

Surrogacy Arrangement: A Socio-Legal Study in Lucknow City

THESIS

SUBMITTED TO THE
BABASAHEB BHIMRAO AMBEDKAR UNIVERSITY
LUCKNOW



FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy

IN
LAW

SUPERVISOR

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2021



THIS THESIS IS DEDICATED

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This is to declare that the thesis titled “**Surrogacy Arrangement: A Socio-Legal Study in Lucknow City**” is a original work undertaken by me under the supervision of **Dr. Sufiya Ahmed**, Assistant Professor, Department of Law and School of Legal Studies, Babasaheb Bhimrao Ambedkar (Central) University, Lucknow, India for fulfillment of the requirements of the degree of **Ph.D.(LAW)**. No part of this thesis has formed the basis for the award of any degree in this or any other university or Institution. This is also to declare that the thesis is essentially free from all kinds of plagiarism.

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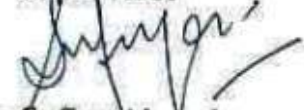
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This thesis submitted to Babasaheb Bhimrao Ambedkar University, Lucknow satisfies all the requirements as stipulated in the *Doctor of Philosophy (Ph.D.) regulations, 1999 as amended in 2013* and it is fit for submission and evaluation for the award of the degree of Doctor of Philosophy of the University.

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ACKNOWLEDGEMENT

The present attempt is directed by the supernatural power, which awakened to be endowed with the prestigious task of accomplishing the work in hand. On the occasion of submission of this thesis first and foremost, I would like to express my deepest sense of gratitude to Almighty for his loving care and enabling me to accomplish this venture.

*I bow my head with great reverence in the pious feet and take my hand towards my inner soul to Babasaheb Bhimrao Ambedkar ji, a great scholar on his name university is established, I am extremely thankful to our Vice-chancellor **Prof. Sanjay Singh** for providing me a suitable platform to carry out my research work.*

*With an utmost degree of sincerity, I avail this opportunity to express my heartfelt thanks to my learned guide and supervisor **Dr. Sufiya Ahmed**, Assistant Professor, Department of Law, School of Legal Studies, Babasaheb Bhimrao Ambedkar (Central) University, Lucknow for her keen interest, valuable guidance, consideration, criticism and unceasing encouragement throughout the thesis work without his interest and deep involvement my thesis could not have been successfully completed.*

*I wish to express my deep sense of gratitude to **Prof. Preeti Mishra** (Dean) School of Legal Studies, BBAU, Lucknow and **Prof. Sanjeev Kumar Chadha**, Head, Department of Law, School of Legal Studies, Babasaheb Bhimrao Ambedkar (Central) University, Lucknow for permitting me to work in this department and their active support and provided all required facilities.*

*I am deeply indebted and grateful to **Prof. Sudarshan Verma** , Former Dean School of Legal Studies, & Former Head, Department of Law, Babasaheb Bhimrao Ambedkar (Central) University, Lucknow, for her inspiration and benevolent cooperation and encouragement.*

*I take this opportunity to express my deep sense of gratitude to my respected teachers of the, School of Legal Studies, Babasaheb Bhimrao Ambedkar (Central) University, Lucknow namely, **Dr. Pradeep Kumar, Dr. Anis Ahmad, Dr. Mujibur Rehman**, for their valuable suggestions, inspiration and liberal help rendered during the course of research.*

I am thankful to all my seniors, my friends and departmental staff for their possible help during the course of research..

*I am grateful to the entire **library staffs** of the Gautam Buddha Central Library, Babasaheb Bhimrao Ambedkar (Central) University, Lucknow and for their valuable cooperation in searching of the study material and providing library facilities.*

*I have no words to express my gratitude to my mother **Smt. Raj Munni Devi** and my father **Shri Triloki Nath Gond** & My Younger Brother **Ghanshyam Kumar Gond**, for their blessing, affection and every kind of support throughout my research. I am also immensely thankful to my family members for their love and affections every kind of support throughout my research.*

*Last but not the least, I am also thankful to the **Dr. Swadesh Kumar**, Proprietor of Scholars Hub, Ratanakarkhand, Southcity, Lucknow, for transforming the manuscript into the present form.*

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TABLE OF CONTENT

<i>Declaration</i>	i
<i>Certificate</i>	ii
<i>Acknowledgement</i>	iii
<i>Table of Content</i>	v
<i>List of Cases</i>	xii
<i>List of Abbreviations</i>	xiv

DESCRIPTION	Page No.
CHAPTER-1	1-28
INTRODUCTION	
1.1 Introduction	1
1.1.1 Types of Surrogacy	4
1.1.2. Causes of Infertility	9
1.1.3 Causes of Female Infertility	10
1.1.5 Defective Transport	10
1.1.7 Congenital anomaly and fibroids	11
1.1.8 Causes of Male Infertility	11
1.1.9 Defective Spermatogenesis	11
1.1.10 Defective Transport	12
1.1.11 Ineffective Delivery	12
1.1.12 Assisted Reproductive Technology (ART)	12
1.1.13 Types of ART	12
1.2 Meaning and Definition of Surrogacy	14
1.3 Types of Surrogacy	15
1.3.1 Traditional surrogacy	15
1.3.2 Gestational surrogacy	15
1.3.3 Altruistic surrogacy	16
1.3.4 Commercial Surrogacy	16
1.4 Rights of Surrogate Parties	16
1.8 Statement of Problem:	22

1.9 Objectives of Study	23
1.10 Hypothesis	23
1.11 Research Question	23
1.12 Research Methodology	24
1.13 Objectives of the Study	24
1.14 Research Methodology	25
1.14.1 Research Design	25
1.14.2 Population	25
1.14.3 Sampling Unit	25
1.14.4 Sample Size	26
1.14.5 Methods of Data Collection	26
1.14.6 Data Collection	26
1.14.7 Research Instrument	27
1.16 Chapterisation	28
CHAPTER-2 SURROGACY: HISTORICAL AND CONCEPTUAL OVERVIEW	29-73
2.1 Introduction	29
2.2 Infertility	30
2.2.1 Infertility in Historical Perspective	32
2.2.2 Infertility in Religious aspects	34
2.2.3 Infertility Social Perspectives	35
2.2.4 Causes and Types of Infertility	37
2.2.5 Female infertility	38
2.2.6 Infertility of Female may be of following four types:-	39
2.2.7 Factures of Female infertility	41
2.2.8 Factor of Age	42
2.2.9 Smoking and Alcohol use	44
2.2.10 Immune Responses	44
2.2.11 Factor of Mobile Phone Use	45
2.2.12 Sexual Violence	45
2.3 Causes and factors of Male Infertility	45

2.3.1 Causes of Male infertility	46
2.3.2 Risk Factors of Male Infertility	46
2.3.3 Risk Factors of Female Infertility	51
2.3.4 Treatment of infertility	55
2.3.5 Assisted Reproductive Technology (ART)	56
2.3.6 Artificial Insemination (AI) 56	57
2.3.7 Historical aspect of Surrogacy	67
2.4 Conclusion	71
CHAPTER-3	74-106
INTERNATIONAL LAW RELATED TO SURROGACY	
3.1 Introduction	74
3.2 Surrogacy Law in United Kingdom	75
3.3 Parenthood under UK Law	76
3.3.1 The Surrogacy Arrangements Act (1985)	76
3.3.2 The Human Fertilization and Embryology (Act 2008)	77
3.4 Surrogacy Law in US	78
3.5 Surrogacy law in China	81
3.5.1 The "Administrative Measures for Human Assisted Reproductive Technology" 2001	84
3.6 Surrogacy Law in Japan	86
3.7 Surrogacy Law in Thailand	88
3.7.1 Laws regulating Surrogacy in Thailand before the Enactment of the ART Act	90
3.7.2 Protection for Children Born Through Assisted Reproductive Technologies Act	91
3.8 Surrogacy Law in Russia	93
3.9 Surrogacy Law in Australia	96
3.10 Surrogacy Law in South Africa	100
3.10.1 Children's Act 38 of 2005 (the Children's Act)	102
3.10.2 The Surrogate Motherhood Agreement	102
3.11 Conclusion	104

CHAPTER-4	107-136
INDIAN LAW AND POLICY RELATED TO SURROGACY	
4.1 Introduction	107
4.2 ICMR 2005, principles for Assisted Reproductive Technologies	109
4.3 Indian Council of Medical Research, Guidelines (2005)-	112
4.4 General Principles	113
4.4.1 Informed Consent	113
4.4.2 Selection of Donor	114
4.4.3 Cloning (through nuclear transplantation or embryo splitting)	117
4.4.4 Specific Principles - Legitimacy of the Child born through ART	117
4.4.5 IVF-ET (in-vitro fertilisation and embryo-transfer) and Surrogate Motherhood	118
4.4.6 Right of Children / Parents	119
4.5 Draft of Assisted Reproductive Technology (Regulation) Bill, 2008	120
4.6 Draft of Assisted Reproductive Technology (Regulation) Bill, 2010	123
4.7 The Surrogacy (Regulation) Bill, 2014 and Indian Visa Regulation 2012, Ministry of Home Affairs	125
4.8 The Surrogacy Bill, 2016	127
4.9 The Law Commission of India 228th report	129
4.10 Surrogacy (Regulation) Bill, 2019	130
4.10.1 Altruistic Surrogacy Requirements	131
4.10.2 Surrogacy Prohibited Acts / Categories	131
4.10.3 The bill also covers the following offences that will be covered by the 2019 bill	131
4.11 Surrogacy (Regulation) Bill, 2020	132
4.11.1 Impact of the Bill on Surrogacy Contracts	133
4.12 Conclusion	134

CHAPTER 5	137-167
JUDICIAL RESPONSE TOWARD SURROGACY	
5.1 INTRODUCTION	137
5.2 UNITED STATES OF AMERICA	138
5.3 UNITED KINGDOM	140
5.3.1 The Surrogacy Arrangements Act 1985	141
5.3.2 The Human Fertilization and Embryology Act 1990	141
5.4 CHINA	147
5.5 JAPAN	149
5.6 AUSTRALIA	149
5.7 SOUTH AFRICA	151
5.8 THAILAND	152
5.9 CANADA	155
5.10 INDIA	159
CHAPTER 6	168-223
SOCIO-LEGAL, ETHICAL AND MORAL ISSUES	
RELATED TO SURROGACY	
6.1 Introduction	168
6.2 Commercial Surrogacy and Its Burring Issues	171
6.3 Legal issues related to surrogacy	175
6.3.1 Legality of surrogacy contract	177
6.3.2 Surrogacy Arrangement	179
6.3.3 Rights of parties in a surrogacy contract	180
6.3.4 The guidelines to protect the interests of the child	184
6.3.5 Legitimacy of child	187
6.3.6 Children born of invalid and voidable marriages have legal status	188
6.3.7 Section 112, Birth during marriage, a conclusive proof of legitimacy	191
6.3.7 Citizenship of Surrogate Baby	191
6.3.8 Surrogate Child Right	194
6.3.9 Protection of Surrogate Mother, Insurance, Medical Facility, Psychological Impact	195

6.3.10 ICMR, Guidelines of the interests of surrogate mother	196
6.3. 11 Rights of Surrogate mother	196
6.3.12 Right to Health	197
6.3.13 Psychological and Mental Risks of Surrogate Mother	201
6.3.13 Attachment with Fetus and New Born	202
6.3.14 Constitutional Provisions	202
6.3.15 Right to Privacy	205
6.3.16 International human rights treaties recognizing the right to health	210
6.3.17 Right to Dignity	211
6.4 Social Issues Related to Surrogacy	212
6.4.1 Surrogacy linked with prostitution	212
6.4.2 Surrogacy as a Baby Selling	213
6.5 Ethical Issues: <i>Morality</i>	215
6.5.1 Financial Issues	218
6.5.2 Facilities	220
6.5.3 Marriage institution	221
6.5.4 Conclusion	222
CHAPTER 7	
DATA COLLCECTION AND INTERPRETATION	224-255
7.1 Introduction	224
7.2 Objectives	224
7.4 Research Design	225
7.4.1 Population	225
7.4.2 Sampling Unit	225
7.4.3 Sample Size	225
7.5 Methods of Data Collection	226
7.5.1 Data Collection	226
7.5.2 Research Instrument	226
7.6 Statistical Tools of Analysis	226
7.6.1 Descriptive Statistics	227
7.6.2 Inferential Statistics	227

7.7 Hypothesis	227
7.8 Data Collection and Interpretation	227
7.9 Demographic Profile	228
7.10 Hypothesis Testing	254
CHAPTER 8 CONCLUSION AND SUGGESTIONS	256-267
8.1 Conclusion	256
8.2 Suggestions	265
BIBLIOGRAPHY	268-281
APPENDICES (QUESTIONNAIRE)	-----

LIST OF CASES

1. *Adair & Anor and Bachan*
2. *Baby Cotton' case*
3. *Baby Mukai case*
4. *Bernieres and Anor&Dhopal*
5. *Baby Manji Yamada v. Union of India &Anr*
6. *B.K Parasarathi's case*
7. *Doe v. Kelley Case*
8. *Down syndrome (Baby Gammy) case*
9. *Farnell v. Chanbua*
10. *Goutam Kundu v. State of West Bengal,*
11. *In re Baby M Case*
12. *In Re M*
13. *In Rypkema v. British Columbia*
14. *In Re M.D*
15. *Inc. v. Armstrong*
16. *Johnson v. Calvert Case*
17. *JR. v. L.H*
18. *Jan Balaz v. Anand Municipality and others*
19. *Kiran Kailas Gavhande and Others v. Union of India*
20. *Kanti Devi v. Poshi Ram*
21. *Kharak Singh v. State of Uttar Pradesh*

22. *Maneka Gandhi v. Union of India*
23. *New State Ice Co. v. Liebmann Case*
24. *P. Geetha v. The Kerala Livestock Development Board Ltd*
25. *R Rajagopal v. State of Tamil Nadu*
26. *Roe v. Wadx*
27. *XX v Whittington Hospital NHS*

ABBREVIATIONS

A.C	:	Appeal Cases
A.L. J	:	Australian Law Journal
A.L.J. R	:	Australian Law Journal Reports
AAL R	:	Anglo-American Law Review
AH	:	Assisted hatching
AIMPLB	:	All India Muslim Personal Law
AIR (J)	:	All India Reporter Journals
AIR	:	All India Reporter
AIR(SC)	:	All India Reporter (Supreme Court)
Ala L Rev	:	Alabama Law Review
All ER Rev	:	All England Law Reports Annual Review
All L J	:	Allahabad Law Journal
All L R	:	Allahabad Law Reports
All L T	:	Allahabad Law Times
All. E. R	:	All England Law Reports
Alld.	:	Allahabad
ALR	:	American Law Reports
ALT	:	Allahabad Law Times
ALT	:	Andhra Law Times
Am U L Rev	:	American University Law Review
AMH	:	Antimüllerian hormone
APEC	:	Asia Pacific Economic Corporation
APQ	:	American Philosophical Quarterly
ART	:	Assisted reproductive technology
Art.	:	Article.
ASIL	:	American Society of International Law
B.Y.I. L	:	British Yearbook of International Law

BJLS	:	British Journal of Law and Society
BLJ	:	Banaras Law Journal
BLR	:	Bombay Law Review
BMMA	:	Bhartiya Muslim Mahila Andolan
Bom.	:	Bombay
C.A	:	Court of Appeal
C.A. D	:	Constituent Assembly Debates
C.J. I	:	Chief Justice of India
Cal.	:	Calcutta
CEDAW	:	Convention the elimination of all forms of Discriminations against women
CESCR	:	Committee of Economic, Social and Cultural Rights
CLT	:	Cuttack Law Times
Com	:	Committee
Cr. L. J	:	Criminal Law Journal
Cr. P. C.	:	Code of Criminal Procedure
Del.	:	Delhi
Doc.	:	Document
e. g.	:	Example gratia (for Example)
E. R	:	English Reports
Ed.	:	Edition
EPW	:	Economic and Political Weekly
EWHC	:	High Court of England and Wales
FB	:	Full Bench
GA	:	General Assembly of the United Nations
GIFT	:	Gamete intrafallopian transfer
H.C	:	High Court
H.R.L. J	:	Human Rights Law Journal
Harv. L. R	:	Harvard Law Review
HMA	:	Hindu Marriage ACT

HR	:	Human Rights
HRC	:	Human Rights Committee
HRQ	:	Human Right Quarterly
I.A.	:	Indian Appeals
I.E	:	Indian Express
i.e.	:	id est (that is)
IBA	:	International Bar Association
Ibid	:	In the same place (Ibidem)
IBR	:	Indian Bar Review
IC	:	Indian Cases
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural
ICJ	:	International court of Justice
ICSI	:	Intracytoplasmic Sperm Injection
IJIL	:	Indian Journal of International Law
IJPA	:	Indian Journal of Parliamentary Affair
IJPA	:	Indian Journal of Public Administration
ILI	:	Indian Law Institute
ILR	:	Indian Law Reports
Infra	:	Below
IPC	:	Indian Penal Code
IPPs	:	Information Privacy Principles
IUI	:	Intra-uterine Insemination
IVF	:	In vitro fertilization
J. C. L& Crim.:		Journal of Criminal Law and Criminology
j.	:	Journal
JBCI	:	Journal of Bar Council of India
JCPS	:	Journal of Constitutional and Parliamentary Studies
JILI	:	Journal of Indian Law Institute
JT	:	Judgement Today (SC)

KLT	:	Kerala Law Times
Lit.	:	Litigation
LQR	:	Law Quarterly Review
LT	:	Law Times
MLJ	:	Madras Law Journal
MLR	:	Modern Law Review
MP	:	Madhya Pradesh
N. Y	:	New York
NGO	:	Non-Governmental Organization
NHRC	:	National Human Rights Commission
OIC	:	Organisation of Islamic Countries
P.C	:	Privy Council
Para	:	Paragraph
PIL	:	Public Interest Litigation
PLT	:	Political and Law Times
PROST	:	Pronuclear stage tubal transfer
QB	:	Queen Bench
QBD	:	Queens Bench Division
R/W	:	Read with
SC	:	Supreme Court
SCC	:	Supreme Court Cases
SCJ	:	Supreme Court Journal
SCR	:	Supreme Court Reports
Sec	:	Section
SRS	:	Sex Assignment Resugery
Supp	:	Supplementary
Supra	:	Above
TET	:	Tubal embryo transfer
u/s	:	Under Section
UCC	:	Uniform Civil Code

UDHR	:	Universal Declaration of Human Rights
UK	:	United Kingdom
UN	:	United Nations
UNC	:	United Nations Charter
UNGA	:	United Nations General Assembly
UOI	:	Union of India
UP	:	Uttar Pradesh
USA	:	United States of America
viz.	:	namely
Vol.	:	Volume
Vs.	:	versus
w.e.f.	:	With effect from
WHO	:	World Health Organization
WLR	:	Weekly Law Reports
WLUML	:	Women Living under Muslim Law
WTO	:	World Trade Organization
ZIFT	:	Zygote intrafallopian transfer

GLOSSARY

- **Infertility: is defined** as the inability to get pregnant within twelve months, despite having frequent and unprotected sexual intercourse
- **Biochemical pregnancy:** When a woman's pregnancy test is initially positive but becomes negative before a gestational sac is visible on ultrasound.
- **Blast cyst:** An embryo that has formed a fluid-filled cavity and the cells has begun to form the early placenta and embryo, usually 5 days after ovulation or egg retrieval.
- **Cervical canal:** the passageway leading from the vagina into the uterus.
- **Cervical mucus:** the substance in the cervix through which sperm must swim to enter the uterus.
- **Cervix:** The narrow, lower end of the uterus.
- **Clinical pregnancy:** A pregnancy conformed by an increasing level of hCG and the presence of a gestational sac detected by ultrasound.
- **Clomiphene citrate challenge test (CCCT):** A test of ovarian reserve in which serum FSH is checked on days 3 and 10 of the menstrual cycle and clomiphene citrate is taken on days 5 through 9.
- **Clomiphene citrate:** An oral antiestrogen medication used to induce ovulation.
- **Cryopreservation:** Freezing at a very low temperature, such as in liquid nitrogen (-196°C) to keep embryos, eggs, or sperm viable.
- **Cryopreserved:** Frozen

- **Ectopic pregnancy:** A pregnancy in the fallopian tube or elsewhere outside the lining of the uterus.
- **Egg (oocyte):** the female sex cell (ovum) produced by the ovary, which, when fertilized by a male's sperm, produces an embryo.
- **Egg retrieval:** the procedure in which eggs are obtained by inserting a needle into the ovarian follicle and removing the fluid and the egg by suction. Also called oocyte aspiration.
- **Electro ejaculation (EEJ):** Procedure to cause ejaculation of sperm, performed by electrical stimulation of tissue in the region of the prostate.
- **Embryo:** A fertilized egg that has begun cell division.
- **Embryo culture:** Growth of the embryo in a laboratory (culture) dish.
- **Embryo transfer:** Placement of an embryo into the uterus or, in the case of ZIFT and TET, into the fallopian tube.
- **Endometriosis:** A disease in which tissue resembling endometrium (the lining of the uterus) grows outside the uterus. It is often associated with infertility.
- **Epididymis:** the duct between testes and vas deferens where sperm are stored and mature.
- **Estradiol:** the predominant estrogen (hormone) produced by the follicular cells of the ovary.
- **Estrogen:** the female hormone largely responsible for thickening the uterine lining during the first half of the menstrual cycle in preparation for ovulation and possible pregnancy. Estradiol is the main estrogen.
- **Fallopian tubes:** A pair of tubes attached to the uterus, one on each side, where sperm and egg meet in normal conception.
- **Fertilization:** the fusion of sperm and egg.



CHAPTER 1
INTRODUCTION



CHAPTER 1

INTRODUCTION

1.1. Introduction

In marriage, birth of child is a very important desire of couples. It is also very important social, religious and ancestry desire. Motherhood of woman is beautiful regard given by the nature. When a couple is not capable to produce a child, due to any physical incapacity, they have only one option i.e. to adopt a child. But their wish to have a genetically related child is still unfulfilled. The advance medical reproductive technology of surrogacy has provided way to the couple to have a child that is genetically related to them. New medical technology has in the recent times made extraordinary advances in responding to the desire of woman or men to have no child. It has witnessed phenomenal growth in the area of reproduction. It has made possibility for couples who would be not capable to conceive and bear of child to able themselves. This technology has been common today in our society, knowing which of Assisted Reproductive Technology (ART) or Surrogacy Arrangement Method. Assisted reproductive technology is a medical science method to achieve pregnancy by artificially or partially artificially means, and is primarily used in fertility treatment. “Technology has made tremendous changes in the field of science. One of the fastest growing technologies is Assisted Reproductive Technology which has made it possible to make a sperm or embryos cry preserved and use it to conceive children even after the death of one of biological parents.”¹

The Assisted reproductive Technology has been accepted as a medical treatment for infertile couples. It is reported that around 15% couples of the world are infertile. The Hague conference on Private International Law, 2014, has reported that, in2010, it is that estimated 48.5 million couples worldwide were said to be infertile. According to the World Health Organization (WHO)², India has an estimated 19-20 million infertile couples. Surrogacy is a composite medical method, and in order to

¹Sufiya ahmed (ed.), *Surrogacy and ART in India: Socio-Legal and Ethical Dilemma*57 (Satyam Law International, New Delhi, 2020).

²Roupa Z.,Polikandrioti M.et al “Causes of Infertility in Women at Reproductive age” vol.3 *HSJ* 5(2009)Last visited on 10-04-2018

create an understanding of the surrogacy conception, it is necessary to comprehend the origins, evolution, and explanations of the meaning of surrogacy as explained in many reports and laws. Surrogacy and other terminology used in the procedure are medical terms that require explanation for the average person to understand. One, in six couple's worldwide exercise some form of infertility problem at least once during their reproductive life duration. Among these an estimated 19-20 million live in India, according to World Health Organization. More than 3.75 million children around the world have been born through in-vitro fertilization or related technique during the last thirty two years.³

These are known collectively as Assisted Reproductive Technology (ART). They take different processes from comparatively simple intra-uterine (IUI) to in-vitro fertilization (IVF), more frequently known as "test-tube baby technology." Although ARTs are often referred to as "modern technology of reproduction," they existed as early as in the 16th century.⁴ Surrogacy has become common among all techniques. Surrogacy has appeared with the use of a woman's womb to reproduce kids for another woman as a fresh stage of science development for reproduction. 'Surrogacy' is one of the most effective techniques of overcoming biological and social infertility. The notion of surrogacy is commonly acknowledged throughout the globe. Surrogate motherhood is regarded by infertile couples as a boon because it is a revolutionary hope to have a kid.⁵

Infertility is a common global medical destruction, which is thinks as a providential curse vertically in the sequence of socio-economic discrimination and psychological ordeal a between the desert couple and individuals. Infertility may lead to extra-marital relationship, domestic violence, divorce, witchcraft, depression, suicide, and other social stigma including ostracism. Mankind has sought answer to the question of fertility since time immemorial, but it was only during the 20th century the medical community started treating infertility as disease.⁶ For example, women face economic and social disadvantages, making childless women more vulnerable to

³Dr. M.P. Verma, *Surrogacy: Medico-Legal Paradigm* (G.B. Books, 1sted., 2016).

⁴Sama, *ARTs and Women: Assistance in Reproduction or Subjugation?* (Sama-Resource Group for Women and Health, New Delhi, ed1st, 2006).

⁵Dr. S.S.Das and PriyankaMaut, "Commercialization of surrogacy in India: A Critical Analysis" *Research Gate* (2014).<https://www.researchgate.net/publication/281710247>

⁶Dr. G.K. Goswami, *Assisted Reproduction and Conflict in Rights* (Satyam Law International New Delhi, edn.2017).

blame, mental and physical torture, divorce risk, expulsion from society, and lack of access to adequate treatment.⁷The various primary and secondary causes of infertility in male and female vary widely among region and culture.⁸Infertility is defined as the inability to get pregnant within twelve months, despite having frequent and unprotected sexual intercourse⁹.

The ancient period (3500 BC-500 AD) marks the beginning of civilization development from Indus Valley to Vedic Civilizations. The practice of Niyogapratha or Levirate was prevalent in the development of the child during this time. Enchantment mixtures (' Magic potions ') created during this era by the sages to make them pregnant by the queen of childless kings was a typical practice. Therefore, people were aware of the concepts of assisted reproduction and control of gamete during that period.¹⁰Religion and related structures affect a wide range of human behavior, including gender roles, divisions of employment, family structure, mortality, and ageing. Therefore, we seek to find alternative ways to have children that can fulfill the culturally accepted spirit of one's own and children beings. The adoption of alternative family formation approaches depends profoundly on cultural norms for the establishment of valid kinship relations, and thus the capacity to be fertile.¹¹

Both males and females are affected by infertility and both males and females are equally responsible for the infertility. One third of cases of infertility can be attributed to male reproductive causes alone, one third can be attributed to female causes alone and one third can be attributed to male causes plus female causes. Male infertility factor is a complicated disease affecting a big industry of the population; however, it is unknown to many of its etiologists.¹²

⁷Anjali Widge and John Cleland, "The Public sector's role in infertility management in India", *HPP* (2009). Access on 20-10-2017 <https://academic.oup.com/heapol/article/24/2/108/593016>

⁸*Ibid.*

⁹Linda Bickerstaff, *Science and Society Technology and Infertility: Assisted Reproduction and Modern Society*, (The Rosen Publishing Group, New York 1st edition 2009).

¹⁰Radhey Shyam Sharma, and Richa Saxena et al., "Infertility & assisted reproduction: A historical & modern scientific Perspective" *IJMR*, (2018). Access on 12-11-2019 <https://pubmed.ncbi.nlm.nih.gov/30964077/>

¹¹*Ibid.*

¹²Aza BahadeenTaha and Khanzad Hadi Rashid, "Etymology of Infertility in Couples attending maternity hospital in Erbil" *ZJMS*, vol.17 (2013). Access on 23-09-2019.

Current Assisted Reproductive Technology (ART) : Artificial Insemination (AI), Intra-uterine Insemination (IUI), Intracytoplasmic Sperm injection (ICSI), Gamete Intrafallopian Transfer (GIFT), Zygote Intrafallopian Transfer (ZIFT), In Vitro fertilization (IVF), Surrogacy.¹³ Louise Brown and Dr. Edwards are famous; few Westerners know that the Kanupriya Agarwal, the world's second and first of India IVF baby, was born on October 3, 1978, in Kolkata (then Calcutta), just 67 days after Brown. A team led by Dr. Subhas Mukherjee conceived and delivered Kanupriya in vitro, referring to her after an Hindu goddess who represents the feminine creative force with the nickname "Durga. Seventeen year later and twenty-five years after the birth of Duraga, the Indian scientific community finely recognized Dr. Mukherjees achievement.¹⁴ "Surrogacy is a procedure or arrangement in which a woman agrees to carry a pregnancy for the benefit of another person or persons who will become the parent(s) of the new-born kid after conception. This is a contract in which a lady carries a pregnancy for the benefit of another couple."¹⁵

The term "surrogate" is rooted in "subrogare" (to replace) in Latin, meaning "named to act instead another."¹⁶ According to The New Encyclopedia Britannica, "surrogate motherhood" is defined as "the practise of a woman bearing a child for a couple who is unable to create children in the traditional way."¹⁷ Surrogacy, according to the Warnock Committee, is the "practise of one woman carrying a child for another with the purpose of the child being handed over after birth."¹⁸

1.1.1 Types of Surrogacy- Surrogacy arrangements are four types - traditional surrogacy, gestational surrogacy, commercial surrogacy and altruistic surrogacy. Commercial surrogacy is form of gestational surrogacy, in which surrogate mother has carried pregnancy for consideration.¹⁹

¹³ Mosammat Rashida Begum, "Assisted Reproductive Technology: Techniques and Limitations" vol.26 *JBCPS* (2008) Access on 12-10-2017
<https://www.researchgate.net/publication/270114969>

¹⁴ Daisy Deomampo, *Transnational Reproduction: Race, Kinship, and Commercial Surrogacy in India*

40 (SAGE Publication India Pvt Ltd, New Delhi, 2017).

¹⁵ Dr J Srinivas Rao and Dr. Matin Ahmad Khan, "Surrogacy in India: Current Perspectives" vol. 3 *IJMR* (2017). Access on 25-11-2018

¹⁶ Nayana Hitesh Patel and Yuvraj Digvijay Singh Jadeja (et al), "Insight into Different Aspects of Surrogacy Practices" vol 11 *JHRS* (2018) Access On 23-10-2019

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/pdf/JHRS-11-212.pdf>

¹⁷ *Ibid.*

¹⁸ Shaun D. Pattinson, *Medical Law and Ethics* 309 (Sweet & Maxwell, London, 3rd Edi. 2013)

¹⁹ *Supra* note

As a result, surrogacy is both a threat and an opportunity. On the one hand, it allows infertile couples and surrogate moms to realize their dreams of having a child and enables to better care for his/her families. However, as a result of the commodification of children and motherhood, there is a risk that women will be exploited and converted into baby producers. There have been numerous reasons for and against surrogacy, and distinguishing between ethically correct and wrong can be difficult. Surrogacy's critics and advocates agree, however, that the practise poses a variety of social, ethical, and legal issues.²⁰

Despite the fact that some rules and regulations have been put in place, not enough is being done at the domestic level to protect the interests of Indian women who have volunteered to be surrogate mothers, the children they bear, or the intended parents who travel long distances to commission pregnancies. These issues will be investigated in this study. The findings will reveal the current position of moms, parents, and children, as well as serve as a foundation for policy proposals.²¹

Discussions have raged around the world the extent to which the human body and its component parts can be purchased, sold, leased, or donated has been debated for decades. Gestational surrogacy has become more popular in recent years, and many persons seeking surrogate services are leaving their home nations to do so. Surrogacy raises a number of issues, including ethical concerns about surrogate trafficking in the global marketplace, the growing potential for reproductive tourism as a result of regulatory variations between countries, and geographical and socio-economic mismatches between providers and buyers. The frameworks for developing international legislation to protect all parties involved in international gestational surrogacy had to be thoroughly scrutinized.²²

Italy, Germany, Turkey, and Japan prohibit surrogacy arrangement. Commercial surrogacies are permitted in California and the Ukraine. Italy, Germany,

Dr. Aneesh V. Pillai, *Surrogate Motherhood and the Law: International and National Perspectives* 53-54 (Regal Publication, New Delhi, 2015). Access on 25-10-2019

²⁰“Surrogate Motherhood-Ethical or Commercial” *Centre for Social Research (CSR)* access on 23-10-2018

<https://wcd.nic.in/sites/default/files/final%20report.pdf>

²¹*Ibid.*

²²Kristiana Brugger, “International Law in the Gestational Surrogacy Debate” vol.35 *FILJ* (2012). Access on 11-05-2017 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2438&context=ilj>

INTRODUCTION

France, Switzerland, and several Australia States prohibit commercial surrogacy contract. The enforcement of surrogacy contract is sharply limited in Canada. The early response of the UK Parliament was to institute the Warnock Committee in 1982 to investigate 'recent and potential developments in medicine and science related to human fertilization and embryology and 'to consider what policies and safeguards should be applied. Any and all future contract between the surrogate and the couple was declared null and void in the Warnock study, 1984, and commercial surrogacy was banned. The Surrogacy Agreement Act was passed in 1985, which did not authorize commercial surrogacy, but allowed altruistic surrogacy to be paid to the surrogate for her and the health of the foetus during pregnancy at a fair cost.²³

States in the United States have responded to the policy issue of surrogacy in a variety of ways. Surrogacy is legal in some states. Other states, however, leave surrogacy partially or completely unaddressed and some explicitly forbid surrogacy altogether. Surrogacy is prohibited in China. The new law passed 2015 in Thailand, and Commercial surrogacy is prohibited. While Russian law on assisted reproduction in general and surrogacy motherhood is permissible on the overall, it is fragmented and inconsistent at times. Regardless of the reasons why surrogacy is utilized, up until recently the legal regulation of surrogacy in South Africa has been shrouded in much uncertainty. It was only with the promulgation of Chapter 19 of the Children's Act that some clarity was provided on the issue of surrogacy under South African law and the conditions under which surrogacy may be undertaken and surrogate motherhood agreements (SMA) may be entered into. However, despite the benefits that this chapter holds, it is not without pitfalls.²⁴

India's ministry of Health and Family Welfare has drafted a bill to regulate cases of commercial surrogacy after India's first major legal cost involving commercial surrogacy the baby Manji's case²⁵ ICMR presented a national regulation addressing not only commercial surrogacy but also other Reproductive Technologies.

²³Mandeep Borkatky, "Is the law regulating surrogacy in need of reform?" *Research Gate* (2015) access on 15-07-2017

<https://www.researchgate.net/publication/277300043>

²⁴C van Niekerk, "Section 294 of the Children's Act: Do Roots Really Matter?" vol.18*PELJ* (2015) access on 23-11-2018

<http://dx.doi.org/10.4314/pelj.v18i2.11>

²⁵Amrita Panday, *Wombs in Labor Transnational Commercial Surrogacy in India* (Columbia University Press, New York, 2014)

And the regulation was known as draft assisted Reproductive Technologies Regulation and Rules Bill 2008²⁶ which was changed in 2010 and named as Draft Assisted Reproductive Technologies Regulation and rules bill 2010²⁷ with some changes in the Draft bill of 2008. Furthermore done 2009 law requisition need also submitted its report card ahead surrogacy also situated curtailed certain suggestion on the regulation from claiming this act.

The government has drafted many draught Bills to regulate surrogacy throughout the years in 2008, 2010, 2014, 2016, 2019, and the most recent draught Bill is the Surrogacy (Regulation) Bill, 2020, in response to the rapid proliferation of surrogacy clinics around the country. The new Bill establishes various guidelines and limitations on who is eligible for and who is not eligible for surrogacy. The bill wants to outlaw commercial surrogacy and limit ethical and altruistic surrogacy to lawfully married infertile Indian couples.²⁸ Surrogacy is also prohibited for overseas Indians, foreigners, unmarried couples, live-in partners, and gay couples.

Judicial response on surrogacy issues related. Thus we find that in some countries the law has been settled while in others, it is in the process of making. The country where in the law has not been drafted or is in process of drafting, the concerned courts have responded in diverse ways in the cases coming before them concerning surrogacy arrangement. Let's discuss some leading cases national and international label.²⁹

India has emerged as a hub of medical tourism. This Ministry of Tourism, Government of India boasts Confederation of Indian Industry (CII) reported that of the largest service sectors with estimated revenue of around \$ 30 billion constituting 5% of GDP". It also noted that it was medical tourism behind such figures and estimates. Reasons that have India centre stage in healthcare sector include cost in

²⁶ Assisted Reproductive Technologies Regulation and Rules Bill, 2008

²⁷ Assisted Reproductive Technologies Regulation and Rules Bill, 2010

²⁸ Astha Srivastava, "The Surrogacy Regulation (2019) Bill of India: A Critique" vol. 22 *JWS* (2021) access on 12-10-2021 <https://vc.bridgew.edu/cgi/viewcontent.cgi?article=2364&context=jiws>

²⁹ Nicole F Bromfield and Karen Smith Rotabi, "Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations" Springer Link (2014). Access on 11-12-2018 <https://link.springer.com/article/10.1007/s40609-014-0019-4>

INTRODUCTION

terms of usage of English language, no waiting period accomplished medical staff including the doctors and know-how, among others.³⁰

Women's rights organizations abuse India's surrogacy industry of being nothing more than a sham “baby factories” for the rich. In the absence of regulation, they say many poor and uneducated women are lured by agents, hired by clinics, into signing contracts they do not fully understand.³¹ The law relating to surrogacy contracts is unclear and uncertain. Different countries have different laws with respect to validity and enforceability of surrogacy contracts. The ART Bill expressly provides for entering into surrogacy agreement between the surrogate mother and the couple who seeks surrogacy by way of the use of assisted reproductive technology and that the surrogacy agreement shall be legally enforceable.³² 3.12 Rights of a Child Born via a different method of ART Technologies 3.12.1 A child born through ART is believed to be the couple's legitimate child, having been born in wedlock and with both spouses' agreement.

The surrogacy arrangement comes with many types of risks. Unfortunately, the common risk is related to the surrogate. The most immediate reason of concern is medical dangers to the surrogate's physical and emotional health. We discovered that the practice of multiple embryo transfers, multiple pregnancies, foetal reductions, and caesarean procedures to produce a successful pregnancy had substantial consequences for the surrogates' health.³³

The right to privacy is understood to include the right to procreate. Commercial surrogacy and prostitution are often compared by opponents of surrogacy. Understanding the problem's intrinsic complexity necessitates knowledge of its historical background. Baroness Warnock headed the Committee of Inquiry into Human Fertilization and Embryology, which was founded in 1982 and reported in 1984. Surrogacy, they claimed, “provided us with some of the most challenging

³⁰Parliament of India Rajya Sabha, Report: 102, The Surrogacy (Regulation) Bill, 2016 (Department-Related Parliamentary Standing Committee on Health and Family Welfare, 2017). http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf

³¹Nita Bhalla and MansiThapliyal, “India seeks to regulate its booming 'rent-a-womb' industry” Health care and Pharma (2013) access on 20-11-2018

<https://www.reuters.com/article/us-india-surrogates-idUSBRE98T07F20130930>

³²Assisted Reproductive Technology (Regulations) Bill 2013, (Tentative Draft) Date Jun. 27, 2013, Legislative Department, Ministry of Law & Justice, Government of India [hereinafter ART Bill 2013]

³³Sama Resource Group for Women and Health, Surrogacy Information Brief” (1st ed. Sama Resource Group for Women and Health, New Delhi. 2014) www.samawomenshealth.org

challenges we encountered,” and the group was unable to reach an accord. The moral and social problems to surrogacy were emphasized by the committee, which unanimously agreed that surrogacy purely for convenience was “absolutely morally wrong.” Surrogate mothers are subjected to domestic abuse and household instability as a result of male partners’ dislikes. Furthermore, it is unknown whether the surrogate will be able to have sexual interactions with her spouse.³⁴

The above discussion we find the extract as- No Specific Legislation Related to Surrogacy, Enforceability of surrogacy contract, Commodification of Motherhood, Baby Selling, Exploitation of poor women, Surrogacy Degrades the Dignity of Woman, Surrogacy has been equated with Prostitution, Attachment with the Gestational Mother, Legitimacy of Children under Personal Law, Consummation of Marriage, Legal Status of Surrogate Child and Indian Evidence Act, 1872, Law of Adoption and Surrogacy and Legal Concern Relating to Commissioning Parent.

"Infertility" is defined as "the inability to conceive after five years of unprotected coitus or other confirmed medical condition preventing a couple from conception" under section 2 (p) of the Surrogacy (Regulation) Bill 2016.³⁵

Infertility is described as "a disorder of the reproductive system characterized by the failure to obtain a clinical pregnancy following 12 months or more of frequent unprotected sexual intercourse," according to the World Health Organization (WHO).³⁶

1.1.2 Causes of Infertility

Causes of infertility, both male and female are equally responsible for the causes of infertility.

³⁴Arti Gupta, Viviktha Ramesh, “Surrogacy: blessing or curse to poor society in India” *Healthcare in Low-resource Settings* volume 3:5465 (2015) access on 12-09-2019
<https://www.researchgate.net/publication/295861915>

³⁵Surrogacy (Regulation) Bill, 2016 (Act 257 of 2016)

³⁶Available at <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/> (Last visited on 16-04-2018)

1.1.3 Causes of Female Infertility, The causes of female infertility can be divided into widely three categories including defective ovulation, transport and implantation. These categories are further discussed below in detail.

1.1.4 Defective Ovulation

Defective ovulation occurs because of the following causes:

- **Endocrine disorders:** The dysfunction of hypothalamus and pituitary gland can lead to an excess amount of prolactin, this may prevent ovulation. Moreover, other endocrine glands including adrenals and thyroid may also delay ovulation. When the corpus luteum, fails to produce enough progesterone required to thicken the uterine lining, the fertilized egg may not be able to implant, thus leading to infertility.
- **Physical disorders:** Certain physical disorders such as obesity, anorexia nervosa, and excessive exercise may lead to overweight or malnutrition, and later the menstrual cycle, thus make the couple infertile.
- **Ovarian disorders:** Polycystic ovarian disease (PCO) can lead to infertility because of an increased amount of testosterone and LH and decrease uptake of glucose by muscle, fat and liver cells resulting in the production of large amounts of insulin by the pancreas. Low FSH levels also hinder the production of eggs from the ovarian follicles, and lead to form fluid-filled ovarian cysts that eventually cover the whole ovaries and prevent conception.
- **Endometriosis:** This refers to a condition in which sections of the uterine lining implant in the vagina, ovaries, fallopian tubes or pelvis. These implants form fluid- filled cysts that grow with each menstrual cycle, and eventually turn into blisters and scars. These scars then block the passage of the egg and delay pregnancy.

1.1.5 Defective Transport

The following can lead to defective transport of ovum and sperm:

- **Ovum:** Occurrence of Pelvic Inflammatory Disease (PID), gonorrhoea, peritonitis, previous tubal surgery, and fimbrial adhesions can cause tubal obstruction; as a result the egg is not released or trapped, therefore, delaying conception.
- **Scar tissue after abdominal surgery:** After abdominal surgeries, presence of scar tissue may alter the movement of the ovaries, fallopian tubes, and uterus, resulting in infertility.
- **Sperm:** Presence of psychosexual problem such as vaginismus, or dyspareunia may hinder fertilization and make the couple infertile.
- **Cervix:** Trauma, surgery, infection, anti-sperm antibodies in the cervical mucus may also delay pregnancy.

1.1.6 Defective Implantation

Defective implantation can occur because of the following causes:

1.1.7 Congenital anomaly and fibroids:

Congenital uterine anomaly such as bicornuate uterus and uterine fibroids near the fallopian tubes or cervix may alter implantation of the zygote and cause infertility.³⁷

1.1.8 Causes of Male Infertility

According to the CDC (2013), male causes of infertility are divided into the following four main categories:

1.1.9 Defective Spermatogenesis

Presence of endocrine disorders such as diabetes mellitus and hyperthyroidism lead to azospermia or the formation of faulty sperms that are not capable to fertilize the ovum. Moreover, testicular disorder such as undescended testis can also affect fertility.

³⁷Shahnaz Anwar and Ayesha Anwar, "Infertility: A Review on Causes, Treatment and Management" vol. 2 *WHG P. 2-5*(2016) available at <https://scionline.org/>(Last visited on 14-05-2018)

1.1.10 Defective Transport

Obstruction of the seminal vesicles or absence of the seminal ducts may affect the mobility of the sperms, and thus end up in infertility.

1.1.11 Ineffective Delivery

The psychosexual problems like impotence, ejaculatory dysfunction, physical disability, hypospadias, and epispadias can affect fertility of males.³⁸

1.1.12 Assisted Reproductive Technology (ART)

Assisted reproductive technologies include any artificial fertilization involving manipulation of gametes, embryos outside the human body and transfer of gametes, embryos, sperm, into the body. The new reproductive technologies give large help and offer biological parenthood to every infertile couple who have desire to have a child of their own.³⁹

World first test tube baby, Luise Brown, was conceived via IVF and embryo transfer in a procedure by Dr. Patrick Steptoe and Dr. Robert Edwards who implanted the embryo into the genetic mother's uterus. The child had been born on 2 July 1978. The world's second baby born through IVF and embryo transfer perhaps took place on 3 October 1978 in India.⁴⁰

1.1.13 Types of ART

There are many types of ARTs. I will mention here the ones that are popular in present time:⁴¹

Artificial Insemination (AI)

A woman is inseminated with a man's sperm produced after masturbation, without having sexual intercourse. The sperm used could be that of the husband

³⁸ *Id.*

³⁹ B.L. Choudhary, "Assisted Reproductive Techniques: Ethical and Legal Issues" vol. 34, *JIAFM* (2012) access on 10-12-2017
https://www.researchgate.net/publication/292297788_Assisted_reproductive_techniques_ethical_and_legal_issues

⁴⁰ K. Kannan, *Medicine and Law*, 339, (Oxford University Press New Delhi India, first edition, 2014)

⁴¹ Available at <http://www.parliament.nsw.gov.au/gi/library/publicn.html>, last visited on 17 Nov 2017

known as AI by husband (AIH) or that of a donor referred to as AI by donor (AID). During one menstrual cycle women are inseminated three to four times. The procedure is generally repeated over a period of six months.

Intra Uterine Insemination (IUI)

The sperms are removed from the seminal fluid by processing the semen in the laboratory and then they are injected directly into the uterine cavity. This could be done with or without administering drugs for super ovulation in order to produce more than one egg per cycle.

In Vitro Fertilization (IVF)

IVF became known with the birth of Louise Brown, the world's first test-tube baby in Britain in 1978. Initially it was used for women with tubal pathologies but now it is also used on women for male infertility and unexplained infertility. In this method the sperm and the egg are fertilized in a laboratory dish. The resulting embryo is transferred to a woman's uterus. The steps in IVF are mentioned subsequently in a separate section.

Intra Cytoplasmic Sperm Injection (ICSI)

This is used in cases of men with severe infertility, low sperm count, immotile sperm, and sperm which cannot penetrate the chemical barrier which protects the egg and for men who have had vasectomy. It can also be used for women with blocked tubes. Through micromanipulation of sperm, it is immobilized and a single sperm is injected into the egg in Petri dish.

Gamete Intra-fallopian Transfer (GIFT)

Oocyte (eggs) is aspirated from the ovary and along with the collected sperm are placed directly into the fallopian tube. This is usually used for women who do not have a problem with their fallopian tubes.

Zygote Intra-fallopian Transfer (ZIFT)

This is a combination of IVF and GIFT techniques. The eggs are collected and fertilization is done in a Petri dish. Eighteen hours later the zygotes (the fertilized egg

before the nuclei of the two cells have merged and start to divide) are replaced in the fallopian tubes. Two surgical procedures are performed on the woman within a short period of time.

1.2 Meaning and Definition of Surrogacy

Surrogacy is a method of assisted reproductive technology. Surrogacy is the term used when a woman agrees to become pregnant and deliver a child for a contracted party. There are different forms of surrogacy and different reasons why one technique may be used over another. One of the most common reasons for surrogacy is the infertility of the woman, sometimes due to damage to the uterus, or even having no uterus at all. Here the in vitro fertilized (IVF) embryo of the “commissioning couple” will be placed in the uterus of the surrogate mother who will go through the process of pregnancy, give birth to the child and hand it to the commissioning couple. One may term this a “full” surrogacy with the surrogate mother having no genetic relationship to the child.⁴²

Surrogacy is defined as "a procedure whereby one woman bears and gives birth to a child for an intending couple with the aim of giving over such child to the intending couple after the delivery" in the Indian Surrogacy (Regulation) Bill 2016.⁴³

Under section 1 (2) of **U K Surrogacy Arrangement Act 1985** surrogacy has been defined as “surrogacy means a woman who carries a child in pursuance of an arrangement- (a) made before she began to carry the child, and (b) made with a view to any child carried in pursuance of it being handed over to, and the parental right being exercised (so far as practicable) by another person or other person”.⁴⁴

Surrogacy is defined by the Warnock Committee as "the practice of one woman carrying a child for another with the purpose of the child being given over after delivery."⁴⁵

⁴²Michael Davies, *Tax book on Medical Law* page no. 252 (Oxford Press, Great Clarendon Street, ed. 2nd/2009)

⁴³Surrogacy (Regulation) Bill, 2016 (Act 257 of 2016)

⁴⁴Surrogacy Arrangements Act, 1985 (Act c. 49 of 1985)

⁴⁵Shaun D. Pattinson, *Medical Law and Ethics* 309 (Sweet & Maxwell, London, 3rd edn, 2013)

The word 'surrogate' comes from the Latin word 'surrogatus,' which is the past participle of 'surrogare,' which means a substitute, or someone designated to act in the place of someone else. A surrogate mother is a woman who bears a child for another woman, either from her own egg or from the fertilized egg of another woman implanted in her womb.⁴⁶

1.3 Types of Surrogacy

Surrogacy arrangements are four types by medical prescriptions. Which are traditional surrogacy, gestational surrogacy, commercial surrogacy and altruistic surrogacy?

1.3.1 Traditional surrogacy

The surrogate mother is pregnant with her own biological child in traditional surrogacy, but the child was conceived with the intention of relinquishing the child to others, such as the biological father and possibly his spouse or partner, and thus the child is genetically related to the surrogate mother. The child could be conceived by sexual activity, frozen sperm, or IUI (intrauterine insemination) or ICI (intra cervical insemination), all of which are fertility clinic procedures. Sperm from the male partner of the "commissioning pair" or sperm from a sperm donor can be utilised instead.⁴⁷

1.3.2 Gestational surrogacy

The second, termed gestational surrogacy is done through in vitro fertilization (IVF). The embryo is transferred to the surrogate's uterus after the intended mother's or an anonymous donor's egg is fertilised in a Petri dish with the intended father's or a donor's sperm. All the cases in this study are gestational surrogacies; that is, the surrogate has no genetic connection with the baby.⁴⁸

⁴⁶ Law Commission of India, 288 the Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinic as well as Right and Obligations of Parties to Surrogacy, (August, 2009).

⁴⁷ Deepa Mishra "Surrogacy in India: Legality" vol. 3 *IJSRMP*. (2015).

⁴⁸ Amrita Pande, "Commercial Surrogacy in India: Manufacturing a Perfect Mother Worker", vol. 35, no. 4, *UCP* 03(2010)

1.3.3 Altruistic surrogacy

In altruistic surrogacy where the surrogate receive no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parent such as medical expenses, maternity clothing accommodation, diet and other related expenses).⁴⁹

1.3.4 Commercial Surrogacy

Commercial surrogacy is form of gestational surrogacy, in which surrogate mother has carried pregnancy for consideration.⁵⁰

The Indian Surrogacy (Regulation) Bill, 2016 is proposed in Lokshabha. The bill has defined two types surrogacy arrangement as “altruistic surrogacy” and “commercial surrogacy”.

Section 2 (b) “altruistic surrogacy” according to bill “Surrogacy in which no charges, expenses, fees, payment, or monetary incentive of any kind is given to the surrogate mother, her dependents, or her representative, except for medical expenses paid on the surrogate mother and insurance coverage for the surrogate mother.

Sec. 2 (f) “commercial surrogacy” means giving payment, reward, benefit, fees, remuneration, or monetary incentive in cash or kind to the surrogate mother, her dependents, or her representative for surrogacy services or procedures or their component services or component procedures, including selling or buying of human embryos or gametes, or selling, buying, or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration, or monetary incentive in cash or kind to the surrogate mother, Surrogacy for profit is becoming increasingly controversial around the world.⁵¹

1.4 Rights of Surrogate Parties

India has no specific law for the regulation of surrogacy arrangement and to ascertain the rights and duties of the parties which would involve in surrogacy arrangement. In order to address these issues and regulate surrogacy arrangements,

⁴⁹ *Id.*

⁵⁰ *ibid*

⁵¹ Surrogacy (Regulation) Bill, 2016 (Act 257 of 2016)

the Indian government took a few steps in 2006, introducing and implementing The Indian Council of Medical Research (ICMR), which is part of the Ministry of Health and Family Welfare, established National Guidelines for Authorization, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics. As a result, there is currently no surrogacy-specific legislation in place to protect the rights and interests of the surrogate mother, the child, or the commissioning parents. The Assisted Reproductive Technology (ART) Regulation Bill of 2010 does, however, create some guidelines, which are as follows:

1.5 Rights and duties of parties of surrogacy arrangement:⁵²(1) During the pregnancy and after birth, both the couple or individual who necessitates surrogacy through the use of assisted reproductive technology and the surrogate mother must engage into a legally binding surrogacy agreement. (2) The couple or individual seeking surrogacy is responsible for all expenses incurred by the surrogate in connection with a pregnancy achieved in furtherance of assisted reproduction as per medical advice, and until the child is ready to be delivered to the biological parent or parents as per medical advice. (3) Notwithstanding anything in sub-section (2) of this section and subject to the surrogacy agreement, the surrogate mother may receive monetary compensation from the couple or individual, as the case may be, for consenting to act as such surrogate. (4) The surrogate mother must waive all parental rights to the child. (5) No woman under the age of twenty-one and no woman beyond the age of thirty-five may act as a surrogate mother under this Act, with the exception that no woman may act as a surrogate for more than five successful live births in her lifetime, including her own children. (6) Any woman seeking or agreeing to act as a surrogate mother must undergo medical testing for sexually transmitted and other diseases, as well as all other communicable diseases that could endanger the child's health, and must declare in writing that she has not received a blood transfusion or blood product in the previous six months. (7) Individuals or couples may hire a surrogate through an ART bank, which may advertise for surrogacy, as long as the advertisement contains no information regarding the caste, ethnicity, or descent of any of the people involved in the surrogacy. A clinic that uses assisted reproductive technologies may not promote its need for surrogates. (8) For any medical treatments

⁵² Centre for Social Research, 2thSurrogate Motherhood- Ethical or Commercial, available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>

INTRODUCTION

or procedures connected to the concerned child, a surrogate mother must register in her own name at the hospital or other medical facility. Declare her to be a surrogate mother and supply the name(s) and address (es) of the person(s) for whom she is acting as a surrogate, as well as a copy of the certificate indicated in clause 17 below. (9) If a surrogate mother's first embryo transfer fails, she can accept up to two additional successful embryo transfers for the same couple that hired her the first time under mutually agreed-upon financial terms. A surrogate mother is only allowed to carry an embryo for the same couple three times. (10) On the birth certificate for a baby born through surrogacy, the name(s) of the individual(s) who commissioned the surrogacy as parents must appear. (11) Anyone who has employed the services of a surrogate mother is legally compelled to accept custody of the child / children, regardless of whatever anomalies the child / children may have, and refusing to do so is a violation of the Act. (12) Under the provisions of this Act, all information on the surrogate shall be kept confidential, and information about the surrogacy shall not be disclosed to anyone other than the Department of Health Research's central database, unless by order of a court of competent jurisdiction. (13) A surrogate mother cannot act as an oocyte donor for the couple or individual seeking surrogacy, depending on the situation. (14) An assisted reproductive technology facility may not provide information on or about surrogate mothers or potential surrogate mothers to anybody. (15) Any assisted reproductive technology clinic that breaches sub-section 14 of this section is considered to have broken the law. (16) If the woman who wants to be a surrogate is married, her husband's consent is required before she can start working as a surrogate. (17) The person or people who have hired a surrogate mother's services must provide her with a certificate stating categorically that she has acted as their surrogate. (18) A surrogate mother for a couple/individual can be a relative, a well-known person, or someone unrelated to the couple. When a relative participates as a surrogate, the relative must be of the same generation as the surrogate's intended mother. (19) A non-resident Indian couple seeking surrogacy arrangement in India must choose a local guardian who will be legally responsible for the surrogate during and after the pregnancy, according to clause 34.2, until the child or children are delivered to the foreigner or foreign couple or the local guardian. also, the party or couple seeking surrogacy should ensure and establish to the assisted reproductive technology clinic that the country permits surrogacy through proper documentation (a letter from either the country's embassy in India or the country's foreign ministry,

clearly and unambiguously stating that (a) the country permits surrogacy and (b) the child born through surrogacy in India will be permitted entry into the country as a biological child of the commissioning couple/individual. Surrogacy children born outside of India to the party's country of origin or residence, as the case may be, including where the embryo was created through the donation of an egg or sperm. If the foreign party seeking surrogacy fails to claim the child born to the surrogate mother commissioned by the foreign party, the local guardian is legally obligated to do so and is free to turn 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 child's birth. During the transition period, the local guardian is responsible for the child's well-being. If the child is adopted or if the legal guardian is obligated to raise the child, the child will be granted Indian citizenship. (20) A couple or individual may not use the services of more than one surrogate at any given time. (21) Embryos cannot be transferred to both the woman and the surrogate at the same time. (22) Only Indian citizens will be allowed to act as surrogates, and no ART bank or facility outside of India will accept or send an Indian for surrogacy. (23) Any woman who accepts to act as a surrogate has a legal obligation not to harm the foetus during pregnancy or the infant after birth until the child is transferred to the chosen individual (s). (24) The intend parent(s) must ensure that the surrogate mother and the child she bears are adequately insured until the child is given to the commissioning parent(s) or another person as agreed, and that the surrogate mother is free of all surrogacy-related health difficulties.

1.6 Determination of status of the child:⁵³ (1) A child born to a couple through assisted reproductive technology is considered the couple's genuine child because it was born in wedlock and with both spouses' consent, and it has the same legal rights as a legitimate child born through sexual intercourse. (2) A child born to an unmarried couple with both parties' permission using assisted reproductive technology is both parties' legitimate child. (3) The child will be the woman's legitimate child in the case of a single woman, and the child will be the man's legitimate child in the case of a single man. (4) A child is deemed the couple's legitimate child if a married or unmarried couple separates or divorces after both parties consented to assist reproductive technology treatment but before the child is born. (5) A child delivered

⁵³*Id.*

to a woman artificially inseminated using her dead husband's saved sperm is deemed the couple's legitimate child. (6) If ooplasm from another donor ovum is found in a donated ovum, both donors must be medically tested for any sexually transmitted or other diseases that may endanger the child's health, as well as any other communicable diseases that may endanger the child's health, and the donor of both the ooplasm and the ovum must relinquish all parental rights in relation to such child. (7) On the birth certificate of a child born through the use of assisted reproductive technology, the name or names of the parent or parents who requested such use must appear. (8) If a foreigner or a foreign couple seeks sperm or egg donation or surrogacy in India and a child is born as a result, despite the fact that the child was born in India, the child is not an Indian citizen.

1.7 CRITICAL ANALYSIS OF SURROGACY (REGULATION BILL) 2016,

That bill was introduced by the Cabinet in Lower house. The Bill's main object is to control of unethical and commercial surrogacy practices and preventing the exploitation of poor women as surrogate mothers.⁵⁴ The Surrogacy (Regulation) Bill 2016, presented by the Indian Union Cabinet, will outright outlaw commercial surrogacy in India. The surrogacy bill intends to protect surrogate women and children born through surrogacy from virtual exploitation. It has the following characteristics:⁵⁵

1. The Bill states that only legally married Indian men and women over the age of 21 and 18 years, respectively, who have been married for more than 5 years and one of the spouses has been diagnosed with infertility, are eligible for surrogacy. To put it another way, only Indian couples who have been married for at least 5 years are eligible for surrogacy, assuming at least one of them has been diagnosed with reproductive difficulties.
2. The major goal of the bill is to prohibit foreigners, homosexuals, live-in partners, single people, NRIs, and gays from using the services of a surrogate

⁵⁴[http://docs.manupatra.in/newsline/articles/Upload/6DEF4F8E - 39FD- 4CF4- 9893- B9178597B 5 95 %20Prabhanjan%20Kumar%20Singh__Civil.pdf](http://docs.manupatra.in/newsline/articles/Upload/6DEF4F8E-39FD-4CF4-9893-B9178597B595%20Prabhanjan%20Kumar%20Singh__Civil.pdf)

⁵⁵Surrogacy (Regulation) Bill, 2016 (Act 257 of 2016)
<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2016>

INTRODUCTION

mother or surrogacy arrangement in India. Surrogacy will be available to women between the ages of 23 and 50 and men between the ages of 26 and 55.

3. A surrogate mother, according to the bill, is only a close relative of the couple who acts as a surrogate mother for them. A woman can be a surrogate mother only for the sake of altruistic surrogacy, and she will not be paid for it under any circumstances, though reimbursement for medical bills may be made.
4. Bill 4. The bill calls for the creation of a National Surrogacy Board at the federal level, as well as Surrogacy Boards and Appropriate Authorities at the state and union territory levels. The union health and family welfare minister will chair the central surrogacy board, with the secretary of the Department of Health Research serving as vice chairperson. Three members of parliament, as well as a representative from a women's organisation, will be chosen as members of the appropriate authority.
5. Enact 5. Enactment of a bill aimed at outlawing commercial surrogacy in India. The bill imposes severe penalties, including a ten-year prison sentence, for violating the bill's provisions. According to the combined reading of these provisions, it appears that both the couple's offer of payment to the surrogate mother and the surrogate mother's receipt of payment are punishable by imprisonment and fine under the bill.
6. The bill mandates that surrogacy arrangement clinics keep surrogacy data for a period of 25 years and be registered with the government.
7. Couples who have already a child, including adopted child, they bars from commissioning surrogacy.
8. The child born through surrogacy, child will have the similar rights of as that of a biologically child. A surrogate child will cannot be neglected by parents.
9. A surrogate mother cannot be misbehaved by the clinic or parent couple.\
10. Only one time surrogacy allowed within life of donor women.
11. The bill imposes ban on the selling and buying of human embryo and gametes.

1.8 Statement of Problem:

The women health is a serious issue in surrogacy. In India, health got little importance as ART clinics generally ignores regular medical checkup, no proper food, no special hostels for pregnancy time or generally had very poor conditions staying home to live in. The surrogacy involves many risks to baby health such as genetic disorders, low birth weight or membrane damage, etc. as many survey studies reported. Further in case of defected or disabled baby, baby has been generally left with surrogate mother or in an orphanage and an innocent baby has to suffer for whole the life for a crime did by his/her intended parents.

The legal status of surrogacy in India helps in growing child trafficking industry. Surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in developing countries.

Many religions do not allow surrogacy even in case of in vitro fertilization like in Catholicism. According to it a child is a gift not right and adopting unnatural means are gravely immoral. Also in Judaism surrogacy is permissible in limited terms. However there is little or no restriction on surrogacy in Hinduism but surrogacy rarely used by Hindus. Many argue that adopting orphan child should be given preference than allowing commercial surrogacy. It challenges the moral values of society.

International surrogacy is a two-sided issue in which the laws of both countries must be on par/uniform, otherwise the concerns and interests of the parties concerned will remain unaddressed. Many times citizenship issues arise due to lack of information on laws of both the countries.

Surrogacy's legal implications are complex, varied, and mostly unresolved. In most countries, the woman who gives birth to a child is considered the legal mother of the kid. The Intended/ Commissioning Parent/s are recognised as legal parents in India, which is one of the few countries that does so. Pre-birth orders, which include the name(s) of the intended parent(s) on the birth certificate from the start, are currently issued by several states through the courts. Commercial surrogacy has been

legal in India since 2002. However commercial surrogacy has been completely prohibited in the recent surrogacy bill of 2016, but it yet to be to become the Law.

The object of thesis is to discuss and explore the surrogacy law and policy; to highlight the shortcoming in law and policy and suggest better initiatives to mend in concern lacunas. Against this background, the study is intended;

1.9 Objectives of Study

The objectives of the study are as given below:

1. To study and analyse the concept of surrogacy.
2. To study legal position of surrogacy in various countries including India.
3. To know the rights and duties of surrogate parties.
4. To study the present social and health protection rights ensured to the surrogate mother.
5. To discuss the status of child who has born in consequence of surrogacy.
6. To explain and critically analyze the recent Surrogacy Bill 2016.
7. To study and analyze the recent trends of surrogacy arrangement in Lucknow.

1.10 Hypothesis

The following propositions are to be tested in the thesis:

1. Surrogacy is a growing phenomenon during recent years despite absence of law regulations in this area.
2. It has now become huge industry, due to 15 percent increasing infertility.
3. The legality of surrogacy arrangement is debatable and the right and responsibility of the parties are not settled.

1.11 Research Question

The following research questions are to be answer in the thesis:

1. What are the reasons giving rise to a debate over surrogacy?
2. What are the international regime regarding surrogacy?
3. Are there specific law regarding surrogacy in India?

4. What are the rights and duties of surrogate parties?
5. To what extent the Law Commission of India have played role regarding surrogacy arrangement in India?
6. Are there any safeguard to ensure the safety of surrogate mother?
7. What will be the status of child who has born in consequence of surrogacy?
8. What are the provisions in the recent surrogacy bill?
9. Why there is need to amend the surrogacy bill?

1.12 Research Methodology

Researcher has methodology adopted for the study will be doctrinal and empirical A survey was used to conduct situational analysis research. The research will be based on empirical study which will be conducted in the fertility centers Lucknow. The data will be collected throwing the detailed questionnaire among the sample of 500 people including medical practitioner, health care staff, surrogate mother, and stake holders. The collected data will be coded and edited and analyzed of SPSS and inferences will be drawn.

A research design is a plan, structure and strategy of investigation to obtain answers to research questions and problems. The plan is the complete scheme or program of the research. It includes an outline of what the investigator will do from writing the hypotheses and their operational implications to the final analysis of data (Kerlinger 1986). The research design is a blueprint of any study.

1.13 Objectives of the Study

The object of thesis is to discuss and explore the surrogacy law and policy; to highlight the shortcoming in law and policy and suggest better initiatives to mend in concern lacunas. Against this background, the study is intended;

1. To analyses the reasons giving rise to a debate over surrogacy.
2. To study the concept of surrogacy.
3. To study legal position of surrogacy in various countries including India.

4. To know the rights and duties of surrogate parties.
5. To examine the present social and health issues and protection rights ensured to the surrogate mother.
6. To discuss the status of child who has born in consequence of surrogacy.
7. To explain and critically analyze the recent surrogacy bill 2016.
8. To study and analyze the recent trends of surrogacy arrangement in Lucknow.

1.14 Research Methodology

The methodology adopted and data analysis techniques used in pursuance of the objectives of the study. This study used mix method (Qualitative as well as Quantitative Technique) of data collection, analysis and interpretation according to requirement of objectives.

1.14.1 Research Design

Descriptive Research Design studies seek accurate observations and the research design focuses on the validity (accuracy) and reliability (consistency) of the observations, and the representativeness of sampling (Blanche et al. 2006).

The present work is confined to a limited period (2017-2021). Therefore, Cross-sectional Design has been used rather than longitudinal design. Cross-sectional research refers to studies which take a snapshot of a situation in time. It examines how something is done at the time of the research study. It measure units from a sample of the population at one point of time.

1.14.2 Population

The population of this study constitutes all stakeholders who are major in age and residing in District Lucknow, Uttar Pradesh, India.

1.14.3 Sampling Unit

Sampling unit is the resident of District Lucknow, Uttar Pradesh, India.

1.14.4 Sample Size

For populations that are large, Cochran (1963) suggested formula yield a representative sample for proportions. He assumes there is a large population but that we do not know the variability in the proportion. Therefore, assume $p=.5$ (maximum variability). Furthermore, suppose we desire a 95% confidence level and $\pm 5\%$ precision.

The formula suggested by Cochran is as follows:

$$n = pq \left(\frac{z}{e} \right)^2$$

Where

‘**p**’ is the frequency of occurrence of something expressed as a proportion

‘**q**’ is the frequency of non-occurrence of the same event and is calculated as $(1-p)$

‘**z**’ is the confidence level related value of the standard normal variable

‘**e**’ is the tolerable level of error in estimating ‘**p**’

Adopting the suggested formula by Cochran, for the present study, the total sample size comes 385. In this study we have taken 430 as a sample size to reduce the margin of error. But unfortunately our valid sample size is 218.

1.14.5 Methods of Data Collection

The type of data to be collected and sample size depends on the nature of the study and its research objectives (Hair et al. 2003). In this study we have used, Primary and Secondary methods of data collection. Primary methods of data collection include Close-Ended Structured Questionnaire Survey to collect primary data and for Secondary methods of data collection we used secondary sources such as research journals, magazines, internet and books.

1.14.6 Data Collection

The data collection was done in Lucknow, District of State Uttar Pradesh, and the period was from 2017 to 2021, wherein 430 questionnaires were distributed to

respondents who are major in age and residing in District Lucknow, Uttar Pradesh, India.

1.14.7 Research Instrument

The structured questionnaire had two parts. First part dealt with the demographic profile of the respondents while second part dealt with the different questions which are related to Surrogacy matters.

1.14.8 Statistical Tools of Analysis

The coded and tabulated data were analyzed using both descriptive and inferential statistical techniques. Mean, standard deviation, range have been calculated to draw a profile of the respondents and their responses. The data set was analyzed with the help of SPSS 20.0.

1.14.9 Descriptive Statistics

Descriptive statistics includes numbers, tables, charts, and graphs used to describe, organize, summarize and present raw data. In this study, descriptive statistics has been used to summarize the basic characteristics of the data.

1.14.10 Inferential Statistics

Inferential Statistics has been used to draw conclusions about the population from the sample collected. The two main methods used in inferential statistics are estimation and hypothesis testing. The study in this case has used hypothesis testing for understanding the population. The tools used are briefly described below:

1.15 HYPOTHESIS

The following propositions are to be tested in the thesis:

H1: Surrogacy is a growing phenomenon during recent years despite absence of law regulations in this area.

H2: It has now become huge industry, due to 15 percent increasing infertility.

H3: The legality of surrogacy arrangement is debatable and the right and responsibility of the parties are not settled.

1.16 Chapterisation

The thesis is divided into the following eight chapters:

Chapter- I Introduction

This chapter introduced an overview on above title and described the surrogacy related laws in contexts to the Surrogacy Arrangement.

Chapter- II History and Concept of surrogacy

Under this chapter described meaning, concept of surrogacy.

Chapter- III International law related to surrogacy

This chapter focal point is legal instruments related surrogacy at international level.

Chapter- IV Indian law and policy related to surrogacy

This chapter described Indian laws and policies concerned to surrogacy at present.

Chapter- Judicial response towards surrogacy

This chapter focused international and Indian judiciary on surrogacy related matters and issues.

Chapter- VI Socio-legal, ethical and moral issues related to surrogacy

This chapter includes information related to surrogacy as socio-legal, ethical and moral.

Chapter- VII Data Analysis and Interpretation

This chapter analyzed and interprets data related to surrogacy collected through questionnaire.

Chapter- VIII Conclusion and suggestions

This chapter conclude the above mentioned chapters and thereafter given some valuable suggestions.



CHAPTER 2
SURROGACY: HISTORICAL AND
CONCEPTUAL OVERVIEW



CHAPTER -2

SURROGACY: HISTORICAL AND CONCEPTUAL OVERVIEW

2.1 Introduction

Surrogacy is the composite medical method and to develop understanding about the conception of the surrogacy it is required to knowing of origin, development and explanations of the meaning of surrogacy as explain in various reports and the legislations.¹ The terms surrogacy which are used in the process are also particular medical terms which need the explanation to the common man to be aware of. In this chapter, researcher has made an attempt to origins, development; explain the meaning, types and various special terms used in the method of surrogacy. This chapter is concerned with the meaning of infertility, causes of infertility and treatments of infertility. Researcher will be analyses the various types of Assisted Reproductive Technology (ART) and Surrogacy Arrangements. In this chapter also concerned historical background, concept, meaning and scope of the surrogacy in general and particular.

One, in six couple's worldwide exercise some form of infertility problem at least once during their reproductive life duration. Among these an estimated 19-20 million live in India, according to World Health Organisation. More than 3.75 million children around the world have been born through in-vitro fertilization or related technique during the last thirty two years.² A fast rise in the amount of techniques that help reproduction, improve the likelihood of conception and bring a pregnancy to term has been seen in the last two decades. These are known collectively as Assisted Reproductive Technology (ART). They take different processes from comparatively simple intra-uterine (IUI) to in-vitro fertilization (IVF), more frequently known as

¹ R.S. Sharma, "Social, ethical, medical & legal aspects of surrogacy: an Indian scenario" vol. 140 *IJMR* (2014). Access on 20-09-2019 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/>

² Dr. M.P. Verma, *Surrogacy: Medico-Legal Paradigm* (G.B. Books 1sted. 2016).

"test-tube baby technology." Although ARTs are often referred to as "modern technology of reproduction," they existed as early as in the 16th century.³

Assisted Reproduction Reproductive Technology (ART) is any technological process that contributes to the conception of infertile females. Different medical techniques, including artificial insemination, have been created to help reproduce and overcome infertility: In vitro fertilization; motherhood surrogate; human cloning; gene replacement therapy; donation of artificial embryos; exogenesis; adoption of embryos; and transfer of eggs, etc.⁴

Surrogacy has become common among all techniques. Surrogacy has appeared with the use of a woman's womb to reproduce kids for another woman as a fresh stage of science development for reproduction. 'Surrogacy' is one of the most effective techniques of overcoming biological and social infertility. Surrogacy has made it possible for couples who are unable to reproduce through artificial reproduction and in vitro fertilization to have a genetically related baby. Surrogacy has become an appealing option for couples and people who want a kid linked to them biologically. The notion of surrogacy is commonly acknowledged throughout the globe. Surrogate motherhood is regarded by infertile couples as a boon because it is a revolutionary hope to have a kid.⁵

2.2 Infertility

Infertility is a common global medical destruction, which is thinks as a providential curse vertically in the sequence of socio-economic discrimination and psychological ordeal a between the desert couple and individuals. Infertility may lead to extra-marital relationship, domestic violence, divorce, witchcraft, depression, suicide, and other social stigma including ostracism. Thus, infertile couple, people are found desperate for family building, and became susceptible to being easily tramped by so called God men and local quacks. Mankind has sought answer to the question of

³ Sama, *ARTs and Women: Assistance in Reproduction or Subjugation?*(Sama-Resource Group for Women and Health, New Delhi. 1st edition 2006).

⁴ Zakariya Mustapha, "The Practice of Assisted Human Reproduction Technologies (Arts) in Nigeria: The Unanswered Legal and Ethical Questions", *JLJS*, Volume 1, Issue 1, (2018).

⁵ Dr. S.S.Das and PriyankaMaut, "Commercialization of surrogacy in India: A Critical Analysis" *Research Gate* (2014).

fertility since time immemorial, but it was only during the 20th century the medical community started treating infertility as disease.⁶

Infertility is deeply feared by women, their identity, status and security are affected, and in the family and society they practice shame, loneliness and a loss of negotiating power and empowerment. It is a big source of disquiet, causative to decreased self-esteem and impotence. In addition, having a son remains a important factor in the socio-economic well-being of most Indian women. Because of structural differences in their personal, political and economic background, many childless women face obstacles to autonomous decision-making. For example, women face social and economic disadvantages, making children less women more exposed to blame, mental and physical abuse, drop-out and divorce threat, social exclusion, and lack of access to sufficient treatment.⁷The causes of primary and secondary infertility are male and female, and the factors that contribute directly to infertility vary broadly among region and culture.⁸

Infertility is defined as the inability to get pregnant within twelve months, despite having frequent and unprotected sexual intercourse⁹. According to the Surrogacy (Regulation) Bill, 2019 is defining infertility as of Sec. 2 (p) ““Infertility” refers to a couple's inability to conceive after five years of unprotected coitus or a medical ailment that prevents pregnancy.¹⁰ Medically define infertility as a couple occurring when at least one year of unprotected sexual intercourse between a man and women between menarche and menopause does not produce a pregnancy.¹¹ Infertility is defined as a couple's incapacity to consider and create children, according to the Britannica online Encyclopaedia. Infertility is defined as a woman's inability to carry a pregnancy to term after one year of regular intercourse without contraception or the

⁶ Dr. G.K. Goswami, *Assisted Reproduction and Conflict in Rights* (Satyam Law International, New Delhi, edn.2017).

⁷ Anjali Widge and John Cleland, “The Public sector’s role in infertility management in India”, *HPP* (2009).

⁸ *Ibid.*

⁹ Linda Bickerstaff, *Science and Society Technology and Infertility: Assisted Reproduction and Modern Society*, (The Rosen Publishing Group, New York 1st edition 2009).

¹⁰ The Surrogacy (Regulation) Bill2019, (Bill No.156 of 2019).

¹¹ Henry T. Greely, *The End of Sex and the Future of Human Reproduction*, (Harvard University Press London, 1st ed. 2018).

failure to regard after one year of regular intercourse with contraception. Infertility affects both men and women and can be caused by a variety of factors.¹²

Infertility medical aspect; infertility is a prevalent occurrence not only in society in India, but also in the globe. It can be defined as infertility to conceive till one and half year of married life though no contraceptive measures are adopted. It is a medical issue and can be handled if correctly diagnosed. It affects both male and female populations.¹³ Infertility is a reproductive disorder defined by the World Health Organization as a failure to produce clinical pregnancy following 12 months or more of regular unprotected sexual intercourse (WHO), International Committee for Monitoring Assisted Reproductive Technology.¹⁴

Infertility is described as the inability to perform pregnancy after a fair period of sexual intercourse without taking any contraceptive steps. Sometimes the terms sterility and infertility are used interchangeably and sometimes distinct populations are defined. The definition of the term sterility in Spanish literature is the complexity of pregnancy, while the word infertility is used when pregnancy grows but at some stage is disrupted; the word is used as a synonym for recurring miscarriages. On the contrary, the word infertile in the English literature relates to a couple, who fails to get pregnant, Either because of the impossibility of becoming pregnant by natural means (sterility) or whenever there are opportunities but pregnancy does not happen (sub fertility) or when pregnancy develops but does not lead to a newborn living. The fertile population, on the other hand, is described as those who become pregnant after a fair period of frequent sexual intercourse.¹⁵

2.2.1 Infertility in Historical Perspective

The ancient period (3500 BC-500 AD) marks the beginning of civilization development from Indus Valley to Vedic Civilizations. The practice of Niyogapratha or Levirate was prevalent in the development of the child during this time. It was also

¹² Infertility- Britannica online Encyclopedia, access on-12-11-2018 <https://www.britannica.com/print/article/287593>

¹³ Supra note 2. P.1

¹⁴ Asha Sharma, "Male Infertility, Evidences, Risk Factors, Causes, Diagnosis and Management in Human" *IMEDPUBJ* vol. 5 (2017).

¹⁵ Dr Santiago Brugo Olmedo, "Definition and causes of infertility" *RBM Online*, vol. 2 (2000). Acces on 20-09-2019. [https://www.rbmojournal.com/article/S1472-6483\(10\)62193-1/pdf](https://www.rbmojournal.com/article/S1472-6483(10)62193-1/pdf)

clear from the Vedic literature that during that time the general population was familiar with the idea of artificial insemination (AI) involving manual semen injection into the women's reproductive tract. Enchantment mixtures (' Magic potions ') created during this era by the sages to make them pregnant by the queen of childless kings was a typical practice. Therefore, people were aware of the concepts of assisted reproduction and control of gamete during that period.¹⁶

Bareness has generally been perceived as a problem for women during this time. It was considered a misfortune for a woman in the ancient east as her husband; family and society were likely to hate the barren wife. Women's worth during the Common Era was measured by their innocence and their reproducibility after marriage. Although there was a way to avoid childlessness by adopting a second wife, divorce was also a choice. In the Common Era, it was assumed that the marriage contract was concluded with child birth, not at consummation. Women's infertility was one of the major causes of divorce during that time; as stated in most Egyptian marriage contracts, polygamy was very common and the reason a man chose more than one wife.¹⁷

Socio-cultural factors influence how people perceive and react to childlessness, and these elements vary greatly between societies. People's perceptions of childlessness are usually demeaning and judgmental, especially in a woman whose major purpose is regarded child-bearing and whose economic and social position is often predicated on her child-bearing abilities. It is the woman who is repeatedly blamed if a couple is childless, whatever the cause of infertility but due to existing social and sex norms. As a effect of childless distress, depression, decreased self-esteem, social stigma, isolation, economic deprivation, physical violence, threats from the family of the husband and husband, rejection, abandonment and divorce, a woman can suffer any or all of the consequences.¹⁸

¹⁶Radhey Shyam Sharma and Richa Saxena (et al), "Infertility & assisted reproduction: A historical & modern scientific perspective"*IJMR*, (2018). Access on 23-10-2019 <https://pubmed.ncbi.nlm.nih.gov/30964077/>

¹⁷*Ibid.*

¹⁸Kirti Mishra, "Indian Women's Perspectives on Reproduction and Childlessness: Narrative Analysis"*IJHSS*, Vol. 4. (2014). Access on 12-10-2017 http://www.ijhssnet.com/journals/Vol_4_No_6_1_April_2014/15.pdf

2.2.2 Infertility in Religious aspects

Religion and related structures affect a wide range of human behavior, including gender roles, divisions of employment, family structure, mortality, and ageing. In terms of family issues, religious differences in demographic behavior are well documented. Recent evidence from many cultures shows that religion plays an important role in family behavior. Although "book religions" such as Judaism, Christianity, and Islam include some basic lessons about contraception and abortion, Buddhism and Hinduism have no such biblical injunctions or institutional standards of conduct on abortion. Because there is no central religious authority that can provide scriptural interpretation on birth and fertility-related concerns, family planning is left to individual choices.¹⁹

In India, pregnancy and childlessness are regarded socially as significant issues with social and religious implications. In Hinduism, religious texts such as "Vedas" and "Upanishads," epic poems such as "Ramayana" and "Mahabharata" and social commentaries such as Kautilaya's "Arthashastra" have convinced people to have children because, according to these sources, childlessness is a curse. Hindu believes that in order to secure their rebirth, a child especially a male child is needed. Only a male child can do death-related rituals. Not having children for many people means not achieving peace in life. Therefore, we seek to find alternative ways to have children that can fulfill the culturally accepted notion of one's own and offspring beings. The adoption of alternative family formation approaches depends profoundly on cultural norms for the establishment of valid kinship relations, and thus the capacity to be fertile.²⁰

Many of the participants said they accepted infertility as a god's gift and had complete faith in him. Even one expressed gratitude for having been blessed with everything in life and wished to see others who couldn't afford to have a recorded religious turn and perform some rituals because they believed they may obtain God's blessings. Aside from God, people have long thought that their actions will determine the destiny of their lives. Participants believed that their past karmas were to blame

¹⁹Vegard Skirberkk and SetsuyaFukuda (et al), "Is Buddhism the low fertility religion of Asia?" *Research Article*, vol.132 (2015). Access on 23-11-2017 <https://www.demographic-research.org/volumes/vol132/1/32-1.pdf>

²⁰*Supra note* 16. At .2.

for the current problem. We also included their previous karmas. They also noted that infertility in present birth is the result of bad infertility in present birth is the result of bad birth.²¹

Religion played a major role in influencing women's experiences and shaping their outlook for disease. God is regarded as the creator in Hindu mythology, and HE can only bless with life. Past acts in this birth or last birth and fate play an important role in shaping the present of an individual. Studies in India and Iran also found that infertile women believed in a supreme power, embraced their infertility as the will of God and the product of their last-born karmas, whereas infertile women reported having lost faith in God as a result of the fight for infertility, as in another analysis.²²

2.2.3 Infertility Social Perspectives

Infertility is a pervasive global health disorder, which is regarded as a divine curse resulting in sequence of socio-economic discriminations and mental ordeal among the wretched couples and individuals. Sterility may lead to extra-marital relationships, domestic violence, divorce, witchcraft, depression, suicide, and other social stigma like ostracism. As a result, infertile people are found desperate for ' family is building ' and are likely to be quickly captured by so-called God men and local quacks. Throughout time immemorial, human beings have sought answers to the question of fertility, but it was only during the 20th century that the medical community started to view infertile as a disease²³.

Society's attitude toward infertile individuals is not positive. In conservative and religious, cultural they are suffering a lot. This is seen in Indian society as accurse. There are many superstitious and spiritual views against such people due to lack of proper education²⁴. Individuals in society take the view that the very person has committed some big sin or performed bad karma in the preceding life.

²¹ Poonam Sheoran and Jyoti Sarin, "Infertility in India: social, religion and cultural influence", *IJRCOG*, Vol.6, (2015). Access on 25-09-2017 <https://www.ijrcog.org/index.php/ijrcog/article/view/2304>

²² *Ibid.*

²³ *Supra note 2* at 1.

²⁴ Fatemeh Yazdani and Ashraf Kazemi (et al), "Studying the Relationship between the Attitude to Infertility and Coping Strategies in Couples Undergoing Assisted Reproductive Treatments" *Journal of Reproduction and Infertility* (2016) access on 12-11-2017 <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1081.1184&rep=rep1&type=pdf>

It's called the couples cures. It is an obstacle in societies decline and rank. Infertile people are outwardly showing contentment, but in fact we are weeping alone. The person concerned was adversely affected by infertility, impotence or natural disability. We have anxiety and are affected by the system of infertility. We try to keep them cut off from society's norm and experience isolation as we find their physics to be incomplete²⁵.

In Indian society, infertility is considered the problem of women and is accused of not being able to procreate. As a dutiful wife, she is expected to start a family immediately after marriage, and if she fails to do so, she is blamed for her role failure and often blamed in laws and neighbours for negative remarks. Women also appeared to be blamed for the cost that their mother in law had spent on care. This culture blaming takes its toll on women's physical and psychological well-being and they shared how a conversation with neighbour or some relative becomes a matter of stress and tension for them and this continuous blaming leaves them emotionally and physically exhausted.²⁶

When a woman is unable to conceive her family and even neighbors get interested in the lives of the couple and put more pressure on women by repeatedly asking and recommending treatments or care outlets. Women are also under pressure to see others with their children of the same gender. She shared a feeling of greater pressure to conceive if someone of the same age is conceiving or delivering a baby in family or friends, she is considered to be the next person to automatically deliver good news. Motherhood is considered a strength that makes here vulnerable to the new bride and lack of it. Although most participants reported having a supportive husband, under social pressure they also expressed constant fear of the remarriage of the husband.²⁷ If the cause of infertility turns out to be a female factor, the treatment cost burden should be borne by the parents of women. It can be noticed that women

²⁵ AnshuBarnawal and AparajitaChattopadhyay "Proposition of Belief and Practice Theory for Men Undergoing Infertility Treatment: A Hospital Based Study in Mumbai, India" Vol. 5 *IIPS* (2020) Access on 30-09- 2021 <https://www.frontiersin.org/articles/10.3389/fsoc.2020.00043/full>

²⁶ *Supra note 22* At 5.

²⁷ *Ibid.*

who belonged to low socioeconomic status and poor education encountered these experiences more profoundly.²⁸

Most women have experienced that baby birth gives a decent place in society. Childless women bear a lot of taunts and other aggressive behavior. A woman sadly mentioned that baby is very important in family and society for integrity and justice. Because people ignore her, she avoids social functions.²⁹ Procreation is necessary for family expansion and the next generation of the family is represented by only one child. This narrative implies the son's choice and significance in society, or the reputation associated with a male child's mother. Women understood that their own biological baby is very significant for the feeling of womanhood. It is crucial to perform funeral, cremation and death-related rituals, especially a child. If they don't have their own baby, they will unsaturated their soul.³⁰

Many women claimed to have visited several holy places and participated in numerous baby ceremonies. They became involved in religious activities as a result of having a child. The women performed religious chores according to their own faith as well as those of other faiths. For example, a Hindu woman was performing "Yagna," visiting temples and pilgrimages, as well as places of faith and traditional healers of other religions, as convinced by friends or acknowledged by other religions.³¹

2.2.4 Causes and Types of Infertility

Both males and females are affected by infertility and both males and females are equally responsible for the infertility. If a single factor exists, the fertile partner may be sensitive to the less fertile partner. However a male and a female factor coincide in many couples. Infertility generally occurs when both partners are sub fertile or have decreased fertility. Unexplained infertility is an exclusion diagnosis provided to an average of 14% of couples who have undergone an infertility causal assessment without identifying a prospective aetiology. One third of cases of infertility can be attributed to male reproductive causes alone, one third can be attributed to female causes alone and one third can be attributed to male causes plus

²⁸ *Supra note 25 at 6.*

²⁹ *Supra note 17 at 4.*

³⁰ *Ibid.*

³¹ *Ibid.*

female causes. Male infertility factor is a complicated disease affecting a big industry of the population; however, it is unknown to many of its etiologists.³²

Infertility is a worldwide issue that affects individuals around the world whose cause and significance may differ depending on geographic place and socio-economic status. According to statistics, 60-80 million pairs worldwide suffer from infertility. Infertility affects 10 to 12 percent of the world's couples, with the guy being sterile in half of the cases. According to estimates, a man is infertile in 35 percent to 40 percent of cases, a woman is infertile in 35 percent to 40 percent of cases, and 20 percent to 30 percent of cases are due to a combination of other variables. When a pregnancy ends in termination or the birth of a child with an inherited condition, infertility sets in.³³

2.2.5 Female infertility

Infertility has been considered a female condition for many years. In reality, in about 40 percent of cases it is a problem in the female, in another 40 percent it is a male problem and in the remaining 20 percent it is a joint problem. For reproduction to occur there must be synchronization of three important factors: female fertility, male fertility, and successful mating.³⁴

Female infertility relies on multiple body functions being coordinated. Ovulation should normally occur. To migrated ovum and sperm, the pathways through the female anatomy need to be open and have a favorable environment. Ultimately, for the implantation and protection of the fertilized ovum, the uterine lining must be hospitable. The uterine lining must be hospitable for fertilized ovum implantation and support. Infertility may be due to a number of factors due to the complex nature of these roles. The main causes, however, seem to be: (A) obstructed fallopian tubes; (b) failure of the ovary to produce a viable ovum; (c) cervical anomalies preventive of sperm penetration; and (d) unwillingness of the uterus to

³²Aza BahadeenTaha and Khanzad Hadi Rashid, "Etymology of Infertility in Couples attending maternity hospital in Erbil" *ZJMS*, vol.17 (2013). Access on 23-09-2019. <https://zjms.hmu.edu.krd/index.php/zjms/article/view/317>

³³Narjes, Deyhoul and MeimanatHoseini (et al), "Infertility-Related Risk Factors: A Systematic Review", *IJWHR*, vol.5 no.1, (2017). Access on 23-10-2019 http://www.ijwhr.net/pdf/pdf_IJWHR_177.pdf

³⁴Nancy L. Porter and F. Scott, "Infertility: Towards an Awareness of a Need among Family Life Practitioners" (1984). Accesses on <https://about.jstor.org/terms>

embrace or sustain the idea of us. These factors can arise either hormonally or structurally. For example, failure to produce a viable ovum may be due to hormonal failure, causing women not to ovulate, or it may be due to physiological growth that covers the ovaries, thus preventing the ovum from being released. For example, failure to produce a viable ovum may be due to hormonal failure, causing women not to ovulate, or it may be due to physiological growth covering the ovaries, thus preventing the release of the ovum. The uterus ability to accept and sustain the idea of us may be due to excessive hormone levels or defects such as tumors.³⁵

2.2.6 Infertility of Female may be of following four types:-

1. Tubal Infertility
2. Non-functional or Inaccessible (or absent) Ovaries
3. Nonfunctional (or absent) Uterus.
4. Idiopathic Infertility

(1) Tubal Infertility:-

Tubal – peritoneal conditions are responsible for ~30% of infertility causes. The functions of Fallopian tubes are closely related to the integrity of the oocyte-taking ciliated epithelium. Fertilization occurs in the orampullar section of the outer end. Early embryo development and transportation of the embryo into the uterine cavity are also involved in the tubes. Consequently, infertility is associated with any physiological or structural changes in the tubes. Cultural changes, including the use of contraceptives, have anticipated the onset of sexual activity in contemporary society several years before partner stability or fertility is even associated with the percentage incidence of tuberos – peritoneal infertility.³⁶

Between 3.1 percent and 16.7 percent of primary and secondary cases of infertility, pelvic inflammatory occurs. A case-control study concluded infections of the reproductive tract as the main cause of the adhesions of Fallopian tubes, raising secondary infertility. Genital infections are one of the most significant causes of infertility, affecting the following parameters: fallopian tubes, endometrial mucosa

³⁵*Id.*

³⁶Gaurav Gaur, Suneel Pal Singh, et.al “Female Infertility: An Overview” *IAMJ* vol.6 (2018). Access on 15-10-2020 <https://ijpsr.com/bft-article/female-infertility-an-overview/>

and sperm.³⁷ Every deformity associated with fallopian tubes etc. is due to tubal infertility. Once IVF was available as a surgical treatment, the damaged and non-functional Fallopian tubes were often fixed by surgery, but their success rate was very small. Certain methods to treating tubal infertility include ovarian implantation, tubal transplantation and grafting pipe replacement. The IVF procedure slowly replaces the above-mentioned surgical methods for the treatment of tubal infertility because once fertilization has occurred in vitro, no fallopian tubes are needed, but only functional uterus is necessary for embryo transfer.³⁸

(2) Non functional or Inaccessible (or absent) Ovaries

This is women's most prevalent endocrine pathology and the most common cause of ovulation. Women with polycystic ovaries may have a wide range of clinical signs and symptoms; however, ovulation and hyper and organism are considered a prerequisite for this L.H. This condition was later associated with insulin resistance and was identified in women with polycystic ovaries during the ultrasound findings.³⁹

Infertility due to ovarian dysfunction may be due to the lack of eggs in the ovaries or due to full ovarian blockage. Infertility due to ovarian dysfunction may be due to lack of eggs in the ovaries or due to complete ovarian blockage. Polycystic ovary syndrome (PCOS) is usually an inherited problem and accounts for up to 90% of an ovulation cases. The ovaries produce high quantities of androgens in PCOS, particularly testosterone, and therefore amenorrhea or oligomenorrhea is very common.⁴⁰

(3) Nonfunctional (or absent) Uterus

Non-functional (or absent) uterus: - When uterus is absent or non-functional, the female partner's oocytes may have IVF and the fertilized embryo may be moved to a surrogate mother for the pregnancy era. The involvement of infertility and repeated abortions has been linked with a wide spectrum of uterine anomalies, whether congenital or

³⁷Ashraf Direkvand-Moghadam, Ali Delpisheh (et al), "Epidemiology of Female Infertility: A Review Literature" *BBRA*, vol.10 (2013). Access on 26-10-2017 <https://www.researchgate.net/publication/270545884>

³⁸*Supra note 1* at 1.

³⁹*Supra note 33* at 9.

⁴⁰WasiuEniola Olooto, "A review of Female Infertility; important etiological factors and management" *JMBR* (2013).access on 12-10-2017 <https://www.researchgate.net/publication/273322572>

acquired. Examples include congenital anomalies, drug exposure intrauterine, submucosalmyomas, polyps, and synechiae. Although such an association is real, such disorders may also arise at the same time as childbirth, leading to difficulties in establishing a relationship between cause and effect. This may be due to the lack of data in infertile patients on the frequency of occurrence of these findings. Through interrogation and physical examination, these types of changes are rarely detected. Hysterosalpingography is the first line method of evaluation.⁴¹

(4) Idiopathic Infertility

Unexplained infertility" or "idiopathic infertility" refers to the inability of a pair to conceive in which there is no clear cause for infertility. This term is preferred to the "normal infertile couple," as in many instances the "normal" adjective may be inappropriate. The average incidence of unexplained infertility among infertile couples that were thoroughly evaluated was reported as about 15 percent.⁴²

Unexplained infertility, also known as idiopathic infertility, is diagnosed in 30% of infertile couples worldwide. The problem is characterised as a woman's failure to conceive after at least 12 cycles of unprotected intercourse or six cycles in women over 35 years of age who pass all standard tests. Several doctors and academics have questioned the validity of the term "unexplained infertility," emphasizing that the volume, reliability, and complexity of diagnostic tests used to diagnose an infertile pair are all important factors.⁴³

2.2.7 Factures of Female infertility

- 1) Fracture of Age
- 2) Hormonal Disorders
- 3) Genital Infections and Diseases
- 4) Smoking and Alcohol Consumption
- 5) Immune Responses

⁴¹*Supra note 1* at 1.

⁴²Kamran S. Moghissi and Edward E. Wallach, "Unexplained infertility" vol. 39, *MT*, (1983) access on 12-10-2016 <https://www.yourfertility.org.au/general-resources/interactive-tools/unexplained-infertility>

⁴³Mohammad Reza Sedeghi, "Unexplained Infertility, the Controversial Matter in Management of Infertile Couples" vol. 16, *JRI* (2015). Access on 23-11-2017 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4322174/>

- 6) Mobile Phone Use
- 7) Sexual Violence

2.2.8 Factor of Age

The age significant factor to consider in the provision of infertility care, in the medical management of infertility and in the development of clinical trials is the age of the infertile spouses. The number of women seeking infertility care is growing because there is a gradual increase in the number of women aged 35 to 45 years. The prognostic effect of age influences decisions and strategies in clinical management and development of trials. In this case, the study of the effect of age on fertility should focus on women as far less is understood about the impact of age on the male partner. There has been extensive review of the effect of female ageing on fertility and pregnancy.⁴⁴

Over age, fertility is increasing. Female fertility is at its height between the ages of 18 and 24, while it starts to decline after age 27 and fall after age 35 at a somewhat higher rate. A typical woman has 12 percent of her balance in terms of ovarian reserve at age 30 and only 3 percent at age 40. Age alone accounts for 81% of the variation in the ovarian reserve, making age the most important factor in female infertility. Ovulatory dysfunction in younger couples is more common than in older couples.⁴⁵

1. Factor of Hormonal Disorders

A hypothalamic casualty function for female infertility requires a proper medical context, with tests indicating hypogonadotrophic hypogonadism. This situation can have physical, physiological or organic sources. Acromegaly and the diseases of Cushing may also affect the fertility of women at various levels. But its functions have not yet been well described.⁴⁶

⁴⁴The ESHRE Capri Workshop Group, "Physiopathological determinants of human infertility" vol. 8 *HRU* (2000). Access on 23-11-2016 https://watermark.silverchair.com/hrup683.pdf?token=AQECAHi208BE49Ooan9kxhW_Ercy7Dm3ZL

⁴⁵WasiuEniola and Olooto, et al "A review of Female Infertility; important etiological factors and management" 380 (2002). Access on 16-10-2017

⁴⁶Ashraf Direkvand and Ali Delpisheh et al "Epidemiology of Female Infertility; A Review of Literature" vol. 10(2) p 563 *BBRA* (2013). Access on 23-09-2018

2. Factor of Genital Infections and Diseases

Mutations of many genes cause female infertility. There are also additional conditions concerning female infertility that are alleged to be genetic but are not responsible for any single gene, including Mayer-Rokitansky-Küstner-Hauser Syndrome (MRKH). In contrast, infertility and pregnancy disorders are caused by an unknown number of gene-environmental mutations.⁴⁷

Mayer – Rokitansky – Kuster – Hauser syndrome (MRKH syndrome), also known as Rokitansky syndrome or uterine vaginal aplasia, is a congenital disorder in which the uterus and vaginal organs are missing. However, ovaries and normal external genitalia exist. Association of mullerian duct aplasia, renal dysplasia, and cervical somite anomalies—mullerian duct aplasia, renal dysplasia, and cervical somite anomalies impact at least 1 out of every 4,500 women.⁴⁸

Untreated (natural) sexually transmitted infections (STIs) are with the factors that harm both men and women's reproductive system. Chlamydia and gonorrhoea are the most common STIs that result in male and female infertility. There is no symptom of this disease.⁴⁹

Sexually transmitted disease STDs are diseases that are transmitted by viruses, bacteria, or parasitic microorganisms from either sex via sexual activity with an infected partner. STD is a major cause of infertility. They are often asymptomatic but may have no symptoms, with the possibility of not seeking proper treatment in time to prevent reduced fertility. Some of the known STDs such as syphilis, chancroid, chlamydia, gonorrhoea, herpes simplex virus, human papilloma virus HIV. Throughout pregnancy and childbirth, STDs can also be transmitted vertically from mothers to children.⁵⁰

⁴⁷*Id.*

⁴⁸ Dr. D.Y. Patil Vidyapeeth, “Mayer–Rokitansky–Kuster–Hauser syndrome: Syndrome of Mullerianagenesis – A report of two cases” vol. 10 *MJ* (2017). Access on 23-11-2018 <https://www.mjdrdypu.org/article.asp?issn=0975-2870;year=2017;volume=10;issue=2;spage=207;epage=210;aulast=Yalavarthi>

⁴⁹ Narjes Deyhoul and Tina Mohamaddoost, (et al), “Infertility-Related Risk Factors: A Systematic Review” vol. 5 P 25 *IJWHR* (2017). Access on 20-12-2018 http://www.ijwhr.net/pdf/pdf_IJWHR_177.pdf

⁵⁰ *Supra note* 34 at 9.

2.2.9 Smoking and Alcohol use

An individual's fertility may be affected by choice of lifestyle. Tobacco smoking and alcohol consumption lead to infertility.⁵¹ Meta-analysis has shown that 40% of infertile people are smokers. Chemicals in cigarettes (such as nicotine, cyanide, and carbon monoxide) cause rapid ovule death. Unfortunately, once ovules have been de-strayed, they cannot be replaced. In male smokers, sperm count and performance deteriorate; sperm mobility is re-reduced, and sperm count falls with irregular appearance. It's possible that smoking prevents sperm from fertilising eggs. Female smokers, like non-smoking women, are unable to conceive. With the average number of cigarettes, the risk of replication increases. Even the impact of smoking on fertility may not be completely eliminated by fertility treatments such as in vitro fertilization (IVF).⁵²

2.2.10 Immune Responses

Female fertility is regulated in the hypothalamic pituitary-ovarian axis by a series of highly coordinated and synchronized interactions. Female fertility can therefore be impaired by reproductive tract diseases or dysfunctions, neuroendocrine system, and immune system, or any severe or stressful general disease. The condition of reproductive autoimmune failure initially occurred.⁵³ For sexual issues such as recurrent miscarriage (RM) infertility, and implantation failure, the immunological system plays an important role. It shows that successful pregnancy depends on the semi-allogeneic fetusmagnititude of the immune response. Local and systemic immune responses such as immune globulins, cytokines, and hormonal and endometrial factors affect the implantation of embryos. It is important that these factors contribute to the success of implantation and delivery. Throughout female sexual activity, natural killer cells play a significant role. These cells are associated with inductive defects, abortion or infertility and gene expression caused by NK cell cytotoxicity.⁵⁴

⁵¹*Supra note 37* at 11.

⁵²*Supra note 46* at 15

⁵³Kadri Haller-Kikkatalo and Andres Salumets (et al) "Review on Autoimmune Reactions in Female Infertility:

Antibodies to Follicle Stimulating Hormone" *AR* (2012). Access on 24-10-2017 <https://pubmed.ncbi.nlm.nih.gov/22007255/>

⁵⁴*Supra note 46* at 15.

2.2.11 Factor of Mobile Phone Use

An electromagnetic field (EMF) is a set of waves that originate from the series of electrical and magnetic fields that oscillate with each other at a specific frequency and at definite intervals. The most common EMF sources used in close proximity to the human body are mobile phones and portable radiofrequency devices. Several studies have been carried out on the impact of mobile phones on human health. Overall, EMFs associated with the use of mobile phones have been reported to cause problems with sleep, fatigue, headaches, loss of concentration, and increased blood pressure to rest. It was documented that mobile phone usage increased the risk of acoustic neurinoma and glioma increase of 10 years, with a higher risk in the half of the head corresponding to the side of the phone. The study also showed a greater impact on tissues closer to the mobile phone. Some studies have shown a negative effect of EMFs on both male and female reproductive systems, while others have shown no negative effect of EMFs.⁵⁵

2.2.12 Sexual Violence

Infertility has been linked to a history of sexual abuse, according to research. Miscarriage is caused by ovulation or sexual malfunction as a result of sexual violence psychological stress. Infertile women have been sexually harassed three times more than fertile women in their lives. Although there is a clear correlation between sexual assault and Fallopian tube infertility, the link between any other type of infertility is hazy and ambiguous. This may be due to the fact that Fallopian tube pathology has been established as a gold standard procedure using human chorionic gonadotropin (HSG). HSG is an ineffective pipe opening measure with strength of 62% and a sensitivity of 83%.⁵⁶

2.3 Causes and factors of Male Infertility

Male infertility factors include disease, trauma, and exposure to contaminants, anatomical variances, chromosomal abnormalities, systemic disorder,

⁵⁵Murat Bakacak and Mehmet SuhhaBostanc et al. "The effects of electromagnetic fields on the number of ovarian primordial follicles: An experimental study" *KJMS* (2015). Available at www.sciencedirect.com

⁵⁶*Supra note 46.*

and antibodies to semen. Further risk factors may add smoking, alcohol use, obesity, and older age, but a result is hindered by a lack of outcomes related to pregnancy. A longitudinal case-control study involving 650 patients with infertility and 698 control participants looked into the influence of environmental risk after assessing many factors such as shift work, stress, and pesticides.⁵⁷

Causes and factors of male infertility were namely further discussed:

2.3.1 Causes of Male infertility

- a. Spermatozoa
- b. Varicocele
- c. Endocrinal disorders
- d. Reproductive tract infection
- e. Ejaculatory disorders
- f. Immunological factor
- g. Genetic and chromosomal defects

2.3.2 Risk Factors of Male Infertility

- a. Smoking
- b. Occupational exposure
- c. Exercise
- d. Electronic devices
- e. Stress

1. Spermatozoa

Azoospermia (low sperm counts), irregular sperm morphology (shape) and poor sperm motility are typically asymptomatic but of considerable etiological significance to most males. Most cases with low sperm counts are "idiopathic," but varicocele and chronic testicular diseases may be related. The performance and total sperm count represent the testicular state, the amount of plasma testosterone and the patentability of the post-testicular duct system. The total volume of seminal fluid is added by the various accessory glands and is therefore a feature of the accessory glands' secretory activity. Also essential are the value of sperm (count, vitality,

⁵⁷Tammy J.Lindsay, "Evaluation and Treatment of Infertility" *FMRI* (2015) Accessed on 23-10-2018 <https://www.aafp.org/afp/2015/0301/p308.html>

motility and morphology) and the composition of seminal fluid. It is well established that sperm DNA can be oxidatively destroyed by oxidative stress and by mechanisms such as aberrant apoptosis and incomplete sperm contamination.⁵⁸

Though, the effect of abating sperm counts on couple fertility has been concealed by major social changes, such as women's career aspirations, which have had a significant negative impact on birth rates and family range. There are two main factors at any given time to determine the sperm count of an individual. Both are the number of Sertoli cells in his samples and the time (abstinence) after last ejaculation. Both obviously have major effects on sperm count, but the big difference is that abstinence is variable, while the number of Sertoli cells is fixed early in development.⁵⁹

2. Varicocele

Varicocele is an irregular pampiniform plexus vein dilatation and tortuosity that drains the testis. This exists within the sperm cord and on physical examination it can be palpated. After puberty, almost all varicoceles are identified and the prevalence among adult men is about 11-15 percent.⁶⁰

Varicoceles are considered the most common cause of male infertility 5 to be corrected. The mechanism through which testicular function is impaired by varicoceles remains unclear. The most widely accepted hypothesis is that varicoceles result in a temperature increase that suppresses spermatogenesis. Certain potential factors are adrenal and renal metabolite reflux and reduced stasis blood flow.⁶¹

3. Endocrinal disorders

Endocrine causes are often referred to as pre-testicular causes of male infertility. In these cases, loss in fertility is due to either a deficiency in hormones or an excess. Hormonal disruptions contribute to about 15 percent of married couples and about 50 percent of them are responsible for males. Hypothalamus, pituitary

⁵⁸WasiuEniola Olooto, "Infertility in male; risk factors, causes and management- A review" vol. 2(4) *JMBR* (2012). access on 12-10-2017

⁵⁹Richard M. Sharpe, "Sperm counts and fertility in men: a rocky road ahead" *SSS* (2012). Access on 28-11-2017 <https://pubmed.ncbi.nlm.nih.gov/22491033/>

⁶⁰Kumar Rajeev and Shah Rupin, "Varicocele and male infertility: current status" vol. 55 *JOGI* (2005). Access on 12-11-2017 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4770509/>

⁶¹ *Ibid.*

glands and testes and the complete production of male germ cells rely on the regulated endocrine secretion of these glands for fertility in males. For male fertility, hypothalamus, pituitary glands and tests and the complete development of male germ cells depend on these glands ' regulated endocrine secretion. Hyperprolactinemia stops the hormone-releasing gonadotrophin from pulsing, leading in reduced pulsatile release of follicle stimulating hormone, luteinizing hormone, and testosterone, resulting in sperm arrest, decreased sperm motility, and altered sperm quality. This too causes secondary infertility and hypogonadism. Thyroid hormones must play a key regulatory role in sperm formation since spermatogenesis takes place in close proximity to sertoli cells. Thyroid dysfunction could consequently have an impact on spermatogenesis and male fertility.⁶²

4. Reproductive tract infection

Infectious pathogens can affect reproductive function in both sexes. About 15% of male infertility is caused by genital urinary tract infections. Many regions of the male reproductive system, including the testis, epididymis, and secondary sex glands, may be affected. Urogenital infections may disrupt spermatogenesis at several stages of spermatozoa generation, maturation, and transmission.⁶³

Male reproductive tract infections are a common condition that can lower sperm quality and affect the operation of the male accessory gland, making it one of the curable causes of male infertility. Infection in the male reproductive system reduces sperm size and seminal plasma levels of -glucosidase, fructose, and zinc, indicating epididymis, seminal vesicles, and prostate secretory function impairment.⁶⁴

5. Ejaculatory disorders

The most common fertility problems associated with ejaculatory disorders arise in one of three main categories: sexual dysfunction; neurological disorders; and the lack of obstruction of internal male genital ducts.⁶⁵

⁶²Roshan Kumar Mahat and ManishaArora, (et al) "Risk Factors and Causes of Male Infertility-A Review" vol.5 *BAB* (2016). Access on access on 11-12-2018 <https://www.longdom.org/open-access/risk-factors-and-causes-of-male-infertility-a-review-2161-1009-1000271.pdf>

⁶³NourhanMesbah and Hosni Khairy Salem, "Genital Tract Infection as a Cause of Male Infertility" vol. 64 *Intech Open* (2016). Access on 12-11-2018 <https://www.intechopen.com/chapters/50020>

⁶⁴*Supra note* 59. P. 30

⁶⁵Stacy Elliott and Margo R. Fluker, "Fertility Options for Men with Ejaculatory Disorders" vol. 22(1) *JSOGC* (2000) access on 25-09-2018 [https://www.jogc.com/article/S0849-5831\(16\)30120-3/pdf](https://www.jogc.com/article/S0849-5831(16)30120-3/pdf)

The sexual intercourse act relies on a sufficient erection and on the capacity to ejaculate within the vagina. Erection, ejaculation and orgasm are different physiological processes, one of which can occur without the other. Clinically, this differential response can be capitalized when men with sexual dysfunction need help with fertility.⁶⁶

The simultaneous deposition of semen into the prostatic urethra, the closing of the bladder neck, and the contraction of the urethral and pelvic floor muscles allow the semen to be expelled through the urethra constitute ejaculation. The ejaculation cycle relies on the regulation of the central and peripheral nervous system. Ejaculation disorders, that resulting a lack of emission ejaculation that retrograde ejaculation, and may result from physiological, anatomical and psychological conditions. Incomplete closing of the bladder neck induces retrograde ejaculation. Diabetes mellitus causes injury to the peripheral nervous system that can lead to retrograde ejaculation or ejaculation. In contrast to spinal cord injury and myelodysplasia, a central nervous system lesion can also cause ejaculatory dysfunction. Ejaculation can be affected by a variety of medications, including -blockers, antidepressants, antipsychotics, and antihypertensive drugs. Ejaculatory dysfunction can be caused by a blockage of the ejaculatory ducts or previous surgery on the bladder neck that results in retrograde ejaculation.⁶⁷

6. Immunological factor

Antisperm antibodies are found in the infertile couple in about 9-33 percent. The antibodies are present in man in 8-19 percent of these couples and the female partner contributes antibodies in 1-21 percent of antisperm antibodies. Sperm antibodies with antisperm also have weak interactions with sperm cells. The acrosome reaction and pellucid zone binding may be compromised, which may in effect decrease the capacity for overall fertility.⁶⁸

For example, cytokines, leukocytes, and T-cell activators, semen is produced along with various immune regulatory molecules. These molecules are formed from testis, level testis, epididymis, efferent ducts, and accessory sex glands transiting

⁶⁶*Id.*

⁶⁷*Supra note 59* at 48.

⁶⁸*Ibid.*

through the reproductive tract using micro vesicles such as epididymosomes and proteomes that are in and form part of seminal secretions. Not only do they affect functional characters of the sperm, they also control immune sensitivity of the sperm.⁶⁹

7. Genetic and chromosomal defects

A large proportion of infertility, however, remains idiopathic for the most part, even though more and more genetic factors have been reported and have been shown to affect fertility. In the general population, the rate of chromosomal aberrations is about 0.6%. Nonetheless, among 2%-14% of males with infertility, cerotype abnormalities were identified. With that frequency of infertility, changes in chromosomal aberrations have been clearly shown to increase proportionally.⁷⁰ Considered one of the reproductive field's most perplexing diseases, male factor infertility is widespread and its prevalence rises while its aetiology remains elusive.⁷¹

Problems in the genes that control male fertility and in the sperm's genetic material itself contribute significantly to men's infertility problems. In fact, 19 percent of the sperm are genetically defective even in men with no known fertility problems. Some medical conditions that have been inherited often contribute to male infertility. It is possible to inherit defective genes themselves, created by environmental attacks (such exposure to radiation), or both. The possibility of transferring these mutations to offspring in men who undergo fertilization techniques that retrieve sperm and directly fertilize the egg is of some concern.⁷²

Sperm carries half of the genetic material needed to make a human. Infertile people with broken or damaged DNA (the molecular chain that makes up a gene) have been documented to have a relatively high percentage of sperm.⁷³

⁶⁹S. Siddalingappa Archana and Sellappan Selvaraju (et al) "Immune regulatory molecules as modifiers of semen and fertility: A review" *MRD* (2019). Access on 12-10-2020 <https://onlinelibrary.wiley.com/doi/full/10.1002/mrd.23263>

⁷⁰Gary L Harton and Helen G Tempest, "Chromosomal disorders and male infertility" vol. 14 *AJA* (2012) access on 29-11-2018 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3735152/>

⁷¹Katherine L (et al), "The genetic causes of male factor infertility: A review" vol. 93 *Elsevier Inc.* (2010). Access on 23-09-2017 <https://pubmed.ncbi.nlm.nih.gov/20103481/>

⁷²Roxana Bohiltea "Genetic Causes of Infertility: Chromosomal Abnormalities in Couples with Reproductive Failure" vol. 9 *Research Gate* (2009). Access on 20-05-2017 <https://www.researchgate.net/publication/287739717>

⁷³*Ibid.*

Major factors in male infertility are abnormalities in genes that specifically regulate sperm production and quality. Some research suggests that approximately 10% of male infertility cases may be caused by problems, most likely genetic.⁷⁴

2.3.3 Risk Factors of Male Infertility

1. Smoking and alcohol

Smoke from tobacco is harmful to reproduction. Male smokers have been proven to have lower sperm counts, impaired sperm motility, additional irregular sperm, and lower testosterone levels, which could lead to congenital defects in their children and asthma.⁷⁵

The WHO reports that around 8% of couples around the world and 10% to 15% of those in industrialized nations experience infertility, and that male factor infertility is involved in 30% to 35% of all cases. Numerous studies have been conducted to identify potential associations between smoking and male infertility, with some evidence of contradictory results. Although many studies have reported negative effects of smoking on parameters of semen analysis and male infertility, some did not find any such effects and even found positive effects on sperm motility and the degree of nuclear DNA damage in sperm in some cases. Other data on the influence of smoking on male infertility were reported to be inconsistent and conflicting.⁷⁶

The use of alcohol in males can affect the physiology of sperm and/or semen and can even induce impotence. 75% of children with fetal alcohol syndrome were reported to have alcoholic parents. Alcohol use is linked to a decrease in sperm parameters, which may be somewhat reversible after the alcohol is stopped. While it has been shown that paternal alcohol consumption influences the offspring's growth and actions, the mechanisms underlying these effects remain to be elucidated. Reduction of cytosine methyl transfers mRNA levels induced by alcohol may reflect

⁷⁴*Id.*

⁷⁵Asha Sharma, "Male Infertility: Evidences, Risk Factors, Causes, Diagnosis and Management in Human" vol. 5 *IMPJ* (2017). Access on 05-07-2019 <https://www.aclr.com.es/clinical-research/male-infertility-evidences-risk-factors-causes-diagnosis-and-management-inhuman.php?aid=20252>

⁷⁶A. Harlev and Ashok Agarwal (et al), "Smoking and Male Infertility: An Evidence-Based Review" *WJMH* (2015). Access on 12-10-2018 <https://pubmed.ncbi.nlm.nih.gov/26770934/>

altered genomic imprinting due to reduced DNA methylation, which in turn may result in the expression of normally silent paternal alleles.⁷⁷

2. Occupational exposure

A variety of occupational exposures have been linked to impaired male fertility.⁷⁸ Globally, human fecundity seems to be declining as semen quality decreases and male infertility is rising. As potential causes, environmental contaminants, occupational exposures and life-style factors are examined. Reproductive toxicants are generally listed as petroleum products, agrochemicals, industrial chemicals, and heavy metals. Several studies have documented the effects of toxicant exposure and male infertility.⁷⁹

Chemicals can adversely affect the reproductive system of men by either disrupting the endocrine gonadal axis or the process of spermatogenesis. Any of these processes can lead to poor performance of semen. Recent studies suggest that some toxic chemicals may be affected by the sperm DNA integrity due to environmental exposure. DNA fragmentation can be an excellent indicator of possible reproductive toxicants and a tool for male infertility diagnosis. Occupational activities involving exposure to specific chemicals or toxicant exposure can interfere with male reproductive health and cause human infertility.⁸⁰

Though there is a rising body of fiction on the impact of different substances on the quality of semen. Further ambiguous and less well known is the association between environmental chemical exposures and male infertility.⁸¹

3. Exercise

Reproductive disruptions are common in humans and in 50 percent of cases the so-called "male factor" may be the cause of infertility. Simultaneously, in the

⁷⁷*Supra note 72* at 33.

⁷⁸Clarisa R. Graciaand and Mary D. Sammel, "Occupational Exposures and Male Infertility" vol. 162 *AJE* (2005). Access on 20-10-2017 <https://pubmed.ncbi.nlm.nih.gov/16120700/>

⁷⁹G U S Wijesekara and D M S "Fernando (et al) Environmental and occupational exposures as a cause of maleinfertility" *CMJ* (2015).Acees on 12-10-2018 <https://pubmed.ncbi.nlm.nih.gov/26132184/>

⁸⁰Jorge Ten and Jaime Mendiola et al "Occupational and Lifestyle Exposures on Male Infertility: A Mini Review" *ORSJ* (2008). Access on 23-09-2017 <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.509.3958&rep=rep1&type=pdf>

⁸¹*Ibid.*

modern era, sports and leisure exercise became extremely popular. Write down anything you want. To paraphrase it, press the Quill It button on the right.⁸² Due to the proven health benefits, the require and practice of physical and sport activities has greatly increased between both men and women over the past few decades. Simultaneously, the number of people participating in competitive sports and pursuing them as a professional vocation has risen dramatically. Despite the rising global interest in exercise, a lack of knowledge and awareness of exercise routines might have negative consequences.⁸³

There are many health benefits of exercise, although the impact of exercise on the male reproductive system has conflicting results. It has been discovered that high-intensity endurance training has little effect on male reproductive function and has no significant influence on hormonal profile and sperm parameters, with the exception of sperm motility in cyclists (riding a bicycle) Sperm motility has been found to be reduced, but this can be attributable to physical causes.. Bicycle lower sperm motility has been observed but can be attributed to physical factors. Bicycle decreased sperm count although motility has been seen; it is due to physical reasons. Another study looked into the effect of vicious cycling and discovered that the less common symptoms were to blame for infertility. However, a recent study found that long-term exercise has a negative impact on sperm parameters, and resistance exercise causes a considerable decline in free and maximal testosterone levels.⁸⁴

4. Electronic devices

Cell phone technology is now an integral part of daily life, and its use will continue to rise as service providers expand their offerings and introduce new, better products. Nevertheless, the human health effects of this innovation are often ignored. Cell phone innovations can be associated with detrimental effects on the human brain, cardiovascular system, and male reproduction in particular. Cell phone biophysics

⁸²Paweł Józko and Marco Rossato “The Impact of Intense Exercise on Semen Quality” vol.11 (3) *AJMH* (2017). Access on 25-02-2019 <https://pubmed.ncbi.nlm.nih.gov/27645515/>

⁸³Stefan S. du Plessis and Anthony Kashou et al “Is There a Link between Exercise and Male Factor Infertility?” *ORSJ* (2011). Access on 12-10-202017 <https://ccf.org/reproductiveresearchcenter/docs/agradoc415.pdf>

⁸⁴Supra note 59 at 30.

accompanied by a study of the effects of cell phone radiation on biological tissues. Specific effects will then be examined on semen and male fertility.⁸⁵

It's difficult to imagine a modern, socially active man who doesn't have access to mobile devices and/or computers with Wi-Fi capability. Cell phone usage has risen substantially during the previous two decades all around the world. Continuous electromagnetic radiation from mobile phones, on the other hand, has been shown to cause a variety of disorders, including cancers, as well as impair spermatogenesis through oxidative stress and DNA fragmentation. The effect of mobile device radiation on healthy male sperm parameters and fertility has recently gotten a lot of attention and research.⁸⁶

Radiation is energy from the unstable nucleus, and radiation is the origin of wave particles, transmitting or spreading radiation across space in the form of particles or waves or rays. There are two types of ionizing and non-ionizing radiation. The non-ionizing radiation transmits electromagnetic radiation (sending and receiving) directly or Sound energy or heat energy that does not break the chemical bond[5], but ionizing radiation is a composition of high-energy waves that can easily remove or move electrons from molecules, atoms and molecules and It also increases the risk of many diseases due to cell damage. The low amount of ionizing radiation is not very harmful according to the medical test, but the high amount of radiation ionization can cause radiation sickness, cancer, etc. DNA is cell-sensitive genetic material to ionize radiation. The ionizing radiation will alter the cell's DNA.⁸⁷

5. Stress

It was hypothesized that life stress alters autonomic, neuroendocrine, and immune system dynamic regulation. Social and family reproductive issues are very

⁸⁵Alaa J. Hamada and Aspinder Singh et al. "Cell Phones and their Impact on Male Fertility: Fact or Fiction" vol.5 *ORSJ* (2011). Access 12-10-2018 <https://benthamopen.com/ABSTRACT/TORSJ-3-125>

⁸⁶Igor Gorpichenko and Oleg Nikitin "The influence of direct mobile phone radiation on sperm quality" *CEJU* (2014). Access on 23-11-2017 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4074720/>

⁸⁷Larik RSA and Mallah GA, et al. "Effects of Wireless Devices on Human Body" vol. 9(4) *JCSSB* (2016). Access on 23-11-201 https://www.researchgate.net/publication/305792822_Effects_of_Wireless_Devices_on_Human_Body/citation/download

important in many cultures, and it seems logical that a couple who fails to achieve the expected goal of reproduction will experience frustration and disappointment.⁸⁸

Lifestyle factors can be modified to improve overall well-being and are ultimately controlled by one's own. Multiple factors, i.e. age of paternity, nutrients, physical exercise, obesity, caffeine, scrotal temperature, clothing, hot water, mobile phones, can affect reproductive health positively or negatively. This can therefore have an impact on the quality of life of reactive oxygen species (ROS) sperm parameters and DNA damage. The altered balance between the antioxidant system and oxidative stress can also determine poor fertilization / embryonic development, loss of pregnancy, birth defects and cancer of the childhood.⁸⁹

Stress is a major part of any society, and infertility itself is stressful due to social pressures, testing, diagnosis, treatment, failure, and unfulfilled desires, and even associated economic costs. Semen parameters can theoretically be associated with pressure, the presence of which can reduce the pulsation of the luteinizing hormone (LH) and testosterone, decreasing sperm and sperm production in turn.⁹⁰

2.3.4 Treatment of infertility

The understanding of reproduction of our society has undergone a revolution over the past three decades. The invention of contraception, which separated reproduction from sexual intercourse, started this movement in the 1960s. Contraceptives enabled people to engage in sexual activity without the possibility of causing pregnancy being overly concerned. The second phase of this revolution in recent years has involved the development of productive technologies that enable reproduction without intercourse.⁹¹

⁸⁸Giulia Collodel and Elena Moretti et al. "Effect of emotional stress on sperm quality" *IJMR* (2008). Access on 12-10-2016 <https://pubmed.ncbi.nlm.nih.gov/19052335/>

⁸⁹Alessandro Ilacqua and Giulia Izzo et al "Lifestyle and fertility: the influence of stress and quality of life on male fertility" *RBE* (2018). Access on 29-10-2019 <https://pubmed.ncbi.nlm.nih.gov/30474562/>

⁹⁰*Ibid.*

⁹¹Andre P. Rose, "Reproductive Misconception: Why Cloning is not Just another Reproductive Technology" vol.48, no. 5, *DLJ* (1999). <https://www.jstor.org/stable/1373092> Accessed: 25-11-2019 09:29.

2.3.5 Assisted Reproductive Technology (ART)

The scientific advances that gave couples a chance to reproduce without having to engage in increasingly complex and increasingly successful intercourse in producing for couples who would otherwise have been unable to make these advances, or Procedures, the heading "assisted reproductive technologies" may be grouped. Any process "designed to improve fertility or compensate for infertility" may be classified as an aided technology for reproduction. Artificial insemination, in vitro fertilization, egg donation and surrogacy are common assisted reproductive technologies.⁹²

In vitro fertilisation (IVF) and other forms of assisted reproductive technology (ART) have become commonplace in the treatment of infertility. Through these procedures, several couples with otherwise untreatable infertility have given birth to healthy babies.⁹³ As recent demand for Assisted Reproductive Technologies (ART) has been increased the number of infertile couples.⁹⁴ Numbers show the success of these supported technologies. As a result of these procedures, about 20,000 children are born each year, "estimates that over 1 million couples in the United States use some sort service each year."⁹⁵

Assisted Reproductive Technology (ART) has grown in recent years by leaps and bounds. Infertile couples in both developed and developing countries are now becoming increasingly available. In addition, many infertile couples can now afford ART treatment and sophistication as the economy has improved. This has resulted in a huge increase in the number of ART clinics providing care throughout the world to these people. As a result, the number of ART clinics that give care to these patients around the world has skyrocketed. Based on the amount of applications received for the National ART Registry, the Indian Medical Research Council (ICMR) believes

⁹²*Id.*

⁹³Assisted Reproductive Technology A Guide for Patients Revised 2018, *ASRM* (2018). Access on 23-09-2019

<https://www.asrm.org/topics/topics-index/assisted-reproductive-technologies/>

(<https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/art-booklet2.pdf>)

⁹⁴*Supra note* 88 at 38.

⁹⁵*Ibid*

there are 125 such clinics in India's capital city, according to a recent survey. Officials estimate the actual numbers are in the range of 250-300.⁹⁶

2.3.6 Artificial Insemination (AI)

Artificial insemination the oldest, most popular and simplest of the assisted reproductive technologies currently in use is artificial insemination. For years, people have used artificial insemination to induce pregnancy in animals, and this method has become so standardized in recent decades that it can be done without the aid of a physician or fertility specialist. In short, artificial insemination involves obtaining donor semen, placing the semen in a syringe, and then placing the semen in a woman's vagina, cervical canal, or uterus.⁹⁷

This could be used for unexplained infertility and woman cases with limited endometriosis and infertility issues with moderate male variable. In this, healthy sperms collected and concentrated during the ovulation period are placed in the uterus directly. IUI timing can be synchronized with the normal cycle or through the use of fertility drugs.⁹⁸

In 1779, an Italian priest and physiologist called Lazzaro Spallanzani revealed the essential nature of sperm for fertilization, demonstrating that a spermatozoon produced a nucleus and cytoplasm through a laboratory experiment. The embryo grows as a result of physical interaction between the egg and the sperm for the first time. Spallanzani successfully inseminated dogs with this new discovery. Another important discovery was that of Carl Ernst Von Baer, who invented the mammalian ovum in 1827 and contributed significantly to embryology.⁹⁹

Ivanow (1922) had begun pioneering efforts to establish AI as a practical procedure in Russia. Ivanov's development led to further advances in techniques and

⁹⁶ Narendra Malhotra and Duru Shah, "Assisted reproductive technology in India: A 3 year retrospective Data analysis" *JHRS* (2014) access 12-10-2016 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3963305/>

⁹⁷ *Supra note* 92 at 39.

⁹⁸ Shahnaz Anwar and Ayesha Anwar "Women's Health & Gynecology" vol.2 *WHG* (2016). access on 23-10-2019

⁹⁹ Radhey Shyam Sharma and Richa et al. "Saxena Infertility & assisted reproduction: A historical & modern scientific perspective" *IJMR* (2018). Access on 23-11-2020 <https://pubmed.ncbi.nlm.nih.gov/30964077/>

stimulated research in other Western countries outside Russia. But while animal AI quickly became an industry, human use of this technology took several years. Eleven years after the test of Spallanzani, a woman made the first positive AI attempt. A Scottish physician, Dr John Hunter, was the first recorded study of the implementation of AI in the late 1770s. The real start of assisted reproductive technology (ART) started nearly a century later when Guttmacher (1943) published the first study on human AI.¹⁰⁰

1. Intra-uterine Insemination (IUI)

In cases of unexplained and mild male sub fertility, it is widely agreed that intrauterine insemination (IUI) should be preferred to more invasive and costly assisted reproduction treatments and offered as a first-choice therapy. If IUI is suggested as a first-line treatment for unexplained and male sub fertility, it must be weighed against other treatment choices such as expectant management, medical and surgical treatment, IVF, and ICSI. The metric would incorporate not just success rates, but also a cost-benefit analysis, a comparison of the various treatment methods' complication rates, the invasiveness of the procedures, and patient compliance.¹⁰¹

Intra-uterine Insemination (IUI): This could be used for unexplained infertility and female cases with minimal endometriosis and mild male factor infertility problems. In this, healthy sperms that have been collected and concentrated are placed directly in the uterus around the time of ovulation. The timing of IUI can be coordinated with the normal cycle or by using fertility medications.¹⁰²

2. Intracytoplasmic Sperm injection (ICSI)

Intracytoplasmic sperm injection (ICSI) was introduced in 1992, and it revolutionised the treatment of extreme male infertility. Live birth rates with ICSI are comparable to those with other non-donor therapy in extreme male infertility. Despite this, pregnancy rates with ICSI for non-male infertility are not higher than with in

¹⁰⁰*Id.*

¹⁰¹Willem Ombelet and Rudi Campo, et al. "Intrauterine insemination (IUI) as a first-line treatment in developing countries and methodological aspects that might influence IUI success" *Oxford Journal* (2015). Access on 11-10-2018 <https://academic.oup.com/eshremonographs/article/2008/1/64/620672?login=true>

¹⁰²*Supra note.* 95 at 40.

vitro fertilisation (IVF).¹⁰³ Over the past 20 years, intracytoplasmic sperm injection (ICSI) has effectively allowed the treatment of male infertility; the direct injection of sperm into the ooplasm has helped the embryologist to resolve low sperm motility, Poor binding sperm-zone Pellucida (ZP) and defective reaction to acrosome.¹⁰⁴ A single healthy sperm is inserted into a mature egg directly in ICSI. ICSI is used when semen quality problems arise or there are few sperms or previous IVF cycles have failed.¹⁰⁵

4. Gamete Intrafallopian Transfer (GIFT)

Originally, in vitro fertilization and embryo transfer (IVF-ET) were intended to treat infertility in patients who had severely damaged blocked or missing fallopian tubes. It was later extended to treat infertility caused by a large range of aetiological causes including fallopian tubes that were patented anatomically. Gamete intra fallopian transfer (GIFT) has been used as a procedure of non-tubal infertility treatment. This procedure involves oocyte laparoscopic extraction and their injection along with washed sperms into the fallopian tube. The procedure is commonly used to treat infertility caused by impaired transport of tubal sperm, poor ability to fertilize sperm, failure of ovum release or failure of the fimbria's ovum pick-up. Other signs for GIFT include unexplained infertility, gender, cervical, immune and endometriosis factors.¹⁰⁶ Several eggs obtained from ovaries are used by Gamete intrafallopian transfer (GIFT). The eggs are put together with the sperm to be used in a small elastic tube (catheter). With a surgical procedure called laparoscopy, the gametes (both eggs and sperm) are then injected into the fallopian tubes. General anesthesia will be used by the surgeon.¹⁰⁷

¹⁰³The ESHRE Capri Workshop Group "Intracytoplasmic sperm injection (ICSI) in 2006: Evidence and Evolution" Vol.13 No.6 *oxford journal* (2007). Access on 28 November 2019. <https://pubmed.ncbi.nlm.nih.gov/17630396/>

¹⁰⁴Lodovico Parmegiani and Marco Filicori, "New Advances in Intracytoplasmic Sperm Injection (ICSI)" *Research Gate* (2012). Access on 17-10-2018 <https://www.intechopen.com/chapters/32057>

¹⁰⁵*Supra note* 95 at 40

¹⁰⁶I.N. Hinduja and A.K. Gupta (et al) "Gamete intra fallopian transfer: A preliminary experience" vol. 4, *2NMJI* (1991). Access on 20-08-2017 <https://pubmed.ncbi.nlm.nih.gov/29751452/>

¹⁰⁷<https://www.healthlinkbc.ca/health-topics/hw202763>

5. Zygote Intrafallopian Transfer (ZIFT)

Zygote IntraFallopian Transfer (ZIFT), also known as tubal embryo transfer, is ideal where the female has regular fallopian tubes but there is a significant male problem and fertilization difficulties. ZIFT is a hybrid of techniques such as IVF and GIFT. The 32 eggs are picked up outside the body and fertilized. The zygote is transferred directly into the Fallopian tube, rather than into the vagina, two days after fertilization.¹⁰⁸

Before cell division occurs, the zygote is transported to the fallopian tube after an egg is fertilized in the lab. On one day, eggs are collected and fertilised, and the embryo is transferred the next.¹⁰⁹

6. In Vitro fertilization (IVF)

Popularly known as IVF technology, in-vitro fertilization is one of the most popular methods of assisted reproductive technologies available today to assist couples who find it hard to have children. It is a simple process in which a woman's egg is fertilized under artificial conditions (literally in a glass) with a sperm in a medically controlled laboratory. The fertilized embryo is then transferred for growth to the uterus. In numerous hospitals around the world, there is a systemic method for carrying out this process.¹¹⁰

The term In-vitro, from the Latin word meaning in glass, is used because early biological experiments involving tissue cultivation outside the living organism from which they originated were conducted in glass containers such as beakers, test tubes or Petri-dishes. The term in vitro is used today to refer to any biological procedure performed outside the organism in which it would normally occur, to distinguish it from an in vivo procedure in which the tissue remains within the living organism in which it is normally found.¹¹¹

¹⁰⁸ Rachel Simpson, "Assisted reproductive technology" *NSW Parliamentary Library* (1998). <http://www.parliament.nsw.gov.au/gi/library/publicn.html>

¹⁰⁹ "Assisted Reproductive Technology: A Guide for Patients" *ASRM* (2018). Access on 19-10-2020 <https://www.asrm.org/topics/topics-index/assisted-reproductive-technologies/>

¹¹⁰ Dr.L. Badger Emeka, "In-vitro Fertilization" *Research Gate* (2013). Access on 09-11-2017 https://www.researchgate.net/publication/290393768_In-vitro_Fertilisation

¹¹¹ *Ibid.*

In-vitro fertilization (IVF) is an innovative and remarkable mechanism that fertilizes eggs outside the body by sperm or In-vitro pronounced. As previously, in-vitro fertilization (IVF) is the latest therapeutic infertility treatment; other types of assisted reproductive technology have failed. "Louise Brown" was born in London on 25 July 1978 as an outcome of natural cycle In-vitro fertilization (IVF), the first successful birth of a "test tube baby" called. The 2010 Nobel Prize in Physiology or Medicine was awarded to Robert G. Edwards, the physiologist who invented the IVF procedure.¹¹²

Louise Brown and Dr. Edwards are famous; few Westerners know that the world's second and first IVF infant, Kanupriya Agarwal, was born in Kolkata (then Calcutta) on October 3, 1978, just sixty-seven days after Brown's birth. A team led by Dr. Subhas Mukherjee conceived and delivered Kanupriya in vitro, referring to her after an Hindu goddess who represents the feminine creative force with the nickname "Durga." Initially the news was received with great interest, and at the Indian Science Congress Mukherjee discussed the achievement in the press and on television. But the Indian government was disbelieving and convened an official scientific committee charged with evaluating the work of Mukherjee, one that did not include any specialists in reproductive science. The first documental test tube baby in India was born to the wife of a municipal employee on August 6, 1986. Seventeen year later and twenty-five years after the birth of Duraga, the Indian scientific community finely recognised Dr. Mukherjees achievement.¹¹³

Although not as old as artificial insemination, a well-established assisted reproductive technology is also in-vitro fertilization. Compared to artificial insemination, IVF relies heavily on science and laboratories. In-vitro fertilization was the first technique of "out - of-womb" design perfected by scientists in the field of reproduction. In-vitro fertilization is so called because in-vitro (literally, "in the glass") fertilization actually takes place, usually in a test tube or Petri dish.¹¹⁴

¹¹²Kirti Rani and Saurabh Paliwal "A Brief Review on In-Vitro Fertilization (IVF) an Advance and Miraculous Gateway for Infertility Treatments" Vol. 3 *WJPPS* (2014). Access on 20-10-2017 <https://silo.tips/download/a-brief-review-on-in-vitro-fertilization-ivf-an-advanced-and-miraculous-gateway>

¹¹³Daisy Deomampo, *Transnational Reproduction: Race, Kinship, and Commercial Surrogacy in India* 40 (SAGE Publication India Pvt Ltd, New Delhi, 2017).

¹¹⁴Dr. Aneesh V. Pillai, *Surrogate Motherhood and the Law: International and National Perspectives* 53-54 (Regal Publication, New Delhi, 2015).

In IVF, the first step is to extract or harvest healthy ovaries from the ovaries of the female. To this end, the development of eggs is stimulated by the use of fertility drugs, which cause the female to produce a higher than normal number of eggs and also enable a certain amount of control over the ovulation timing to promote the optimum scheduling of the recovery process. The second step in IVF is the fertilization with the man's sperm in a Petri dish of the successfully recovered eggs. In some cases, especially those where sperm motility is a factor, doctors may use a more invasive technique called micro-injection, directly injecting the sperm into the eggs to facilitate fertilization. The embryo is implanted into a women's uterus in case of successful fertilization, with the hope that it will result in pregnancy.¹¹⁵

Couples who want to have a child but are unable to conceive effectively by sexual intercourse are opting for the IVF treatment.¹¹⁶ With the birth of over half a million children help in reproductive, vitro fertilization, technique every year; ARTs have transformed the way we see According to Centers for Disease Control and Prevention, ART includes, all, fertility treatments in which both eggs and sperm are handled. Remove eggs from the ovaries of a female, mix them with sperm in the laboratory, and return them to the woman's body or donate them to another woman: they do not include treatments in which only sperm or ovum is treated or procedures in which a woman takes medication only to stimulate egg production without the intention of having eggs retrieved.¹¹⁷

7. Surrogacy

Surrogacy is a procedure or arrangement in which a woman agrees to bear a child for another woman or persons who, after beginning, will become the parent(s) of the new-born child. This refers to a contract in which a woman is carrying a pregnancy for another commissioning couple.¹¹⁸

¹¹⁵*Id.*

¹¹⁶*Ibid.*

¹¹⁷Hareesh S. Gouda and Umadevi, "Assisted reproductive technology Medical, legal and psychosocial Issues" *JIAFM*. (2009) <http://www.indianjournals.com/ijor.aspx?target=ijor:jiafm&volume=31&issue=4&article=024>

¹¹⁸Dr J SrinivasRao and Dr.Matin Ahmad Khan, "Surrogacy in India: Current Perspectives" vol. 3 *IJMHR* (2017). Access on 12-10-2019 <http://www.medicalsciencejournal.com/archives/2017/vol3/issue5/3-5-17>

The phrase "The word "surrogate" comes from the Latin word "subrogare," which means "to act in place of another." It mention to a woman who becomes achieve pregnant and gives birth to a child with the intention of giving birth to another person or couple, known as the "intended parents" or "intended parents."." "the process of commissioning "Surrogacy is an important fertility treatment in which in vitro fertilization (IVF) has made motherhood probable for women without the uterus, with uterine anomalies preventing pregnancy, with severe medical problems, or or to achieve motherhood despite other pregnancy contraindications by transferring an embryo produced by the gestational carrier or a donor to the uterus of the gestational carrier.. This ART technique too enabled gay couples and single men to attain fatherhood by having their sperm and donor oocytes create an embryo.¹¹⁹

There are two ways to do surrogacy:¹²⁰

1. Conventional surrogacy in which the mother has a genetic relationship with the child and the surrogate mother's egg is artificially conceived by the spouse's sperm, and
2. Full surrogacy in which there is no genetic relationship between the pregnant woman and the child. The surrogate mother carries in vitro the embryo conceived in this method.

Surrogacy: Meaning of Surrogacy

The word'surrogate' comes from the Latin word'surrogatus,' which is the past participle of'surrogare,' which means a substitute, or someone designated to act in the place of someone else. A surrogate mother is a woman who bears a child for another woman, either from her own egg or from the fertilised egg of another woman implanted in her womb.¹²¹

¹¹⁹Nayana Hitesh Patel and Yuvraj Digvijay Singh Jadeja, et al, "Insight into Different Aspects of Surrogacy Practices" vol. 11 *J Hum ReprodSci* (2018). Access on 26-10-2020
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/>

¹²⁰*Supra note* 11 at 5.

¹²¹Law Commission of India, 288 the Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinic as well as Right and Obligations of Parties to Surrogacy, (August, 2009).

According to the Black's Law Dictionary, "surrogacy" means the process of carrying and delivering a child for another person.¹²² "Surrogacy" is a method and arrangements of assisted reproductive technology. Surrogacy is the term used when a woman agree to became pregnant a deliver a child for a contracted party. There are different form of surrogacy and different reasons why one technique may be used over another. One of the most common reasons for surrogacy is the infertility of the woman, sometimes due to damage to the uterus, or even having not uterus at all. Here the in vitro fertilized (IVF) embryo of the "commissioning couple" will be placed in the uterus of the surrogate mother who will go through the process of pregnancy, give birth to the child and hand it to the commissioning couple. One may term this a "full" surrogacy with the surrogate mother having no genetic relationship to the child.¹²³

Definition of surrogacy

The New Encyclopedia Britannica defines "surrogate motherhood" as "the practise of a woman bearing a child for a couple who are unable to have children in the traditional way."¹²⁴ The Warnock Committee defines surrogacy as "the practise of one woman carrying a child for another with the aim of the child being handed over after birth."¹²⁵ **Surrogacy define in U K Surrogacy Arrangement Act 1985** thus "surrogacy" section 1 (2) means a woman who agree to carries a child in pursuance of an arrangement- (a) made before she began to carry the child, and (b) made with a view to any child carried in pursuance of it being handed over to, and the parental right being exercised (so far as practicable) by another person or other person.¹²⁶

The Surrogacy (Regulation) Bill, 2019 is defining "surrogacy" and also define two type's surrogacy arrangements, first, altruistic surrogacy and second commercial surrogacy as-Sec.2 (zc) Surrogacy is defined as a process in which one woman bears and gives birth to a child for another couple with the aim of handing the kid over to the commissioning couple after the birth.¹²⁷ "Surrogacy" is described as "the procedure of carrying and delivering a child for another person," according to

¹²²*Id.*

¹²³Michael Davies, *Tax book on Medical Law* page no. 252 (Oxford Press, Great Clarendon Street, and Ed. 2nd).

¹²⁴*Supra* note 118.

¹²⁵Shaun D. Pattinson, *Medical Law and Ethics* 309 (Sweet & Maxwell, London, 3rd Edi. 2013)

¹²⁶Surrogacy Arrangements Act 1985 (Act sec. 49 of 1985)

¹²⁷The Surrogacy (Regulation) Bill, 2019(Bill No. 156 of 2019).

Black's Law Dictionary, while "surrogate parent" is defined as "a parent who is not the kid's natural parent but assumes the position of parent."¹²⁸

Definitions of Surrogate mother

According to the Surrogacy (Regulation) Bill, 2019, of the Sec.2 (z f) "surrogate mother" means a woman who, from the implantation of an embryo in her womb, is carrying a child (who is genetically linked to the intending couple) through surrogacy and meets the standards set forth in sub-paragraph (b) of clause (iii) of section 4.¹²⁹

"Surrogate mother," according to Sama – Resource Group for Women and Health, is an Indian woman who lives in India and agrees to have an embryo created from the sperm of a man who is not her husband and the oocyte of another woman implanted in her to carry the pregnancy to viability and deliver the child to the couple or individual who requested surrogacy.¹³⁰

Types of Surrogacy

Surrogacy arrangement are manly four type by medically prescribes. Which are traditional surrogacy, gestational surrogacy, commercial surrogacy and altruistic surrogacy?

Traditional surrogacy

The surrogate is carrying her own biological child, but this child was created with the intention of giving it to others to nurture, such as the biological father and maybe his spouse or partner, and so the child is genetically related to the surrogate mother. Sexual activity, frozen sperm, IUI (intrauterine insemination) or ICI (intra cervical insemination), all of which are fertility clinic treatments, could be used to

¹²⁸Dr. P. Marathi "A Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi", *NHRC*. Access on 12-10-2020 https://nhrc.nic.in/sites/default/files/Report_NHRC_Surrogacy_24122018.pdf

¹²⁹*Supra note* 124 at 40.

¹³⁰Sama group, *Surrogacy Information Brief* (Sama-Resource Group for Women and Health, New Delhi, ed. 1st 2014).

conceive the kid. Instead, sperm from the "commissioning pair's" male spouse or sperm from a sperm donor can be used.¹³¹

Gestational surrogacy

The second method, known as gestational surrogacy, involves in vitro fertilization (IVF), in which the intended mother's or an anonymous donor's egg is fertilized in a Petri dish with the intended father's or a donor's sperm, and the embryo is transferred to the surrogate's uterus. All the cases in this study are gestational surrogacies; that is, the surrogate has no genetic connection with the baby.¹³²

"Altruistic Surrogacy" is a term used to describe a type of surrogacy that is In altruistic surrogacy, the surrogate receives no financial compensation for her pregnancy or the child's relinquishment (although the intended parent typically pays for all expenses related to the pregnancy and birth, including medical expenses, maternity clothing, housing, diet, and other related expenses).¹³³

Sec. 2(b) "'Altruistic surrogacy" is a type of surrogacy in which the surrogate mother, her dependents, or her delegate receive no charges, expenses, fees, remuneration, or monetary incentive of any kind other than medical expenses incurred on the surrogate mother and insurance treatment for the surrogate mother.¹³⁴

Commercial Surrogacy

Commercial surrogacy is type of gestational surrogacy, in which surrogate mother has agree to carried pregnancy for consideration.¹³⁵ According to Sec.(f)"Commercial surrogacy" refers to the commercialization of surrogacy services or procedures, or their component services or procedures, such as selling or buying human embryos or gametes, or selling, buying, or trading surrogate motherhood services in exchange for a payment, benefit, fees, remuneration, or monetary incentive in cash or kind, to the surrogate mother, her dependents, or her representative, ex..¹³⁶

¹³¹Deepa Mishra "Surrogacy in India: Legality" vol. 3 *IJSRM* .2255 (2015). Access on 12-10-2018 <https://ijsrm.in/index.php/ijsrm/article/view/316>

¹³²Amrita Pande, "Commercial Surrogacy in India: Manufacturing a Perfect Mother Worker", vol. 35 *UCP* (2010). Access on 12-11-2017 <https://www.jstor.org/stable/10.1086/651043>

¹³³*Ibid.*

¹³⁴*Supra note* 124 at 40.

¹³⁵*Supra note* 129 at 42.

¹³⁶*Supra note* 131at 42.

2.3.7 Historical aspect of Surrogacy

The concept of surrogacy in the world, of the numerous prominent cultures such as, Indus, Valley, Babylonian, and Egypt. It is thought that the first surrogate mother in history was almost two thousand year before Christ's birth, who resided close Hebron, Canaan's earth. Sarah, Abraham's infertile wife, orders her maid Hager by persuading her to bear a child, Abraham sleeping with her. That time, Abraham was 86 years old. But he was still able to conceive a child despite his time.¹³⁷

Use of surrogacy and issues of women infertility was we found throughout the history. If we go through the Indian context, the significance of paternity and parenthood in ancient times is also obvious in Hindu mythology. Hindu mythology also provides surrogacy examples and reflects the secrecy that still surrounds the practice of surrogacy. Vishnu heard Vasude's prayers in Bhagavata Parana calling on Kansa not to kill all the born children. Vishnu heard these prayers and had an embryo transferred from Devaki's womb to Rohini's womb, another Vasudev's wife. Rohini gave birth to Balaram, Krishna's sibling, and raised the kid secretly while Vasudev and Devki informed Kansa that the kid had been born dead.¹³⁸

In the Mahabharata Prashangh, Gandhari did not produce child but rather born semi solid material that was split into 100 parts by Maharishi Veda Vyas and planted in separate pans. So it was the born of the 100 Kauravas. Likewise, after a bath and seeing such a lovely lady, Maharishi Bhardwaj saw a divine maiden emerge from the sea and felt discerned, so he placed his sperm in the Darona yagna pot. The ship was born here and named for Dronacharya.. Thousands of years after the biblical incidents in 599 AD, Mahavira, the 24th Trithankar, was born after an embryo was moved from one womb to another. He is one of the Jain mythology's main figures.¹³⁹

In ancient Hindu civilization, a tradition known as Niyog Pratha allowed a woman to conceive through her brother-in-law who was barren since her husband was unable. The child belonged to the couple and the brother-in-law did not have any claims. In the epic Mahabharata, one case of niyoga is described. Queen Satyavati has

¹³⁷Debra L.Spar, *Baby Business*, (Harvard Business School Press, and Boston, Massachusetts 2006).

¹³⁸Dr. S.S.Das and Priyanka Maut, "Commercialization of surrogacy in India: A Critical Analysis" *Research Gate* (2014). Access on 20-10-2018 https://www.researchgate.net/publication/281710247_Commercialization_of_Surrogacy_in_India_A_Critical_Analysis

¹³⁹*Ibid.*

asked her son, guru Vyasa, to play niyoga with the two widows of her son Vichitravirya. Ambika and Ambalika, as well as one of their maids, bear Dhritarashtra, Pandu, and Vidura, respectively.¹⁴⁰

The mention of surrogacy can be found in the renowned Hammurabi Code in the form of laws. This is from 1800 BC. Even in the Hebrew Bible, surrogacy and surrogacy are frequently referenced.¹⁴¹ The story of Sarah and Abraham in "The Book of Genesis" contains the first mention of surrogacy.¹⁴²

Sarah and Abraham were a childless couple." and Sarai had no child. Sarah therefore provided Abraham with Hagar, an Egyptian maid, and gave her as his wife to Abraham. The pregnancy of Hagar gave her supremacy over Sarah, who bear that "in her eyes I was insufferable ..." Together with Hagar's pregnancy, Sarah's failure to conceive resulted to tense relationships between two females. Sarah was hardly dealing with her as a desire for revenge. This situation could not be resolved by Hagar, so "... Hagar managed to escape from her face." Ultimately, when Abraham was 86, Hagar gave birth to a child, Ishmael. One day, "... three people stood by him, and when he (Abraham) saw them, he bowed to the floor. One person announced to their surprise that" ... depending on the moment of life, .. Sarah your wife is going to have a child. "Sarah created and bare Abraham a child in his ancient era ..." Thus, when Isaac was born, Abraham was one hundred years old while Sarah was ninety years old. These verses portray how Sarah's infertility and the related psychological issues were handled by Abraham's family. The pregnancy of Hagar and the psychological issues associated with her pregnancy, the birth of a surrogate child, and the pregnancy of Sarah in advanced era. Sarah could not conceive. Thus, she offered to be Abraham's mother to her maid, Hagar, and to bear a kid.¹⁴³

Jacob and his wives, Rachel and Leah, are another instance of surrogacy in the Bible. Rachel stayed barren while Leah gave birth to four children. She was jealous of Leah and gave her maid Bilhah to Jacob as a surrogate mother. Two sons were born to

¹⁴⁰<https://en.wikipedia.org/wiki/Niyoga>

¹⁴¹ Surrogacy -The History and Today Available at https://www.indiaparenting.com/infertility-treatments-and-solutions/479_4466/surrogacy-the-history-and-today.html

¹⁴² surrogate.com. Available at <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>

¹⁴³Liubov Ben-Nun, *Surrogate mother HoodHagar and Sarah* 11-12 (B. N. Publication House, Israel, 2014.)

Bilhah: Dan and Naphtali. Another Biblical precedent for surrogacy is the Mosaic Law, which provides for levirate marriage (a sort of marriage in which the deceased's son is forced to marry the widow of his brother and the widow is forced to marry the brother of her deceased husband); One instance was when Boaz, a member of his family, impregnated Ruth, his deceased brother's widow, to bring kids on his behalf.¹⁴⁴

According to Islam, children's protections whether boys and girls, as well as infertility are both determined by Allah's will. The domination of the heavens and the earth belong to Allah. He creates what He wants (and plans). According to His will (and schedule), He bestows (kids) men or women, or He bestows men and women, and He leaves out whom He wants: for He is full of knowledge and power. The Qur'an refers to two Prophets, Ibrahim / Abraham and Zakariyya, whose wives were unable to bear kids at first, but ultimately did so when they were old.¹⁴⁵

These instances send a message that married couples may not be able to bring kids now, but may succeed in doing so later, despite their problems, if it is Allah's will. If one is certain that this conception is impossible after exhausting all permissible possibilities of medical intervention, one should acknowledge that this destiny is also Allah's will, since He alone has the authority to initiate conception. Religion still has a strong significance in Muslim societies and significantly affects behaviour, procedures and policy making.¹⁴⁶

Progeny protection is the objective of the law that is most closely linked to the subject of surrogacy. As Islam promotes reproduction, it promotes infertility treatment. Protection of the offspring also involves care for pregnant females and children's health. It also involves preserving the lineage. Every baby should understand his / her mother and dad and be linked. The aim of the law most closely linked to the subject of surrogacy is to protect the progeny. As Islam promotes reproduction, it promotes infertility treatment. Protection of the offspring also

¹⁴⁴ ShamimaParvinLasker, "Surrogacy" vol.3 *Research Gate* (2016). Access on 12-10-2018 <https://www.researchgate.net/publication>.

¹⁴⁵ Aref Abu-Rabia, "Infertility and Surrogacy in Islamic Society: Socio-Cultural, Psychological, Ethical, and Religious Dilemmas" *The Open Psychology Journal*, ((2013). Access on 30-10-2019 https://www.researchgate.net/publication/273940964_Infertility_and_Surrogacy_in_Islamic_Society_Socio-Cultural_Psychological_Ethical_and_Religious_Dilemmas

¹⁴⁶ *Ibid.*

involves care for pregnant females and children's health. It also involves preserving the lineage. Every baby should understand his / her parent and be linked.¹⁴⁷

Hiring a "womb" for procreation is a very latest phenomenon to be handled by religion jurists. Islamic bioethics cannot recognize this practice because surrogacy is an uncomplicated way to use donor sperm, a foreign component, in a woman's womb that leads to lineage combination. The Islamic intellectual, Mufti Sheik Ahmad Kutty, believes that the introduction of male sperm into the uterus of a female with whom he is not married transgress Allah's boundaries.¹⁴⁸

Surrogacy is an arrangement when a woman carries pregnancy her womb for the intended couple to produce a child. Traditional surrogacy and gestational surrogacy are the two types of surrogacy. The surrogate mother carries her own sperm-fertilized ovum from a intended father in traditional surrogacy. The surrogate baby is therefore genetically associated with the mom of the surrogate and the accepted father. However; the intended parents donate both the ovum and the sperm in the gestational type of surrogacy. The surrogate mother holds only the donated ovum and sperm in her womb and provides the child birth. Genetically, the baby is associated with the ovum and sperm donors, but has no related with the "mother" surrogate.¹⁴⁹

Consider a surrogate gestational condition. If the surrogate mother is married, her husband's resulting baby would be legally the baby even though another individual donated the sperm. The situation of genetic surrogacy is more critical and disturbing, as the female does not only carry the fetus but also donates her egg. So she's the child's real mother, but she can't get a mother's status. Actually, surrogacy generates a dilemma about the offspring's identity. In a word, the status of any child born under the surrogacy agreement would be unlawful as the contractor did not enter into a marriage contract with the surrogate. Even though a spouse gave written consent to his spouse being able to behave as a surrogate, there is a religious issue that would ban this. Islam prevents one man's semen from touching a fetus produced by

¹⁴⁷ Sharmin Islam, "Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic Bioethics", available at <http://dx.doi.org/10.5915/44-1-5920>

¹⁴⁸ *Ibid.*

¹⁴⁹ Tawfique Al-Mubarak, "Surrogacy and Islam: Between Permissibility and Prohibition" *Research Gate* (2014) at: <https://www.researchgate.net/publication/284293479>

the semen of another person. Are we going to issue a law banning husbands from exercising their [sexual] right to their wives when they are pregnant with the child of another man? And have a law like this been adopted; how will it be implemented?¹⁵⁰

Although most academics consider surrogacy in Islam to be totally illegitimate, some academics have advocated it. They asserted that surrogacy is not necessarily prohibited by the Qur'anic verses that mention pregnancy. Second, surrogacy advocates find it permissible on Islam's "wet-nursing" analogy. Similarly in surrogacy, the child is fed by the surrogate mother as the foster mom who breastfed the child and gives nutrition through it. Therefore, they do not consider any distinction between surrogacy and wet nursing, and neither should the legal decision for the two vary.¹⁵¹

2.4 Conclusion

According to the WHO, the overall prevalence of primary infertility in India ranges between 3.9 to 16.8%. According to research, India accounts for 25% of the total number of infertile couples worldwide. In Indian societies, motherhood is viewed as a significant obligation on the side of women. In India, around 8.8% of currently married women in the reproductive age group reported infertility issues, with a wide range of 14% to 3%. Around 6% of women in the United States suffer primary infertility; whereas 2% have secondary infertility. Infertility affects 48 million couples and 186 million people worldwide, according to estimates. Infertility in men is most usually caused by issues with sperm ejection, the absence or low amounts of sperm, or defective morphology (morphology) and motility (motility) of the sperm. Infertility in women can be caused by a variety of problems with the ovaries, uterus, fallopian tubes, and endocrine system, among other things.

A baby is very important in Indian society, and having a baby has religious overtones. When a marriage does not have children, the women are deemed solely accountable. Infertile women have a lower social standing and prestige as a result of social conventions, and in severe situations, they may be denied basic necessities. Male infertility raises doubts about men's virility and manhood, thus it's kept hidden.

¹⁵⁰ *Supra note* 144 at 55.

¹⁵¹ *Supra note* 146 at 55.

Women face social and financial difficulties from time to time and this is not limited to those from low-income or low-education backgrounds. To reduce the stigma associated with infertility, researchers advocate using IEC (information, education, and communication) techniques at the community level. In order to give counseling, therapy, and referrals to women with fertility difficulties for consultation and further treatment, health care practitioners must comprehend the cultural and societal implications of infertility.

In Indian societies, motherhood is viewed as a significant obligation on the side of women. Despite the fact that women have become active participants in all disciplines, including economics, politics, commerce, health, and sports, the ability to give birth remains the most important aspect of a woman's existence. In our communities, women without children are looked down upon. The majority of the blame for infertility falls on women. They are often excluded from auspicious events, abused, humiliated, and threatened with remarriage by their husbands. Because of the stigma connected with infertility, mothers are willing to go to any length to have a biological kid. This is one of the reasons behind the rapid expansion of ART clinics around the country. For some women, ART treatment is both expensive and painful. Other health problems can arise as a result of the medicine and treatment. Women, on the other hand, should have the right to know about the risks of using Assisted Reproductive Technology before undergoing treatment. ART service providers should advise them of the benefits and drawbacks of using such technologies. Furthermore, society should be open enough to not stigmatism women who are unable to have children. Apart from that, adoption should be considered as a realistic choice for eradicating the pain of infertility.

Because of today's assisted reproductive technology, the decision to seek therapy for infertility is a viable one. Most infertile couples will ultimately experience the pleasures of motherhood with patience, an optimistic attitude, and the proper treatment. Surrogacy is a part of (Assisted Reproductive Technology) procedure (ART). Surrogacy has been used to conceive children since ancient times. However, as science and technology advance, this approach is being utilized to conceive children not only by infertile couples, but also by anybody who chooses to have a kid. Contraception became easier and less expensive thanks to technological

SURROGACY: HISTORICAL AND CONCEPTUAL OVERVIEW

advancements and a market arose to meet the need. As a result, surrogacy's growing popularity has sparked legal, ethical, moral, and religious debates around the world. Because surrogacy involves more than two persons, each of whom can lawfully claim to be the child's biological parent. As a result, a disagreement may arise over who should assume parental rights and obligations for the kid. This is a problem that is intrinsic to surrogacy, and no one can guarantee that it will not occur. Surrogacy is a godsend to infertile couples on the one hand, but it has also led to its commercialization, which has created a slew of issues.



CHAPTER 3
INTERNATIONAL LAW RELATED
TO SURROGACY



CHAPTER 3

INTERNATIONAL LAW RELATED TO SURROGACY

3.1 Introduction

After the birth of Louise Brown in 1978, the news that in vitro fertilization (IVF) had succeeded in producing a child provoked widespread debate about the safety and morality of the procedure and calls for legislation. Surrogacy remains an ethical controversial area, and different societies and different nations take radically different stances in their approach to it. In recent decades, fierce debates have erupted around the world about the extent to which the human body and its component parts should be purchased, sold, rented, or donated. Surrogacy, particularly gestational surrogacy, has been increasingly popular in recent years, and an increasing number of persons seeking surrogacy services are leaving their native countries to do so. Surrogacy raises a number of issues, including ethical concerns about surrogate exploitation in the global marketplace, the growing potential for reproductive tourism as a result of country regulatory variances, and geographic and socioeconomic disparities between providers and consumers. It's worth looking into the necessity for international regulation and the processes for establishing it to protect all parties involved in international gestational surrogacy. Debates have raged around the world in recent decades concerning the extent to which the human body and its component parts can be bought, sold, leased, or donated. In recent years, gestational surrogacy has grown in popularity, and an increasing number of people seeking surrogacy services are leaving their home countries to do so.¹

Italy, Germany, Turkey, and Japan prohibit surrogacy arrangements. Commercial surrogacies are permitted in California and the Ukraine. Italy, Germany, France, Switzerland, and several Australian States prohibit commercial surrogacy contracts. Surrogacy raises several challenges that have been raised, including ethical concerns about surrogate trafficking in the global marketplace, the increased potential

¹Kristiana Brugger, "International Law in the Gestational Surrogacy Debate" vol.35 *FILJ* (2012). Access on 23-10-2018 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2438&context=ilj>

for reproductive tourism as a result of legislative differences across countries, and geographical and socioeconomic mismatches between suppliers and buyers. The necessity for international legislation to safeguard all parties involved in international gestational surrogacy, as well as the frameworks for developing such legislation, should be addressed more extensively.

The early response of the UK Parliament was to institute the Warnock Committee in 1982 to investigate 'recent and potential developments in medicine and science related to human fertilization and embryology and 'to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments. Its subsequent Report formed the basis of the Human Fertilization and Embryology Act 1990, which is today the subject of a Department of Health review. Assisted reproductive technologies (ARTs) are more heavily regulated than any other medical intervention and it is within this context.²

3.2 Surrogacy Law in United Kingdom

After a lengthy process, the United Kingdom became one of the first countries in the world to offer a complete legislative framework to regulate assisted reproductive technologies (ARTs).³ Existing UK legislation covering surrogacy arrangements the Surrogacy Arrangement Act 1985, the Adoption and Children Act 2002, the Human Fertilization and Embryology Act 2003, the Human Fertilization and Embryology Act 2008, and number of statutory instruments including the Human Fertilization and Embryology Regulations 2010 is based on the conclusion of the 1984 Warnock Report.⁴ Any and all future contract between the surrogate and the couple was declared null and void in the Warnock study, 1984, and commercial surrogacy was banned. The Surrogacy Agreement Act was passed in 1985, which did not authorize commercial surrogacy, but allowed altruistic surrogacy to be paid to the surrogate for her and the health of the foetus during pregnancy at a fair cost.⁵

²*Id.*

³Amel Alghrani and Danielle Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" vol. 29 *SRO* (2017) Access on 10-02-2020. http://sro.sussex.ac.uk/id/eprint/68402/4/2017_02_CFLQ_165_Griffiths.pdf

⁴Katarina Trimmings and Paul Beaumont (ed.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, 367, (Hart Publishing Ltd United Kingdom Oxford, OX1 2JW, 2013).

⁵Mandeep Borkataky, "Is the law regulating surrogacy in need of reform?" *Research Gate*(2015) access on 12-10-2017 <https://www.researchgate.net/publication/277300043>

3.3 Parenthood under UK Law

The woman who bears a child is the legal mother, under UK law. The legal mother of a child born by surrogacy is still, at birth, the surrogate mother, whether or not she is also the genetic mother, whether the child is eventually adopted or parenthood is transferred by court order (and irrespective of whether the surrogacy took place in the UK or elsewhere and where the child is born).⁶

In the case of a kid born as a result of a married woman's infertility, treatment with donor sperm, her husband would be treated as the father of the child until it is proven that he did not agree to the treatment of his wife. This rule (and others functioning to establish legal parenthood) is subject to the presumption of common law that a child is a married couple's legitimate child. This implies that, even though he is the biological father, the commissioning father does not have an automatic right to legal parenthood.⁷

At the time of treatment, if the surrogate is in a civil union, then her husband will be considered as the child's parent, unless it can be shown that she did not agree to the treatment. Thus, it is possible for two male or female partners to gain parental status with regard to a child born by means of a surrogacy arrangement.⁸

3.3.1 The Surrogacy Arrangements Act (1985)

The Surrogacy Arrangements Act 1985 sought to prohibit the aid of profit-making agencies in the development of plans for surrogacy. In relation to surrogacy, it makes any payment to third parties illegal and forbids advertisement.⁹

Sec. 2 makes making surrogacy deals on a contractual basis a criminal offence. Either the surrogate mother or the commissioning couple commits no criminal offence if it is decided between them that payments will be made to the surrogate mother. However, the crime is committed by any other individual, company

⁶*Supra note 6* at 2.

⁷*Ibid.*

⁸*Ibid.*

⁹Margaret Brazier, Susan Golombok and Alastair Campbell, "Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation" vol. 3 *HRU* (1997). Access on 20-03-2020 <https://watermark.silverchair.com/030623.pdf?>

or organization that makes or otherwise assists in a surrogacy agreement for payment negotiations.¹⁰

Sec.3 renders it a criminal offense to carry surrogacy advertising in any newspapers, etc., and to distribute such ads.¹¹

Sec.4 deals with infractions. An individual is liable for a fine and/or imprisonment on conviction for an offense under section 2 and a fine for conviction under section 3. 4.2 Section 36 of the Human Fertilization and Embryology Act 1990 was amended by the Surrogacy Arrangements Act 1985.¹²

3.3.2 The Human Fertilization and Embryology (Act 2008)

Changes to the 1990 Act were made by the Human Fertilization and The Embryology Act of (2008) expanded legal parental rights for persons who sought a family through assisted conception. Those in a same-sex relationship or "two individuals living as spouses in a lasting family relationship and not within the banned degrees of interaction with each other" are now eligible to file for parental orders.¹³

Finally, Section 1 of the Adoption and Children Act (ACA) 2002 was subsequently extended to parental order applications by the Human Fertilization and Embryology (Parental Orders) Regulations 2010 accompanying the 2008 Act, so that the child's wellbeing must now be the primary concern of the court for his whole lifespan. Because the child's welfare must be viewed from a lifetime point of view, rather than only through childhood, because the court must evaluate the welfare checklist outlined in section 1 of the ACA 2002, the child's wellbeing is no longer merely one of several concerns, but rather the issue that should take precedence over all others.¹⁴

Section 33 The latest rules on parentage that acknowledge the parental role played by same-sex partners are working in tandem with this important recognition of women's reproductive rights in terms of access to care. These proposed laws are

¹⁰*Id.*

¹¹*Ibid.*

¹²*Ibid.*

¹³*Supra note 5 at 2.*

¹⁴*Ibid.*

meant to put into line with those for heterosexual married and unmarried couples the legal status for same-sex couples. Therefore, regardless of genetics, the mother is the birth mother.¹⁵

Section 35 (HFEA) If he consents to treatment, the legal father will be the husband of the woman (regardless of whether his or her donor sperm is used).¹⁶

Section 42 Likewise, the consenting civil partner of a woman who gives birth is legally the second legal parent of the child in a civil partnership.¹⁷

Section 37 The male is the father of the child for unmarried couples where donor sperm is used, as long as the current contractual model of 'agreed fatherhood requirements' is met.¹⁸

The parents who decide not to apply are the bigger problem. Many consider the legal procedure of the United Kingdom finds it inconvenient to introduce themselves as parents to a child they already consider their own. Despite the fact that parental orders were clearly intended to be a more acceptable alternative to adoption, they nevertheless fail to recognise that these are the parents' natural children who were born with that identity. The process of obtaining a parental order is frequently perceived as arduous, time-consuming, and expensive, with little discernible benefit. Even while parental orders were clearly intended to be a more acceptable alternative to adoption, they ignore the fact that these are the parents' natural children who were born with that identity. Obtaining a parental order is usually regarded as a lengthy, time-consuming, and expensive process with no visible value.¹⁹

3.4 Surrogacy Law in US

Feminist and other progressives in the United States have no settled or consistent point of view about assisted reproductive technologies (ARTs). On one hand, most welcome the increased parental options that in-vitro fertilization and its

¹⁵ Rachel Fenton, and Jane Rees (et al), "Finally fit for purpose? The Human Fertilization and Embryology Act.2008" vol. 32 *JSW* (2010). Access on 10-02-2020 <https://www.tandfonline.com/doi/abs/10.1080/09649069.2010.520520>

¹⁶*Ibid.*

¹⁷*Ibid*

¹⁸*Ibid.*

¹⁹ Helen Prosser and Natalie Gamble, "surrogacy practice and the need for reform" Vol. 4 *JME* (2016). Access on 15-02-2020 <https://www.ngalaw.co.uk/uploads/docs/586bd489a8617.pdf>

associated techniques offer to people who are infertile, gays and lesbians, and single women. And most support technologies that enable the separation of sex from reproduction, both to avoid conception and to enable it. On the other hand, many US feminists and other progressives also acknowledge the array of challenging safety, ethical and social questions that some fertility industry practices raise.

Surrogacy raises a slew of subtle, contested, and ever-evolving issues at the crossroads of law, science, ethics, and public policy. Surrogacy touches on both the most sensitive and highly personal parts of family life, as well as crucial public issues involving the promotion and protection of the best interests of vulnerable groups such as children, women, and minorities, both nationally and internationally. This argument takes place in the context of surrogacy, which is currently a rapidly rising and globalising industry. At least tens of thousands of children are born each year as a result of surrogacy partnerships, and this may be an understatement.²⁰

States in the United States have responded to the policy issue of surrogacy in a variety of ways. Surrogacy is legal in some states. Other states, on the other hand, leave surrogacy largely or entirely unanswered, and some openly prohibit it. Despite the country's high level of inconsistency, most states are moving away from prohibition and toward control. Surrogacy is illegal in four states in the United States, including New York. This question arises in the backdrop of surrogacy's rapid growth and globalisation.²¹

The social and legal reaction to and perception of surrogacy in the US have evolved significantly over the last 30 years. In the early 1980s, there was no established law of any kind in the US that governed surrogacy and in vitro fertilisation (IVF) was a new medical procedure that was relatively unreliable. Therefore, the vast majority of surrogacy arrangements during this time were traditional surrogacies, meaning that the surrogate was artificially inseminated with sperm of the intended father (or sperm donor), and then gestated and subsequently delivered to the intended parents a child that was her own genetic offspring. This an unprecedented and ethically uncertain concept for many, and public attention across the US was

²⁰Alex Finkelstein (et al) "Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking" *Columbia Law School Sexuality & Gender Law Clinic* (2016). Access on 15-02-2020

²¹*Ibid.*

irresistibly focused on the issues when the first dispute over custody between a surrogate and the intended parents was litigated and decided in New Jersey in *Matter of Baby M*.²²

In addition to the empirical and sociological developments that have taken place since the decision of *Baby M*, a broad variety of legal alternatives to surrogacy have been articulated by courts and legislators throughout the United States."The California Supreme Court found the intended mother to be the "legal, natural" mother of the child in the 1993 case of *Johnson v. Calvert*, involving a zygote formed from the egg and sperm of the intended parents, and held that the surrogacy contract was not "inconsistent with public policy. The New York Legislature, on the other hand, passed a law in 1992 specifying that "surrogate parenting contracts are hereby declared contrary to this state's public policy, and are void and unenforceable."Some states limit intended surrogate parents to married couples outside New York and California, others impose sharp limits on who can act as a surrogate, a few forbid payment to surrogates, and still others in both legislation and case law have been silent about surrogacy. Globally, countries, from prohibition to approval, have followed widely divergent approaches to surrogacy. Meanwhile, women's infertility rates in the U.S. hover at around 12 percent, and surrogacy has become "a booming, global business."²³

Approximately 10 states passed prohibitive or restrictive legislation regarding surrogacy, most of which did not distinguish between traditional surrogacy and gestational surrogacy.²⁴

State law concerning surrogacy varies widely and generally falls into one of three categories. The first category includes states whose legislatures have been proactive in passing specific legislation, whether permissive or prohibitory, that specifically applies to and /or governs surrogacy (see statutes of Texas). The second Category includes states that have no statutes that apply to surrogacy but whose appellate courts have affirmatively decided contested and litigated surrogacy cases to create case precedent that applies to and / or governs surrogacy (statutes and case law

²²*Supra note 6 at 2.*

²³Eric A. Feldman, "Baby M Turns 30: The Law and Policy of Surrogate Motherhood" vol.44 *AJLM* (2018). Access on 01-01-2020 https://scholarship.law.upenn.edu/faculty_scholarship/2000.

²⁴*Supra note 6 at 2.*

of California). The third category included those states that have neither statutes nor case law that apply to and/or govern surrogacy (statute of Minnesota).in states that fall into this last category, surrogacy raise or falls on the application of and options law as it existing parentage, termination of parental rights and adoption law as it existing before surrogacy became a viable family-building option. The pre-existing laws of parentage, termination of parental rights and adoption are applied to create the parental relationships originally intend by the parties to a surrogacy arrangement.²⁵

This is the case in virtually all surrogacy in the US. Even in New York and Michigan, where compensated surrogacy is criminalized, there are existing court orders affirming the parentage of intended parents under existing law as long as the parties are all in agreement.²⁶

Surrogacy laws vary from state to state in the United States, with California being considered the most surrogacy-friendly. Although socio-demographic dimensions such as U.S. surrogate ethnicity and income levels are largely unknown, young, poor women of color serve as surrogates and surrogacy are frequently believed to be portrayed as a form of severe reproductive injustice, Jennifer Damelio and Kelly Sorensen argue that Surrogate mothers in the United States come from the poorest socioeconomic groups and are unlikely to receive financial or educational assistance, exposing them to exploitation and violence and placing them in a situation where the wealthy exploit the poor and the surrogacy industry preys on marginalised women.. Despite this claim, researchers discovered that most U.S. surrogates are women in the lower middle or middle class, in their twenties or thirties, and appear to be white, Christian, and married to families. Indeed, among U.S. surrogates, women of colour tend to be underrepresented.²⁷

3.5 Surrogacy law in China

In 1988, the first Chinese test-tube baby was born at Peking University's Third Hospital in Beijing, and in 1996, the first test-tube surrogate baby was born at the same hospital. Since then, surrogacy in the country has become a more and more

²⁵*Id.*

²⁶*Ibid.*

²⁷Nicole F. Bromfield, "Surrogacy Has Been One of the Most Rewarding Experiences in my Life" vol.9 *IJFAB* (2016). Access on 03-02-2021. <https://www.jstor.org/stable/10.2307/90011864>

common solution to infertility. A huge underground surrogacy market has emerged in China since 2004 with the prevalence of the internet and wireless communications. Numerous commercial surrogacy ads are posted on the internet and on the streets. In 2012, there were around 400 to 500 commercial surrogacy agencies across the world, one-tenth located in Guangzhou, according to insiders in the underground surrogacy industry. By 2009, it was roughly estimated that 25,000 surrogate children were born in the country. In Guangzhou, a wealthy couple also spent a million yuan on in vitro fertilization and employed two surrogate mothers who gave birth to five surrogate children for the couple.²⁸

Chinese legislation does not restrict or authorize surrogacy activities directly. "According to Article 3 of the Administrative Measures for Assisted Reproductive Technology published in 2001, "the procurement or selling of gametes, zygotes and embryos in any form" and "Any form of surrogacy technology may not be used by medical institutions and medical staff in China. The Standing Committee of the National People's Congress, however, removed this section of Article 6 in December 2015, suggesting a change in the Chinese government's attitude. Nonetheless, Ethical Principles of Assisted Reproductive Technology and Human Sperm Banks, Subsection 5, Part 3, also released in 2001, it still describes any surrogacy technology as unlawful, banning the conduct of surrogacy procedures by medical personnel. Confusion is caused by the modifications to one document but not the other. Regardless of the law, only administrative penalties are levied on publications by the Ministry of Health, which ensures that any sanctions are imposed only on the medical staff but not on the other staff involved; that is to say, the commissioning parents, the institution (if not officially licensed as a medical agency) and the surrogate mother are not responsible for any criminal liability. Although under current Chinese law, organizations can still practice surrogacy, the validity and legal issues surrounding surrogacy generally depend on the substance of surrogacy contracts or the interpretation of such contracts by the court. The next segment will clarify this further.²⁹

²⁸ Chunyan Ding, "Surrogacy litigation in China and beyond" *JLB* (2015). Access on 16-10-2020 <http://jlb.oxfordjournals.org>

²⁹ Qian Tang, "Surrogacy in China: Public Opinion, Litigations, and Court Rulings" vol. 15 *Asian Social Science* (2019). Access on 30-10-2020 https://www.researchgate.net/publication/336129823_Surrogacy_in_China_Public_Opinion_Litigations_and_Court_Rulings

A recent epidemiology report concluded that infertility affects 15 percent to 20 percent of women of reproductive age in China. That percentage corresponds to 40-50 million women, many of whom are in need of care, but who still have limited access to ART facilities, especially in western China. The study also estimated that 10-12% of men (45 million) suffer from male infertility, relative to their urban counterparts, with a higher incidence of infertility in men living in rural areas (15%). (10 %).As well as work-related stress and unhealthy lifestyles, exposure to radiation, pesticides and other environmental contaminants is believed to lead to the rising incidence of infertility in China.³⁰

Via surrogacy, patients who suffer from incurable uterine disorders may want their own children. This is especially true in countries such as China that are developing. China is home to 447 million women aged 16-60 years old, according to a study published on 26 February 2015 (Statistical Communiqué of China's National Economy and Social Growth, 2014).About 2.7 million of these women are reported to be unable to conceive due to uterine causes, such as congenital uterine or primordial uterine absence, intrauterine attachments, or extreme adenomyosis. Approximately 2.1 percent (15/140) of couples receiving assisted reproductive technology treatment preferred to have their babies by surrogacy alone at the Center for Reproductive Medicine, Shandong University, before limits on surrogacy were imposed by the 'Human Assisted Reproductive Technology Law' in 2001.Today, more than 10,000 couples are pursuing in vitro fertilization (IVF) therapy every year in our centre alone, and the market for surrogacy is likely to be much higher.³¹

The Chinese government and academics have not comprehensively examined the actual status of Chinese surrogacy. There was just a prohibition issued by the health department. Far from perfection, it is. While surrogacy is prohibited by law, over time, the attitude of the public towards it has changed. However, it should not be set aside because of such an emotional aspect and the technology of surrogacy.³²

³⁰JieQiao and Huai L. Feng, "Assisted reproductive technology in China: compliance and non-compliance" *Translational Pediatrics*, vol. 3, 2014 Access on 10-02-2021 <http://www.thetp.org/article/view/3545/4408>

³¹Linlin Cui (et al), "Surrogacy: a family-building option in search of legitimacy" *BJOG* (2016). Access on 20-01-2020. <https://pubmed.ncbi.nlm.nih.gov/27627601/>

³²Jinguo Wang and Na Wang, "Assumption of Ethical Rules of Surrogacy" vol. 99 *ASSEHR* (2017).Access on14-02-2021.<https://www.atlantis-press.com/proceedings/icsshe-17/25884412>

Modern surrogacy technology has given infertile couples hope. There's a huge market demand for surrogacy. Statistics indicate that more than ten thousand babies are born on the black market in China every year. The underground surrogate companies are overwhelmed because of the immense consumer demand and the limitation of regular medical institutions, motivated by interests. Surrogacy is turning into a kind of social anarchy. It brings with it a range of legal and social issues. In this context, the issue we have to face is how to govern surrogacy by legislation.³³

Artificial assisted reproductive technology has been rapidly evolving in China. There are a number of domestic medical institutions currently carrying out technology services. They argue that a fundamental human right is reproductive freedom. The use of modern science and technology to have their own children is not problematic. Because of their physical defect, it is not fair to deny their children's birth rights.³⁴

3.5.1 The "Administrative Measures for Human Assisted Reproductive Technology" 2001

There is a derogatory attitude towards surrogacy in Chinese law. The "Administrative Measures for Human Assisted Reproductive Technology" provided by the Ministry of Health in 2001 is the most direct norm.³⁵

Article 3 of the measures provides: "The acquisition or selling, in any form, of gametes, zygotes and embryos shall be prohibited. Any type of surrogacy technology shall not be adopted by medical institutions and medical staff. In breach of this provision, pursuant to **Article 22 of the Measures:** "the Departments of Health Administration of the People's Governments of the Provinces, Autonomous Regions and Municipalities, directly under the Central Government, shall issue warnings and impose fines of up to 30,000 yuan And grant the liable persons administrative penalties; if they constitute a felony, they shall be investigated in compliance with the law for criminal liability. The stance of "Human Assisted Reproductive Technology

³³ *Id.*

³⁴ *Ibid.*

³⁵ Chen Silin and Yao Tianchong, "The Status Quo and Legal Regulation of Surrogacy in China" vol. 246 *ASSEHR* (2018). Access on 10-20-2021. <https://www.atlantis-press.com/proceedings/icpel-18/25905448>

and Ethical Principles of Human Sperm Bank" by the Ministry of Health in 2003 was reiterated.³⁶

Moreover, in our regulations, there is no explicit law on surrogacy. What may be used in the different departmental laws may be important to surrogacy in actual judicial judgments:

Article 7 of the General Principles of Civil Law of the People's Republic of China reads as follows: "Civil activities shall respect social morality, shall not harm the public interest of the society, and disrupt the social and economic order."³⁷

Article 7 of the Contract Law of the People's Republic of China states: The parties sign the arrangement and carry it out. It complies with laws and administrative rules, respects social morality, does not interfere with social and economic order, and does not affect the public interest. Article 52 provides that contracts are void if they violate the mandatory provisions of laws and administrative regulations. And **Article 25 of the People's Republic of China Marriage Law states:** "Children born out of wedlock have the same rights as children born out of wedlock, and no one is liable to harm or discriminate against them." The father or mother who does not raise children born out of wedlock directly must meet the living expenses and school fees of the children before the children can live independently.³⁸

Indeed, banning all types of surrogacy by the administrative rules might raise the issue of constitutionality. Under Article 49 of the Constitution, both husband and wife have the duty to practice family planning; moreover, the Act of Population and Family Planning of the People's Republic of China, effective as of 1 September 2002, provides, in Article 17, that Chinese citizens have the right to reproduction as well as the obligation to practice family planning. Article 18(1) of the Act goes on to stipulate that couples are encouraged to have only one child; however, where the requirements specified by laws and regulations are met, couples are entitled to request to have a second child. This article states in the second paragraph that specific measures in this regard shall be formulated by the peoples' congress or the standing committee of a province, autonomous regions or municipality directly under the central government.

³⁶*Id.*

³⁷*Ibid.*

³⁸*Ibid.*

So far, all local authorities except Tibet Autonomous Region have issued specific measures to implement the Act of Population and Family Planning. Though local regulations are not identical on the specific requirements for having a second child, they share some common grounds, for example in rural areas, if the first child is a girl, and the couple is entitled to have the second child, in urban areas, only-child' couples can have two children, etc.³⁹

3.6 Surrogacy Law in Japan

Japan is one of the countries where surrogacy remains legally unregulated. The first child to be born to a surrogate mother in Japan was delivered in 2001 at Suwa Maternity Clinic in Nagano Prefecture. This was a gestation surrogacy case, after this case made public, different sectors of society, including medical associations and courts, sought to discourage the practice of surrogacy. However no legislative proposal has ever been introduced in the Japanese legislature to regulate the practice.

A key challenge with respect to this ART is identifying the legal parent(s) of a child given that surrogacy may implicate up to five parties, thus complicating the historical view of parentage and child creation as involving only one woman and one man. Currently, there is no consensus among states as to how legal parentage in a surrogacy contract is to be identified. For those seeking to evade the scrutiny of a home country that prohibits surrogacy or champions strict familial norms by pursuing surrogacy abroad, the conceived child is at risk of being denied legal recognition and is hence at risk of statelessness upon the family's return home. For this reason, even if the intended parents are identified as the child's parents on a birth certificate obtained in the country of birth, "incompatible [inter-state] norms complicate or foreclose altogether the recognition of parental statuses on which rights to transmit citizenship...are predicated", and it is this legal quandary that places such children at risk of statelessness in Japan.⁴⁰

Surrogacy in Japan began in 1991. In that year, the Information Center for Surrogacy was established in Tokyo. Infertile couples wishing to avail themselves of surrogacy services started to travel overseas with the Center's support and assistance.

³⁹*Supra* note 6 at 2.

⁴⁰Patrick Balazo, "Cross-border Gestational Surrogacy in Japan and the Spectre of Statelessness" ed. 5 *ISI* (2017). Access on 12-10-2019 https://files.institutesi.org/WP2017_05.pdf

The Information enters for Surrogacy reports that it receives inquiries from between 300 and 400 infertile couples per year. First IVF baby was born in Japan in 1983. Donor insemination (DI) has been performed since 1948 in Japan, but is also subject to the JSOG guidelines limiting provision to legally married couples.⁴¹

The Japanese government, in contrast, has consistently favored surrogacy restrictions, stating that surrogacy leads to “increased risks, danger of custody battles, complication of family relationships, fear of commercialization, lack of social consensus, and the usage of humans as a tool.” The government’s negative spin on surrogacy, however, might actually be what is contributing to the practice’s poor reception. Surrogates face no greater risks than any pregnant women, and in 2000, only 0.04% of surrogacy agreements resulted in custody battles. Surrogacy’s lack of legal status and availability may limit the degree to which people are familiar with the practice in Japan. Furthermore, much of the general public’s knowledge may come from controversies such as the Baby Manji and Aki Mukai cases discussed below, which may further dissuade people from wanting to learn about the practice.⁴²

Gestational surrogacy is neither legal nor illegal in Japan, rather guidelines and legal opinions proffered by professional associations and government have seen the practice of this specific ART forbidden. Beginning in 2003, the Japan Society of Obstetrics and Gynaecology (JSOG) issued guidelines advising its members not to perform gestational surrogacy at risk of losing their membership and their license to practice medicine. Later that year, the Ministry of Health, Labour and Welfare and the Ministry of Justice issued reports calling for the prohibition of surrogacy, with this opinion further supported in 2007 by the Science Council of Japan and the Japan Federation of Bar Associations. In 2008, Japan’s ART Review Committee repeated the call to prohibit the practice of gestational surrogacy, and in 2014 the Liberal Democratic Party put forth a proposal calling for the prohibition of surrogacy except for in exceptional circumstances. Even so, because there is no statutory regulations regarding surrogacy in Japan, people are free to avail the services of an overseas

⁴¹Yukari Semba (et al.), “Surrogacy: Donor Conception Regulation in Japan” Vol. 24, Research Gate (2009). : <https://www.researchgate.net/publication/40679989>

⁴²Trisha A Wolf, “Why Japan Should Legalize Surrogacy” vol. 23 *WILJ* (2014). Access on 23-11-2018 <https://digitalcommons.law.uw.edu/wilj/vol23/iss2/6/>

surrogate, and do so without realizing the potential consequences this may have for their child.⁴³

3.7 Surrogacy Law in Thailand

Thailand was a favorite target for international surrogacy arrangements as the country is famous for the quality of its health care facilities and personnel. These arrangements tend to avoid the limelight and are low key. However, in recent years there have been a number of very high profile cases where these arrangements were burst out in the open, creating international uproars which led to the country introducing a new legislation designed to stamp out unregulated, commercial surrogacy once and for all.⁴⁴

The controversy of concerning surrogacy occurred in August 2014. At that time, in the baby Gammy case, an Australian utilized a Thai surrogate mother through surrogacy arrangement in Thailand and then abandoned one of twins, called Gammy who was born severely handicapped (Down Syndrome). The couple took only the child's twin sister, called Pipah, back to Australia. The problem is who should be responsibility for the baby Gammy. The law in Thailand at that time could not be applied to this situation properly. However, commercial surrogacy was officially banned by the Medical Council of Thailand. Subsequently, shortly afterwards, it was discovered that a Japanese man was the father of a large number of children utilizing surrogate mothers through surrogacy in Thailand. The whole issue was sensitive to the society. The assumption of human trafficking via commercial surrogacy is of great important issue to be investigated. Later, a specialist in Assisted Reproductive technologies had been charged with a number of serious offences. The thing that should be considered in this case is properly legal regulation to solve this problem. That commercial surrogacy should be banned or not is considered upon the public order and morality. The expression of "commercial surrogacy" should be profoundly defined.⁴⁵

⁴³*Supra note 43* at 12.

⁴⁴SorajHongladarom, "Surrogacy Law in Thailand," *Research Gate* (2018) Access on 23-09-2020 <https://www.researchgate.net/publication/322286708>

⁴⁵Allison L. Zimmerman, "Thailand's Ban on Commercial Surrogacy: Why Thailand Should Regulate, Not Attempt to Eradicate" Vol. 41*BJIL* (2016) access on 12-08-2018 <https://brooklynworks.brooklaw.edu/bjil/vol41/iss2/9/>

Until recently, Thailand did not specifically ban commercial surrogacy by law. Though doctors were under certain restrictions regarding their ability to perform surrogacy procedures for compensation, these limitations were rarely enforced, and no regulations were placed on either surrogacy agencies or surrogate mothers. As a result, gestational surrogacy has become a lucrative, yet largely unregulated business in Thailand. However, given recent scandals that have brought Thailand's commercial surrogacy industry into the spotlight, Thailand's military government has sought reform.⁴⁶

In recent years, reproductive tourism has been a booming industry in Thailand for a variety of reasons. Against back drop of minimal and rarely enforced regulations, commercial gestational surrogacy has proliferated for a number of years. Thai laws concerning commercial surrogacy, however, began to evolve, and restrictions tightened once issues arising from the industry made their way to the forefront of the international stage.⁴⁷

Prior to the ART Act's passage in 2015, Thailand was a leading destination for reproductive tourism. In Thailand, "officials estimate that there are several hundred surrogate births" each year. For at least ten years, couples paid Thai women to carry a genetically unrelated child to term in exchange for a fee, a practice known as commercial gestational surrogacy. Couples may travel abroad in search of gestational surrogates due to unavailability, illegality, cost, long waiting lists, and other hurdles present in their home countries. Depending on the couple's country of origin, reproductive tourism can significantly cut down costs, making "ART45 use financially accessible to some who could not afford it at home." Additionally, some countries may not possess the necessary materials or technology to provide an ideal surrogacy arrangement. No matter the motivation, "reproductive tourism has become a normal and accepted part of our global culture."⁴⁸

One of the main incentives in choosing Thailand as a destination for commercial gestational surrogacy was economic. Because of the relatively low costs,

⁴⁶Anan Tapiromkul, "Legal Problems on Commercial Surrogacy in Thailand under the Protection of Children Born from Assisted Reproductive Technology Act, B.E. 2558," vol. 5 *TBLJ* (2015) access on 23-10-2018 <https://so05.tci-thaijo.org/index.php/TBLJ/article/view/111712>

⁴⁷*Ibid.*

⁴⁸*Ibid.*

Thailand was “a go-to destination for couples from Australia, Hong-Kong, and Taiwan, and a low-cost alternative to the United States.” Reports show that the cost of a commercial surrogacy in Thailand is about \$42,000USD. In comparison, commercial surrogacy arrangements in the United States may cost couples around \$150,000 USD, more than triple the price in Thailand. Viewed in economic terms, it is clear why an American couple would prefer the less costly pursuit of a Thai surrogate mother. During the ten years preceding the ART Act, the main reason commercial surrogacy proliferated among women within Thailand was also economic.⁴⁹

3.7.1 Laws regulating Surrogacy in Thailand before the Enactment of the ART Act

Before the enactment of the ART Act in 2015, Thailand represented an attractive destination for international surrogacy. From a legal standpoint, surrogacy was highly unregulated and hardly ever monitored. **Thailand only had 2 Medical Council Regulations introduced in 1997 and 2001 addressing the use of ARTs (Announcements 1/2540 and 21/2545).** The purpose of these Announcements was to assure that the reproductive procedures met the medical standards and principles of care. **Section 4/2** of the Announcement was of particular interest and stated that “in case a couple wants to have a child through surrogacy, the medical practitioner may provide the service only in the case of embryo from that couple’s gametes.” Furthermore, under the Announcement **21/2545**, the surrogate mother had to be a relative of either of the applicants, and economic compensation for the surrogate mother was not allowed. These announcements, however, were not legally binding.⁵⁰

In most of the cases, the rules to determine legal parentage followed the principle *mater semper certaest* (the mother is the one who gives birth). More specifically, the legal mother of the child was considered to be the surrogate, even if there was no genetic link between the birth mother and the baby. **Under Section 1546 of the Civil and Commercial Code**, in fact, “a child born of a woman who is not

⁴⁹*Id.*

⁵⁰Alessandro Stasi, “Protection for Children Born through Assisted Reproductive Technologies Act, B.E. 2558: The Changing Profile of Surrogacy in Thailand”, vol.11 *Clinical Medicine Insights: Reproductive Health* (2017) access on 21-10-2019 <https://journals.sagepub.com/doi/full/10.1177/1179558117749603>

married to a man shall be deemed to be the legitimate child of such woman.” The father of a child born outside marriage has no rights over the child even though his name “is recorded on the birth certificate and has a DNA test showing that he is indeed the biological father.”⁵¹

In accordance with the generally accepted interpretation of **Section 1546 of the Thai Civil and Commercial Code**, the woman who gives birth to a child is considered its mother. If a surrogate is married, the issue she bears will be presumed by law to be the legitimate child of herself and her husband. It follows that under Thai law the commissioning couple does not automatically acquire parental rights and responsibilities in respect of the surrogate child. Under Section 1547 of the Civil and Commercial Code “A child born of the parents who are not married to each other is legitimate by the subsequent marriage of the parents, or by the registration made on application by the father, or by a judgment of the Court.”¹⁸ It must be noted, however, that in recent years, clinics performing gestational surrogacy have provided a different interpretation to the word “mother” and allowed intended parents to register their names as the parents of the child in the surrogate child’s birth certificate. It was a simple procedure: the fertility clinic had to report the child’s birth to the nearest Registrar Office to obtain birth certificate. The commissioning couple then only had to request the birth certificate from the Registrar Office regardless of their nationality. There was no need to undergo a “complex legal adoption.”⁵²

3.7.2 “Protection for Children Born Through Assisted Reproductive Technologies Act”

As surrogacy becomes increasingly popular, the insufficiency of surrogacy laws, or altogether lack of regulation, has created international confusion. Take, for example, the recent baby gammy controversy. A Thai surrogate mother gestated twins for an Australian couple. During the pregnancy, it became known that one of the twins, Gammy, had Down syndrome. The surrogate mother refused to abort the child due to her Buddhist beliefs, and the Australian couple refused to take Gammy back to Australia once he was born. Since Thai law had no formal provisions regarding surrogacy, the Australian parents had no legal obligation to care for Gammy. The

⁵¹*Id.*

⁵²*Ibid.*

Thai surrogate mother, who expected the intended parents to take both children back to Australia, did not have the funds to care for a special needs child. Furthermore, the surrogate was legally Gammy's mother and Gammy was a Thai citizen, so no action could be taken against the Australian parents.⁵³

Before February 2015, there was no Thai law formally regulating surrogacy. Without any formal surrogacy law to determine parentage of surrogate children, the parental rights of intended parents were also extremely uncertain. After the baby Gammy and Shigeta controversies, the Thai government began working on new surrogacy legislation that was passed in February 2015. Although the new law mitigates some of the uncertainty, it does not address the statelessness issues stemming from lack of mirror citizenship reform. Furthermore, it falls prey to the downsides of strict regulation.⁵⁴

While the Draft Law addressed many issues relating to the protection of children and the use of assisted reproductive technology, Chapter Three specifically targeted surrogacy. In a blanket provision, Section 23 completely prohibited “surrogacy for commercial purposes.” Section 25, within the surrogacy chapter, prohibited any person from acting as a paid middleman or broker who manages or promotes surrogacy. Section 26 prohibited the circulation of information about women who wanted to be surrogate mothers, as well as women who wanted to find surrogates, whether it was for commercial or other purposes. These laws, now memorialized in the ART Act, make commercial surrogacy a criminal offense. Offenders of the ban on commercial surrogacy can be imprisoned for up to ten years, fined up to 200,000 baht, or both. Any person who violates Section 25 or 26, which would include agencies, advertisers, or recruiters of surrogate mothers, can be sentenced to up to five years in prison and fined up to 100,000 baht.⁵⁵

The ART Act, Took effect on July 30, 2015. The law “prohibits commercial surrogacy serving foreign clients,” and exclude same-sex couples as well, since only married couples can use surrogates and “same-sex marriage is not recognized” in Thailand. To qualify for a surrogacy arrangement, both the husband and wife must be

⁵³ Caitlin Pyrcce, “Surrogacy and Citizenship: A Conjunctive Solution to a Global” Problem, vol.23 *IJGLS* (2016). Access on 12-09- 2018 <https://www.repository.law.indiana.edu/ijgls/vol23/iss2/19/>

⁵⁴ *Ibid.*

⁵⁵ *Supra note* 48 at 16.

Thai, or “if only one applicant is Thai, the couple must have been married for at least three years.” The ART Act expressly forbids any individual involved from profiting from the arrangement, and the surrogate mother must be a “blood relative of either of the applicants” and have had a pregnancy prior to the surrogacy. As outlined in the Draft Law, the provisions of the ART Act completely ban surrogacy for commercial purposes, and offenders can be imprisoned for up to ten years, fined up to 200,000 baht, or both. Those acting as agents of commercial surrogacy “by requesting or accepting money, property, or other benefits in return for managing or giving advice about surrogacy” can face “imprisonment for up to five years and/or a fine of up to 100,000 baht.”⁵⁶

The new law here in effect puts an end to international surrogacy arrangements in Thailand. This is because of the requirement that the commissioning couple have to be Thai citizens, or if one of the parents is not a Thai citizen, they have to be legally married for no less than three years. Another requirement is that the surrogate mother has to be blood related to either one of the commissioning parents. While the law here only is enforceable in Thailand, children born through surrogacy arrangements in other countries are accepted as legal children provided that the parents can provide documentation that the children are accepted as legal in their own country. This is a normal practice according to the Civil Code. The child born through surrogacy arrangements will be a Thai citizen provided that one of his or her parents is a Thai citizen; this applies whether the child is born in Thailand or not. Thus since the PCA law allows that children born through surrogacy arrangements will be the legal offspring of the commissioning parents, in case where one of the parents is a Thai citizen, then the child receives Thai citizenship automatically.⁵⁷

3.8 Surrogacy Law in Russia

The issues of legal regulation of medical and family law, protection of the rights and interests of children in the healthcare field are important in the study of interjectorily interaction. The rights of parents and children through the prism of medical and family law in healthcare matters are central to the state in terms of both creating a family, it is normal functioning, and the implementation of the rights and

⁵⁶*Id.*

⁵⁷*Supra note 47* at 15.

legitimate interests of the subjects of these legal relations. Motherhood is also a constitutional value and is enshrined in the Basic Law of Russia. Article 7 of the Constitution of the Russian Federation stipulates that the Russian Federation provides state support for family, motherhood, fatherhood, and childhood. The methodological basis of our study is formed by modern methods of general scientific knowledge, applied from the standpoint of dialectics, analyzing the use of assisted reproductive technology in its development in direct connection with the law enforcement practice.⁵⁸

There is neither specific federal law regarding all aspects of assisted reproduction in Russia nor a regulating authority in this area such as the Human Fertilization and Embryology Authority in the UK. Due to a critical demographical situation in Russia, drafting of a federal law on legal regulation of assisted reproduction treatment and reproductive rights has been resumed. There is no age limit for IVF treatment except that the female patient should be an adult (at least 18 years old) and of ‘childbearing’ age.⁵⁹

Although liberal on the whole, Russian legislative control of assisted reproduction in general and surrogate motherhood in particular is fragmented and inconsistent. The Federal Law on the Fundamentals of Citizens' Health Protection was passed in 2011 and was the most recent modification in Russian law in this area. However, this Law did not close all of the gaps in the legal framework around assisted reproduction. The law is contradictory and not often clear, especially when it comes to surrogate motherhood. This will be explained in due course when related issues are discussed.⁶⁰

Currently, the main legal sources that govern surrogate motherhood in Russia are the following:⁶¹

- 1) The Family Code of 1995 (as amended), which took effect on March 1, 1996,

⁵⁸ArturIl farovich Khabirov, “Abuse of Assisted Reproductive Technology”, *Publicado* (2020) access on 12-05-2021

⁵⁹Konstantin Svitnev, “Legal regulation of assisted reproduction treatment in Russia” *Reproductive Biomedicine Online* (2010) access on 23-05-2016. <https://pubmed.ncbi.nlm.nih.gov/20435519/>

⁶⁰European Union “A Comparative Study on the Regime of Surrogacy in EU Member States” *LEGAL AFFAIRS* (2013) Access on 30-10-2016

<http://www.europarl.europa.eu/studies>

⁶¹*Ibid.*

- 2) the Federal Law on the Fundamentals of Protection of Citizens' Health in the Russian Federation 2011 (hereinafter referred to as the Law on Citizens' On January 1, 2012, the Russian Federation's Fundamentals of Legislation on Protection of Citizens' Health were replaced by the Russian Federation's Fundamentals of Legislation on Protection of Citizens' Health 2011), which included a section on assisted reproduction (including surrogate motherhood).
- 3) The Federal Law on the Acts of Registration of Civil Status 1997 (as amended), enacted from the day of its official publication;

The Russian Federation (RF) Ministry of Health Order 67 of February 26, 2003 "On Application of Assisted Reproductive Technologies (ART) at Therapy of Female and Male Infertility" (hereinafter referred to as "the Ministry of Health Order on ART 2003"), as well as the Regulation on the Application of Assisted Reproductive Methods (replaced RF Ministry of Health Order No. 301 of December 28, 1993 "On application of the method of artificial insemination of women with donor's eggs).

With the Federal Law on Citizen's Health Protection, which updated the Family Code in terms of kinship and the Law on Civil Status Acts from 1997, the Russian Federation built a broad system in 2011, which was finalised on August 13, 2012 by Ministry of Health Order 107. The intended parents can be citizens or foreigners, heterosexual couples or single women who demonstrate infertility or inability to bear children, and the surrogate must be a woman between the ages of 20 and 35 who has already given birth, is in good health, and cannot use her own ovule in any case, according to the legal requirements. The intended parent or parents' filiations to the child are established simply by presenting the birth certificate and the surrogate mother's renunciation in the Registry, however she will continue to be designated as the woman who gave birth to the resulting child. As previously indicated, her consent is always required to correctly register parentage, and the Constitutional Court has ruled that the Family Clause permitting her to keep the kid is constitutional (ruling of 15 May 2012). This strategy, however, has several faults, as it lacks accuracy in a number of situations where it is impliedly approved. First and foremost, it is unclear if the material used must be provided by the intended parents or if third parties may be involved. Furthermore, there are no provisions for financial

compensation to the carrier or payments for agency services, implying that there is no effective control over the provisions traded or the practise of commercial surrogacy. Advertising for surrogacy services is also unregulated in most cases. Finally, there is no system in place for registering international birth certificates in the state.⁶²

3.9 Surrogacy Law in Australia

Tremellen and Everingham give a figure of only 36 babies born to altruistic surrogates in Australia in 2013. As a result many Australians – an estimated 250 couples each year – travel overseas to access surrogates in countries where the practice is legal and available; this may be to certain parts of the United States, where surrogacy, including medical, legal, counseling, travel and accommodation expenses as well as the fee for the surrogate, may cost up to \$150 000; or to countries such as Thailand, India and Ukraine, where surrogacy maybe cheaper and surrogates easier to find but medical care may be inferior to that available in Australia.⁶³

Recent years have seen a paroxysm of inquiry and reform around surrogacy laws in Australia. In the space of just three years, reports were issued by seven public inquiries, and a specially-created federal–state government working party involving all nine Australian jurisdictions issued a discussion intended to ‘harmonies’ state approaches. In turn, this rash of interest has generated new surrogacy laws in all Australian jurisdictions except the Northern Territory. Broadly speaking these reforms take place in two areas. One is the amendment of laws which had previously restricted eligibility for assisted reproductive technology (‘ART’), in order to allow the use of in-vitro fertilization (‘IVF’) for surrogacy in limited circumstances. The other major change, which, state-based regimes for the transfer of legal parentage to the ‘commissioning’ or ‘intended’ parents.⁶⁴

In Australia, surrogacy is directly regulated¹ at the state and territory level. In all Australian jurisdictions but the Northern Territory, commercial surrogacy is

⁶²The miss Competition 2020, “Gestational Surrogacy: A European Overview and The Spanish Case a Feasible Proposal?” European *Judicial Training Network*, (2020) Access on 23-02-2021 <https://www.ejtn.eu/PageFiles/18747/TH-2020-03%20ES.pdf>

⁶³Australian and New Zealand Journal of Obstetrics and Gynaecology (2016) access on 12-10-2018 <https://www.scimagojr.com/journalsearch.php?q=12547&tip=sid>

⁶⁴JenniMillbank, “The New Surrogacy Parentage Laws In Australia: Cautious Regulation Or ‘25 Brick Walls’?” vo. 35 *Melbourne University Law Review* (2011) access on 12-09-2017 https://law.unimelb.edu.au/__data/assets/pdf_file/0005/1703507/35_1_5.pdf

prohibited and criminalized. Following recent reforms, altruistic surrogacy is now permitted in most Australian jurisdictions, but it is diversely and extensively regulated. There is even greater diversity in the legal treatment of surrogacy internationally. Some countries do not permit any form of surrogacy; others allow commercial surrogacy subject to regulations; yet others do not regulate it at all.⁶⁵

The fact that regulatory functions and powers are divided between States and Territories and the Commonwealth, and related legislation change from jurisdiction to jurisdiction, adds to the complexity and complications surrounding surrogacy in Australia. There is no single surrogacy law that is uniform or even consistent.⁶⁶

The following is a summary of Australia's current legal position on domestic surrogacy:⁶⁷

The Parentage Act 2004 (ACT) governs the Australian Capital Territory (ACT),⁶⁸ Surrogacy for charitable purposes is permitted, but commercial replacement parent arrangements are not. The Australian Capital Territory's legislation permits same-sex couples to be surrogate parents if one of them is a genetic parent. Single people are not permitted to be surrogate parents in the Australian Capital Territory.⁶⁹

The Queensland Surrogacy Act 2010 (Qld) allows for altruistic surrogacy while outlawing commercial surrogacy. Intended parents can be married, in a de-facto relationship (including same-sex relationships), or single.⁷⁰

The Surrogacy Act 2010 (NSW) allowed certain surrogacy agreements while prohibiting commercial surrogacy, prohibiting surrogacy advertising, and addressing the status of children born as a result of surrogacy arrangements. The NSW Act

⁶⁵Mary Keyes, "Cross-border surrogacy agreements", *Australian Journal of Family Law* (2012) access on 19-05-2017. https://research-repository.griffith.edu.au/bitstream/handle/10072/48503/80585_1.pdf;sequence=1

⁶⁶David Plater and Madeleine (et al), "Surrogacy: A Legislative; A Review of Part 2B of the Family Relationships Act 1975 (SA)", *South Australian Law Review Institute, Adelaide* (2018) access on 23-10-2019 <https://nla.gov.au/nla.obj-2865779006/view>

⁶⁷*Ibid.*

⁶⁸Australian Capital Territory, (Parentage Act 2004) Access on 20-05-2018 <https://www.legislation.act.gov.au>

⁶⁹Eric Blyth and Karin Hammarberg, "Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India" vol. 22 *JLM* (2014) access on 20-08-2017 <https://www.researchgate.net/publication/267731455>

⁷⁰<https://eprints.qut.edu.au/28961/1/28961.pdf> access on 12-03-2018

permits same-sex couples to participate in a non-commercial surrogacy arrangement.⁷¹

The Victorian Assisted Reproductive Authority regulates surrogacy contracts under the Assisted Reproductive Treatment Act 2008. (Vic). Commercial surrogacy arrangements are illegal, whereas altruistic surrogacy arrangements are permitted. A Patient Review Panel must approve all surrogacy arrangements. The intending (intended) parent must be infertile, unable to carry a pregnancy or give birth, or there must be a likely medical risk to the mother or baby if a pregnancy happens in order to receive approval. Women, who are single, married, de facto, or in same-sex relationships who meet these criteria are eligible to apply for a surrogacy arrangement that has been approved.⁷²

The Surrogacy Act of 2012 governs surrogacy arrangements in Tasmania (Tas). Commercial surrogacy is prohibited by this Act, which permits for altruistic surrogacy partnerships. There may be one or two intended parents in a surrogacy agreement. It is possible for intended parents to be married in a de facto relationship (including same-sex de facto relationships), or single.⁷³

The Surrogacy Act 2008 governs surrogacy arrangements in Western Australia (WA). The approval of a surrogacy arrangement by the Western Australian Reproductive Technology Council is required before a parentage order may be granted. The Surrogacy Act 2012 governs arranged surrogacy arrangements in Tasmania (Tas). Commercial surrogacy is prohibited by this Act, which permits for altruistic surrogacy partnerships. If a parent is infertile, unable to carry a pregnancy or give birth, or if there is a serious medical risk to the woman or child if the pregnancy is carried out, a parent may obtain a parentage order. A single woman, a married

⁷¹NSW Department of Justice ii, “Statutory Review of the Surrogacy Act 2010” (2018) access on 20-10-2020 www.justice.nsw.gov.au

⁷²Rachel Thorpe and Kerry Petersen (et al), “New assisted reproductive technology laws in Victoria: A genuine overhaul or just cut and paste?” vol. 18 *JLM* (2011) access on 16-06- 2018.
<https://www.researchgate.net/publication/51506876>

⁷³Report to the Western Australian Parliament, “Review of the Surrogacy Act 2008 (2014)” access on 12-10-2019

<https://www.healthywa.wa.gov.au/~media/Files/Corporate/Reports%20and%20publications/PDF/12859-surrogacy-act-report.pdf>

<https://www.healthywa.wa.gov.au/~media/Files/Corporate/Reports%20and%20publications/PDF/12859-surrogacy-act-report.p>

woman, or a woman in a de facto heterosexual relationship who fits these qualifications can apply to be a surrogate mother. Surrogacy is not available to single men or same-sex couples.⁷⁴

The Australian Federation has a complex system of ART regulation because the states exercise power over health matters and because medical and scientific professional organizations have played a significant regulatory role from the outset. A clear distinction has developed between the regulation of embryo research (research ART) and the provision of IVF and other treatment services (reproductive ART).⁷⁵

The lack of a uniform approach to the regulation of embryo research became a pressing issue over the last decade with growing concerns about the commercial exploitation of human stem cells and cloning and the need to keep pace with international research developments. At meetings held in 2001 and 2002, the Council of Heads of Australian Governments (COAG) agreed to develop nationally consistent legislation to ban human cloning and to permit embryonic stem cell research on embryos surplus to ART requirements in limited circumstances and subject to strict controls. Subsequently, laws were passed by the Commonwealth Parliament banning human cloning and other practices (such as planting an embryo in the body of an animal), but permitting embryo stem cell research and creating a Licensing Committee within the National Health and Medical Research Council (NHMRC).

To administer a national licensing scheme for embryo research in the public and private sectors (PHC Act, 2002; RIHE Act, 2002). Mirroring legislation was passed by the States and Territories pursuant to the COAG agreement. Chalmers (2006) argues that this legislation represents a compromise between those in parliament who advocated freedom in research and a national biotechnology strategy versus those who held concerns about Mirroring legislation was passed by the States and Territories research (Adamson, 2002; Robertson, 2004a; Spar, 2006), relying on existing general legislation and/or professional self regulation. Others have very rigid

⁷⁴Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and Surrogacy Act 2008 (Report: Part 2)* (2019) https://ww2.health.wa.gov.au/~/_/media/Files/Corporate/Reports-and-publications/HRT/Review-of-HRT-and-Surrogacy-Act-Part-2.pdf

⁷⁵Dr Kerry Petersen, "ART test regulation? Comparing the regulatory structures for ART in the UK and Australia", vol.15 *Reproductive Bio Medicine Online* (2007) access on 20-02-2018. www.rbmonline.com/Article/2873

proscriptive laws (Robertson, 2004b). The UK and Australia lie between these extremes.⁷⁶

3.10 Surrogacy Law in South Africa

Surrogacy became a common topic of conversation in South African households in 1987 when Pat Anthony, a Tzaneen grandmother, gave birth to her own grandchildren. Anthony's daughter, Karen Ferreira Jorge then adopted the children and raised them as her own. Although surrogacy has remained a practice in South Africa, the sensationalism surrounding the birth of the Ferreira Jorge triplets has remained unparalleled since.⁷⁷

Regardless of the reasons why surrogacy is utilised, up until recently the legal regulation of surrogacy in South Africa has been shrouded in much uncertainty. It was only with the promulgation of Chapter 19 of the Children's Act that some clarity was provided on the issue of surrogacy under South African law and the conditions under which surrogacy may be undertaken and surrogate motherhood agreements (SMA) may be entered into. However, despite the benefits that this chapter holds, it is not without pitfalls.⁷⁸

Section 294 is one such pitfall. It provides that surrogacy agreements are invalid in situations where the child born lacks a genetic link with the commissioning parent(s). In an era where infertility is more common, this section raises a number of concerns: some constitutional and others ethical and moral. The response to this criticism has been a suggestion that the parties concerned consider adoption as an alternative. This suggestion assumes that adoption is an alternative to surrogacy.⁷⁹

In 1987, the then SA Law Commission (SALC) investigated surrogate motherhood, culminating in a report in 1992. These report made comprehensive recommendations for the statutory regulation of surrogate motherhood. In 1994, a

⁷⁶*Id.*

⁷⁷Caroline Nicholsoa and Andrea Bauling“Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?” *Lecturer, Department of JurisprudenceUniversity of South Africa* (2013) access on 23-10-2018 http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602013000200009

⁷⁸C van Niekerk, Section 294 of the Children's Act: Do Roots Really Matter? Vol.18 *PELJ* (2015) access on 12-09-2018<https://www.ajol.info/index.php/pelj/article/view/121298>

⁷⁹*Ibid.*

parliamentary ad hoc committee (the ‘Ad Hoc Committee’) was established to enquire into and report on the SALC Report. The changes that the Ad Hoc Committee recommended to their commendations of the SALC included, among others, the inclusion of unmarried couples (irrespective of their sexual orientation) and single persons into those who can access surrogacy. They retained the requirement that surrogacy should only be exercised as ‘remedy of last resort’.⁸⁰

‘Surrogacy should only be exercised as a remedy of last resort because of all the risk factors which are inherent in surrogate motherhood. The legislative intent of the threshold requirement was to exclude surrogacy for convenience and restrict surrogacy to a reproductive remedy of last resort. The wording ‘not able to give birth’ was designed to give effect to such legislative intent. The SALC Report and the Ad hoc Committee’s Report did not consider the differentiation between the narrow and the broad interpretations of the threshold requirement.’⁸¹

The provisions contained in Chapter 19 of the Children’s Act for the first time created a statutory scheme for the regulation of surrogacy in South Africa. The main features of this surrogacy model include the following: The requirement of a court-sanctioned surrogate motherhood agreement prior to the artificial fertilization of the surrogate mother; the automatic vesting of legal parenthood in the intending commissioning parents at the subsequent birth of the commissioned child; and the outlawing of commercial surrogacy. The challenge posed by surrogacy would thus no longer appear to be a decision on whether or not to regulate surrogacy but, rather, to decide on how best to regulate surrogacy.⁸²

The focuses on the judgment in *Ex parte WH*, delivered with the express purpose of providing guidance to parties applying for the confirmation of surrogate motherhood agreement in South Africa. The dualistic role played by the judiciary in confirmation proceedings is appraised with reference to a statement made by the court in *Ex parte WH*. Attention is drawn to the difference in the approach that has to be

⁸⁰D W Jordaan, “Surrogate motherhood in illness that does not cause infertility” vol. 106 *SAMJ* (2016) access on 11-10-2018 <https://pdfs.semanticscholar.org/99b8/0cbe5d879ffeb950407504a1a31e76a39a2.pdf>

⁸¹*Ibid.*

⁸²Anne Louw, “Surrogacy in South Africa: Should wereconsider the current approach?” vol. 76 *JCRDL* (2014) access on 09-11-2019 <https://ssrn.com/abstract=2430642>

followed by the courts when applying the best interest of the child standard to a resultant child, rather than an existing child.⁸³

3.10.1 Children's Act 38 of 2005 (the Children's Act)

The provisions contained in chapter 19 of the *Children's Act* 38 of 2005 (the *Children's Act*) address the elements pertinent to formal surrogate motherhood agreements. Parties who wish to exercise their reproductive rights by making use of surrogacy are required to enter into a written agreement that results in the complete transfer of parental responsibilities and rights from the surrogate mother to the commissioning parents once the child is born. Contracting parties are furthermore instructed to approach the High Court for the confirmation of a surrogacy agreement before the artificial insemination of the surrogate mother is allowed to take place.⁸⁴

3.10.2 The Surrogate Motherhood Agreement

All surrogacy arrangements in South Africa must now be the subject of a valid, written surrogate motherhood agreement, the provisions of which, together with the CA, regulate the surrogacy arrangement. The surrogate motherhood agreement has been described as “a contract of a special kind” (sec 292 CA) and is defined as:

An agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent. (Sec.1 CA).⁸⁵

In terms of the Latin maxims *mater semper certaest* and *paterest quemnuptiae demonstrant* which received statutory recognition inspection of the Children's Status Act, the mother who gave birth to a child, and her husband if she was married, were regarded as the parents of that child. This meant that the commissioning persons in a surrogate relationship could only become the legal parents of such a child if they

⁸³*Id.*

⁸⁴MathaboBaase, “The Ratification of Inadequate Surrogate Motherhood Agreements and the Best Interest of the Child”, *PER / PELJ* (2019) DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6083>

⁸⁵*Supra note* 73 at 33.

followed the adoption procedure in terms of the Child Care Act. In terms of section 5(1) (b) of the Children's Status Act, it was presumed that, if a surrogate mother was married, both she and her husband consented to the artificial fertilisation and the child born of such fertilisation was therefore deemed to be their legitimate child. Section 5(2) of the Children's Status Act provided that no right, duty or obligation would arise between the child and the genetic donor(s). This meant that, in circumstances where a surrogate mother had changed her mind and no longer wished to give her consent to the adoption of the baby by the commissioning person(s), she was entitled to do so since the surrogate agreement would in all probability have been considered to be *contra bonos mores*. This was the case even in instances where both the commissioning persons were the genetic parents of a child.⁸⁶

Section 294 is one such pitfall. It provides that surrogacy agreements are invalid in situations where the child born lacks a genetic link with the commissioning parent(s). In an era where infertility is more common, this section raises a number of concerns: some constitutional and others ethical and moral. The response to this criticism has been a suggestion that the parties concerned consider adoption as an alternative. This suggestion assumes that adoption is an alternative to surrogacy.⁸⁷

This thing thus aims to critically analyse section 294 and the issues it raises. It further considers whether adoption is an alternative to surrogacy in the light of the assumption made. The discussion must, of necessity, consider the importance of a genetic link in obtaining a child, as well as alternatives. In conclusion, recommendations are made for a way forward.⁸⁸

As indicated above, where no genetic link is possible, surrogacy is not an option and alternative forms of founding a family – in particular adoption – must be considered. The implication of this is that in instances where a single commissioning parent or both commissioning parents are infertile they are excluded from pursuing surrogacy as an option. This provision has been "deemed harsh and discriminatory by practising reproductive specialists."⁸⁹ It has also been suggested that section 294 is

⁸⁶Lize Mills, Certainty About Surrogacy, STELL LR (2010) access on 12-10-2018 <https://core.ac.uk/download/pdf/188223857.pdf>

⁸⁷*Supra note* 74 at 34.

⁸⁸*Ibid.*

⁸⁹*Ibid.*

unconstitutional as it violates an infertile person's right to make decisions regarding reproduction, as well as the person's rights to equality and dignity.⁹⁰

3.11 Conclusion

Surrogacy's legal challenges are complicated, varied, and largely unresolved. In most countries around the world, the woman who gives birth to a child is regarded as the child's legal mother. In certain countries, however, because the surrogate agreed to give the kid back to the intended parents the intended parents are recognised as legal parents from the moment the kid is born. India is one of the few countries in the world that recognises the intended parent(s) as a legal parent. Several countries are currently issuing pre-birth orders through the courts, which include the name(s) of the intended parent(s) on the child's birth certificate. The positions on surrogacy in many nations are listed here. Meanwhile, infertility rates among women in the United States are roughly 12%, and surrogacy has become "a huge, global business." Surrogacy law was passed in approximately ten states, the majority of which did not differentiate between traditional surrogacy and gestational surrogacy. Surrogacy and related issues in the United States are governed by state law, which varies widely from state to state. For dealing with surrogacy difficulties, some states in the United States have established laws, while others rely on precedent. Some states have had altruistic surrogacy legalised, while others have allowed commercial surrogacy and made it simple for the intended parents to be acknowledged as the child's legal parents. Some states that are surrogacy-friendly exclusively help married heterosexual couples, while others don't care if the intended parents are married or not. Illinois, California, Maryland, Arkansas, and New Hampshire are some of the surrogacy-friendly states in the United States.

The Surrogacy Arrangements Act of 1985 makes commercial surrogacy arrangements unlawful in the United Kingdom. Because surrogacy agreements are not legally binding, a surrogate mother retains the legal right to decide on the surrogate child unless the court issues a parental or adoption order. In Australia, the surrogate mother is legally recognised as the child's legal mother, and any agreement awarding custody to others is deemed illegal and unenforceable by the courts. Commercial

⁹⁰*Id.*

surrogacy is considered a crime in Australia. Most couples in Australia who want a child through surrogacy must adopt the child rather than be recognised as birth parents, especially if the surrogate mother is married. Surrogacy for altruistic reasons, on the other hand, is still permitted.


Commercial surrogacy is illegal in Canada, as it is in Australia, by the Assisted Human Reproduction Act of 2004, however altruistic surrogacy remains allowed. Agreements containing surrogacy are unenforceable in the province of Quebec. Since 1994, all types of surrogacy agreements, whether commercial or alternative, have been prohibited in France. Japan: Surrogacy is not regulated by Japanese law. Surrogacy is opposed by a panel of the Ministry of Health, Labor and Welfare and the Japan Society of Obstetrics and Gynecology, who believe that humans should not be used as a source of reproduction. In March 2008, the Japanese Science Council, which opposes surrogacy, urged that commercial surrogacy arrangements be penalised for doctors, agents, and their clients.. Commercial surrogacy is absolutely outlawed and illegal in Belgium, and it is also prohibited and unlawful in the Netherlands.

The Chinese government and academia have not conducted a thorough investigation on the current state of Chinese surrogacy. The health department had only issued a prohibition. It is far from flawless. Despite the fact that surrogacy is illegal the public's perception of it has evolved through time. However, because of the emotional aspect and the technology of surrogacy, it should not be dismissed. Infertile couples now have hope because to modern surrogacy technology. Surrogacy is in high demand on the market. Every year, more than 10 thousand infants are born on the black market in China, according to statistics. The underground surrogate enterprises are overburdened due to high consumer demand and the limitations of traditional medical institutions, which are driven by profit motives. Surrogacy has become a form of social anarchy. It brings a slew of legal and societal difficulties with it. In this setting, the question is how to regulate surrogacy through legislation.


On July 30, 2015, the ART Act went into effect. Because only married couples can employ surrogates and "same-sex marriage is not recognised" in Thailand, the law "prohibits commercial surrogacy serving foreign customers" and excludes same-sex couples as well. Both the husband and wife must be Thai to qualify for a surrogacy

agreement, or "if only one applicant is Thai, the couple must have been married for at least three years."The ART Act clearly prohibits any party from benefitting from the arrangement, and the surrogate mother must be a "blood relative of either of the applicants" and have previously given birth. In Thailand, the new law effectively bans overseas surrogacy arrangements.

For the first time, the South African Children's Act 38 of 2005 (which took effect on 1 April 2010) made surrogacy arrangements permissible, provided that the Act's prerequisites are met. Commercial surrogacy is prohibited, and the Act states that a court certifying the arrangement must guarantee that the surrogate mother is not using surrogacy as a source of revenue and is doing so for altruistic reasons. Both the commissioning parent(s) and the surrogate are subject to various restrictions. It is needed of the commissioning parent(s) to confirm to the court that they are unable to bear children and that this condition is permanent and irreversible. Additionally, both commissioning parents' gametes must be used, or If this isn't possible for biological, medical, or other reasons, at least one of the commissioning parents' gametes must be used. If a single parent is the commissioning parent, that person's gamete must be used. As a result, an infertile couple or a single individual is barred from participating in a surrogacy agreement - a position that could be considered unconstitutional.



CHAPTER 4
INDIAN LAW AND POLICY RELATED
TO SURROGACY



CHAPTER 4

INDIAN LAW AND POLICY RELATED TO SURROGACY

4.1 Introduction

In the backdrop of tremendous growth of surrogacy clinics across the country, the Government has formulated various draft Bills to regulate surrogacy over the years in 2008, 2010, 2014, 2016, 2019 and latest draft Bill being the Surrogacy (Regulation) Bill, 2020. The new Bill provides certain rules and restrictions on who can avail and who cannot avail surrogacy. The Bill proposes a complete ban on commercial surrogacy, restricting ethical and altruistic surrogacy to legally wed infertile Indian couples only. It also creates a ban on the overseas Indians, foreigners, unmarried couples, live-in partners and gay couples to be a part of surrogacy.¹

Thus in place on dodge difficulties What's more upsetting situations, far reaching enactment ought a chance to be sanctioned taking under thought Different existing enactment Likewise need been happened for Japanese couples situation of baby Manji Also German couples instance for Jan Balaze² which makes thereabouts huge numbers legitimate issues of the couples same time bringing their youngster with their home country. Thereabouts with succeed for everyone these issues an free enactment needed, existing Indian laws need aid completely contrary with advanced medicinal headway.³

The successful birth of the world's first baby conceived by in vitro fertilization (IVF) and embryo transfer occurred on July 25, 1978, in the UK. The world's second IVF baby was born 67 days later on October 3, 1978 in Kolkata. However, on August 6, 1986, in Mumbai, India's first scientifically verified IVF baby was born through the

¹Dr. Dipankar Debnath, "The Surrogacy (Regulation) Bill, 2020: A Critical Analysis of the Provisions In The Light Of Procreative Choice of Surrogate Mother to Use Her Agency" vol. 5 *IJCRT* (2020) access on 30-09-2012 <https://ijcrt.org/papers/IJCRT2005219.pdf>

²Anil Malhotra and RanjitMalhotra, *Surrogacy in India -A Law in the Making*,57-58 (Universal Law Publishing Co., New Dehli, 2013). (AIR 2010 Guj 21)

³S.s. Das, "Commercialization of Surrogacy in India: A Critical Analysis", vol. *Research Gate* (2014) <https://www.researchgate.net/publication/281710247>

support of the Indian Council of Medical Research. Since then, over one and half million babies conceived by Assisted Reproductive Technologies (ART) have reportedly been born throughout the world.⁴

Feminist ethnographers have often venture din to factories and global assembly lines to watch what they call “gender at work” on the shop floor, and they have demonstrated that good labor- cheap, docile, and dexterous- is not found ready-made (Freeman2000; Salzinger2003; Pun 2005). It is created through relations of production, through the “meaningful practices and rhetoric’s of shop-floor life” (Salzinger2003, 16). Within this schema, managerial control operates through the constitution of shop-floor subjects.⁵

Apart from the recent spurt of surrogacy in India, commercial surrogacy is mainly practiced in the state of California and in Israel. The Indian structure is closer to the liberal market model of surrogacy in California, where surrogacy births are primarily managed by private, commercial agencies that screen, match, and regulate agreements according to their own criteria and without state interference⁶.

Anand is a city of about 100,000 people in the western Indian state of Gujarat. A curious fact about the demographics of the state of Gujarat is that a large percentage of Gujaratis have settled in different parts of the world. Of the 20 million Indians spread across the globe, 6 million are from the state of Gujarat, meaning that nearly 30 percent of the total non-resident Indian (NRI) population is from this one state. Non-resident Gujaratis (NRGs) coming to India for personal and medical visits are making Gujarat one of the most popular sites for medical tourism in India. The majority of medical tourists are cardiac patients, but an increasing number of patients are coming for joint replacement, plastic surgery, and now in vitro fertilization and surrogacy (Bhargav 2006).⁷

India’s ministry of Health and Family Welfare has drafted a bill to regulate cases of commercial surrogacy after India’s first major legal cost involving

⁴https://main.icmr.nic.in/sites/default/files/guidelines/Prilim_Pages.pdf

⁵Amrita Pande, “Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker” Vol. 35, No. 4 (Summer 2010), pp. 969-992, *The University of Chicago Press* (2010)

⁶*Ibid.*

⁷*Supra note 3* at 1.

commercial surrogacy the baby Manji's case⁸ ICMR presented a national regulation addressing not only commercial surrogacy but also other Reproductive Technologies. And the regulation was known as draft assisted Reproductive Technologies Regulation and Rules Bill 2008⁹ which was changed in 2010 and named as Draft Assisted Reproductive Technologies Regulation and rules bill 2010¹⁰ with some changes in the Draft bill of 2008. Furthermore done 2009 law requisition need also submitted its report card ahead surrogacy also situated curtailed certain suggestion on the regulation from claiming this act.

4.2 ICMR 2005, principles for Assisted Reproductive Technologies

In 2005, the ICMR released a statement of specific principles for Assisted Reproductive Technologies with respect to Surrogacy¹¹, the guidelines offered several protections to the surrogate: these were as follows:

- (i) Surrogacy should be resorted to only when it is coupled with authorized adoption, wherever applicable;
- (ii) It should be rebuttable presumed that a woman who carries the child and gives birth to it is its mother;
- (iii) The intending parents should have a preferential right to adopt the child subject to six weeks postpartum delay for necessary maternal consent;
- (iv) The contract for surrogacy, despite permitting reasonable payment of compensation on completion of adoption, would be valid, subject to the surrogate's right to retain the baby if she so desires;
- (v) The only remedy for the genetic parents would be to make a claim for custody on the ground of best interest of the child;
- (vi) Abortion under the abortion law on medical grounds should be the inviolate right of the surrogate, and in that event, the adopting parents have no claim over

⁸ Amrita Panday, *Wombs in Labor, Transnational Commercial Surrogacy in India*, 14 (Columbia University Press, New York 2014).

⁹ Assisted Reproductive Technologies Regulation and Rules Bill, 2008

¹⁰ Assisted Reproductive Technologies Regulation and Rules Bill, 2010

¹¹ National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf

the amount already paid. And on September 4, 2002 the Secretary of Family Welfare released draft guidelines on ART clinics.¹² The draft guidelines were developed by a committee formed by ICMR and the National Academy of Medical Sciences, New Delhi with respect to surrogacy, the draft guidelines provided:

1. That no relative could act as surrogates;
2. Genetic (Biological) parents must adopt a child born through surrogacy;
3. Surrogacy is usually only considered for patients for whom carrying a kid to term would be physically or medically impossible or unacceptable.
4. And a kid born through ART must be considered as the couple's legitimate child, born within wedlock with all the rights to percentage, maintenance, and inheritance that entails. And after several years of discussion and debate primarily among the ICMR, NAMS and practitioners of ART, the Ministry of Health and Family Welfare published the non binding National guidelines.

To control and manage the craftsmanship clinics, those ICMR What's more national Academy of medicinal Sciences (NAMS) bring turn out for national rules for Accreditation, supervision and regulation for craft centers over India On over 2,800 doctor look assignments led from April 1, 2009 to March 31, 2010. The guidelines in respect of Surrogacy are mentioned as follows:

1. A tyke destined through surrogacy must make received Eventually Tom's perusing those hereditary (Biological) folks unless they cam wood create through hereditary (DNA) finger printing (of which those records will a chance to be upheld in the clinic) that the child will be theirs. Surrogacy via assisted conception should typically be explored only for people for whom carrying a kid to term would be physically or medically impossible or unpleasant.
2. Instalments plan to surrogate mother ought to further bolstering disguise every one real costs connected with those pregnancy. Documentary confirmation from claiming surrogacy budgetary plans must be made

¹²Sarojni N Vrinada Marwah, (ed.), *Reconfiguring Reproduction Feminist Health Perspective on Assisted Reproductive Technologies*, 96 (Zubaan, New Dehli, 2014).

available. This financial issue should not be handled by the ART centre. Aside from medical expenditures, the surrogate mother would be eligible to monetary recompense from the couple.

3. The ART clinic shall not make any surrogacy advertisements. The task of locating a surrogate mother, either through advertisements or personal contacts.
4. Otherwise, take a break with the couple or visit a sperm bank.
5. A "surrogate mother" should be no older than 45 years old. The ART clinic should check a woman's background before considering her as a surrogate for a certain couple's child. (and put on record) that the woman satisfies all the testable criteria to go through a successful full term pregnancy.¹³
6. A surrogate mother for the pair can be a relative, a well-known person, or someone completely unknown to the couple. If a relative is acting as a surrogate, the relative must be from the same generation as the lady who wants the surrogate.
7. Just prior to embryo transfer, a potential surrogate mother must be screened for HIV and shown to be sera negative for the virus. She must also submit a written certificate stating the following:
 - a. She a. She has never been given a drug intravenously with a shared syringe;
 - b. She has never had a blood transfusion.;¹⁴
8. She 8. To the best of her/his knowledge, she and her spouse have not had any extramarital affairs in the last six months. (This is to ensure that during the surrogacy period, the person does not develop HIV-related symptoms.) Surrogacy is only permitted three times in a woman's lifetime.
9. Surrogate moms who are giving birth to biologically unrelated children must register as patients in their own names. When registering, she must say that she is a surrogate mother and provide all pertinent information about the genetic parents, such as name, address, and so on. She is not permitted to use or register in the name of the pregnant woman.

¹³*Id.*

¹⁴*Ibid.*

10. Child the birth certificate should be in the name of the genetic parents, and the clinic should produce a document with the surrogate mother's name and address.
11. An egg donor is not permitted to act as a surrogate mother for the couple to whom the egg is given.

In the absence of any law on the issue of commercial surrogacy these guidelines will be applicable but are non-binding.

4.3 Indian Council of Medical Research, Guidelines (2005)-

In 2005, the ICMR published national criteria for accreditation, supervision, and regulation of ART clinics optimum benefit of these newer technologies to appropriate persons by skilled team of experts, at affordable health and economic cost, in all public and private facilities in our country.¹⁵ A national registry pertaining to all centres that are accredited by the licensing authority shall be maintained at ICMR and shall contain records of treatment cycles and outcome. Equally important are issues related to the conduct of research with material obtained as by-products from the clinical activity. These include the follicular fluid, oocytes, and spare embryos, semen samples which can be used by researchers in basic or molecular science.

This includes fertilization involving manipulation of gametes outside the human body and the transfer of gametes or embryos into the body. All protocols used in the laboratory for Assisted Reproduction (AR) procedures must be documented and available as manuals. These manuals should be revised periodically.¹⁶ Log books for the maintenance and periodic overhauling of all equipments should be maintained. The entire procedure from the ovarian stimulation protocol to the oocyte retrieval and oocyte and sperm preparation including evaluation of the morphology of the gametes, their number, timing of insemination, date of embryo transfer, number of embryos or gametes transferred and the fate of the gametes must be documented. Abnormal pre-embryos such as polyploidy embryos should not be transferred. Cryopreserved material must be labelled indexed and stored properly. The laboratory personnel

¹⁵ Anil Malhotra and Ranjit Malhotra, *Surrogacy in India - A Law in the Making*, 78-79 (Universal Law Publishing Co, New Dehli, 2013).

¹⁶ *Ibid*,

should be well versed with the techniques of cryopreservation. Batches of culture media must be identified. All agents used in the Laboratory must be entered in a Register and the date of their receipt entered on the box containing them. Asepsis should be maintained at all cost. Each couple undergoing treatment should undergo a minimal screening for HIV and Hepatitis. The laboratory personnel should be adequately protected which include screening and vaccinations. It is essential that all documentation regarding every patient treated in the centre is maintained meticulously and all precautions are taken to ensure that confidentiality is maintained.¹⁷

4.4 General Principles

There is a certain element of risk associated with all AR procedures. It is, therefore, necessary to ascertain the therapeutic and research value of the AR procedure in each case.

4.4.1 Informed Consent: After duly counselling the couple / oocyte/semen donor, an informed and written consent should be taken from both the spouses as well as the donor, as the case may be.¹⁸

They should be explained the various risk factors associated with the procedures in simple language and the words that they can understand. These include risks associated with ovarian hyper stimulation, anaesthetic procedures, and invasive procedures like laparoscopy, aspiration of ovum etc.

They should be explained the possibility of multiple pregnancies, ectopic gestation, increased rate of spontaneous abortion, premature births, higher perinatal and infant mortality as well as growth and developmental problems, probable adverse effects (e.g., of the medicine used) and treatment dangers to women, as well as the risks of multiple pregnancy.

They should also be explained that –

- i.** there is no guarantee on the success / failure of the procedure and the need to lower the number of viable foetuses in order to ensure that at least two foetuses survive;

¹⁷http://www.cns.iisc.ac.in/wordpress/wp-content/uploads/2017/01/ethical_guidelines.pdf

¹⁸<https://main.icmr.nic.in/sites/default/files/guidelines/>

- ii. The patient's domestic life may be disrupted as a result of the treatment;
- iii. Concerns include probable degradation of gametes or embryos as a result of storage, as well as pain and suffering;
- iv. Concerning the cost to the patient of the proposed therapy and, if applicable, an alternative treatment (there must be no extra "hidden expenses").
- v. on the necessity of sending a pre-paid mail to the clinic with the pregnancy result; and
- vi. on the benefits and drawbacks of continuing treatment after a specific number of failed attempts

Informed consent should include information regarding use of spare embryos. It should be made clear whether embryos that are not used for transfer could or could not be used for research purposes or implanted in another woman's womb, or "preserved" for use at a later date or destroyed. Investigators should ensure that participants are informed and consent is taken afresh in writing on the above issues at every stage.¹⁹ Consent may be withdrawn at any time before implantation. Couples who have their gametes or embryos frozen must give their explicit consent with regard to what should be done with them in case of death, or if any of the parties becomes incapable of varying or revoking her or his consent.

Investigators should clarify the ownership of the embryos that they belong to the genetic mother or the laboratory. Abortions should never be encouraged for research purposes.

No AR procedure will be done without the consent of the spouse or partner.

There is no ethical objection at the moment for IVF or any other related procedure for research or for clinical application.²⁰

4.4.2 Selection of Donor: The semen bank assumes the responsibility in selection of the suitable donor on following terms:²¹

¹⁹*Id.*

²⁰*Ibid*

- Complete physical examination of the donor should be done to ascertain the good health of the donors of semen, oocyte or embryo. The donor should be healthy with reasonable expectation of good quality eggs or sperms and preferably with proven fertility record.
- The physical characteristic and mental make-up of the donor should match as closely as possible to that of the spouse of the recipient, especially with reference to colour of the skin, eyes and hair, height and build, religious and ethnic background, the educational level and ABO blood type.
- Blood group of the proposed donor and donee should be tested with respect to Rh compatibility.
- No person suffering from any sexually transmitted disease (e.g. syphilis, gonorrhoea, Chlamydia, herpes, HIV etc.), infectious disease (e.g. hepatitis B and C, HIV) or genetically transmissible disease should be used as donor. Sexually transmitted diseases should be ruled out within a week of obtaining the seminal fluid.
- It is essential that donated semen is cryon-preserved and used only after 6 months as this would enable the centre to retest the donor after 6 months for HIV and eliminate the potential risk of HIV transmission in the ‘window’ period of HIV infection.
- Identity of the donor as well as the recipient should be protected from each other. However, all the records of the donor must be preserved for at least 10 years in order to trace her / him in case of any eventuality and should be confidential.
- Confidentiality of the entire procedure and its outcome is advisable and therefore, no relative should be accepted as a donor in order to avoid identification and claims of parenthood and inheritance rights.
- All information pertaining to clients and funders must be kept private. Except with the approval of the person(s) to whom the information refers, no information concerning the treatment of couples provided under a treatment agreement may be revealed to anyone other than the accreditation authority or those protected by the licence or in a medical emergency concerning the

²¹*Id*

patient, or a court order. It is this person(s)' right to decide what information will be passed on and to whom.²²

- Written consent of the donor should be taken towards unrestricted use of sperms or oocytes for AR, as well as an undertaking from him / her that he / she will not attempt to seek the identity of the recipient. In case the donor is married, the written consent of the spouse should be taken, if possible.
- It is also desirable to restrict the use of semen from the same donor to a maximum of 10 pregnancies to avoid the possibility of an incestuous relationship occurring among the offspring's at a later date.
- In case of the oocyte donor, incurring any health problems related to the process of donation, the costs of the subsequent health care should be borne by the potential recipient couple irrespective of whether they receive oocyte donation as planned or not.
- In case of unused surplus/ spare embryos, consent of the concerned couple should be obtained to cry preserve such embryos for donation to other needy couples. Such embryo donations should be kept anonymous.

The ownership rights of such embryos rest with the couple concerned.

Gametes and embryos:

Respect for embryo can be shown by –

1. Accepting limits on what can be done in embryo research;
 2. Committing to an inter-disciplinary process of peer group review of planned research; and
 3. Carrying out an informed consent process for gamete and embryo donors.
- Further, respect for the embryo's moral status can be shown by careful regulation of conditions of research, safeguards against commercial exploitation of embryo research, and limiting the time within which research can be done on embryo up to 14 days' growth i.e. when the primitive streak appears.²³

²² <http://www.legalserviceindia.com/article/I413-Breach-Of-Confidentiality-&-Various-Legal-Issues.html>

²³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563268>

This restriction is in keeping with the policy in several nations that permit research with embryos. At this time, the development of nervous system begins and the embryo begins to become a distinct individual. With regard to use of gametes or embryo –

- no • No woman shall be handled with gametes or embryos produced from multiple men or women's gametes;
- no ART clinic shall mix semen from two individuals before use;
- no ART clinic shall provide a couple with embryo of desired sex;
- no gametes shall be stored for more than 10 years; v an embryo shall be stored for not more than five years; v sale, transfer or use outside India is prohibited;
- The donor must waive all parental rights to any child conceived from her or his gamete.

Women have a special position as care givers for children with disabilities. Since the bulk of care falls upon the women, she should make the final decision among reproductive options, without coercion from her partner, her doctor, or the law. The choice is more than the absence of legal prohibition or coercion and should include the economic and social ability to act upon a decision, including disability. There should be a positive right to affordable genetic services, safe abortion and medically indicated care for children with disabilities.

4.4.3 Cloning (through nuclear transplantation or embryo splitting): The possibility of human cloning cannot be rejected since sheep and mice have already been cloned. However, since its safety, success, utility and ethical acceptability is not yet established, research on cloning with intent to produce an identical human being, as of today, is prohibited.

4.4.4 Specific Principles - Legitimacy of the Child born through ART: A child born through AR is presumed to be the legitimate child of the couple having been born within the wedlock and with consent of both the spouses with all the attendant rights of parentage, support and inheritance.²⁴ Sperm/ oocyte donor should have no

²⁴Egon Guttman, "Presumptions of Legitimacy and Paternity Arising out of Birth in Lawful Wedlock" Vol. 5, No. 2 (Apr., 1956), pp. 217-229 (13 pages) *The International and Comparative Law Quarterly*, Cambridge University Press <https://www.jstor.org/stable/755846>

parental right or duties in relation to the child and their anonymity should be protected.

4.4.5 IVF-ET (in-vitro fertilisation and embryo-transfer) and Surrogate Motherhood: There are no medico-legal problems posed by IVF-ET with egg and sperm of married couple. Donation of either egg or sperm is governed on the same lines as those for Artificial Insemination Donor with the married partner as the natural or biological mother.

IVF-ET with donated egg or sperm or womb leasing will create two to three sets of parents, genetic/ biological and natural. Following consensus has emerged universally with respect to surrogate motherhood:

1. Surrogacy is a contract in which a woman undertakes to carry a pregnancy that is genetically unrelated to her and her husband to term and then hand over the kid to the genetic parents with whom she has entered into a surrogacy agreement.
2. It should be resorted to only when it is coupled with authorized adoption wherever applicable.
3. The intending parents should have a preferential right to adopt the child subject to six week's postpartum delay for necessary maternal consent.
4. Genetic parent's claim for the custody of the child in its the best interest through adoption would be, to prove that the child is theirs using genetic (DNA) fingerprinting, the results of which will be kept in the clinic's records.
5. Surrogacy should only be used if it is medically shown to be the only remedy for infertility or any other medical condition that prevents the intended mother from becoming pregnant.
5. A qualified consultant should supervise to enforce adequate genetic screening.
6. Abortion under the Abortion Law on the medical ground should be inviolate the surrogate and genetic parents have no claim to the money that has already been paid.

8. The contract for surrogacy is legally enforceable. It shall provide for all expenses related to medical management during pregnancy, delivery, and immediate postpartum period till adoption and should be borne by the intending couple. Monetary compensation for agreeing to be the surrogate may also be specified in the agreement.

9. Information about the surrogate shall be kept confidential except with the consent of the person whom the information relates to or by court order.

10. ART clinics shall not provide surrogate mothers or information on potential surrogate mothers to couples or individuals. Preservation, Utilisation and Destruction of Embryos:

- Research is prohibited on embryos of more than 14 days after fertilization excluding the period during which the embryo was frozen with maximum storage period of 10 years and a 5 yearly review of semen and embryo deposits as practiced in other countries eg. U. K. Spare Embryos:
- Embryo-splitting may be resorted to in selected cases for overcoming the paucity of suitable embryos during ART in a couple. Child born of cryo-preserved embryos after divorce is deemed to be illegitimate if existing law does not permit it.

4.4.6 Right of Children / Parents:

- Because the kid was born in wedlock and with both spouses' consent, an ART-born child is assumed to be the couple's legitimate child. As a result, the child will be entitled to parental support, inheritance, and all other rights that a child born through sexual relations would be entitled to.²⁵
- Children born through the use of gametes donor, as well as their social/adopted parents, have the right to know any medical or genetic information about the child's genetic parents that may be significant to the child's health.
- The child's has a right to seek information on genetic parent(s) or surrogate mother (including a copy of the DNA fingerprint, if available) when they

²⁵*Supra note 13* at 4.

reach the age of 18, with the exception of information on the gamete donor's or surrogate mother's personal identity, which is only necessary in life-threatening medical situations.

- The couple is not obliged to provide the information to the child on their own when s/he reaches the age of 18, but no attempt must be made by the couple to hide this information from the child should an occasion arise when this issue becomes important for the child.

4.5 Draft of Assisted Reproductive Technology (Regulation) Bill, 2008 -

The process of regulating conceptive technologies (like artificial insemination, in vitro fertilisation and surrogacy) commonly known as Assisted Reproductive Technologies (ARTs), which started in 1999 in the country, reached an important turning point on September 13, 2008. At a two day National Consultation on 'Assisted Reproductive Technologies (ARTs): Emerging Concerns and Future Strategies' organised by Sama²⁶ Resource Group for Women and Health in New Delhi, the Draft Assisted Reproductive Technologies (Regulation) Bill & Rules-2008 was produced by the Indian Council of Medical Research.. The Bill has been in the pipeline for about three years now and has finally been made public on the websites of the Ministry of Health and Family Welfare and the Indian Council of Medical Research.²⁷

Women and health rights activists have been looking forward to the drafting of this Bill in light of the unregulated practice of these technologies and the increasing commercialisation and commodification of women's reproductive tissues. The Bill is based on the 'Accreditation, supervision, and regulation of ART clinics in India: National Guidelines' issued by the ICMR in 2005. It is a welcome and much appreciated step, but unfortunately, it carries on the vestiges of the drawbacks present in the guidelines. Although some of the concerns regarding the guidelines have been taken into account, many issues-some new, some old-continue to be contentious.²⁸

²⁶Sama, *ARTs and Women Assistance Reproduction or Subjugation?*(Sama- Resource Group for Women and Health, New Dehli, 2006).

²⁷Sarojini N B, Aastha Sharma, "The draft ART (Regulation) Bill: in whose interest?" access on 12-10-2018 <https://doi.org/10.20529/IJME.2009.009>

²⁸*Ibid.*

Concerned activists feel that the Draft Bill tends to regularise and promote the interest of the providers of these technologies rather than regulate and monitor the current practices. The Bill is also inadequate in protecting and safeguarding the rights and health of the women who undergo these procedures, surrogates and egg donors and of the children born through these techniques. The Bill also actively promotes medical tourism in India for reproductive purposes. Though the Bill takes some step to regulate the process of surrogacy in the context of growing numbers of foreign couples coming to India, the equally important issue of Indian women also becoming egg ‘donors’ for foreign couples is not taken into consideration.

The Bill, making commercial surrogacy legal, prohibits the use of the egg of the surrogate mother for attaining pregnancy. This implies that an infertile couple will have to look for a surrogate as well as an egg donor; further, a woman with a healthy reproductive system (surrogate) will be subjected to a complicated, hazardous and expensive procedure like in vitro fertilisation rather than a simpler one like intra uterine insemination (IUI). The legislation is self-contradictory when it comes to protecting the anonymity of the surrogate. The document, while insisting on a number of measures to be taken to ensure the anonymity of the surrogate, states that the surrogate mother should register under her For medical care, she must use her own identity, as well as the names of the couple for whom she is acting as surrogate. If the legislation makes it mandatory for the surrogate to disclose her identity, then it is unclear as to how her privacy and anonymity will be maintained.²⁹

In case the intended couples are NRIs or foreigners, The law allows them to select a guardian who will be legally responsible for the surrogate during the pregnancy and until the child is given to the foreigner or foreign couple. But, there is no clarity on who can be the local guardian and the guardian’s exact responsibility. Also, the role of the local guardian in case of any mishap to the surrogate or the child does not find a mention in the legislation.³⁰

The legal parentage of children born through surrogacy has not been adequately tackled and situations where the intended couple no longer want the child,

²⁹<https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>

³⁰ [https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET\(2013\)47440 EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)47440_EN.pdf)

split up, pass away or abandon the child have not been addressed. The process of handing over the child from the surrogate to the intended parents has also not been adequately addressed. The legislation also clarifies that the name on the birth certificate will be that of the genetic parents, thus equating the term with intended parents/parent. Such a clause, although protecting the anonymity of the donor, presumes that the intended parents will also be the genetic parents.³¹

The Bill states that In her lifetime, a woman can be a surrogate for three successful deliveries, including a maximum of three attempts at pregnancy for a single couple. This takes the number of times she can undergo IVF cycles to a high figure, thus jeopardising her physical and mental health. Along similar lines, the Bill permits a woman to donate her eggs six times in her life, at intervals of three months, which again could be hazardous for her health. But an important aspect of the maximum number of eggs that can be retrieved in each IVF cycle is still left untouched in the legislation, thereby completely leaving it in the hands of the providers to decide on this.

Surprisingly, semen banks have been made quite an important player in the ART industry and are supposed to provide not only donor semen but also donor oocytes and surrogates. Egg or oocyte retrieval from a donor, unlike semen collection, is a complicated process and calls for sophisticated equipment as well as expertise. The process of equipping semen banks for these procedures is not clear. Moreover, semen banks have been permitted to advertise and make payments to donors and then source them to the ART clinics. The legislation is silent on the regulation of the semen banks in spite of giving them important roles.

The document is still ambiguous on certain key areas like the maximum age of women who can opt for ARTs (while mentioning the minimum age to be 21 years), the eligibility of persons from different sexual orientations for accessing these technologies, and listing the disorders/diseases that a gamete donor and surrogate need to be screened for. Certain other clauses also call for an explanation of the rationale behind them, like prohibiting the use of sperm or eggs from a relative or a known person, prohibition of genetic surrogacy, and the role envisaged for the semen

³¹*Id.*

banks. The Bill is weak on the operational realities of the processes it aims to put in place and contradicts itself at several places.³²

However, the drafting of the Bill should be looked at as a positive step towards regulation of this burgeoning industry. But the ICMR must not rush into finalising the Bill till a wider debate across the country, at various levels and regions, has been conducted and their responses incorporated. The Bill should be kept open for public critique for at least a period of six months, during which all concerned groups can adequately articulate their suggestions³³.

4.6 Draft of Assisted Reproductive Technology (Regulation) Bill, 2010-

The Assisted Reproductive Technologies (Regulation) Bill, 2010 [henceforth to be known as the 'Bill'] aims to fill the void that exists in the legal regulation of surrogacy in India.³⁴ Ideally, it would have been expected that the Bill would give tantamount importance to the protection of the rights of a surrogate, as citizens of India, as desperate and poor women resorting to any means to survive economic hardships and as the foundations on which the surrogacy industry and the whole argument of them being players in the medical tourism business rests.³⁵ It is clear that the Bill merely aims at regulating the thriving ART industry by bringing it under the aegis of the government through the establishment of regulatory bodies both at the state and central levels and participation of scientific, reproduction, bio-ethical and human rights etc. experts at both levels. By intending to legalize surrogacy, more specifically, commercial surrogacy, it basically sidelines the globally controvertible moral and ethical debates on surrogacy to nought in the Indian context³⁶. *The Bill also rejects the Law Commission's recommendation in Report No. 228 titled "Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy," which had highlighted the need for legislation in this area and suggested a ban on commercial surrogacy while accepting*

³²Supra note 24 at 7.

³³Ibid.

³⁴The Assisted Reproductive Technologies (Regulation) Bill, 2010

³⁵M.P. Verma, *Surrogacy Medico-Legal Paradigam*, 29 (G.B. Books, New Delhi, 2016).

³⁶Katarina Trimmings and Paul Beaumont (ed.), *International Surrogacy Arrangements-legal Regulation at the international level*, 187(Hart Publishing Ltd., United Kingdom, 2013).

*altruistic surrogacy in India as "...the need of the hour..." and thus ".....a pragmatic approach..." reality".*³⁷

However, the incorporation of the state of reality in the Bill as it is, could also be the direct effect of the only decision of the Apex Court relating to surrogacy, ***Baby Manji Yamada vs. Union of India and Another***³⁸ rather than the recommendations of the Law Commission. The issue relating to the absence of a regulation was highlighted in the case but the Court accepted the existing phenomenon of surrogacy and surrogacy contracts in India to the effect of accepting it as legal in the following words:

"We need not go into.....whether bona fides are involved or not." In the Indian social context specially, children are also a kind of old age insurance. If marriage is a personal choice monitored by social practices and obligations in India, so is motherhood; to not become a mother is rarely a matter of personal choice and in the least, encouraged. In this conundrum of familial pressure, concerns over genetic progeny and continuation of property rights of a group of persons who are genetically related to each other, not having a 'next generation' has made persons look to alternative remedies for continuation of the bloodline. Apart from the desire for a genetic progeny, medical issues resulting in infertility in couples could also be a factor contributing to the need for a child and the relevance of alternate methods of reproduction. Incapacitations of reproduction like low sperm count, impotency or other medical problems or terminal diseases could make it impossible for the male to contribute to pregnancy.³⁹ Recurring miscarriages, ectopic pregnancies, absence of a womb or other health problems on the other hand might make pregnancy critical for a woman. It can so happen that a genetic progeny might inherit defective genes from either parent and create complications for the child conceived as well as the mother.⁴⁰ These are some factors that push people towards ART, not to mention convenience and appalling but often disguised reasons like "hedonistic womb leasing". In order to

³⁷ G.K. Goswami, *Assisted Reproduction and Conflict in Rights*, 115(Satyam Law International, New Dehli 2017)

³⁸ *Baby Manji Yamada vs. Union of India and Another Writ Petition (C) NO. 369 OF 2008 SC*

³⁹ *Supra note 17 at 4.*

⁴⁰ <https://www.nujs.edu/workingpapers/analysing-the-status-of-the-surrogate-mother-under-the-assisted-reproductive-technologies-regulation-bill2010.pdf>

prevent hedonistic womb-leasing, the Bill categorically states ‘infertility’ as the single reason for which persons, single as well as couples, can opt for surrogacy in India.

However, the parameter for determination of ‘infertility’ is the prerogative of the ART clinics and its doctors; the qualifications to being allowed to opt for surrogacy have been dealt with in Part III. ART, of which surrogacy is a small ‘service’ sector, has to a large extent helped in solving these problems. As treatment of infertility has become more high profile, medical technology has developed new techniques to assist conception over the past thirty years.

India herself has received ART, beginning with a lot of scepticism for almost the same number of years with its first test tube baby being born on the 3rd of October, 1978.

Assisted Reproductive technology (ART) has been defined under the Bill to mean “all methods for obtaining a pregnancy by touching or altering gametes, sperm, or oocytes outside the human body and then transferring the fertilised embryo into the woman's reproductive tract”.

This ‘manipulation’ could be through artificial insemination (AI) or implantation of fertilized gametes in a womb under clinical conditions. There are varied methods of artificial insemination, one where the semen of the husband or partner is used and is generally known by the term “Assisted Insemination by Partner (AIP)” and the other where the sperm comes from a donor the latter as “Artificial Insemination by donor (AID)”.

4.7 The Surrogacy (Regulation) Bill, 2014 and Indian Visa Regulation 2012, Ministry of Home Affairs -

The Draft ART Bill 2014 has made it clear that the only kind of surrogacy permitted under the Bill is ‘gestational surrogacy ‘or ‘in vitro fertilization surrogacy’ (IVF) or ‘host uterus surrogacy’. This means that the egg involved in the pregnancy is not from the surrogate, thus ensuring that she has no genetic links with the child she is carrying. However, it must be noted that gestational surrogacy is more invasive than artificial insemination and will take a greater toll on the health of the surrogate. While this definitely puts an end to the ambiguity in this area, concerns have been

raised about this. Many surrogates form emotional bonds with the child in their womb. Such a scenario raises questions surrounding what might be the best way to accommodate the surrogate's emotions along with the parental rights of the commissioning couple.⁴¹

Even an oocyte donor, who actually shares genetic linkages with the baby, has no parental rights. This means that only the commissioning couple, who is paying money to obtain a child, can claim to be parents. From a long term policy perspective, anthropologists fear that this essential zed perspective of parenthood might lead to the process of birth being viewed as a mere manufacturing process, thus commodifying the baby and creating a business of 'baby-selling'. The law has mandated provision of insurance for the development and growth of only a child in whom abnormalities are detected during the gestation period.⁴²

While the legislative intent behind this is clear, in as far as ensuring that a child with unique medical needs does not languish for want of care in case of death of commissioning parents, it would be beneficial to extend insurance cover for all children, up to a certain age. What happens in the case of death of commissioning parents (Indian citizens or NRIs) before custody of child? There is no provision for insurance cover or appointment of guardian, like there exists in the case of OCI/PIO/foreigner married to Indian citizen. It seems that while legislature is being over-cautious vis-à-vis non-Indians, it is failing to adopt the same strict scrutiny for Indian couples. Additional safeguards have been adopted in the 2014 Bill, such as that the foreigner must necessarily be visiting on a medical visa (and not on a tourist visa, as was the norm) and OCIs, PIOs and foreigner married to an Indian citizen will require an 'exit' permission from the concerned authorities for the child or children born through surrogacy before leaving India. Children born to these three groups of persons will not be considered citizens.

This Bill restricts the option of availing ART procedures to only a married couple consisting of a man and woman, where the woman has been proven to be unable to conceive by natural means. This excludes four categories of potential

⁴¹<https://nslr.in/wp-content/uploads/2019/04/NSLR-Vol-11-No-11.pdf>

⁴² Ipshita Bhawania, "The Draft Assisted Reproductive Technology (Regulation) Bill, 2014: A Legislative Analysis", Vol.1, Nalsar Student Law Review (2019)
<https://nslr.in/wp-content/uploads/2019/04/NSLR-Vol-11-No-11.pdf>

parents: homosexual couples, single men or women, couples in live-in relationships and the third gender. A potential Constitutional challenge could lie under this, in the event that this Draft Bill became law, as it adversely affects the rights of four groups of stakeholders.

4.8 The Surrogacy Bill, 2016-

The surrogacy Bill, 2016 was presented in Lok Sabha on November 21, 2016 and is listed for passage this month. The Bill regulates altruistic surrogacy and prohibits commercial surrogacy.⁴³ The objectives of the bill are the prohibition of foreigners from exploitation of women, especially those in rural and tribal areas. The bill, in effect, will help authorities to take action on the various surrogacy rackets that are currently in operation across the country. There have also been many instances of childless couples of very advanced age opting for surrogacy and IVF. Though the bill so far just prohibits single parents, the homosexuals and live-in relationship couples to opt for altruistic surrogacy, many hope the guidelines will also aid in dissuading 'senior couples' from opting for this as well.⁴⁴

1 According to the bill (defines) “surrogacy as a practice where a woman gives birth to a child for an intending couple and agrees to handover the child after the birth to the intending couples”.

2- Surrogacy for commercial purposes is prohibited, however altruistic surrogacy is permitted. Other than medical expenditures and insurance coverage during the pregnancy, there is no monetary compensation for the surrogate mother in altruistic surrogacy. Surrogacy or comparable operations performed for a monetary gain or reward (in cash or kind) in excess of minimum medical expenses and insurance coverage are referred to as commercial surrogacy.

3- Surrogacy is legal if it is (i) for intending couples who have been diagnosed with infertility, (ii) altruistic, (iii) not for economic gain, and (iv) not for the aim of selling, prostitution, or other forms of exploitation.

⁴³ The Surrogacy (Regulation) Bill, 2016

⁴⁴ Prabhanjan Kumar Singh, “Critical Evaluation of Draft Surrogacy (Regulation) Bill”, 2016, vol. 2 *Jamia Law Journal* (2017) access on 12-10-2018 http://docs.manupatra.in/newsline/articles/Upload/6DEF4F8E-39FD-4CF4-9893-B9178597B595.%20Prabhanjan%20Kumar%20Singh__Civil.pdf

4- A 'certificate of essentiality' and a 'certificate of eligibility' should be granted by the competent authority to the intended couples.

5- A District Medical Board certificate of proven infertility for one or both members of the including couple; I a Magistrate's court order of paternity and custody of the surrogate child; and (ii) insurance coverage for the surrogate mother.

6- The following are the requirements for obtaining a certificate of eligibility: I they must be Indian citizens and have been married for at least five years; (ii) they must be between the ages of 23 and 55 for females and 26 to 55 for males; and (iii) they must not have any surviving child (biological, adopted, or surrogate); this does not include a child who is mentally or physically challenged or suffers from a life-threatening disorder or fatal illness. Regulations may specify additional conditions.

7- To obtain a certificate of eligibility from the appropriate authority, the surrogate mother must I be a close relative of the intending couple (ii) be an ever married woman with a child of her own; (iii) be 25 to 35 years old; (iv) be a surrogate only once in her lifetime; and (v) have a certificate of medical and psychological fitness for surrogacy.

8- Within 90 days of the Bill becoming an Act, the federal and state governments must nominate one or more competent authorities. The competent authority's responsibilities include: I issuing, suspending, or cancelling surrogacy clinic registration; (ii) enforcing surrogacy clinic standards; (iii) investigating and taking action against violations of the Bill's provisions; and (iv) suggesting rule and regulation changes.

9- Surrogacy clinics are not permitted to perform surrogacy-related procedures unless they are registered with the proper authority. Clinics must apply for registration within 60 days of the appropriate authority's appointment.

10- The National Surrogacy Board (NSB) and the State Surrogacy Board (SSB), respectively, will be established by the federal and state governments. The NSB's responsibilities include I advising the central government on surrogacy policy, (ii) establishing a code of conduct for surrogacy clinics, and (iii) overseeing the operation of SSBs.

11- The following offences are listed in the bill: I commercial surrogacy; (ii) exploring the surrogate mother; (iii) abandoning, exploring, or disowning a surrogate kid; and (iv) selling or importing human embryos or gametes for surrogacy.

12- These offences will carry a minimum sentence of ten years in prison and a fine of up to ten lakh rupees.

13- The bill specifies a wide range of offences. Furthermore, further contraventions of the bill's procurements will be punished, as will the start of business surrogacy. We provide a high-level overview of the bill as well as some key points to consider.

4.9 The Law Commission of India 228th report-

The Law Commission of India submitted the 228th report on ART procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements⁴⁵. The following explanation had been made by the Law Commission.

1- Surrogacy will continue to be governed by a contract between the parties, which will include all terms requiring surrogate mother's consent to bear child, agreement of their husband and other family members for the same, artificial insemination procedures, reimbursement of all reasonable expenses for carrying child to full term, willingness to handover the child born to the commissioning parents, and so on. However, such an arrangement should not be commercial in nature.

2- A surrogacy agreement should include financial assistance for the surrogate kid in the event that the commissioning couples or persons die before the child is delivered, or if the intended parents divorce and no one wants to take the child.

3- A surrogacy contract must include life insurance coverage for the surrogate mother.

4- Because the biological relationship is the primary source of love and affection for a kid, one of the intended parents should also be a donor. If the intended

⁴⁵ The Law Commission of India 228th report <https://lawcommissionofindia.nic.in/reports/report228.pdf>

parent is single, he or she should be a donor to be able to have a surrogate child; otherwise, adoption is the means to have a child if biological and adoptive parents are not compatible.

5- Without the requirement for adoption or even a declaration of guardianship, legislation should regard a surrogate kid as the legitimate child of the commissioning parents.

6- Only the commissioning parents' names should appear on the surrogate child's birth certificate.

7- The right to privacy of both the donor and the surrogate mother should be respected.

8- Surrogacy that is based on a woman's gender should be forbidden. (Sex-determination surrogacy should be prohibited)

9- Abortion cases should be controlled solely by the Medical Termination of Pregnancy Act of 1971.

The above report of the law commission even support surrogacy in India but has emphasized the proper way of operating surrogacy in Indian conditions. So law must address to save woman from exploitation through surrogacy which is another perturbing factor. The law commission has strongly recommended against commercial surrogacy and expects a strong legislation with respect to ART to regulate surrogacy business.

4.10 Surrogacy (Regulation) Bill, 2019⁴⁶

Provisions the Surrogacy (Regulation) Bill 2019 contains a number of provisions. There are two types of surrogacy that are covered by the law. Surrogacy for profit vs. surrogacy for good A circumstance in which the surrogate mother receives no monetary compensation other than medical expenses and insurance coverage during the pregnancy is known as altruistic surrogacy. This sort of surrogacy is the most popular in the bill, and it meets the needs of today's culture. Surrogate

⁴⁶<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>

mothers, in particular, have been used for a long time, and fundamental reforms are now required to address this social issue. The second type of surrogacy is commercial surrogacy, which includes monetary incentives or compensation (in cash or in kind) in addition to medical bills and insurance coverage.⁴⁷

4.10.1 Altruistic Surrogacy Requirements⁴⁸

1. Childless couples are those who have not had a child naturally for 5 years after marriage and have been diagnosed with infertility and are between the ages of 23 and 55 for women and 26 and 55 for males.
2. There is a requirement that the surrogate mother be a member of the family. Furthermore, the bill must properly define relative in order to understand the situation.
3. There is a clause that no monies will be transferred as an enticement, except for medical or insurance needs.
4. 4. The surrogate mother must be between the ages of 25 and 35 years old in order to act as a surrogate mother. She can only be a surrogate mother once in her life.

4.10.2 Surrogacy Prohibited Acts / Categories⁴⁹

- 1) Surrogacy for profit
- 2) Homosexual Couples
- 3) Foreigners, NRIs, and PIOs
- 4) Individuals who are in live-in relationships
- 5) Parents who are single
- 6) Couples who are not married.

4.10.3 The bill also covers the following offences that will be covered by the 2019 bill:⁵⁰

1. Engaging in or promoting commercial surrogacy Abandoning, exploiting, or disowning a surrogate child.

⁴⁷Avinash Krishna Goswami and PradeepKulshrestha, "Surrogacy (Regulation) Bill, 2019: A Critical Appraisal" *Research Gate* (2020) access on 30-10-2021
<https://www.researchgate.net/publication/340443765>

⁴⁸<https://www.drishtiiias.com/daily-updates/daily-news-editorials/surrogacy-regulation-bill-2019>

⁴⁹ Supra note 47 at 16.

⁵⁰The Surrogacy (Regulation) Bill, 2019 Sec 35

http://164.100.47.5/committee_web/BillFile/Bill/70/137/156-C%20of%202019_2019_12_12.pdf

2. Taking advantage of the surrogate mother (Exploiting of the surrogate mother)
3. Disowning, abandoning, or exploiting a surrogate child
4. Selling or importing human embryos or gametes for surrogacy. The above-mentioned offences can result in a ten-year prison sentence and a fine of up to ten lakh rupees.

4.11 Surrogacy (Regulation) Bill, 2020⁵¹

The Bill seeks to act as an ethical, moral and social legislation which protects the reproductive rights of a surrogate mother as well as the rights of the child born through surrogacy. It will also help in establishing regulatory frameworks to monitor surrogacy. The main objective of the Bill is to prevent exploitation of surrogate mothers, abandonment of children born out of surrogacy and the import of human embryos and gametes which have been reported over the years.⁵²

It can be stated that the Bill, 2020 has a positive impact on ‘Mother-workers’. It is an initiative to protect the interest of women who are involved in it, to promote fair play in the trade and to ensure that commercial surrogacy is banned. Further, the Bill mainly focuses on the regulation of surrogacy in India and seeks to establish National Surrogacy Board at the central level and State Surrogacy Board along with appropriate authorities at the Union and State territories.⁵³

The Government has formulated various draft Bills to regulate surrogacy over the years in 2008, 2010, 2014, 2016, 2019 and latest draft Bill being the Surrogacy (Regulation) Bill, 2020. The new Bill provides certain rules and restrictions on who can avail and who cannot avail surrogacy. The Bill proposes a complete ban on commercial surrogacy, restricting ethical and altruistic surrogacy to legally wed infertile Indian couples only. It also creates a ban on the overseas Indians, foreigners, unmarried couples, live-in partners and gay couples to be a part of surrogacy. The following are some of the important features of the Bill.⁵⁴

⁵¹<https://pib.gov.in/PressReleaseDetail.aspx?PRID=1603649>

⁵²Sidhart Behera, “A Critical Analysis of the Surrogacy (Regulation) Bill, 2020”, (2020) <https://lexforti.com/legal-news/surrogacy-regulation-bill-2020/>

⁵³*Ibid.*

⁵⁴Supra note 3 at 1.

- a. It allows any “willing” woman to be surrogate mother.
- b. It included live-in couple, divorced women, widows, non-resident Indians (NRIs), persons of Indian origin (PIO), and overseas citizenship of India (OCI) etc.
- c. Instead of five years, the term of confirmed infertility has been decreased to one year.
- d. It aims to make ethical altruistic surrogacy available to prospective infertile Indian married couples aged 23-50 for women and 26-55 for men.
- e. It suggests establishing a National Surrogacy Board at the federal level, as well as State Surrogacy Boards and competent authorities in states and union territories.
- f. The insurance coverage for surrogate mothers has been increased to 36 months from 16 months provided in the earlier version.
- g. . The bill requires the couple to get a certificate of necessity as well as a certificate of surrogacy eligibility.
- h. . It suggested banning commercial surrogacy, as well as the sale and purchase of human embryos and gametes.

4.11.1 Impact of the Bill on Surrogacy Contracts

Since the Bill has introduced stringent regulatory mechanisms, it is pertinent to analyze the issue of validity of surrogacy contracts. Surrogacy contracts play a vital role in the process of surrogacy.⁵⁵

In the absence of a surrogacy contract, it becomes very difficult to regulate the process since it could lead to a lot of legal hassles. The major purpose of surrogacy contracts is to protect the surrogate mothers, the intending parent(s) and the child equally.

The financial and legal issues are taken care by such contracts. The issue of surrogacy contracts raises three conflicting questions: –⁵⁶

1. Do surrogacy contracts amount to baby selling?
2. Whether surrogacy contracts are forbidden by any law or opposed to public policy?
3. Is the purpose of surrogacy contract unlawful in lieu of s. 24 of Indian Contract Act, 1872?

⁵⁵*Supra note 43* at 14.

⁵⁶*Ibid.*

The most conflicting issue raised on surrogacy contracts is that whether such contracts amount to baby selling. The 2020 Bill has put an end to all such speculations by seeking to put a blanket ban on commercial surrogacy.

Proponents of commercial surrogacy argue that a woman has a right to procreate and can claim compensation for the gestation period. However, such an argument does not stand valid in the eyes of law because commercial surrogacy contracts ignore the rights of the surrogate mothers and undermine them.

4.12 Conclusion

Surrogacy is legal in India; however it is neither prohibited nor completely regulated. Surrogacy is currently unregulated in India due to a lack of legislation. It is regarded enforceable and fully legitimate because it is not expressly declared unenforceable by law. The Ministry of Health and Family Welfare published the non-binding After years of discussion and debate, India issued National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in 2005. primarily among the ICMR, the National Academy of Medical Sciences, and ART practitioners. In the lack of any codified legislation, which is the case exclusively in the case of surrogacy arrangements, the ordinary civil law of the land would apply to surrogacy arrangements as well, because there is no specific law to govern such arrangements. The Assisted Reproductive Technology Bill, 2008 was created by the Indian Council of Medical Research to regulate and legitimise many forms of reproductive technologies, including commercial surrogacy. The Indian Law Commission, in its 228th Report, explains why surrogacy laws are necessary.

The Cabinet has recently approved the introduction of the Following a succession of advancements in the realm of regulating the illegality issue through many Assisted Reproductive Technology (Regulation) Bills, the Surrogacy (Regulation) Bill was introduced in 2016. Bill 2019 and Bill 2020 are two separate bills. However, there are also serious faults in this bill that could exacerbate the problem. In 2005, the Indian Council of Medical Research (ICMR) issued rules that made surrogacy lawful in India. They authorised monetary compensation if the surrogate and commissioning parents agreed. It also emphasised the need of surrogate

life insurance and safeguarded both parties' privacy. It outlawed sex selection as well as surrogate egg donation for embryos.

In the case of *Balaz v. Union of India*, the Honourable Supreme Court of India ruled that the citizenship of the child born through this technique is determined by the surrogate mother's citizenship. Surrogacy should be available to all single people, married couples, and unmarried couples, according to the draught Assisted Reproductive Technology Bill of 2010, which was never passed into law. The Surrogacy Regulation Bill of 2016, which was passed in 2016, was hailed as a watershed moment in India's surrogacy policy. Surrogacy should be available to all single people, married couples, and unmarried couples, according to the draught Assisted Reproductive Technology Bill of 2010, which was never passed into law. The Surrogacy Regulation Bill of 2016, which was passed in 2016, was hailed as a watershed moment in India's surrogacy policy. The bill places a high priority on de-commercializing and preventing surrogacy from becoming commercialised, as well as protecting surrogate mothers and children born through surrogacy. The bill lays out a comprehensive regulatory framework for current surrogacy facilities. The draught bill, however, is not without flaws. The Surrogacy (Regulation) Bill, 2019 was enacted by the Lok Sabha on August 5, 2019 to prohibit commercial surrogacy and protect surrogate mothers' rights. It specifies the requirements for becoming a surrogate mother. The surrogate should be a married woman between the ages of 25 and 35, who is a close cousin of the commissioning parents and has at least one child. She must demonstrate that she is emotionally and physically healthy, and she should never have been a surrogate in the first place. The surrogate will not be able to use her own eggs in the process. Surrogacy is only permitted in Indian couples who have been married for at least 5 years and have proved infertility, with the wife being 23-50 years old and the husband being 26-55 years old. The prospective couple must receive a certificate of 'essentiality' and a certificate of 'eligibility' from the competent body authorised by the state or central government and must not have any surviving child (biological, adoptive, or surrogate). Surrogacy has become trendy, with many celebrities opting for the procedure. Any clinic not registered with state or national surrogacy boards would be barred from performing surrogacy procedures. Surrogacy clinics would be governed by these boards, which would establish a code of conduct and oversee their operations. Before embryo transfer, the surrogate mother has the

option to refuse the agreement. In accordance with the Medical Termination of Pregnancy Act of 1971, she is permitted to have an abortion with her written agreement, pending approval by the competent authority. Violators, who engage in commercial surrogacy, exploit the surrogate, abandon or exploit the surrogate child, or misuse gametes/embryo for surrogacy face a fine of up to ten lakh rupees and a sentence of up to ten years in jail. It declares the biological parents of a surrogate kid to be the biological parents of the child born through surrogacy.

The following are the provisions of the Surrogacy Regulation Bill of 2016. 1. It prohibits the use of commercial surrogates. 2. Foreigners are unable to find surrogate moms in India. 3. It allows infertile Indian couples to use surrogacy. 4. The length of a marriage is crucial. 5. A surrogate mother cannot be compensated. 6. Surrogacy can only be obtained from a close relative. 7. You can't have another child if you already have one. Surrogacy is a fertility treatment that is only available to childless couples. Couples with natural-born and/or adopted children are unable to have more than one child Surrogacy will be permitted only if it is a one-time option. Surrogacy is used to create a child. 9. Regulatory bodies in charge of surrogacy A National Surrogacy Board, led by the Health Minister, will be established at the national level. Following that, State Surrogacy Boards and competent lower-level authorities shall oversee and regulate all cases and matters connected to surrogacy, as well as the supervision of hospitals and clinics that provide the service.

The government has drafted many draught Bills to regulate surrogacy throughout the years in 2008, 2010, 2014, 2016, 2019, and the most recent draught Bill is the Surrogacy (Regulation) Bill, 2020, in response to the rapid proliferation of surrogacy clinics around the country. The new Bill establishes various guidelines and limitations on who is eligible for and who is not eligible for surrogacy. The bill wants to outlaw commercial surrogacy and limit ethical and altruistic surrogacy to lawfully married infertile Indian couples. Surrogacy is also prohibited for overseas Indians, foreigners, unmarried couples, live-in partners, and gay couples.



CHAPTER 5
JUDICIAL RESPONSE TOWARD
SURROGACY



CHAPTER 5

JUDICIAL RESPONSE TOWARD SURROGACY

5.1 INTRODUCTION

In Asian countries, there are not set specific law of artificial reproduction technology, but in the execution the law specifically prohibits any forms of surrogacy in Japan. However, in South Korea and Thailand, non-commercial surrogacy is allowed, but for the cognizance of the parent child relationship between the two countries isn't identical. Reproductive provisional authority of Hongkong has submitted a regulation on surrogacy. Its basic principle is to prohibit commercial surrogacy, allowing non-commercial surrogacy¹. The draft is in favor of a surrogacy regulation. The surrogate mother is limited to married women. It prohibits unmarried women to serve as a surrogate mother and also prohibits unmarried women to seek a surrogate mother². Western countries appropriately open surrogacy legislation gradually and surrogacy becomes a mainstream, according to the objective demand of surrogacy. It also makes the western countries to maximize the legislative achievements to realize the dream of infertile couples. For the protection of women and children, commercial surrogacy is banned in many countries. But in practice it is really not easy to put an end to commercial surrogacy³. Therefore, countries must from all aspects strengthen the supervision of surrogacy agency and be strict with censorship on surrogacy. Otherwise, legal prohibitions will not exist. Countries such as Britain and America open genetic surrogacy. Overall, Asian countries on surrogacy legislation present a limited open trend from a complete ban. Judicial response on surrogacy issues related. Thus we find that in some countries the law has been settled

¹ Rimm J., "Booming baby business: Regulating commercial surrogacy in India. University of Pennsylvania Journal of International Law" (2009) access on 12-10-2018
<https://scholarship.law.upenn.edu/jil/vol30/iss4/1/>

June Stephenson. "Women's Roots: The History of Women in Western Civilization", 2000 Posner Richard A. The ethics and economics of enforcing contracts of surrogate motherhood., *The Journal of contemporary health law and policy*, 1989 access on 11-11-2018 https://www.researchgate.net/publication/320953250_Assumption_of_Ethical_Rules_of_Surrogacy

³ Richard A Posner, "Regulation of the Market in Adoptions, Boston University Law Review. 1987 access on 23-09-2018 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2903&context=journal_articles

while in others, it is in the process of making. The country where the law has not been drafted or is in process of drafting, the concerned courts have responded in diverse ways in the cases coming before them concerning surrogacy arrangement. Let's discuss some leading cases national and international level.

5.2 UNITED STATES OF AMERICA

In re Baby M Case

On February 3, 1988, the Supreme Court of New Jersey invalidated a contractual agreement between William and Elizabeth Stern and Mary Beth Whitehead.⁴ The Sterns wanted a baby but believed they could not safely conceive; Whitehead wanted to give "the 'gift of life'." Their contract stipulated that Whitehead would be inseminated with William Stern's semen, gestate the baby, and surrender it to the Sterns for a fee of \$10,000.³ The court's rejection of the surrogacy contract did not signal a concern that Whitehead had signed it under duress, or lacked the mental capacity to understand the contractual terms. Nor was the court worried about misrepresentation. Instead, in the court's judgment,

The surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this...through the use of money.

"There are in a civilized society," the court concluded, "some things that money cannot buy." In addition to the scientific and sociological changes that have occurred since the Baby M decision, courts and legislatures across the United States have articulated a wide range of legal approaches to surrogacy.

Johnson v. Calvert Case

In the 1993 case of Johnson v. Calvert⁵, involving a zygote formed from the egg and sperm of the intended parents, the California Supreme Court found the intended mother to be the child's "legal, natural" mother, and held that the surrogacy contract was not "inconsistent with public policy." In reaching its decision in Johnson

⁴*In re Baby M*, 537 A.2d 1227, 1261 (N.J. 1988)

⁵*Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993)

v. Calvert, the California Supreme Court underscored that view, concluding that “woman who wanted to produce the kid – that is, she who intended to give birth to a child who would be raised as her own -- is the natural mother under California law.” In contrast, in 1992, the New York Legislature passed a law stating that “Surrogate parenting contracts are hereby deemed to be against this state's public policy, void, and unenforceable.” Beyond New York and California, some states limit intended surrogate parents to married couples, others place sharp restrictions on who can serve as a surrogate, a few prohibit payment to surrogates, and still others have been silent about surrogacy in both legislation and case law. Globally, nations have adopted widely divergent approaches to surrogacy, from prohibition to acceptance. All the while, infertility rates among women in the U.S. hover at approximately 12%, and surrogacy has become “a booming, global business.”

Doe v. Kelley Case

In 1978, after appealing to the public's sense of altruism by publicizing the plight of these couples, Keane was finally successful in attracting surrogates for all of the couples, each of whom had babies through surrogacy arrangements." Despite these success stories, Keane's primary objective was to arrange for the legal payment of fees to surrogate mothers. To this end, he attempted to determine a method by which to circumvent the Michigan adoption statutes, which prohibited payment of money to a mother for relinquishing her rights to her child. Thus, in representing an infertile couple in **Doe v. Kelley**⁶, Keane unsuccessfully challenged these laws.

In this case, the Michigan Court of Appeals held that, *even though a couple might legally use a surrogate to conceive a child, any payment made to the surrogate in exchange for the release of her parental rights to the child was illegal under state law.*

Frustrated by Michigan's hard-line rejection of compensation for surrogates, Keane decided to work with a clinic in Kentucky, where the payment to a woman for the relinquishment of her parental rights to a child had not been prohibited. As part of his work, Keane sent Michigan couples to Kentucky, where they established

⁶Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DePaul J. Health Care L. 557 (1999) access on 10-09-2017 <https://via.library.depaul.edu/jhcl/vol2/iss3/5/>

residency, completed adoption proceedings, and paid the surrogate mother \$10,000 for her “services.” These procedures made Keane’s practice of arranging surrogacy agreements highly successful, and helped popularize surrogacy as a viable solution to infertility.

In the 1980s, surrogacy became a prominent practice in California and many other states. In addition to its newfound popularity, the technological aspect of surrogacy expanded with the success of the first gestational surrogacy arrangement in 1986. By the mid-1980's, however, the growth and success of surrogacy arrangements was thwarted by legal battles and controversies.

New State Ice Co. v. Liebmann Case

American-style federalism leaves a great many policy decisions in the hands of the states, including most of those involving health and welfare. A common justification for this delegation of power was articulated by Justice Louis Brandeis in *New State Ice Co. v. Liebmann*⁷, where he wrote in dissent: “One of the wonderful side effects of the federal system is that a single brave State can act as a laboratory, allowing its population to test out new social and economic experiments without putting the rest of the country at risk.”

5.3 UNITED KINGDOM

Baby Cotton’ case

The SAA was initiated as a response to the ‘Baby Cotton’ case and was later amended to make surrogacy arrangements unenforceable. Kim Cotton became the first (paid) UK surrogate after receiving £6,500 from an anonymous American couple. The Local Authority intervened and the resulting baby was made a ward of court, with the media treating it as a ‘baby for- cash’ deal illustrating misunderstandings of surrogacy.⁸ Cotton subsequently established the UK’s first surrogacy agency, Childlessness Overcome through Surrogacy (COTS), and has recently stated she does not regret the choice she made.

⁷New State Ice Co. v. Liebmann, 285 U.S. 262, 387 (1932)

⁸<https://www.lexiswebinars.co.uk/legal/family-law/update-on-surrogacy-2020/supporting-materials/Re-C-A-Minor-Surrogacy-Wardship-1985>.

5.3.1 The Surrogacy Arrangements Act 1985

The Surrogacy Arrangements Act 1985 sought to outlaw profit-making agencies from assisting in the creation of surrogacy arrangements. It makes any payment to third parties illegal and bans advertising in relation to surrogacy.⁹

*Section 2 makes it a criminal offence to make surrogacy arrangements on a commercial basis. No criminal offence is committed by either the surrogate mother or the commissioning couple if between them it is agreed that payments will be made to the surrogate mother. However any other person, company or agency who for payment negotiates makes or otherwise assists in a surrogacy arrangement commits the offence.*¹⁰

Section 3 makes it a criminal offence to carry advertisements about surrogacy in any newspapers etc and to distribute such advertisements.

*Section 4 deals with offences. On conviction for an offence under section 2 a person is liable to a fine and/or imprisonment; and to a fine for conviction under section 3.*¹¹

The Surrogacy Arrangements Act 1985 was amended by section 36 of the Human Fertilization and Embryology Act 1990: see below.

5.3.2 The Human Fertilization and Embryology Act 1990

The 1990 Act gave legal effect to the wider recommendations in the Warnock Report and followed a consultation paper in 1986 and a White Paper in 1987. It contains two provisions in respect of surrogacy:

If certain circumstances are met, the courts can make an order allowing a child to be treated in law as the child of a couple under Section 30. Conditions are met as follows:

the child is genetically related to at least one of the commissioning couple; the surrogate mother has consented to the making of the parental order (or is incapable

⁹The Surrogacy Arrangements Act 1985

¹⁰*Ibid*

¹¹*Ibid.*

JUDICIAL RESPONSE TOWARD SURROGACY

of doing so or cannot be found) no early than 6 weeks following the child's birth; the commissioning couple are married to each other and are both aged 18 years or over; the commissioning couple have made the application within 6 months of the child's birth; no money other than expenses has been paid in respect of the surrogacy arrangement unless authorized by the court; the child is living with the commissioning couple; The commissioning couple is usually from the UK, the Channel Islands, or the Isle of Man.

In other words, provided that all these conditions are met, this provision enables the court to order that the commissioning couple in a surrogate arrangement is to be treated in law as the parents without their having to adopt the child. A court considering an application for a parental order will be assisted by a detailed written report from an independent specialist social worker.¹²

Section 36 introduced section 1A into the 1985 Act to provide that 'No surrogacy agreement can be enforced by or against the people who make It.' i.e. surrogacy contracts are unenforceable in the courts. This means that the surrogate mother cannot be required by the commissioning parents under any contractual provision to hand over her child, nor can the commissioning parents be required to hand over any money, or recover any money paid to the surrogate mother under the terms of such a contract.¹³

In addition, section 27 of the 1990 Act provides that, in respect of treatment which is regulated by the Act, then 'a woman who is carrying or has borne a child as a result of an embryo or sperm and eggs being implanted in her; and no other woman, is to be treated as the mother of the child'. This is relevant where IVF or donor inseminations (which are regulated by the Act) are involved.

The Parental Orders (Pos) should not be used to govern parenthood status in surrogacy arrangements, especially as they are granted ex post facto. IPs should be recognized as legal parents after their child's birth. The irrelevance of POs is seen through the courts' consistent purposive interpretation of the section 54 HFEA 2008 requirements - all bar three have been circumvented to promote the child's welfare.

¹²The Human Fertilisation and Embryology Act 1990

¹³*Ibid.*

The only relevant provisions are the applicants' domicile and the age requirement due to underlying policy issues and ensuring the courts do not overstep their boundaries.

The Section 54 (3) of HFEA 2008 imposes a six-month time limit to apply for a PO. The is J observed that "there is no power vested in the court" to extend 54 the deadline, reiterated by Eleanor King J who found she could not grant a PO regarding a 7.5 month old child. Such strict application does not promote the child's welfare, especially as POs not only help affirm the child's identity by recognizing their parents in law, but affords the parents legal rights.¹⁴

As the is J notes, POs reflect "the reality of what was intended, [...] and more accurately reflects the child's identity." POs are also the only way to fully recognize and protect the child's Article 8 ECHR right (respect for one's private and family life), as adoption orders "effectively deny adequate recognition of the Applicants' and children's identity." The strict applications also highlight the absurdity of assigning parenthood ex post facto as there could be any number of reasons why a person did not apply for a PO. There should not be a time limit imposed upon 'claiming' legal parenthood of one's child born through something other than 'natural' intercourse, therefore, the requirement should be abolished.

That said, Munby P "blew this subsection into smithereens" in **Re X (A Child) (Surrogacy: Time Limit)**, describing the limit as "almost nonsensical", doubting it was Parliament's intention that an application be refused if it were lodged one day late. He subsequently granted a PO regarding a child over two years old. Purposive interpretation of the statute is to be applauded as it clearly acknowledges the paramountcy principle. Time limits are immaterial now as many other cases have followed **Re X**, heightening the "mockery" that has been made of the requirement, truly "hammering the nails into the coffin" of section 54.

Despite the fact that Section 54(4)(a) of the HFEA 2008 stipulates that the child's residence must be with the applicants, this need not mean that both are alive when it is granted.¹⁵ In **A v P (Surrogacy: PO: Death of Applicant)**, despite the husband's death, Theis J granted the order signifying that but for the death, the child's home would have been with them both, emphasizing the fact it promotes the

¹⁴The Human Fertilisation and Embryology Act, 2008

¹⁵*Ibid*

child's welfare. Furthermore, in **Re A and B (No. 2 - Parental Order)** Theis J granted POs even when the parents had separated and lived in separate homes. It was just unsuitable for the twins to stay at their father's accommodation; the quality of contact remained the same. A recent case also evidences that the marriage need not contain a sexual element.

Despite one of the parties to the marriage being homosexual, this did not negate its validity. There was also no question of the child's home being 'with' both the parties, despite them living separately, because the child was equally familiar with both. These cases illustrate the court's creative approach to the subsection and heighten its immateriality.

The Act requires at least one of the applicants to be domiciled in the UK. This has been strictly enforced, as in **Re G (Surrogacy: Foreign Domicile)**¹⁶. A recent case, **Y v Z &Ors**,¹⁷ further highlights the strictness of this provision. The case concerned a PO application where the child, X, was living with the genetic father, Y, in New York, and the other applicant, Z, living in London (without permanent right to reside). The judgment seems to suggest that the child's best interests under English law, in ensuring their identity is reflected as the child of the IPs, is second to the domicile requirement in certain circumstances. Theis J concluded that, despite Z's optimism of securing permanent residency, "it is more likely that Z retained his domicile of origin in Country B" and so the PO application could not proceed. A distinction regarding the paramountcy principle seems to be made when there is an overseas element with no real possibility of the child coming into contact with the overseas applicant (Z has not had contact with X since late 2015). Given the unlikelihood of contact, and because Z cannot establish domicile in the UK, the child's best interests are side-stepped in English law because there is no real need to consider them. Thus, domicile should potentially remain a requirement because it ensures the courts are not overstepping their boundaries by inadvertently giving rise to permanent residency - but regard should be had to the psychological impact of not receiving a PO upon an applicant.

¹⁶Re G (Surrogacy: Foreign Domicile),

¹⁷Y v Z &Ors,

According to the Section 54 (6)-(7) of HFEA 2008 The law requires the surrogate's consent to the PO, vesting enormous power in the surrogate wherein she can retain legal parenthood status even out of spite.¹⁸ This is, however, rare. There are only seven reported cases of a dispute between the surrogate and IPs.

Sometimes, the surrogate may wish to keep the child due to concerns regarding the IPs' behavior. Two recent cases, evoking opposite conclusions despite using similar reasoning, are of use here: **Re M** in which the baby was ordered to stay with the surrogate; and **Re H**, in which the child was placed in with the IPs after the surrogate withheld consent.

In **Re M**, Black LJ allowed the surrogate, X, to keep the child, despite having no genetic link, due to the IPs' "potentially exploitative" behavior, and that the child's welfare was more likely to flourish with X as a result of already having a child and being more accustomed to a child's needs.

Whilst genetics are given little importance in **Re M**, they are given more weight in **Re H**. After giving birth, the surrogate refused to relinquish the child to the IPs, one of whom was the genetic father. This was, again, due to the application of the welfare principle. McFarlane LJ said the IPs were best able to promote the child's welfare due to being able to meet their demands in an "attuned way" and because their identity as the child of a homosexual couple "would be best met by living with a genetic parent." She also made reference to different types of 'parent' considered by Baroness Hale in **Re G (Children) (Residence: Same-Sex Partner)** which are: (i) genetic (ii) gestational, and (iii) social/psychological. What constitutes a 'parent' will be explored in the next chapter, but it is relieving to see the courts acknowledging diverse family structures whilst prioritising the child's welfare. In contrast to **Re M**, emphasis was placed on the existence of a genetic link in determining where the child should live. However, this was in relation to the child's identity, not as an indicator of parenthood.

Unreasonable withholding of consent cannot be overturned by the court, unlike in adoption. If consent is unreasonably withheld, the courts should be able to override this to engage the child's welfare. An exception to obtaining consent is if the

¹⁸*Id.*

surrogate cannot be found and the applicants have exhausted all reasonable avenues of attempting to find them, as well as it being in the child's best interests and/or would better enhance their identity.

For IPs, this solves only part of their issue. The fact the court is already willing to dispense with consent in some circumstances paves the way to viewing it as superfluous if unreasonably withheld.

The law also regards the surrogate's consent to a PO as 'ineffective' if given within six weeks of childbirth. Considering the child has most likely been living with the IPs since birth, this is arbitrary as it constrains the IPs' decision-making capacity because they are not legal parents. If a surrogate gave birth to a premature child which led to health complications, all medical decisions would have to emanate from the surrogate. This is unacceptable because the surrogate has entered the agreement knowing the child is not theirs. Herein lies a fundamental issue with POs being granted ex post facto, and it will be examined in the following chapter how parenthood assigned at birth to the IPs would better promote the child's welfare. This subsection also undermines the autonomy of the surrogate to make free and unconditional arrangements which is stipulated in section 54(6), making the six week rule paradoxical.¹⁹ The presumption of parenthood should be reversed so the IPs enjoys automatic legal parenthood, and it would be up to the surrogate to contest this. As such, this requirement should be removed to resolve the "inherent uncertainty that permeates the current law."

The Section 54 (8) of HFEA 2008 provides provision regarding payment(s). The courts have retrospectively authorized payments for decades to promote the child's welfare. 'Reasonable' is not defined, but it would be illogical to deny a PO based on monies paid, especially as it impacts both the parents and child.²⁰ Hedley J found it is "impossible to imagine a set of circumstances "where the welfare of any child would be not "gravely compromised "by refusing to grant a PO. In this case, a surrogate was given €25,000 which she explicitly stated would be for a deposit on a flat. This clearly contravenes section 54 (8) but a PO was granted nonetheless. This is due to POs being granted ex post facto by which time the child has usually settled into

¹⁹Section 54 (6)-(7) of HFEA 2008

²⁰Section 54 (8) of HFEA 2008

the IPs' home and refusal could damage their welfare. Indeed, Hedley J said that "It will only be in the most egregious cases of public policy abuse." to withhold a PO. Theis J has aptly said payments are now a "non-controversial matter", authorizing a payment of US \$52,523, of which only \$9,500 was expenses, and granting a PO. This illustrates the UK policy of "permitting only 'altruistic' surrogacy as an illusion rather than a reality," and, alongside the current law encouraging dishonestly and creating confusion, reinforces why the requirement should be abolished.

Despite the courts' tendency to retrospectively authorize payments, it is clear from **XX v Whittington Hospital NHS Trust** that they are still ambivalent to commercial surrogacy. Here, a patient was claiming damages because of the hospital's negligence by failing to recognize signs of cancer. The patient subsequently "suffered a complete loss of fertility." The court's conundrum was that she was claiming damages to enter into a surrogacy arrangement in California where commercial surrogacy is legal. Following earlier precedent, the court rejected this argument. She was, however, awarded £74,000 plus VAT to attempt two surrogacy arrangements in the UK.

This, therefore, shows that, whilst the courts will retrospectively authorize payments for the welfare of child, the courts will not award damages to patients where they have expressly said they intend to use this to fund an arrangement unrecognized in UK law. However, XX has recently been granted permission to appeal this decision as the judge concluded there was a public interest in the recoverability of damages for commercial surrogacy where the jurisdiction in question viewed commercial surrogacy as lawful.

5.4 CHINA

In sum, the Chinese government has not issued a general prohibition on surrogacy and surrogacy contracts are not necessarily invalid under Chinese law. Their validity will depend on how the content of these contracts is evaluated by a court.²¹

²¹Raposo, VeraWai, U Sio, "Surrogacy in Greater China: The Legal Framework in Taiwan, Hong Kong, Macao, and Mainland China" *UCLA Pacific Basin law journal* (2017) access on 23-11-2019 <https://escholarship.org/uc/item/41d104d5>

Surrogacy contracts will still be illegal if a court concludes that they violate “public interest,” which is generally understood as a kind of “social morality,” according to Article 55(3) and 58(5) of the 1986 General Principles of Civil Law.

Nonetheless, Chinese legal scholars cannot reach a consensus on whether surrogacy contracts violate the “public interest” or not. If the contract involves a payment to the surrogate, it is definitely illegal, since the 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank impose a prohibition on any kind of commercialization in the context of reproductive technologies, including human gametes and human embryos.²²

This raises the important legal question, why was the surrogate getting paid? Is the surrogate paid for the egg (which may even be provided by a donor) or for the embryo or because of the gestational service she provides? If it is the first (the egg) or the second (the embryo) then the payment violates the Ethical Principles. Conversely, if the surrogate is merely being paid for the gestational service it can be argued that the Ethical Principles are not being violated. Practically, however, it seems that unpaid surrogacy escapes from the legal prohibition.

Despite the dubious legal status of surrogacy arrangements, surrogacy arrangements remain surprisingly widespread in China. Some studies allege that in the last thirty years more than 25,000 babies were born from surrogacy arrangements carried out by around 500 unlicensed agencies. In addition, the demand for this procedure is growing by up to thirty percent, especially underground, as the market takes advantage of the internet. The reasons for the proliferation of surrogacy arrangements are various, but the increase of infertility rates and the importance of preserving bloodlines (or, at least, bloodline semblances) are probably the main reasons for the boom in surrogacy contracts.²³

²²*Id.*

²³*Ibid*

5.5 JAPAN

Baby Mukai case

A somewhat different conflict over parenthood arose in the Baby Mukai case²⁴, in which a Japanese media personality, Aki Mukai, and her professional wrestler husband, Nobuhiko Takada, arranged for a surrogate to bear their child. A de facto ban on surrogacy in Japan led Mukai and Takada to find a jurisdiction that would allow them to contract with a surrogate mother. They chose Nevada, where in 2003 two embryos created with Mukai's eggs and Takada's sperm were implanted in a surrogate. Unlike Whitehead, Cindy (the surrogate) willingly relinquished the babies, and Mukai and Takada obtained a birth certificate from Nevada listing them as the baby's legal parents.⁵⁸ When they returned to Japan with their twins, however, the Japanese government refused to recognize Mukai as the mother, triggering a legal conflict over parentage that languished until Mukai legally adopted the children five years later.

5.6 AUSTRALIA

Despite being stated as the father or mother on an international birth certificate and being recognised under the Australian Citizenship Act 2007, intended parents of children born to surrogates overseas (whether biologically related or not) the) are only recognised as gamete donors/providers and have no legal status as parents. The non-biological parent has no legal position as a parent when a third-party gamete was used.

In the case of **Adair &Anor and Bachan**²⁵ the Family Court of Western Australia made orders granting equal shared parental responsibility to the biological father, Mr Adair, of twins born in India as a result of a commercial surrogacy arrangement and his former partner, Mr. Bonfils, who lived with Mr. Adair and shared the care of twins. The birth mother had been served with the application and expressed she had no objection. In noting that the Court must proceed with caution, particularly due to the risk of exploitation of vulnerable women in poorer countries, Duncanson J granted the orders in favors of the applicants on the following basis:

²⁴Yuri Hibino, *Gestational Surrogacy in Japan*, in *Handbook of Gestational Surrogacy: International Clinical Practice And Policy Issues* 177 (E. Scott Sills ed., 2016).

²⁵Adair &Anor and Bachan[2017] FCWA 78

...I have approached this matter on the basis that the best interests of the children are the paramount consideration the children have a meaningful relationship with the applicants and it is to their benefit that it continues. They are not at risk of harm in their care. I have considered the terms of the Surrogacy Agreement and notwithstanding concerning issues which can arise from such agreements, in the circumstances of this case I am satisfied that the orders sought are in the best interests of the children. They are loved and cared for by the first and second applicants who make sound and reliable provision for their futures.²⁶

It is noted that parenting orders were made in the above discussed Family Court of Australia case of *Bernieres* which were governed by Part VII of the Family Law Act 1975 (Cth) 560 – the original lower Court judge finding that such orders ‘were entirely appropriate’.⁵⁶¹

In 2017 in the decision of ***Bernieres and Anor & Dhopal***, The Full Court of the Family Court has confirmed that the paternity of children born through offshore surrogacy arrangements cannot be decided under the current Family Law Act 1975 (Cth) 3 As a result of this judgement, the legal paternity of thousands of Australian children born through surrogacy agreements that do not comply with state laws remains in question.²⁷

This means that their biological (& social) parents may:

- Not being able to make decisions concerning their child's education and medical treatment;
- Not being able to travel with the child overseas;
- Should they decide to divorce or separate, they will face legal issues.
- Dealing with inheritance and pension issues can be tough; and
- The surrogate must be consulted and included in all future choices about their child.

²⁶*Id.*

²⁷*Bernieres and Anor & Dhopal* [2017] FamCAFC 180 (1 September 2017)

*Farnell v Chanbua*²⁸

FCWA [2016] 17 per Thackray J. the Discussion should be had with the Commonwealth Government and other states and territories concerning the issue of the granting of citizenship, passports, and/or long-term visas to children born as a result of commercial surrogacy arrangements given the specific complexities that arise in relation to ART, donor conception, and surrogacy, and the strong public policy position against commercial surrogacy taken in Australia. The Commonwealth, State and Territory governments have called for ‘greater harmonisation of laws’. This may include “consideration of whether Commonwealth citizenship laws should be harmonised with all the other laws of this country”.

5.7 SOUTH AFRICA

Surrogacy has been established as a legally recognised procedure in South Africa. The legal consequences of surrogate motherhood are incorporated in the Children’s Act, 2005. The Act defines surrogate mother as ‘an adult woman who enters into a surrogate agreement with the commissioning parent’. A common definition of a “surrogate” is a woman who substitutes for another who is unable to become pregnant. The Act further defines a surrogate motherhood agreement as:²⁹

“an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent”

In an African custom, like in the biblical times, the substitute wife and the original wife’s husband should “lie together” for the process of pregnancy to take place. In other words, surrogacy involves actual sexual intercourse with the husband of an infertile woman.

²⁸Farnell v Chanbua FCWA [2016] 17

²⁹the Children’s Act, 2005

Actual sexual intercourse is involved in the customary approach. Surrogacy in terms of customary law is regulated by the customary rules of a particular traditional community.

The facts of *Ex parte WH* are straight-forward. The application was brought by a male same-sex couples (the commissioning parents), domiciled in South Africa, and united (presumably) in terms of the Civil Union Act (16 of 2006) (the court uses the word “married”). The couple does not have children of their own and “both being male persons are incapable of having children that are genetically related to them except via the process of surrogacy”.

The court confirmed that commercial surrogacy is prohibited in South Africa, and that it is only allowed for altruistic purposes, and with only specific payments being allowed. The court - under the heading “The surrogate mother and the risk of commercial surrogacy” - notes that agencies facilitating the introduction of surrogate mothers to commissioning parents play an important role, although this role can easily lead to abuse.

5.8 THAILAND

Public attention to the issue of commercial surrogacy services in Thailand was heightened after widely read media coverage exposed the negative downsides of the ART market in Thailand. What started as a discrete practice with time became a large and booming industry. More precisely, the rapid development of the surrogacy industry took place in 2012 following the new Indian surrogacy requirements that restricted access to ART exclusively to married heterosexual couples. As a consequence of the increasing public acceptance of ART, a wide range of private fertility clinics, medical practitioners, and surrogate parenting agencies emerged. The rapid growth of the surrogacy industry in Thailand attracted large number of foreign couples in search of gestational carriers.

In the absence of legislation and regulation to limit discretion, a series of illegal practices took place on an extensive scale. These practices violated the spirit, if not the letter, of the Announcements 1/2540 and 21/2544 of the Medical Council of Thailand.

JUDICIAL RESPONSE TOWARD SURROGACY

A first major scandal occurred in January 2011 when a raid conducted by Thai police freed 13 Vietnamese women from a surrogacy clinic operated by the Taiwanese-owned company “Baby 101.” The business advertised surrogate motherhood services in Thailand offering commercial surrogacy arrangements to international clients for a fee of about US \$5000. The illegal company “Baby 101” even had a Web site which described itself as a company with offices in Bangkok, Phnom Penh, and Vietnam and registered with the Russian Federation in Vladivostok that offered “eugenics surrogacy.”

Baby 101 provided both surrogacy and egg donation services and had on its Web site several photographs of women who could be chosen as surrogate mothers by potential customers (ie, intended parents). For women who were unwilling or unable to conceive and/or carry a child on their own in the natural manner, there was a US \$32,000 package where the commissioning parents had to provide their eggs and sperm, determine the sex of the future child, and select the gestational carrier of their choice. Subsequently, the surrogate mothers were brought to specific clinics in Bangkok waiting to give birth to the surrogate child as stipulated in the surrogacy agreement.

At the time of the raid, police arrested Taiwanese staff and 1 Chinese. Among the 13 Vietnamese women who were rescued, were pregnant with children allegedly destined for other people and a further 2 women were identified at a hospital after just having given birth.

This high-profile case reached its conclusion on June 22, 2012 when the Court of First Instance of the Minburi District found all 5 defendants in the case guilty as charged. The Court found that the 5 defendants did not inform the victims of the nature of the job, and the victims agreed to this offer without knowing that they would have to act as surrogates for the company’s customers. The defendants arranged a 1-way trip to Thailand for the 4 victims. After their arrival in Thailand, the defendants picked the victims up from the airport and brought them to a house in Thararom Village in Bangkok. The victims were forced to stay in the house and their movements were strictly monitored by the defendants at all times³⁰

³⁰(Minburi Provincial Court Black Case No. 3375/2554)

The Court also found that after staying in the house for a while, the defendants told the victims that they had been hired to become pregnant for the company's customers. If they did not, they would have to pay 940 USD as a penalty, and to pay for the tickets to go back to Vietnam themselves. The victims did not have any money, they were far away from home, unfamiliar with Thailand, and their passports had been taken away by the defendants. Therefore, they could not leave Bangkok and had to agree to the defendants' demands³¹.

The 4 Taiwanese defendants were sentenced to 5 years and 3 months in jail for working in the Kingdom without a work permit (Section 9 Subsection 1 and Section 51 Subsection 1 of the Working of Alien Act, B.E. 2551 (2008)), deprivation of liberty of others (Section 310 of the Criminal Code), trafficking in persons for the purpose of exploitation (Section 6 and 52 of the Anti-Trafficking in Persons Act, B.E. 2551 (2008) to gather with Section 83 of the Thai Criminal Code), and a 220 000 baht fine (US \$7040) for hiring illegal migrants. The Chinese defendant was sentenced to 3 months in jail for working in the Kingdom without a work permit. After several discussions and legal processes, on December 11, 2011, 11 babies involved in the scandal were finally sent to Taiwan to their biological families.

On this point, Whittaker²⁰ interestingly notes that "Despite public outrage within the Thai press at the time, this case prompted no widespread investigation into the industry."

A second high-profile surrogacy controversy erupted in 2014 when an Australian couple was accused of abandoning a baby with **Down syndrome (Baby Gammy)** carried by a Thai surrogate while taking his healthy twin sister. This case, in fact, made international headlines and highlighted to the eyes of the world the laxity of ART regulations in Thailand.³²

More precisely, the case of Baby Gammy, being cared in hospital by his Thai gestational surrogate, garnered worldwide attention in August 2014. Mother-of-2 Ms Janbua Patharamon received 16 000 in Australian dollars to undergo a pregnancy for a commissioning couple and successively fell pregnant with twins in breach of Thai Medical Council guidelines (Murdoch, 2014). However, when one of

³¹ (Minburi Provincial Court Red Case No. 2176/2554)

³² Down syndrome (Baby Gammy)

the twins was diagnosed with Down syndrome, Janbua was requested to terminate her child's life and undergo a partial abortion. As she refused, the intended parents decided to abandon Gammy in Thailand and return with Gammy's twin sister, Pipah, to Australia. It must be pointed out, however, that the commissioning couple has denied the accusations and several versions of the story have been circulated in the media. While the Thai surrogate mother stated that an "Australian couple took home only one baby after she had twins, leaving a boy, Gammy, who is being cared for by Ms Janbua in hospital, the commissioning couple has said that they had not been told about Gammy's birth." In an interview to ABC news, the Australian couple declared that they were not told about the baby boy's existence and that the surrogacy agency no longer existed.

The story was reported by the media after appeals from Ms Janbua Pattharamon for contributions for her son's medical expenses from international foundations. In an interview, she declared that she had decided to be a surrogate mother to pay her debts and had rejected the possibility of abortion when she found out that one of the twins was affected by Down syndrome.

Instead of institutionalizing Baby Gammy, she decided to care for him. Subsequently, the commissioning couple took only the healthy child and went back to Australia, abandoning Baby Gammy with the surrogate mother. As the story hit the news headlines, further media investigations revealed that the Australian father David Farnell was a convicted sex offender who spent time in prison for sexually abusing young girls and Australian authorities were investigating into the welfare of Baby Gammy's sister. Several hundred thousand dollars were raised in funds to support Baby Gammy who became an Australian citizen in January 2015 and remains in the care of his surrogate mother.

After Baby Gammy's high-profile international scandal exposed the unethical practices of certain IVF clinics in Thailand, Thai authorities launched a crackdown on commercial surrogacy and the new legislation became a priority.

5.9 CANADA

The Supreme Court decision, the responsibility for regulating many reproductive technologies now lies with the provincial governments.

In December 2010, the Supreme Court of Canada struck down much of the federal government's Assisted Human Reproduction Act (AHRA) for infringing provincial jurisdiction. Over two decades after the federal government began attempts at regulation (and six years after the AHRA's enactment), there suddenly existed no Canadian legislation in controversial areas such as in vitro fertilization, licensing of assisted human reproduction clinics, and research involving human and nonhuman reproductive material. Although criminal prohibitions remained, the federal government's capacity to regulate reproductive technologies had been gutted.³³

A sixth part of the typical ART policy complex - parentage policy - was left out of the AHRA. Parentage policy involves the procedures used to determine and transfer parental responsibility for children born through assisted reproduction. As noted above, surrogacy raises parentage issues in dramatic fashion. Similar or related issues are posed by egg and sperm donation, regardless of who gestates the fetus. Ottawa's decision to steer clear of this policy area - which was included in the British model on which Canada otherwise relied - was the AHRA's only significant concession to Canadian federalism.⁶ Parentage law (such as law governing adoption) differs from province to province due to longstanding provincial variation in common law and family law, and any attempt to set national regulations for assisted reproduction parentage seemed unlikely to withstand constitutional challenge.³⁴ In this vein, while the Act created a criminal prohibition for commercial surrogacy, it contained no discussion of surrogacy contracts, which are considered provincial jurisdiction and are often decided on a case-by-case basis.

That parentage was the AHRA's only concession to federalism does not mean that the rest of the Act was free of constitutional doubts. Far from it! So significant and prominent were federalism-based doubts and challenges that neither the AHRA nor AHRC ever functioned coherently or effectively. As a single, comprehensive enactment (covering all of the relevant policy areas except for parentage) the AHRA embodied the Royal Commission's view that given "the overarching nature, profound importance, and fundamental inter-relatedness of the issues involved,... federal regulation of new reproductive technologies ... is clearly warranted." But this view,

³³Dave Snow and Rainer Knopff, *Assisted Reproduction Policy in Federal States: What Canada Should Learn From Australia*, SSP, Volume 5, Issue 12, April 2012 Volume 5 • Issue 12 • April 20

³⁴*Attorney General of Quebec v. Attorney General of Canada* [2008], QCCA 1167, para. 25).

which had been controversial from the outset, was authoritatively rejected in December 2010, when a narrowly divided Supreme Court, upholding a decision of the Quebec Court of Appeal, struck down most of the AHRA's regulatory provisions as exceeding federal jurisdiction, while sustaining the Act's prohibitory provisions as appropriate federal criminal law. Twenty-one years after the Royal Commission began work, Canadian policymakers found themselves back to square one on many of the issues addressed by the AHRA.

The AHRA contained both criminal prohibitions and regulations. The prohibitions - whether those concerning human cloning, embryo research, offspring engineering, or payment for surrogacy - might be controversial on policy grounds, but there was little doubt that they fell within the scope of Ottawa's criminal law jurisdiction. Any suggestion that the provinces would control the entire field of ART policy was impossible from the beginning. Certainly the criminal prohibitions in the AHRA aroused no opposition on jurisdictional grounds by critics during the AHRA's development, and they were not challenged in the recent litigation before the Quebec Court of Appeal and the Supreme Court.

By contrast, the Act's regulatory provisions - almost all of which dealt with assisted conception - were often portrayed as infringing on provincial jurisdiction over health care.

Three of the four opposition parties dissented on jurisdictional grounds from a 2001 Report by the House of Commons Standing Committee on Health (the Brown Report), which advocated a "single regulatory regime encompassing one set of standards and one set of penalties... with no exceptions." The Bloc Québécois urged coordination with the provinces, claiming "large sectors of the field of medically assisted reproduction are matters of provincial responsibility." The Progressive Conservatives similarly maintained that "the provinces and territories should have to be involved" (emphasis in original). And the Canadian Alliance expressed concern that "attempted federal regulation of assisted human reproduction facilities may raise constitutional challenges." Provinces also considered the AHRA to be "intrusive," with regulatory aspects "interfering with the provincial authority with respect to social and medical aspects of fertility and intervention technologies." Throughout the legislative process, the government of Quebec was particularly active in its

opposition, frequently writing letters to the federal Health Minister insisting that the Act's regulatory aspects would violate the division of powers.

The Act's proponents were often impatient with such constitutional niceties. Diane Marleau, the federal Minister of Health during much of the legislative drafting, acknowledged that assisted reproductive technologies "tended to be in provincial jurisdiction" but said she "didn't care." In her view, these were issues of "women's health... [about which w]e had to do something, and the quicker the better." And the urgent action had to take the form of centralized, national legislation.

In *Rypkema v. British Columbia*³⁵, a case decided while legislation for the Assisted Human Reproduction Act was pending but before the Act was passed, the Director of the Vital Statistics Agency refused to list the intended parents as the legal parents of a child born out of a gestational surrogacy arrangement. The surrogate mother consented both before and after the birth of the child that the intended parents should be the legally recognized parents. The court concluded that because this was not a case where the parental rights of the intended parents were being questioned by the surrogate mother, it was appropriate for the intended parents to be identified as the child's parents on the Vital Statistics Agency's birth registration. The intended parents were therefore not required to go through the process of adopting the child.

Similarly, the Ontario Superior Court of Justice in *JR. v. L.H.*³⁶ declared that the intended parents who were also the genetic parents in an uncontested gestational surrogacy arrangement were the legal parents of the child. Because the Assisted Human Reproduction Act makes no mention of a presumption of parental status, *Rypkema* and *JR.* are, presumably, still good law.

In *Re M.D.*,³⁷ a case filed after the issuance of the Assisted Human Reproduction Act, the Ontario Superior Court of Justice granted custody to the intended parents, declared the intended parents to be the mother and father of the child, and directed the Deputy Registrar to amend the registration of the birth of the child to show that the intended parents were the mother and father.

³⁵*Rypkemav. British Columbia*, [2003] B.C.J. No. 272, 2003 BC.C. LEXIS 4820, at *4-8(B.C.S.C. Nov. 28, 2003)

³⁶*J.R. v. L.H.* [2002] O.J. No. 3998, 2002 ON. C. LEXIS 799 (O.S.C.J. Sept. 3, 2002).

³⁷*Re M.D.* [2008] O.J. No. 07, 2008 ON. C. LEXIS 1147, at *1, 36 (O.S.C.J. Mar. 10, 2008).

However, it must be noted that the decisions in Rypkema and JR. are very limited; neither of these cases involved a dispute between the surrogate mother and the intended parents, and the arrangements were for gestational surrogacy, so the surrogate mothers were not genetically related to the children. In fact, the JR. court noted that if the status of the intended parents was opposed by the surrogate mother, whether the court could award legal parental status to the intended parents would be unclear.

When the surrogate mother objects to the intended parents becoming the legal parents of the child, at least one Canadian court did not recognize a presumption of parental status for the intended parents. The case of **H.L. W. and T.H. W.**³⁸ involved a traditional surrogacy arrangement where the surrogate mother's own egg was used for conception. After the child had lived with the intended parents for three months, the surrogate mother contested the adoption of the child by the intended mother and requested custody of the child.

5.10 INDIA

In India, surrogacy journey can be said to have actually arisen in 2002 when the Supreme Court, the apex Court of the Country, approved commercial surrogacy in India as a legal, even though India's.

Baby Manji Yamada vs Union of India & Anr³⁹

It is very first case which was filed through a writ petition under *Article 32* of the Constitution of India, 1950 before the Supreme Court of India for declaration of legalities of the various issues relating to surrogacy arrangement. Till the date no enact proper law which governs various aspects of surrogacy. The Supreme Court opined in this case that surrogacy arrangements are legal in India and so it ordered to hand over the child Manji born through surrogacy arrangement, to her guardians. The court also held that the medical procedure even in commercial surrogacy is legal in India as it is in many countries of the world.⁴⁰

³⁸H.L.W. & T.H.W., [2005] B.C.J. No. 2616, 2005 BC.C. LEXIS 3326

³⁹2008) 13 SCC 518

⁴⁰Dr. M.P.Verma, *Surrogacy: Medico-Legal Parading* (G.B. Books New Delhi ed. 1st 2016)

JUDICIAL RESPONSE TOWARD SURROGACY

This petition under *Article 32* of the Constitution of India, 1950 (hereinafter for short 'the Constitution') raises some important questions. Essentially challenge is to certain directions given by a Division Bench of the Rajasthan High Court relating to production/custody of a child Manji Yamada. Emiko Yamada, claiming to be grandmother of the child, has filed this petition.⁴¹

M/s. SATYA, the opposing party in this case, filed a Writ Petition in the Rajasthan High Court, claiming to be an NGO. M/s. SATYA filed the D.B. Habeas Corpus Writ Petition in 2008, in which the parties were the Union of India through the Ministry of Home Affairs, the The State of Rajasthan is represented by the Principal Secretary, the Director General of Police, the Government of Rajasthan, and the Superintendent of Police, Jaipur City (East), Jaipur.⁴²

Dr. Patel brokered a contract between Japanese couple Ikufumi and Yuki Yamada and surrogate mother Pritiben Mehta at the Akanksha Infertility Clinic in late November 2007. The couple inserted a stipulation in their contract that stated the husband would care for the child if the couple divorced. The surrogate handed away all rights to the kid, as per Akanksha's customary process. The clinic generated an embryo from Yamada's sperm and an egg from an unidentified donor and implanted it in Mehta as the Yamadas waited. After that, the Yamadas returned to Japan to await the birth of their child. Mehta was given a bungalow worth 325,000 rupees in exchange for her services. (US \$6,825), a one-time payment of 50,000 rupees (US \$1,050), and a monthly allowance of 5,000 rupees (US \$105) for living expenses while pregnant. In India, the monthly total amounted to "the salary of a well-paid blue-collar work."⁴³

The genetic father DrIkufumi Yamada desired to take custody of the child, However, due to the expiration of his visa, he was forced to return to Japan.⁴⁴

Eight months later, just a month before the baby was born, the Yamadas divorced. On July 25, 2008, Manji was born in a private hospital in Ahmedabad,

⁴¹<https://indiankanoon.org/doc/854968/>

⁴²*Ibid.*

⁴³https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/BabyManji_Case2015.pdf

⁴⁴Law commission of india, report no. 228 need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy (20009)

Gujarat.⁴⁵ When Yamada's ex-wife (the intended mother) refused to travel with him to take possession of Manji, he flew to India alone.⁴⁶ Matrimonial discord between the couple resulted in their divorce and the wife refused to honour the agreement.⁴⁷

The Anand Municipality issued a birth certificate that included the genetic father's name. The child was born on 25.07 2008 and moved on 03.08.2008 to Following a law and order crisis in Gujarat, Arya Hospital in Jaipur was established. The baby received much-needed care, including breast-feeding by a woman.⁴⁸

Ikufumi Yamada, the intended father, still wanted to raise Baby Manji, but Yuki Yamada, the intended mother, did not. First, Ikufumi Yamada petitioned the Japanese embassy in India for a Japanese passport for Baby Manji, but the embassy refused due to Japan's birth citizenship requirement. Ikufumi Yamada then addressed the Indian embassy to obtain an Indian passport for Baby Manji so that she may return to Japan. Ikufumi Yamada's status as a single adopted father, however, was not recognised under Indian law.⁴⁹

As a result, the Indian embassy was unable to grant the infant with a passport because in India, a child's passport is issued based on the mother's citizenship. The surrogate, the intended mother, and the egg donor were all unwilling to identify Baby Manji as their own. While the city of Anand issued a birth certificate for Baby Manji, naming Ikufumi Yamada as her father, the slot for her mother's name was left blank. Despite the fact that Ikufumi Yamada was Infant Manji's biological father, he now faced the possibility of having to formally adopt her due to the unique legal circumstances he and the baby were in. India's adoption regulations prohibit a single guy from adopting a female kid, once again posing an obstacle.⁵⁰

Yamada ran into another legal snag: single men are not permitted to adopt newborn girls under a 120-year-old legislation (Guardians and Wards Act 1890). Dr.

⁴⁵IzabelaJargilo, "Regulating the Trade of Commercial Surrogacy in India" vol.15 *JIBL* (2016) access on 12-11-2018<http://scholarlycommons.law.hofstra.edu/jibl/vol15/iss2/12>

⁴⁶Supra note 4.

⁴⁷Stellina Jolly, "Cross-Border Surrogacy: Indian State Practice" *Research Gate* (2017) access on 12-10-2019<https://www.researchgate.net/publication/312570998>

⁴⁸Supra note 5.

⁴⁹SeemaMohapatra, "Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy" *BERKJIL* (2012) access on 23-10-2018https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911716

⁵⁰*Ibid.*

Patel maintained to the press that Yamada did not need to adopt the child because he was the biological father. Despite this, Manji was not permitted to accompany Yamada out of the hospital.⁵¹

Ms. Emiko Yamada, the baby Manji's grandmother, travelled in from Japan to care for her grandson and filed a petition with the Supreme Court under Article 32 of the Constitution.⁵²

A non-governmental organisation (NGO) filed a case in the Rajasthan High Court opposing the baby's grandmother being given custody of Baby Manji (who was born through a surrogacy arrangement). The contract was invalid, according to the NGO, because surrogacy is not governed by any legislation in India, and there are worries about unlawful behaviour in the market.⁵³ Because there was no law controlling surrogacy in India, many illegalities were occurring, and the surrogacy contract was effectively a money-making racket and unlawful, according to the claim. The baby was ordered to be brought before the High Court in four weeks. The petitioner took the High Court's order to the Supreme Court for review. The main issue in this case was who would have custody of the infant born through a surrogacy arrangement.⁵⁴

*The Supreme Court, on the other hand, did not reach a decision on the matter. This appears to be primarily due to doubts about the NGO's locus standi in approaching the Rajasthan High Court to challenge the paternal grandmother's custody of the child. The Court determined that commissions for the protection of children's rights, established under the Commissions for the Protection of Children's Rights Act of 2005, would be the competent body to hear complaints about custody. The Court covered surrogacy and the numerous medical and legal terms related with it in the decision.*⁵⁵

⁵¹*Supra note 4* at 2.

⁵²RichaYadavand and SonaliAnand, "Commercial Surrogacy: Legal, Social, Ethical Issues" vol. 4 *JLSR* (2018) ACCESS ON 26-10-2019
<https://thelawbrigade.com/wp-content/uploads/2019/05/Richa-Sonali.pdf>

⁵³Securing Reproductive Justice in India: A Casebook, access on 23-08-2021
<https://reproductiverights.org/wp-content/uploads/2020/12/SecuringReproductiveJusticeIndia-Chpt04.pdf>

⁵⁴*Ibid.*

⁵⁵*Ibid.*

The importance of this case stems from the fact that it is not only the Apex Court's first judgments on surrogacy, but it also highlights the lack of control in India's surrogacy business. As a result, it can be considered a direct forerunner of the newly passed Assisted Reproductive Technologies (Regulation of) Bill, 2010, which was enacted in response to the 2008 Draft Bill. The case is especially noteworthy since it was determined under the presumption that surrogacy arrangements and motherhood are lawful, with the Court just commenting on their status. The Indian Council of Medical Research had issued guidelines governing surrogacy in 2006, but they were not included in the Court's opinion to buttress its presumption of legality of surrogacy in India.⁵⁶

Jan Balaz V. Anand Municipality and others (AIR 2010 GUJ 21)

The fact of the case is that Jan Balaz and his wife Susanne Anna Lohle came to Anand, Gujarat and opted surrogacy to get the twin children. Jan Balaz applied to the regional Passport Office of the Ministry of External Affairs, Government of India for granting passport to the twin's baby. Accordingly passport was granted under "Tatkal Scheme" Later on, Ministry of External Affairs issued a notice withdrawing the passport due to coming across some new facts that surrogacy is not recognized in Germany and twins' baby cannot get German citizenship if they are not first recognized as India citizen. The twins' babies were left "Stateless" for more than two years.⁵⁷

*According to the regulations of the Registration of Births and Deaths Act, 1969, Anand Nagar Palika issued birth certificates to the children. The surrogate mother's name was listed on the birth certificate as Marthaben Immanuel Khristi. The Gujarat High Court considered the citizenship of a kid born in India to an Indian surrogate mother whose biological father is a foreign national. The petitioner's lawyer argued that because both children were born in India, they are citizens by birth under Section 3 of the Citizenship Act of 1955.*⁵⁸

⁵⁶Jwala D. Thapa, "The 'Babies M': The Relevance of Baby Manji Yamada V. Union of India (UOI) And In The Matter of Baby "M"" vol. 2 *JLS*, access on 28-11-2021
<http://docs.manupatra.in/newslines/articles/Upload/B2DC0190-6995-4560-A6E0-6B65B4895120.pdf>

⁵⁷*Supra* note 1.

⁵⁸Stellina Jolly, "Cross-Border Surrogacy: Indian State Practice" Research Gate (2017) access on 20-10-2019
<https://www.researchgate.net/publication/312570998>

In the lack of any legislation to the contrary, the Court opined that the gestational surrogate who gave birth to twins should be recognized as the legal mother of the twins. It was stated that the factum of the babies' births had been confirmed, and that they were born in India to an Indian mother. The egg donor is also said to be an Indian woman; in any case, the babies' mother is an Indian national. Even though the children are regarded as illegitimate children born in this country to an Indian person, they are nonetheless eligible for citizenship by birth.⁵⁹

The only inference that can be drawn, according to the High Court, is that a gestational mother who has blood links with the child is more deserving of the title of natural mother. She carried the embryo in her womb for ten months and nursed the babies through the umbilical cord.⁶⁰

Aggrieved with the judgment, the Central Government filed an appeal in the Supreme Court of India. Government took the stand that the commission parents are German couple and so and so under citizenship act, 1955 both children cannot be treated as Indian citizen and hence there was no question of granting passport to them.⁶¹

The Indian government appealed the Gujarat High Court's decision to the Supreme Court, where the case is still pending. (Case No. 8714/2010, Union of India v. Jan Balaz).

The two judge bench comprising Justice G.S. Singh and Justice A.K .Ganguli opined that “statelessness” cannot be clamped upon the children. There must be some mechanism by which they can get citizenship of some country. Children should be allowed to leave the country after an assurance that citizenship will be given. The Supreme Court asked the couple to first adopt the child and then take them to their country because Germany does not recognize surrogate motherhood but allows international adoption of children by its citizens. The court also asked the central government to try to settle the issues of citizenship through diplomatic channels.

⁵⁹*Id.*

⁶⁰*Ibid*

⁶¹*Supra note 1 at 1.*

Central government assured to provide one time visa on humanitarian grounds to the twins child.⁶²

This case posed the fundamental topic of whether a judicial decision clarifying the rights of parties in a surrogacy arrangement is required in the situation of foreign biological parents who desire to return the surrogate kid to his or her home country or permanent residency.⁶³

A thorough law establishing the rights of a child born through a surrogacy arrangement the rights and responsibilities of a surrogate mother, egg donor, commissioning parties, legal validity of the agreement, the parent-child relationship, and the responsibilities of the Infertility clinic was also required, according to the Division bench of the HC, comprised of Justices K.S. Radhakrishnan and A.S. Dave. " We have no choice but to hold, in the current legal context, that babies born in India to gestational surrogates are citizens of this nation and hence entitled to a passport, and to direct the passport officials to deliver the passports immediately." the Court said, upholding the boys' citizenship rights.⁶⁴

Javed and Ors. vs State of Haryana and Ors. AIR 2003 SC 3057,

Even while the The Supreme Court upheld the provision prohibiting a person from running for a Panchayati Raj election if they had two living children, it did not state that the right to procreate is not a fundamental right. India's judiciary has also recognized reproductive rights.⁶⁵

B.K. Parthasarthi v. Govt. of Andhra Pradesh &Ors. AIR 2000 AP 156

Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Andhra Pradesh Panchayat. Three writ petitions were filed before the Andhra Pradesh High Court by the disqualified candidates

⁶²*Id.*

⁶³*Ibid.*

⁶⁴"Nyaya Deep", *The Official Journal of Nalsa*, vol.18 (2017) access on 15-11-2018
https://nalsa.gov.in/uploads/pdf/2019/01/08/08_01_2019_428894042.pdf

⁶⁵*Ibid.*

challenging the constitutional validity of the provision arguing, inter alia, that it infringed their right to privacy under Articles 19 and 21 of the Indian Constitution.⁶⁶

These writ petitions raise a significant legal question about the constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994. The individual petitioner in each of these three writ petitions is an elected Chairman or other office holder of one of the local bodies established under the Andhra Pradesh Panchayat Raj Act, 1994. The stated text of the Indian Constitution does not include the "right to privacy" as a constitutionally protected right. The claimed right, however, is acknowledged as a feature of Article 21 of the Indian Constitution. The Andhra Pradesh High Court later ruled that an individual's 'right to reproductive autonomy' is also his 'right to privacy'.⁶⁷

P. Geetha V. The Kerala Livestock Development Board Ltd., 2015 SSC

The court had the opportunity to address a number of important issues in this case, including the concept of motherhood obtained through medical technology, including surrogacy, the legal safeguard for maternity rights, the right of a child to health care, as well as the incorporation of international convention laws into municipal law, and beneficial interpretation of laws.⁶⁸

The court expands the definition of legal maternity or legal motherhood to encompass motherhood achieved via the use of sophisticated reproductive technologies, which may or may not have biological ties to the child. This is consistent with the relevant provision of the UDHR, UNCEDAW, and Beijing Declaration appropriately identified by the court, which states that maternity is a social function coupled with and recognition of the responsibility for the upbringing and development of their children, and imposes a duty on the state government to allow maternity leave as social benefits and prevent discrimination against women on the basis of maternity, and that motherhood and childhood are enmeshed. Accordingly, the Kerala High Court held that women who become mothers through

⁶⁶Securing Reproductive Justice in India: A Casebook
<https://reproductiverights.org/wp-content/uploads/2020/12/SecuringReproductiveJusticeIndia-Chpt02.pdf>

⁶⁷*Supra* note 25 at 6.

⁶⁸SonaliKusum, "Right to child care leave for the women attaining motherhood through surrogacy in India", Vol .48 *AIR 's Labour and industrial cases journal* (2015)
<http://www.familiesthrusurrogacy.com/india->

advanced reproductive technologies (ART) should be treated the same as natural biological mothers and should be entitled to the same set of rights and obligations, and that denial or non-recognition of such rights status would be discriminatory.⁶⁹

Kiran Kailas Gavhande and Others v. Union of India (2018 SCC on Line Bombay. (7463)

In a recent case the court permitted termination of surrogate pregnancy on the ground of complications and risk to the life of the baby.

Dr. PoojaJigneshDoshi v. State of Maharashtra, 2019 SCC Online BOM 1433

A commissioned mother or a woman securing a child through surrogacy would both be considered mothers, as indicated above. Any alternative interpretation would defeat the purpose of maternity leave for a mother who has given birth to the child.⁷⁰

The Court decided that the petitioner was entitled to maternity leave for the child delivered through surrogacy as a result of the abovementioned judgement. The petitioner's numerous leaves were ordered to be changed to maternity leave, as requested by the petitioner.⁷¹

⁶⁹*Id.*

⁷⁰<http://lexcliq.com/case-dr-pooja-jignesh-doshi-v-the-state-of-maharashtra/>

⁷¹*Ibid.*



CHAPTER 6

SOCIO-LEGAL, ETHICAL AND MORAL ISSUES RELATED TO SURROGACY



CHAPTER 6

SOCIO-LEGAL, ETHICAL AND MORAL ISSUES RELATED TO SURROGACY

6.1 Introduction

The reproductive environment has been changed by advances in assisted reproductive techniques like as donor insemination and embryo transfer methods, resulting in 'surrogacy' becoming the most desirable alternative. Many infertile couples who desire a child of their own have found hope in the surrogacy system. They explore other methods such as Artificial Reproductive Technology (ART), With-Vitro Fertilization (IVF), and Intra-Uterine Injections (IUI) in the aim of having a child of their own, taking advantage of improved medical facilities. The word 'surrogate' literally means 'substitute. This means that a surrogate mother will take the place of the biological mother. In layman's terms, a surrogate mother is a woman who is paid to bear a kid and then gives it to her employer upon birth.¹

Surrogate motherhood through newer technologies have introduced undreamt of possibilities in the sexual arena. Because any reproductive technique that replaces the conjugal act is violation of the dignity of procreation when human procreation is disconnected from sexual relation, the spouses can quickly become objects for sex. It becomes difficult to recognize dignity in each other; especially the pre born child. Though, science and technology have made enormous contributions to the society. However, the fact is that it is not ethically right rather controversial.²

Surrogacy carry social stigma in the society as it is equated with prostitution and by virtue of that it is argued that it should be disallowed on moral grounds. Surrogate moms are kept apart from their family and only allowed to see them on weekends, which violates their human rights. Hence, there are number of ethical,

¹Surrogate Motherhood- Ethical or Commercial, Centre for Social Research (CSR)

²Pawan Kumar and Deep Inder (et al), "Surrogacy and women's right to health in India: Issues and perspective" *IJPH* (2013) <https://www.researchgate.net/publication/314153728>. Accesson 10-02-2020

social, legal and psychological issues associated with surrogacy, which require urgent need for framing and implementation of law.³

New industry in India surrogacy, the article started, was India's new form of outsourcing, where couples from all over the world could hire India women to bear their children for a fraction of the cost of surrogacy elsewhere and with no government regulation. Where, a class of womanis valued merely as breeders of childrenof the privileged race, and class. Perhaps India was where Atwood's fears come true, where skinny India women would be kept captive in dormitories like the handmaids-in-training, where they would sleep on old military cots and would be watched continuously by matrons with cattle prods. India had gradually becoming a land of not just slim dogs, call center, and yogis but also baby farms? The surrogacy hostels, locate in towns close to the clinic, are less sterile, and the surrogate have fewer restriction on their movement. They have access to a kitchen (along with cook). Husbands are allowed to visit but are encouraged not to stay the night, to emphasize the requirement that the surrogate cannot have any sexual relations during the nine months of pregnancy.⁴

The economic benefits of motherhood are structured along racial, ethnic, and class lines with poor women renting their wombs out for service to higher-economic women and couple in exchange for capital. They are selling their bodily labour, to more economically privileged women. Commercial surrogacy can be best be understood as stratified reproduction in which poor women and increasingly women from racial and ethnic background are renting their wombs out or "selling their uterus" to wealthier women and men in exchange. They lack the economic, social, and cultural resources of the couple whom they serve. Yet White surrogate remain advantage over Blacks in that they can always refuse to accept from Black couples seeking a surrogate.⁵

Pande introduces the concept of sexualized care work to describe new types of reproductive labour; commercial surrogacy that is similar to existing forms of care work but is stigmatized in the public imagination, among other reason, because of it

³*Id.*

⁴ Amrita Pande, *Wombs in Labor: Transnational commercial Surrogacy in India* (Columbia University Press New York 1st ed. 2014)

⁵*Ibid.*

parallel with sex work. The global market in gestational surrogacy has generated a new set of ethical dilemmas and sociological questions regarding the responsibility of state.⁶

With sperm and ova donation and surrogacy, ARTS can involve commerce in body part and bodily process. Like other technology used for the management of labour, contraception, abortion and prenatal and genetic diagnosis, ARTs can be situated within the larger umbrella of “new reproductive and medical technology”⁷

The 'global capital of surrogacy' is India. Surrogacy generates \$2 billion in revenue in India each year. Despite the fact that India is a surrogacy hotspot, there are no rules in place to control the practice. Commercial surrogacy, on the other hand, has been declared legal in India, as evidenced by the Supreme Court decision in the case of *Baby Manjiv vs. Union of India*. In the case of *Jan Balaz vs. Anand Municipality*, the Gujarat High Court affirmed the Supreme Court's decision permitting commercial surrogacy in India, and went on to explain that commercial surrogacy was allowed in India because there was no statute forbidding womb leasing or surrogacy agreements. Both of these rulings called for the enactment of a surrogacy law in India.⁸ Ever since commercial surrogacy was legalized in India it has grown to become a big industry since 2002 and is often called the ‘surrogacy capital’ of the world with the 228th report of Law Commission of India claiming it to have become a Rs. 25,000 Crore industry.⁹

In India, the average fee is roughly \$25,000 to \$30,000, which is about a third of what it is in industrialised countries like the United States. As a result, India has become a popular destination for foreign couples seeking a cost-effective therapy for infertility, and a new field of medical tourism has sprung up around surrogacy. The art sector has grown into a 25,000-crore-rupee gold mine. Anand, a small town in Gujarat, has developed a reputation as a hub for commercial surrogacy outsourcing.

⁶*Id.*

⁷ Marwah Sarojini N Vrinda, (et al) *Reconfiguring Reproduction: Feminist Health Perspective on Assisted Reproductive Technologies*. (Zubaan P Publishers Pvt. Ltd. New Delhi, Ed. 1st 2014)

⁸ Parliament of India Rajya Sabha, Report: 102, The Surrogacy (Regulation) Bill, 2016 (Department-Related Parliamentary Standing Committee on Health and Family Welfare, 2017). http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf

⁹ Prabhanjan Kumar Singh, “Critical Evaluation of Draft Surrogacy (Regulation) Bill, 2016,” Vol.2 *Jamia Law Journal* (2017) access on 02-02-2021

Wombs in India appear to be for rent, resulting in kids for foreigners and dollars for Indian surrogate moms.¹⁰

India has emerged as a *hub of medical tourism*. This Ministry of Tourism, Government of India boasts Confederation of Indian Industry (CII) reported that of the largest service sectors with estimated revenue of around \$ 30 billion constituting 5% of GDP". It also noted that it was medical tourism behind such figures and estimates. Reasons that have India centre stage in healthcare sector include cost in terms of usage of English language, no waiting period accomplished medical staff including the doctors and know-how, among others.¹¹

The U.K. based Daily Mail prints a story about surrogacy in India with the highly descriptive title, *The Designer Baby Factory: Beautiful Eastern European Eggs, Wealthy Western Sperm, and Embryos Implanted in Desperate Women* Reproduce this post in its entirety not because it is exceptional; rather, it is the norm in surrogacy stories in India.¹²

This chapter described commercial surrogacy, social issues, under the legal issues like Constitutional, contractual principal of contract against the public policy, rights and duties of such contracting parties and legitimacy of child under the Evidence act, Adoption Act and Citizenship Act.

6.2 Commercial Surrogacy and Its Burring Issues-

Commercial surrogacy is a type of gestational surrogacy in which the surrogate mother carries the pregnancy for a fee. Section (f)"commercial surrogacy" means the commercialization of surrogacy services or procedures, or their component services or procedures, such as the selling or buying of human embryos or gametes, or the selling, buying, or trading of surrogate motherhood services by way of payment, reward, benefit, fees, remuneration, or monetary incentive in cash or kind, to the surrogate mother, her dependents, or her representative.

¹⁰*Id.*

¹¹Parliament of India RajyaSabha, Report: 102, The Surrogacy (Regulation) Bill, 2016 (Department-Related Parliamentary Standing Committee on Health and Family Welfare, 2017). http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf

¹²RudrappaSharmila, *Discounted Life: The price of Global Surrogacy in India* (Orient BlackswanPvt. Hyderabad, 1st ed. 2016).

Women's rights organisations have slammed India's surrogacy industry, claiming that fertility clinics are nothing more than a money-making scheme “baby factories” for the rich. In the absence of regulation, they say many poor and uneducated women are lured by agents, hired by clinics, into signing contracts they do not fully understand.¹³

Commercialization of surrogacy creates several social conflicts. Given the extreme vulnerability, one-third of the Indian women due to poverty, exclusion from and marginalization in labour and job markets, patriarchal social and family structures and low educational levels, the financial gain from surrogacy has become a major motivator. Since most surrogate mothers are not from well-off sections and the motive primarily is monetary so they are easily exploited by the agents working for commissioning parents. Secrecy and anonymity creates a negative environment that affects human relations within and outside families.¹⁴

The first set of Government accredited guidelines about surrogacy is the Indian Council of Medical Research Guidelines on ART Clinics, 2005. While not drafted exclusively for surrogacy, it contained material guidelines to be followed by ART clinics in terms of carrying out all surrogacy procedures.¹⁵

Upon realizing the need to provide legislation to regulate clinics carrying out ART procedures and the need to codify the rights and obligations of the parties, the Law Commission decided to take Suo Moto action and dealt with surrogacy in its 228th report. The report's recommendations were multifarious to comprehensively simplify and regulate the provisions aiming at transparency, privacy, avoiding sex-selective surrogacy, prioritizing the future and ensuring the legitimacy of the surrogate child, and providing financial support for the surrogate child and mother, under speculated events of future contingencies.¹⁶

¹³Nita Bhalla and MansiThapliyal, “India seeks to regulate its booming 'rent-a-womb' industry” Health care and Pharma (2013) access on 20-11-2018

<https://www.reuters.com/article/us-india-surrogates-idUSBRE98T07F20130930>

¹⁴Anu and Pawan Kumar (et al), “Surrogacy and Women’s Right to Health in India: Issues and Perspective” vol.57 *IJPH* (2013) Access on 20-02-2021

¹⁵<https://main.icmr.nic.in/sites/default/files/guidelines/b.pdf>

¹⁶<https://lawcommissionofindia.nic.in/reports/report228.pdf>

Another planned regulation is the Assisted Reproductive Technology Bill, 2020, initially drafted in 2008 but was not presented before Parliament. A year later, in light of the aforementioned 228th Law Commission Report, a new bill was formulated in 2010.¹⁷ Eventually, after several modifications in 2013, 2014 and 2017, the Bill of 2020 was introduced in the Lok Sabha on 14 September 2020. The Bill seeks to support and provide for the regulation of Assisted Reproductive Technology services in the country.¹⁸ Some key features among other things include the mandatory registration of all ART clinics under the National Registry of Banks and Clinics of India to maintain a central database and the legal implications and prescribed sanctions for any contravention. To avoid ambiguity, this Bill of 2020 relies upon the Surrogacy (Regulation) Bill, 2020.¹⁹

Commercial surrogacy, a practice similarly known as '*Rent a Womb*', was legal in India in the year 2002, in order to support medical tourism. And rapidly, India became the hub of surrogacy. Commercial surrogacy has become a growing sector in the country, owing to reasons such as *low costs* and the *lack of strict legislation*.²⁰

The Indian surrogate motherhood sector is worth \$2 billion per year, according to a 2012 survey by the Confederation of Indian Industry. Another UN-backed study from 2012 estimated With over 3,000 fertility clinics spread across the country, the Indian surrogacy industry is estimated to be worth \$400 million each year.²¹

Women's rights organisations have slammed India's surrogacy sector, claiming that fertility clinics are little more than "baby factories" for the wealthy. They claim that in the absence of regulation, many impoverished and uneducated women are induced into signing contracts they do not fully understand by agents recruited by clinics.²²

¹⁷ <https://www.mondaq.com/india/constitutional-administrative-law/1126150/surrogacy-regulations-in-india>

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ <https://www.drishtiiias.com/loksabha-rajyasabha-discussions/in-depth-new-surrogacy-bill>

²¹ *Ibid.*

²² Nita Bhalla and MansiThapliyal, "India seeks to regulate its booming 'rent-a-womb' industry" *Health care and Pharma*(2013) access on 20-11-2018

<https://www.reuters.com/article/us-India-surrogates-idUSBRE98T07F20130930>

The social conflict that surrogacy creates is primarily in relation to distrusted motherhood. This is the most evidence in films on surrogacy in mainstream Hindi cinema. The role of multiple mothers is played out of the context of Indian mother as an 'ideal'- juxtaposed with the nation and as aeulogized role for all women (Bagchi 1990; Bhattacharji 1990). (AninditaMajumdar)²³

Madhubala, the prostitute-surrogate in **ChoriChoriChupkeChupke** says: **pet kevastekamatithi, aaj pet hi kamakedega** (I used to earn to feed the stomach, now the stomach will earn for me). The overt commoditization of their own bodies is seen in shots in both the films (**ChoriChoriChupkeChupke**, was 'inspired' by **Doosri Dulhan**) where the prostitute- surrogate Madhubala and Chanda, respectively, are seen to haggle for the exact amount to be paid for the entire arrangement.²⁴

Recently launched a movie named **Mimi 2021**. This movie's facts similarly as Down syndrome Court case **Baby Gammy** 2014 of Thailand. In this film Mimi played a role of surrogate mother. It is based on the selective surrogate mother for healthy baby by foreigner couple. But the information came out, according to the medical technical report baby is mentally disabled. Therefore this reason foreigner couple denied to tacking a surrogate baby. But after the born of baby, baby is healthy. After four years the intended parents demanding the child upon the ground on biological parental hood and they are not to be paid any compensation for birch of contract of surrogacy. It is the story of the surrogate mother who suffering from irreparable loss and social stigmatization problem after the birth of contract of surrogacy.²⁵

Some of the writers painted chilling future scenario when baby breeding would become a serious industry, almost like dairy farming. It was a scary world in which surrogate mother and egg donors would be used like milch cows: bred and nurtured for a very specific purpose. Baby commerce and selective breeding would be the norm. The unwitting, often impoverished, woman who walked into this trap could be turned into a baby incubating machine with no rights of her own. (Gita Aravamudan)²⁶

²³AninditaMajumdar, *Transnational Commercial Surrogacy and the (Un) Making of Kin in India*, 15 (Oxford University Press, New Delhi Ed. 1st 2017).

²⁴*Ibid.*

²⁵Mimi 2021 movie at youtube.com

²⁶Gita Aravamudan, *Baby Makers: The Story of Indian Surrogacy*, 125 (Harper Collince Publisher, Noda, UP, Ed. 1st 2014).

The contextual factors that affected the emergence of surrogacy motherhood as a social problem in the mid-1980s; then I turn to the key issues that came to frame public debate surrogacy in the years to come.(Susan Mrkens)²⁷

The Baby Business's final argument is that. Bluntly put, the book suggests that governments need to play a more active role in regulating the baby trade. This doesn't mean that governments should control the industry, or ban it. On the contrary, Markets, as noted earlier, will dominate the baby business. Private enterprise will profit from baby making technologies, and outright bans on these technologies are destined to fail. If there is demand for babies, there will be supply. (Devora L. Spar)²⁸

A few of Maine issues raised by surrogacy include –

1. Social issues
2. Ethical issues: *morality*
3. Financial issues: affordability, facilities

Some Rights raised by Surrogacy related to Surrogate and Child

1. Right to Health
2. Right to Privacy
3. Right to Dignity
4. Children's interest: child Right
5. Citizenship

6.3 Legal issues related to surrogacy

Although the number of surrogate birth in India is not known, anecdotal evidence indicates that the number continues to rise as the numerous assisted reproductive technology (ART) facilitators continue to streamline the process for prospective commissioning parents. India has never prohibited surrogacy, but in recent years India has increasingly recognised the need to regulate the industry. Regulation to date has taken the form of non-binding guidelines promulgated by the medical industry, but it is expect that more formal regulation will be enacted at the

²⁷Susan Mrkens, *Surrogate Motherhood and politics of Reproduction* (University of California Press Ltd., London, 2007).

²⁸Devora L. Spar, *the Baby Business* (Business Harvard School, US America, 2006).

national and state levels. Given the number of problematic cases that continue to be reported with respect to cross-border surrogacy arrangements where the child's citizenship and parentage status are undefined, and given the concerns about adequate protections for surrogate mothers, the need for regulation is evident.²⁹

After business process, knowledge process and legal process outsourcing, genetic pool banks of India are the latest outsourcing Industry from India. Would-be parents from the India Diaspora in the US, UK and Canada and foreigners from Malaysia, UAE, Afghanistan, Indonesia, Uzbekistan, Pakistan beside Nepal are descending on sperm banks and In-Vitro Fertilisation (IVF) centers in India looking for South Asian genetic traits of perfect sperm donor. Equally, Another simple and inexpensive method in India is to hire wombs. The relatively low cost of medical services, the easy availability of surrogate wombs, the abundance of donors with similar racial characteristics, and the lack of any legislation to govern these procedures are all enticing both foreigners and domestics and Non- resident Indians(NRIs) to sperm banks and surrogate mother in India.³⁰

The advancement in reproductive science resulted in new kinds of social and legal relationships making the beginning of new ethical and legal discourses. The legislation on ARTs and surrogacy in India remains an ethical terrain which continues to be contingent and experimental. Reproductive stratification, connection autonomy, and commodification reproduction are three interrelated conceptual challenges that are at the heart of India's new ARTs legislation. The concept of 'stratified reproduction' refers to social terrain where reproductive labour is differentially valued and rewarded according to the inequalities of access to material and social resources in particular historical and cultural context. Rapp holds that notion of stratified reproduction connotes, "A lens through which we can see how representation of pregnancy and parenting, gender relations, socio-economic futures and collective as well as familial aspirations for the next generation are also being reproduced". "It may be her eggs but it is my blood" said Amrita Pande. She observed, in India the actors in

²⁹ Katarina Trimmings and Paul Beaumont, (et al), *International Surrogacy Arrangements: Legal Regulation at the International Level*, 186-187 (Hart Publishing Ltd United Kingdom Oxford, OX1 2JW, 2013).

³⁰ Anil Malhotra and Ranjit Malhotra, *Surrogacy in India -A Law in the Making*, 174-175 (Universal Law Publishing Co., New Dehli, 2013)

assisted reproductive suffer with inequalities especially the surrogate mothers and deserve access to justice.³¹

6.3.1 Legality of surrogacy contract

The law relating to surrogacy contracts is unclear and uncertain. Different countries have different laws with respect to validity and enforceability of surrogacy contracts. Some of the countries consider these contracts as illegal while some others have their own laws for their regulation. In India, it is generally criticised that surrogate contracts are opposed to public policy because they involve the use of a womb by a women for begetting a child to be handed over to the other party on payment of money, which is like renting of a womb and **selling of the child**. It is to be noted that a contract opposed to public policy is a void contract according to the Indian Contract Act, 1872. Thus the legality of surrogate contracts is uncertain.³²

Provision under the Indian Contract Act “Public Policy” Or “Opposed to Public Policy”

Section-23 What factors and objects are permissible and others are not. Unless the consideration or goal of an agreement is unlawful, the agreement is valid. It is forbidden by [law]; or

Is of a character that, if allowed, would negate any law's requirements; or Is fraudulent; or Involves or indicates harm to another's person or property; or It is considered immoral or contrary to public policy by the Court. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. The terms “public policy” and “opposed to public policy” are not defined in the Contract Act. The terms “public policy,” “opposed to public policy,” and “contrary to public policy” are impossible to define precisely due to their very nature. Public policy, on the other hand, is not the policy of a single government. It denotes a topic that is important to the public good and interest. Old transactions that were once judged against public policy are now being upheld by the courts when new notions emerge.³³

³¹ G.K. Goswami, Assisted Reproduction and Conflict in Rights, (Satyam Law International, New Delhi, India 2017)

³² Kaumudhi Challa, “Contentious Issues in Surrogacy: Legal and Ethical Perspectives in India” vol. I *Christ University Law Journal* (2012)

³³ <https://lawcommissionofindia.nic.in/101-169/Report103.pdf>

There are two schools of thought on the subject. There are two types of schools: “limited view” and “wide view.” When interpreting the term “public policy” in this case, the court decided that it should be given a broader definition. The concept of public policy can be defined as something that is concerned with the public good and the public interest. What is good for the public or in the public interest varies from period to time, as does what is bad or damaging to the public welfare or interest.³⁴

The Indian Contract Act of 1872 codifies the legal principles that govern contracts that can be enforced in Indian courts. It establishes the legality of any agreement that transforms into a contract upon the fulfilment of specified conditions. The parameters of a valid contract are The Indian Contract Act, Section 10, defines what constitutes a contract. Section 10 of the aforementioned Act states the following conditions must be met in order for a legitimate contract to be formed: a hundred percent, (a) There must be an agreement that is the outcome of one party’s proposal³⁵ and the other’s acceptance of it.³⁶ (b) The parties to the agreement must be legally capable of contracting;³⁷ (c) there must be a legal consideration,³⁸ (d) their goal must be legal, and ³⁹(e) the parties must freely agree to enter into the arrangement. ⁴⁰, and (f) the agreement cannot be declared void explicitly. ⁴¹

Surrogacy is legal in India and is backed by formal agreements between the parties. These agreements are a formal declaration of the parties’ offer and acceptance. The amount of payment provided to the surrogate mother is also mentioned in this form of concurrence, thus it sat⁴²

Any contract to perform an illegal act is void, as stated above. When it comes to surrogacy, the goal is to prevent and prohibit the ‘selling’ of a baby. The Supreme Court of Kentucky stated in **Surrogate Parenting Assolates, Inc. v. Armstrong**⁴³

³⁴ *Id.*

³⁵ Sec. 2 (a) of The Indian Contract Act of 1872

³⁶ *Ibid* Sec. 2 (b)

³⁷ Sec. 11 of The Indian Contract Act of 1872

³⁸ Sec. 23 of The Indian Contract Act of 1872

³⁹ *Ibid*

⁴⁰ Sec 14 of The Indian Contract Act of 1872

⁴¹ Sec 26 of The Indian Contract Act of 1872

⁴² ICMR guideline, 2005

⁴³ <https://casetext.com/case/surrogate-parenting-v-com-ex-rel-armstrong>

that "The most important concern is to aid a person or couple that wishes to have a child but is unable to do so." is unable to conceive one in the customary manner to achieve a biologically related offspring"⁴⁴ and thus distinguished surrogacy from baby-selling. This remark supports the idea that the practise has a legal purpose.

The parties' free permission is a requirement for the contract's legitimacy, thus the parties to the surrogacy agreement are exercising their free will. It makes no difference whether the surrogate mother is motivated by altruistic intentions or not when it comes to the surrogate mother's free consent.⁴⁵

But ICMR Code says that the surrogacy contract is legally enforceable. Under the term of surrogacy contract, the surrogate mother might have agreed to hand over the child and given up all claims to parenthood, and even received payment. This is declared to be a universal consensus.⁴⁶

6.3.2 Surrogacy Arrangement

Even though commercial surrogacy is an Anti- thesis of transplantation laws, but it is medically accepted practice reflected in the 2005 Indian Council of Medical Research (ICMR) Guidelines and the Assisted Reproductive Technology Regulation Bill, (ART), 2010, prepared by the Health Ministry. Clearly surrogacy flourishes legally because it is medically not illegal. No doubt, the Supreme Court in *Baby Manji* case commercial surrogacy, He remarked that the emotionally charged and sometimes insulting expressions "wombs for rent," "outsourced pregnancies," and "baby farm" are sometimes used to describe reaching industry proportions. India therefore, is slated to be the only court in the country to legalise commercial surrogacy under a proposed law that is already a reality.⁴⁷

It indicates that surrogacy by assisted conception should be considered only for individuals for whom carrying a kid to term would be physically or medically difficult or unpleasant. The use of ART for a married woman with the approval of her husband does not constitute adultery on the side of either the donor or the wife. ART

⁴⁴*Id*

⁴⁵ M. M. Tieu, "Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers" Vol. 35, No. 3 *JME* (Mar., 2009), Access on 03/05/ 2019 <https://www.jstor.org/stable/27720287>

⁴⁶*Supra note* 18 at 5.

⁴⁷*Supra note* 15at 12.

without the approval of the husband, on the other hand, can be grounds for divorce or judicial separation.⁴⁸

The only face saving which can be pondered and deliberated is how to regulate surrogacy, prevent exploitation besides resolve issues of citizenship, nationality and parentage. In this context, the ART Bill, 2010, suffers from serious lacunas and shortcomings. Some questions left unanswered in the bill are enumerated below:⁴⁹

- Remedies Biological parents have options for obtaining exclusive legal custody of surrogate children and waiving surrogate mother's rights, in addition to limiting sperm or ovum donor rights.
- Model of statutorily establishing genetic constitution of surrogate baby.
- Legal process of recording parentage of surrogate child.
- Process of determination of citizenship and nationality rights.
- Guardianship/adoption proceeding in respect of children born out of surrogacy agreements as Hindu law does not allow non- Hindu parents adopt in India.
- Custodial rights of single, gay, unmarried, divorced parents.
- Legal validity of surrogacy agreements vis-a-vis existing Indian laws.
- Right to prevent exploitation of surrogate mothers.

6.3.3 Rights of parties in a surrogacy contract

Surrogacy agreement is defined as Section 2 defines "a contract between the person(s) using assisted reproductive technology and the surrogate mother" as "a contract between the person(s) using assisted reproductive technology and the surrogate mother" (cc), ART Bill 2010. In simple terms surrogacy agreement means

⁴⁸Aneesh V Pillai, "Surrogacy: Legal, Ethical and Moral Issues" *Research Gate* (2020) access on 10-02-2021

<https://www.researchgate.net/publication/340755343> Access on 02-02-2012

⁴⁹*Ibid.*

“a comprehensive document that lays the foundation for governing relation between the commissioning couple and the surrogate including rights, liabilities, responsibilities details about the need for surrogacy, purpose and situation of both parties, the terms under which the surrogate has agreed, compensation, payment schedule, etc”.

The ART Bill expressly provides for entering into surrogacy agreement between the surrogate mother and the couple pursuing surrogacy through assisted reproductive technology, and that the surrogacy arrangement will be legally binding.⁵⁰

Rights and obligations of the contracting parties have been divided in two parts. The first part, the obligations imposed by the contract using the surrogate uterus of the legal parents towards the surrogate mother is studied and in the second part the obligations of the surrogate mother towards the legal parents is studied:⁵¹

1. The obligations of the legal parents under the Surrogacy Contract

- ❖ Paying wage (satisfaction) to the Surrogate Mother
- ❖ Paying necessary costs to the Surrogate Mother.
- ❖ Take delivery of the born baby in the appointed time
- ❖ Legal At any given moment, legal parents or an individual may not use the services of more than one Surrogate.

a) Paying wage (satisfaction) to the Surrogate Mother⁵²

This obligation is formed only when the Surrogacy Contract is concluded in a reciprocal form (not friendly). As was mentioned if the Surrogacy Contract is formed in commercial (reciprocal) then the intended parents undertake to pay a sum for the services provided by the Surrogate Mother and the paid sum of money is considered as the satisfaction of the obligations of the Surrogate Mother in the contract.

b) Paying necessary costs to the Surrogate Mother.

Whether a commercial or a friendly contract, this obligation stands for the legal parents. These costs include; the costs related to Surrogacy (taking the embryo

⁵⁰ Assisted Reproductive Technology (Regulations) Bill 2013, (Tentative Draft) Date Jun. 27, 2013, Legislative Department, Ministry of Law & Justice, Government of India [hereinafter ART Bill 2013]

⁵¹ Assisted Reproductive Technology (Regulations) Bill 2013, sec 34

⁵² Assisted Reproductive Technology (Regulations) Bill 2013, sec 34(2)

to the uterus of the Surrogate Mother in the laboratory and medical centers), the costs related to holding and growing the embryo in the uterus of the Surrogate Mother (the cost of feeding the embryo in the gestation period), the costs related to the necessary costs for medical treatments, drug and treatment care during the gestation, the costs related to child laboring and other related costs. It should be noted that the obligation of the legal parents to pay such costs in the friendly type of Surrogacy Contract.⁵³

c) Take delivery of the born baby in the appointed time⁵⁴

In the lease contract as the hired worker is obligated to do the subject of obligation and give the subject of work (for example goods produced according to the order of the tenant) to the tenant, the tenant should accept the product that has been ordered and accept the work done for him. In the contract of using the Surrogate uterus as the Surrogate Mother is obliged to deliver the baby at the appointed time to the legal parents, the legal parents are also obliged to take delivery of the child or in other case should compensate their delay.⁵⁵

Determining a date in which the legal parents are obliged to take delivery of the child depends on the agreement with the Surrogate Mother and can be just after childbirth, a few days after that or after the breastfeeding period. In any case the legal parents delay in taking delivery of the child are obliged to pay the inflicted costs and the damages to the Surrogate Mother in the time period between childbirth and handing over the baby. According to the law of tort and its rules concerning the responsibility of people in case of causing a loss to others, it seems that these costs include different cases such as: All of the costs related to taking care of the child in the appointed time that includes eating, dressing, and treatment.

The Fair equivalent remuneration (remuneration) of holding the child in this period Remuneration of breastfeeding the baby in case the Surrogate Mother has breastfed the baby.

The damages resulted from disability of Surrogate Mother in this period because of her engagement for taking care of the child.

⁵³ Assisted Reproductive Technology (Regulations) Bill 2013, sec 34(3)

⁵⁴ Assisted Reproductive Technology (Regulations) Bill 2013, sec 34(24)

⁵⁵ *Ibid*

d) Legal parents or an individual shall not have the service of more than one Surrogate at any given time.⁵⁶

B) The Obligations of the Surrogate Mother under the Contract of Surrogacy

In effect of the conclusion of the Surrogacy Contract, the woman owning the uterus has also obligations for the Legal Parents or Infertile Couple: Accepting the embryo of the infertile couple in her uterus, holding and nurturing her during gestation period and finally giving birth to the child.⁵⁷

Under this contract the Surrogate Mother is obliged to take care of the embryo and deliver the baby under the terms of the contract, the common practice in gestation and medical principles.

The obligation of the Surrogate Mother to take care of the embryo in her uterus includes other obligations impliedly. Because through accepting taking care of the embryo in her uterus in fact she is obliged to do things that are commonly necessary for the healthiness of the embryo (such as regular appointments with gynaecologist during the gestation period, proper feeding, and taking proper drugs under the prescription of the physician.

Also she is obliged to abstain from doing things that endanger the healthiness of the embryo according to the common standards (such as smoking, drinking alcoholic beverages, using dangerous drugs for the embryo, taking drugs without the permission of the physician, doing heavy physical activities and. Delivering the baby to the legal parents at the appointed time.

In her lifetime, no Surrogate Mother may be a surrogate for more than five successful live deliveries, including her own children. Surrogate Mothers seeking or agreeing to act as surrogates must be medically tested for sexually transmitted and other diseases, as well as all other communicable diseases that could endanger the child's health, and must declare in writing that they have not received a blood transfusion or blood product in the previous six months. In the Surrogate Mother contract based on the type of the agreement there is the possibility a time gap exists between childbirth to the delivery of the child to the legal parents.⁵⁸

⁵⁶Assisted Reproductive Technology (Regulations) Bill 2013, sec 34(20)

⁵⁷Assisted Reproductive Technology (Regulations) Bill 2013, sec 34(23)

⁵⁸Assisted Reproductive Technology (Regulations) Bill 2013, sec 34(5)

One of the other obligations of the Surrogate Mother is that, in this time gap takes care of the child without any extremities. In this respect the Surrogate Mother plays the role of a trustworthy person that should act under the common standards of taking care of the baby. So her obligation in this respect does not depend on the result, rather she is only obliged to do all of the standard procedures for taking care of the baby. Only this prove makes her innocent. Thus if the Surrogate Mother does fail to take care of the baby, she has no responsibility in case the baby gets any harm or her physical health is damaged.

6.3.4 The guidelines to protect the interests of the child

The guidelines also tries to protect the interests of the child and thus prohibits sex selection at any stage after fertilization, or Abortion of a pregnancy of any gender, unless there is a danger of genetic abnormalities transmission as determined by genetic testing of biological parents or pre-implantation genetic diagnosis (PGD)(R.3.5.9.).⁵⁹ In addition, ART facilities are not allowed to make a promise to give a couple with a child of the desired sex. (R.3.5.10.).⁶⁰

It further states that the ART facility is not permitted to make surrogacy advertisements. The couple, or a semen bank, is responsible for obtaining a surrogate mother, whether through advertisements or other means. (R.3.10.4.).⁶¹ The standards also provide that the surrogate child's birth certificate must be in the genetic parents' name. The clinic must, however, give the genetic parents with a certificate that includes the surrogate mother's name and address. (R.3.5.4.).⁶² A child born through surrogacy should be adopted by the genetic (biological) parents unless they can prove that the kid is theirs through genetic (DNA) fingerprinting (records of which will be kept in the clinic). (R.3.10.1.).⁶³

If the offspring is of a donor programme – be it sperm or ova – the law of the land as it pertains to a normal conception would apply in the event of a divorce during the gestation period. (R.3.12.4.).⁶⁴ Most crucially, the guidelines stipulate that a child

⁵⁹ICMR Gide line 2005.R.3.5.9

⁶⁰R.3.5.10

⁶¹R.3.10.4

⁶²R.3.5.4

⁶³R.3.10.1

⁶⁴R.3.12.4

born through ART is presumed to be the couple's legitimate child, born within wedlock with both spouses' permission, and with all parental and inheritance rights it entails. (R.3.16.1).⁶⁵

The Indian Council for Medical Research ("ICMR"), a component of India's Department of Health Research, published criteria for accreditation, monitoring, and funding in 2005 and regulation of assisted reproductive technology ("ART") clinics in India ("Guidelines") in response to the ballooning number of unregulated and unaccredited fertility clinics appearing throughout India. The ICMR observed that clinics delivered highly sophisticated medical services absent proper training or infrastructure, and exhibited success rates fewer than thirty percent at best. Thus, the ICMR published guidelines for the legislature to adopt when considering how to regulate assisted reproduction industry in India for clinics to provide safe and ethical services to infertile couples.⁶⁶

Specifically, the Guidelines define surrogacy and address how surrogate mothers should be sourced, and financial and medical considerations for the contracting parties. The ICMR also provides a sample agreement for surrogacy addressing the mother's legal rights.⁶⁷

Despite the fact that the ICMR set standards for certification, supervision, and control of ART clinics in India in 2005, these guidelines are routinely broken. It's easy to understand the frustration of cross-border childless couples who not only have to deal with a language barrier, but also have to fight a protracted legal struggle to acquire their child. Even if everything goes well, they will have to stay in India for 2-3 months after the kid is born to complete the necessary papers..⁶⁸

The Citizenship, nationality, motherhood, parentage, and a child's rights are all affected by cross-border surrogacy. When children are denied nationality in the country of their intended parents, it can result in a long legal battle (as in the case of the German couple with twin surrogate children or the Israeli gay couple who had to

⁶⁵R.3.16.1

⁶⁶ Jaya Reddy, Comment, Indian Surrogacy: Ending Cheap Labor, 18 *SANTA CLARA J. INT'L L.* 92 (2020).

Available at: <https://digitalcommons.law.scu.edu/scujil/vol18/iss1/1> access on 12-02-2021

⁶⁷*Ibid.*

⁶⁸*Ibid.*

undergo DNA testing to establish parentage) or a bleak future in an orphanage (as in the case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage). There have been cases where the child born to a couple through surrogacy is not genetically linked to them, and as a result, the intended parent disowns the child, forcing him to spend his life in an orphanage..⁶⁹

When it comes to surrogate moms, the situation is considerably worse and immoral. Poor, illiterate women from rural areas are frequently enticed to participate in such transactions by their husbands or middlemen in order to make quick money. These women have no right to make decisions about their own bodies or lives. In India, psychological examination and legal counselling are not required, as they are in the United States. Following commercial agency recruiting, these women are placed in hostels for the duration of their pregnancy under the guise of receiving antenatal care. The true motivation is to protect them and prevent any social stigma associated with becoming an outcast in their community. These women worry for their home and children for the duration of their pregnancy. They are only permitted to leave the house for antenatal visits, and they are only permitted to see their families on Sundays. The worst thing is that they are unlikely to get compensated if the pregnancy does not go well, and there is no insurance or post-pregnancy medical or mental assistance available to them. Surrogate mothers are hired by wealthy career women who do not want to go through the hassle of carrying their own pregnancy. Surrogacy has become more of a commercial racket, and there is an urgent need for rules to be framed and implemented for both the parents and the surrogate mothers.⁷⁰

The guidelines are a positive step towards the regulation of surrogacy in India and contain provisions for protecting the interests of surrogate woman as well as the child. However, there are many drawbacks in these guidelines. As per the definition of surrogacy provided in these guidelines only gestational surrogacy can be practiced in India. Moreover, the woman can act as a surrogate only for the genetic parents. Thus the guidelines are unclear about the situation where one of the intended parents

⁶⁹Dr.Santosh Kumar and TusharVedSaxena, "Surrogacy: How far new Laws successful in combating issues in regard to surrogate mother and the child" AIJJS

<https://www.coursehero.com/file/61640560/15d72016-AIJJS-77-88pdf/>

⁷⁰*Ibid.*

was not able to contribute the genetic material. The question arises whether they can take the help of a donor? This question is also relevant, when the gays, lesbians and single individuals want to use surrogacy for begetting a child. Further, the restriction that only, gestational surrogacy can be practiced would create hardship for the intended parents as they would have to search for egg donor also in case the female partner of intended parents is unable to provide the genetic material. The guidelines also stipulate that, the surrogacy can be availed normally by people for whom carrying a baby to term would be physically or medically impossible or undesirable. So the guidelines are impliedly prohibiting the use of surrogacy by married fertile couples. Further, the gay couples and single men can use surrogacy as it is physically/medically impossible to them to carry a child. However it is unclear regarding the issue whether a lesbian couple/ single woman can have access to surrogacy.⁷¹

An important drawback of the guidelines is that, the genetic parents name will be mentioned in the birth certificate of surrogate child. This is in conflict with the right to anonymity of the donor and may deter the donor to participate in such surrogacy arrangements. Thus even though the guidelines say that the surrogate child will be the legitimate child of intended parents, the mentioning of genetic parents name in certificate will create problem for intended parents. This is because their name will not be there in the birth certificate if they have not contributed the genetic material and if only one of them had contributed, then, certificate will carry the name of such partner and the donor.⁷²

6.3.5 Legitimacy of child

3.12 Rights of a Child Born through a Variety of ART Techniques 3.12.1 A child born through ART is believed to be the couple's legitimate child, having been born in wedlock and with both spouses' agreement. As a result, the kid will be entitled to parental support, inheritance, and all other rights and privileges accorded to a child born through sexual intercourse. 3.12.2 Children born from donor gametes and their "adopted" parents have a right to any medical or genetic information about the genetic parents that may be significant to the child's health. 3.12.3 Children born with the use

⁷¹*Supra note 22 at 5.*

⁷²*Ibid.*

of donor gametes have no right to know their genetic parent's identify (such as name, address, parentage, etc). (s). However, a child born in this manner will be given all additional information (including that indicated in Section 3.4.8).⁷³

The As stated in section 112 of the Evidence Act 1872, the Hindu Law and Mohammedan Law generate comparable presumptions of legitimacy, but while English Law emphasises the time of birth, the Hindu Law and Mohammedan Law emphasise the period of conception. According to section 16 of the Hindu Marriage Act 1955, a child of a null and void marriage under section 11 of the Act or an annulled marriage under section 12 of the Act is legitimate.⁷⁴

6.3.6 Children born of invalid and voidable marriages have legal status. (sec.16)⁷⁵:-

- (1) Any child born to a marriage that would have been legal if the marriage had been valid is legitimate, regardless of whether the marriage is null and void under section 11.
- (2) Any child born or conceived before the decree is issued, who would have been the parties' legitimate child if the marriage had been dissolved instead of annulled at the time of the decree, is held to be their legitimate child despite the nullity judgement.
- (3) Nothing in sub sections 1 and 2 shall be construed as conferring any right in or to the property of any person other than the parents on any child of a null and void marriage or a marriage annulled by a decree of nullity under sec. 12, in any case where, but for the passage of this Act, such child would have been incapable of possessing or acquiring such rights due to his not being his parents' legitimate child.

Paternity is a legal question that is founded on a genetic element. The paternity of the offspring is unaffected by the use of the husband's sperm for in vitro or in utero

⁷³ICMR Gide line 2005. Access on 10-05-2018 <https://main.icmr.nic.in/sites/default/files/guidelines/b.pdf>

⁷⁴SandeepKulshrestha, "Indian Surrogates: Whether Laws provide room for it?" vol.2 *IJIRMF* (2016) access on 12-10-2018 <https://www.researchgate.net/publication/308721644>

⁷⁵*Ibid.*

insemination of the wife. The utilisation of donated sperm, on the other hand, completely transforms the situation.⁷⁶

The primary flaw in Sec. 112 of the Evidence Act of 1872 is that it considers sexual intercourse to be absolutely necessary for the creation of a child. It is expressly stated in the non-access clause of this section that if a man could not reasonably have had sexual intercourse, it cannot be his kid.⁷⁷

Sec. 112 read as follows:-

6.3.7 Section 112, Birth during marriage, a conclusive proof of legitimacy⁷⁸

According to Section 112 of the Evidence Act, 1872 that the birth of a child during marriage is to be accepted as a conclusive proof of legitimacy till 280 days after dissolution of marriage and the mother remaining unmarried, unless no access is proved by the husband to his wife at the relevant time.⁷⁹

GoutamKundu v. State of West Bengal,

According to the Supreme Court, there can be no roving inquiry by holding a blood group or DNA test to determine paternity unless it can be established that at any time that the child could have been conceived, the parties to the marriage had no access to one other.⁸⁰

In GoutamKundu' case, the Supreme Court's ruling can be stated thus⁸¹:

- (i) Courts in India can-not order blood test as a problem of course;
- (ii) Whenever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained;
- (iii) There must be a solid prima-facie case established by the husband must establish non-access in order to dispel the presumption arising under Sec. 112 of Indian Evidence Act.

⁷⁶*Id*

⁷⁷*Ibid*

⁷⁸Sec.112. *the Indian Evidence Act, 1872*<https://legislative.gov.in/sites/default/files/A1872-01.pdf>

⁷⁹GunjanGupta, "Conclusive Proof of Legitimacy of Child: Silently Wiping Age-Old Law – Legal Analysis and Justification", *ILI Law Review* (2019) access on 20-10-2020 <https://ili.ac.in/pdf/gung.pdf>

⁸⁰*GautamKundu v. State of West Bengal*, 1993 Cri LJ 3233

⁸¹A.L.T. Criminal, Journal. (2012) Access on 23-10-2019.

<https://bvpnlcpune.org/Article/INHERENT%20POWER%20OF%20HIGH%20COURTS%20TO.pdf>

Kanti Devi v. Poshi Ram

Section 112 of the Evidence Act was determined to have been enacted at a period when modern scientific technology, like as DNA tests, was not even on the legislators' radar. Such a test's outcome is deemed to be scientifically correct. This, however, is insufficient to avoid the conclusiveness of If the husband and wife were living together at the time of conception, Section 112 applies.⁸²

The Supreme Court says in the case of BanarsiDass? Thus⁸³:

"A genuine DNA test is thought to yield scientifically reliable results. Even so, See 112 of the Indian Evidence Act's conclusiveness would remain unassailable if a husband and wife were living together at the time of conception but a DNA test revealed that the kid was not born to the husband."

As soon as a widow conceives after her husband's death by using his preserved sperms to become pregnant, the complication is that sec. 112 of the Evidence Act requires "continuance of a valid marriage," so the child will unfortunately be born after her husband's death, and the child can easily be proven to be illegitimate (no legal status) with the help of sec. 112 of the Evidence Act. Despite having no connection with the child, a gestational surrogate's spouse is considered the father under section 112 of the Evidence Act when she gives birth to a kid.⁸⁴

Given the above discussion, it is clear that any form of conclusive presumption has no place in assessing the paternity or legitimacy of a child when definite evidence is readily available thanks to contemporary technological breakthroughs. Further investigation into the apparent conflict between the court's duty to find the truth and a person's right not to be subjected to medical examination forcibly reveals that the court should exercise its caution only after weighing the parties' interests and determining whether a DNA test is eminently necessary for a just decision in the case.⁸⁵

⁸²*Kanti Devi v. Poshi Ram*, (2001) 5 SCC 331.

⁸³*Supra* note 83 at 36.

⁸⁴*Supra* note 76 at 33.

⁸⁵*Ibid*

6.3.7 Citizenship of Surrogate Baby-

In addition to NRIs, India attracts a big number of foreigners seeking surrogacy. The commissioning parents of a child born through surrogacy, particularly foreigners, encounter issues with the child's citizenship. Situations are complicated by a clash of laws. Citizenship in India can be obtained through birth,⁸⁶ descent,⁸⁷ registration,⁸⁸ naturalization,⁸⁹ and territorial incorporation, according to the Citizenship Act of 1955.⁹⁰ The problem first came up in the instance of Baby Manji.⁹¹ Mr. and Mrs. Yamada, a Japanese couple, engaged an Indian surrogate mother to bear their kid, who would be genetically connected to Mr. Yamada and an Indian oocyte donor.⁹²

The commissioning couple divorced after the birth of Baby Manji Yamada, and the commissioning mother laid no claim to the child. The Anand Municipal Office issued a birth certificate with only the commissioning father's name on it. The Japanese officials warned him that the baby may only enter Japan if he adopts Baby Manji in accordance with both Indian and Japanese rules and obtains an Indian passport. While Mr. Yamada was attempting to make the necessary arrangements, an NGO filed a public interest lawsuit in the High Court of Rajasthan, attempting to halt Baby Manji's transfer to Japan and call into question the legitimacy of surrogacy in India.⁹³

The NGO argued that because there was no law on the matter, the practise was illegal and that no one could claim ownership of Baby Manji. Mr. Yamada's mother filed a writ petition in the Supreme Court, despite the high court's order that the infant be delivered within four weeks. The supreme court granted the grandmother interim custody of the baby and dismissed the lawsuit, ruling that the commissions formed under The Commissions for Protection of Child Rights Act, 2005 were competent to

⁸⁶Citizenship Act, 1955, s. 3

https://indiancitizenshiponline.nic.in/UserGuide/Citizenship_Act_1955_16042019.pdf

⁸⁷Citizenship Act, 1955, s. 4

⁸⁸Citizenship Act, 1955, s.5

⁸⁹Citizenship Act, 1955, s.6

⁹⁰Citizenship Act, 1955, s.7

⁹¹Baby Manji Yamada vs Union Of India &Anr on 29 September, 2008

<https://indiankanoon.org/doc/854968/>

⁹²*Ibid*

⁹³*Ibid.*

investigate the NGO's purported objections. It stated unequivocally that commercial surrogacy was permitted in India.⁹⁴

The Jaipur passport office awarded Baby Manji an identity certificate as a result of the court's decision. The Japan Embassy then granted Baby Manji a Japanese visa, allowing her grandma to accompany her to Japan. The fact that the newborn was given a certificate of identity, which is given by the Indian government to stateless people living in India, is notable.⁹⁵ A certificate of this type has a ten-year validity period. In *Jan Bala v. AnandMunidpality Corporation*, another case of this sort arose.⁹⁶ In that case, a German couple in Anand, Gujarat, recruited an Indian surrogate mother for her gestational services.⁹⁷

In 2008, the surrogate mother gave birth to twins who were exclusively genetically connected to the commissioning father. Initially, the commissioning couple was listed as the parents of the child on the birth certificate. Regardless, the German authorities refused to recognise the couple's babies' parentage and nationality because surrogacy was illegal in Germany. The commissioning parents then approached Indian authorities to obtain Indian passports for their children. Meanwhile, the birth certificate issued by the competent authority was withdrawn due to a typographical error in the date of birth, which needed to be corrected. In addition to this rectification, the surrogate's mother's name was changed from the commissioning mother's name to the surrogate's name on the birth certificate.⁹⁸ Despite this, Balaz was still listed as the father on the document. Passports were granted by the Indian passport authority on the basis of the⁹⁹

The Ministry of Home Affairs, Government of India, changed visa restrictions in order to prevent situations when the commissioning couple's country of residency does not recognise surrogacy; the question of the children's citizenship arises. The government stated its position on visa requirements for foreign nationals seeking

⁹⁴*Id.*

⁹⁵*Ibid.*

⁹⁶*Ibid.*

⁹⁷*Ibid.*

⁹⁸Dr.M.P.Verma, *Surrogacy: Medico-Legal Parading* (G.B. Books New Delhi ed. 1st 2016)

⁹⁹Stellina Jolly, "Cross-Border Surrogacy: Indian State Practice" Research Gate (2017) access on20-10-2019 <https://www.researchgate.net/publication/312570998>

surrogacy in India in 1993.¹⁰⁰ It stated in its order that a tourist visa, which is the most prevalent and often utilised by foreign nationals, is ineligible. It was said that no such relaxation would be granted, and that all such couples would be required to get a medical visa for such purposes, which could be granted if certain conditions were met. A letter from the embassy of their respective countries must be sent with the visa application, and the pair must have been married for at least two years, "(a) The country recognises surrogacy, and (b) The child/children born to the commissioning couple through the Indian surrogate mother would be given entry into their country as a biological child/children of the couple commissioning surrogate," the document states."¹⁰¹

The Bench is looking into the larger issue of the need for a “comprehensive legislation” dealing with all the issues and situations, citizenship of a surrogate child, created by the latest reproductive technology.¹⁰²

The problem of citizenship of a surrogate child was highlighted in the case of two twin babies born to an Indian surrogate mother and a German father in 2008. The two boys- Balaz Nikolas and Balaz Leonard, whose father is German national Jan Balaz -were conceived by an Indian woman in Anand district of Gujarat in January 2008.¹⁰³

Justice Gogoi suggested whether the government could even consider dual citizenship for surrogate children born in such circumstances.¹⁰⁴

“The concept of dual citizenship for surrogate children born in certain circumstances could be considered. This dual citizenship can give limited entitlements to such children,” Justice Gogoi suggested to Mr. Mehta.¹⁰⁵

The ASG informed that a Bill - Assisted Reproductive Technology Regulation Bill - was introduced in the parliament in 2010, and he would get instruction on the status of the Bill.¹⁰⁶

¹⁰⁰*Supra note 88 at 36.*

¹⁰¹*Ibid.*

¹⁰²Nyaya Deep”, *The Official Journal of Nalsa*, vol.18 (2017) access on 15-11-2018 https://nalsa.gov.in/uploads/pdf/2019/01/08/08_01_2019_428894042.pdf

¹⁰³*Ibid.*

¹⁰⁴*Ibid.*

¹⁰⁵*Ibid.*

According to The ART Bill 2014 that a child born to contracting parents who are OCI, PIOs NRIs and a foreigner married to an Indian would not be an Indian citizen. He/she would be permitted to Overseas Citizenship of India under Section 7A of the Citizenship Act, 1955. Though, where the contracting parents refuse to take the custody of the child, the local guardian will be legally bound to take care of the child or hand over the child for adoption. In such cases child will be granted Indian citizenship.¹⁰⁷

Surrogacy Regulating 2014 Bill and the new 2016 Bill ban foreigners from adopting surrogacy. To prevent any kind of issues of citizenship and nationality arising out of surrogacy, the Union Home Ministry has instructed Indian duties and foreigner's regional registration offices (FRRO) not to grant visa to couples intending to visit India for surrogacy. This was in contrast to the earlier medical visa rules prescribed for surrogacy. Both the Bills are seen as a setback for commissioning parents and the surrogate mothers in India as the fertility 'industry' is now valued at \$1 billion.¹⁰⁸

6.3.8 Surrogate Child Rights-

The 288th and the 289th Law Commission Reports collectively provide for the limited rights of the surrogate child. Firstly regarding, citizenship. The child born out of surrogacy by the sperm or egg donation from any foreigner or foreign couple will not be recognised as an Indian child. Secondly, all the rights associated with the child so born out of surrogacy will be transferred to the couple from the surrogate mother on the birth of the child; the surrogate mother is legally obligated to do so.

Thereby, the birth certificate will be registered in the name of the parents or individual who gets the surrogate child. The child will be their legitimate child, irrespective if the couple divorces each other before the birth of the child. Thirdly, the legal custody of the child shall transfer to the local guardian if the foreign party who entered into a surrogacy agreement fails to take the delivery of the surrogate child. Such that, the local guardian has the right and authority to place the surrogate child up

¹⁰⁶*Id*

¹⁰⁷ Stellina Jolly, "Cross-Border Surrogacy: Indian State Practice" (2018) access on 12-11-2020 <https://www.researchgate.net/publication/312570998>

¹⁰⁸*Ibid.*

for adoption. Further, provided that the child is not claimed by the legal representative within a month of the birth of the child.

6.3.9 Protection of Surrogate Mother, Insurance, Medical Facility, Psychological Impact

It is hard to imagine the child as commerce. Babies, after all are the product of love, not money, a conception that occurs far away from any commercial activity. Poor parents across time and place have viewed their children as potential economic assets, weighing their eventual economic contribution-in the rice field or factory or manor- against the costs of carrying them through childhood. Likewise, surrogacy has become a commercial business in countries like India, which has given rise to many questions leading to political debate. Feminists have argued over the alienability of woman's bodies; legal scholars have probed the contractual and jurisdictional issues. The market for surrogacy is large and is growing. There are thousands of potential parents across the world with both the desire and the wherewithal to hire another woman to bear their children.¹⁰⁹

The ICMR standards specify that a surrogate mother must adhere to specific conditions, such as not being older than 45 years old,¹¹⁰ a woman may only function as a surrogate three times¹¹¹ Before a woman can be considered as a surrogate for a certain couple's child, the ART clinic must establish (and document) that she meets all of the tested criteria for a successful full-term pregnancy. A surrogate mother for the pair could be a relative, a known individual, or someone completely unknown to the couple. If a relative is to be used as a surrogate, the relative must be of the same generation as the lady seeking the surrogate. An oocyte donor, on the other hand, cannot behave as a surrogate mother for the couple to whom the oocyte is given. A surrogate mother must also register as a patient and as a surrogate in her own name, as well as supply all relevant information regarding the genetic parents, such as names, addresses, and so on. To avoid any legal complications, she must not use/register in the name of the person for whom she is carrying the child, especially in the

¹⁰⁹S.S.Das, "Commercialization of Surrogacy in India: A Critical Analysis", Research Gate (2014) access on 15-03-2021 <https://www.researchgate.net/publication/281710247>

¹¹⁰ ICMR Guidelines, R.3.10.5

¹¹¹ *Supra note* R.3.10.6

unfortunate event of maternal death.¹¹² The surrogate must give informed consent, which must be witnessed by someone who is not affiliated with the facility..¹¹³

6.3.10 ICMR, Guidelines of the interests of surrogate mother

The standards also take into account the interests of the surrogate mother, stating that the couple seeking surrogacy should cover all of the surrogate mother's expenses during the pregnancy and post-natal care related to the pregnancy. The couple would also be obligated to pay the surrogate mother a monetary compensation for consenting to act as a surrogate; the exact amount of this compensation would be determined through conversation between the couple and the intended surrogate mother. Payments to surrogate mothers should cover all legitimate pregnancy-related expenses. Documented evidence of the surrogacy financial arrangement is required. This financial issue should not be handled by the ART centre. (R.3.10.3.).

6.3. 11 Rights of Surrogate mother

Most Indian women act as surrogate mothers due to poverty or other economic necessity. However, surrogacy technology may involve some complications and cause harm to the health and life of the surrogate mother. This raises the important issue of liability for the harm caused or suffered by a surrogate mother. If there is no medical negligence on the part of the doctors and other medical staff, it would be difficult to fix the liability and thereby indemnify the loss suffered by the surrogate mother.¹¹⁴

Surrogacy, in which women agree to rent their bodies in exchange for a child, is becoming a big concern in the twenty-first century. This procedure is surrounded by a slew of complicated and contentious problems that raise concerns about women's health and rights. The issues concerning surrogate women are the most essential among the numerous kinds of stakeholders in surrogacy. It's worth noting that the right of a woman to be a surrogate isn't explicitly addressed in any international or national legal documents. Because India is becoming a centre for surrogacy activities and many poor Indian women are offering to participate as surrogates, this subject has

¹¹²*Id.*

¹¹³*Supra note R.3.5.22.*

¹¹⁴Dr.S.S.Das, "Commercialization of Surrogacy In India: A Critical Analysis"*Research Gate* (2014) Access on 20—05 2019
<https://www.researchgate.net/publication/281710247>

acquired importance in India. In the absence of specific legal recognition, it is critical to clarify whether there is a right to be a surrogate at all, i.e., a right to rent a womb, and what the legal basis for such a right is.¹¹⁵

6.3.12 Right to Health

The surrogacy arrangement comes with many types of risks. Unfortunately, the common risk is related to the surrogate. The most immediate reason of concern is medical dangers to the surrogate's physical and emotional health. The risks of a surrogate pregnancy are said to be similar to those of other IVF pregnancies and are reported on a case-by-case basis rather than as a rule. Yet, according to recent research, two out of every nine surrogates suffered a postpartum hysterectomy: The first was for placentas accrete after triplet delivery, and the second was for uterine ruptures during macrocosmic child delivery. We discovered that the practice of multiple embryo transfers, multiple pregnancies, foetal reductions, and caesarean procedures to produce a successful pregnancy had substantial consequences for the surrogates' health.¹¹⁶

Infertility, physical and medical conditions, differences in sexual identity and orientation, and social issues are all factors that influence patients' decisions to use surrogacy. Surrogacy is usually reserved for women who have a severe Mullerian abnormality or a congenital lack of uterus and/or vagina. Another group of individuals who require surrogacy is those with Mayer-Rokitansky-Kuster Hauser Syndrome, which is characterised by a female genotype and phenotype and is associated with uterine and vaginal aplasia. In addition to the aforementioned, women with Complete Androgen Insensitivity Syndrome (CAIS), in which the uterus and ovaries are lacking, as well as women who have had a hysterectomy, are only a few of the circumstances where surrogacy is required and women may select this as a path to parenting. Due of the recognised cardiac and medical difficulties in Turner's syndrome patients, gestational surrogacy is also recommended. Surrogacy may also be a viable option for ladies suffering from repeated miscarriages or undiagnosed

¹¹⁵ Aneesh V Pillai, "Legal and Human Right Concerns OF Surrogate Mother" *Research Gate* (2020) Access on 26-07-2021

<https://www.researchgate.net/publication/340755419>

¹¹⁶ Sama Resource Group for Women and Health, *Surrogacy Information Brief* (1st ed. Sama Resource Group for Women and Health, New Delhi. 2014) www.samawomenshealth.org

infertility therapy failure. Heart or kidney illness, as well as severe Rhesus vaccination during pregnancy is a good cause for the mother to avoid such high-risk conditions, and hence surrogacy is a viable option. Other reasons for surrogacy include maternal medicine for a specific condition that could enhance teratogenesis in the embryo or serious genetic abnormalities in the intended parents. The stress experienced by the intended mother regarding the physical changes and discomfort associated with her perception of pregnancy may correspond to highly driven career women and the stress experienced by the intended mother regarding the physical changes and discomfort associated with her perception of pregnancy. Ultimately, surrogacy may fulfill same-sex couples' or even a single parent's wish for a genetically linked family. It is noticeable that the alternative of surrogacy corresponds to a wide range of drivers, extending beyond strictly medical reasons' mainly into today's sera.¹¹⁷

The principle of non-maleficence states that a medical operation should not cause the patient unnecessarily harm or injury. The existing gestational surrogacy industry in India is in violation of this concept, as the technique frequently ignores surrogate women's health risks, perpetuates conventional racial and socioeconomic inequities, and commodifies surrogate women.¹¹⁸

Surrogate Women's Health Risks Are Ignored The health of the surrogate woman is far too frequently jeopardised in India's gestational surrogacy market. "In the United States, surrogates are implanted with no more than two embryos for their safety," according to the article, "whereas in India, surrogates are implanted with up to five embryos to improve the odds of pregnancy." There is a good chance that more than one embryo will turn into a viable pregnancy if up to five embryos are implanted. If the surrogate woman has more than one foetus and the commissioning parents do not opt to abort the remaining babies, the surrogate woman faces serious health risks, including:

(1) preeclampsia (high blood pressure that can escalate to eclampsia, which can be fatal); (2) gestational diabetes (related to a higher risk of diabetes later in life); (3) blood clots... an increased risk of needing a C-section, especially if pregnant with

¹¹⁷M. Simopoulou and K. Sfakianoudis (et al), "Risks in Surrogacy Considering the Embryo: From the Preimplantation to the Gestational and Neonatal Period" *Bio Med Research International* (2018) access on 12-10-2019 <https://www.hindawi.com/journals/bmri/2018/6287507/>

¹¹⁸*Supra note* 70 at 32.

more than two babies. Furthermore, the surrogate woman is at “an increased risk for postpartum problems, such as bleeding, fatigue, and postpartum depression,” according to the study. Thus, the practise of implanting up to five embryos in Indian surrogates clearly benefits the commissioning couple at the expense of the surrogate woman, as it “maximize[s] the profit in a ‘Costco-size’ manner (most number of children per round of IVF)” while ignoring the surrogate woman’s severe health risks.¹¹⁹

Recently the guideline given by the Indian council for medical Research are to be strictly followed till the ART Bill is passed in order to protect the reproductive rights of the surrogate mother. A brief analysis of the relevant provision of Assisted Reproductive Technology Bill 2010 and 2013 or Surrogacy (Regulation) Bill, 2019 and 2020 are given below which either directly or indirectly have significance to the reproductive right and right to health of surrogate mother.¹²⁰

A woman is entitle to all expenses including those related to insurance during pregnancy and after that till the baby is hand over to commissioning parents, as govern by the surrogacy arrangement. The provision has major objection been raised on the following ground: there is absence of free consent on ground of undue influence under section 10 and section 16 of the Indian Contract Act, 1960, which render the contract enforceable and thus void.¹²¹

Further, although commercial surrogacy has been kept out of the purview, the Bill incorporated certain monetary aspects in the name of insurance coverage, medical expenses and prescribed expenses (such as cost of food, maternity wear etc.) etc., an interesting paradox lies in the fact that the inclusion of the term “prescribed expenses” leaves the door half open for some form of compensation, especially since the arrangement is not restricted to “close relatives.”¹²²

Surrogacy's future projections range from opportunity to exploitation, from rural surrogate women in India being lifted out of poverty to a futuristic nightmare of

¹¹⁹*Id.*

¹²⁰Kamaljit Kumar, “A Critical Analysis of the Right to Reproductive Health of Surrogate mother: A Human Right C concern” vol.5 *RGNUL Law Review (RLR)* (2015). Access on 23-10-2018 <https://www.rgnul.ac.in/PDF/96cd635c-9ce8-44da-8d64-1b39c180bf19.pdf>

¹²¹*Ibid.*

¹²² Dr.DipankarDebnath, “The Surrogacy (Regulation) Bill, 2020: A Critical Analysis Of The Provisions In The Light Of Procreative Choice Of Surrogate Mother To Use Her Agency” Vol. 8 *IJCRT*(2020) access on 30-02-2020 www.ijert.org

a baby farm in a developed country. In the case of surrogacy in India, it's difficult to discern whether these women are exercising their own personal rights or being coerced to become surrogate moms by their mother-in-law or husband's desire to meet pecuniary needs and economic needs.¹²³

Surrogacy opponents say that the procedure is analogous to prostitution, and that as a result of this similarity, it should be prohibited on moral grounds. Surrogacy contracts are "dehumanising and alienating" because they undermine the surrogate's perspective on the pregnancy's legitimacy. Surrogate mothers try to avoid building a unique attachment with the child in their womb and see the pregnancy as solely a way to make money. Payment for bodily services dehumanises the surrogate mother and exploits her reproductive organs and capacity for the wealthy's selfish gain.¹²⁴

When we consider the issue of surrogate moms, things get more worse and unethical. Poor, illiterate women from rural areas are frequently forced into such arrangements by their husbands or middlemen in order to make quick money. These women have no right to make decisions about their own bodies or lives. In India, psychological examination and legal counselling are not required, as they are in the United States. Following commercial agency recruiting, these women are placed in hostels for the duration of their pregnancy under the guise of receiving antenatal care. The true motivation is to protect them and prevent any social stigma associated with becoming an outcast in their community. These women worry for their home and children for the duration of their pregnancy. They are only permitted to leave the house for antenatal visits, and they are only permitted to see their families on Sundays. The worst thing is that they are unlikely to get compensated if the pregnancy does not go well, and there is no insurance or post-pregnancy medical or mental assistance available to them. Surrogate mothers are hired by wealthy career women who do not want to go through the hassle of carrying their own pregnancy. Surrogacy has become more of a commercial racket, and there is an urgent need for rules to be framed and implemented for both the parents and the surrogate mother.¹²⁵

¹²³Anu and Pawan Kumar (et al), "Surrogacy and Women's Right to Health in India: Issues and Perspective" vol.57 *IJPH* (2013). Last visit 10-03-2021 <https://pubmed.ncbi.nlm.nih.gov/23873191>

¹²⁴*Ibid.*

¹²⁵Dr.Santosh Kumar and TusharVedSaxena, "Surrogacy: How far new Laws successful in combating issues in regard to surrogate mother and the child" AIJJS. Access on 12-02-2021 <https://www.coursehero.com/file/61640560/15d72016-AIJJS-77-88pdf/>

6.3.13 Psychological and Mental Risks of Surrogate Mother

From this perspective, the gestational surrogate mother's psycho-emotional state is critical in the development of the foetus' regulating systems. Surrogacy, on the other hand, is thought to be more frequently related with stress, according to psychologists. The following are some of the major emotional issues that stress surrogate mothers:¹²⁶

1. Enforced suppression of feelings for the child.
2. Panic and anxiety that the child has health issues.
3. Connections with the family, relatives, and genetic parents of the fetus; fear of her husband's reactions in marriage and sexual relations
4. Fears about financial reward from genetic parents.
5. Suspicions about telling her own children about the type of pregnancy
6. Distresses and anxiety related to telling relatives and friends.
7. Moments of surrogacy: difficulties of pregnancy, hospital stay caesarean section, the retrieval period a
8. In the absence of religious and social acceptability, persons involved in the surrogacy procedure face religious issues.

The emotional connection with the baby during its prenatal growth is another significant psycho-logical feature of the surrogate pregnancy. During a normal pregnancy, a woman's interior experience and feelings change and she develops an attachment to the baby and an emotional bond with it. The degree of relationship and attachment between the mother and the foetus has a significant impact on the mental health of infants. It is not without cause that attachment skills development is a part of prenatal treatment in many nations throughout the world. Are there any differences in terms of connection, emotional participation, and attachment to the kid between surrogate motherhood and a natural pregnancy? Surrogate moms were obliged to repress their feelings for the child or even felt bad in front of their own genetic children, according to the report. Gestational surrogates interacted with the foetus less than regular mothers. Surrogacy, on the other hand, was found to have no influence

¹²⁶Oksana Sulaieva, "Medical aspects of surrogate motherhood" vol. 64 *Proc. Shevchenko Sci. Soc. Med Sci.* (2021) access on 30-10-2021 <https://mspsss.org.ua/index.php/journal/article/view/392/400>

on children's psychosomatic conditions; therefore the actual repercussions of such a prospective effect have yet to be investigated.¹²⁷

6.3.13 Attachment with Fetus and New Born

Mothers who do not wish to have children have poorer bonding with their children, are more likely to suffer from post-partum depression or other mental illnesses, and are less likely to breastfeed their children.¹²⁸

Because childbirth and breastfeeding boost parasympathetic activity, which reduces anxiety and fosters bonding, it is widely assumed that maternal oxytocin circulation predisposes women to develop relationships and exhibit bonding behaviour. Breastfeeding is said to promote early postpartum maternal bonding through touch, responsiveness, and mutual gazing.¹²⁹

6.3.14 Constitutional Provisions –

The Constitution of India not only provides for the health care of the people but also directs the state to take necessary measures to improve the condition of health of the people. Though the provisions enshrined under this part have no direct link with the healthcare, however from various judicial interpretations it has been established that the intention of the legislature were there to cover the health as a right of the citizens.¹³⁰

These are the some provisions of articles under the part-iii of the Indian constitution, 1950 which are as under -

Article 14 speaks about equality before law where the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.¹³¹

¹²⁷ *Id.*

¹²⁸ Preeti Tyagi and Amit Kant Singh (et al), "Surrogacy- Does it Affect Physiology of Bonding between Surrogate Mother Fetus and Biological Mother- New Born?" vol.5 *IJHSR* (2015) access on 23-10-2018 https://www.ijhsr.org/IJHSR_Vol.5_Issue.3_March2015/46.pdf

¹²⁹ *Ibid.*

¹³⁰ The Constitution of India, 1950

¹³¹ Art. 14 of The Constitution of India, 1950

Article 15 contains provisions for a particular application of the general principle of ‘equality of treatment’ embodied in Article 14. It prohibits discrimination against citizens on the grounds only of religion, race, caste, sex, place of birth or any of them. Further no citizen shall also be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainments; or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Even nothing in this Article shall prevent the State from making any special provision for women and children for their betterment of life.¹³²

Article 21 of the Indian Constitution ensures protection of life and personal liberty of the individual, No one's life or personal liberty can be taken away from them unless they follow a legal procedure.¹³³

Article 23 prohibits traffic in human beings and beggar and other similar forms of forced labour and any contravention of this provision shall be an offence punishable in accordance with law.¹³⁴

Article 24 also prohibits the employment of children below the age of fourteen years in any factory or mine or in any other hazardous employment.¹³⁵

The above mentioned provision of articles collectively provides safeguards for the health wellness and security of health its citizens/peoples.

Apart from the above fundamental rights, the Constitution of India provides for the following directive principles to be followed by the state regarding health care of the citizens. These are the several provisions of articles under the part –iv of the Indian constitution, 1950 which are the given below-

Article 38 in this regard provides that, “the State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice- social, economic and political, shall inform all the institution of the national life”. Thus this is an imposition of liability on state that the State will

¹³² Art. 15 of The Constitution of India, 1950

¹³³ Art. 21 of The Constitution of India, 1950

¹³⁴ Art. 23 of The Constitution of India, 1950

¹³⁵ Art. 24 of The Constitution of India, 1950

secure a social order for the promotion of welfare of the people including public health because without public health welfare of people is practically meaningless.¹³⁶

Article 39¹³⁷ further speaks that “the State shall, in particular, directs its policy towards securing –

(e) That employees' health and strength, as well as children's young age, are not exploited, and that people are not compelled by economic necessity to engage in occupations that are unsuitable for their age or strength;

(f) That children are provided with opportunity and resources to grow up in a healthy, free, and dignified way, and that childhood and youth are protected from exploitation and moral and material abandonment.

Article 41 deals with right to work, education and public assistance in certain cases and thus imposed duty on the State to public assistance basically for those who are old, sick and disable. This Article specifically says that “the state shall within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want”. Their implications in relation to health are obvious.¹³⁸

Article 42 provides for just and humane conditions of work and maternity relief and gives the power to the State for making provisions in this regard, which implies that this Article is intended to protect the health of infants and mothers by providing maternity benefit.¹³⁹

Article 47 imposes duty on the State to raise the level of nutrition and the standard of living and to improve public health. It categorically provides that “the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption

¹³⁶ Art. 38 of The Constitution of India, 1950

¹³⁷ Art. 39 of The Constitution of India, 1950

¹³⁸ Art. 41 of The Constitution of India, 1950

¹³⁹ Art. 42 of The Constitution of India, 1950

except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”¹⁴⁰

Article 48-A ensures that State shall endeavour to protect and impose the pollution free environment for good health.¹⁴¹

The above provisions imposed duty, upon the state to tack action for the securing life, health and others essential requirements for standard living of human life these are the matter related of policies.

Article 51 A (g) under Part IV – A of the Constitution says that “it shall be the duties of every individual to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”¹⁴²

This Article imposes the duties of every person’s to protect the living creatures, human is the social living creatures.

6.3.15 Right to Privacy

The Constitution of India under part III guarantees certain fundamental rights. It is article 21 of the Constitution of India that has been held to be the cornerstone and heart of fundamental rights. Following the landmark judgment of the Supreme Court of India in **Maneka Gandhi v Union of India**¹⁴³ the courts went all out to widen the scope of the instant article and thus, it acts as the wellspring of countless rights today.

Article 21 guarantees to every person right to life and personal liberty. The term life’ has been unreservedly expanding since the landmark decision. In the present scenario, the provision encompasses within itself a number of rights such as right to live with dignity, right to shelter, right to quality of life, right to livelihood, right to medical aid, right to clean environment, right to clean air and water, etc. It however does not include the right to die.

The right to privacy, guaranteed by Article 21 of the Constitution, is crucial to the enforceability of surrogacy agreements. In the case of **Kharak Singh v. State of**

¹⁴⁰ Art. 47 of The Constitution of India, 1950

¹⁴¹ Art. 48 A of The Constitution of India, 1950

¹⁴² Art. 51 A (g) of The Constitution of India, 1950

¹⁴³ 1978 AIR 597, 1978 SCR (2) 621

Uttar Pradesh¹⁴⁴, the subject of the right to privacy was first placed before the courts. In its dissenting opinion, the court stated that the right to privacy is a necessary component of the right to personal liberty. In the case of **R Rajagopal v. State of Tamil Nadu**¹⁴⁵, the court went on to say that article 21 contains an implicit right to privacy.

The right to privacy is understood to include the right to procreate. The Supreme Court of India has alluded to the famous American case of **Roe v. Wade**¹⁴⁶ in a number of cases involving the subject matter. In this decision, the United States Supreme Court decided that a person had the "right to defend his own, his family's, marriage, reproduction, pregnancy, child-bearing, and education, among other things." In the case of *Skinner v. Oklahoma*¹⁴⁷ is another case that has been regularly cited by the Indian judiciary. According to the American court in this case, one of man's essential civil rights is the ability to reproduce. In **B.K Parasarathi's case**¹⁴⁷, the "The freedom to make a decision regarding reproduction is ultimately a very personal decision taken by the man or woman," the Andhra Pradesh High Court ruled. The freedom not to reproduce is inextricably linked to such a right. Constitutional courts in both this country and America carefully examine the right not to replicate an individual's decision-making process." Similarly, in *Kasturu Lai Lakshmi Reddy v. State of J&K*¹⁴⁸, The Supreme Court of India ruled that article 21's right to life and personal liberty must be interpreted broadly to encompass all of the rights that make up a person's personal liberty, including the freedom to enjoy all materialistic pleasures and have as many children as one chooses. Nonetheless, the courts have acknowledged that such a right to procreate may be subject to reasonable restrictions.

Surrogacy is a way of procreation, although one that is helped. In light of the preceding, surrogacy agreements must be afforded the same level of constitutional protection. American courts have granted surrogacy agreements constitutional protection, ruling that the parties have a fundamental right to reproductive privacy.

¹⁴⁴1963 AIR 1295, 1964 SCR (1) 332

¹⁴⁵1995 AIR 264, 1994 SCC (6) 632

¹⁴⁶Roe v. Wade, 410 U.S. 113 (1973)

¹⁴⁷2000 (1) ALD 199, 1999 (5) ALT 715

¹⁴⁸1980 AIR 1992, 1980 SCR (3)1338

The topic has also been addressed by Indian courts. "The individual's own decision over birth and infants, known as 'reproductive autonomy,' is a part of a 'right of privacy,' the courts ruled in 2000.

The state has no right to intervene in areas of private order or as personal as procreation. Individuals must be given protection on how to exercise their right to privacy and reproductive autonomy now that these rights have been established. To put it another way, the state cannot intervene in concerns of procreation mode, that is, whether individuals reproduce spontaneously or via the use of assisted reproductive technologies.

Article 21 of the Constitution can be interpreted to include the use of assisted reproductive procedures by people under the framework of reproductive privacy and autonomy. Article 21 of the Indian Constitution protects surrogacy as one of various assisted reproductive techniques.

One of the difficult balancing acts in relation to infertility treatment is to consider the conflict between the need to maintain the privacy of the couple involved in treatment and the need to improve information flow and protect the welfare of child who is the products of such techniques. There may be a fear that to give this short information out might breach medical confidence or lead to other legal or medical disciplinary consequences. As yet there have been no clear answer to these dilemmas of privacy and access to information. It is a difficult balance of welfare and rights.¹⁴⁹

Thus, in the absence of a specific legal recognition, it is essential to verify the fundamental question whether there is a right at all to be a surrogate i.e. right to rent a womb and what is the legal basis of such a right? Also, in the contemporary human rights jurisprudence of expanding notion of rights as well as the State's right to interfere and restrict these rights on the grounds of public interest and morality, it is critical to decide the nature and extent of the right to rent womb or right to be a surrogate. It is argued by various authors and jurists that there is a right to rent womb and this right stems from three basic human rights i.e. the right to personal liberty and

¹⁴⁹Davies Michael, *Tax book on Medical Law* page no. 252 (Oxford press, Great Clarendon Street, ed. 2nd/ 2009).

right to privacy; right to ownership of body; and right to enjoy benefits of technological and scientific developments.¹⁵⁰

The term “privacy” refers to a sense of seclusion or solitude. In legal terms, privacy refers to a person’s right to be left alone, to be free of unwelcome publicity, and to live without inappropriate public involvement in topics with which the public is not necessarily concerned.¹⁵¹

The World Medical Association (WMA) is dedicated to ensuring that everyone’s right to health is protected and promoted. This includes critical elements like access to high-quality, affordable health care, a safe workplace and working conditions, appropriate housing, and nutritional food.¹⁵²

The right to health was first pronounced in the WHO Constitution (1946) which states that: “the enjoyment of the maximum achievable standard of health is one of the fundamental rights of every human being” The preamble of the Constitution defines health as: “*A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*”.¹⁵³

Many of the same health issues impact men and women, but women have different experiences with them. Women’s poverty and economic dependence, their experiences of violence, gender bias in the health system and society at large, discrimination based on race or other factors, the limited power many women have over their sexual and reproductive lives, and their lack of influence in decision-making are all social realities that have a negative impact on their health. As a result, women face unique health challenges and discrimination, with some groups, such as refugee or internally displaced women, women in slums and suburban settings, indigenous and rural women, women with disabilities, and women living with

¹⁵⁰ *Supra note 84* at 34.

¹⁵¹ *Ibid.*

¹⁵² “Right to Health: An Inclusive Right for All” *World Medical Association* (2021) Access on 20-11-2021

<https://www.wma.net/what-we-do/human-rights/right-to-health/>

¹⁵³ *Ibid.*

HIV/AIDS (see section below on HIV/AIDS), facing multiple forms of discrimination, barriers, and marginalisation in addition to gender discrimination.¹⁵⁴

The International Covenant on Economic, Social, and Cultural Rights, as well as the The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a treaty that aims to eliminate all forms of discrimination against women both demand that discrimination against women in health care be eliminated, as well as equal access to health-care services for men and women. Treating health as a human right requires addressing discrimination in all forms, including in the provision of health care, and promoting equality between men and women. In this regard, The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a treaty that aims to eliminate all forms of discrimination against women (art. 14) specifically calls on States to ensure that “women in rural areas participate in and benefit from rural development” and that, have access to adequate health-care facilities counselling, and family planning services.”¹⁵⁵

The right to an adequate standard of life was included in the 1948 Universal Declaration of Human Rights (article 25). In 1966, the International Covenant on Economic, Social, and Cultural Rights, Article 12 reaffirmed it as a human right. Article 12:¹⁵⁶

1. The States Parties to the present Covenant recognise that everyone has the right to the best physical and mental health that is possible.
2. The steps that States Parties to the present Covenant must take to fully realise this right include those that are required for:
 - a) Provision for the reduction of stillbirths and infant mortality, as well as for the child’s healthy growth;
 - b) All areas of environmental and industrial hygiene should be improved;

¹⁵⁴“The Right to Health “*Office of the United Nations High Commission for Human Right New York USA* (2008) access on 12-10-2018<https://www.ohchr.org/documents/publications/factsheet31.pdf>

¹⁵⁵*Ibid*

¹⁵⁶ <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

- c) Epidemic, endemic, occupational, and other diseases prevention, treatment, and control;
- d) The establishment of conditions that would ensure that all medical services and attention are available in the event of illness.

The Committee on Economic, Social, and Cultural Rights, an independent organisation charged with monitoring the Covenant's implementation, provided the following broad interpretation of article 12 (General Comments No.2014):¹⁵⁷

The right to health is a broad concept that encompasses not only timely and appropriate health care, but also the underlying determinants of health, such as access to safe and potable water and adequate sanitation, safe working and living conditions, and access to health-related education and information, including on sexual and reproductive health (Paragraph 11).

Every state recognises the right to health, and every state has ratified at least one international human rights treaty that recognises it.

6.3.16 International human rights treaties recognizing the right to health¹⁵⁸

- Article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted in 1965. (iv)
- Article 12 of the International Convention on Economic, social, and cultural rights, signed in 1966
- The 1979 convention on the elimination of all forms of discrimination against women: arts. 11 (1) (f), 12 and 14 (2) (b)
- The 1989 convention on the rights of the child: art. 24
- The 1990 international convention on the protection of the rights of all migrant workers and members of their families: arts. 28, 43 (e) and 45 (c)
- The 2006 convention on the rights of persons with disabilities: art. 25.

¹⁵⁷<https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx>

¹⁵⁸*Supra note* 105 at 44.

6.3.17 Right to Dignity

Right to dignity is one of the natural and special rights of every human being. It is argued that surrogacy degrades the inborn dignity of a woman. Surrogacy involves the use of a woman's body for producing a baby which is handed over to the commissioning parents. For the period of the term of pregnancy, the surrogate mother has to abide by the conditions laid down in the contract and has no right to take any decision affecting her body. Furthermore the surrogate mother also considers pregnancy as a means of earning money and tries to avoid developing a special bond with the child in her womb. Thus the natural mother-child bond is either absent or suppressed and the entire process is viewed as a commercial transaction. The critics argue that the women's body is reduced to being an incubator or breeder machines and thus it degrades the dignity of women.¹⁵⁹

The right to dignity is one of every human being's fundamental and valued rights. Surrogacy is said to be degrading to a woman's innate dignity. Surrogacy is the practise of using a woman's body to produce a child for the commissioning parents. During the pregnancy, the surrogate mother is bound by the terms of the contract and has no authority to make any decisions that impact her body. Furthermore, the surrogate mother sees pregnancy as a way to make money and avoids forming a unique relationship with the kid in her womb. As a result, the natural mother-child relationship is either nonexistent or repressed, and the whole thing is regarded as a business transaction. Critics claim that the body of a woman is reduced to that of an incubator or breeding machine, lowering her dignity. *Anand Municipality v. Jan Blaze the German Couple* case is a well-known example of this. Dan Goldberg and Arnon Angel, Israeli twins born in Mumbai to an Indian surrogate mother, were trapped in India after

The Jerusalem Family Court declined to allow the twins to take a paternity test in order to start the process of seeking Israeli citizenship.¹⁶⁰

¹⁵⁹KaumudhiChalla, "Contentious Issues in Surrogacy: Legal and Ethical Perspective in India" *Christ University Law Journal*(2012) access on 12-02-2019 <https://journals.christuniversity.in/index.php/culj/article/view/360>

¹⁶⁰*Supra note* 12 at 3.

In the instance of the Indian surrogate, previous legislation has failed to meet the surrogate's right to personal autonomy and dignity. The surrogacy business in India is estimated to be worth USD 2.5 billion, with thousands of international couples taking advantage of the country's low-cost surrogacy services each year. Human trafficking and labour exploitation have a long history in this case. Surrogates, for example, are paid anything from INR 50,000 to INR 500,000, while clinics make millions. Furthermore, in addition to being involved in unlawful and unhealthy surrogacy activities, these so-called surrogacy clinics frequently serve as fronts for brokers involved in women and child trafficking.¹⁶¹

6.4 Social Issues Related to Surrogacy

Surrogacy carry social stigma in the society as it is equated with prostitution and by virtue of that it is argued that it should be disallowed on moral grounds. Surrogate moms are kept apart from their family and only allowed to see them on weekends, which violates their human rights.. Hence, there are number of ethical, social, legal and psychological issues associated with surrogacy, which require urgent need for framing and implementation of law.¹⁶²

6.4.1 Surrogacy linked with prostitution

Surrogacy has been compared to prostitution by some creators because it involves the offering of a woman's origin limit and the use of her body as significance of a financial payment. It is said that, like a whore who must pick between restricted options and control in front of a client who has asked for her help and paid money, the surrogate mother must also select between limited alternatives and must adhere to all of the terms and conditions put out by the appointing guardians. In both situations, one's physical services are supplied, and material compensation is paid in both cases for the physical administrations provided.¹⁶³

¹⁶¹Meghna Borah and Arup Hazarika (et al), "Right to be a Surrogate: Biological, Constitutional and Economic Perspectives" *Research Gate*(2020) access on 10-02-2021 <https://www.researchgate.net/publication/342540624>

¹⁶²*Ibid.*

¹⁶³LeeleshSundaram. and AshaSundaram, "Legal And Ethical Issues Of Commercial Surrogacy In IndianScenario" vol.120 IJPAM (2018)access on 12-03-2020<http://www.acadpubl.eu/hub/>

Commercial surrogacy and prostitution are often compared by opponents of surrogacy. Surrogacy is defined as “a type of exploitation comparable to prostitution,” according to Mary Wamock, who quotes a similar concern allegedly stated by a doctor. ‘With the help of scientists who want access to the womb for research and power, motherhood is becoming a new branch of female prostitution.’ Andrea Dworkin, a well-known American feminist, writes about this. Women can sell their reproductive powers in the same manner that old-time prostitutes sold their sexual capacities, however, there is no shame associated with whoring because no penile penetration is involved. The womb is being sold, not the vagina.’ There are several obvious connections between prostitution and surrogacy. They’re also prevalent in most transactions involving the exchange of physical labour for monetary recompense. On a daily basis, we exchange money for services without forming a “strong personal or emotional tie.” Those who contend that surrogacy is analogous to prostitution for these reasons (and thus unethical) must live in a culture of “prostitutes” and be very unhappy.¹⁶⁴

6.4.2 Surrogacy as a Baby Selling

Most children have one set of parents; an adopted child has two (one biological, the other adoptive); but a child born through a surrogate arrangement has the unusual opportunity to have anywhere from two to five “parents.” The term “surrogate” becomes a euphemism when the surrogate mother is also an egg donor. We’re talking about a natural or biological mother who has consented to conceive, carry a pregnancy to term, birth the child, and then relinquish her parental rights in exchange for medical expenses and, in most circumstances, a monetary payment made after the contract is fulfilled. She, in a nutshell, sells her child.¹⁶⁵

The single person, the gay, the transgender, or the person who believes she is too busy to have a kid in the traditional way receives little attention.’ Surrogate parenting organisations and individual attorneys are springing up all over the country, offering a vision of a happy family with a white picket fence that frequently belies the reality of

¹⁶⁴Anton van Niekerk and Liezl van Zyl, “The ethics of surrogacy: women’s reproductive labour” *J Med Ethics* (1995) access on 12-10-2020 <http://jme.bmj.com/>

¹⁶⁵Nancy W. Machinton “Surrogate Motherhood: Boon or Baby-Selling – The Unresolved Questions” vol. 71 *Marq. L. Re.* (1987) access on 12-10-2018 <http://scholarship.law.marquette.edu/mulr/vol71/iss1/5>

the situation. They try to get around the legislative restriction on child sale by claiming that there aren't enough newborns available.¹⁶⁶

The Protocol to the "Convention on the Rights of the Child" on the sale of minors' child prostitution and child pornography ("the Protocol") is a voluntary addition to the "Convention on the Rights of the Child." The Protocol calls for governments to outlaw the sale of minors, as well as child prostitution and pornography. According to the Protocol definition, "any act or transaction whereby a child is transferred by any person or group of persons for money or any other consideration. In addition to the apparent activities that fit under that definition, such as the sale of minors for sex trafficking, some academicians, nongovernmental organisations, and human rights officials have contended that commercial surrogacy is also a sale of children. As a result, one new way to resolving the issues with commercial surrogacy is to advocate for a blanket ban, as it should already be regarded illegal under the Protocol as the sale of children."¹⁶⁷

Others express concerns about payment and commercialization, believing that this type of arrangement turns the child into a marketable commodity, and that due to the possibility of shifting emotions and attitudes toward the foetus during pregnancy, it is impossible to give true informed consent to relinquish the child until after the birth. Identity of the Child - there are also ethical aspects to consider when notifying the child of his or her surrogate mother, as doing so may affect the child's sense of self-identity. This will turn India into a baby-farming enterprise, with many children suffering from neglect and abuse as a result of their lack of emotional attachment to the commissioning parents. There is no evidence that surrogacy is damaging to children, and we agree that prohibiting or criminalising surrogacy is more likely to cause significant harm to children. Surrogacy does not always imply the commodification or degradation of children, as we have demonstrated before. All parties participating in or contemplating surrogacy agreements are frequently

¹⁶⁶*Id.*

¹⁶⁷Lily Johnson, "Commercial Surrogacy Is the Sale of Children? An Argument That Commercial Surrogacy Does Not Violate International Treaties" vol. 28 *Wash. L. Rev.* (2019) access on 28-11-2020 <https://digitalcommons.law.uw.edu/wilj/vol28/iss3/9>

presented with distinct and often complex legal issues. Several recent scandals have shaken this business.¹⁶⁸

6.5 Ethical Issues: Morality

Understanding the problem's intrinsic complexity necessitates knowledge of its historical background. Baroness Warnock headed the Committee of Inquiry into Human Fertilisation and Embryology, which was founded in 1982 and reported in 1984. Surrogacy, they claimed, "provided us with some of the most challenging challenges we encountered," and the group was unable to reach an accord. The moral and social problems to surrogacy were emphasised by the committee, which unanimously agreed that surrogacy purely for convenience was "absolutely morally wrong." Despite some potential benefits, such as the surrogate mother's generosity and the joy of the commissioning parents, the committee concluded that It is always morally objectionable for people to regard others as a means to their own purposes, no matter how pleasant the outcomes may be. When financial interests are involved, such treatment of one person by another becomes genuinely exploitative.¹⁶⁹

Report The Warnock Committee produced two majority recommendations regarding surrogate motherhood. One was that all surrogacy motherhood agreements, not just commercial ones, should be considered unlawful contracts, rendering them unenforceable in court. Even though they thought surrogate motherhood agreements were probably not enforceable anyhow, they made this proposal to place the problem "beyond all possible debate in law."¹⁷⁰

The other was that it should be illegal to create and operate agencies (both for commercial and non-profit) Its goals include finding ladies to be surrogate mothers or arranging for folks or couples who want to use the service. Of a carrying

¹⁶⁸Vinita Singh and Pushpawati Thakur, "Does Surrogacy Involve Making Families or Selling Babies" vol.2, *IJHS* (2014) access on 12-10-2020
www.researchpublish.com

¹⁶⁹Natalie Gamble and Louisa Ghevaert, "The Chosen Middle Ground: England Surrogacy Law and the International Arena" *Letterpart Ltd* (2009) access on 21-11-2018
<https://www.ngalaw.co.uk/uploads/docs/535faf6133845.pdf>

¹⁷⁰Dr. Hugh V. McLachlan, "Human Reproduction and Genetic Ethics Surrogate Motherhood: Beyond the Warnock and the Brazier Reports" vol.11 *LSS* (2005) access on 12-11-2017
<https://www.tandfonline.com/doi/abs/10.1179/hrge.11.1.h87x5v7366r73831>

mothers should be a criminal offence. As can be seen, the current law in the United Kingdom complies with the first proposal but not with the second.¹⁷¹

There's a reference to Kant here. Treating individuals only as means to one's own interests, according to Kant, is morally unacceptable. Even Kant would not declare that treating people as means to our own aims is necessarily wrong: such activities can be justified if they are consistent with treating the persons involved with the respect due to independent moral beings. Surrogacy can help you meet this need. Furthermore, declaring all morally incorrect behaviours to be crimes is not reasonable. Suicide, for example, Kant considered to be a very immoral act. Even if Kant were correct, would it be wise to make suicide a crime, as it was previously? Certainly not.¹⁷²

The rise of bio markets, in which certain bodies become more bio accessible within the existing global and structural inequities, is a major ethical problem of this international movement. Such worldwide inequities may be seen not just in the transnational surrogacy movement, but also in analogous bio markets like gamete donation, organ donation, human trafficking, and prostitution. These markets raise ethical concerns about exploiting the needs of the poor, particularly when disadvantaged participants enter into unfair contracts, the importance of informed consent, unequal distribution of health resources, unfair benefit distribution, violations of good medical practises, and the commodification of women and children.¹⁷³

This case highlights a number of ethical issues, including surrogate mothers' rights over their own bodies, particularly her opinion on whether to abort or keep the child; children's rights to know about the surrogate mother; conflicts between notions of (wish child and the characteristics of such a child) and rights of a disabled child; and people with criminal backgrounds aspiring to be parents through transnational surrogacy. Surrogacy, according to some writers, is equivalent to any other job or product on the market. However, this example highlights the complexities of surrogacy, which distinguishes it from other types of labour. Surrogate women cannot be viewed as baby-making machines, nor can the newborns be equated to machine-

¹⁷¹ *Id.*

¹⁷² *Ibid.*

¹⁷³ Sheela Saravanan, *A Transnational Feminist View of Surrogacy Bio markets in India* (Springer Nature Singapore Pte Ltd. 2018).

made goods, because human sensibilities and the attachment that a surrogate mother can create with the baby are taken into account.¹⁷⁴

When it comes to surrogate moms, the situation is much more dire and unethical. Women from rural areas who are poor and ignorant are frequently enticed to participate in such dealings by their husbands or middlemen in order to make quick money. These women have no right to make decisions about their own bodies or lives. Psychological evaluation and legal counselling, which are both mandatory in the United States, are not available in India. Following commercial agency recruiting, Under the pretext of obtaining antenatal treatment, these women are kept in hostels for the duration of their pregnancy. The underlying goal is to keep them safe and avoid the social shame that comes with being an outcast in their community. Throughout their pregnancy, these mothers are concerned about their home and children. They are only permitted to leave the house for antenatal visits, and they are only permitted to see their families on Sundays. The worst thing is that they are unlikely to get compensated if the pregnancy does not go well, and there is no insurance or post-pregnancy medical or mental assistance available to them. Surrogate mothers are hired by rich businesswomen who don't want to deal with the stress of bearing a child on their own. Surrogacy has evolved into a commercial enterprise, necessitating the formulation and implementation of standards for both the parents and the surrogate mother.¹⁷⁵

Surrogacy contracts, which pose categorical challenges to two of contemporary society's most fundamental conceptual structures—family and motherhood—represent even more clearly aberrant phenomena than birth. Surrogacy marks the pinnacle of instability of the family notion in an era when the contemporary, nuclear family structure is more “fragmented” as divorce rates increase and other family forms emerge. Surrogacy shatters the moral framework that regards reproduction as a “natural truth” rooted in love, marriage, and sexual activity. Surrogacy uses the marketplace to create families, making them a matter of choice

¹⁷⁴*Id.*

¹⁷⁵PikeeSaxena and Archana Mishra(et al), “Surrogacy: Ethical and Legal Issues” vol. 37 *IJCM* (2012) access on 12-10-2018
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/>

rather than chance. Surrogacy indicates that families are social constructs rather than biological truths, since it threatens the concept of families as biological facts.¹⁷⁶

6.5.1 Financial Issues:

Commodification

The Surrogacy (Regulation) Bill, introduced in 2019, seeks to regulate the commercial surrogacy sector. Surrogacy for commercial gain is illegal, although "altruistic surrogacy" for infertile Indian couples is allowed. The couple must have been married for at least 5 years and have documents from new regulatory organisations verifying either partner's infertility to be eligible for altruistic surrogacy. Surrogacy is not legal for LGBTQ+ families, single parents, unmarried couples, or men, according to the law. Furthermore, altruistic surrogates for the intending parents can only be "near relatives" (undefined) of the intended parents. Surrogate moms must also be between the ages of 25 and 35, and they are only allowed to carry one child. Intended parents might face up to 10 years in prison and a fine of up to ten lakh rupees if they pay a surrogate mother more than a "reasonable" fee for 16 months of insurance coverage for postpartum delivery difficulties. This law has sparked substantial debate owing to the lack of measures to guarantee that the altruistic surrogate is not exploited, as well as the ability to appeal government decisions to grant or reject surrogacy.¹⁷⁷

India is presently a popular fertility tourism destination. India appeals to would-be Western parents because of its high-quality health care, western-trained physicians, and affordable medical prices. Another factor contributing to India's appeal among infertile couples is the lack of rules governing reproductive technology. To govern reproductive services, the Indian Council of Medical Research ("ICMR") published national guidance lines ("Guidelines") in 2005. These guidelines, on the other hand, are not legally enforceable. As a result, foreigners can take advantage of private hospitals under India's permissive policies, where doctors are ready to use reproductive methods that are branded, severely controlled, or difficult to get in many

¹⁷⁶EllyTeman, *Birthing a Mother: The Surrogate Body and the Pregnant Self* (University of California Press, Ltd.London, England, 2010)

¹⁷⁷Maya Gupta and ShiromiChaturvedi (et al), "The Indian Ban on Commercial Surrogacy" *OP-ESD* <https://wpj.hkspublications.org/2020/06/19/the-indian-ban-on-commercial-surrogacy/>

other nations. This has resulted in a rising phenomenon labelled “the ultimate outsourcing” by some journalists: infertile couples are increasingly resorting to India in search of a surrogate to bear their kid.¹⁷⁸

In the lack of a criterion for affordability, surrogate mother payments vary depending on their fair skin colour, caste background, education, proficiency in English, and economic status. Additionally, surrogate mothers who birth twins, eat properly, gain weight, have healthy or positive test results, or other signs of a successful pregnancy are paid a bonus of approximately (25 percent). It has also been shown that surrogate mother payments vary from state to state, and that there is no uniformity in surrogate mother payments, rather discrimination and arbitrariness.¹⁷⁹

What can be done to ensure that poor women who are ready to act as surrogate mother because they are starving for money are not exploited? To begin, it should be noted that surrogate mother are usually always less financially secure than the intended parent(s) for whom they are carrying a child. Financial inequity, on the other hand, does not always imply financial exploitation. The key question is whether people who operate as surrogates do so out of financial need and consequently lack bargaining power when entering into a contractual partnership. Do they have any other sources of income? Is it a violation of their human rights to restrict their activities, food choices, or capacity to terminate their pregnancy while functioning as surrogates?¹⁸⁰

Surrogacy (Regulating) Bill, 2019,¹⁸¹ has sparked substantial debate owing to the lack of safeguards to guarantee that altruistic surrogates are not exploited, as well as the ability to appeal government decisions to authorise or reject surrogacy. The majority of the discussion about surrogacy legislation has focused on the morality of the procedure. It’s undoubtedly a sort of commercialization of women’s bodies and

¹⁷⁸Jennifer Rimm Booming “Baby Business: Regulating Commercial Surrogacy in India” vol. 30 Le. Sch. Repo. (2014) access on 12-11-2019.

<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1837&context=jil>

¹⁷⁹The Indian Journal of Law & Public Policy (New Delhi) Vol.1 2014-2015

https://cdn.dynamic.soolegal.com/document-center/90184/other/ijlpp_1_2.pdf

¹⁸⁰Eric A. Feldman, Baby M Turns 30: “The Law and Policy of Surrogate Motherhood” vol.44, *American Journal of Law & Medicine*, (2018) access on 12-05-2021

https://scholarship.law.upenn.edu/faculty_scholarship/2000

¹⁸¹<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>

reproductive labour. Furthermore, because surrogacy includes paying for the process of producing a kid, some academics accuse it of being a form of baby-selling. The global south's power dynamics between intended parents and surrogates, in which women with economic and racial advantages gain control over women's bodies, can cause discomfort. Because rejection is difficult, providing large quantities of money to women in great poverty might be perceived as coercive. On the other hand, we can't just assume that surrogate mothers are unable to make rational decisions. They choose to participate in this procedure after weighing their financial options. To the idea of inherent corruption, there are various counter-arguments. To begin with, even if a miscarriage occurs, the clinic is compensated. This means that the payment is for the service of carrying the child, not for the child as a product. Second, as Judge Sorkow pointed out in the "Baby M" legal case, the surrogate child already has a genetic link to the intended parents. They can't "buy a child" because the child is at least partially theirs regardless of financial circumstances.¹⁸²

6.5.2 Facilities

India's gestational surrogacy industry not only fails to balance non-maleficence and beneficence, but it also fails to meet the notion of autonomy. Autonomy means a patient "has the capacity to act purposefully, with comprehension, and without controlling factors that would prevent a free and voluntary act." The concept of autonomy states that "individual individuals have the right to make their own decisions and build their own life plan" outside of the medical environment. Because "to violate a person's autonomy is to treat that person only as a means; that is, in line with the purposes of others without consideration for that person's own aspirations," this concept is especially crucial. Finally, autonomy is the "foundation for the practise of 'informed consent' in the physician-patient health-care transaction." The majority of women who become gestational surrogates in India do not voluntarily choose to be surrogates, and once a woman becomes a surrogate, the surrogacy facility has complete control over her life.¹⁸³

¹⁸²Manya Gupta, and Shiromi Chaturvedi, "The Indian Ban on Commercial Surrogacy" (2019). Access on 13-02-2020

<https://wpj.hkspublications.org/2020/06/19/the-indian-ban-on-commercial-surrogacy/>

¹⁸³Kristine Schanbacher, "India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women" vol.25 *Hastings Women's Law Journal* (2014) access 23-10-2019
<https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1150&context=hwlj>

The surrogacy hostels, located in towns close to the clinic, are less sterile, and the surrogates have fewer restrictions on their movement. They have access to a kitchen (along with a cook), a television and prayer room. Husbands are allowed to visit but are encouraged not to stay the night, to emphasize the requirement that the surrogacy cannot have any sexual relations during the nine months of pregnancy. The hostels are spaces where the daily activities of the surrogates can be not just monitored but also controlled. The timetable establishes a rhythm that is meant to ensure a healthy and docile mother- worker.¹⁸⁴

6.5.3 Marriage institution

Surrogate mothers are subjected to domestic abuse and household instability as a result of male partners' dislikes. Furthermore, it is unknown whether the surrogate will be able to have sexual interactions with her spouse.¹⁸⁵

All of these are unintended outcomes of the surrogacy operation that must be considered. Surrogacy can cause societal and family ties to be distorted as a result of breaking the marriage link to solve infertility. Surrogacy's impact on mother-child interactions and children's psychological adjustment, on the other hand, is unknown. Surrogacy-related medical tourism puts a strain on existing healthcare systems. Rather than building fundamental infrastructure to prevent infertility, the public sector is focused on providing advanced artificial reproductive technology. Surrogacy also contributes to a diminishing sex ratio and female feticide, as well as interfering with the country's birth registration system. Poor young women are more likely to be trafficked as the reproductive tourism industry grows.¹⁸⁶

The Surrogacy (Regulation) Bill, 2019, aims to regulate commercial surrogacy industry. Commercial surrogacy is banned, although "altruistic surrogacy" for infertile Indian couples is allowed. This law has sparked considerable debate owing to

¹⁸⁴ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press New York, 2014)

¹⁸⁵ Arti Gupta, Viviktha Ramesh, "Surrogacy: blessing or curse to poor society in India" *Healthcare in Low-resource Settings* volume 3:5465 (2015) access on 12-09-2019 <https://www.researchgate.net/publication/295861915>

¹⁸⁶ *Ibid.*

the lack of actions to guarantee that the altruistic surrogate is not exploited, as well as the ability to request government decisions to grant or reject surrogacy.¹⁸⁷

Though surrogacy can be advantageous to some women in specific situations, it is a well-known reality that many surrogate moms are emotionally mistreated, culturally ridiculed, and ethically exploited during the process. Because of their lack of awareness and understanding of their rights as surrogate mothers, they are subject to surrogacy agencies' exploitation, as well as the systemic handicap in law enforcement protecting rights for the poor and underprivileged. If something goes wrong, the impoverished and marginalised surrogate women are punished by an Indian system that views them as simple objects or tools carrying a surrogate kid, a commodity that must be delivered in good shape. Thus, from the perspective of Indian surrogate moms, commercial surrogacy is carried out in an unethical manner, even if one could claim that they are better off as a result of their surrogacy. Surrogacy may provide temporary benefits, but it does not provide women with the opportunity to be empowered. So women suffering poverty are used and abused in commercial surrogacy in India to ride the industry that is primarily commercial and corporate in its nature, even though incidentally there are profits to some in the process.¹⁸⁸

6.5.4 Conclusion

For the past few years, India has become a surrogacy hub for couples from all over the world. Unethical activities, including as the mistreatment of surrogate mothers, the abandonment of surrogate children, as well as the importation of human embryos and gametes have all been documented. In its 228th Report, the Indian Law Commission suggested that commercial surrogacy be prohibited by establishing suitable legislation. It's vital to adopt legislation that legalises surrogacy services in the country, forbids probable surrogate mother exploitation, and safeguards the rights of surrogate children.

The debate over enacting Surrogacy laws in India began with a submission from the Department of Health Research, which stated that the Law Commission of India's 228th Report (2009) strongly recommended prohibiting commercial surrogacy and allowing principled altruistic surrogacy facilities by enacting appropriate legislation. In the years 2014, 2016, and 2019, several bills were introduced in India to regulate

¹⁸⁷ *Supra note* 69 at 32.

¹⁸⁸ *Ibid.*

surrogacy. The most recent surrogacy (Regulation) Bill, 2019, was introduced in the Lok Sabha and passed. The Rajya Sabha referred the bill to a Rajya Sabha Select Committee.

After considering the Select Committee's recommendations, the Union Cabinet passed the Surrogacy Regulation Bill 2020 in February 2020. Following enactment, the Central Government must notify the public of the Act's effective date. The Act's principal benefit will be that it will standardise surrogacy services in the country. Commercial surrogacy, including the use of human embryos and gametes, will be prohibited. On completion of specific conditions, Indian Matrimonial, Indian Origin Matrimonial, and Indian Single Woman (only widow or divorcee) will be permitted. As a result, it will regulate immoral surrogacy practises, prevent surrogacy from becoming commercialised, and prohibit possible abuse of surrogate women and children born through surrogacy.

Medical advancements in surrogacy, as well as legal precedents in this area, have brought the traditional concept of parentage into question. The notion for a legally acceptable definition of a family is one of the two main considerations of genetics and legitimacy. However, the author enjoys and is knowledgeable about the subject.

Stump of articulates that different contributors should have the most rights at different stages of procreation in the route of procreation. The psychosomatic dimension of the intending parent is most terrible before to the gestational time. Only genetic and psychological concepts are used in family law. The case of the infertile woman exemplifies the mental idea even more clearly. She will have no genetic ties to the child, but her husband's ingenuity makes the surrogacy procedure a success. The procreative process is only private for a married couple. Surrogacy agreements, on the other hand, involve third parties such as the surrogate mother, a medical practitioner, and a lawyer.

The above discussion we find the extract as- No Specific Legislation Related to Surrogacy, Enforceability of surrogacy contract, Commodification of Motherhood, Baby Selling, Exploitation of poor women, Surrogacy Degrades the Dignity of Woman, Surrogacy has been equated with Prostitution, Attachment with the Gestational Mother, Legitimacy of Children under Personal Law, Consummation of Marriage, Legal Status of Surrogate Child and Indian Evidence Act, 1872, Law of Adoption and Surrogacy and Legal Concern Relating to Commissioning Parent



CHAPTER 7
DATA COLLCETION AND
INTERPRETATION



CHAPTER 7

DATA COLLECTON AND INTERPRETATION

7.1 Introduction

In this chapter we discuss the methodology adopted for this study. A research design is a plan, structure and strategy of investigation to obtain answers to research questions and problems. The plan is the complete scheme or program of the research. It includes an outline of what the investigator will do from writing the hypotheses and their operational implications to the final analysis of data (Kerlinger 1986). The research design is a blueprint of any study.

7.2 Objectives

The objectives of the study are:

The object of thesis is to discuss and explore the surrogacy law and policy; to highlight the shortcoming in law and policy and suggest better initiatives to mend in concern lacunas. Against this background, the study is intended;

1. To analyse the reasons giving rise to a debate over surrogacy.
2. To study the concept of surrogacy.
3. To study legal position of surrogacy in various countries including India.
4. To know the rights and duties of surrogate parties.
5. To examine the present social and health protection rights ensured to the surrogate mother.
6. To discuss the status of child who has born in consequence of surrogacy.
7. To explain and critically analyze the recent surrogacy bill 2016.
8. To study and analyze the recent trends of surrogacy arrangement in Lucknow.

7.3 Methodology

The methodology adopted and data analysis techniques used in pursuance of the objectives of the study. This study used mix method (Qualitative as well as Quantitative Technique) of data collection, analysis and interpretation according to requirement of objectives.

7.4 Research Design

Descriptive Research Design studies seek accurate observations and the research design focuses on the validity (accuracy) and reliability (consistency) of the observations, and the representativeness of sampling (Blanche et al. 2006).

The present work is confined to a limited period (2017-2021). Therefore, Cross-sectional Design has been used rather than longitudinal design. Cross-sectional research refers to studies which take a snapshot of a situation in time. It examines how something is done at the time of the research study. It measure units from a sample of the population at one point of time.

7.4.1 Population

The population of this study constitutes all stakeholders who are major in age and residing in District Lucknow, Uttar Pradesh, India.

7.4.2 Sampling Unit

Sampling unit is the resident of District Lucknow, Uttar Pradesh, India.

7.4.3 Sample Size

For populations that are large, Cochran (1963) suggested formula yield a representative sample for proportions. He assumes there is a large population but that we do not know the variability in the proportion. Therefore, assume $p=.5$ (maximum variability). Furthermore, suppose we desire a 95% confidence level and $\pm 5\%$ precision.

The formula suggested by Cochran is as follows:

$$(-)$$

Where

‘p’ is the frequency of occurrence of something expressed as a proportion

‘q’ is the frequency of non-occurrence of the same event and is calculated as $(1-p)$

‘z’ is the confidence level related value of the standard normal variable

‘e’ is the tolerable level of error in estimating ‘p’

Adopting the suggested formula by Cochran, for the present study, the total sample size comes 385. In this study we have taken 430 as a sample size to reduce the margin of error. But unfortunately our valid sample size is 218.

7.5 Methods of Data Collection

The type of data to be collected and sample size depends on the nature of the study and its research objectives (Hair et al. 2003). In this study we have used, Primary and Secondary methods of data collection. Primary methods of data collection include Close-Ended Structured Questionnaire Survey to collect primary data and for Secondary methods of data collection we used secondary sources such as research journals, magazines, internet and books.

7.5.1 Data Collection

The data collection was done in Lucknow, District of State Uttar Pradesh, and the period was from 2017 to 2021, wherein 430 questionnaires were distributed to respondents who are major in age and residing in District Lucknow, Uttar Pradesh, India.

7.5.2 Research Instrument

The structured questionnaire had two parts. First part dealt with the demographic profile of the respondents while second part dealt with the different questions which are related to Surrogacy matters.

7.6 Statistical Tools of Analysis

The coded and tabulated data were analyzed using both descriptive and inferential statistical techniques. Mean, standard deviation, range have been calculated to draw a profile of the respondents and their responses. The data set was analyzed with the help of SPSS 20.0.

7.6.1 Descriptive Statistics

Descriptive statistics includes numbers, tables, charts, and graphs used to describe, organize, summarize and present raw data. In this study, descriptive statistics has been used to summarize the basic characteristics of the data.

7.6.2 Inferential Statistics

Inferential Statistics has been used to draw conclusions about the population from the sample collected. The two main methods used in inferential statistics are estimation and hypothesis testing. The study in this case has used hypothesis testing for understanding the population. The tools used are briefly described below:

7.7 Hypothesis

The following propositions are to be tested in the thesis:

H1: Surrogacy is a growing phenomenon during recent years despite absence of law regulations in this area.

H2: It has now become huge industry, due to 15 percent increasing infertility.

H3: The legality of surrogacy arrangement is debatable and the right and responsibility of the parties are not settled.

7.8 Data Collcetion and Interpretation

Blank Questionnaires was distributed in hard copy as well as in soft copy. Researcher has received 430 filled questionnaires. Under these filled questionnaire researcher found that 218 respondent are know about the Test Tube Baby Technique/IVF Surrogacy. So out of 430 questionnaires only 218 questionnaires was valid for data analysis and interpretation.

The rest of data analysis and interpretation which are based on research questions and objectives are as discussed below:

7.9 Demographic Profile:

Gender

Table no. 1 and Chart no. 1 is related to Gender Profile. Table shows that total number of Male and Female respondents is One Hundred Forty Three and Seventy Five respectively. Male respondents are highest in number as compared to Female respondents.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Male	143	65.6	65.6	65.6
	Female	75	34.4	34.4	100.0
	Total	218	100.0	100.0	

Table no. 1: Gender

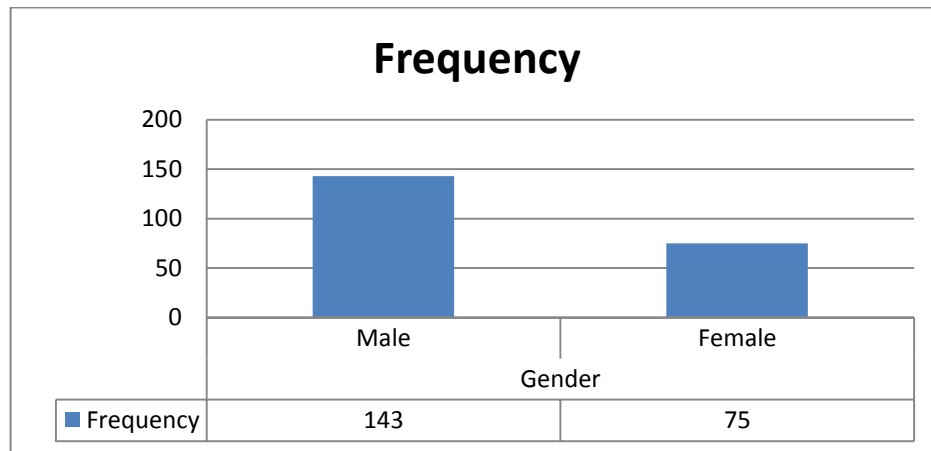


Chart no. 1

Age Group

Table no. 2 and Chart no. 2 is related to age group of respondents. We can see that there are Two Hundred Eighteen respondents of different age groups are taken into study. The highest numbers of respondents are in age group 26-40 yrs that is One Hundred Thirty which is 59.6% of total population. The second highest age group is 18-25 yrs, in which Sixty Eight respondents (31.2%) are present. The next third age group is 41 -60 yrs in which only Eighteen respondents (8.3%) are included in study

DATA COLLCECTION AND INTERPRETATION

and least number of respondents is came in age group above 60 yrs. In this age group only two respondents are included which are 0.9 percent of total respondents.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	18-25 yrs	68	31.2	31.2	31.2
	26-40 yrs	130	59.6	59.6	90.8
	41-60 yrs	18	8.3	8.3	99.1
	Above 60 yrs	2	.9	.9	100.0
	Total	218	100.0	100.0	

Table no. 2: Age Group

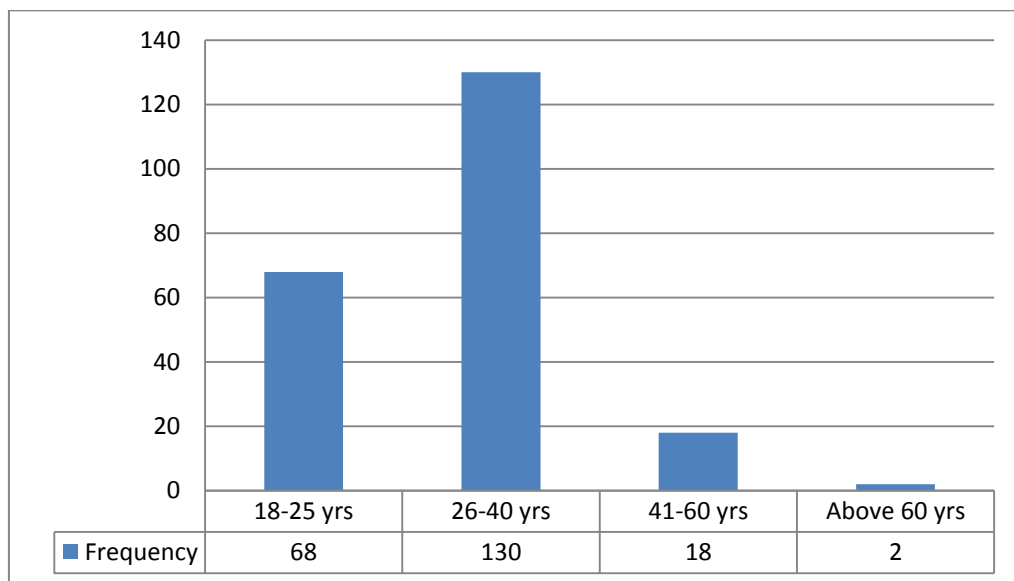


Chart No. 2: Age Group

Designation

Under this study the respondent’s designation is categorized into six different groups, these are Govt. Employee, Private Employee, Professional, Students, Unemployed and Self Employed. Table number 3 and Chart number 3 shows that the highest numbers of respondents are Private Employee (43.6%). The second highest numbers of respondents are belonging to Self-Employed group, which covered 19.3% of total population. The third highest numbers of respondents are may be called as

DATA COLLCECTION AND INTERPRETATION

Professional. Their population is 13.8 % of total population. Govt. Employee and Students are comes on fourth highest numbers of respondents. Both have equal numbers of respondents which is total twenty three in numbers and the least numbers of respondents are in Unemployed, where their number is just single digit i.e. five only.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Govt. Employee	23	10.6	10.6	10.6
	Private Employee	95	43.6	43.6	54.1
	Professional	30	13.8	13.8	67.9
	Student	23	10.6	10.6	78.4
	Unemployed	5	2.3	2.3	80.7
	Self-Employed	42	19.3	19.3	100.0
	Total	218	100.0	100.0	

Table no. 3 Designation

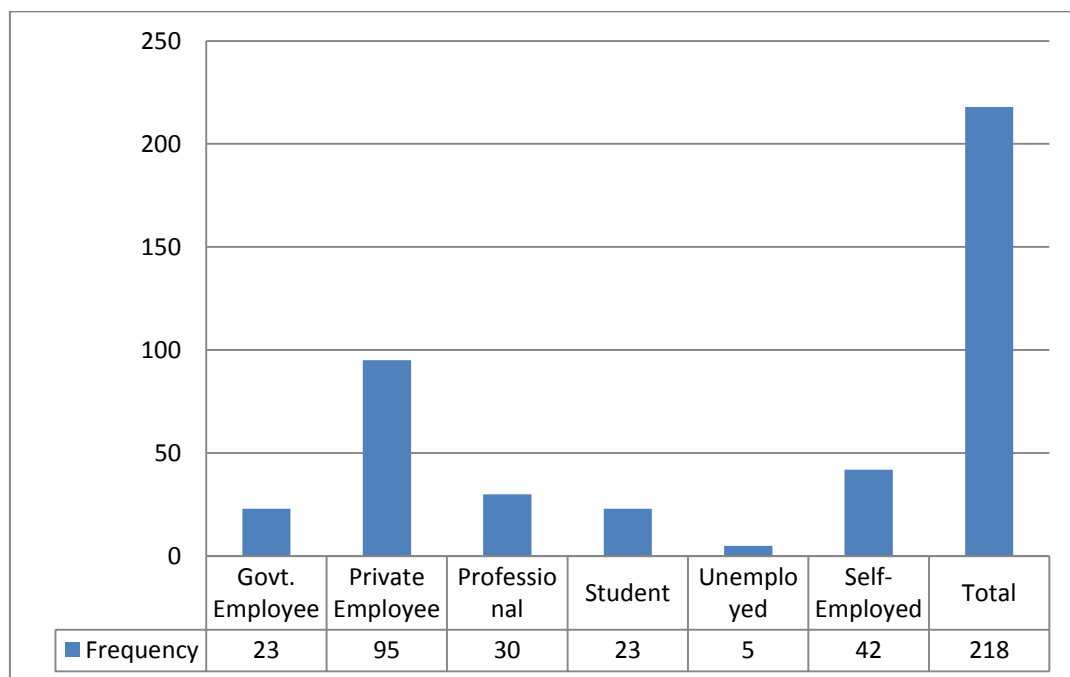


Chart no. 3: Designation

Table number 4 is related Education level of respondents. Here respondents Education are categorized into six different levels of education. These are upto 10th, upto 12th, Graduate, Post-Graduate, Doctorate and Post Doc. Highest numbers of

DATA COLLCECTION AND INTERPRETATION

respondents are Post-Graduate. They are 48.2 percent of total population. The second highest respondents are Graduate. The third highest number of respondents is Doctorate, which is 20.2 percent of total population. Least number of respondents is seen in Post Doc.

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid upto 10	3	1.4	1.4	1.4
upto 12	12	5.5	5.5	6.9
Graduate	53	24.3	24.3	31.2
Post Graduate	105	48.2	48.2	79.4
Doctorate	44	20.2	20.2	99.5
Post Doc	1	.5	.5	100.0
Total	218	100.0	100.0	

Table no. 4: Education

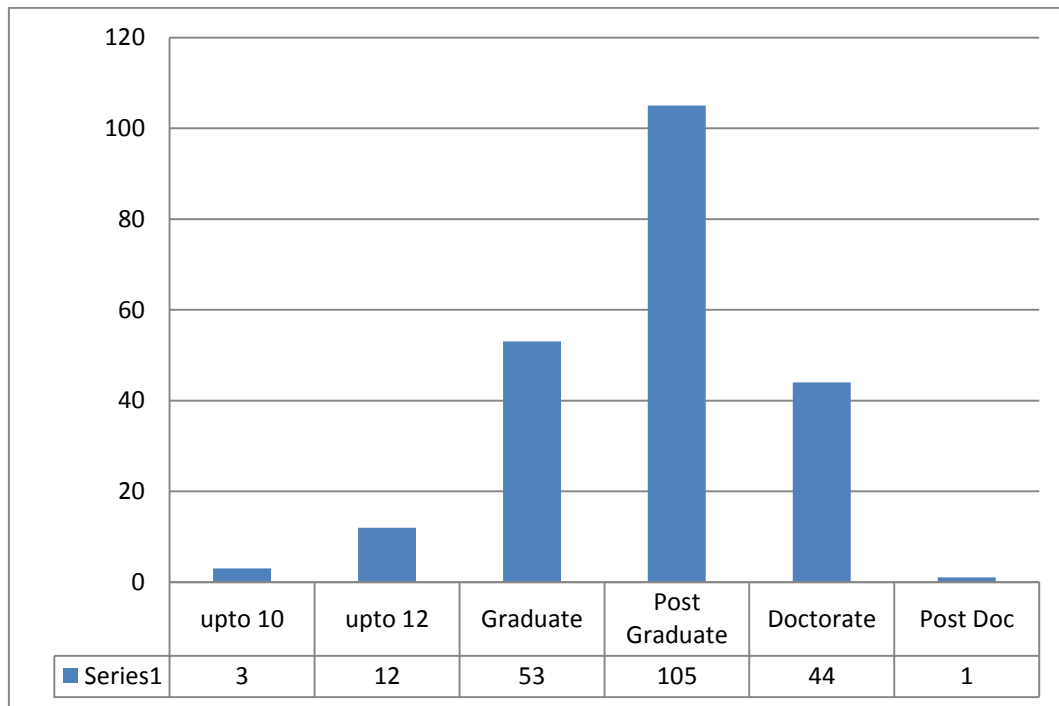


Chart no. 4: Education

Table no. 5 and Chart no. 5 is related to qualifying question for respondents. . The question was “*Do you know about of Test Tube Baby Technique/ IVF, Surrogacy?*” Researcher has received 430 filled questionnaires. Under these filled questionnaire researcher found that 218 respondent are know about the Test Tube Baby Technique/IVF Surrogacy. So out of 430 questionnaires only 218 questionnaires was valid for data analysis and interpretation. Only 218 respondents are qualified and found suitable for further questions.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	218	100.0	100.0	100.0

Table no. 5: Knowledge about TTBT/IVF/Surrogacy

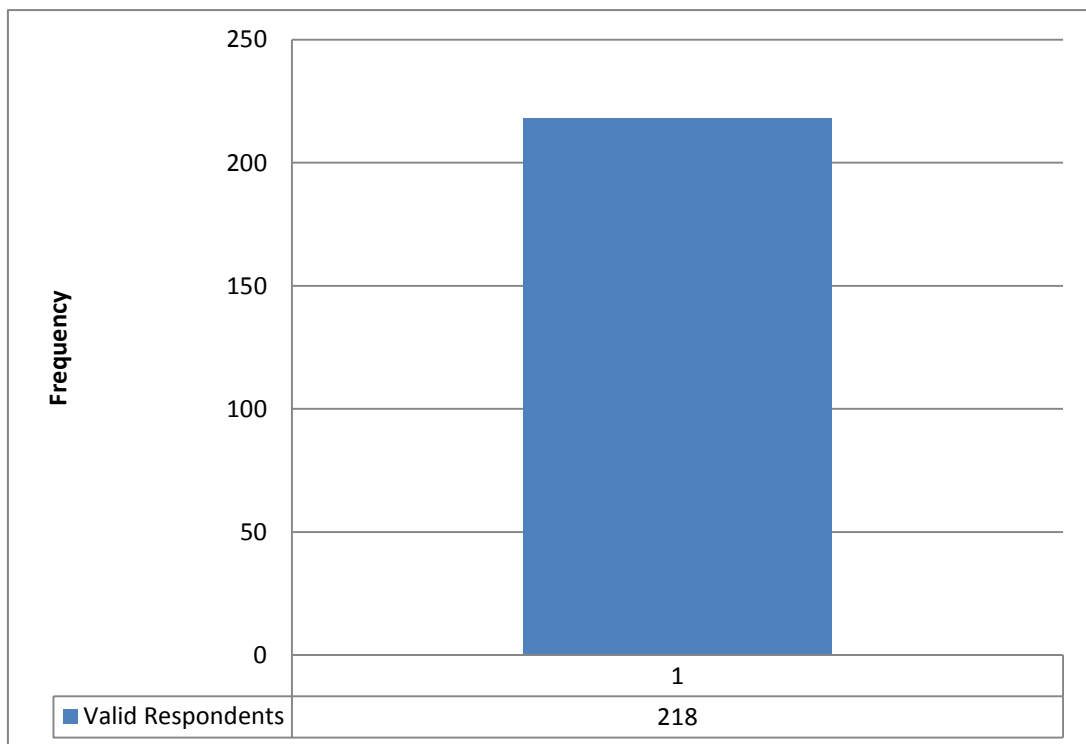


Chart no. 5: Knowledge about TTBT/IVF/Surrogacy

Table number and Chart number 6 is related to question “*Do you know about of Test Tube Baby Technique/ IVF, Surrogacy? If Yes, How to know this?*” Table shows that 46.8 percent of respondents are gain knowledge / information about Test Tube Baby Technique/ IVF, Surrogacy from Friends and Relatives, Electronic & Print Media and Internet. The second highest number of respondents are know about Test Tube Baby Technique/ IVF, Surrogacy through Internet their percentage is 22.5. Electronic and Print Media have the third highest sources of information about Test Tube Baby Technique/ IVF, Surrogacy and Table also show that Friends and Relative are the least sources of information about Test Tube Baby Technique/ IVF, Surrogacy. Their share is eleven percent.

Friends and Relative found as least source of information regarding Test Tube Baby Technique/ IVF, Surrogacy. While Internet known as good source of information about Test Tube Baby Technique/ IVF, Surrogacy which is highest among first three sources. This finding shows that Test Tube Baby Technique/ IVF, Surrogacy is not taken as a general question among Friend and Relatives because of personal relationship and closed mind set. While the other sources played a vital role is disseminating information regarding Test Tube Baby Technique/ IVF, Surrogacy because of their non-personal/personal or far contact relationship or no relationship among sender and receiver of information.

We have to overcome our narrow mind set regarding Test Tube Baby Technique/ IVF, Surrogacy. We can see that friends and relative are found a least source of information because of their personal nature. This should be taken as a success result of hard working of Research & Development. And we need to frame a better policy to promote and protect different stakeholders of Test Tube Baby Technique/ IVF, Surrogacy.

DATA COLLCECTION AND INTERPRETATION

	Frequency	Percent	Valid Percent	Cumulative Percent
Friends and Relative	24	11.0	11.0	11.0
Electronic and Print Media	43	19.7	19.7	30.7
Valid Internet	49	22.5	22.5	53.2
All of Above	102	46.8	46.8	100.0
Total	218	100.0	100.0	

Table no. 6: Source of information

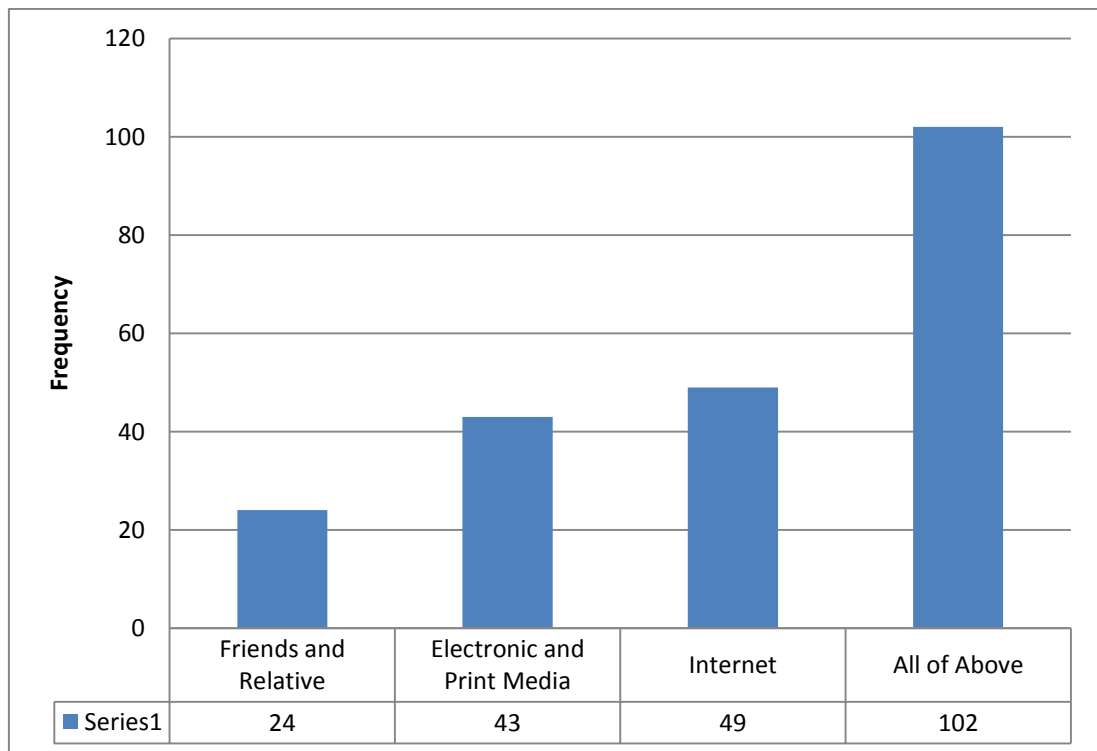


Chart no. 6: Source of information

Table and Chart number 7 is related to question “**Do you know about of Surrogacy Arrangement?**” This table shows that 74.8 percent of respondents are know about Surrogacy Arrangement. While 18.8 percent of respondents are not known about Surrogacy Arrangement and 6.4 percent of respondents are not able to answer this question.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	163	74.8	74.8	74.8
	No	41	18.8	18.8	93.6
	Can't Say	14	6.4	6.4	100.0
	Total	218	100.0	100.0	

Table no. 7: Surrogacy Arrangement

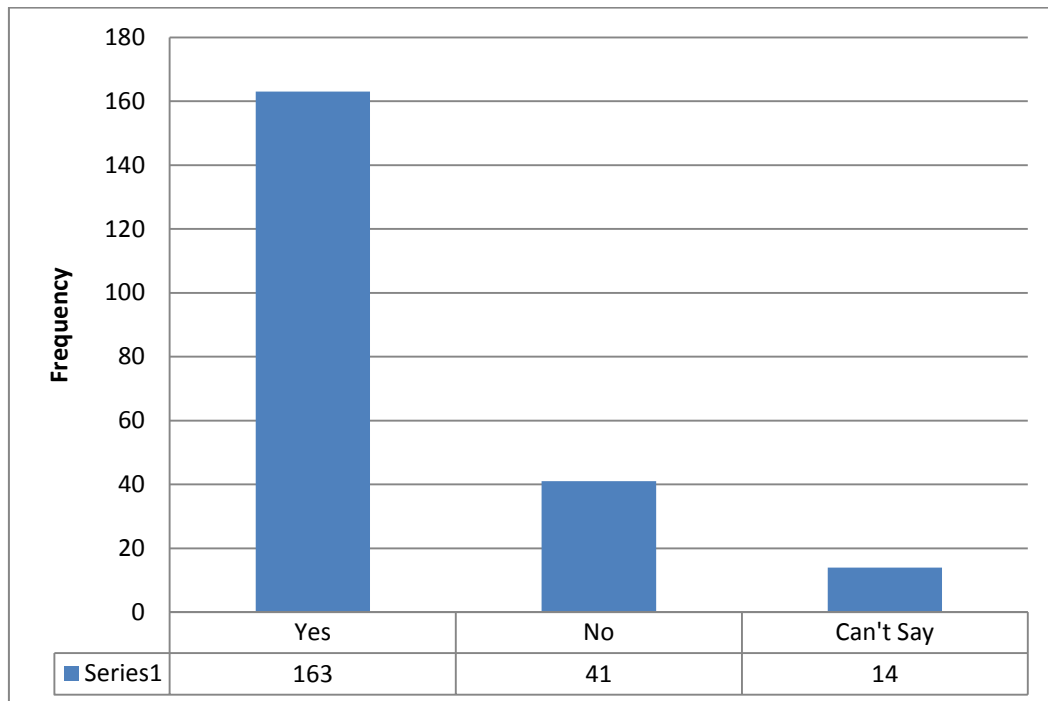


Chart no. 7: Surrogacy Arrangement

Table and Chart number 8 is related to question “**Is there any Difference between In-Vitro Fertilization and Surrogacy Arrangement?** Here 60.6 of respondent said that there is any difference between In-Vitro Fertilization and Surrogacy Arrangement, while 11.9 percent of respondents are finds not any difference between In-Vitro Fertilization and Surrogacy Arrangement and Can’t Say are in sixty in numbers.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	132	60.6	60.6	60.6
	No	26	11.9	11.9	72.5
	Can’t Say	60	27.5	27.5	100.0
	Total	218	100.0	100.0	

Table no. 8: Difference between IVF & Surrogacy

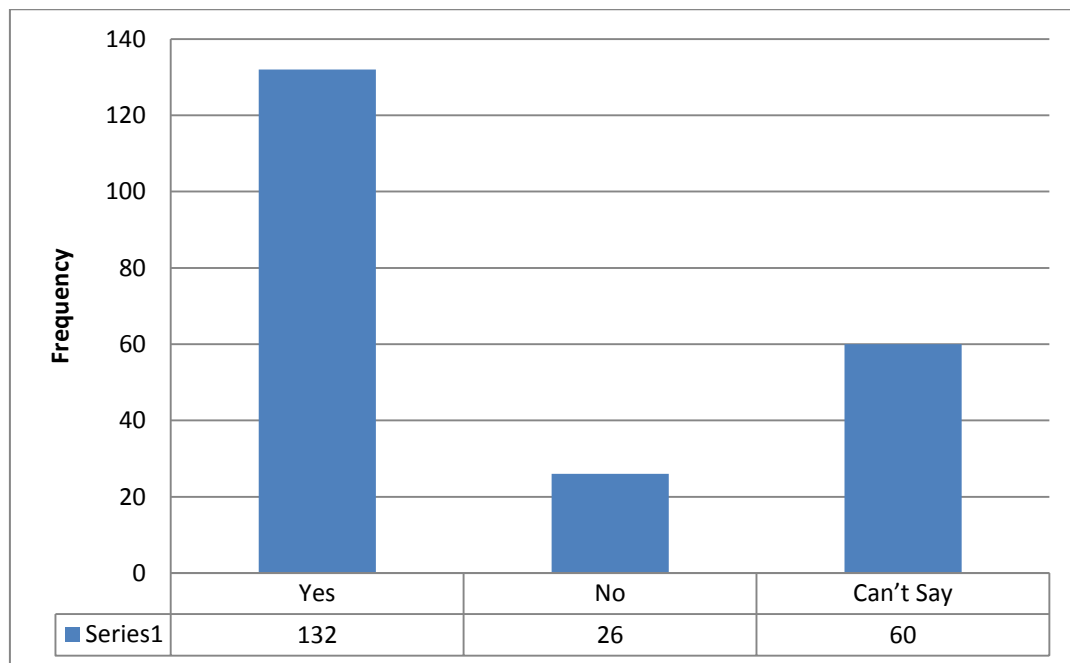


Chart No. 8: Difference between IVF & Surrogacy

Table and Chart no. 9 is related to question “**What are the Possible Impact of infertility, Impotency or Natural Incapacity?** The question is trying to analyse the Possible Impact of infertility, Impotency or Natural Incapacity with five different closed ended options i.e. Persons are affected by inferiority complex, they keep them

DATA COLLCECTION AND INTERPRETATION

cut off from the mainstream of society, Persons suffer from depression, Broken Marriage and All of the above. The table shows that highest numbers of respondents responds on all of above (57.8 %), the second highest option is Persons are affected by inferiority complex i.e. 20.6%, Persons suffer from depression is on third position, Broken Marriage gets forth number i.e. 8.7% and least highest is They keep them cut off from the mainstream of society.

	Frequency	Percent	Valid Percent	Cumulative Percent
Persons are affected by inferiority complex	45	20.6	20.6	20.6
They keep them cut off from the mainstream of society	8	3.7	3.7	24.3
Persons suffer from depression	20	9.2	9.2	33.5
Broken Marriage	19	8.7	8.7	42.2
All of Above	126	57.8	57.8	100.0
Total	218	100.0	100.0	

Table no. 9: The Possible Impact of infertility, Impotency or Natural Incapacity

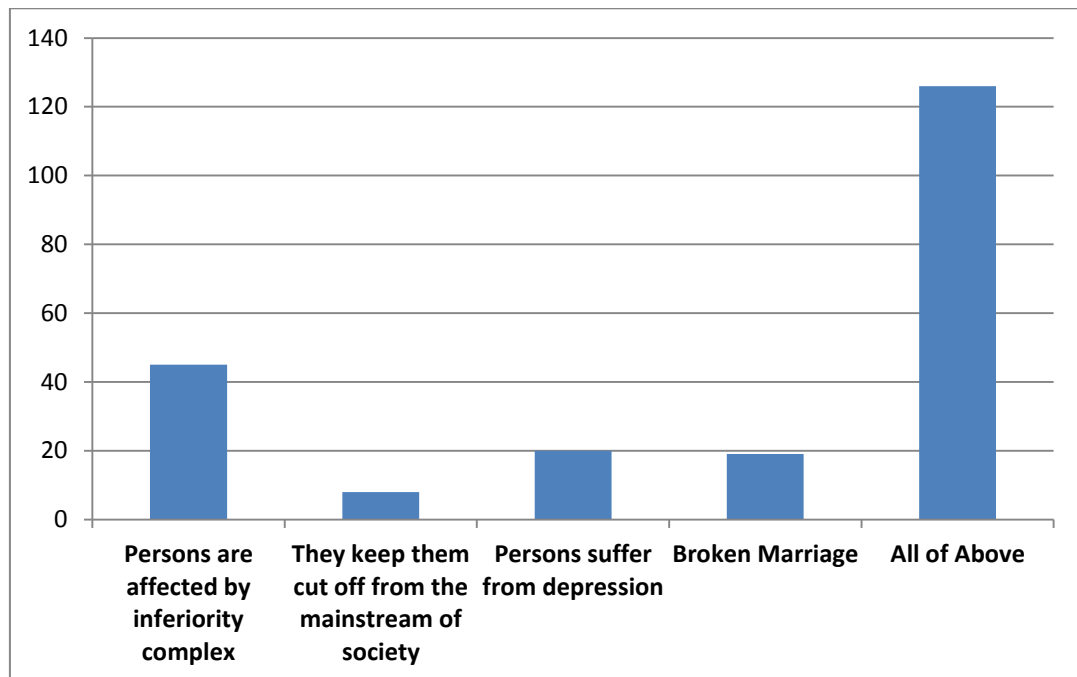


Chart no. 9: The Possible Impact of infertility, Impotency or Natural Incapacity

DATA COLLCECTION AND INTERPRETATION

Table and Chart no. 10 shows that Social Experience of Infertility. In this table we can see that 52.8 percent of respondents choose the all of above options which is highest score of social experience of infertility while Attitude of people in society is the second highest preferred option i.e. 25.2 percent. Attitude of life partner is the third highest preferred option, forth one is Attitude of relatives (8.3%) and in least preferred option is Attitude of family members (3.2%).

	Frequency	Percent	Valid Percent	Cumulative Percent
Attitude of People in Society	55	25.2	25.2	25.2
Attitude of relatives	18	8.3	8.3	33.5
Attitude of family members	7	3.2	3.2	36.7
Attitude of life partner	23	10.6	10.6	47.2
All of Above	115	52.8	52.8	100.0
Total	218	100.0	100.0	

Table no. 10: Social Experience of Infertility

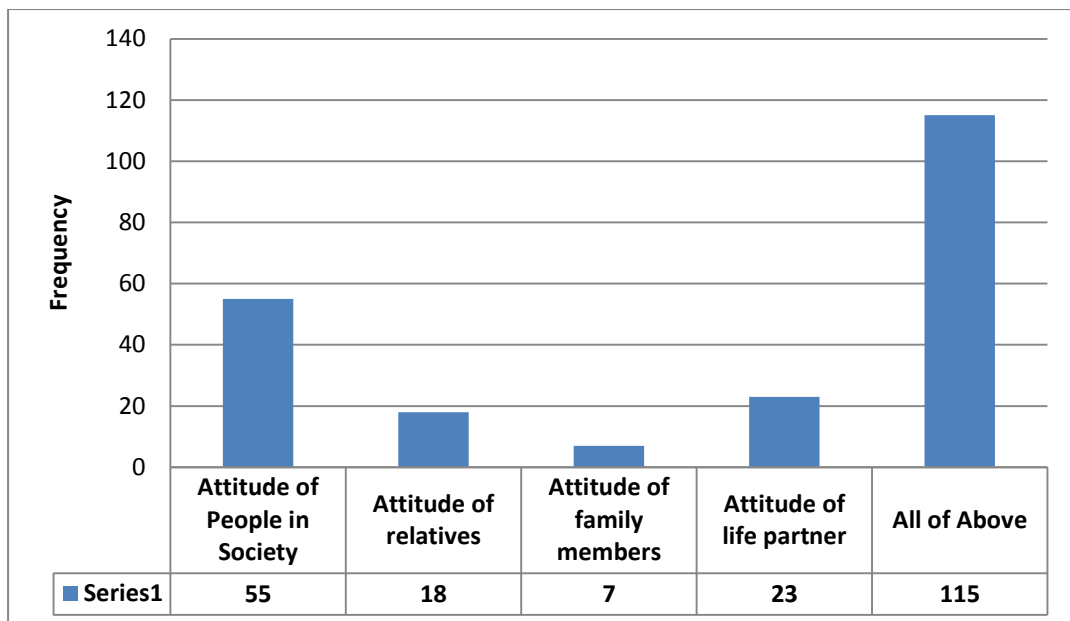


Chart no. 10: Social Experience of Infertility

DATA COLLCETION AND INTERPRETATION

After the analysis of Social Experience of Infertility question, the next question is related to find out the Most Suitable Alternative for Infertility, Impotency and Natural incapacity. For this table and Chart no. 11 shows that In-Vitro Fertilization and Surrogacy Arrangement are the most suitable alternatives. Surrogacy Arrangement has the highest scorer (17.4%) in comparison to In-Vitro Fertilization (14.7%). Any other method (if there is) is the lowest preferred option by the 4.6 percent of respondents.

	Frequency	Percent	Valid Percent	Cumulative Percent
In-Vitro Fertilization	32	14.7	14.7	14.7
Surrogacy Arrangement	38	17.4	17.4	32.1
Any Other Method (If there Is)	10	4.6	4.6	36.7
(a) and (b) both	92	42.2	42.2	78.9
All of Above	46	21.1	21.1	100.0
Total	218	100.0	100.0	

Table no. 11: Most Suitable Alternative

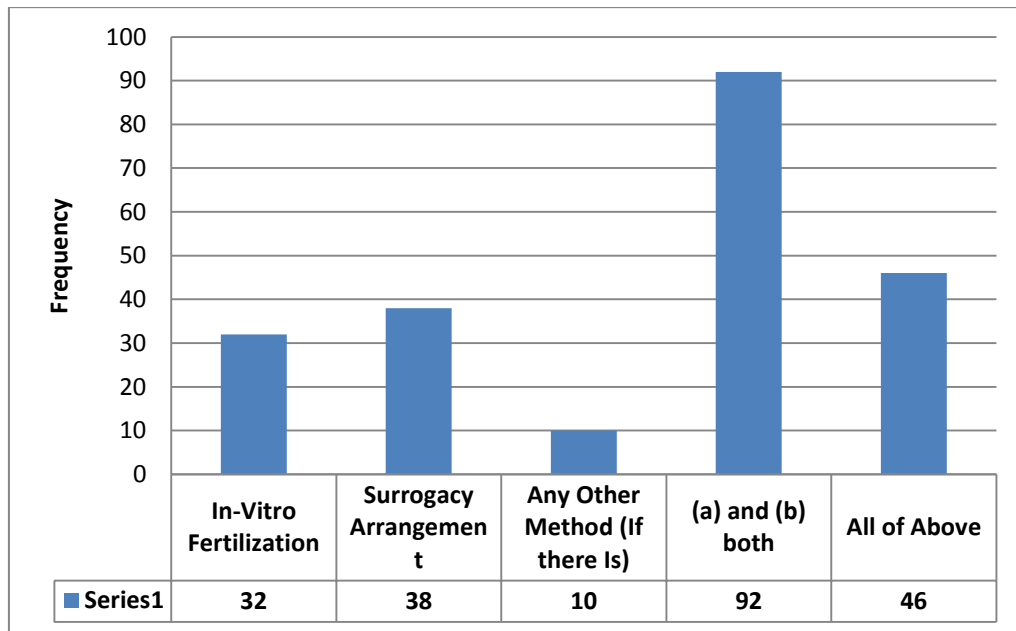


Chart no. 11: Most Suitable Alternative

DATA COLLCECTION AND INTERPRETATION

Table and Chart no. 12 is related to analysis and interpretation of Reasons for the Mushroom Growth of ART Clinics in India. Here our respondents have different opinions regarding mushrooming growth of ART clinics in India. These opinions are classified into four different categories. The table and Chart shows that Desire to have a baby (41.7%) is the most preferred reason for mushrooming of ART clinics in India. While Desire to have a male child is the second most (39%) most preferred reason for mushrooming, Any other Desire have the third most (12.4) preferred reason for mushrooming lastly Desire to have a female child have the least (6.9%) preferred reason for mushrooming of ART clinics in India.

	Frequency	Percent	Valid Percent	Cumulative Percent
Desire to have a male child	85	39.0	39.0	39.0
Desire to have a female child	15	6.9	6.9	45.9
Desire to have a baby	91	41.7	41.7	87.6
Any other Desire	27	12.4	12.4	100.0
Total	218	100.0	100.0	

Table no. 12: Reasons for the Mushroom Growth of ART Clinics in India

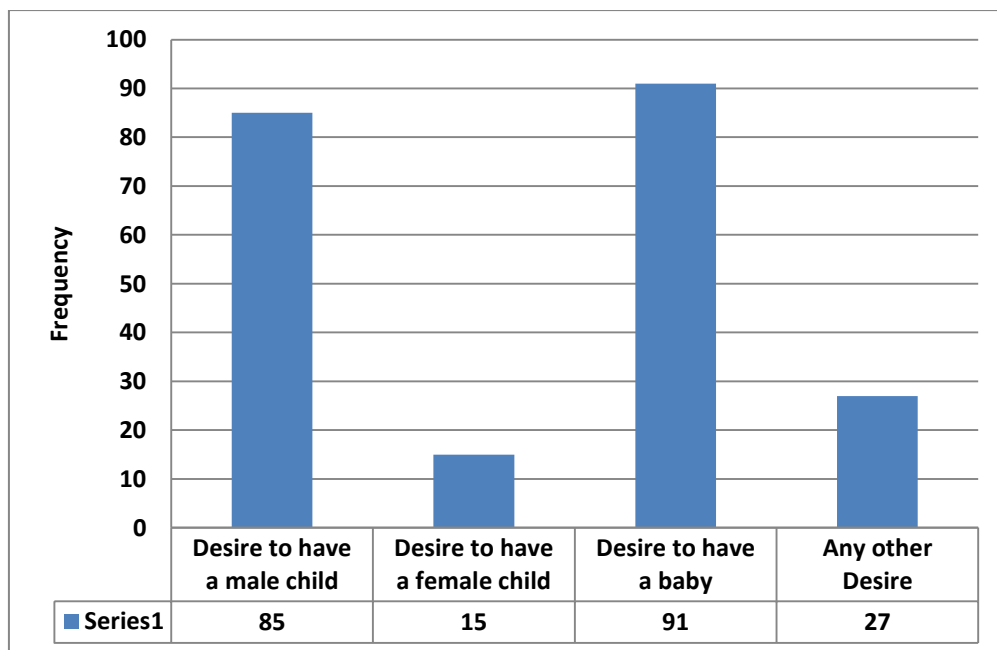


Chart no. 12: Reasons for the Mushroom Growth of ART Clinics in India

DATA COLLCECTION AND INTERPRETATION

Table and Chart number 13 shows that frequency of respondent’s opinions (in regards to commercialisation of IVF and Surrogacy Arrangement at present times) on three nominal scale Yes, No and Can’t Say. The data analysis and interpretations clearly shows that 61.5 % of respondents said Yes for its commercialisation, 15.1% are in against of its commercialisation and 23.4% respondents are not able to express their opinions against commercialisation or not.

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Yes	134	61.5	61.5	61.5
No	33	15.1	15.1	76.6
Can't Say	51	23.4	23.4	100.0
Total	218	100.0	100.0	

Table no. 13: IVF and Surrogacy Arrangement Is Being-Commercialized

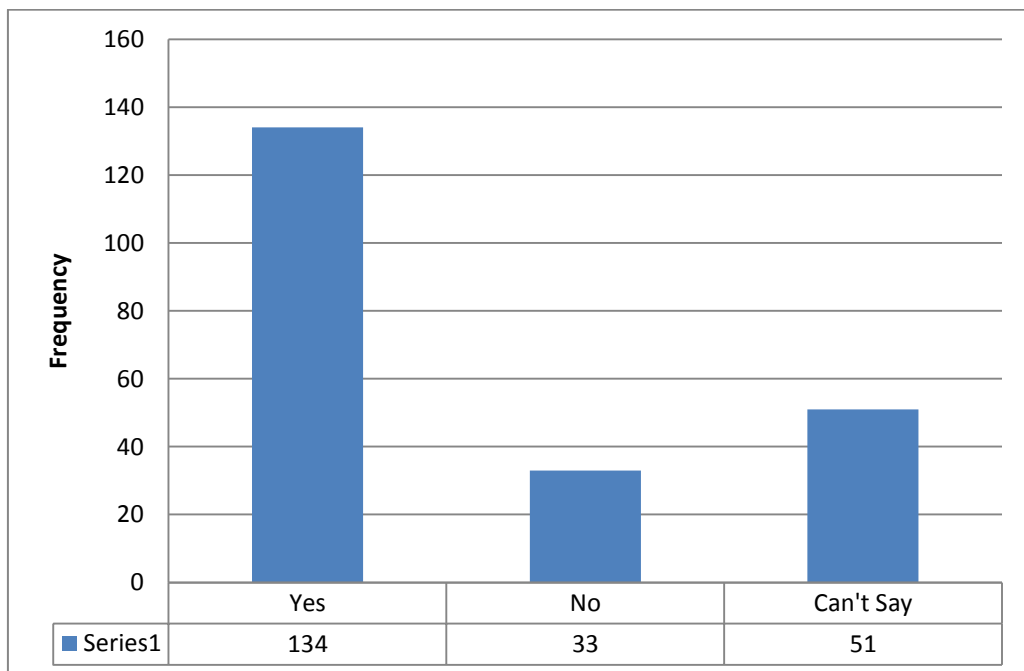


Chart no. 13: IVF and Surrogacy Arrangement Is Being-Commercialized

DATA COLLCECTION AND INTERPRETATION

Another table and Chart number 14 is about the awareness of Surrogacy & ART Bill. Table shows that 45.9 percent of respondents have the information about Surrogacy & ART Bill, 27.1 percent of respondents are not aware about Surrogacy & ART Bill, while 26.6 percent of respondents not able to say anything about Surrogacy & ART Bill and lastly .5 percent of respondent have read about the bill in newspaper but don't have descriptive knowledge. Majority of respondents (100 out of 218 respondents) have well awareness and knowledge about Surrogacy & ART Bill.

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	100	45.9	45.9	45.9
No	59	27.1	27.1	72.9
Can't Say	58	26.6	26.6	99.5
Valid I have read about the bill in newspapers but don't have descriptive knowledge.	1	.5	.5	100.0
Total	218	100.0	100.0	

Table no.14: Awareness about Surrogacy & ART Bill

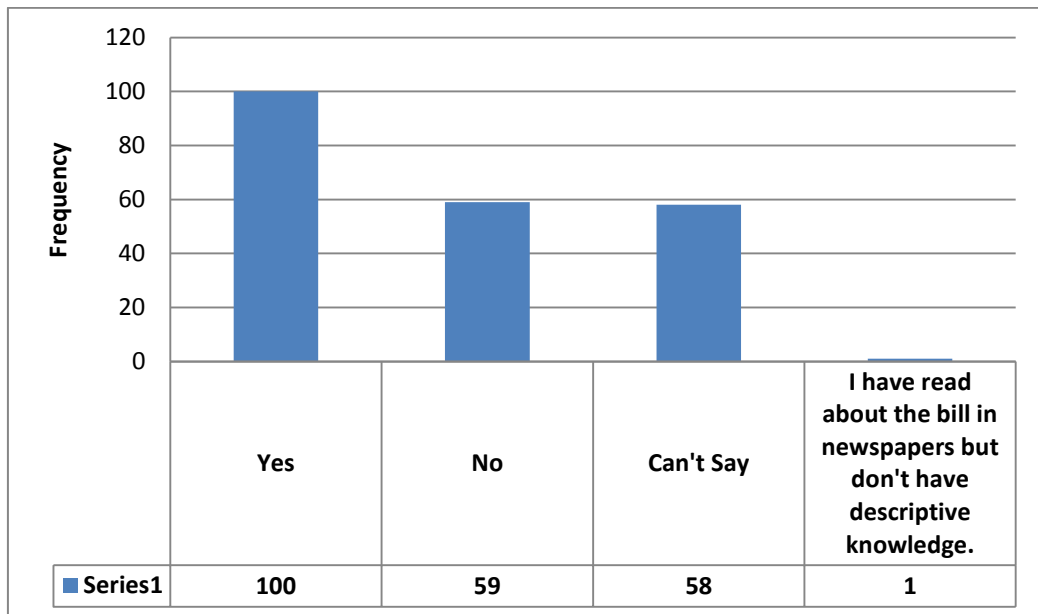


Chart no. 14: Awareness about Surrogacy & ART Bill

DATA COLLCECTION AND INTERPRETATION

The given below table is showing the different opinions of hundreds respondents (who opted “Yes” in previous question) on question on “Whether Surrogacy (regulating Bill) 2019 and ART (regulating Bill) 2020 will be able to regulate IVF and Surrogacy Arrangement?” Table shows that forty five percent of respondents opted “Yes” and forty five percent of respondents opted “No” and lastly only ten percent of respondents opted Can’t Say.

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Yes	45	45.0	45.0	45.0
No	45	45.0	45.0	90.0
Can't Say	10	10.0	10.0	100.0
Total	100	100.0	100.0	

Table no: 15: Able to regulate IVF and Surrogacy Arrangement

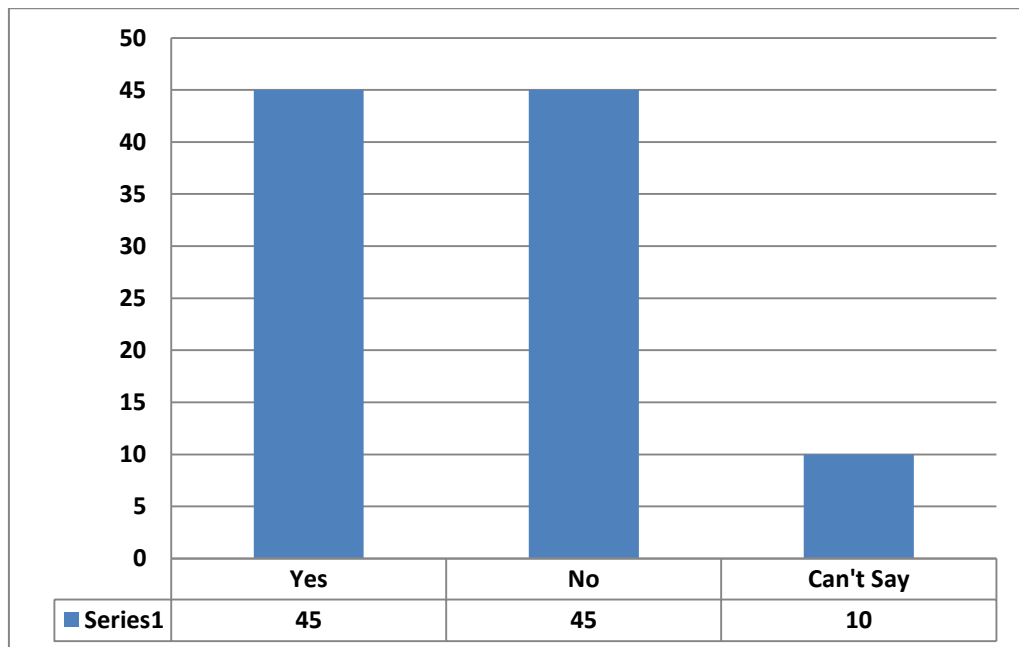


Chart no: 15: Able to regulate IVF and Surrogacy Arrangement

DATA COLLCECTION AND INTERPRETATION

The given below table and Chart is related to opinions on “**Surrogate Mother develops a Sentimental Relation with the Child**”. Here 147 respondents dominate on 71 respondents. 147 respondents means 67.4 percent opted ‘Yes’ and 9.6 percent of respondents opted ‘No’ while 22.9 percent of respondents are not able to clearly opted for any above option.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	147	67.4	67.4	67.4
	No	21	9.6	9.6	77.1
	Can't Say	50	22.9	22.9	100.0
	Total	218	100.0	100.0	

Table no. 16: Surrogate Mother Sentimental Relation with the Child

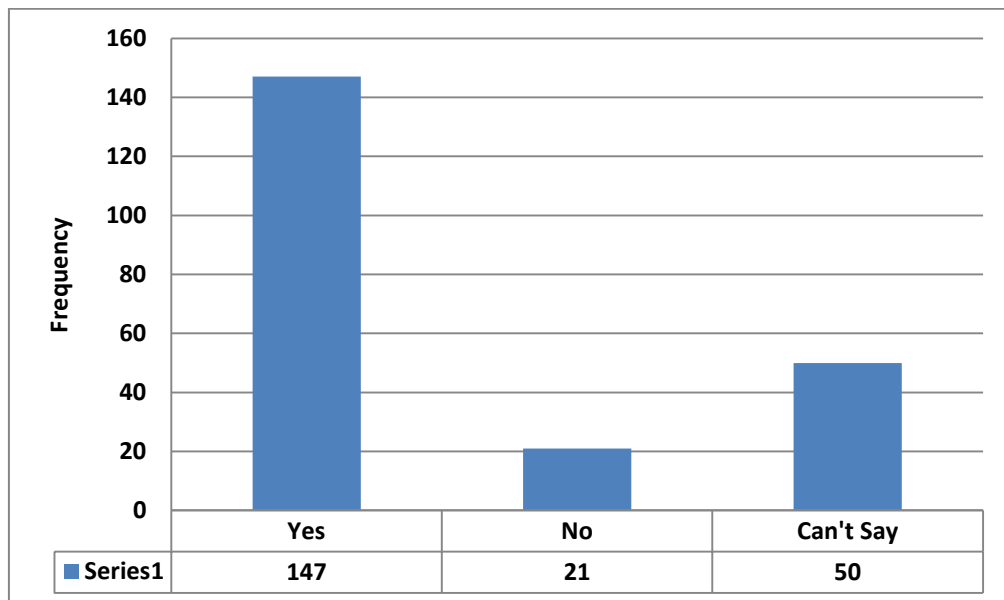


Chart no. 16: Surrogate Mother Sentimental Relation with the Child

DATA COLLCECTION AND INTERPRETATION

The given below Table and Chart no. 17 is related to the question “Surrogacy Arrangement should be available only to Naturally Incapable Parents?” and respondents opinions. The table shows that 140 respondents (64.2%) are in favour of this question while 45 respondents are against it. Only 33 respondents are not able express their opinion in ‘Yes or No’.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	140	64.2	64.2	64.2
	No	45	20.6	20.6	84.9
	Can't Say	33	15.1	15.1	100.0
	Total	218	100.0	100.0	

Table no. 17: Surrogacy Arrangement & Naturally Incapable Parents

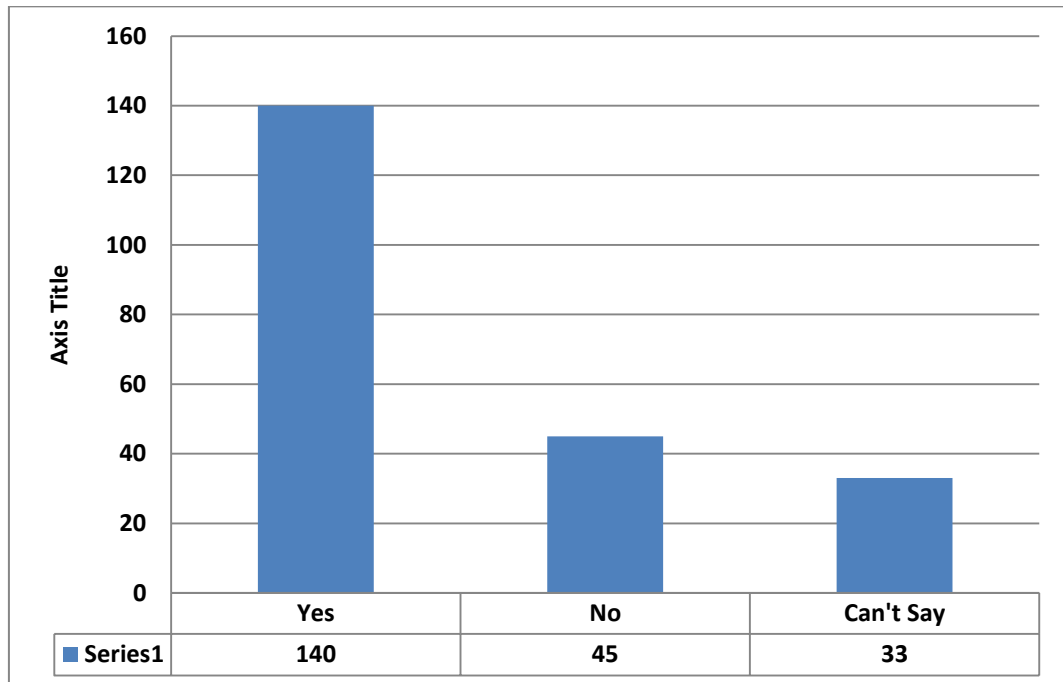


Chart no. 17: Surrogacy Arrangement & Naturally Incapable Parents

DATA COLLCECTION AND INTERPRETATION

Under given table and Chart no. 18 is related to question ‘Should Single Parents have Right to Baby through Surrogacy Arrangement?’ Here 153 respondents are opted ‘Yes’ while 30 respondents opted ‘No’. and 35 respondents are ‘Can’t Say.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	153	70.2	70.2	70.2
	No	30	13.8	13.8	83.9
	Can't Say	35	16.1	16.1	100.0
	Say				
	Total	218	100.0	100.0	

Table no. 18: Single Parents Baby through Surrogacy Arrangement

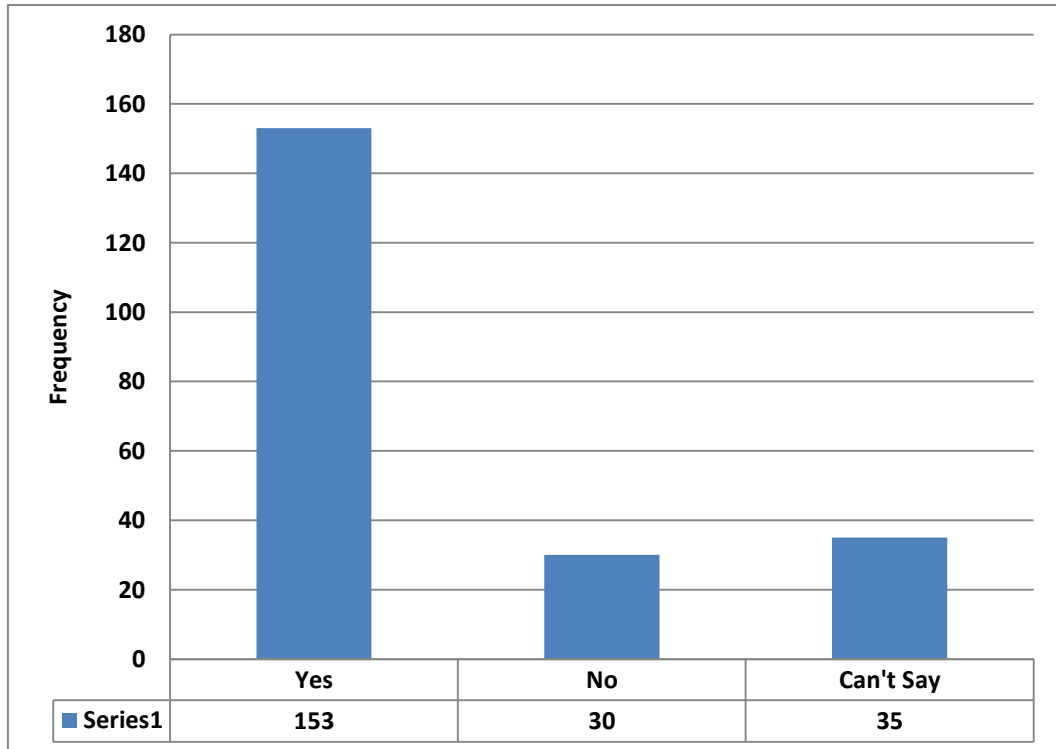


Chart no 18: Single Parents Baby through Surrogacy Arrangement

DATA COLLCECTION AND INTERPRETATION

The given below table and Chart no. 19 is based on question “**Whether Transgender, Gays or Bisexuals should be allowed to have Baby through Surrogacy Arrangement?**” The data analysis shows that 138 respondents are in favour of Transgender, Gays or Bisexuals be allowed to have Baby through Surrogacy Arrangement, while 37 respondents opted ‘No’ and 43 respondents opted Can’t Say which is second highest in number.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	138	63.3	63.3	63.3
	No	37	17.0	17.0	80.3
	Can't Say	43	19.7	19.7	100.0
	Total	218	100.0	100.0	

Table no. 19: TGB & Baby through Surrogacy Arrangement

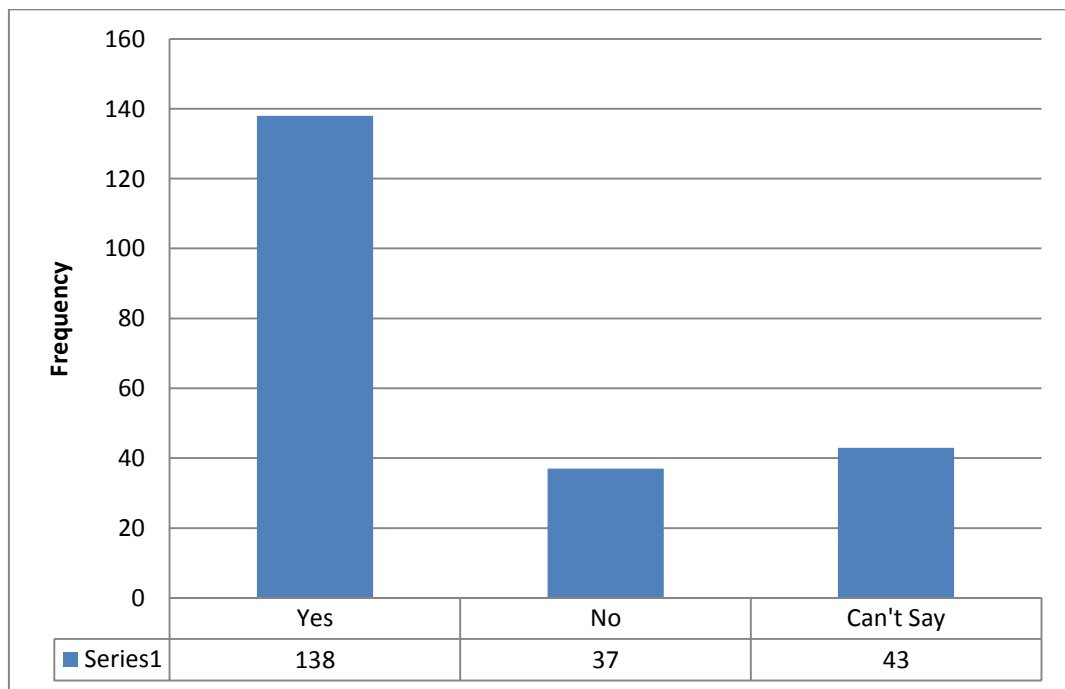


Chart no. 19: TGB & Baby through Surrogacy Arrangement

DATA COLLCECTION AND INTERPRETATION

The given below table and chart is related to question ‘Should ART and Surrogacy Arrangement be permitted at professional Level?’ In this table we can see that 117 respondents opted ‘Yes’ 50 respondents are not in favour at professional level while 51 respondents opted Can’t say.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	117	53.7	53.7	53.7
	No	50	22.9	22.9	76.6
	Can't Say	51	23.4	23.4	100.0
	Total	218	100.0	100.0	

Table no. 20: ART and Surrogacy Arrangement professional Level

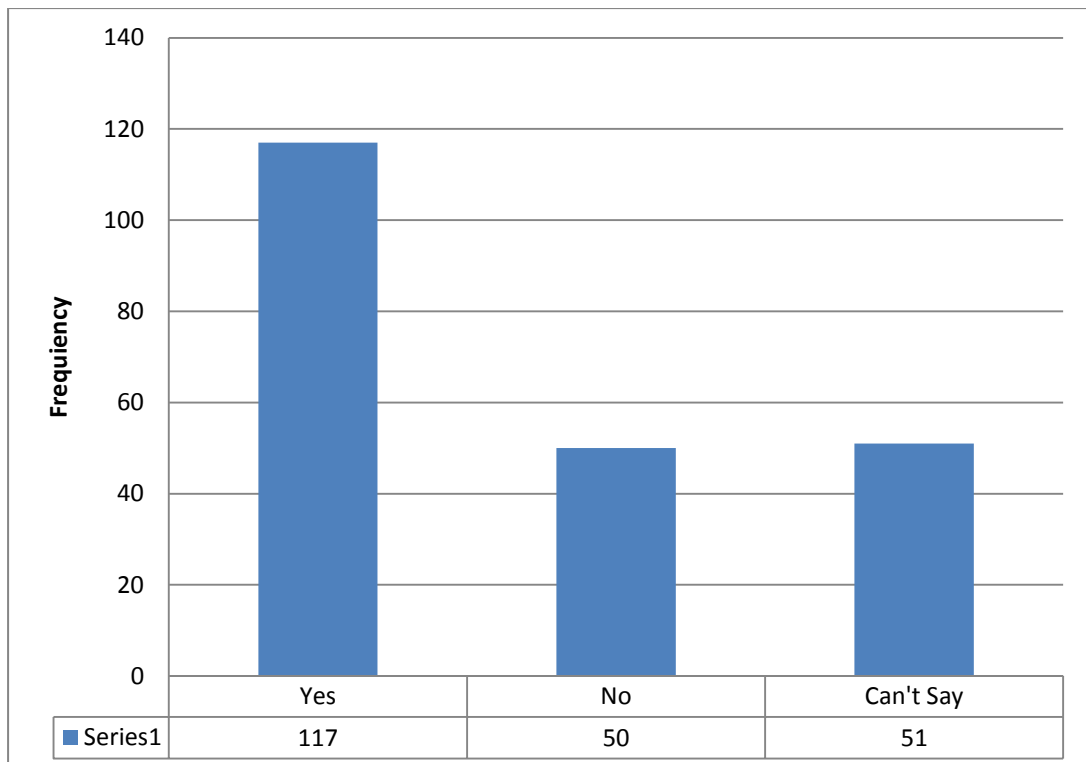


Chart no. 20: ART and Surrogacy Arrangement professional Level

DATA COLLCECTION AND INTERPRETATION

The given below table and chart no. 21 is related to question reveal that 64.7 percent of respondents are the first highest in numbers who wanted to strictly prohibited Sex-determination in ART and Surrogacy Arrangement. Can't Say scored second highest in numbers and least scorers of respondents are categorized in 'No'.

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	141	64.7	64.7
	No	29	13.3	78.0
	Can't Say	48	22.0	100.0
	Total	218	100.0	100.0

Table no. 21: Sex-Determination Prohibited in ART and Surrogacy Arrangement

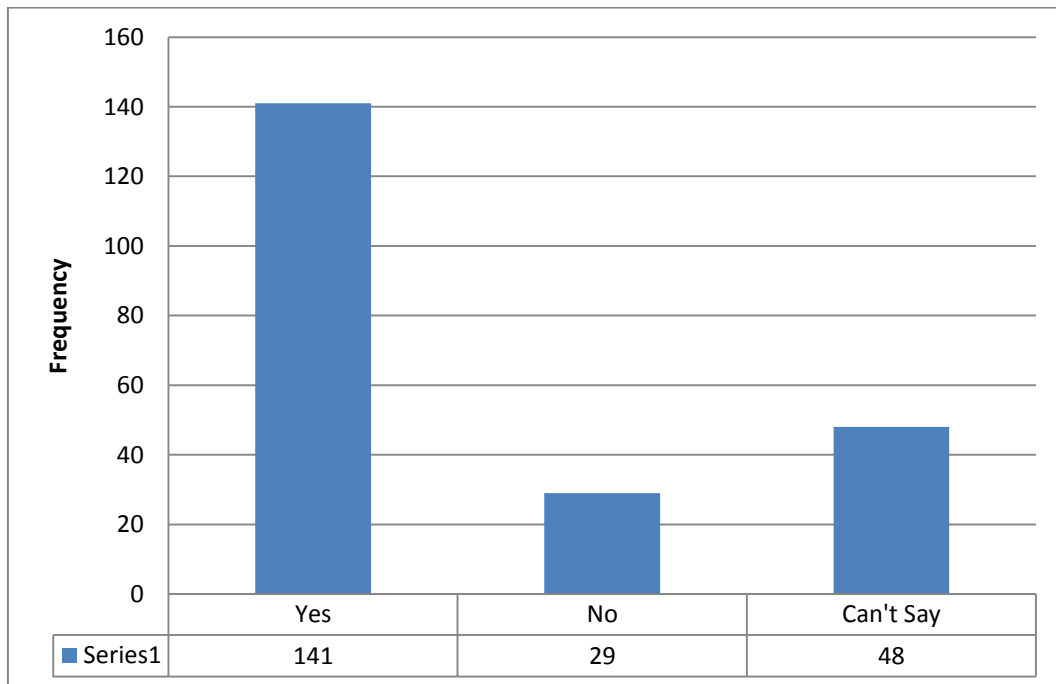


Chart no. 21: Sex-Determination Prohibited in ART and Surrogacy Arrangement

DATA COLLCECTION AND INTERPRETATION

In another question when next question was asked from respondents about “whether IVF and the Surrogacy Arrangement is being Misused?” Table no.22 and chart no. xxx shows that 133 respondents opted ‘Yes’ which is highest in numbers. Can’t Say supporter respondents are the second highest in numbers and least number of respondents (21 respondents) are against the question.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	133	61.0	61.0	61.0
	No	21	9.6	9.6	70.6
	Can't Say	64	29.4	29.4	100.0
	Total	218	100.0	100.0	

Table no.22: IVF and the Surrogacy Arrangement is being Misused

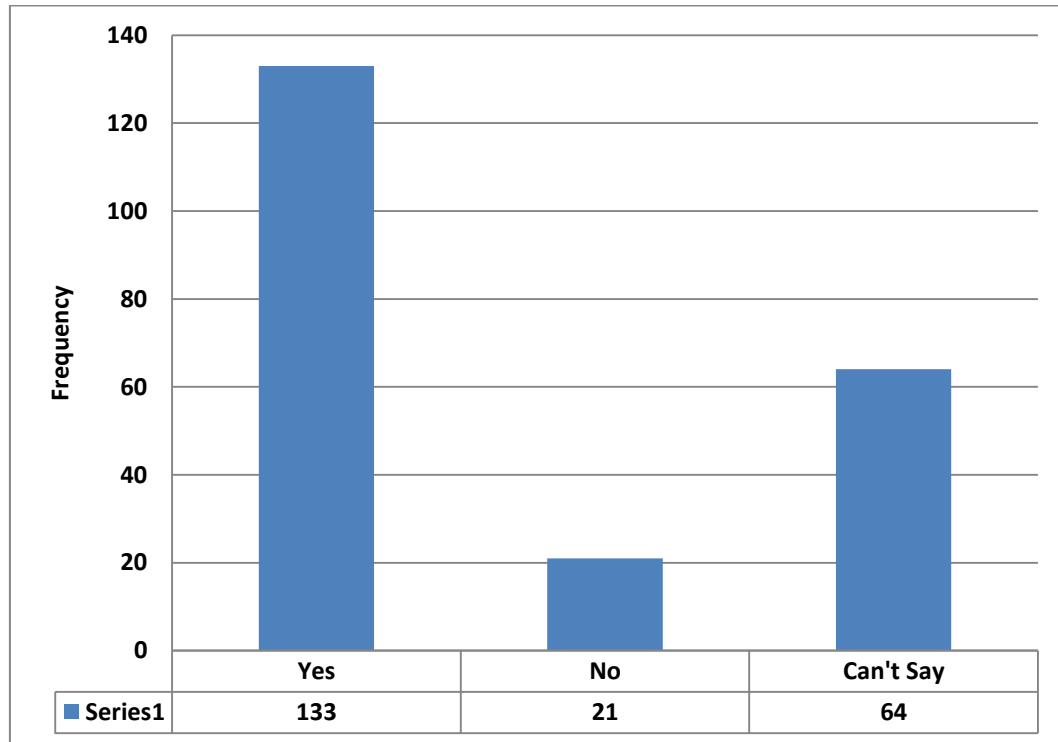


Chart no.22: IVF and the Surrogacy Arrangement is being Misused

DATA COLLCECTION AND INTERPRETATION

Table and chart no. 23 revealed respondent opinion on question ‘Do you think that a proper law is necessary to regulate surrogacy?’ that 173 respondents opted ‘Yes’ for proper law is necessary to regulate surrogacy. Table and chart also shows that 5.5 percent of respondents are not in favour of this question and they are all in least number i.e. 12 respondents, while there are also we have another option for this question to respondents i.e. Can’t Say. So Can’t Say respondents are the second highest in this data analysis.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	173	79.4	79.4	79.4
	No	12	5.5	5.5	84.9
	Can't Say	33	15.1	15.1	100.0
	Total	218	100.0	100.0	

Table no. 23: Proper law to regulate surrogacy

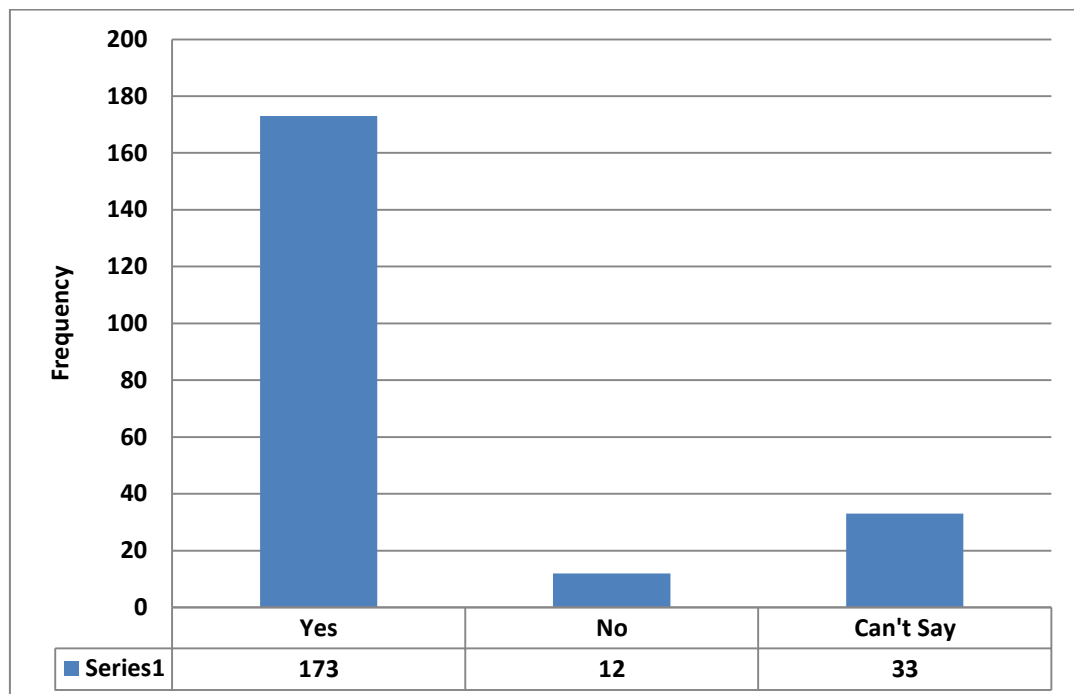


Chart no. 23: Proper law to regulate surrogacy

DATA COLLCECTION AND INTERPRETATION

The table and chart no. 24 is related to respondent's opinions on question 'Do you think that there is exploitation of surrogate mother?' The chart and table shows that 151 respondents opted 'Yes', 16 respondents opted 'No' which is third in score and 51 respondents are categorized in 'Can't Say' which is second highest in score.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	151	69.3	69.3	69.3
	No	16	7.3	7.3	76.6
	Can't Say	51	23.4	23.4	100.0
	Total	218	100.0	100.0	

Table no. 24: Exploitation of surrogate mother

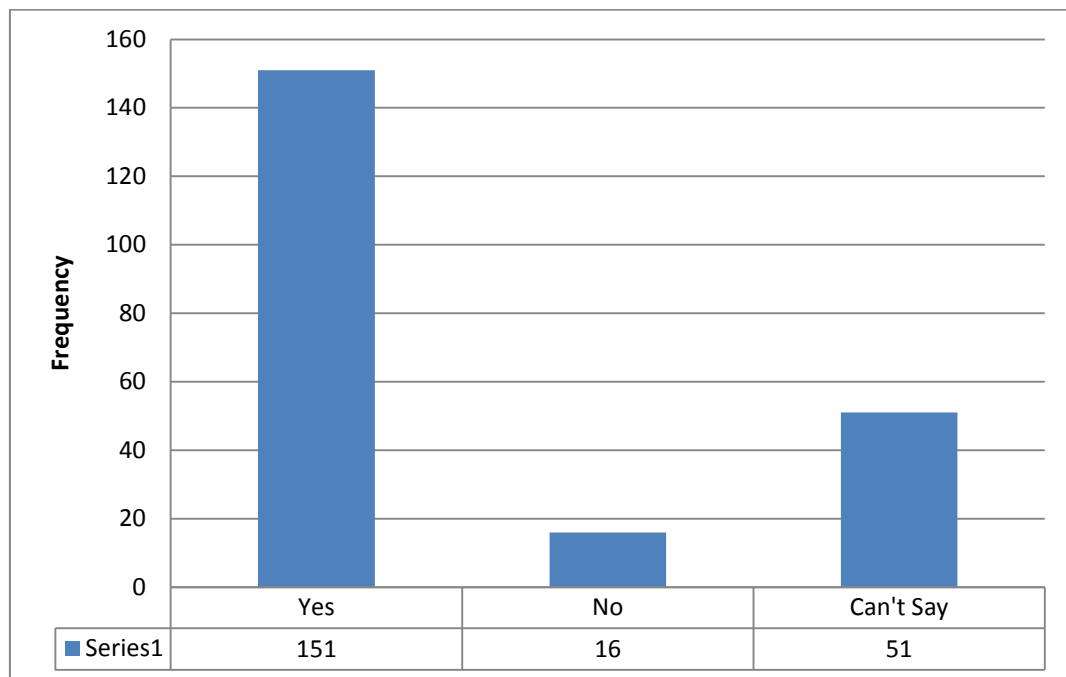


Chart no. 24: Exploitation of surrogate mother

DATA COLLCECTION AND INTERPRETATION

Table and Chart no. 25 shows the question ‘**Whether there should be a proper compensation system for the surrogate mother?**’ For this question opinion of 183 out of 218 respondents opted ‘Yes’ which is the highest in score. ‘No’ opinion respondents are in least number i.e. 7 respondents only. And third are those respondents who opted ‘Can’t Say’ is only in 12.8 percent which is the second highest category.

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Yes	183	83.9	83.9	83.9
No	7	3.2	3.2	87.2
Can't Say	28	12.8	12.8	100.0
Total	218	100.0	100.0	

Table no. 25: Proper compensation system for the surrogate mother

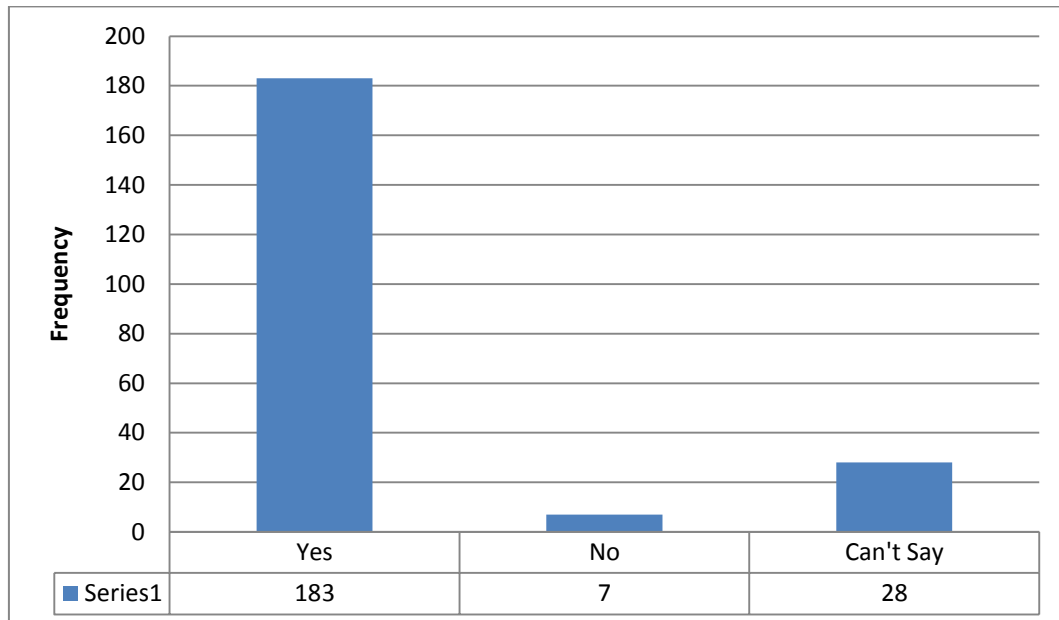


Chart no. 25: Proper compensation system for the surrogate mother

7.2 Hypothesis Testing

The following propositions are to be tested in the thesis:

H₀₁: Surrogacy is not a growing phenomenon during recent years and there is no absence of law regulations in this area.

H₁: Surrogacy is a growing phenomenon during recent years despite absence of law regulations in this area.

Table no. 26 shows that Surrogacy is a growing phenomenon during recent years despite absence of law regulations in this area. Pearson Correlation is .774 and hence the statistical evidence does not support the null hypothesis and the data favors the alternative hypothesis.

		Surrogacy is a growing phenomenon during recent years	Absense_law
Surrogacy is a growing phenomenon during recent years	Pearson Correlation	1	.774**
	Sig. (2-tailed)		.000
	N	218	218
	Pearson Correlation	.774**	1
Absense_law	Sig. (2-tailed)	.000	
	N	218	218

** . Correlation is significant at the 0.01 level (2-tailed).

Table no. 26: Correlations

H₀₂: It has not now become a hub industry, there is not a 15 percent increasing infertility.

H₂: It has now become hub industry, the 15 percent increasing infertility.

Table no. 27 is shows that it has now become hub industry, the 15 percent increasing infertility. Pearson Correlation is .318 and hence the statistical evidence rejects the null hypothesis and the data favors the alternative hypothesis.

DATA COLLCECTION AND INTERPRETATION

		Surro_hub_I ndustry	Increasing_in fertility
Surro_hub_Indust ry	Pearson Correlation	1	.318**
	Sig. (2-tailed)		.000
	N	218	218
Increasing_infertil ity	Pearson Correlation	.318**	1
	Sig. (2-tailed)	.000	
	N	218	218

** . Correlation is significant at the 0.01 level (2-tailed).

Table no. 27: Correlations

H₀₃: The legality of surrogacy arrangement is not debatable and the right & responsibility of the parties are settled.

H₃: The legality of surrogacy arrangement is debatable and the right & responsibility of the parties are not settled.

Table no. 28 is shows that the legality of surrogacy arrangement is debatable and the right & responsibility of the parties are not settled. Pearson Correlation is .210 and hence the statistical evidence rejects the null hypothesis and the data favors the alternative hypothesis.

		SurroArrang_de betable	RR_are_Settele d
SurroArrang_debetable	Pearson Correlation	1	.210**
	Sig. (2-tailed)		.000
	N	218	218
RR_are_Settele d	Pearson Correlation	.210**	1
	Sig. (2-tailed)	.000	
	N	218	218

** . Correlation is significant at the 0.01 level (2-tailed).

Table no. 28: Correlations



CHAPTER 8
CONCLUSION ANS SUGGESTIONS



CHAPTER 8

CONCLUSION AND SUGGESTIONS

8.1 Conclusion

Surrogacy has seen a recent surge in popularity due to technology advancements like as IVF, a softening of cultural attitudes, and the tendency of having children later in life. It has grown into a global phenomenon during the last two decades. Louise Brown, the world's first IVF baby, was born on July 25, 1978, in the United Kingdom. Kanupriya (alias Durga), On October 3, 1978, the world's second and India's first IVF baby was born, 67 days later. In the well-known "Baby M" case, a court in the state of New Jersey recognized the legitimacy of the traditional/genetic surrogate mother for the first time in 1986. Surrogacy is a process in which a surrogate mother carries and delivers a child for the benefit of another couple or individual.

Some couples have been able to start children that they would not have been able to start otherwise thanks to advances in reproductive technology. The present legal anomalies around international surrogacy, on the other hand, have caused a slew of issues for all parties involved. Surrogacy may never reach its full potential unless some type of regulation is implemented soon. Over the last decade, the number of global surrogacy partnerships has expanded significantly, prompting concerns about social justice, exploitation, and human rights breaches. Advances in reproductive technologies have caused major legal, moral, and ethical controversies in the world today. There are currently no international norms or guidelines governing global surrogacy arrangements, and there is limited national control or monitoring in some countries where the practice is common, such as India. Surrogacy is a complex topic that involves morality, paternity, the natural mother–infant bond, and the nuances of inequity in a globalised world, all of which connect with a multibillion-dollar industry.

CONCLUSION AND SUGGESTIONS

Thailand, termed the "womb of Asia" by some, is the most common destination for international surrogacy. Hundreds of thousands of couples travelled to Thailand to hire women to carry their children. This influx eventually led in a slew of controversies arising from the mostly unregulated business. A surrogacy partnership between an Australian couple and a Thai surrogate resulted in the birth of Baby Gammy, who has Down syndrome and heart and lung abnormalities. Because of these developmental problems, Gammy's intended Australian parents abandoned him in Thailand, leaving his destitute surrogate mother to care for him. Gammy's twin sister was healthy when the couple returned to Australia. Not just his intended parents, but the entire world was outraged by Baby Gammy's desertion. Surrogacy may never reach its full potential unless some type of regulation is implemented soon. The surrogacy market is rapidly growing, and the current challenges that couples and surrogates face will not be remedied by keeping the system as it is. Sovereign countries have the right to rule their inhabitants without interference, but a single regulatory framework for the surrogacy business would benefit both the people of signatory countries and those who participate in cross-border surrogacy partnerships. Regulators are desperately needed to address the difficulties that put the children and adults involved in international surrogacy in danger on a daily basis.

After the United States, India has become a popular surrogacy destination in the last decade. According to the Global Surrogate Mothers Advancing Rights, 50,000 couples may use it each year. Due to the intended parents' economic and political backgrounds (who come from developed countries where surrogacy may be prohibited), the numerous medical facilities offered by the medical community, and the low socio-economic background of Indian women, a plentiful source of "reproductive labour," both demand and supply are high in India. The popularity of "medical tourism," or, in this case, "fertility tourism," adds another degree of complexity. "Fertility tourism" has grown in popularity in recent years in nations with relatively lenient assisted reproduction technology legislation, such as India, Ukraine, and even the United States. This Note will provide an outline of the key centres of operation in the "fertility tourism" boom, as well as the main legal difficulties that arise in international surrogacy.

CONCLUSION AND SUGGESTIONS

Surrogacy arrangements with women from low-resource countries like India or Thailand are becoming more popular, not only because they are less expensive than elsewhere, but also because the laws in their home countries, where commercial surrogacy is either highly restricted or illegal, may be less restrictive. In Canada, Israel, and the United Kingdom, commercial surrogacy is forbidden, but an altruistic surrogate may be reimbursed for reasonable pregnancy-related expenditures. In Germany, Italy, France, Japan, and China, surrogacy is outright forbidden, and no type of surrogacy is permitted. Despite the fact that numerous states in the United States have permissive surrogacy laws, US residents continue to engage in worldwide surrogacy arrangements with women from other countries due to the exorbitant costs. The Thai government began working on new surrogacy legislation in February 2015, following the infant Gammy and Shigeta issues. On July 30, 2015, the ART Act went into effect. Because only married couples can employ surrogates and "same-sex marriage is not recognized" in Thailand, the law "prohibits commercial surrogacy serving foreign customers" and excludes same-sex couples as well. Both the husband and wife must be Thai to qualify for a surrogacy agreement, or "if only one applicant is Thai, the couple must have been married for at least three years." The ART Act clearly prohibits any party from benefitting from the arrangement, and the surrogate mother must be a "blood relative of either of the applicants" and have previously given birth. The provisions of the ART Act, as detailed in the Draft Law, entirely prohibit surrogacy for commercial purposes, with offenders facing up to 10 years in prison, a fine of up to 200,000 baht, or both.

Surrogacy regulations vary widely in the United States because they are governed by each of the 50 states and the District of Columbia, with surrogacy being completely illegal in Washington, DC and practically unregulated in the rest of the country. Regardless of stated statutes in a state, actual surrogacy practices can differ substantially from statutory surrogacy laws. Statutes in states like Arizona, Indiana, Michigan, and although gestational surrogacy contracts are unenforceable in New York, the practise of surrogacy continues, and the vast majority of surrogacy agreements are successful. Surrogacy is widely permitted in states like California, Illinois, and Nevada, and these jurisdictions provide regulatory structure, making them the most surrogacy-friendly, with California being a popular destination location for international surrogacy arrangements. In states like Colorado, Georgia, and

CONCLUSION AND SUGGESTIONS

Oregon, there are no explicit surrogacy laws, and there are no published cases to set precedent. Many nations around the world restrict commercial surrogacy arrangements, making finding a surrogate mother extremely difficult. In comparison, IVF and surrogacy procedures in India cost less than a third of what they do elsewhere, and the easy availability of surrogacy services has prompted a global flood of patients to India. In India, a surrogacy package costs between \$10,000 and \$35,000, whereas in the United States, it costs between \$59,000 and \$80,000. In 2012, the 3,000 fertility clinics operating across India, offering artificial insemination, IVF, and surrogacy procedures, were anticipated to produce more than \$400 million in revenue. In the same year, the number of medical tourists climbed from 150,000 to 450,000, and the number of surrogate births doubled, with estimates ranging from 200 to 350. Before recent legislation, Commercial surrogacy is expected to be a \$2 billion market by 2012, according to the Confederation of Indian Markets, and a \$6 billion industry by 2018, according to the Indian Council of Medical Research. Commercial surrogacy has remained mostly uncontrolled in India over the past two decades, despite its growing popularity. Surrogacy is a rare occurrence in India, with about 1% of couples seeking Assisted Reproductive Technologies (ART) treatment. But, especially since India became the "global centre of commercial surrogacy," it is the most contentious infertility therapy, criticized as a baby business, a capitalist market, and a patriarchal exploitation of vulnerable women. Surrogacy thus attracts a rising amount of attention from the media, academics, and students, as well as Non-Governmental Organizations (NGO). The fact that there is no specific law governing surrogacy in India adds to the issues.

Surrogacy is legally deemed to be part of ART treatment, which has been regulated in India since 2005 by consecutive Assisted Reproductive Technologies (Regulation) Bills. With an increase in reports of surrogate mothers being exploited, unethical techniques being used, and children being abandoned as a result of surrogacy, the government was compelled to outlaw commercial surrogacy and all forms of exploitation carried out in the name of surrogacy. The Indian Council of Medical Research (ICMR), which is mandated by the Indian Government, created all of the bill's suggestions based on public debates, consultations, and comments. Before being approved as a Bill, these suggestions are sent to the government for examination and change. The ICMR assessed the ART Bill 2010 in 2012, but it has

CONCLUSION AND SUGGESTIONS

yet to be officially approved by the government. Meanwhile, the Government of India made new ideas in a Cabinet Note in December 2012, before final adoption of the text of the previous Bill. Surrogacy was only available to married couples and foreigners with a medical visa as a result of this restriction (in order to avoid legal problems when foreigners wish to return to their home country with the new born). In September 2013, this Cabinet Note went into effect. Furthermore, same-sex couples are not recognized in India, according to a Supreme Court order from 2013. As a result, they are ineligible to become parents through surrogacy. Surrogacy access in the country has been curtailed as a result of these measures. The government has drafted many draught Bills to regulate surrogacy throughout the years in 2008, 2010, 2014, 2016, 2019, and the most recent draught Bill is the Surrogacy (Regulation) Bill, 2020, in response to the rapid proliferation of surrogacy clinics around the country. The new Bill establishes various guidelines and limitations on who is eligible for and who is not eligible for surrogacy.

People are beginning to believe that India's surrogacy clinics use unscrupulous techniques to entice people in order to make a lot of money. Through numerous legislation and acts, the government has attempted to control surrogacy clinics. However, the government must take numerous steps to ensure that the rules are strictly enforced. Commercial surrogacy must be outlawed in India, and surrogacy clinics must be closely supervised and appropriately sanctioned if found guilty. Surrogacy must be controlled and ethically conducted in the best interests of the patient and the community.

The Surrogacy (Regulation) Bill 2019 is a bill that regulates surrogacy. Commercial surrogacy is prohibited; however altruistic surrogacy for infertile Indian couples is permitted. The couple must have been married for at least 5 years and have documents from new regulatory organisations verifying either partner's infertility to be eligible for altruistic surrogacy. According to the bill, LGBTQ+ families, single parents, unmarried couples, foreign citizens, and anyone outside the age groups of 23-50 for women and 26-55 for males are not eligible for surrogacy. Furthermore, altruistic surrogates for the intending parents can only be the intended parents' "close relatives" (undefined). Surrogate moms must also be between the ages of 25 and 35, and they are only allowed to carry one child. If IPs pay a surrogate mother more than

CONCLUSION AND SUGGESTIONS

a "reasonable" amount for 16 months of insurance coverage for postpartum birth complications, they might face up to ten years in prison. Due to the lack of provisions to ensure that the altruistic surrogate is not exploited, as well as the possibility to appeal government decisions to approve or refuse surrogacy, this bill has caused significant debate. The Surrogacy (Regulation) Bill 2020 is a bill that seeks to regulate surrogacy. It makes it possible for any "willing" woman to become a surrogate mother. Live-in couples, divorced women, widows, non-resident Indians (NRIs), persons of Indian origin (PIO), and overseas citizenship of India (OCI), among others, were included. The five-year term of confirmed infertility has been decreased to one year. It aims to allow potential infertile Indian married couples aged 23-50 years for females and 26-55 years for males to use ethical altruistic surrogacy. It suggests establishing a National Surrogacy Board at the federal level, as well as State Surrogacy Boards and competent authorities in each state and union territory. Surrogate mothers' insurance coverage has been expanded to 36 months, up from 16 months in the previous edition. The bill requires the couple to get a certificate of necessity as well as a certificate of surrogacy eligibility. It suggested banning commercial surrogacy, as well as the selling and purchase of human embryos and gametes. Surrogacy is a topic that is fraught with ethical, moral, and legal concerns. Surrogate mothers are subjected to physical, mental, and financial exploitation in all aspects of surrogacy because the pain and agony they have endured cannot be realized by the prospective mother, which is why it is critical that her interests be protected under the contract in such a way that a proper balance can be maintained between both mothers (prospective and surrogate). Rather than treating the contract as a commercial one for which the Bill provides a penalty, the interests of the person providing a womb for surrogacy must be monetarily protected under it, including the provision of proper insurance and medical expenses that are borne by the surrogate mother, as well as physical and mental sufferings.

Before entering into an agreement between the parties, proper counseling should be conducted in order to preserve the parties' numerous rights, including the surrogate mother's right to procreate. There is no doubting that, rather than emotional or other variables, the economic factor is the one that receives the most attention since it is seen as the fundamental and most important factor related to the right to livelihood.

CONCLUSION AND SUGGESTIONS

Other human rights considerations include the right to individual autonomy, the right to health, including reproductive liberty, the right to dignity, and the right to privacy, among others. These considerations should be made clear to the surrogate mother, who is poor and illiterate and has no idea about legal complications that may arise at any time during the pregnancy.

Apart from the financial aspect, the surrogate mother's procreative right should be properly protected, and special attention should be paid to her health (both mental and physical) during pregnancy, because she should not be left vulnerable at such a vulnerable stage of pregnancy, and she should not be left vulnerable after the baby is delivered, putting her health in jeopardy.

In empirical study through questionnaire the analysis of data leads to findings of this research. The findings and subsequent discussion are to be viewed in the context of objectives of the study in order to relate to same with outcome of study. The various objectives of the study are to evaluate. Table no. 5 and Chart no. 5 is related to qualifying question for respondents. . The question was “***Do you know about of Test Tube Baby Technique/ IVF, Surrogacy?***” Researcher has received 430 filled questionnaires. Under these filled questionnaire researcher found that 218 respondent are know about the Test Tube Baby Technique/IVF Surrogacy. So out of 430 questionnaires only 218 questionnaires was valid for data analysis and interpretation. Only 218 respondents are qualified and found suitable for further questions. Table number and Chart number 6 is related to question “***Do you know about of Test Tube Baby Technique/ IVF, Surrogacy? If Yes, How to know this?*** Table shows that 46.8 percent of respondents are gain knowledge / information about Test Tube Baby Technique/ IVF, Surrogacy from Friends and Relatives, Electronic & Print Media and Internet. The second highest number of respondents are know about Test Tube Baby Technique/ IVF, Surrogacy through Internet their percentage is 22.5. Electronic and Print Media have the third highest sources of information about Test Tube Baby Technique/ IVF, Surrogacy and Table also show that Friends and Relative are the least sources of information about Test Tube Baby Technique/ IVF, Surrogacy. Their share is eleven percent. Table and Chart number 7 is related to question “***Do you know about of Surrogacy Arrangement?***” This table shows that 74.8 percent of respondents are know about Surrogacy Arrangement. While 18.8 percent of

CONCLUSION AND SUGGESTIONS

respondents are not known about Surrogacy Arrangement and 6.4 percent of respondents are not able to answer this question. Table and Chart number 8 is related to question **“Is there any Difference between In-Vitro Fertilization and Surrogacy Arrangement?”** Here 60.6 of respondent said that there is any difference between In-Vitro Fertilization and Surrogacy Arrangement, while 11.9 percent of respondents are finds not any difference between In-Vitro Fertilization and Surrogacy Arrangement and Can't Say are in sixty in numbers. Table and Chart no. 9 is related to question **“What are the Possible Impact of infertility, Impotency or Natural Incapacity?”** The question is trying to analyse the Possible Impact of infertility, Impotency or Natural Incapacity with five different closed ended options i.e. Persons are affected by inferiority complex, they keep them cut off from the mainstream of society, Persons suffer from depression, Broken Marriage and All of the above. The table shows that highest numbers of respondents responds on all of above (57.8 %), the second highest option is Persons are affected by inferiority complex i.e. 20.6%, Persons suffer from depression is on third position, Broken Marriage gets forth number i.e. 8.7% and least highest is They keep them cut off from the mainstream of society. Table and Chart no. 10 shows that Social Experience of Infertility. In this table we can see that 52.8 percent of respondents choose the all of above options which is highest score of social experience of infertility while Attitude of people in society is the second highest preferred option i.e. 25.2 percent. Attitude of life partner is the third highest preferred option, forth one is Attitude of relatives (8.3%) and in least preferred option is Attitude of family members (3.2%). After the analysis of Social Experience of Infertility question, the next question is related to find out the Most Suitable Alternative for Infertility, Impotency and Natural incapacity. For this table and Chart no. 11 shows that In-Vitro Fertilization and Surrogacy Arrangement are the most suitable alternatives. Surrogacy Arrangement has the highest scorer (17.4%) in comparison to In-Vitro Fertilization (14.7%). Any other method (if there is) is the lowest preferred option by the 4.6 percent of respondents. Table and Chart no. 12 is related to analysis and interpretation of Reasons for the Mushroom Growth of ART Clinics in India. Here our respondents have different opinions regarding mushrooming growth of ART clinics in India. These opinions are classified into four different categories. The table and Chart shows that Desire to have a baby (41.7%) is the most preferred reason for mushrooming of ART clinics in India. While Desire to

CONCLUSION AND SUGGESTIONS

have a male child is the second most (39%) most preferred reason for mushrooming, Any other Desire have the third most (12.4) preferred reason for mushrooming lastly Desire to have a female child have the least (6.9%) preferred reason for mushrooming of ART clinics in India. Table and Chart number 13 shows that frequency of respondent's opinions (in regards to commercialisation of IVF and Surrogacy Arrangement at present times) on three nominal scale Yes, No and Can't Say. The data analysis and interpretations clearly shows that 61.5 % of respondents said Yes for its commercialisation, 15.1% are in against of its commercialisation and 23.4% respondents are not able to express their opinions against commercialisation or not. Another table and Chart number 14 is about the awareness of Surrogacy & ART Bill. Table shows that 45.9 percent of respondents have the information about Surrogacy & ART Bill, 27.1 percent of respondents are not aware about Surrogacy & ART Bill, while 26.6 percent of respondents not able to say anything about Surrogacy & ART Bill and lastly .5 percent of respondent have read about the bill in newspaper but don't have descriptive knowledge. Majority of respondents (100 out of 218 respondents) have well awareness and knowledge about Surrogacy & ART Bill The table and Chart related to opinions on **“Surrogate Mother develops a Sentimental Relation with the Child”**. Here 147 respondents dominate on 71 respondents. 147 respondents means 67.4 percent opted 'Yes' and 9.6 percent of respondents opted 'No' while 22.9 percent of respondents are not able to clearly opted for any above option. The Table and Chart no. 17 related to the question “Surrogacy Arrangement should be available only to Naturally Incapable Parents?” and respondents opinions. The table shows that 140 respondents (64.2%) are in favour of this question while 45 respondents are against it. Only 33 respondents are not able express their opinion in 'Yes or No'. The table and Chart no. 18 are related to question 'Should Single Parents have Right to Baby through Surrogacy Arrangement?' Here 153 respondents are opted 'Yes' while 30 respondents opted 'No'. And 35 respondents are 'Can't Say'. The table and Chart no. 19 is based on question **“Whether Transgender, Gays or Bisexuals should be allowed to have Baby through Surrogacy Arrangement?”** The data analysis shows that 138 respondents are in favour of Transgender, Gays or Bisexuals be allowed to have Baby through Surrogacy Arrangement, while 37 respondents opted 'No' and 43 respondents opted Can't Say which is second highest in number. The table and chart related to question 'Should ART and Surrogacy Arrangement be permitted at

CONCLUSION AND SUGGESTIONS

professional Level?’ In this table we can see that 117 respondents opted ‘Yes’ 50 respondents are not in favour at professional level while 51 respondents opted Can’t say. The table and chart no. 21 is related to question reveal that 64.7 percent of respondents are the first highest in numbers who wanted to strictly prohibited Sex-determination in ART and Surrogacy Arrangement. Can’t Say scored second highest in numbers and least scorers of respondents are categorized in ‘No’. In another question when next question was asked from respondents about “whether IVF and the Surrogacy Arrangement is being Misused?” Table no.22 and chart no. xxx shows that 133 respondents opted ‘Yes” which is highest in numbers. Can’t Say supporter respondents are the second highest in numbers and least number of respondents (21 respondents) are against the question. Table and chart no. 23 revealed respondent opinion on question ‘Do you think that a proper law is necessary to regulate surrogacy?’ that 173 respondents opted ‘Yes’ for proper law is necessary to regulate surrogacy. Table and chart also shows that 5.5 percent of respondents are not in favour of this question and they are all in least number i.e. 12 respondents, while there are also we have another option for this question to respondents i.e. Can’t Say. So Can’t Say respondents are the second highest in this data analysis. The table and chart no. 24 is related to respondent’s opinions on question ‘Do you think that there is exploitation of surrogate mother?’ The chart and table shows that 151 respondents opted ‘Yes’, 16 respondents opted ‘No’ which is third in score and 51 respondents are categorized in ‘Can’t Say’ which is second highest in score. Table and Chart no. 25 shows the question ‘**Whether there should be a proper compensation system for the surrogate mother?**’ For this question opinion of 183 out of 218 respondents opted ‘Yes’ which is the highest in score. ‘No’ opinion respondents are in least number i.e. 7 respondents only. And third are those respondents who opted ‘Can’t Say’ is only in 12.8 percent which is the second highest category.

8.2 Suggestions

On the basis of the study conducted by the researcher, the researcher wants to give the following suggestions:

1. There is an urgent need to have a specific and comprehensive law for the regulation and control of commercial surrogacy in India.

CONCLUSION AND SUGGESTIONS

2. To protect the rights of women and children, laws should be drafted and executed to address the grey areas.
3. It should consider problems such as surrogacy access, liability issues, the child's best interests, parentage, and so on.\
4. The conditions and circumstances must be clearly confirmed, and a strong balance must be maintained between the surrogate mother's responsibilities and the protection of her rights' dignity.
5. In all surrogacy arrangements, the relationship between the surrogate mother and the child, as well as the commissioning parents, should be clearly defined and made uniform.
6. Surrogacy has achieved a successful balance between societal and private individual requirements. Before consenting to and signing a contract, both the surrogate and the infertile couple should get legal advice and that should be included in the contract; there will also be a second legal parent if the first parent has troubles.
7. The child's nationality should equal to that of the commissioning parents.
8. Personal laws regarding the rights and legitimacy of a surrogate child must be amended.
9. The welfare of the child in all circumstances should be given top priority.
10. Commercial surrogacy should not be completely prohibited; it should be allowed with restrictions for limited purpose.
11. The clinical practices of Artificial Reproductive Technology should be governed by appropriate regulations.
12. Most importantly, the rights and obligations of the biological parents and surrogate mother should be determined by the statute not by the contract. Such a socially sensitive issue should not be regulated by contractual relations.

CONCLUSION AND SUGGESTIONS

13. Local guardian are uncertain in surrogacy law in India, it should be fixed by law.
14. The government should encourage the couple to adopt a child. Only infertile couples should be permitted to use surrogacy, not those who already have a child. In the case of commercial surrogacy, the hospital authority should not allow a middleman.
15. The media and NGOs should be used to raise public awareness about the risks associated with human egg donation and surrogacy arrangements involving surrogate mothers.



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APPENDICES



QUESTIONNAIRE

Dear Respondent,

I am requesting you to fill up this questionnaire. The topic of my research work is “**Surrogacy Arrangement: A Socio-Legal Study in Lucknow City**”. The following questions are designed with the intention to know the awareness of females and males towards their rights and position of gender justice in society. The information you provide will be kept completely confidential and will only be used for research work. The researcher will always be grateful for your cooperation.

Research Scholar
Mohan Kumar Gond

Department of Law
Babsaheb Bhimrao Ambedkar University, Lucknow

- 1. Name:**
- 2. Age:**
- 3. Designation:**
- 4. Gender:** (A) Male (B) Female (C) Other
- 5. Address:**
- 6. Mob.:**
- 7. E-mail:**
- 8. Education:-**

प्रश्नावली

प्रिय प्रतिवादी,

मैं आपसे इस प्रश्नावली को भरने का अनुरोध कर रहा हूँ। मेरे शोध कार्य का विषय “**Surrogacy Arrangement: A Socio-Legal Study in Lucknow City**” है। निम्नलिखित प्रश्न महिलाओं और पुरुषों को उनके अधिकारों और समाज में लैंगिक न्याय की स्थिति के प्रति जागरूकता जानने के इरादे से तैयार किए गए हैं। आपके द्वारा प्रदान की जाने वाली जानकारी पूरी तरह से गोपनीय रखी जाएगी और इसका उपयोग केवल शोध कार्य के लिए किया जाएगा। अनुसंधानकर्ता आपके सहयोग के लिए सदैव आभारी रहेगा।

अनुसंधानकर्ता

मोहन कुमार गोंड

विधि विभाग

बाबासाहेब भीमराव अंबेडकर विश्वविद्यालय, लखनऊ

1. नाम:

2. आयु:

3. पदनाम:

4. लिंग: (ए) पुरुष (बी) महिला (सी) अन्य

5. पता:

6. मोबाइल न.:

7. ई-मेल:

8. शिक्षा:-

Section- B

1. Do you know about of Test Tube Baby Technique/ IVF, Surrogacy?

Yes NO Can't Say

2. If Yes, How to know this?

(a) Friends and Relative

(b) Electronic and Print Media

(c) Internet

(d) Other Sources

3. Do you know about of Surrogacy Arrangement?

Yes NO Can't Say

4. Is there any Difference between In-Vitro Fertilization and Surrogacy arrangement?

Yes NO Can't Say

5. What are the Possible Impact of infertility, Impotency or Natural Incapacity?

(a) Persons arc affected by inferiority complex

(b) They keep them cut off from the mainstream of society

(c) Persons suffer from depression

(d) Broken Marriage

(e) Other impacts

6. What are the Social Experience of Infertility?

(a) Attitude of People in Society

(b) Attitude of relatives

(c) Attitude of family members

(d) Attitude of life partner

अनुभाग- बी

1. क्या आप टेस्ट ट्यूब बेबी तकनीक/आईवीएफ, सरोगेसी के बारे में जानते हैं?

हां नहीं कुछ नहीं कह सकते

2. यदि हाँ तो कैसे?

- (a) मित्र और रिश्तेदार
- (b) इलेक्ट्रॉनिक और प्रिंट मीडिया
- (c) इंटरनेट
- (d) अन्य स्रोत

3. क्या आप सरोगेसी व्यवस्था के बारे में जानते हैं?

हां नहीं कुछ नहीं कह सकते

4. इन-विट्रो फर्टिलाइजेशन और सरोगेसी व्यवस्था में कोई अंतर है?

हां नहीं कुछ नहीं कह सकते

5. क्या बांझपन, नपुंसकता या प्राकृतिक अक्षमता प्रभावित कर रहा है?

- (a) व्यक्ति हीन भावना से प्रभावित होते हैं
- (b) वे उन्हें समाज की मुख्यधारा से अलग रखते हैं
- (c) व्यक्ति अवसाद से पीड़ित होते हैं
- (d) टूटी हुई शादी
- (e) अन्य प्रभाव

6. बांझपन के सामाजिक अनुभव क्या हैं?

- (a) समाज में लोगों का रवैया
- (b) रिश्तेदारों का रवैया
- (c) परिवार के सदस्यों का रवैया
- (d) जीवन साथी का रवैया

7. What is the Most Suitable Alternative for Infertility, Impotency and natural incapacity?

- (a) In-Vitro Fertilization
- (b) Surrogacy Arrangement
- (c) Any Other Method (If there Is)
- (d) (a) and (b) both

8. What are the Reasons for the Mushroom Growth of ART Clinics in India?

- (a) Desire to have a male child
- (b) Desire to have a female child
- (c) Desire to have a baby
- (d) Treatment of infertility

9. Whether IVF and Surrogacy Arrangement Is Being-Commercialized At Present Times?

Yes NO No Idea

10. Are you aware about Surrogacy (regulating Bill) 2019, ART(regulating Bill) 2020 drafted by Ministry of health and Family Welfare Govt. of India?

Yes NO Can't Say

11. Whether Surrogacy (regulating Bill) 2019 and ART (regulating Bill) 2020 will be able to regulate IVF and Surrogacy Arrangement?

Yes NO Can't Say

7. बांझपन, नपुंसकता और प्राकृतिक अक्षमता के लिए सबसे उपयुक्त विकल्प क्या है?
- (a) इन-विट्रो फर्टिलाइजेशन
- (b) सरोगेसी व्यवस्था
- (c) कोई अन्य तरीका (यदि है तो)
- (d) (ए) और (बी) दोनों

8. भारत में एआरटी क्लिनिक के मशरूम विकास के कारण क्या हैं?
- (a) एकल पुरुष बच्चे को पाने की इच्छा
- (b) एकल महिला बच्चे को पाने की इच्छा
- (c) एक बच्चे को पाने की इच्छा
- (d) कोई अन्य कारण, यदि है

9. वर्तमान समय में आईवीएफ और सरोगेसी व्यवस्था का व्यवसायीकरण किया जा रहा है?
- हाँ नहीं कुछ नहीं कह सकते

10. क्या आप भारत की स्वास्थ्य और परिवार कल्याण मंत्रालय सरकार द्वारा तैयार किए गए सरोगेसी (रेगुलेटिंग बिल) 2019 , एआरटी (रेगुलेटिंग बिल) 2020 के बारे में जानते हैं?
- हां नहीं कुछ नहीं कह सकते

11. क्या सरोगेसी (रेगुलेटिंग बिल) 2019 एवं एआरटी (रेगुलेटिंग बिल) 2020 आईवीएफ और सरोगेसी व्यवस्था को विनियमित करने में सक्षम होगा
- हां नहीं कुछ नहीं कह सकते

12. Whether Surrogate Mother develops a Sentimental Relation with the Child?

Yes NO Can't Say

13. Whether Surrogacy Arrangement should be available - only to Naturally Incapable Parents?

Yes NO Can't Say

14. Should Single Parents have Right to have Baby through Surrogacy Arrangement?

Yes NO Can't Say

15. Whether Transgender, Gays or Bisexuals should be allowed to have Baby through Surrogacy Arrangement?

Yes NO Can't Say

16. Should ART and Surrogacy Arrangement be permitted at professional Level?

Yes NO Can't Say

12. क्या सरोगेट मां बच्चे के साथ एक भावुक संबंध विकसित करती है ?

हां नहीं कुछ नहीं कह सकते

13. क्या सरोगेसी व्यवस्था उपलब्ध होनी चाहिए- केवल स्वाभाविक रूप से अक्षम माता-पिता के लिए?

हां नहीं कुछ नहीं कह सकते

14. क्या एकल माता-पिता को सरोगेसी व्यवस्था के माध्यम से बच्चा पाने का अधिकार होना चाहिए?

हां नहीं कुछ नहीं कह सकते

15. क्या ट्रांसजेंडर, समलैंगिक या उभयलिंगियों को सरोगेसी व्यवस्था के माध्यम से बच्चा प्राप्त करने की अनुमति होना चाहिए?

हां नहीं कुछ नहीं कह सकते

16. क्या एआरटी और सरोगेसी व्यवस्था पेशेवर स्तर के रूप उपलब्ध कराने की अनुमति होना चाहिए?

हां नहीं कुछ नहीं कह सकते

17. Whether Sex-Determination Should be Strictly Prohibited in ART and Surrogacy Arrangement?

Yes NO Can't Say

18. Whether IVF and the Surrogacy Arrangement is being Misused?

Yes NO Can't Say

19. Do you think that a proper law is necessary of regulate surrogacy?

Yes NO Can't Say

20. Do you think that there is exploitation of surrogate mother?

Yes NO Can't Say

21. Should there be a proper compensation system for the surrogate mother?

Yes NO Can't Say

22. Your view/suggestion to improve Test Tube Baby Technique/ IVF, Surrogacy

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.....

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17. क्या सेक्स-निर्धारण तकनीकी को एआरटी और सरोगेसी व्यवस्था में निषिद्ध किया जाना चाहिए?

हां नहीं कुछ नहीं कह सकते

18. क्या आईवीएफ और सरोगेसी व्यवस्था का दुरुपयोग हो रहा है?

हां नहीं कुछ नहीं कह सकते

19. क्या आपको लगता है कि सरोगेसी को विनियमित करने के लिए एक उचित कानून की आवश्यकता है?

हां नहीं कुछ नहीं कह सकते

20. क्या आपको लगता है कि सरोगेट मां का शोषण होता है?

हां नहीं कुछ नहीं कह सकते

21. क्या सरोगेट मां के लिए एक उचित प्रतिकर की व्यवस्था होनी चाहिए ?

हां नहीं कुछ नहीं कह सकते

22. आप सरोगेसी व्यवस्था/ टेस्ट ट्यूब बेबी तकनीक /आईवीएफ, में सुधार करने के लिए कोई सुझाव देंगे

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