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## LEGAL CONTROL OF SURROGACY: A CRITICAL ANALYSIS OF INTERNATIONAL EXPERIENCE WITH SPECIAL REFERENCE TO ENGLISH AND AMERICAN LAW

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**Abstract:** Marriage which is considered as a social institution of paramount importance, is inter-alia recognized by all the civilizations across the globe as a legitimate means for procreation leading to the perpetuation of the very existence of the society. But there are thousands of couples who are deprived of the bliss of procreation due to infertility of one of them or both or for the reason that they are physically incapable of involving themselves in sexual intercourse. The barrenness so caused has grave psychological, social and emotional impact on both the couples. Generally it is the wife being branded as barren becomes a prey of social contempt, though at times not for her fault. In conservative and traditional societies a childless woman's position becomes so pathetic that because of the wrath of in laws the matrimonial home becomes a hell for her as against her expectation of it to be a heaven. Adoption is one legal solution for the problem of issueless couples, which enables them to have a son or daughter subject to the fulfillment of the conditions contemplated in the relevant adoption laws.

**Keyword:** Surrogacy, Analysis, American Law, psychological.

### INTRODUCTION:

It is a fiction of law under which the adopted child is deemed as natural child of the adopting parents sans any genetic tie between them. The other option open to such couples is to take recourse to surrogacy an assisted reproductive technique a priceless legacy of modern medical science, which bestows them the bliss of having an issue genetically related to either of them or both depending upon the type of surrogacy arrangement. Though it can be compared to an oasis in a desert, it has its darker and flip side which has given rise to many formidable difficulties by way of very intricate complex legal and ethical issues. In this article an attempt is made to critically analysis the legal and ethical issues surrounding surrogacy by investigation of the legal position in a few foreign jurisdictions with special reference to the English and American law as in India still courts have to grapple with the issues emerging from surrogacy.

### Surrogacy:

Meaning of: The word surrogate has been derived from Latin *surrogatus* signifying to act in place of or substituted.<sup>1</sup> Surrogacy is an arrangement between a woman and a couple or an individual, under which she undertakes to conceive, carry, deliver a baby and handover it to the latter.<sup>2</sup> A woman, who carries and delivers the baby for someone else, usually for an unfortunate barren couple, is styled as the surrogate mother or a mere gestational carrier without any genetic tie with the child.<sup>3</sup> A classic definition of surrogacy

contemplated in the America Law Reports is as follows.<sup>4</sup>

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

It follows from the above definition that the essential elements of a surrogacy contract are a promise by the surrogate mother to conceive and deliver the child, termination of her right over the child, by handing over it to the intending or commissioning parents and payment of fee by the intending or commissioning parents. But payment of a fee is not a sine qua non of a surrogacy contract.

**Classification of Surrogacy:** The Surrogacy arrangement is broadly classified as follows:

- a) Commercial: It involves payment of a hefty sum of money or any reward having huge pecuniary value to the surrogate mother for the service rendered by her.<sup>5</sup> It is seen as a business opportunity.<sup>6</sup>
- b) Non-Commercial: It involves payment of money as recompense to the surrogate mother for the pains taken by her and reimbursement of the medical expenses and other incidental expenses.<sup>7</sup> It is not seen as a business opportunity.<sup>8</sup> The sublime object of this type of arrangement is only to make the barren couples to be blessed with a child. Hence it

can be called as altruistic surrogacy.

c) Traditional or Partial: It signifies insemination of the surrogate mother with the sperm of commissioning or intending father.<sup>9</sup> It is otherwise called as partial surrogacy.<sup>10</sup> It is obvious from the explanation that the surrogate mother is also the genetic mother.

d) Gestational or full: Pregnancy implies completion of the process of fertilization which requires sperm, egg and an uterus.<sup>11</sup> In gestational or full surrogacy uterus is provided by the surrogate mother. An embryo created by using the sperm and egg of the intending or commissioning parents in a petri dish, is implanted into the womb of surrogate mother who carries it to term.<sup>12</sup> The surrogate mother is only a gestational carrier without any genetic tie with the child.<sup>13</sup>

e) Donor: It involves insemination of the surrogate mother, not with the sperm of the intending or commissioning father, but with the sperm of a third person, who donates it.<sup>14</sup>

f) Natural Surrogacy: After the advent of assisted reproductive techniques, natural surrogacy fell into oblivion. But before the emergence of assisted reproductive techniques, it was only way out for the barren couples. The wife involves herself in copulation with a third person with or without the consent of her husband when she cannot beget with a child by him.<sup>15</sup> Alternatively when the husband cannot have a child from his wife, involving himself in sexual intercourse with another woman, with or without the consent of the wife, he may beget with a child. There is nothing novel in the concept of surrogacy. It dates back to the biblical times.<sup>16</sup> An example is the biblical story of Sarah, wife of Abraham.<sup>17</sup> Sarah for a long time did not have children. Therefore she allowed her husband to have copulation with her housemaid. She was blessed with a child later. Sarah envious of both the maid and her child ousted them as the maid was not prepared to give up the identity of the child.

Natural surrogacy is not socially acceptable as it involves physical intercourse with a third person or woman other than the spouse. Assisted reproductive technique has become socially acceptable as it does not involve physical intercourse.

#### Surrogate Mothers – Who can be?

As implantation of the embryo or insemination of sperm of intending father or donor is carried out in surrogacy clinics, the identity of the surrogate mothers at least initially is unknown to the commissioning couples.<sup>18</sup> It follows that an unrelated woman can be a surrogate mother.<sup>19</sup> Apart from this, sisters, sister in laws and friends are the most common surrogate mothers.<sup>20</sup> There is an instance, where a 43 years old mother acted as surrogate mother for her infertile daughter and gave birth to her grandchildren.<sup>21</sup>

The question is, can a sister act as surrogate mother for her own brother and sister-in-law where she has to be inseminated with the sperm of her own brother. The answer depends upon explanation attached to sexual intercourse. The act of sexual intercourse involves passing of sperm

physically from the body of a male to female. Insemination also involves passing of sperm to a female uterus. How the transfer of sperm takes place, becomes an irrelevant question. On the other hand law prohibits marriage and sexual intercourse between persons who fall within the prohibited degree of relationship.<sup>22</sup>

So it follows that a woman who falls within the prohibited degree of relationship cannot act as a surrogate mother, where she has to be inseminated with the sperm of a man falling within the same relationship. There is no objection for her to act as a surrogate mother whether the intending father or a donor whose sperm is to be inseminated is a person who does not fall within the prohibited degree of relationship.

A Comparative Analysis of Law Relating to Surrogacy.

#### English Law Judicial Response

The question of validity of surrogacy arrangement, for the first time came before the court in *A v.C.*<sup>23</sup> In this case a married couple unable to have children entered into a surrogacy arrangement with a surrogate mother, for a fee, that the latter would be artificially inseminated with the sperm of the intending father. It was agreed that the surrogate mother should handover the child to the couple after delivery. The mother changed her mind during pregnancy. After delivery she refused to hand over the child. However the couple had access to the child. The father sought custody of the child, which was rejected. Subsequently he applied for access to the child, which was allowed in the first instance. The mother (surrogate vis-a-vis genetic) preferred an appeal. Allowing the appeal the court observed that all the three involved in the arrangement acted in an extraordinary and irresponsible manner and there was nothing between the parties except a sordid commercial bargain. The arrangement was further condemned as a kind of baby farming operation of a wholly distasteful and lamentable kind. The court went to the extent of describing it as an ugly little drama.

Subsequently the courts have refused to comment on the ethical validity of surrogacy arrangements and protection of welfare of the children born out of surrogacy arrangement loomed large in their eyes.<sup>24</sup> In *Re C*,<sup>25</sup> (A minor) it was held that complicated issues of ethics, morality and social desirability emerging from surrogacy were not relevant to determine what would be in the best interest of the child. In this regard the court observed,<sup>26</sup> "The Baby is here. All that matters is what is best for her now that she is here and not how she arrived."

The British Medical Association which did not initially approve surrogacy arrangements by directing the medical profession to keep away from it, over a period of time relented its stance to permit such an arrangement under an extreme circumstance, where it is impossible for the intending mother to conceive or for medical reasons it is not advisable to conceive.<sup>27</sup> The Human Fertilization and Embryo Authority also permitted surrogacy arrangement under the circumstances contemplated by the British Medical Association.<sup>28</sup>

The question whether single man, gay couples or a

woman who for non-medical reason does not want to conceive, can take recourse to surrogacy arrangement for getting a baby is not legally addressed and still remains a controversial issue.<sup>29</sup>

#### **Surrogacy Arrangements Act, 1985**

The aftermath of the decision in Baby cotton Case (In Re C, A Minor) eventually lead to the enactment of the above statute. It contemplated that a surrogacy agreement cannot be enforced either by or against any parties to it.<sup>30</sup> Accordingly a surrogate mother cannot sue the commissioning parents, if they refuse to take the baby after delivery nor the commissioning parents if the surrogate mother refuses handover the child after delivery. It is not an offence to enter into a surrogacy contract of an altruistic nature.<sup>31</sup> But commercial surrogacy arrangements are prohibited.<sup>32</sup> Commercial involvement in the initiation and negotiation of a surrogacy arrangement is illegal.<sup>33</sup> Publication of advertisement indicating a willingness to take part in a surrogacy arrangement is made a criminal offence.<sup>34</sup>

Even though payment of a fee for being a surrogate mother is prohibited, in practice the surrogate mothers receive a fee around 10,000/- to 15,000/- pounds.<sup>35</sup> The reason for this discordance between law and practice is that the courts are entitled to authorize the illegal payments made in violation of the prohibition on commercial surrogacy.<sup>36</sup> If the court opines that the best interest of the child can be better safeguarded by allowing it to be with the commissioning parents, retrospective authorization of illegal payments becomes a justification. But the commissioning parents need not make any payment which is unreasonable.<sup>37</sup>

A dichotomy is created between implantation of an embryo created by way of IVF in the womb of a surrogate mother and partial surrogacy. The former is regulated by the Human Fertilization and Embryo Authority as contemplated in the Human Fertilization and Embryology Act, 1990.<sup>38</sup> The latter is left to be regulated by the ethical committee of concerned surrogacy clinic.<sup>39</sup>

#### **DETERMINATION OF MATERNITY:**

The question that arises here is who the legal mother of the child is. There are three possible ways of determining it. The surrogate mother could be the mother of the child as she carries the pregnancy to term and delivers the baby. In partial surrogacy as the egg of the surrogate mother is fertilized by the sperm of some other person, she becomes genetically related to the child. In case where the surrogate mother is a mere gestational carrier without any genetic relationship with child, the intending mother could be the mother.<sup>40</sup>

Legal position under English Law is very clear. The surrogate mother who is a mere gestational carrier (in case of full surrogacy) or genetically related to the child (in case of partial, surrogacy) shall be the legal mother.<sup>41</sup> Even though the law is clear, it has its flipside. If after delivery, the commissioning parents, refuses to accept the child, the position of the surrogate mother being the legal mother becomes very precarious that she cannot abandon the child, which she never intended to have. But responsibility to look

after the child falls on her. on the contrary, the intending parents who wished to have the child and ought to have been responsible to bring up the child, may give up their responsibility.

#### **DETERMINATION OF PATERNITY:**

If the husband or partner of a woman is infertile and she is inseminated with donor sperm for conception, it enables the husband who has intended to have the child to be recognized as the legal father from the very birth of the child.<sup>42</sup> On the contrary where the wife is infertile and she intends to have a child through surrogacy arrangement, she cannot be considered as the legal mother, even though she is the intending mother.<sup>43</sup> Legally the surrogate mother is the legal mother.

The presumption of legitimacy within the marriage leads to a conclusion of the paternity of the child. The husband of the surrogate mother is considered as the father.<sup>44</sup> This presumption is rebuttable. But DNA test can disprove paternity. According to the Human Fertilization and Embryology Act, 1990 the husband of surrogate mother shall be the legal father, provided he has given consent for the surrogacy arrangement.<sup>45</sup> If he has not given consent, he cannot be considered as the legal father. Whether surrogate mother is unmarried or married if her husband or partner does not give consent for surrogacy arrangement and she conceives by insemination of sperm of a donor who has no intention to have a child leads to the situation of a fatherless child in a grotesque way.<sup>46</sup> According to the Adoption and Children Act, 2003, any person whose name is entered in the birth certificate, is considered as the legal father whether he is married to the intending mother or not.<sup>47</sup>

#### **TRANSFER OF PARENTHOOD**

If the surrogate mother is willing to hand over the child the commissioning couples may make an application for parental order before the Family Proceedings Court subject to the fulfillment of the following conditions.<sup>48</sup> The commissioning couples must be husband and wife. The child must have been conceived by any woman other than the commissioning wife as a result of implanting in her an embryo created by the sperm and eggs of commissioning couples or she must have been artificially inseminated by the sperm of the commissioning husband. The woman should not conceive as a result of sexual intercourse with the commissioning husband. Such arrangement does not fall within the definition of surrogacy. The application must be lodged within six months of the birth of the child. At the time of filling the application child must be residing with the commissioning husband and wife, under a residence order issued by a competent court. The commissioning husband and wife must have the domicile of U.K. They must have attained the age of 18 years at the time of making the order. The surrogate mother and her husband or her partner who is considered as the father of the child by virtue of Sec. 28 of the Human Fertilization and Embryology Act, must have given free consent with an understanding of the consequences of passing a parental order. Consent of a person is disposed with when he is not found or not capable of giving consent.

The consent of the surrogate mother becomes ineffective, if the same is given within six weeks of the birth of the child. The surrogate mother should not have received any benefit other than reasonable expenses in consideration of handing over the child or obtaining a parental order. It follows that commercial surrogacy is not permitted. However where money has changed hands in pursuance of a surrogacy arrangement, the court has the discretionary power either to pass a parental order or an order that the baby should be with the surrogate mother in the best interest of the child. In *Re.C.*<sup>49</sup>, Mr. & Mrs. Butin in vain tried to have a baby for 20 years. They entered into a surrogacy arrangement with a woman who agreed to carry the child by insemination of the sperm of the commissioning husband. Further it was agreed that she should be paid a sum of Rs. 12,000 inclusive of loss of earning. During pregnancy, it transpired that she was on income support. Initially parental order was refused on the ground that it would defeat justice as the payment was not confined only to reasonable expenses. But subsequently the court authorized the payment and in the best interest of the child, passed a parental order. The court took into consideration the pathetic position of the parents who genuinely for a very long period cherished the desire of having a child.

If the surrogate mother is not willing to hand over the child, question of parental order and related issues do not arise. On the other hand, if the surrogate mother is not willing to look after the child and the commissioning couples are willing, the court should adopt a pragmatic approach to serve the ends of justice in the best interest of the child with due importance to the substance and not the form.

#### **B. America Judicial Response**

Surrogacy arrangement initially could not cut ice with the court which adopted a very rigid and formalistic approach. In *Re Baby M.*<sup>50</sup> a couple entered into a surrogacy arrangement with a surrogate mother who agreed to carry the pregnancy to term and handover the child to them in consideration of which she was to receive a sum of \$ 10,000 plus medical expenses. After the delivery she refused to hand over the custody of the child to the commissioning couples because of a deep sense of attachment towards the child. There was no statute regulating surrogacy arrangement. In the absence of such legislation the New Jersey Supreme Court held that surrogacy arrangements would not fall within the garnut of the right to privacy and right to procreation. The court opined that the arrangement was against public policy as it put into oblivion the best interest of the child standard and the consent of the mother was not genuine as it was motivated by pecuniary consideration and potentially demeaning to women. Further it was observed that the contract was involuntary as the mother gave consent at a point of time when she was not in a position to perceive the depth of natural bond between a mother and child which could be experienced only after the birth of a child. It follows from the decision that keeping apart the matter of public policy, surrogacy arrangements whether commercial or non-commercial cannot be legally permitted and in effect, surrogacy agreement suffers from the

flaw of being non-enforceable.

On the contrary in *Johnson v. Calvert*,<sup>51</sup> the California Supreme Court laid down a path breaking judgment by extending constitutional protection to surrogacy agreement on the edifice of public policy considerations. The feminist overtones can be inferred from the observation of the court that surrogacy agreements involved free, informed and rational choice by a woman to use her body as she wished and the ethical issues relating to exploitation and commoditization were to be addressed by the legislature. The courts struck a very consequential note on the freedom of contract and economic independence of a woman which is manifested in the following observation.<sup>52</sup>

“The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother and not to deny intending parents what may be their only means of procreating a child of their own genetic stock.”

However it was held that the right to procreate did not extend to a surrogate mother as she was not exercising her own right to make a procreative choice and there was only an undertaking to provide a service without any intention to rear the resulting child as her own.

#### **DETERMINATION OF MATERNITY**

The courts in United States have ventured to adopt different definitions of motherhood taking into consideration the circumstances under which conception of child took place. In *Johnson v. Calvert*,<sup>53</sup> there was a surrogacy arrangement between Anna Johnson and Mr. & Mrs. Calvert. The former had conceived by implantation of an embryo created in vitro using Mr. & Mrs. Calvert's sperm and egg. The surrogate mother as well as the intending mother claimed motherhood. Scale was tilted in favour of the intending mother, Mrs. Calvert applying the intention test. It was held that a rule recognizing that the intending parents should be the legal and natural parents of the resulting child would best promote certainty and stability for the child. It was further held that as the surrogate mother did not have any intention to conceive to have a child for herself and by undertaking to handover the child to the intending couples contracted out her rights over the resulting child. Such contracting out the rights would amount to conceding that the best interest of the child was not with her but would lie with the intending mother. If the case discussed were to come before a court in the U.K. the decision would have gone in favour of the surrogate mother by virtue of the provision contemplated to that effect in the Human Fertilization & Embryology Act.<sup>54</sup>

Intention test could not cut ice with other courts in the U.S.A. Instead they have applied genetic test. In *Belsito v. Clark*,<sup>55</sup> the court criticized the Johnson decision on the ground that the test employed therein cannot deliver goods in a given situation where there are two intending mothers willing to raise the child. The court accepted 'the genetic test as one ensuring certainty.

In *Soos v. Superior Court of Maricopa*<sup>56</sup>, the validity of an Arizona statute which contemplated that the gestational mother was the legal mother of the resulting child from a surrogacy arrangement. It was held that the statute violated equal protection right of the genetic mother and genetic father.

#### **DETERMINATION OF PATERNITY**

In *Re John Buzzanca*,<sup>57</sup> John Buzzanca in his divorce petition asserted that his marriage to Luanne Buzzanca was childless. He concealed the fact that they were expecting a child from a surrogate mother, which was revealed to the court by Luanne Buzzanca. Six days later a female baby was born. She had been conceived by the surrogate mother using the sperm and eggs of anonymous donors. Both John and Luanne Buzzanca refused the responsibility of raising the baby. The problem to be addressed by the court was very complex one. There were three plausible mothers and fathers. The mothers were Luanne Buzzanca (intending mother), egg donor and surrogate mother and the fathers were John Buzzanca (intending father), sperm donor and surrogate mother's husband. The Herculean task before the court was to ascertain the legal parents of the child from among the above mentioned fathers and mothers. Astonishingly, the trial judge concluded that as none could be considered as the legal parents, the child was a legal orphan. On appeal, the court setting aside the decision of the trial judge held that Mr. & Mrs Buzzanca were the legal parents and accordingly they should bear the responsibility of upbringing of the child. According to the court, as it was John Buzzanca who induced the unconventional conception of the baby he should not be allowed to escape from his obligation of upbringing it.

It is obvious from the above decision that the commissioning parents can not abandon their responsibility towards the resulting child. The child is the result of their desire to have one. The court has laid down a very pragmatic and rational decision that but for their intention, the child would not have come to this earth. But under English Law, conclusion would have been different. As surrogate mother is considered as the legal mother and her husband in the absence of any objection on his part would have been considered as the legal father, John Buzzanca would have been exonerated from his responsibility even though he had intended to be the father. On the other hand it is unjust to consider the husband of a surrogate mother as the legal father of the child which he never intended.

#### **STATUTORY RESPONSE**

The statutory regime pertaining to surrogacy manifests varying response. The legislations in the states of Arizona, Michigan, New York, Columbia and Indiana have imposed a total ban on all surrogacy contracts rendering them void and unenforceable.<sup>58</sup> On the other hand in the states of Louisiana, Nebraska and Washington, there is statutory prohibition on surrogacy contracts which contemplate compensation to the surrogate mother.<sup>59</sup> In some states like Florida, New Hampshire and Virginia there is total prohibition on commercial surrogacy with an exception of reimbursement of expenses incurred as a result of

pregnancy.<sup>60</sup> In many states altruistic surrogacy is permitted.<sup>61</sup> In some states there is ban on traditional surrogacy, but gestational surrogacy is permitted.<sup>62</sup> There are some states where there is no statute, but courts are generally in favor of surrogacy arrangements.<sup>63</sup> In Texas judicial approval of surrogacy contracts is mandatory.<sup>64</sup> Some states allow only heterosexual couples and some only married couples to take resort to surrogacy contracts.<sup>65</sup> Some states have expressly prohibited single males and females, lesbians, gay couples and unmarried couples from entering into surrogacy contracts.<sup>66</sup> In some states the statutes are silent whether the above said categories of people can take resort to surrogacy.<sup>67</sup> In Vermont even though there is no statute pertaining to surrogacy, a judicial decision indirectly suggests that even homosexual, bisexual and transgender individuals also may enter into surrogacy contracts.<sup>68</sup>

#### **CANADA**

The Assisted Human Reproduction Act, 2004, has legalized surrogacy contracts not involving payment of money except reasonable expenses incurred in connection with pregnancy.<sup>69</sup> Commercial surrogacy, advertising and acting as intermediaries for earning profits are prohibited.<sup>70</sup>

#### **Surrogacy in Certain other jurisdictions**

Japan placed a blanket ban on all types of surrogacy naming it as a "lease of a womb."<sup>71</sup> In all jurisdictions of Australia altruistic surrogacy is permitted, but commercial surrogacy is made an offence.<sup>72</sup> France has banned all types of surrogacy arrangement whether commercial or altruistic.<sup>73</sup> There are many countries which prohibit all types of surrogacy arrangements.<sup>74</sup> In the Russian Federation gestational surrogacy only is allowed. It can be a commercial surrogacy arrangement.<sup>75</sup> There should be certain medical indication for surrogacy, like absence of uterus, uterine cavity, or cervix deformity etc.<sup>76</sup> Israel legalized gestational surrogacy under the Embryo Carrying Agreements Law, which contemplates a state controlled surrogacy regime that every contract requires direct approval of the state.<sup>77</sup> It is further mandated that the parties to the surrogacy who are Israeli citizens must belong to the same religion.<sup>78</sup> Surrogates must not be single, widowed or divorced and only infertile heterosexual couples are permitted to hire surrogates.<sup>79</sup>

#### **CONCLUSION**

The above discussion manifests that even though the altruistic notion underlying surrogacy arrangement can be readily discerned, one cannot be blind and deaf to the complex legal and ethical problems to which it has given rise to and its misuse when it is seen as a business opportunity. From the point of view of commissioning couples it is an all out noble effort to beget with a child to erase the melancholy and stigma created by the barrenness especially in orthodox societies where a barren woman is subjected to a severe attack of social ostracism. Examined from the perspective of surrogate mothers, the naked truth that needs to be accepted is no woman would take the pains of carrying a pregnancy to term for others unless there is some material incentive to her. Altruism flows throughout the surrogacy arrangement only

when the intending mother is a close relative of the surrogate mother as happened in the instance discussed above where a woman assumed the role of a surrogate mother on behalf of her own daughter or the surrogate mother has special attachment and love & affection towards the barren intending mother. This is exactly where law should strike a balance between the interest of a surrogate mother and childless commissioning couples without diluting too much the avowed object of surrogacy arrangements. To this effect, it can be seen that in many jurisdictions commercial surrogacy could not cut ice with the legislatures as violating public policy and non-commercial surrogacy could obtain legislative nod. But as a radical departure from it in some states of the U.S.A. there is a total ban on all surrogacy arrangements without any distinction whatsoever. In some states non-commercial surrogacy arrangements are permitted. The Texas statutory model insisting judicial pre-authorization of all surrogacy arrangements subject to the fulfillment of the legal parameters contemplated therein is a step in the right direction. But the above discussion reveals that in the U.S.A. there is no consensus among the various states regarding various issues relating to surrogacy. It's in a muddle. In a few jurisdictions all surrogacy arrangements are prohibited as violating public policy without contemplating an exception in favour of altruistic surrogacy arrangements. It will certainly amount to pushing the public policy defence to its illogical extreme limit. It should be kept in mind that the term public policy does not admit any precise definition. It is generally a reflection of what society considers as permissible at a given point of time. Public policy condemns an arrangement which is seen as a business opportunity. There is no justification for using the weapon of public policy to condemn surrogacy arrangements which are of non-commercial in nature. Public policy should accommodate altruistic surrogacy respecting the cherished wish of barren couples to have a child. One may argue at this juncture that there is an option in the form of adoption which is nothing but a legal fiction. Surrogacy is a better option in situations where either of the spouses or both the spouses can have genetic relation with the child to be borne that abuses associated with adoption can be done away with.

The phrases 'lease of wombs' or "wombs for rent" can be aptly used in the context of commercial surrogacy, but not in case of altruistic surrogacy which could generally find favour with the courts and legislatures in many jurisdictions. In most of the circumstances it is possible to ascertain whether or not the surrogacy arrangement is commercial or non-commercial looking at the exorbitant amount of money that exchanged hands. But there may be border line cases where the distinction may be very thin. It is not advisable to look for mathematical precision in computing the expenses incurred in connection with pregnancy, payment of which is legally permitted. It is submitted that additionally such payment should include some reasonable incentive for the reason discussed above. In this context, it is worth noting that under English law courts are given discretion to authorize the illegal payments within certain limits in the best interest of the child.

A child is a child. It is entitled for all human rights irrespective of how it is born. There is no difference between

a child which is born of a commercial and non-commercial surrogacy. The resulting child is innocent. Its human rights cannot be curtailed. What should loom large in the eyes of courts, policy makers, the persons who are responsible for its birth and the society at large is the best interest of the child. Under English law, before the statutory response to surrogacy, on a welcome note the courts began to apply the test of best interest of the child without much ado about the nature of surrogacy. Law should ensure that the child is not placed in a very lamentable and pathetic position of a legal orphan as obviously it is possible to identify the persons responsible for its birth. In an extreme situation a child born of a surrogacy arrangement may have three plausible mothers and fathers as discussed above out of which the anonymous egg and sperm donor cannot be identified. Law should be clear as to out of the identifiable fathers and mothers on whom the responsibility to look after the child should fall. The right approach is as decided in the case of John Buzzanco, throwing the responsibility on the commissioning parents who should be husband and wife (intending parents) and are primarily responsible for the birth of a child which certainly outweighs all other logic whatsoever. There is no need to apply the genetic test here. If the commissioning couples are genetically related to the child, it is welcome. It will culminate in blatant injustice to fix the responsibility on the donors of egg and sperm for a result which they never intended.

The English Surrogacy Arrangements Act does not permit commercial surrogacy which is made an offence. The proposition that non-commercial surrogacy though permitted but not enforceable has resulted in a position of self-contradiction. There is always a danger of the surrogate mother and the commissioning couples taking shelter of the above provision by becoming wise after the event which is evident from a few cases discussed above. The surrogate mother may refuse to handover the child after delivery by a change of mind. Curiously the judicial response is in favour of such change of mind on the justification that consent for handing over the child was given by the surrogate mother at a point of time when she was totally ignorant of what made motherhood and hence the consent which was not genuine vitiated the contract by reason of absence of consensus ad idem. Alternatively the surrogate mother at the time of entering into the contract by concealing her inner intension of not handing over the child after delivery may give her consent for the arrangement. If a child is born with physical handicap, naturally she may change her mind as against the initial concealed intention. On the other hand, the commissioning parents also may refuse to accept a physically handicapped child. In such an eventuality the responsibility falls on the surrogate mother as she being the legal mother to look after the child which she never intended to have. In the light of the above discussion it is submitted that the lacuna in the English Act needs to be plugged out by enforcing the surrogacy arrangements.

Under English law mere willingness of the surrogate mother to handover the child will not conclude the right of the commissioning parents upon the child unless they obtain a parental order from a competent court fulfilling the conditions prescribed. One of the conditions is that there



must be genuine consent on the part of surrogate mother and her husband or partner as the case may be before handing over the baby. It is meaningless to insist for consent requirement at that stage of contract. The obvious reason is that the surrogate mother knows that she has agreed to conceive not for herself. It is for the commissioning couples. The baby cannot be handed over to the commissioning couples immediately after the delivery. Therefore law contemplates a minimum gap of six weeks before the transfer. But in a situation where the surrogate mother dies immediately after delivery or within the above said statutory period, the condition of the statutory minimum becomes meaningless. The only choice is a better alternative among the available alternatives. The procedure is made further complicated by the insistence of a residence order permitting the child to live with the commissioning couples which is mandatory, before the commissioning couples file an application seeking a parental order. The rationale behind such mandatory condition is to ascertain the willingness of the commissioning couples to accept the child. As a matter of right, a parental order cannot be claimed. It is left to the discretion of the court taking into consideration the best interest of the child. If parental order is refused, it leads to a very strange situation of re-transfer of the child to the surrogate mother and the position will be very precarious if she refuses responsibility of the child. Therefore in the fitness of things, it is suggested that the law should be simplified in this regard and the responsibility for the child should fall on the commissioning couples that they should not be allowed to escape from the clutches of law for the reason stated elsewhere in the course of the discussion. Law can think for some other alternative, in the best interest of the child where the child will not be safe at all in the hands of the commissioning couples. It should be clearly contemplated in all contingencies on whom the eventual responsibility for the child should fall.

There is need for concretization of the provisions as to who can take recourse to surrogacy arrangement. The right of an unmarried woman, lesbians, gay couples and couples of live-in relationship to take recourse to surrogacy arrangement has remained a grey area. In case of an unmarried woman, it is obvious that she wants to keep away from the marital ties which she considers as a burden or she does not want to conceive because of the constraints of pregnancy. She has a better alternative in adoption under which she cannot absolve herself from the responsibility for the child. If she is allowed to go for surrogacy, subsequent change of mind in her places the surrogate mother in a very precarious position. Moreover for the healthy development of child, it requires the existence of both father and mother. If on the other hand the surrogate mother refuses to handover the child it results in frustration. Further as the English Embryology and Human Fertilization Act, contemplates that only husband and wife can apply for parenting order. In gay marriages and lesbian relationship couples cannot be considered as husband and wife. They cannot confer upon the child the love and affection of natural parents. Disastrous consequences will follow, if the child is left under the care of gay couples and lesbians. There is no stability in live-in relationship which may affect the welfare of the child.

Legally the couples cannot be considered as husband and wife. But in case of married couples, though stability in their relationship ensured, there are eventualities of divorce. But divorce laws are clear about the custody and care of the child. A married woman, who is otherwise healthy and capable of conception, may seek a child by way of surrogacy arrangement as she is not willing to undergo the pains and constraints of pregnancy. As a matter of public policy it should not be allowed. Therefore it is submitted that the outcome of the above discussion is that the categories of people contemplated above should not be allowed to seek surrogacy arrangement.

The other question which needs to be answered concretely is who can act as a surrogate mother. In a case of partial surrogacy where the sister acts as surrogate mother for the brother through artificial insemination using the sperm of her own brother, it should not be allowed. If allowed it violates the rule of prohibited degree of relationship and permitting to do indirectly what is prohibited directly as there is passing of semen from one body to the other even though there is no physical sexual intercourse.

In appears from the decision of American court that any woman capable of conceiving can act as a surrogate mother. It is based on the principle of bodily autonomy and right of privacy which paved the way for the proposition that a woman is free to use her body as she wishes and knows what shall and shall not be done with her body. It may not lead to ill consequences in the western society. But certainly it leads to disaster in traditional societies affecting the marriage prospects of the unmarried surrogate mother. In case of a married woman acting as surrogate, consent of her husband should be made mandatory to avert the possibility of any break in their relationship. In the absence of consent of the husband, it appears it may be a ground for divorce under the head mental cruelty. There is need to lay down statutory provisions regarding the maximum no of times a woman can act as surrogate mother, taking into consideration the no. of times she delivered giving birth to her own children, the upper age limit beyond which one cannot be permitted to act as surrogate mother and the gap between two surrogacy arrangements. According to the current position under English law these issues are to be determined by the ethical committee attached to the concerned surrogacy clinic.

The other issues that need legislative attention is whether the child is entitled to inherit the property of the surrogate mother when she is genetically related to the child and what if she is a mere gestational carrier, whether the child has a right to know its parentage and can a surrogate mother go for abortion, in case of anticipatory breach of surrogacy contract by the commissioning parents, as it falls within the ambit of non-therapeutic abortion which is not permissible, if so at what stage it is permitted.

In India law relating to surrogacy is in take-off stage. Efforts can be made in India to lay down a vibrant and sensitive surrogacy legal regime addressing in anticipation legal issues that emerged in the western jurisdictions as discussed above duly accommodating the demands of Indian Society.

**END NOTES:**

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2. Emily Jackson, "Medical Law : Cases & Material" London, p. 872
3. See supra n. 1 at p. 190
4. American Law Reports, Validity and Construction of Surrogate Parenting Agreement, 77 A.L.F. 470 (1989)
5. Dr. Shasi Bala, "Commercial Surrogacy- The Need for Regulation" IBR vol 3, 2012 p. 209
6. A v. C, (1985) FLR 445
7. See Supra n. 5 at p. 210
8. Ibid.
9. See supra n. 2
10. Ibid.
11. See supra n. 1 at p. 190
12. See supra n. 2
13. See supra n. 1 at p.190
14. See supra n. 2
15. See supra n. 1
16. Ibid.
17. Ibid.
18. See supra n. 2 at p. 873
19. Ibid.
20. Ibid.
21. Ibid.
22. See sec.1 of the Marriage Act(English) 1949, in most of the jurisdictions there is a prohibition on marital tie with one who falls within the prohibited degree of relationship
23. See supra n.6
24. See supra n.2 at p.874
25. (1985)FLR 8
26. Ibid
27. See supra n.2 at p.874
28. Ibid.
29. See supra n.2. at p.875
30. See sec.1B of Surrogacy Arrangements Act, 1985
31. Id at sec.2
32. Ibid.
33. Ibid.
34. Ibid.
35. See supra n.2 at p.876
36. Ibid.
37. Briody v. St. Helen's and Knowsley Area Health Authority, (2001) EWCA Civ.1010, (2002)2B. 856
38. See sec. 13(5) Human Fertilization and Embryology Act, 1999
39. See supra n.2 at p.877
40. Id at p.878
41. See sec. 27(1) of Human Fertilization and Embryology Act, 1990
42. See supra n.2 at p.879
43. Ibid
44. Ibid.
45. See sec. 28 of the Human Fertilization and Embryology Act, 1990
46. In Re Q (Parental order) (1996) 1 FLR 369
47. See supra n. 2 at p. 880
48. See supra n. 38 at sec. 30
49. (2002) 1 FLR 909
50. 2d 1227 (February 03, 1988)
51. Cal. 484 (May 20, 1993)
52. Ibid.
53. See supra n. 51
54. See supra n. 41
55. 644 Ne 2d 2d 760
56. 897 P 2d 1356
57. 72 Cal Rptr 2d 280
58. www.thesurrogacyexperience.com, visited on 22.05.2013
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72. Ibid.
73. Ibid, see Art. 16-7 the Code Civil
74. Quebec, Iceland, Italy, Pakistan, Saudi Arabia, Ibid.
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