. 690.

⁷¹⁾ For reference see Cornwell Dawson, *The Hague Convention on Surrogacy: Should we agree to disagree?*, ABA Section of Family Law 2012 Fall CLE Conference Philadelphia, October 2012.

COMPARISON OF THE STATE OF SURROGATES BETWEEN USA AND INDIA

Casey Humbyrd argues that⁷²⁾ if the psychological damage and stigma of being poor is marred and defeated by the psychological damages of being a surrogate in the minds of the women opting to be surrogates then the harm done by commercial surrogacy can be taken into hands.

This in order to rule that commercial surrogacy is harmful to the surrogate mothers, the psychological harm of surrogacy must outweigh psychological harm of poverty.

Jennifer Parks⁷³⁾ in her paper talks about the way by which benefits of surrogacy are seen on the society. It is known to provide economic benefit as it gives a fair share of independence in the minds of the surrogates, which in many people's views is a major feature of Human Rights as it majorly makes the woman feel like she has a say in her life, the decisions of her family. Also in a patriarchal society it is taken for granted that it is the lady who shall take care of the children and if that doesn't happen the children are neglected. Having some sort of income gives her a chance to take care of those dear to her.

It is also about body freedom and feeling liberated from mental limitations.

It can be said these are some of the driving factors for women to opt for surrogacy.

In the USA, mostly teenage girls of high school or who have graduated from high school or even college goers opt to become surrogates. The general age bracket can be

⁷²⁾ Humbyrd, Casey. "Fair Trade International Surrogacy." *Developing World Bioethics*, (2009: v.9 no.3) p. 116.

⁷³⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, Tuftscope: The Journal of Health, Ethics and Policy.

said to be from 21 years to 38 years.⁷⁴⁾

They are lured towards this as it gets them to earn an average of \$25,000 to \$40,000.

Some empirical studies⁷⁵⁾ show that it's not just the money but rather the flexibility that such work offers to them to pursue their studies and other interests and also help around the house.

The girls usually hail from the service class or the middle class⁷⁶⁾.

There is no coercion found in the surrogacy industry in America. In fact, if found to be with financial motives then the surrogates are rejected right at the stage of screening by the authorities.

When it comes to Human Rights the surrogates are given a certain grace period after the delivery, they have an option of backing out or annulling the contract and ending the pregnancy. Also their expenses on medicals and other wise are duly compensated. They have legal representation and have a fair and equal opportunity.

Also have an opportunity to carry on a relationship with the child and the family which the child goes to after birth.⁷⁷⁾

Now looking at an average Indian surrogate,

The average age bracket for the Indian surrogates is somewhere between 18 years and 45 years and have not much opportunity to be educated or have an exposure to deal with the world and the way to quote remuneration.

⁷⁴⁾ Usha Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India" (2008) 39 Cumberland Law Review 15, 17. Accessed on 25 January 2015.

⁷⁵⁾ Supra 72.

⁷⁶⁾ Flaherty Keith, *Genetically Engineered Babies: An Ethical Debate*, Tuftscope: The Journal of Health, Ethics and Policy.

⁷⁷⁾ Ibid.

Also a big drawback in Indian state of affairs is that there are specific surrogate hostels wherein the women are forced to spend their pregnancy term with no contact with the outer world or even their family. Even the husbands aren't allowed to stay so as to prevent any sexual involvement. As discussed in the previous chapter, the surrogates are not allowed to go out even and have to spend the entire term in the clinical compound. Their everyday routine is regulated and monitored and need permission for every activity. Unlike their counterparts of US their reimbursement is way less than what they deserve.

So we see the state disparity between the Surrogates of India and those of US.⁷⁸⁾

Her motivation is majorly financial and so the decision of an average Indian surrogate is 'generally made in a context of limited possibilities for self-expression or development, rising unemployment, lack of financial resources.....low education levels, poverty, marginalization in labour and job markets, and patriarchal social and family structures'⁷⁹⁾.

Like many authors notice the Indian surrogates have no say while the process of drafting the surrogacy agreement takes place. Their consent or opinion is not even asked for. And if the Indian surrogate raises her voice or tries to object to a certain clause or ask for higher an amount of remuneration then there is a fear or probability of such surrogacy offer to fall into the hands of some other surrogate who'd be willing to adhere to their terms and conditions.⁸⁰⁾

So in a way the "consent" so obtained is by authority.⁸¹⁾ There is no possibility or

⁷⁸⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 -343, <http://dx.doi.org/10.1080/17449626.2013.818390>

⁷⁹⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 -343, <http://dx.doi.org/10.1080/17449626.2013.818390>

⁸⁰⁾ Ibid.

⁸¹⁾ Pande, Amrita. "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker." *Signs:*

room to bargain.

The surrogate is subjected to varying lengths to obtain her acceptance by manipulation or simple bartering. The surrogate's bargaining power also plays a crucial role in determining how those nine months and the days of the contract proceed.⁸²⁾

Also after the term of the pregnancy is over and the surrogate is liberated from further surrogate contractual obligations, she comes back to zero job related security, i.e. she has no job in hand as in most of the middle class or lower economic class of the Indian society, a woman is not usually encouraged to go out and follow her career goals. Her marital life is given priority over her own career growth. Yes it is a trend that is fast changing but it sure is yet to touch down to all the classes of the society.

She then has to anticipate for another call to become a surrogate as most times she isn't hired by employers due to her lack of education and null amount of encouragement from her family to search for other jobs.

The courts of United States rely heavily on the 'best interests of the child'⁸³⁾ and not just the contract document for their judgements.

The Re Baby M case⁸⁴⁾, a highly argued case found the Court issuing the custody of the child to the commissioning parents. They held that the contract was invalidated as it flouted norms of public policy welfare. Also the surrogate mother was contracted for a sum of \$10,000 for her services. This was done keeping in mind the best

Journal of Women in Culture and Society, (2010 v.35 no.4) p. 973.

⁸²⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 -343, <http://dx.doi.org/10.1080/17449626.2013.818390>

⁸³⁾ Supra 28.

⁸⁴⁾ Misra S., *Commercial Surrogacy: The Need for Regulation*, available at <http://www.legalservicesindia.com/article/article/commercial-surrogacy-1188-1.html> [accessed on 20 February 2015].

interests of the child.

In another prominent case⁸⁵⁾, the Californian Supreme Court provided all rights of parenthood to the commissioning parents/recipients by enforcing the surrogacy contract. It held that the remuneration made was not for transferring the child but rather for carrying out the term successfully while taking on the risks and harms.

While the above decision was gravely condemned, the Court in *Re Marriage Moschetto*, ruled that since the Intending parents due to marital discord parted ways, the child would be taken care of by the surrogate.⁸⁶⁾

⁸⁵⁾ Johnson v. Calvert

⁸⁶⁾ rtdrtd

HUMAN RIGHTS ISSUES AT A GLANCE AT THE GLOBAL LEVEL

Globally from the surrogate's eyes

The surrogates have no legal representation and no rights under the contract: they do not have a grace period following birth within which they can change their mind, and they are guaranteed no compensation should they fail to produce a child.

It is clearly established the lack of rights faced by surrogates generally all over the globe and to decide her own reproductive actions due lack of free will and suppression.

The United Nations in 1994⁸⁷⁾ and the World Health Organization⁸⁸⁾ include such that

⁸⁷⁾ *Reproductive Rights*, United Nations Department of Economic and Social Affairs, Population Division, Available at <http://www.un.org/en/development/desa/population/theme/rights/> [accessed on 01 April 2015]

: The 1994 *International Conference on Population and Development* in Cairo (ICPD) defined reproductive rights as

'...reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.'

⁸⁸⁾ *Healthy Timing and Spacing of Pregnancies: A Family Planning Investment Strategy for Accelerating the Pace of Improvements in Child Survival*. US Aid, Available at

this when they assert the basic right of all couples and individuals to freely decide on the number of children and the spacing/ time between each child and the rights of other reproduction aspects.

The surrogate is lacking in having reproductive freedom. Since she isn't provided enough moral strength by law to negotiate, she has zero negotiating power. As a result, the surrogate doesn't bargain. Also many times she is forced to become a Surrogate. This shows having no say in your own life decisions. Reproductive freedoms principally states freedom from coercion.

It is the violation of her basic human rights that are violated due to her exploitation. Further enabling this exploitation is the lack of any concrete law for the domain and no stringent laws from the surrogate's perspective. Criminalising is not the only solution but rather having an effective legislation in this regard is.⁸⁹⁾

A short look at the Conventions in the Domain

'On the 10th of March in the year 2011, the Permanent Bureau of The Hague Conference on Private International Law published and authenticated a preliminary but a broad and comprehensive note entitled Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements.'⁹⁰⁾

The major issue when it comes to international surrogacy which the States globally

<http://www.usaid.gov/sites/default/files/documents/1864/calltoaction.pdf>

⁸⁹⁾ Panitch V., *Global Surrogacy: Exploitation To Empowerment*, Journal of Global Ethics, Vol. 9 No. 3, 329 -343, <http://dx.doi.org/10.1080/17449626.2013.818390>. Accessed on 08 March 2015

⁹⁰⁾ Cornwell Dawson, The Hague Convention on Surrogacy: Should we agree to disagree?, ABA Section of Family Law 2012 Fall CLE Conference Philadelphia, October 2012. Accessed on 10 March 2015

are trying to resolve is how to decide the custodial rights of a surrogate on the child that they give birth to although not being genetically related to the child. The other humming question for the states to solve is if the legal parental rights can be given to the sperm donor. These are the fundamental questions that each country's laws need to answer to in order to avoid exploitation in this industry.

Another wavelength this spectrum pertains to the case of same sex couples i.e. the homosexual community.

"The Hague Conference's Council requires the Permanent Bureau to gather information on the practical legal needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach in order to address the pressing international surrogacy issues."⁹¹⁾

The American Law Reports⁹²⁾ gave the definition of the term "Surrogacy" with respect to human rights at the international scenario as being a contract and contractual obligation in which there is a surrogate mother which is a natural mother of the child with a natural father's sperm and her egg and after birth the child is transferred or handed over to that person/couple intending to raise the child (of whichever nationality).⁹³⁾

As per the Black's Law Dictionary meaning, "surrogacy means the process of carrying and delivering a child for another person"⁹⁴⁾.

⁹¹⁾ Ibid.

⁹²⁾ American Law Reports, *Validity and Construction of Surrogate Parenting Agreement*, 77 A.L.R. 470. (1989)

⁹³⁾ "...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's".

⁹⁴⁾ Law Commission of India in Report No-228, *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy*,

Surrogacy laws both in the domestic sphere and in the international sphere has been try to come up to the expectations of the public. World over, the responses and reactions to surrogacy and surrogacy laws has been varied, incongruent and diverse often on the line of being extreme.

These can be majorly/ generally be classified into the following categories:

- (a) those states where surrogacy arrangements are legal and enforceable;
- (b) those states where surrogacy arrangements are legal, but strictly controlled and subject to meeting specific criteria;
- (c) those states where surrogacy is illegal; and
- (d) those states which have made no provision in their domestic legislation.⁹⁵⁾

***The Convention on Protection of Children and Co-operation in respect of Inter-country Adoption 1993.*⁹⁶⁾**

If we look at the Hague Inter-Country Adoption Convention of 1993, it seems to be a very good accommodating instrument for the regulation of surrogacy agreements at the international level.

If there are no expressive provisions for parental control then adoption orders can be made. It also points out the factors that make the 1993 Convention ineffective for international surrogacy agreements.

It points out that:

-Article 4(c)(3) states that the Convention prohibits commercial adoptions;⁹⁷⁾

August 5, 2009

<http://lawcommissionofindia.nic.in/reports/report228.pdf>,

⁹⁵⁾ Ibid.

⁹⁶⁾ Cornwell Dawson, The Hague Convention on Surrogacy: Should we agree to disagree?, ABA Section of Family Law 2012 Fall CLE Conference Philadelphia, October 2012.

-Article 4(c)(4) states that the consent of the mother has to be taken after the birth. In surrogacy cases the surrogate mother has to give the free consent before conceiving the child;⁹⁸⁾

-Article 4(b) sets out the subsidiary principle, wherein the consideration is to be given to the occurrence that the child may be taken to the state of origin; and this shall not apply to most of the surrogacy cases, in particular international cases.

-Article 29 gives out a broad rule that there should be no relation or contact between the prospective adopters of the child and the child's parents; 'this is unlikely to be workable in surrogacy cases as contact will have to take place when the surrogacy arrangement is entered into and when any reproduction process or treatment takes place.'⁹⁹⁾

The Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 19th October 1996¹⁰⁰⁾

The 1996 Convention also potentially can be a suitable medium for controlling international surrogacy arrangements.

The Convention is now being largely accepted internationally. On the other hand, Article 4(a) of the above the Convention specifically excludes from its scope 'the establishment or contesting of a parent-child relationship'.¹⁰¹⁾

It is doubtful if the terms of the Convention will be changed or renegotiated as it

⁹⁷⁾ Ibid.

⁹⁸⁾ Ibid.

⁹⁹⁾ Ibid.

¹⁰⁰⁾ *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.text&cid=70 Accessed on 07 April 2015.

¹⁰¹⁾ Ibid

would lead to certain disputes between the parties.

The Hague conference on Private International Law from 2012¹⁰²⁾, has begun to focus on the question of international surrogacy arrangements, particularly the status of these arrangements under Private International Law and the status of those children who are born as per the international surrogacy arrangements.

In April 2010, The Council and General Affairs on Policy for Hague Conference acknowledged the multifaceted concerns of Private International Law and protection of children born via the cross-border or transnational surrogacy arrangements.

The UNODC Model Law against Trafficking in Persons was developed by the United Nations Office on Drugs and Crime (UNODC) to aid the States in enforcing the provisions so limited by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing that Convention.¹⁰³⁾ It was suggested "the use of women as surrogate mother¹⁰⁴⁾ "being as under exploitation.

"In the absence of any international regulation, intercountry surrogacy remains in a situation similar to that of international adoption prior to the 1993 Hague Adoption Convention. This leaves the potential for great harm to be caused to children, vulnerable surrogate mothers

¹⁰²⁾ *Preliminary Report On International Surrogacy Arrangements*, The Private International Law Issues Surrounding The Status Of Children, Including Issues Arising From International Surrogacy Arrangements., Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=text.display&tid=178, accessed on 07 April 2015.

¹⁰³⁾ United Nations Office on Drugs and Crime, *Model Law Against Trafficking in Persons*, at. http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf. Accessed on 02 December 2014.

¹⁰⁴⁾ *Ibid.* Sec.2(f) at 28

and naïve commissioning parents involved in the process.¹⁰⁵⁾

Commercial surrogacy, as opposed to altruistic surrogacy, occurs when the surrogate mother is compensated for her efforts, usually according to the guidelines of a previously decided agreement¹⁰⁶⁾.

The issues at a glance

Gestational surrogacy is hence practised widely in India. But since gestational surrogacy is now being used for pecuniary profit, it can be said Commercial Surrogacy is what is now prevalent.

Now commodification arguments are related to commercial surrogacy. Indeed, one of the strongest and most emotive arguments against permitting commercial surrogacy arrangements is that they create a market in children (result in child selling). According to this argument, the baby or child becomes a product to be bought and sold, reducing it to a commodity. Applying the argument to women, it is claimed that a surrogate's reproductive labour becomes the commodity. While commodification and exploitation often go together, this is not necessarily always the case. Accordingly, it might be useful to first clarify the plain English meaning of the two terms.

According to the Oxford Dictionary, to *commodify* or *commoditize* something is to 'turn [it] into or treat it as a mere commodity.'¹⁰⁷⁾ The word *commodity* is defined as 'a raw material or primary agricultural product that can be bought and sold, such as copper or coffee' or 'a useful or valuable thing.'¹⁰⁸⁾

¹⁰⁵⁾ Erica Davies, "The Rise of Gestational Surrogacy and the Pressing Need for International Regulation"

(2012) 21 Minnesota Journal of International Law 120, 137-138. Accessed On 31 January 2015

¹⁰⁶⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, Tuftscope: The Journal of Health, Ethics and Policy.

¹⁰⁷⁾ <<http://oxforddictionaries.com>> accessed on 13/02-2015

It has also been referred to as an 'article of trade'.¹⁰⁹⁾ The word *exploit*, on the other hand, has two ordinary meanings. First, to exploit a resource means to make full use of and derive benefit from [it].¹⁰⁹⁾ However, exploit can also mean to make use of (a situation) in a way considered unfair or underhand¹¹⁰⁾ or to benefit unfairly from the work of (someone), typically by overworking or underpaying them.¹¹¹⁾ It is the second meaning of *exploit* which is relevant where it concerns surrogacy arrangements. Thus, in this context, *exploitation* is the action or fact of treating someone unfairly in order to benefit from their work.¹¹²⁾

In India and other developing nations, women are forced by their husbands to join this industry just for the money/remuneration paid to them, and also at times for the act of donating their eggs.

Looking at the Indian Perspective

The unregulated industry of this sphere violates Article 21¹¹³⁾ and 19(1) (a)¹¹⁴⁾ of the

¹⁰⁸⁾ <<http://oxforddictionaries.com>> accessed 13/02-15. Water is given as an example of a precious commodity

¹⁰⁹⁾ The Australian Pocket Oxford Dictionary, first Australian edition (1976).

¹¹⁰⁾ Such as, eg, a company exploiting a legal loophole, <http://oxforddictionaries.com> accessed on 20 February 2015

¹¹¹⁾ For example, women exploited in the workplace, <http://oxforddictionaries.com> accessed on 20 February 2015.

¹¹²⁾ For reference see <http://oxforddictionaries.com> as accessed 15 February 2015. Here, the example given is the exploitation of migrant workers.

¹¹³⁾ *Article 21 of Indian Constitution:*

Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

For reference see O.P Rai, *The Constitution of India*, 30, (Orient Publishing Company, 2nd ed, 2014)

¹¹⁴⁾ *Article 19 (1) of Indian Constitution:* (1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

Indian Constitution. The surrogate isn't allowed to stay in her house or with her family during the term that she is pregnant. They have to stay in the Hostels or the accommodation provided by the Reproductive Clinics under their observations.

As they were, force to become surrogate mother, so their rights were, violated under Article 23¹¹⁵⁾. 'Even if there is any complication during the delivery of child, the life of the unborn child used to give more importance by the Reproductive Clinic and not the mother life, which is again a violation of the Reproductive Rights of Article 21. '¹¹⁶⁾

If one accepts the definitions above, it is technically possible to commodify something without exploiting it since the commodification of something is connected to its use as an article of trade. If commodification is also to be regarded as exploitative, it must contain the element of unfair advantage.

(A)Commodification of the child

It is said that the position of surrogacy born children are pathetically relegated to

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business.

For reference see O.P Rai, *The Constitution of India*,30,(Orient Publishing Company, 2nd ed, 2014)

¹¹⁵⁾ *Article 23 of Indian constitution:*

Prohibition of traffic in human beings and forced labour

(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

For reference see O.P Rai, *The Constitution of India*,30,(Orient Publishing Company, 2nd ed, 2014)

¹¹⁶⁾ Arhatia A. and Bhaumik U., Surrogacy : Commercialising Motherhood, JOURNAL OF LEGAL ANALYSIS AND RESEARCH, Volume 1, Issue 1(1), March 2014, Chapter 19.

property which can be sold and purchased in open markets. The whole biological process of pregnancy and reproduction is regarded as baby farming or a baby manufacturing and selling activity, wombs for lease or rent a womb. There are many instances where a baby born with abnormalities was rejected by the commissioning parents, like a commodity with a defect which gets rejected by a potential customer.

117)

In *Malaboff v. Stiver*¹¹⁸⁾, a surrogacy born child suffering from hearing loss, mental retardation and neuro-muscular disorders was rejected by all the parties to the surrogacy contract. The naked truth which has come to the fore in the above case has falsified the counter argument of the proponents that parents do not disown their natural children born with deformities. The proponents justify commercial surrogacy on the ground that whatever financial consideration flows to the surrogate mother is only compensatory of the pains undertaken by her with a philanthropic motive to enable the barren couples to enjoy the bliss of the existence of a child, which is a unique human being, not a commodity.

(B) Commodification of Women:

Surrogacy makes women breeder machines demeaning the mother –child relationship. Rich will exploit the poor women. In India a woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. Married women may be compelled by the in-laws for economic reasons or it may be a suo-moto decision to see a better life ahead. The supporters of surrogacy profess that surrogacy signifies exercise of reproductive right by a woman as a part of her freedom to contract. Consequently it promotes the constitutional right of woman to privacy and procreation by conferring economic

¹¹⁷⁾ Scott Carney, *Inside India's Rent-a-Womb Business*, (10 March 2010) Mother Jones, <http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>. Accessed on 01 April 2015

¹¹⁸⁾ *Malahoff v. Stiver*, 975 F.2d 192 (6th Cir.,1988)

autonomy to her. It is true that surrogacy upholds the constitutional right of procreation of an intending or commissioning woman. But it is a myth that it endows economic independence to the surrogate as surrogacy cannot be made perennial source of livelihood.¹¹⁹⁾

Surrogacy is further equated with prostitution. The analogy lies in the fact that like prostitution commercial surrogacy is undertaken for material and monetary consideration. The altruistic motive if any is outweighed by the commercial consideration. On the other hand non –commercial or altruistic surrogacy cannot be equated with prostitution. Altruistic surrogacy whether results in illicit intercourse especially in case of partial surrogacy which involves artificial insemination of sperm of another person is a debatable issue, if sexual intercourse is viewed as transfer of semen from a male to female body without reckoning how it is done.¹²⁰⁾

Further objection is that the consent of a surrogate is not informed and well found as she is forced to relinquish the right upon a child even before her bond with the child grows. There is no room for this argument as she knows that she is only a gestational carrier and whatever she does is for others and in case of gestational surrogacy, where she is not at all genetically related to the child, one is at loss to understand the above contention.

(C) Psychological Anguish To The Mother And Child

The rivals argue that surrogacy causes psychological anguish to the mother as well as the child. Commercial values underlying surrogacy annihilates the very biological relation and bond of kinship. Separation psychologically affects both the mother and child. The surrogate mother may find it agonizing to part with the child. As the child is deprived of breast feeding immediately after birth, it will certainly have a grave impact on its health.¹²¹⁾

¹¹⁹⁾ Supra 117.

¹²⁰⁾ Ibid.

¹²¹⁾ Colon Deborah, "No Pain, No Gain": Outsourcing Surrogacy In India, Development

Further the child will be placed in a lamentable situation when it comes to know about its birth. The proponents have ventured to silence the critics by advocating that the altruistic objective animating the whole surrogacy arrangement outweighs the negative impact arising there from. Further it is argued that the surrogate mother may change her mind subsequently to refuse to surrender the child. The current legal position under English law fortifies this argument that in such an eventuality the commissioning parents cannot enforce the surrogacy contract.¹²²⁾

(D) Determination Of The Best Interest Of The Child

The matter pertaining to the custody of the child is determined even much before the conception that it is the contractual right of the commissioning parents which puts into oblivion the best interest of the child.¹²³⁾

The rivals argued that it is the discretion of the courts to decide the issue of custody of the child after it is born, reckoning the best interest of the child. This view has garnered statutory and judicial support under English law that the courts may refuse to pass parental order in favour of the commissioning parents in the best interest of the child. It may be entrusted to the surrogate mother who is genetically related or the commissioning parents if genetically related.

Thus, the greatest attack against surrogacy is that "creating a child without desiring it

Perspectives, May 29, 2014, <http://www.developmentperspectives.ie/no-pain-no-gain-outsourcing-surrogacy-in-india/>. Accessed on 20 March 2015

¹²²⁾ Arhatia A. and Bhaumik U., "Surrogacy: Commercialising Motherhood", JOURNAL OF LEGAL ANALYSIS AND RESEARCH, Volume 1, Issue 1(1), March 2014, Chapter 19. Accessed on 20 March 2015.

¹²³⁾ Ibid.

fundamentally changes the way we look at children--instead of viewing them as unique individual personalities to be desired in their own right, we may come to view them as commodities or items of manufacture to be desired because of their utility¹²⁴⁾ leading to the danger of rejection of handicapped children. However, the proponents are strongly premised on the freedom and economic autonomy of women¹²⁵⁾ and the following resounding note is pertinent to be quoted in this regard:

“Woman as conscious, moral, social and political being is also woman as economic being. We cannot separate ourselves from our economic existence or ignore the value of our reproductive powers. The failure to acknowledge the economic value of female reproductive labor is blind folly for those who wish for equity in women's social situation.¹²⁶⁾

As both stances on these ethical dilemmas are vulnerable to fallibility due to equally convincing counter arguments, law needs to strike a delicate balance, not attempting to take sides on the moral battlefield, but by devising a framework in light of various interests involved.

From the arguments above, it seems that even where the surrogacy contract represents a commercial transaction, whether or not the child is a commodity might depend on how the surrogacy contract is actually formed. Whether or not a surrogacy contract turns the surrogate into a commodity is also open to question. What is clear is that there is no consensus about how to label the process of surrogate motherhood – particularly if one’s aim is to avoid the label of commodification. Whether it can instead be phrased as baby selling, renting a womb or selling a right to a child is in part a semantic exercise. If we accept that money changes hands we really have to

¹²⁴⁾ Herbert T. Krimmel, *Surrogate Mother Arrangements from the Perspective of the Child*, 9 *Logos* 97 (1988).

¹²⁵⁾ See Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 *J. Contemp. Health L. & Pol'y* 21 (1989).

¹²⁶⁾ Christine L. Kerian , *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children*, 12 *Wis. Women's L.J.* 113 (1997)

acknowledge that surrogacy will involve commodification –be it of a child, a uterus, or a woman. Yet the word commodification somehow feels offensive in the context of human services, especially reproduction, even though it does not have to be. Either way, as long as commercial surrogacy is involved, it is difficult to get past the argument that surrogacy arrangements commodify *something*.

The question that should be in focus is whether commodification must in itself be unethical.

(E) For The Surrogate

Gestational surrogacy is the most expensive and invasive infertility treatment, and is in general perceived as a final attempt for infertile couples. Like discussed above, in gestational surrogacy the embryo is conceived through in vitro fertilization (IVF), usually using the egg and sperm from the Intending/Prospective couple, even though donor eggs and sperm may or not be used.

The success rates of IVF vary significantly as it depends on factors such as age, cause of infertility, and weight. For example, in 2006, the U.S. had average IVF success rates of 39% in women under age thirty-five, 30% in women age thirty-five to thirty-seven, 21% in women age thirty-seven to forty, and 11% in women forty-one to forty-two¹²⁷⁾.

Commercial surrogacy has specifically been renamed “reproductive outsourcing¹²⁸⁾”. Due to the medical staff being well versed in English, good advanced technology and medical care and majorly because of low costs and expenses; India has an increasing statistics when it comes to Surrogacy. There are very few restrictions and regulations and government interferences as there is no concrete legislation laying down the do’s

¹²⁷⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, Tuftscope: The Journal of Health, Ethics and Policy.

¹²⁸⁾ *Mother’s Market: An Exploratory Study on the Surrogacy Industry in India.*, http://iussp.org/sites/default/files/event_call_for_papers/Mother.pdf

and don't look for Commercial Surrogacy. Hence there are many couples facing infertility or impotency problems/ single parents/ same-sex couples that throng to India from European nations or the American continent.

India legalized commercial surrogacy in 2002¹²⁹⁾. The guidelines given by ICMR¹³⁰⁾ and the subsequent regulations provide no means of enforcement. As the surrogacy industry in India is loosely regulated and decentralized, with very few documents and files and no official central registry exist to document and keep the various results of the procedures, the names of the Recipients and their nationalities, or any relevant information about them or the surrogates. And since there can't be any proper documentation of the numbers and statistics and the surrogacy projections or of the people so involved in this arrangement there are many instances of corruption and exploitation of the poor by the well endowed and of the illiterate by the literate. This state of affairs calls for a proper genuine attempt by the Government to legislate Surrogacy and frame and enforce regulations regarding the same especially Commercial Surrogacy.

It can be said that the rural poor in India have less than four doctors and medical opportunities for every 10,000 people in the country.

"According to the 2005 Reproductive and Child Health Facility Survey, fewer than half of India's primary health centres have a labour room or a laboratory, less than one-third stock essential drugs, and only one-fifth has a telephone connection."¹³¹⁾

The growth of private health care and ever upgrading medical infrastructure in India has led to the migration of skilled doctors and medical specialists and healthcare workers to cities and/or overseas, leaving the poor people of rural areas with very few or absolutely no healthcare options that are of some quality.

¹²⁹⁾ In Manji Yamada Case, the Apex Court held that Surrogacy is legal.

¹³⁰⁾ See Chapter IV. Legal Aspect of this Document. Pg 17.

¹³¹⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, Tuftscope: The Journal of Health, Ethics and Policy.

Very few women intending to be surrogates complete high school, more often than not they don't even complete middle school, or even have the basic education while some of the illiterate surrogates can only give their legal authorization or sign their consent forms in the Surrogate Agreement with a simple thumbprint.

These women are usually employed as nannies, maids or are housewives to farmers and tailors. Many of such unfortunate women have husbands who are contract workers, farmers, or even unemployed. Hence the relative success of India's booming and prosperous commercial surrogacy industry can be found to be standing in stark contrast to the standards of healthcare and social and economical state that these surrogate women are used to living in.

Living Conditions

To make sure the term is completed without any issues plus the safety of the growing foetus in the surrogate's womb; it is essentially required by many clinics that these women spend the period of their pregnancy residing in a surrogacy hostel.

It is alleged that reporters and researchers are rarely allowed access to the clinics or the surrogates, so gathering information about the surrogates' lives and attitudes has been difficult. At an average, the hostel rooms would have eight to ten single beds fit into a small space something like a bad dormitory.

"The women have little to occupy their time, as they cannot climb stairs or use the elevators without the nurses present. Their husbands are allowed to visit, but are forbidden to stay the night to ensure that the surrogates do not have any sexual relations during the pregnancy."¹³²⁾

¹³²⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, Tuftscope: The Journal of Health, Ethics and Policy.

But on the brighter side, some clinics do offer the surrogates activities to pass their time, such as classes on Home Science, English and other languages and also computer lessons to help them have better prospective as Surrogate mothers in the future and also improve their communication skills.

“...The nurses monitor every moment of the surrogates 'daily lives for nine months, so the clinic directors can assure their clientele that their women are, as Dr. Patel explains, 'free of vices like alcohol, smoking, and drugs. ¹³³⁾

The risks involved

This arrangement is such that the onus regarding the surrogate's health and medical or economical state lays on no one neither the Doctor nor the Intended Parents nor the Brokers. Gestational surrogacy is considered to be a complex medical process that has the potential to cause a great deal of physical harm to the carrier.

Firstly the surrogate should be medically fit and bodily prepared to take on artificial pregnancy as the baby at most times isn't genetically related to her. Although the process of transferring the embryo isn't by itself a tough and complicated one but the pre and post transfer are difficult for the surrogate, sometimes extending even till weeks after the insemination.

The surrogates' body is subjected many hormonal shots and birth control pills, estrogen shots and drugs to build her interior lining, regulate and suppress the natural ovulation cycle of the surrogate. This done to sustain the pregnancy for the full term.

All these drugs greatly affect the women's bodies by permanently changing her internal working to great extent.

The side effects of all these medications range from light-headedness, hot flashes, uterine cramping, breast fullness, spotting, to mood swings, vaginal irritation, headaches, bloating.

¹³³⁾ Ibid

If some mishap penning occurs the surrogates have no one to blame it on as it is made clear right from the time the Surrogate contract is signed that only the surrogate shall be accountable for any wrong.

As a surrogate reported to a researcher Amrita Pande during an interview, "We were told that if anything happens to the child, it's not our responsibility but if anything happens to me, we can't hold anyone responsible."¹³⁴⁾

In India, if the surrogate is injured or dies during the whole procedure the doctor cannot be held liable by the surrogate or her family.

Such riders in the Surrogate Contract show to what extent the unknowing and helpless surrogates can be used/ exploited by the brokers or the clinics with the intention of garnering maximum financial set ups by such set ups by taking short cuts in the procedures and not providing enough during the pregnancy term.

Surrogate mothers are forced to deal with another kind of probable psychological harm which has roots in their social status as being inferior and powerless pawn in the Surrogate contract.

Surrogacy implies psychological detachment from the child. Detachment has deep impacts on both the woman and the child. There are many medical and psychological studies highlighting the importance of the links and bonds formed during the pregnancy term between the mother and the child, and the need for the same for the child's development.

Majorly three reasons can be cited for these women to engage in Surrogacy. It may be completely altruistic in nature which is, when a woman feels compelled to help a helpless couple out on humanitarian grounds and the pay is considered an added perk. Financial pressure and monetary benefits can be another factor with the hope of

¹³⁴⁾ Pande, Amrita. "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker." *Signs: Journal of Women in Culture and Society*, (2010 v.35 no.4) p. 973.

upgrading in the social circle and getting to be economically better off. At last, various women get engaged in this set up because of external pressures like from the husband or parents.

In Pande's interactions¹³⁵⁾ and interviews with forty-two surrogate mothers and also close members of the family, friends, and the doctors and clinic workers, it was found that these women time and again cite their own children as the major motive for becoming commercial surrogates. "Their wishes to send their children to a proper school and/or pay for a good wedding would only be possible with the money they earned from their reproductive labour."¹³⁶⁾ Any and all of these reasons for engaging in commercial surrogacy in India, if viewed under the biomedical principles, commercial surrogacy in India may apply undue pressure on the women to consent.

Alongwith the physical harm there is a magnitude of psychological harm that she is inflicted with. For instance, when soon after birth the baby is taken away from the surrogate mother. "Some in the field of commercial surrogacy claim that the bond between the surrogate mother and her genetically unrelated newborn is weaker than the bond of the natural mother-newborn bond, since surrogate and infant are not genetically related."¹³⁷⁾ In India, there is no chance for the surrogate mother to claim parental control/ relations with the child as even the law doesn't recognize it. Although due to the state of affairs in the developing countries, there are greater chances of abuse.

Social stigma

Surrogate mothers also face immense amounts of "social stigma and ostracism"¹³⁸⁾ in India.

¹³⁵⁾ Ibid.

¹³⁶⁾ Pande, Amrita. "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker." *Signs: Journal of Women in Culture and Society*, (2010 v.35 no.4) p. 973.

¹³⁷⁾ Flaherty Keith, *Genetically Engineered Babies: An Ethical Debate*, Tuftscope: The Journal of Health, Ethics and Policy.

¹³⁸⁾ "Statement of Specific Principles for Assisted Reproductive Technologies." Indian Council of Medical Research. "

This social stigma can be said to be contributed by several factors. Surrogacy is both a procedure and a practice involving the bodies of women who basically come from the lower middle class section of the society or from the BPL¹³⁹⁾ sector, and India having a very orthodox and conservative culture, there is immense belittling and mocking and looking down upon faced by the Surrogates sometimes even by their own family who force them to rent their womb¹⁴⁰⁾.

Sometimes treated as disposable objects even by the Recipients the surrogates are pushed to one corner. There is a huge sect of the society that believes surrogacy to be a profession in parlance with sex work and prostitution leading to further stigma in the minds of the surrogate women.

Now we come to the remuneration aspect of the Surrogacy Agreement. The question is whether the Surrogates are given fitting remuneration and pecuniary consideration for their labour by the Intended Parents and the clinics. Also due to lack of any legislation in India, there is confusion regarding who bears the pre natal and post natal expenses.

The essential question is what the benefits that the women get are.

Casey Humbyrd argues that "in order to rule that commercial surrogacy is harmful to the surrogate mothers, the psychological harm of surrogacy must outweigh psychological harm of poverty."¹⁴¹⁾

It is said, "Although commercial surrogacy in India helps to create one family life, it potentially can destroy another."¹⁴²⁾

¹³⁹⁾ Bellow Poverty Line

¹⁴⁰⁾ *J Med Ethics, Commercial Surrogacy: How Provisions Of Monetary Remuneration And Powers Of International Law Can Prevent Exploitation Of Gestational Surrogates*, 2013;39:6 397-402

¹⁴¹⁾ Humbyrd, Casey. "Fair Trade International Surrogacy." *Developing World Bioethics*, (2009: v.9 no.3) p. 116.

¹⁴²⁾ Haworth, Abigail. "Surrogate Mothers: Wombs for Rent." *Marie Claire*, (2009).

After the women's nine-month job is over, the Indian surrogate mother returns, in most cases, to a dissatisfied husband with a drinking and abusive habit, neglected and malnourished children, and a hypocritical society waiting to stigmatise the surrogate and her decision of joining the Surrogacy industry.

In theory, the freedom to contract intends to preserve the independence of the Indian surrogate women, but is heavily restrictive in reality. The contracts require and subsequently command the surrogate mother to comply and direct her emotions to the interest of the other parties i.e. the Commissioning Parents to the contract.

Additionally, such contracts limit the surrogates' actions and behaviour and demand the surrogates limit her wishes and needs and emotions. As the surrogacy industry in India follows a 'laissez-faire' system, these surrogacy arrangements incline more towards the Surrogacy agencies, the healthcare providers, and intended parents all at the cost of the surrogates their families and their communities.

These women have little or absolutely no say all through the process, neither in drawing up the surrogacy contract, nor in the exercise of commercial surrogacy which inevitably encroaches upon their independence and autonomy.

Being poor and illiterate and usually hailing from lower income groups and being down trodden caste wise the surrogates are inflicted with feelings of inferiority which are contributed by the clinic workers, surrogacy doctors, and also sometimes the intended parents. They are manipulated and made follow to follow instructions and commands which may not even be properly explained to them and aren't given an opportunity to ask questions or put up complaints.

With influence from India's traditional patriarchal society, there is no control of these women on their own finances and their hard earned money that further contributes to feelings of inferiority in them as all the other stake holders in the contract have monetary control right from determining the fees and their distributing the income and then their own family members who take away their money.

The lack of independence, poverty, the mental trauma and then desperation the surrogate women (and sometimes their families) face calls into assessment whether the surrogates actually get make autonomous decisions to agree to be surrogates in the very first place. "In many clinics, the doctors, nurses, and clinic staff who benefit monetarily from the practice of surrogacy actively travel into the impoverished surrounding communities to recruit young women to become surrogates."¹⁴³⁾

Many surrogates are forced by their husbands and/or parents and/or in-laws to enter into commercial surrogacy contracts for want of money. It is imperative to look into why and basically how the women decide to agree to be surrogates in the first place. Familial pressure and desperate poverty and bleak financial conditions are the primary reasons as discussed above while clinic recruitment is the other factor to influence women to opt for the nine-month job, and indirectly contravene with their ability to make independent, self-made informed decisions.

The contract

The surrogate many times has no power or say in the deciding of the Recipients. Many times the clinics do not allow the intended parents to meet the surrogate mother and in doing so the parents never even come to know who might have fulfilled their dream.

The women are required to sign a binding consent form listing the procedures that they will undergo and the consideration amount or compensation they might receive.

A language most surrogates cannot read or understand due to being uneducated or not well versed with, the contract and forms are usually phrased in English. She signs away her reproductive rights after the contract is read out and translated by the Clinic staffs that are also driven by financial wants.

As it is commonly known, there is huge disparity between the developed countries

¹⁴³⁾ "Statement of Specific Principles for Assisted Reproductive Technologies." Indian Council of Medical Research. "

and developing nations and now with the advent of Commercial Surrogacy expanding globally; it is possible for a woman from a developing nation to have a baby sought by parents hailing from a developed nation.

According to Amrita Pande, 'In gestational surrogacy, the parents no longer care about the surrogate's genes. Not surprisingly, gestational surrogacy allowed the surrogacy market to go global. It was now possible for a South Korean couple sitting in Los Angeles to hire a surrogate from a little village in western India to have a child for them.'¹⁴⁴⁾

In India, even within the practice of commercial surrogacy, women of higher caste receive better wages for the same work than women from lower castes, further emphasizing the social inequalities that exist in the population.¹⁴⁵⁾

As discussed before and currently practiced, commercial surrogacy in India has the calibre to happen without the autonomous and informed consent of the surrogate mother. The newborn is handed over to the Intended Parents right after the delivery. There is no time provided by the contract to the surrogate to change her mind regarding the handing over of the child. Also most surrogates do not have the resources to seek legal counsel, and consequently no chance or opportunity to challenge the terms and conditions of the surrogacy contract.

When examining justice from the surrogate's point of view, it is important that the principles of medical ethics not be violated during the process of commercial surrogacy in India.

One source of injustice that affects the surrogate woman in India is the international double standard regarding the practice of commercial surrogacy. In recent times most developed nations have sought to ban commercial surrogacy for reasons that it is violative of women's ethical rights. And yet it is the people from those developed

¹⁴⁴⁾ Pande, Amrita. 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker.' *Signs: Journal of Women in Culture and Society*, (2010 v.35 no.4) p. 973

¹⁴⁵⁾ [accessed online on 20 February 2015]

countries that come to third world nations in the quest to have a child of their own when all procedures of the same (like adoption) fails in their own.

As France states, 'the human body cannot be lent out, rented out, or sold.'¹⁴⁶⁾ So this puts up the question that does a French woman's body wanting or deserving of this kind of protection more than the body of an Indian woman? If the right of an Indian woman to live under the protection and security of the principles of medical ethics any inferior to that of the right of any other woman globally?

They intend to keep what they do a secret, as reproduction is considered acceptable only within the limits of marriage; and if taken outside the purview of the domestic sphere of family, then the same childbearing intending for economic achievement is seen as dirty business or 'dirty work, 'baby-selling.'

Article 16¹⁴⁷⁾ of The Universal Declaration of Human Rights focuses on the right to marry and having a family.

Also Article 27¹⁴⁸⁾ talks about harnessing the profits and benefits of scientific procedure and technology.

By this reasoning, if there exists a certain technology to have a child with the technology of surrogacy is available, then women and even men have every right to

¹⁴⁶⁾ Humbyrd, Casey. "Fair Trade International Surrogacy." *Developing World Bioethics*, (2009: v.9 no.3) p. 116.

¹⁴⁷⁾ Art 16: (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

¹⁴⁸⁾ Art 27: (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

avail such technology & benefits.

Legal issues

Pregnancy related complications can raise certain legal issues. Some of which can be to what extent can the Recipients or the commissioning couple be held accountable for any injury or death of the surrogate due to complications in Pregnancy and labour? Also the claims that the surrogate mother may have over the child.

The materialization of a black market is inevitable and so is the criminalisation of commercial surrogacy that has left and continues to leave desperate couples and unknowing surrogates vulnerable to exploitation by the 'mafia' of the surrogacy brokers.

There is disparity between the countries regarding their take on surrogacy both Commercial and Altruistic. India and Israel seem to have pretty liberal approach towards this arrangement. Such inconsistency in the laws globally has given birth to several complicated legal dilemmas with relation to the increasing popularity of reproductive tourism.

For The Commissioning Parents

The issue which is of primary concern to commissioning couples is that the host may wish to retain custody of the child. This has occurred, but is very rare, particularly in gestational surrogacy arrangements where there is no genetic link to the surrogate mother.¹⁴⁹⁾

For The Children Born In The Surrogacy Set Up

There are also issues regarding the child being born with some defect or abnormality. The Intending parents frequently express concerns regarding the

¹⁴⁹⁾ Brinsden P., *Gestational Surrogacy*, Human Reproduction Update, Vol.9, No.5 pp. 483.

abnormality. Many times the child is rejected by the parents

- There are issues about under whose care the child goes to if the Intending Parents have marital discord before the delivery of the child.
- As a result many times the children are abandoned by the Intending Parents, the clinics and also many times by the surrogates and left with no citizenship.
- Long-term effects on the child can be seen on children given up for adoption or born after an in vitro fertilization with the donor, as surrogacy combines both situations, and provides more complexity to it.
- The child or rather the foetus also faces problems: if the surrogate mother's health or life is endangered during pregnancy term, if she changes her mind and desires to keep the child, if the commissioning/intending parents divorce during pregnancy and refuse to have the child, if the child is born with some abnormality or a disability and neither the surrogate nor the commissioning parents want to have him or her.

The Indian judiciary has been involved in the twisted aspects of Transnational Surrogacy and have tried to reason out all angles of the cases ranging from the claims if the Surrogate to Maternity benefits or the citizenship of the babies born out of such arrangement. It has been observed that emotional and legal relationship of the babies with the surrogate mother and the donor of the ova are also of vital importance¹⁵⁰⁾.

In surrogacy, the child is treated like a commodity or the object of a legal agreement between two parties. The only aim of surrogacy is to fulfil the desire of a child of adults, and to enable foreign parents to satisfy their wish for a child at any price.

¹⁵⁰⁾ (Union of India Vs. Jan Balaz) Jan Balaz Vs. Anand Municipality & Ors. Letters Patent Appeal No.2151 of 2009

SURROGACY AS EXPLOITATION

After talking about all advantages and disadvantages of the industry, it can be bulleted it as:

- a. The child is made a commodity and objectified thus compromising the dignity of the child. Also the dignity of the mother is compromised, even if her participation is said to be voluntary.
- b. Such intentional parenthood via surrogacy give rise to a situation in which upto five people can claim parental status over the child: and the surrogate, the genetic mother and father and the contracting parents.
- c. This can be said to fragment human relations, ‘First, it separates sex from reproduction; second, it separates motherhood from pregnancy; and third, it separates the unity of one couple in the involvement of a third person within the potential family relationship.’¹⁵¹⁾
- d. Many intending parents or the contracting couples, desperate to have children, are also ready ‘to pay premium prices for specific physical attributes and good looks.’¹⁵²⁾ This willingness of infertile couples to shell out significant amounts of money has resulted in a direct effect over the increasing number of women inquiring about egg donation.
- e. The women who desire to donate eggs or become surrogate mothers have to undergo a very long process comprising of questionnaire covering all aspects of the her life right from physical state, medical history, sex life, parental background, etc. On the hindsight, this exposes the not so literate surrogates.

¹⁵¹⁾ Olga van den Akker, The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK, 15 HUMAN REPROD. 1849, 1849 (2000) [hereinafter Importance of a Genetic Link].

¹⁵²⁾ the Iona Institute, The Ethical Case Against Motherhood: What we can learn from the law of European Countries

f. Most surrogates and contracting couples perceive the surrogate pregnancy to be a business transaction from the starting, even while the surrogate is also the genetic mother of the child. This causes the detachment of the surrogate from the child and the pregnancy leading to psychological damage.

g. In most surrogacy situations, five individuals have a claim of right as the child's legal parent. Up until the child is born and by law the contracting couple is legally declared the child's parents, there is always a possibility of the child being claimed by someone other than the intended couple for custody of the child leading to extreme worry and anxiety in the minds of the Surrogate and the couple.

'It is common for the contracting couple and the surrogate to make arrangements for continuing contact after the birth of the child, including the exchange of pictures, letters, phone calls, and visitation. ¹⁵³⁾

Other worries include fear that the IVF treatments will be unsuccessful, concern about the expenses involved, fear of social stigma, and concern for the emotional well-being of both the surrogate and the contracting mother.

h. When Baby Becomes the Unwanted Object of Contractual Transaction: if born with any kind of disability, a baby with two mothers and with a legal claim of parentage, will yet be unwanted. This shows that there is expectation in the minds of the intending parents that the child should not be disabled.

i. In Asia, surrogacy for profit is mostly banned because of the 'tricky ethics of wealthy couples paying comparatively poorer women to bear their children ¹⁵⁴⁾.

In many countries like USA, Thailand, Vietnam there are many surrogate rings that exploit the women who come forward to be the surrogate. These women are sexually

¹⁵³⁾ Lin Tina, Born Lost: Stateless Children in International Surrogacy Arrangements, *Cardozo Journal of International & Comparative Law*; Winter 2013, Vol. 21 Issue 2, p545

¹⁵⁴⁾ Singer D. and Hunter M., *Assisted Human Reproduction: Psychological and Ethical Dilemmas*, John Wiley & Sons, 22-February 2006.

exploited by the members of the ring and also paid very low wages for their service or at times forcibly impregnated with other women's embryos or when their health is not fit for pregnancy.

j. Commercial surrogacy arrangements raise concerns of forced surrogacy and manipulation. Given the nascent stage of many reproductive technologies, the nexus between human trafficking and surrogacy has largely been ignored. India and other countries, which is at the front of the international surrogacy market, have raised concerns about the ethics of surrogacy since it is vastly unregulated and unfettered and open to oppressive situations.

k. Surrogacy recruits/ prospective surrogates are normally kept in the hotel of the clinics wherein they are monitored by the doctors around the clock.

There is a lack of counselling services accessible to surrogates before and after the relinquishment of their gestational babies and use of scheduled check ups and C-sections by clinics that helps in quick delivery.

The surrogacy industry in India also promotes discrimination in its basest forms by choosing the surrogate based on her caste, colour, religion, looks. Women's bodies have become commodities in the course of which others can procure what they desire to have while at most times all concern, care, and medical attention is directed towards the child while the surrogate mother is left to fend for herself.

CONCLUSION

Despite its various economic rewards, many believe that commercial surrogacy by its very concept inherently is violative of the bioethical principles to which the Indian surrogate women should be permitted. As the author in *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*¹⁵⁵⁾ points out that in a country such as India, which has a free market economy¹⁵⁶⁾, with a combination of private and public medical and healthcare sectors, will have difficulty in attaining a well moderated or moderate or regulated adaptation of surrogacy. It is believed that it is crucial to preserve the rights and dignities of these Indian women, and that commercial surrogacy in India must be banned in order to end the potential exploitation that is occurring.¹⁵⁷⁾

Moreover, it can be held that the right to reproduce is an inborn and fundamental human right¹⁵⁸⁾.

Surrogacy is the only mode to conquer both biological infertility and its social impacts by providing medically infertile couples and also the socially infertile individuals like same sex couples or single women and men wanting a baby or those who are not willing to get married to actually have a child to call their own.

India needs to have a proper legislation to prevent the minority of the society from being kept hapless in one corner and ever desirous of a child but not being to ever

¹⁵⁵⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, *TuftsScope: The Journal of Health, Ethics and Policy*.

¹⁵⁶⁾ Free market economy is said to be one where the buyers and sellers are solely responsible for their decisions that they make. The subsequent power of allocation and distribution of goods and services is on the prices of the commodities.

¹⁵⁷⁾ Wadekar Neha, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, *TuftsScope: The Journal of Health, Ethics and Policy*.

¹⁵⁸⁾ Ibid 49 and 50

have one. Yet such a legislation needs to be made keeping in mind that the ones with financial and social resources don't exploit the unknowing surrogates in their desire to have a child and so remove any trace of possibility of frustration, indignation in minds of any of the parties.

There are four paths that India can take so as to regulate commercial surrogacy in the coming times.

Either India can continue to subsist in a vaguely regulated setting concerning surrogacy, in which case the women opting to be surrogates are the most likely to be subjugated to exploitation and deprived of the fundamental medical moral principles.

Or, the Indian government can go ahead with laws to regulate and control the surrogacy industry, necessitating and establishing a central registry for surrogate women and the intended parents, creating more of sufficient remuneration for surrogates, and establishing agencies to inspect and aid in maintaining a quality standard of care. Additionally, this regulation ought to also provide protection and non-binding clauses for the women opting to be surrogate mothers, in case they suffer from any injury and ailment during the surrogacy process, either mentally or physically.

India could follow in the footsteps of countries such as England by declaring gestational surrogacy to be legal, but with the condition being only in altruistic cases. In such state of affairs, the aspect of money would be isolated from the practice itself, but the technological aspect of surrogacy would still be accepted and utilized.

Finally, India can also realize a ban on commercial surrogacy.

The ART¹⁵⁹⁾ Bill needs to be finalised and enforced without further delay. Also a more specialised legislation on Surrogacy itself needs to be framed keeping in mind the provisions in the Contract Act 1872 and chances of exploitation and mis-interpretation of the laws by the people.

¹⁵⁹⁾ Assisted Reproductive Technology Bill 2010

Recommendations for the legislation of a Surrogacy domain Law and majorly for the pending ART Bill 2010:

For the RIGHTS AND WELFARE OF THE CHILD:

The legislation should favour the Intended Parents to be the donors which has time and again proven to be for the best interest of the children which should be the focus of the laws. It is best for the mother and the child both emotionally and psychologically if there is allowed room for some kind of bonding between the people sharing the same genes.

So it can be agreed that it is for the best for all the parties if one of the intended parties becomes the donor as there will be maximum chances of bonding of emotional ties and mental and physical similarities due to sharing of the genes.

This can also lead to reduction in instances of abandonments of the child (if born with some deformity or if the parents opt for divorce before the birth of the child). Also there are lesser chances of the child being abused by the Commissioning Parents.

The Place of information: Although the draft of the Bill provides provisions for the child born of surrogacy to obtain information about the donors and his/her surrogate mother upon attaining major status i.e. 18 years of age but it has some drawbacks. On the hindsight, it has provisions that state the expose of personal identification information except in some rare cases when the consent of the surrogate has been taken already.¹⁶⁰⁾

Also this document in no place expressly clarifies where such application needs to be

¹⁶⁰⁾ Clause 36 of Assisted Reproductive Technology Bill 2010: Right of the child to information about donors or surrogates –

(1) A child may, upon reaching the age of 18, apply for any information, excluding personal identification, relating to his / her genetic parent or parents or surrogate mother.

put up by the seeker although the ICMR¹⁶¹⁾ and its semen banks and the ART clinics handle all the documents of the database of the donors and surrogates.

This shows that there is dire need for specific laws and also specific provisions in these laws regarding the processes and the dealings of the procedure after the delivery and subsequent years.

For the rights concerning the physical, social welfare and mental state and the children born out of surrogacy. If such points are included in the bill then there shall be conferred some legitimacy to the children and also the social stigma for the surrogates shall be lessened. Serious special measures need to be taken up to make sure the welfare of the child is focussed on and the intending parents are capable both mentally and financially of raising the child taking into account all factors like age, living conditions, health, etc.

FOR THE RIGHTS OF THE SURROGATE:

Age: The draft bill needs to specify its standing on the age factor of the surrogate mother as in Clause 26(3)¹⁶²⁾ of the ART Bill, the bare minimum age is being 21

(2) The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent or parents or surrogate mother when required, and to the extent necessary, for the welfare of the child.

(3) Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother.

Provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother.

¹⁶¹⁾ Indian Council of Medical Research.

¹⁶²⁾ Clause 26. Sourcing of gametes :

(1) The collection, screening, storage and handling of gametes shall be done by a semen bank registered as an independent entity under the provisions of this Act.

(2) A semen bank shall operate independently of any assisted reproductive technology clinic.

(3) Semen banks shall obtain semen from males between twenty one years of age and forty five years of age, both inclusive, and arrange to obtain oocytes from females between twenty one years of age and

years but the Rule 4.7.1¹⁶³⁾ imparts that the donor must be a healthy women of the age

thirty five years of age, both inclusive, and examine the donors for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the parents, or any one of them, surrogate or child.

(4) All semen banks shall have standard, scientifically established facilities and defined standard operating procedures for the cryo-preservation of sperm and oocytes.

(5) All semen banks shall cryo-preserve sperm donations for a quarantine period of at least six months before being used and, at the expiry of such period, the semen bank shall not supply the sperm to any assisted reproductive technology clinic unless the sperm donor is tested for such diseases, sexually transmitted or otherwise, as may be prescribed.

(6) A semen bank may advertise for gamete donors and surrogates, who may be compensated financially by the bank.

(7) A semen bank shall not supply the sperm of a single donor for use more than seventy five times.

(8) No woman shall donate oocytes more than six times in her life, with not less than a three-months interval between the oocyte pick-ups.

(9) If more than fourteen (14) oocytes are retrieved from the donor at one occasion, they shall not be used for more than two recipients thus ensuring that at least seven oocytes are available for each recipient.

(10) One sample of semen supplied by a semen bank shall be used by the ART clinic only once on only one recipient.

(11) A semen bank shall obtain all necessary information in respect of a sperm or oocyte donor or a surrogate, including the name, identity and address of such donor or surrogate, in such manner as may be prescribed, and shall undertake in writing to the donor to keep such information confidential.

(12) No semen bank shall divulge the name, identity or address of any sperm donor to any person or assisted reproductive technology clinic except in pursuance of an order or decree of a court of competent jurisdiction.

(13) Any person or semen bank who divulges the name, identity or address of a sperm donor in contravention of subsections 11 and 12 of this section shall be guilty of an offence under this Act.

(14) A semen bank may, for such appropriate fee as may be prescribed, store any semen obtained from a donor for the exclusive use of the wife or partner of the donor.

¹⁶³⁾Rule 4.7.1 Indications for oocyte donation:

Examples are:

- Gonadal dysgenesis.
- Premature ovarian failure.
- Iatrogenic ovarian failure due to ovarian surgery or radiation, or chemical castration.

bracket of 18yrs –35 years.

This calls for the removal of the discrepancies between the two provisions

Payment To The Surrogate: There is no clarity on financially compensating the surrogate , as on one hand it seems that the surrogate receives the amount after negotiations between the intended parents and the surrogate herself. But also there are times when the semen bank pays the surrogate. This creates a lot of confusion as there is no deciding factor as to from where the payment of surrogate will come.

Health Risks Of Surrogate : As per Section 26 (8)¹⁶⁴⁾ of the Bill a woman is permitted to donate her eggs six times in her lifetime, in intervals of three months each, which is dangerous for her health as the time interlude of 3 months is too premature for a woman to commence with hormonal injections intended for the creation of eggs and for that reason this time period should be extended at least to 6 months as by then the surrogate would have become physically strong and well enough to sustain another pregnancy term.

Also the time period mentioned in Clause 34(5) must be increased to 2 years for the surrogate to attempt surrogacy for a particular couple.

Confidential Information: As per section 34(12)¹⁶⁵⁾ of the drafted ART Bill 2010

- Women who have resistant ovary syndrome, or who are poor responders to ovulation induction.
- Women who are carriers of recessive autosomal disorders.
- Women who have attained menopause.

Donors should be healthy (as determined by medical and psychological examination, screening for STDs, and absence of HIV antibodies) women in the age group of 18-35 years. The recipient should be a healthy woman (determined by medical and psychological examination) having normal genitalia (as determined by physical examination) and uterine cavity (as determined by hystero-salpingography). In case of OD, the semen characteristics of the husband must be determined to see if they are in conformity with those associated with normal fertility. The blood group of the donor should be noted; the donor should also be tested for HIV, HBsAg, HCV and VDRL.

¹⁶⁴⁾ *Supra* 7.

¹⁶⁵⁾ Clause 34(12): *Rights and Duties in relation to Surrogacy:*

every bit of the information regarding the surrogate shall be held in reserve confidence and information with reference to the surrogacy shall at no cost be disclosed to any person.

But in section 34(17)¹⁶⁶⁾ it is clearly stated that the surrogate mother is to be a certification by the Recipients or the Clinic authorities i.e. the persons who were availing her services.

But looking at the way the surrogates are treated and ostracized by the society, it would be good option to keep these records in highest security and the law should do away with the certification as this only commoditise the whole set up and ends up grading the women.

Also such disclosure should be made only after the direction by a court competent enough to do so.

In fact, the legalization of gestational surrogacy done with intention of profiting financially majorly aims to protect and safeguard the surrogate's interests and rightfully so. It also attempts to look at the concerns and risks that might be faced by the Intended Parents. But what should be focussed more than the former is the state of the babies born out of surrogacy and the risks that they might have to face.

In this perspective, for the progress of commercial surrogacy and to control it from becoming a pure business venture for some people it necessary to take up measure that may prevent the legal rights of the surrogate and the babies from being jeopardized.

Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Indian Council of Medical Research, except by an order of a court of competent jurisdiction.

¹⁶⁶⁾ Clause 34(17)): *Rights and Duties in relation to Surrogacy*:

A surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them.

As a law student certain suggestions that are made:

- a. The ART Bill needs to first answer certain questions:
 - If it is ethically fitting for paying the surrogate for the nine month period??
 - If a disability is detected during pregnancy, can the surrogate mother be obliged to abort?
 - Will it be considered upholding the rights and dignity of the surrogate and the children to be bound by just the Law and the contracts?? What if there is a change of mind and if so, then is it justified?
 - When the Commissioning parents give up/ abandon the child due marital discord or fall outs between them or due to the child being deformed, it is acceptable by the current times and isn't considered a contractual breach. Does there occur a need for a law regulating this probability? Also will it still be a breach of contract if there is a discord between the surrogate and the other parties resulting in the surrogate wanting to abort or not relinquish the child after delivery???
- b. To prevent the child of a surrogate arrangement from being made a product of commercial transactions, it calls for "Successful handling" of surrogacy wherein special attention needs to be given to address the concerns of all parties
- c. In cases of surrogacy involving nationals of other nations i.e. "international intending parents" the needs of both the countries need to be addressed keeping in mind the legal framework and the legal environment in both the lands(the country from where the recipients come from and the country where the surrogate comes from). The partnership with the local organizations should work in tandem with the wishes and needs of the parties, the surrogate and the recipients, while not contradicting with the laws. International parents should make sure to find an agency with such understanding of the laws to help determine which legal strategy would work best to ensure that they can return and gain full legal rights for both parents and newborns back home
- d. The Indian legislature needs to take up sufficient steps to draft a law that no longer projects surrogacy as a work for the downtrodden only or an act that calls for social boycotting. Proper legislation can erode the paradigms regarding surrogacy.
- e. In case of any mental or physical trauma that she may experience before or

during the pregnancy, there should be provisions letting the surrogate to terminate the term.

f. The surrogate should be given enough time to nurse and stay with the child. As already discussed before it gives the child reassurance and the much needed comfort after birth. Such time period should be laid down and strictly followed.

Commercial Surrogacy is still a new concept in the third world countries and so the guidelines. Regulations, laws all need to be framed keeping the human rights issues all over the world.

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SURROGACY AND HUMAN RIGHTS.

Dissertation under the guidance of Ms Kavya Salim.
