

CHAPTER -V

INTERNATIONAL CONVENTIONS, CONSTITUTION OF INDIA AND JUDICIAL APPROACH TOWARDS SURROGACY

5. INTRODUCTION

HUMAN RIGHTS are the rights which are possessed by all human beings irrespective of their race, caste, nationality, sex, language, etc. simply because they are human beings. According to Fawcett, “Human rights are sometimes called as fundamental rights or basic rights or natural rights.”⁹³⁷ It is the “immutable laws of nature”⁹³⁸ i.e. rights given to human beings by the nature. It is said that the human rights are not gifts of the Constitution or Legislation. Hence, these basic or fundamental rights cannot be taken away by any legislature or any act of government and which are often set out in a Constitution. Any civilized country must recognize them.

Human rights are nothing but interests of individuals protected by the rules of right either by moral or legal rules.⁹³⁹ Hence, it demands for a decent, civilized life in which the inherent dignity of each human being is well respected and protected. And the protector of the HUMAN RIGHTS in a country is the judiciary. Human rights are also described as the *Magna Carta* of mankind. The first documented use of the expression of “human rights” found in the charter of the United Nations.⁹⁴⁰ The first concrete steps taken by the United Nations General Assembly by adopting the Universal Declaration of Human Rights in 10th December 1948. It was, however, felt that a declaration is not enough, so the United Nations drafted two separate Covenants in the year 1966 viz., the International Covenant on Civil and Political Rights and

⁹³⁷ Dr. S. K. Kapoor, ‘International Law & Human Rights,’ (Central Law Agency, Allahabad, 16th Edn. 2012), at p. 56

⁹³⁸ R. N. Trivedi, (ed.), ‘The world of All Human Rights,’ ‘Soli Sorabjee,’ *A Festschrift*, (Universal Law Publication, New Delhi, 2010 Edn.), at p. xvii

⁹³⁹⁹³⁹ P.J. Fitzgerald, “Salmond on Jurisprudence,” (Universal Law Publication, New Delhi, Twelfth Edn, 2014), p. 217

⁹⁴⁰ It was adopted after the second World War at San Francisco on 25-06-1945. The preamble of the chapter declared its object “to reaffirm faith in fundamental human rights”

International Covenant on Economic, Social and Cultural Rights to be signed, ratified and acted upon by the members States.

In India, core of Human Rights is protected and promoted through the Fundamental Rights and Directive Principles of State Policy protected in Parts III and IV of the Constitution as well as the Protection Human Rights Act, 1993. Section 2 (d) of the Protection of Human Rights Act, 1993, defines 'Human Rights' as:

“The right relating to life, liberty, equality and dignity of the individual, guaranteed by the Constitution or embodied in the International Covenants, enforceable by the Courts in India.”⁹⁴¹

All individuals have reproductive rights and the Constitution guaranteed this right to every person irrespective of his/her gender or his/her nationality. These guarantees are found in the oldest and most accepted human rights instruments, as well as more recently adopted international and regional treaties. A series of documents adopted at United Nations Conferences, most notably the 1994 *International Conference on Population and Development (ICPD)*, have explicitly linked governments' duties under international treaties to their obligations to uphold reproductive rights of the individuals.⁹⁴²

Article 16 (1) of the Universal Declaration of Human Rights 1948 says, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and start a family”.

However, there is no international human rights instrument which specifically states about the surrogacy right. In India a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India.

Now, if reproductive right gets constitutional umbrella, hence the surrogacy which allows an infertile couple to exercise that right also gets the same constitutional

⁹⁴¹ R. N. Trivedi, (ed)., 'The world of All Human Rights,' 'Soli Sorabjee,' *A Festschrift*, (Universal Law Publication, New Delhi, 2010 Edn.), at p.67

⁹⁴² United Nations Human Rights And The Danish Institute for Human Rights, “Reproductive Rights are Human Rights,” *A Handbook For National Human Rights Institutions*, 2014, *C.f.* <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>, visited on 24/05/2015 at 3.00 pm.

protection. Thus, the Judiciary in India has acknowledged the reproductive right of humans as a basic right in *B. K. Parthasarthi v. Government of Andhra Pradesh*,⁹⁴³

Interestingly, from the last two decades the surrogacy arrangement has increased tremendously, but it has raised various issues such as social justice, exploitation, and human rights abuses. Presently, there is no international and national regulation for surrogacy arrangement. Recently, the Hague Conference Permanent Bureau has conducted significant work on the private international law issues surrounding the status of children, and especially on the issue of cross-border surrogacy.

Researcher under this chapter is discussing about the various international Conventions pertaining to surrogacy rights, especially rights for the protection surrogate and the surrogate child, the Constitutional status of the surrogacy in India and judicial attitude towards it.

5.1. SURROGACY AND INTERNATIONAL CONVENTIONS

5.1.1. Reproductive Rights

In today's scientific and technological world, there is no any single international human rights instrument which specifically states about the surrogacy right.

Article 1 of the Charter of the United Nations, sets its purpose, "to achieve international cooperation...., to promote and encourage the respect for human rights and for fundamental freedoms of all."⁹⁴⁴ Therefore, the question arises, whether surrogacy can be claimed as a human right? All individuals have the right to become parents, which is the basic, natural human right. Reproductive rights refer to a diversity of civil, political, economic, social and cultural rights affecting the sexual and reproductive life of individuals and couples.⁹⁴⁵

There are various documents of the United Nations, which provides the State's duties under international treaties to uphold reproductive rights of the individuals.

⁹⁴³ *B. K. Parthasarthi v. Government of Andhra Pradesh* 2000 (1) ALD 199, 1999 (5) ALT 715.

⁹⁴⁴ Charter I, Article 1 Purposes and Principles of the United Nations, C.f. <http://www.un.org/en/sections/un-charter/chapter-i/>, visited on 10/10/2013 at 2.00.pm

⁹⁴⁵ Center For Reproductive Rights, "Reproductive Rights are Human Rights 2009" C.f. http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/rrrehr_final.pdf, Visited On 24/11.2013at 6.00 pm

1. Universal Declaration of Human Rights (UDHR), 1948:

Article 16 (1) of the Universal Declaration of Human Rights 1948 says, that “men and women of full age without any limitation due to race, nationality or religion, have the right to marry and start a family.”⁹⁴⁶

The meaning of the word “to start the family” is the nothing but reproductive right of the individuals. Thus, the child’s origin may be through natural conception or adoption or surrogacy arrangement. But, the Declaration has excluded Transgender right to become parents and restricted only to the men and women.

Now a contemporary society has challenged the 58 years old drafting of the UDHR, the manner in which a family life is created and also reproductive rights.⁹⁴⁷

2. International Covenant on Civil and Political Rights, 1966

Article 23 of the International Covenant on Civil and Political Rights, 1966 provides that the right of men and women of marriageable age to marry and to found a family.⁹⁴⁸

3. International Covenant on Economic, Social and Cultural Rights, 1966

Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966, recognizes that the family is the “natural and fundamental group unit of society”, hence it should be protected.⁹⁴⁹

⁹⁴⁶ Article 16(1) of the Universal Declaration of Human Rights, 1948, C.f. <http://www.un.org/en/universal-declaration-human-rights/>, visited on 30/12/2013 at 3.00 p.m.

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, as a common standard of achievements for all peoples and all nations. For the first time, the fundamental human rights to be universally protected.

⁹⁴⁷ Nicole F. Bromfield, ‘Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations’, published online 1st July 2014, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 12/11/2014 at 10.30. pm

⁹⁴⁸ United Nations Human Rights, “The International Covenant on Civil and Political Rights 1966” C. f. <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, visited on 25/02/2015 at 1.00.pm.

⁹⁴⁹ United Nations Human Rights, “International Covenant on Economic, Social and Cultural Rights, 1966” C. f., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, Visited on 25/02/2015 at 2.00.pm. Article 23 of the International Covenant on Civil and Political Rights, 1966 also states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The same right i.e. right to marry and found a family is also protected by the Article 17 of the *American Convention on Human Right (ACHR)*, Article 12 of the *European Convention on*

4. Teheran Conference on Human Rights in 1968

The reproductive rights are rather new in the international law. This fundamental right for the first time appeared in the **Teheran Conference on Human Rights in 1968**, which has recognized the “rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights.”⁹⁵⁰

5. International Conference on Population and Development (ICPD) 1994

In 1994 the International Conference on Population and Development (ICPD) i.e. (**Cairo Conference**) has specifically expressed about the reproductive rights of the individuals under its Para 7.3.⁹⁵¹ The object of the conference was to support couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice.

The ICPD recognized the reproductive rights include both “the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health.”⁹⁵² However, the question is whether it includes the right of person who cannot become parents

Human Rights (ECHR), 1950 (ECHR), and Article 18 of the *African Charter on the Rights and Welfare of the Child*.

⁹⁵⁰ Barbara Stark, “Transnational Surrogacy and International Human Rights Law,” *C.f.* http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2118077, Visited on 26/10/2015 at 5.30. p.m.

⁹⁵¹ United Nations Population Information Network, *Report of the ICPD*, 1.12, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), *available at* <http://www.un.org/popin/icpd/conference/offeng/poa.html>, Visited on 13/10/2013 at 3.45.p.m. As per the Paragraph 7.3 of the ICPD Programme of Action: Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights document documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.”

CEDAW: An important international instrument is the Convention on the Elimination of All Forms of Discrimination against Women which obligates the states parties to ensure “*access to health care services, including those related to family planning*” and mentions appropriate services in connection with pregnancy and the right to decide on the number and spacing of children (Articles 12 and 16). *Article 23 of the Convention on the Rights of Persons with Disabilities* is the first comprehensive international human rights instrument which clearly declares the reproductive rights as a human right.

⁹⁵² *Supra Note 11*

naturally, whether for medical reasons or because they are single or live in same sex relationships?⁹⁵³

6. Beijing Conference 1995:

In 1995 the Fourth World Conference on Women in Beijing has supported the reproductive rights. It has declared the human rights of women also include the right to control over her body. She is free to decide the matters relating to her body including reproductive health, violence and discrimination.⁹⁵⁴

Thus, in the international human rights instruments the reproductive rights are broadly recognized as rights. However, at the Cairo Conference, the surrogacy arrangement was not the agenda, hence it neither supported nor rejected. As talking about the surrogacy, as stated at the **Cairo conference in Para 7.16** that “the aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice”⁹⁵⁵ It means, debatably Cairo conference supports the surrogacy.

5.1.2. Reproductive Rights of Women

A women’s lives, liberty and security, health, autonomy, privacy, equality and non-discrimination and education cannot be protected without ensuring that women can determine when, how and whether to bear children, control their bodies and reproductive health information and services. Just as women’s human rights cannot be realized without promoting women’s reproductive rights.⁹⁵⁶ Thus, it is very clear that the reproductive rights are playing very significant role in the life of the women.

⁹⁵³United Nations Human Rights and Danish Institute for Human Rights, “Reproductive Rights are Human Rights,” A Handbook For National Human Rights Institutions, 2014, at 33 *C.f.* <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>, visited on 24/05/2015 at 3.00 pm.

⁹⁵⁴United Nations, “Report of the Fourth World Conference on Women,” Beijing, China, Sept. 4, 1995, 96, U.N. Doc. A/Conf.177/20/Rev.1 (1996), *available at* <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> , Visited on 14/12/2013 at 2.00 p.m.

⁹⁵⁵ United Nations Population Information Network, *Report of the ICPD*, 1.12, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), *available at* <http://www.un.org/popin/icpd/conference/offeng/poa.html>, Visited on 13/10/2013 at 3.45.p.m.

⁹⁵⁶ Center For Reproductive Rights, “Reproductive Rights are Human Rights” ‘2009’ *C.f.* http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/rrarehr_final.pdf, Visited On 24/11.2013at 6.00 pm

There are two major legal, human instruments which clearly states about the reproductive rights of the women.

1. The Convention on the Rights of Persons with Disabilities (Disability Rights Convention) 2006:

It is the first comprehensive international human rights instrument which specifically recognized the reproductive right as a human right of women under Article 23.

2. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa) 2003:

Article 14 of the regional level protocol expressly states those women's reproductive rights as human rights. It also declares that women's right to control their fertility and right to decide whether to have children and the number and spacing of children. It also guarantees right to reproductive health of the women⁹⁵⁷

3. Convention on the Elimination of All Forms of Discrimination against Women⁹⁵⁸ (CEDAW), 1979:

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women has defined its purpose to prevent "discrimination against women" in all its forms and manifestations.⁹⁵⁹

Besides the civil rights issues of the women, the convention also confirms the reproductive rights of women.

⁹⁵⁷ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa, 2003, C.f. http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf, Visited on 05/02/ 2015 at 2.00 pm.,

⁹⁵⁸ The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly on 18 December 1979. It is often described as an international Bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

⁹⁵⁹ United Nation, "*The convention on the Elimination of All Forms of Discrimination against Women* " 'CEDAW', 1979, C.f. <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, Visited on 24/10/15 2 9.37 am, The term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 4 of the Convention states that the “role of women in procreation should not be a basis for discrimination.” The convention directly confirms the ‘rights of maternity’ and the States have “to adopt special measures with the aim to protect the maternity without any discrimination.” It means the Article 4 of the convention confirms the reproductive rights of the women which also includes the right to gestate. However, Article 5 of the Convention⁹⁶⁰ recognizes the maternity as social function and not the commercial function. Hence, it is difficult to settle with commercial surrogacy, where the commissioning parents and surrogates remain strangers.⁹⁶¹ Article 11.1. (c) Provides that the women’s right to free choice of profession and employment and State should not make any discrimination in the area of employment.⁹⁶² However, it is not clear whether rights of women engaged in the work of “Occupation of Maternity” for giving service to others.⁹⁶³ When CEDAW law passed that time, even the concept of surrogacy was not in the existence. Under Article 11.2 the State has to prevent any discrimination on the ground of maternity and ensure the women’s effective right work.⁹⁶⁴

In surrogacy practice a woman’s right to choose and also right to participate in surrogacy arrangement is consistent with CEDAW. Thus, the surrogacy has challenged the concept of right to work and control over the reproduction. In Article 12 the State has to ensure the access to health care services, and also ensures the appropriate services in connection with pregnancy, confinement in the post-natal period, and adequate nutrition during pregnancy and lactation.⁹⁶⁵ Thus, this article protects the right to health of the surrogate. Lastly, Article 16 of the CEDAW provides that the State has to eliminate discrimination against women in all matters relating to marriage and family relations and right to decide freely and responsibly on the number and spacing of their children. It is also to be reflected that right to found a

⁹⁶⁰ CEDAW, *supra* note 24, art. 5

Article 6 of the CEDAW provides that the States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

⁹⁶¹ *Supra* Note 14

⁹⁶² CEDAW, *supra* note 24, art. 11.1.(c).

⁹⁶³ Nicole F. Bromfield, ‘Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations, published online 1st July 2014, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 12/11/2014 at 10.30. pm

⁹⁶⁴ CEDAW, *supra* note 24, art. 11.2

⁹⁶⁵ CEDAW, *supra* note 24, art. 16

Article 25.2. of the *Universal Declaration of Human Rights* states that the childhood and the motherhood are entitled to special care and assistance.

family may include right to conceive, gestate and to deliver a child. Article 16 clearly gives reproductive right to women, whether she is the commissioning mother or surrogate mother.

According to **the International Institute of Social Studies (ISS)** that CEDAW prohibits the discrimination against the women, but not allowing a woman to act as a surrogate is also discriminatory. While some say commercial surrogacy is totally discriminatory exploitative and coercive to the surrogates.⁹⁶⁶ So it should not be allowed.

4. The UN International Research and Training Institute for the Advancement of Women (UN-INSTRAW)⁹⁶⁷ is also working to improve the lives of women throughout the world for ensuring the rights, needs and development of women.

5. The United Nations Population Fund (UNFPA) and the World Health Organization (WHO) also supports the reproductive rights of the women.

6. The Eleventh International Conference of the International Coordinating Committee (ICC) of National Institutions 2012⁹⁶⁸ has focused on human rights of women and girls and under Para 25 protected, promoted and recognized the reproductive rights without any discrimination.

7. YOGYAKARTA PRINCIPLES

A Yogyakarta Principles on the application of human rights law in relation to sexual orientation and gender identity has supported the reproductive rights are the human rights.

⁹⁶⁶ International Institute of Social Studies (ISS), Report on “Global Surrogacy Practices”, December 2014, *C.f.* <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm

⁹⁶⁷ The United Nations International Research and Training Institute for the Advancement of Women (UN-INSTRAW), *C.f.* <http://www.unfoundation.org/how-to-help/donate/instraw.html>, Visited on 24/10/15 at 11 pm.

⁹⁶⁸ United Nations Human Rights And The Danish Institute for Human Rights, “Reproductive Rights are Human Rights,” A Handbook For National Human Rights Institutions, 2014, at 33 *C.f.* <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>, visited on 24/05/2015 at 3.00 pm.

According to the Centre for Reproductive Rights the following twelve essential human rights comprises in the reproductive rights.⁹⁶⁹

- i. The Right to Life
- ii. Right to Liberty and Security of Person
- iii. The Right to Health, Including Sexual and Reproductive Health
- iv. The Right to Decide the Number and Spacing of Children
- v. The Right to Consent to Marriage and to Equality in Marriage
- vi. The Right to Privacy
- vii. The Right to Equality and Non-Discrimination
- viii. The Right to be Free from Practices that Harm Women and Girls
- ix. The Right to not be Subjected to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment
- x. The Right to be Free from Sexual and Gender-Based Violence
- xi. The Right to Access Sexual and Reproductive Health Education and Family Planning Information
- xii. The Right to Enjoy the Benefits of Scientific Progress

Especially, the twelve reproductive rights, i.e. the right to enjoy the benefits of the scientific progress. Today, the scientific technology has made it possible for everyone to become the parents of the child through the use of the assisted reproductive technology. Surrogacy a method of assisted reproductive technology is the new scientific and technological investigation, which fulfills dream of all individuals⁹⁷⁰ to become the parents of the own genetic child. Therefore, the surrogacy method is the right to enjoy the benefits of the scientific progress.

The right to enjoy the benefits of scientific progress guaranteed by the various international human right instruments such as Article 27(1) of the Universal declaration of Human Rights states that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific

⁹⁶⁹ Center For Reproductive Rights, “Reproductive Rights are Human Rights 2009” C.f. http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/rrarehr_final.pdf, Visited On 24/11.2013at 6.00 pm

⁹⁷⁰ All individual includes heterosexual married couple, single men and women, same sex couples and Transgender.

advancement and its benefits.” Article 15 (1) of the United Nations International Covenant on Economic, Social, and Cultural Rights has also recognized the right of all individuals to enjoy the benefits of scientific progress and its applications.”⁹⁷¹ Besides the above mentioned documents, other various regional treaties and international conferences recognizes right to enjoy the benefits of scientific progress.⁹⁷²

The right to procreate is the natural, inalienable right of any individual person. Hence, it should not depend on gender, family, or the sexuality of the person. One of the fundamental principles of the modern bioethics i.e. the Universal Declaration on Bioethics and Human Rights, 2005 is the interests and welfare of the individual should have priority over the sole interest of science or society. However, refusing the right of the childless people to become parents through surrogacy is nothing but refusing to treat them equally, which clearly amounts to selective discrimination of the people.⁹⁷³

Unfortunately, till today no international human rights instruments specifically talking about the practice of surrogacy as a human right. But when, the reproductive rights are recognized as human rights then surrogacy is the one of the shades of the reproductive rights, therefore, it automatically becomes the human right of the every individual.

In India, the human rights of women are protected by the National Commission for Women Act, 1990 and for their redressal of the grievances the government has established the National Commission for Women (NCW). Apart from the above enactment, the government has also enacted the Protection of Human Rights Act,

⁹⁷¹ Supra note 33

⁹⁷² Article 7 of the United Nations International Covenant on Civil and Political Rights states that, “No one shall be subjected without his [sic] free consent to medical or scientific experimentation.” A regional *Protocol of San Salvador* under Article 14(1) and the Vienna Declaration in Paragraph 11 declares the same right.

⁹⁷³ K. Svitnev, ‘Legal control of surrogacy – International perspectives’, http://www.jurconsult.ru/publications/ethical_dilemmas/13_Legal%20control%20of%20surrogacy%20-%20international%20perspectives.pdf, p. 155 visited on 24/09/2014 at 11.00 pm, Just because something is wrong with surrogate children in their new families, the peoples are desperately deprived form of their right to the reproduction and use of reproductive technologies. In such case it is the job of society and social services to take care of them. Therefore, it is said that it is not an appropriate reason to deny reproductive rights

1994⁹⁷⁴ for the protection of human rights of people and established Human Right Commissions at National, State and District level.

5.1.3. Rights of Surrogate Child and International Conventions:

There are multiple international human rights instruments which have extensively recognized the rights of the child. Every child is protected under international human rights conventions, whether a born out of surrogacy or not. The object to the need of special care and assistance to the child, as stated in the *Geneva Declaration of the Rights of the Child, 1924 and Declaration of the Rights of the Child, 1959*.

Article 25 (2) of the Universal Declaration of Human Rights, 1948, provides that “motherhood and childhood are entitled to special care and assistance, whether born in and out of wedlock shall enjoy the same protection.”⁹⁷⁵

Article 24 of the International Covenant on Civil and Political Rights, 1966 and Article 10.3 of the International Covenant on Economic, Social and Cultural Rights, 1966 as well as various regional statutes and other relevant international instrument states about the special measures of protection and assistance should have been taken by the State for the welfare of children.

5.1.3.1. United Nations Convention on the Rights of Child (UNCRC), 1989

The most notable convention for the protection of the rights of the child is the United Nations Convention on the Rights of Child (UNCRC), 1989.⁹⁷⁶ This convention is the

⁹⁷⁴ Dr. S. K. Kapoor, ‘International Law & Human Rights,’ (Central Law Agency, Allahabad, 16th Edn. 2012) , at p. 77, Other laws for protecting human rights of the people, the Government of India has enacted the Protection of Civil Rights Act, 1955, and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995

⁹⁷⁵ M.P. Tandon, “International Law and Human Rights,” Allahabad Law Agency, Faridabad, (Sixteenth Edn. 2005, Reprint 2007.), at p. 223

⁹⁷⁶ The Convention on the Rights of Child is adopted by General Assembly of the United Nations through its *resolution 44/25 of 20 November, 1989* and which came into force 2 September 1990. Presently, **194 countries** have signed up to the UNCRC, and only two countries in the world still remained to ratify it. The *United Nations Convention on the Rights of the Child (UNCRC)* is a legally-binding international agreement. It provides the ***civil, political, economic, social and cultural rights*** of every child, regardless of their race, religion or abilities. It consists of **54 articles** that set out children’s rights and also states how the governments should work together for making it **available to all the children**.

universally agreed and ratified human rights instruments. According to the convention the child means “every human being below the age of eighteen years of age.”⁹⁷⁷

The several rights of the child under the CRC are linked with the surrogacy. Article 2 of the CRC states that, the “rights of every child should be respected and ensured without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race,..... including birth or other status of the child.”⁹⁷⁸ Originally, the article 2 was indented to protect an illegitimate child but expansive application can be drawn which suggests the protection to the child born out of surrogacy.⁹⁷⁹

5.1.3.2. Principle of Best Interests of the Child

The CRC convention on the rights of the child is mainly based on the principle of the best interest of the child. Article 3 (1) of the CRC states that “in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁹⁸⁰ In India, section 2 (9) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and Para 2 (5) of the Guidelines Governing Adoption of Children, 2015 defines the best interest of the child.⁹⁸¹ However, it is found that, hardly any Courts apply the best interest of the child test in surrogacy cases.⁹⁸² In *Johnson v. Calvert*⁹⁸³ the California Court applied the best interest of the child test and granted the custody of the child to the commission parents i.e. Calvert Couple and rejected the claim of surrogate mother. In India, the Supreme Court in applied the best interest of the child and granted custody of the child to the commissioning parents.

⁹⁷⁷ Article 1 of the UN Convention on the Rights of the Child, 1989, C.f. <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, visited on 19/02/2015 at 2.00 pm. The word “ten” is replaced with the word “eighteen” by the amendment, which came into force on 18 November 2002.

⁹⁷⁸ Ibid at Article 2 (1), Article 16 (a) of the CEDAW also confirms the same rights and responsibilities as a parent, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.

⁹⁷⁹ Barbara Stark, “Transnational Surrogacy and International Human Rights Law,” C.f. http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2118077, Visited on 26/10/2015 at 5.30. p.m.

⁹⁸⁰ UNCRC Supra note 42 at art. 3

⁹⁸¹ Section 2 (9) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and Para 2 (5) of the Guidelines Governing Adoption of Children, 2015, defines the “best interest of child” means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

⁹⁸² CARLA SPIVACK, “National Report: The Law of Surrogate Motherhood in the United States” Oklahoma City University School of Law, January 2010, C.f. http://works.bepress.com/carla_spivack/15, visited on 23/04/2014 at 11.00. pm

⁹⁸³ 5 Cal. 4th 84 (1993).

Article 6 states that the child's right to identify, name, and family relationships. Article 7 (1) of the CRC provides that, the child should be registered instantly after birth. From the birth he has the right to carry the name, nationality of the parents, right to get the information about *Baby Manji case*,⁹⁸⁴ and *Jan Balaz Case*⁹⁸⁵ parents and the protection and care from his or her parents.⁹⁸⁶ This provision, however, has raised two main difficulties in the case of incorporation of national law. If the law says, a birth woman is the mother of the child, and then the position of the baby is unclear. So the child born out of surrogacy cannot acquire the nationality of the commissioning parents as a result a child may be in an uncertain situation.⁹⁸⁷ Therefore, a domestic law should declare that, the commissioning parent is the legal parents of the child as well as before entering into surrogacy contract, the commissioning couples have to prove that, the child will be granted citizenship in the State where her intending parents live. In India, a proposed ART Bill on the same issues is pending before the Parliament. Article 8 (1) also gives the right to know the information about their conception, gamete donor (i.e., their genetic parents), and a surrogate mother and preserve his identity, including nationality, name and family relations and be cared for by their parents.⁹⁸⁸ Thus, Article 7 and 8 are very significant articles from the point of view of surrogacy, it gives guaranteed rights to the child such as the right to be registered immediately after a birth, right to know, right to acquire the nationality, right not to be Stateless,⁹⁸⁹ right to be cared by the parents. Article 9 (1) states that, "a child shall not be separated from his or her parents as against their will." Article 24 (1) provides that the state has to recognize the right of the child to enjoy of the highest standard of health and Article 24 (2) (e) provides the

⁹⁸⁴ *Baby Manji Yamada v. Union of India & Anr.*, AIR 2009 SC84, *Baby M case* (537 A.2d 1227)

⁹⁸⁵ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010)

⁹⁸⁶ UNCRC Supra note 42 at art. 7 (1) & *CEDAW Article 9* states about the nationality of the children, it provides that "States Parties shall grant women equal rights with men with respect to the nationality of their children"

⁹⁸⁷ Barbara Stark, "Transnational Surrogacy and International Human Rights Law," C.f. http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2118077, Visited on 26/10/2015 at 5.30. p.m.

⁹⁸⁸ International Institute of Social Studies (ISS), Report on "Global Surrogacy Practices", December 2014, C.f. <http://repub.eur.nl/pub/77402>, visited on 20/06/2015 at 4.30 pm, *Article 8* (1) provides that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

⁹⁸⁹ In Jan Balaz case, children were remained as stateless due to non recognition of surrogacy by Germany.

guaranteed right of the child to have breastfed.⁹⁹⁰ Article 35 of the CRC requires that the, States Parties to take ‘all appropriate national, bilateral and multilateral measures to prevent the...sale of or traffic in children for any purpose or in any form.’⁹⁹¹

The Committee on the Rights of Child in its 3rd and 4th Periodic Reports of India 2014, in para 57 (d) has stated its concern that, the Commercial use of surrogacy is not the properly regulated, is widespread, leading to the sale of children and the violation of children’s rights.⁹⁹²

Therefore, the committee in Para 58 (d) recommended that the Government of India has to ensure the Assisted Reproductive Technology (Regulation) Bill, 2013, or other subsequent legislation contain provisions which define, regulate and monitor surrogacy arrangements and criminalizes the sale of children for the purpose of illegal adoption, including the misuse of surrogacy.⁹⁹³ Thus, the present Surrogacy Bill, 2016 prescribe the various types of punishments for protecting the rights of surrogate child.⁹⁹⁴

Thus, the various provisions of the Convention on the Rights of Child provide the guaranteed rights of the every child irrespective of the child are born out of surrogacy or natural conception or adoption. After the study of the CRC, it is clear that, the CRC has protected the surrogate child under its umbrella.

⁹⁹⁰ UNCRC Supra note 42 at art. 24 (1) & (2) (e). In surrogacy arrangement however, after the birth of the child, the surrogate are not allowed to breastfeed the child, in order to avoid chance of emotional attachment of surrogate with the child. But it adversely affects on the health of child and the surrogate too and also violate right to breastfeeding of the child guaranteed by the CRC.

⁹⁹¹ Ibid at art. 35, the surrogacy arrangement however, alleged that amounts to the sale of child or trafficking because the surrogate mother takes the payment for the birth of the child. However, another view is that, the surrogacy arrangements is not the baby – selling, because a contract between the surrogate, the surrogate agency, and the commissioning parents existed before the conception of the child and a service was contracted between the parties and not the child.

⁹⁹² Committee on the Rights of the Child, “Concluding observations on the combined (CRC/ 3rd and 4th Periodic Reports of India” 2014, at p. 12 C.f. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIND%2fCO%2f3-4&Lang=en, visited on 11/06/2015 at 12.10 pm

⁹⁹³ *Ibid*

⁹⁹⁴ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 14, visited on 21/11/2016 at 3.00 pm.

5.1.3.3. Hague Convention on Protection of Children and Co-operation in Respect to Inter country Adoption (HCIA), 1993

The Hague Convention on Protection of Children and Co-operation in Respect to Inter country Adoption (HCIA), 1993 has mainly focused on the principle of the best interest of the child. It has also discussed the prohibition of child-selling, trafficking and abduction of the children and declared it as the crimes of the child.⁹⁹⁵

Because of the increasing problems of the global surrogacy, the Permanent Bureau of the Hague Conference has undertaken the research project on international surrogacy arrangement. The Report of The Hague conference has discussed the various issues of the child born out of surrogacy such as the issue of the legal parentage of the child, the different countries establishes the different legal parentage of the child, which result in uncertainty of the legal parentage of the child. Therefore, the issues such as 'limping legal status' of the child, child's nationality, inheritance, maintenance and the parental responsibility of the child has raised.⁹⁹⁶ It has also stated the child's right to know his or her genetic origin, the Physical and psychological health⁹⁹⁷ of children born out of international surrogacy arrangement.⁹⁹⁸ However, till date the decision regarding whether a convention related to inter-country surrogacy will be drafted or not, has not been reached out.

5.1.3.4. Indian Scenario towards the Protection of Surrogate Child:

The Indian Council of Medical Research, National Guidelines, 2005, in Para 3.12 provides several rights of the child born out of the ART procedure.⁹⁹⁹ In Para 3.12.1.,

⁹⁹⁵ Nicole F. Bromfield, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations, published online 1st July 2014, available at https://www.academia.edu/7014185/Global_surrogacy_exploitation_human_rights_and_international_private_law_A_pragmatic_stance_and_policy_recommendations, visited on 12/11/2014 at 10.30. pm

⁹⁹⁶ Hague Conference on Private International law, 'A permanent Beaur Report on,' "A Study Of Legal Parentage And The Issues Arising From International Surrogacy Arrangements," Prel. Doc. No 3 C (The Study), March 2014, C.f. http://www.hcch.net/upload/wop/gap2014pd03c_en.pdf, visited on 21/05/2015 at 9.30. pm.

⁹⁹⁷ *Ibid*

⁹⁹⁸ It is stated by the conference that, in international surrogacy arrangement the increased risk of multiple and pre-term births of the children for example, premature, multiple birth babies dying in India.

⁹⁹⁹ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, para 3.12.1., at p.70., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

states that, “a child born out of ART is presumed to be legitimate child of the couple. Therefore, the child is entitled to a legal right to parental support, inheritance, and all other privileges of a child born to the couple through sexual intercourse.”¹⁰⁰⁰

A draft of the Assisted Reproductive Technology Bill, 2014, under section 61 provides the determination status of the child. The Bill also declares the child born out of ART procedure is the legitimate child of the couple.¹⁰⁰¹

Under section 62 (1) of the ART Bill, 2014 states that the surrogate child is having right to know the information about the donors and surrogates.¹⁰⁰² The new Surrogacy Bill, 2016 has also provided the punishment with the imprisonment of not less than 10 year and fine upto 10 lakh rupees for abandonment and exploitation of the children by any person.¹⁰⁰³

Besides the above surrogacy laws, there are also special statues which protect the rights of the child. The Orphanages and Other Charitable Homes (supervision and Control) Act, 1960, it provides for the supervision and control of the orphanage and

¹⁰⁰⁰ *Ibid*,

3.12.2 Children born through the use of donor gametes, and their “adopted” parents shall have a right to available medical or genetic information about the genetic parents that may be relevant to the child’s health.

3.12.3 Children born through the use of donor gametes shall not have any right whatsoever to know the identity (such as name, address, parentage, etc.) of their genetic parent(s). A child, thus born will, however, be provided all other information (including that mentioned in about the donor as and when desired by the child, when the child becomes an adult. While the couple will not be obliged to provide the above “other” information to the child on their own, no deliberate attempt will be made by the couple or others concerned to hide this information from the child as and when asked for by the child.

3.12.4 In the case of a divorce during the gestation period, if the offspring is of a donor programme – be it sperm or ova – the law of the land as pertaining to a normal conception would apply.

¹⁰⁰¹ The Assisted Reproductive Technology (Regulation) Bill, 2014, Section 61 (1), at p. 51, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm. It also states that a child born to an ever married woman through the use of assisted reproductive technology shall be the legitimate child or children of the woman¹⁰⁰¹ and even in case of couple gets separated or divorced after consented for ART treatment still then child is legitimate of the couple.¹⁰⁰¹ The birth certificate of the child or children born through the surrogacy shall contain the names of the commissioning couple.

¹⁰⁰² *Ibid* at 52, section 62 (1) A child or children may, upon reaching the age of eighteen, ask for any information, excluding personal identification, relating to the donor or surrogate. Section 62 (2) provides that, the legal guardian of a minor child or children may apply for any information, excluding personal identification, about his or her genetic parents or surrogate when required, and to the extent necessary, for the welfare of the child. Section 62 (3) states that the personal identification of the donor or surrogate may be released only in cases of life threatening medical conditions which require physical testing or samples of the donor or parents or surrogate: Provided that such personal identification shall not be released without the prior informed consent of the donor or parents or surrogate.

¹⁰⁰³ The Surrogacy (Regulation) Bill, 2016, *C.f.* http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 14, Visited on 21/11/2016 at 3.00 pm.

homes for children. The Medical Termination of Pregnancy Act, 1971 stipulates when pregnancies may be terminated by a registered medical practitioner. The Apprentices Act, 1961 permits above fourteen years age of the child to undergo apprenticeship and the Child Labour (Prohibition and Regulation) Act, 1986 prohibits the employment of children below 14 years of age. The pledging of children is prohibited by the Children (Pledging of Labour) Act, 1933. The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, supply and Distribution) Act, 1992 is made with the view to protect and promote breastfeeding. The Pre-Conception & Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994, provides for the use of prenatal diagnostic techniques and for prevention of misuse of such techniques for the prenatal sex determination leading to female foeticide. The Juvenile (Justice Care and Protection of Children) Act, 2000, This Act deals with the law relating juvenile in need of care and protection and Juvenile in conflict with the law.

Apart from the above mentioned special legislations regarding the child, there are various provisions of the general law such as the Code of Civil Procedure 1908, The Code of the Criminal Procedure 1973 provides the special procedures for civil and criminal proceedings in case minor is engaged matters. The Indian Evidence Act, 1872 provides the competency of the child witness (section 112). The several criminal laws give special protection to children, such as the Indian Penal Code, 1860 provides special offences of the child and special punishment for it, for example causing of miscarriage to the unborn child (IPC Secs. 312-318), Marital rape if a girl child is below fifteen years of age (sections 375-376), and enhanced punishment if rape by the public servant (Secs. 376 (a) (b) (c) & (d)). The Immoral Traffic (Prevention) Act, 1956 tries to curb trafficking of young person both boys and girls. There is also provision regarding children in the Cable Television Network (Regulation) Act, 1995 & the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988. The various personal laws also protect the rights of the child Such as Hindu Marriage Act, 1955, The Hindu succession Act, 1956, the Hindu Adoption and Maintenance Act, 1955, The Indian Succession Act, 1925. In case of marriage, maintenance, custody, guardianship, succession and inheritance is governed by the Muslim Personal law. Section 125 of Cr. P.C., provides the maintenance to the minor

child. There are various labour laws also protects the minor child. The Indian Contract Act, 1872, the Indian Partnership Act, 1932, and the Indian Trust Act, 1882 deals with the civil and commercial rights and liabilities of the minors. Besides the above laws, the Constitution of Indian has made a golden box of provisions for the protection of the rights of the child.

A very important legislation for protecting the rights of the child is **the National Commission for Protection of Child Rights Act, 2005**. This Act provides for the constitution of the National Commission and State Commission for the protection of the rights of the child and children's court for providing speedy trial of offences against children regarding violation of child rights.

5.2. SURROGACY AND CONSTITUTION OF INDIA

Right to Reproduction- A Constitutional Right.....

All individuals have reproductive rights and the Indian Constitution guaranteed this right to every person irrespective of any gender or nationality. These guarantees are found in the oldest and most accepted human rights instruments, as well as more recently adopted international and regional treaties. A series of documents adopted at United Nations Conferences, most notably the 1994 International Conference on Population and Development (ICPD), have explicitly linked governments' duties under international treaties to their obligations to uphold reproductive rights of the individuals.¹⁰⁰⁴ The Universal Declaration of Human Rights, 1948 under Article 16 (1) says, that "men and women of full age without any limitation due to race, nationality or religion, have the right to marry and start a family."¹⁰⁰⁵ Thus, the right to marry, found family, procreate children or become pregnant is the natural right of the human beings. It is legal and fundamental right of the every individual.

The Indian Constitution did not directly deal with the right to procreation, but it can be derived from the Article 19 and 21 of the fundamental rights, i.e. freedom of

¹⁰⁰⁴ Supra note 15,

Paragraph 7 (3) of the ICPD Programme of Action states, "Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents.

¹⁰⁰⁵ Supra note 10

speech and expression and personal liberty respectively, which may include women's right to conceive a child and bear and give birth. When one accepts, that right to procreate is to be construed as a fundamental right, would imply that the couples who are unable to procreate their biological children in the normal course of their married life, is entitled to seek recourse to the assisted reproductive technology or the surrogacy arrangement as a right under the fundamental rights. Since the surrogacy is the new concept being developed worldwide, the Constitutional Law has not been applied by the Indian courts to deal with the surrogacy till today. Therefore, the answer goes without any hesitation, that the motherhood, whether it is natural or artificial is to be accepted and protected under the Constitution of India.

The Supreme Court in *P. Rathinam v. Union of India*,¹⁰⁰⁶ has given the significant interpretation with respect to Article 21 of the Constitution, which is to be understood wider than mere 'animal existence,' and includes all aspects of life which make it worth living. As a negative right of freedom from State interference, Article 21 has a positive content about the quality of life and 'the right to carry on such functions and activities as to constitute the bare minimum expression of the human self.'¹⁰⁰⁷

Therefore, the right to procreation of children through ART or surrogacy can be derived from the Article 19 (1) (a) and Article 21 of the Constitution. Article 19 deals with the protection of certain rights regarding freedom of speech, etc. sub clause (a) of clause (1) of the Article 19 gives all citizens the right to freedom of speech and expression. However, the Constitution also confers the powers on the State to impose reasonable restrictions on the rights confirmed under section 19 (1) (a) in the interest of sovereignty and integrity of India.¹⁰⁰⁸

The Hon'ble Supreme Court of India, in its series of judgments described the fundamental rights are as paramount. In the Case of *A. K. Gopalan v. State of Madras (1950)*,¹⁰⁰⁹ the Supreme Court described the fundamental rights as sacrosanct and interpreted the words "procedure established by law in Article 21 by giving the wider meaning of the expression." Further, in *State of Madras v. Chapakam Dorairajan*

¹⁰⁰⁶ *P. Rathinam v. Union of India*, (1994) 3 SCC 394.

¹⁰⁰⁷ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746; *C.E.R.C. v. Union of India*, AIR 1995 SC

¹⁰⁰⁸ Inserted by the Constitution (Sixteenth Amendment) Act, 1963.

¹⁰⁰⁹ AIR 1950 SC27

(1951) called it as the right sought by the people.¹⁰¹⁰ In *M.S.M. Sharma v. Shri Krishna Sinha (1960)*¹⁰¹¹ it is described as inalienable and inviolable. Lastly, in *Ujjam Bai v. State of U.P. (1963)*¹⁰¹² it is viewed as transcendental. Therefore, “Rights are those conditions of social life without which no man can see to be himself at his best.” According to the P.B. Gajendragadkar, defines a fundamental right as “a legally enforceable right governing relations between the State and the individual.” Hence, fundamental rights have been rightly regarded as the soul of the Constitution.

5.2.1. Right to Privacy and Reproductive Rights

A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both State and private organizations to intrude on that autonomy.... Privacy as a key value which underpins human dignity and other key values such as freedom of association and freedom of speech... Privacy is a basic human right and reasonable expectation of every person.¹⁰¹³

Privacy is a fundamental human right recognized in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and many other international and regional treaties.¹⁰¹⁴ According to the Louis Brandeis, “the privacy is the most cherished freedom in a democracy, and it should be reflected in the Constitution.”¹⁰¹⁵ The right to privacy “in one sense, all human rights are aspects of the right to privacy.”¹⁰¹⁶

¹⁰¹⁰ AIR 1951SC 226

¹⁰¹¹ 1960 AIR 1186

¹⁰¹² 1963 SCR (1) 778

¹⁰¹³ “The Australian Privacy Charter,” Published by the Australian Privacy Charter Group, Law School, University of New South Wales, Sydney 1994, see R. N. Trivedi, (ed.), ‘The world of All Human Rights,’ ‘Soli Sorabjee,’ *A Festschrift*, (Universal Law Publication, New Delhi, 2010 Edn.), at p.24

¹⁰¹⁴ Article 17 of the International Covenant on Civil and Political Rights, “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation”. Similar provisions are contained in the Convention on the Rights of Persons with Disabilities, Article 8 of the ECHR and Article 11 of the ACHR. Article 16 of the Convention on the Rights of the Child guarantees the freedom of the child from “arbitrary or unlawful interference with his or her privacy, family, home or correspondence”. Article 22 (1) of the Disability Rights Convention, Paragraph 106 (f) of Beijing Platform for Action guarantees the same right and Paragraph 7.45 of ICPD Programme of Action provides that the [Reproductive and sexual health] services must safeguard the rights of adolescents to privacy....

¹⁰¹⁵ Louis Brandeis, “The Right to Privacy”, Harvard Law Review, 4, 1890, pp.190-223

¹⁰¹⁶ Volio, Fernando, “Legal Personality, Privacy and the Family” in Henkin (ed.). *The International Bill of Rights*, New York: Colombia University Press, 1981.

The reproductive right has been recognized as a part of Article 21 of the Constitution. Article 21 of the Constitution of India envisages that,

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

The Supreme Court in the case of **R. Rajgopal v. State of Tamil Nadu**¹⁰¹⁷ held that the right to life includes the ‘right to privacy’. A citizen has a right to safeguard not only his own privacy, but also of his family, marriage, procreation, motherhood, child bearing and education among other matters.

As so far as the Article 21 of the Indian Constitution is concerned, it has many facets, the Indian courts have by their liberal construction of the provisions, have added new dimensions to it over the years and stretched to accommodate the desire for the motherhood under “RIGHT TO PRIVACY”. The said right to privacy include the right to procreation (natural or artificial) being the basic feature of the Constitution. The right to bear a child is the woman’s constitutionally protected rights. It is the liberty of thoughts and expression.

In the 21st Century, the Indian courts brought to the light the concept of privacy in **Govind v. State of M.P.**¹⁰¹⁸ under Article 21 of the Indian Constitution and applied in various rights. Nearly every Country in the world recognized the right to privacy explicitly in their Constitution. The right to privacy is one of the un enumerated rights guaranteed to the citizens of India.¹⁰¹⁹ The freedom of Speech and expression under Article 19 (1) (a) has been recognized to include a person right to privacy.¹⁰²⁰ The Supreme Court of India specifically recognized the right to privacy as a fundamental right under Article 21, in a famously known case of **Maneka Gandhi v. Union of India**¹⁰²¹ and ruled that the procedure established by law means, just, fair and reasonable procedure.

Taking into consideration of the importance of right to privacy, the National Commission, to review the working of the Constitution in its report has recommended

¹⁰¹⁷ (1994)6 SCC

¹⁰¹⁸ AIR 1975 SC 1978

¹⁰¹⁹ Unnikrishnan J.P. v. State of A.P., AIR 1993SC 2178

¹⁰²⁰ Peoples Union for Civil Liberties v. U.O.I, AIR 1997 SC 568

¹⁰²¹ AIR 1978 SC 597

the inclusion of a new Article namely Article 21-B as 'RIGHT TO PRIVACY' under the Constitution of India.¹⁰²² Therefore, by applying liberal interpretation to right to privacy, the Indian Courts included the right to procreation i.e. 'reproductive autonomy' in the right to privacy.

Thus, the Indian Judiciary has also recognized the reproductive right of humans as a basic right. The Andhra Pradesh High Court in **B. K. Parthasarathi v. Government of Andhra Pradesh**,¹⁰²³ declared the reproductive rights as a fundamental right and upheld "the right of reproductive autonomy" of an individual as an aspect of his "right to privacy" and agreed with the decision of the US Supreme Court in **Jack T. Skinner v. State of Oklahoma**,¹⁰²⁴ which characterized the right to reproduce as "one of the basic civil rights of man." Once, the concept of privacy is extended to matters of procreation, State's interference or boundaries on the procreation amount to a direct encroachment on one's privacy. Therefore, even in **Javed v. State of Haryana**,¹⁰²⁵ though the Supreme Court upheld the two living child norm to debar a person from contesting a Panchayati Raj election, it refrained from stating that the right to procreation is not a basic human right.¹⁰²⁶

In Suchita Srivastava v. Chandigarh Administration¹⁰²⁷ the Supreme Court said that, "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial privacy, dignity and "Bodily integrity should be respected. Reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, the provision of the MTP Act 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

¹⁰²² Report of the National Commission to Review the working of the Constitution, Volume I, Universal Law publishing Company, 2002 Ed. P. 62

¹⁰²³ *B.K. Parthasarathi v. Government of Andhra Pradesh*, AIR 2000 AP 156

¹⁰²⁴ 316 US 535

¹⁰²⁵ *Javed v. State of Haryana*, (2003) 8 SCC 369

¹⁰²⁶ Law Commission of India, "228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a Surrogacy," (Aug, 2009), available at <http://lawcommissionofindia.nic.in/reports/report228.pdf> at 1.9, visited on 15/05/2011 on 14.00 pm.

¹⁰²⁷ *Suchita Srivastava v. Chandigarh Administration*, 2009 SCC 1p.14

The surrogacy is widely protected under the right to privacy in the Article 19 and 21 of the Indian Constitution. It is not only the Indian Courts but also the American Supreme Court recognized right to privacy as a fundamental right. In one of the noted U.S. Case **Elsenstad v. Baird** ¹⁰²⁸ the Court stated that, “if the right to privacy means anything, it is the right of the individual, married or single, to free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget the child.” In **Roe v. Wade**,¹⁰²⁹ the American Supreme Court had decided that every woman has a right to take a decision how her body is to be used and therefore, it is said that a woman has a right to enter into the contract of commercial surrogacy.

Now, if reproductive right gets constitutional umbrella, Surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection.

Therefore, the right to procreate, that is to bear or beget the children, is widely considered as one of the rights implied by the constitution. It is grounded on both individual liberty and the integrity of the family unit and is viewed as a fundamental right, which is essential to the notion of liberty of justice. But the surrogacy transaction is not specifically recognized by law.¹⁰³⁰ Therefore, in such situation it is the positive obligation of the State under 21 to recognize method like surrogacy, so that persons who are unable to procreate child on their own, can legitimately exercise their right to ‘reproductive choices.’¹⁰³¹

The Supreme Court in **Mr. ‘X’ v. Hospital ‘Z’**¹⁰³² observed that, when there is clashes between two fundamental rights, then the right, which would advance the public morality or public interest would alone be enforced through the process of court. In **Govind v. State of Madhya Pradesh**,¹⁰³³ the court said that, the right to privacy itself is a fundamental right must be subjected to the restriction on the basis of compelling public interest.

¹⁰²⁸ 405 U.S. 438, 453-54 (1972)

¹⁰²⁹ 410 U.S. 113 (1973)

¹⁰³⁰ *Jan Balaz vs. Anand Municipality*, AIR 2010 Guj 21 at 14

¹⁰³¹ *B.K. Parthasarathi v. Government of Andhra Pradesh*, AIR 2000 AP 156

¹⁰³² *Mr. ‘X’ v. Hospital ‘Z’* (1998) 8 SCC 296 (310), in the said case the Right to privacy and Right to health both are the fundamental rights under Article 21 of the Constitution of India were clashed with each other.

¹⁰³³ (1975) 2 SCC 148 (156)

The American Court, however, in *Gariswold v. Connecticut*¹⁰³⁴ (1965) held that married couples have the right to be free from State interference in their decision to a pain and use of contraceptive, basing upon the decision of the marital privacy, a sphere of personal interest largely immune from State regulation.

When we look at the surrogacy arrangement, the provisions under the contract do not fall within the reasonable restrictions laid down under Article 19 (1) (a). Moreover, it is a freedom of a person to express or opt for surrogacy. It is equal liberty of a person to bear a child through ART or become a surrogate for others. At the same time the dignity of the woman cannot be lowered by becoming a surrogate to help others to create their own family. Hence, the State cannot restrict this right. If any restriction on this right is imposed by the State, the Courts will definitely protect reproductive right without any hesitation.

When one looks at the surrogacy in its constitutional perspective, it gives the individual an exclusive right to take his or her own decision whether to bear children artificially or through a non coital method. In case of infringement of these rights, more particularly those guaranteed under Part-III of the Constitution of India, the individual is provided with the remedies under Article 32 and also under Article 226 for enforcement of such rights.¹⁰³⁵ Article 21, further confers positive rights to life and liberty. The word 'life' in Article 21 means a 'life of dignity' and 'not just a mere animal survival.' The Apex Court in *Chandra Mohan v. State of U. P.*¹⁰³⁶, said that the words of the constitution cannot be construed in a narrow or pedantic sense. It is being living an organic document, is the law, not only for the present but in the future. Therefore, a broad and liberal spirit to be inspired. The Supreme Court further held in *Nalla Thampi v.U.O.I.*,¹⁰³⁷ and declared that the right to life includes the final grace of human civilization, virtually rendered this Fundamental Right a repository of various rights.

¹⁰³⁴ 381 U.S. 479 (1965)

¹⁰³⁵ Article 32. Remedies for enforcement of rights conferred by this Part i.e. III, Article 226, Power of the High Court to issue certain writs. M. P. Jain Indian Constitutional Law, Justice Ruma Pal, Samaraditya Pal, Sixth Edn. Reprint 2012, LexisNexis Butterworths, Wadhwa, Nagpur.

¹⁰³⁶ AIR 1966 SC 1987

¹⁰³⁷ AIR 1985 SC 1138

The Chennai High Court in the case of *K. Kalaiselvi v. Chennai Port Trust*¹⁰³⁸ recognized the maternity leave to a woman employee working in the Chennai Port Trust, where she gets the child through the surrogacy arrangement as parent of the surrogate baby. The Kerala High Court in this case *P. Geetha V. The Kerala Livestock Development Board Ltd*¹⁰³⁹ granted the post maternity to petitioner a woman who is a biological mother of the child born through surrogacy. The Bombay High Court in *Dr. Mrs. Hema Vijay Menon v. State of Maharashtra & Ors.*,¹⁰⁴⁰ held that the right to life includes right to motherhood and also right of every child to full development. The refusal to grant maternity leave to a mother who begets the child through surrogacy procedure is arbitrary, discriminatory and violative of Arts. 14 and 21 of the Constitution of India. Thus, a mother is entitled to maternity leave who has begotten a child through surrogacy.

The Supreme Court in *Baby Manji v. U.O.I.*,¹⁰⁴¹ as well as in *U.O.I. v. Jan Balaz with Jayashree Wad v. U.O.I.*,¹⁰⁴² refrained from stating anything about the surrogacy right under the Constitution of India, it may be due to the absence of statutory law of surrogacy. But the Court even failed to give guidelines for regulating the surrogacy arrangement as like given in the case of *D. K. Basu v. State of West Bengal*,¹⁰⁴³ where the court laid down clear cut guidelines relating to the law of arrest and in *Vishakha v. State of Rajasthan & others case*,¹⁰⁴⁴ there was no prohibition of sexual harassment of women in the working place, the court made the law.

Recently, in the case of *Jayashree Wad v. Union of India & Ors, with Union of India Anr. v. Jan Balaz & Ors*¹⁰⁴⁵ issues raised that, whether commercial surrogacy is inconsistent with the dignity of Indian womanhood and therefore violative of Article

¹⁰³⁸ *Kalaiselvi v. Chennai Port Trust*, W.P.No.8188 of 2012, C. f. <https://indiankanoon.org/doc/28691523/>

¹⁰³⁹ *Geetha v. The Kerala Livestock Development Board Ltd*, W.P. (C) No. 20680 of 2014, C.f. http://judis.nic.in/judis_kerala/content.asp

¹⁰⁴⁰ AIR 2015 BOMBAY 231

¹⁰⁴¹ *Baby Manji Yamada v. Union of India & Anr.*, AIR 2009 SC84

¹⁰⁴² *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹⁰⁴³ AIR 1997 SC 610

¹⁰⁴⁴ AIR 1997 SC 3011

¹⁰⁴⁵ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

21 of the Constitution? The petitioner argued that, the commercial surrogacy contract is illegal, unethical and against public policy of India as violative of fundamental rights guaranteed to the Indian women under Article 21 of the Constitution of India. Therefore, it is very necessary in the public interest to stop the entry of all foreign couples including individuals under Section 3 of Foreigner Act, 1946 from entering into a surrogacy arrangement in order to protect the rights of the womanhood as guaranteed under article 21 of the Constitution of India. Accordingly, the Government of India issued the notification¹⁰⁴⁶ and the Supreme Court of India passed an order¹⁰⁴⁷ regarding the prohibition of Commercial surrogacy in India, prohibition of import of the human embryo and a ban on all foreign nationals from entering into a surrogacy arrangement in India and thus, the matter is sustained for further order till the passing of the ART Bill, 2016¹⁰⁴⁸ by the Parliament. Therefore, presently only the Indian married infertile couple can enter into a surrogacy arrangement in India.

5.2.2. Reasonable Restrictions and Fundamental Rights:

The fundamental rights are not the absolute rights. The Constitution of India itself provides for the reasonable restrictions in the exercising these rights by its citizen in the interest of sovereignty and integrity of the State. Sub Clause (2) to (6) of the Article 19 imposes restrictions on the citizens of India, while exercising the freedoms guaranteed under sub Clause (a) to (g) of the clause 1 of Article 19. Therefore, a State may impose reasonable restrictions on the surrogacy issue, such as:

- Infertility criteria of the couple for opting surrogacy arrangement.
- Medical Condition of woman for becoming a surrogate
- Age of surrogate mother
- Number of times volunteering for surrogacy
- Payment (Compensation) to surrogate

¹⁰⁴⁶ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015’, issued by the Department of Health Research, Government of India, on 4th November, 2015, p. 3 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> , visited on 10/11/2015 at 4.00 pm

¹⁰⁴⁷ *UNION OF INDIA & ANR V. JAN BALAZ & ORS.* (Pending in Civil Appeal No(s). 8714/2010 WITH *JAYASHREE WAD V. UNION OF INDIAN & OTHERS* W.P. (C) No. 95/2015, C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹⁰⁴⁸ The ART Bill, 2016 is not yet published by the Government on public domain. However, before passing of the ART Bill, 2016, the Government introduced the Surrogacy Bill, 2016 in Lok Sabha on 21st November, 2016

- Conditions for opting surrogacy by Foreign persons or single person, unmarried couples, Gay, Lesbian, Bio- sexual or transgender (LGBT)
- Confidentiality of information about surrogate and donor etc.,

The Supreme Court of India in *Peoples Union of Civil Liberties v. U.O.I.*,¹⁰⁴⁹ held that the right to freedom of Speech and expression under Article 19 (1) (a) means the right to express one's conviction and opinion freely by word of mouth, writing, printing, picture or in any other manner, thus recognizing person's right to privacy. Therefore, the expressions made by the parties and the contracts entered by them for surrogacy will be within the ambit of personal liberty and right to privacy.

Ultimately, the protection of surrogacy contract is the part of right to privacy. And the right to privacy includes the right to make marital and procreative choices and it also encompasses the right to hire a surrogate mother to conceive a child.

Therefore, the surrogacy arrangements "deserve Constitutional protection because of the private relationships and procreative intention of the parties, the woman's control over her own body, and the right of genetic parents to association with their child."¹⁰⁵⁰

Further, Article 19 (1) (g) of the Constitution of India gives the right to all citizens the "Right to practice any profession or to carry on any occupation, trade or business." Thus, this Article protects the right of the doctor who practices in ART for procreating children through the surrogate mother. In this context the reasonable restrictions are highly important to restrict the exploitation of poor surrogate woman by the doctors, intermediaries or fertility centers, which are practicing in ART and surrogacy. But when such a practice or profession transform into business or becomes an immoral activity, the State shall extend its iron hand to curb such practice. Then, it must be absolutely prohibited or may be restricted and regulated. And the same time the State cannot impose the absolute restrictions on the practice of surrogacy or ART Procedure.¹⁰⁵¹

¹⁰⁴⁹ AIR 1997 SC 568

¹⁰⁵⁰ National Report: "The Law of Surrogate Motherhood in the United States", January 2010, Oklahoma City University School of Law, Available at: http://works.bepress.com/carla_spivack/15

¹⁰⁵¹ *Hari shanker v. Deputy Commissioner*, AIR 1974 SC 1121

But with respect to the modern reproductive techniques, the protection of health or morals, the prevention of crime or the protection of the rights and freedoms of others (in particular to the child) the state may restrict right to privacy. Those restrictions, however, be provided by law and are necessary in a democratic society, i.e. it should be accepted by the tolerant and pluralistic society.

One of the primary objects of the marriage is the procreation of children. Unfortunately, due to the biological or medical reasons few families are cursed with childlessness. This kind of inequality among the childless couples made them equal by the advancement of science through the use of the assisted reproductive technology or the surrogacy. But, if it is denied by the State or the society, the childless couple will never become equal with those couples who have their own biological children. Therefore, the right to equality or equality before law guaranteed under Article 14 of the Constitution of India does not give the absolute meaning of equality among human beings to whom it is physically not possible to have their own genetic child without use of surrogacy.

5.2.3. Right to Parent of Single person and Unmarried Couple:

To take the recourse of assisted reproductive technology including surrogacy for procreation of children is considered as the reproductive rights of the single man and woman as guaranteed by the Constitution of India¹⁰⁵² and the several international human rights instruments.¹⁰⁵³ If any single man and woman are restricted for the use of ART or surrogacy services, it amounts to discrimination.

Article 15 (1) of the Constitution of India envisages that the “State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”¹⁰⁵⁴ The expression of ‘discrimination’ according to ‘Oxford dictionary,’ means “to make an adverse distinction with regard to”, “to distinguish unfavorable from others.” The discrimination involves an element unfavorable bias and it is in that sense that the expression has to be understood in this context. If such

¹⁰⁵² Article 21 of the constitution of India guarantees reproductive right to every individual including single man and woman.

¹⁰⁵³ *Supra note p. 6*

¹⁰⁵⁴ M.P. Jain, “Indian Constitutional Law “at p. 1303, Sixth EDN. Reprint 2012, LexisNexis, Butterworth’s Wadhwa, Nagpur, at p.987

bias is disclosed and is based on any of the grounds mentioned in Article 15, the law will struck down as being violative of the Constitutional provisions, unless it is saved by Article 15 (3) or (4).¹⁰⁵⁵

A woman can become a single parent by going to a sperm bank and undergoing artificial insemination process. For a man, however, has to take help of two women, one is the egg donor and second is, to serve as a surrogate mother. But here main concern is, if the single parenting is allowed how our society treats the babies born out of wedlock, the morality, ethics and the psychology of our society will accept this. The question however is, Can Indian society absorbs this type of parenting?

In India, however, already seen the case of a single man became the father of the surrogate child. India's first case of a surrogate child conceived for a single father, a 46 year old Chartered accountant namely, Amit Banerjee (Kolkatta) used his sperm to be fertilized with the egg of a donor woman, after developing it artificially, the embryo was placed in the womb of the other woman i.e., surrogate woman. After the delivery of the child the surrogate handed over the child to Mr. Banerjee. Thus, Mr. Banerjee became the first single surrogate father in India.¹⁰⁵⁶

The Indian Council of Medical Research, National Guidelines, 2005 does not provide any legal bar to the use of ART or surrogacy by a single man or woman for becoming a parent of the child.¹⁰⁵⁷ Thereafter, the draft Assisted Reproductive Technology (Regulation) Bill 2008,¹⁰⁵⁸ and the draft Assisted Reproductive Technology

¹⁰⁵⁵ V.N. Shukla, "Constitution of India," 9th Edn. 1994, Eastern Law Book Co, Lucknow, p. 71, Article 15 of the Indian Constitution states the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Article 15 (3) Nothing in this article shall prevent the State from making any special provision for women and children. Article 15 (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

¹⁰⁵⁶ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 141

¹⁰⁵⁷ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, para , 3.5.2. at p.62., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011at 11.00. am

¹⁰⁵⁸ Section 32 (1) of the Assisted Reproductive Technologies (Regulation) Bill-2010, C.f. http://www.prsindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf visited on 25/10/2010 at 3.00 pm at p. 25.

(Regulation) 2010,¹⁰⁵⁹ also states that ART, in India would be available to all persons including single persons and unmarried couples. Thereafter, the New Visa Regulation, July 9, 2012 restricted the single, unmarried foreign nationals for commissioning surrogacy in India. However, the said guidelines, 2012 challenged in **Sudan National Shihabeldin Case**,¹⁰⁶⁰ in Punjab and Haryana High Court on the ground of violation of the right to life and personal liberty under Article 21 of the Constitution of India. That surrogacy cannot be denied to single foreign nationals. It is the unreasonable and unjust classification treats equals unequally, which violates the equality before the law and equal protection of laws under Article 14 of the Constitution. He contended that, imposing a ban on surrogacy by foreign single persons or foreign unmarried couples amounts to an unreasonable, unjust and arbitrary classification, which has no nexus with the object wants to achieve by the government. However, the High Court passed an order relying upon the reply of the Central Government that the guidelines issued in July 2012 under the Foreigner Act, regarding regulation of surrogacy will prevail over any other similar guideline issued earlier.

The recent draft of the Surrogacy Bill, 2016 provided that, only the Indian infertile married couples can avail the service of altruistic surrogacy and prohibited the single persons and unmarried couples from surrogacy arrangement.¹⁰⁶¹

The National Commission for women (NCW) has suggested that, the Bill should be allowed single, divorcee and widow women to become a surrogate mother.¹⁰⁶² The New Guidelines Governing Adoption of Children, 2015¹⁰⁶³ and the Juvenile Justice

¹⁰⁵⁹ Section 32(1) of the Assisted Reproductive Technologies (Regulation) Bill-2010, available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf. at p. 25

¹⁰⁶⁰ The Indian Express, "Sudan national moves HC against surrogacy norms," Updated: April 9, 2014 3:24 pm, C.f. <http://indianexpress.com/article/india/india-others/sudan-national-moves-hc-against-surrogacy-norms/>

A Sudan National Shihabeldin bachelor came to India in 2013 to become a single parent through surrogacy. However, he was not allowed to do so because of the New Visa Regulation Guidelines issued on July 9, 2012, by the Ministry of Home Affairs (MHA) restricting single foreign nationals and unmarried couples from coming to India for purposes of surrogacy on medical visas.

¹⁰⁶¹ Section 58 (1) of the Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 41, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

¹⁰⁶² THE TIMES OF INDIA, Foreigners may be Barred from Commissioning Surrogacy in India, Sushmi Dey, TNN | Oct 16, 2015, 08.52PM IST, available at <http://timesofindia.indiatimes.com/india/Foreigners-may-be-barred-from-commissioning-surrogacy-in-India/articleshow/49418285.cms>, visited on 24/10/2015 at 2.00 p.m.

¹⁰⁶³ Guidelines Governing Adoption of Children, 2015, of 5 (c) provide the single female is eligible to adopt a child of any gender, issued by Ministry of Women and Child Development on 17th July, 2015, p. 68, available at

(Care and Protection of Children), Act, 2015¹⁰⁶⁴ which allows the single parents as well as foreigners to adopt the child. The Supreme Court in *Stephanie Joan Becker v. State and Anr.*,¹⁰⁶⁵ case permitted a single 53-year-old lady to adopt a female orphan child aged 10 by relaxing the rigidity of the guidelines of the Central Adoption Resource Authority (CARA). The Supreme Court in *Lakshmi Kant Pandey v. Union of India*¹⁰⁶⁶ has given the high watermark decision for the development of the law relating to adoption and inter-country adoptions and laid down the guidelines for protecting the interest of the child.

In today's situation, the ART Bill, 2014 has made discrimination in the access of surrogacy to the single persons and which also came into contradiction with the new adoption rules of 2015 and Juvenile Justice (Care and Protection) Act, 2015 which allows single persons to adopt the child irrespective any nationality. Thus, on the one side government allowing the single parenting through adoption and on the other side, it rejects the right to become a single parent by the use of ART or surrogacy service, it is nothing but clear discrimination as prohibited under Article 14 and 15 of the Constitution of India.

According to the Report of the Ethics Committee of American Society for Reproductive Medicine (ASRM), that the ART services should be equally available to single persons without regard to marital/partner status or sexual orientation.¹⁰⁶⁷

Every Individual has the reproductive right to enjoy the benefits of scientific progress and technology,¹⁰⁶⁸ which is also recognized as a right by the Article 15 (1) of the United Nations International Covenant on Economic, Social, and Cultural Rights.

http://cara.nic.in/writereaddata/UploadedFile/NTESCL_635760082361561985_english%20guidelines.pdf visited on 10 / 09/2015 at 3.00 p.m.

¹⁰⁶⁴ The Juvenile Justice (Care and Protection of Children), Act, 2015, available at <http://www.egazette.nic.in/WriteReadData/2016/167392.pdf>, Visited on 05/01/2016 at 11.00 am. The Juvenile Justice (Care and Protection of Children), Act, 2015 has received the assent of the President on 31st December 2015, it allows adoption to the single and divorcee person and also permit the inter country adoption, so, now foreigner can also adopt the child in India irrespective of their religion.

¹⁰⁶⁵ (2013) 12 SCC 786

¹⁰⁶⁶ (1984) 2 SCC 244

¹⁰⁶⁷ The Ethics Committee of the American Society for Reproductive Medicine on 'Access to fertility treatment by gays, lesbians, and unmarried persons: a committee opinion, December 2013, C.f. https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/fertility_gaylesunmarried.pdf, visited on 11/05/2014 at 4. p.m.

¹⁰⁶⁸ *Supra note 33*

It is found that, we are still making the law on the basis old emotional and cultural concept of family, consisting of father, mother, grandfather, grandmother, but in today's modern and scientific world the lifestyle of the person has changed tremendously, many women are staying alone and wants to enjoy motherhood through the surrogacy. Therefore, the lawmakers should consider this fact while framing the law on surrogacy. If the law fails to recognize the rights of the persons, it will have bad impact on the society, as a chance to go surrogacy underground.¹⁰⁶⁹

Thus, the advantage of Article 21 of the Constitution of India is available to all persons, which guarantees the right to life and personal liberty of the person without any discrimination. The right to privacy as a part of the right to life and personal liberty includes the reproductive rights, i.e. the right to bear a child or become a parent of the child by the use of surrogacy. Therefore, according to the researcher the reproductive rights should be equally made available to the single man and woman in interest of justice.

5.2.4. Right to Parent of Homosexual Couple and Transgender Person:

The practice of surrogacy has suffered from various legal, moral and social complexities, but still it can't stop the people from becoming a parent of the child. For Lesbian and Gay couples, a surrogacy is the best option to become parents of their genetically related child. There are several international human rights instruments which give the guarantee to every individual person of the right to become a parent of the child¹⁰⁷⁰

In India, the reproductive rights are guaranteed by the Article 21 'Right to Life and Personal Liberty' of the Constitution of India. The right to bear the child or right to become a parent of the child is included under the right to privacy. The reproductive rights equally available to all persons without any discrimination as protected by the Article 14 of the Constitution of India and under Article 15 of the Constitution, that "the State is prohibited from making any discrimination on grounds of religion, race, caste, sex, place of birth or any of them."¹⁰⁷¹ Article 19 (1) (a) of the Constitution gives the freedom of speech and expression to the citizen of India. Thus, the

¹⁰⁶⁹ Maharashtra Times, Pune, "Rights to Enjoy Happiness" September 4, 2016, p. n. 12.

¹⁰⁷⁰ Supra note 15, ICPD Para.7.3

¹⁰⁷¹ Supra note at 113

reproductive rights of the individual are protected without discrimination by the Constitution of India as well as judiciary through its various pronouncements. Therefore, the question is, whether the Lesbian, Gay Couples, Bio-sexual and transgender [LGBT] persons are having the right to access of assisted reproductive technology including surrogacy without the discrimination of the gender identity¹⁰⁷² and sexual orientation.¹⁰⁷³ Whether they are entitled to claim the right to parent? The researcher herewith is discussing about the position of the right to parent of the LGBT persons in the various countries and in India.

The South Africa Court in the case of *Minister of Home Affairs v. Fourie*¹⁰⁷⁴ said the expanding the benefit of marriage to the same sex partners is basically a matter of equality. The European Union has also recognized the equal rights of same-sex couples.¹⁰⁷⁵ The European Court of Human Rights, while interpreting the European Convention on Human Rights said to the contracting nations, the need of family rights of same-sex couples.¹⁰⁷⁶ The General Assembly of the Organization of American States (OAS) along with its members, approved the Resolution on Human Rights, Sexual Orientation, and Gender Identity¹⁰⁷⁷ and also given major importance to the ‘Yogyakarta Principles’¹⁰⁷⁸ In North America and Canada, the Civil Marriage Act,

¹⁰⁷² Gender Identity means: Gender identity is one of the most-fundamental aspects of life which refers to a person’s intrinsic sense of being male, female or transgender or transsexual person. It refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category.

¹⁰⁷³ **Sexual orientation refers** to an individual’s enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexual, bisexuals, heterosexuals, asexual etc

¹⁰⁷⁴ *Minister of Home Affairs v. Fourie*, 2005 (1) SA 19 (CC) at 37 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2005/19.html>, (a right to same-sex marriage found in the South African Constitution)

¹⁰⁷⁵ Katharina Boel-Woelki, *The Legal recognition of Same-Sex Relationships within the European Union*, 82 TUL. L. REV. 1949, 1951 (2008).

¹⁰⁷⁶ Barbara Stark, “Transnational Surrogacy and International Human Rights Law,” *C.f.* http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2118077, Visited on 26/10/2015 at 5.30. p.m.

¹⁰⁷⁷ *Ibid*

¹⁰⁷⁸ The *Yogyakarta Principles* applied to the International Human Rights Law in relation to Sexual Orientation and Gender Identity. It is a set of principles relating to sexual orientation and gender identity. The object is to apply international human rights law standards to undertake the abuse of the human rights of lesbian, gay, bisexual and transgender (LGBT) people, and intersex people. The right to universal enjoyment of human rights. It means all human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

2005 allows the same-sex marriage. The California Court in the case of *Perry v. Schwarzenegger*¹⁰⁷⁹ strikes down California's scheme which prohibited the same-sex marriage.

Recently, the United Nations General Assembly, on 12th December, 2008 confirmed the international human rights protections apply to sexual orientation and gender identity. It is also stated that even though homosexuality is a crime in many countries, but still there is inclination towards recognizing the rights of same-sex couples.¹⁰⁸⁰

In India, the Indian Council of Medical Research, National Guidelines, 2005 does not provide any legal bar to the use of ART or surrogacy by any couple, however, the child born through surrogacy require to be adopted by genetic (biological) parents¹⁰⁸¹ and is presumed to the legitimate child of the couple.¹⁰⁸² Thus, according to ICMR guidelines any couple may include gay and lesbian couples too.

The draft of the Assisted Reproductive Technology (Regulation) Bill 2008,¹⁰⁸³ and the draft of the Assisted Reproductive Technology (Regulation) 2010,¹⁰⁸⁴ states that the ART in India would be available to all persons, including single persons, married or unmarried couples, gay or lesbian couples. Accordingly the ART Bills, 2008 and 2010 were clearly allowed the use of surrogacy service to the lesbian, Gay couples, married or unmarried couples and foreign nationals because of the use of the word 'all persons'.

As a result, in the year 2008 in *Israeli Gay Couple's case*,¹⁰⁸⁵ the gay couple Yonathan and Omer became the parents of surrogate child in India. In Israel, gay couple could not adopt or enter into surrogacy arrangement. In this case the baby Evyatar born to the gay couple's through surrogacy in Mumbai, where Yonathan was

¹⁰⁷⁹ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (2010).

¹⁰⁸⁰ *Supra* Note 132

¹⁰⁸¹ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, Chapter 3, Code of Practice, Ethical Considerations and Legal Issues, para , 3.10.1. . at p.68., available at http://icmr.nic.in/art/art_clinics.htm., visited on 25/02/2011 at 11.00. am

¹⁰⁸² *Ibid* at Para 3.12.1 at p. 70

¹⁰⁸³ Section 32 (1) of the Assisted Reproductive Technologies (Regulation) Bill-2010, C.f. http://www.prsindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf visited on 25/10/2010 at 3.00 pm at p. 25.

¹⁰⁸⁴ Section 32 (1) of the Assisted Reproductive Technologies (Regulation) Bill-2010, available at: www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf. at p. 25

¹⁰⁸⁵ The Times of India, Mumbai, 18-11-2008

the sperm donor. However, for taking a surrogate child to Israel, they required to do a DNA test to prove their paternity.

Thereafter, many foreign homosexual couples became the parents of the surrogate children in India. It means the ART Bill, 2008 and 2010 were clearly recognized the gay couples rights to become a parent through the surrogacy arrangement.

Thereafter, on 2 July 2009, the Delhi High Court in its landmark judgment in *Naz Foundation v. Government of National Capital Territory of Delhi [NCT]*¹⁰⁸⁶ held that the treating consensual sex between homosexual adults as a crime is the violation of fundamental rights of an individual protected by the Indian Constitution under Article 21 the right to life and personal liberty, under Article 14 the right to equality before a law and under Article 15 prohibits the discrimination on the basis of sex. Thus, the repealing of section 377 of Indian Penal Code, (IPC), 1860 and legalized the sexual intercourse of homosexual consenting adults in India.

But after the verdict of Delhi High Court evoked mixed reactions among the all sections of the society in India, as earlier, India had allowed the foreign singles, Gay and lesbian couple's use of the method of ART for producing babies via surrogates.

Hence, for making surrogacy provision more severe, the Ministry passed the New Indian Visa Regulation Guidelines, on July 9, 2012¹⁰⁸⁷ which prohibited the foreign same sex couples and single persons from surrogacy arrangement and restricted only to foreign married heterosexual couples. The Visa Regulation, 2012 reflected the attitude of the government as a discriminatory towards the foreign homosexual community. Moreover, India has ratified the Universal Declaration of Human Rights,

¹⁰⁸⁶ *Naz Foundation v. Government of National Capital Territory of Delhi*, WP (C) No.7455/2001, Decided on 2nd July, 2009, C.f. <https://indiankanoon.org/doc/100472805/>

In this case the court said that the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21 of the Constitution, and the section 377 of IPC criminalization of consensual gay sex violated these rights. The Court also held that Section 377 offends the guarantee of equality enshrined in Article 14 of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class. Hence, the court held, it is not a valid ground for classification under Article 14. Article 15 of the Constitution forbids discrimination based on certain characteristics, including sex. The word "sex" includes not only biological sex but also sexual orientation, and therefore discrimination on the ground of sexual orientation is not permissible under Article 15.

¹⁰⁸⁷ New Indian Visa Regulations, dated 9 July 2012, available at http://www.icmr.nic.in/icmrnews/art/MHA_circular_July%209.pdf, p.1, visited on 11/12/2012 at 3.30. pm

1948 and promised to protect the human rights of individuals which extends beyond the boundaries of the India

After that, the decision of the Delhi High Court in Naz Foundation case was challenged in the Supreme Court of India in *Suresh Kumar Koushal and another v. NAZ Foundation and others*¹⁰⁸⁸ wherein the Court held that the Section 377 of IPC, 1860 does not violate the Article 14, 15 and 21 of the Constitution of India. It is merely a identifies certain acts which, if committed would constitute the offence and it does not criminalize the particular group of people or identity or orientation. Hence, it does not a sound basis for declaring the said section is *ultra vires* to the Constitutional provisions.

After this case, it becomes clear that the non recognition of the relationship of Indian gay and lesbian couples will lead to a conclusive fact they are not eligible for surrogacy or adoption. Thus, this judgment has great impact on surrogacy issues considering the fact, in 2013 a ban imposed on foreign gay and lesbian couples as well as singles to adopt the surrogacy as a means of procreation.

But it is very significant to consider that, the 10th revision of the International Statistical Classification of Diseases (ICD-10) of the World Health Organization (WHO) and the Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association, globally accepted that **homosexuality is not a mental disorder but a normal and natural variant of human sexuality.**¹⁰⁸⁹

Meanwhile, the Apex Court of India on April 15, 2014 in the case of *National Legal Services Authority v. Union of India and Ors*,¹⁰⁹⁰ recognized the transgender as the third gender. The Court said the discrimination based on gender identity or sexual orientation violates the Constitutional guarantees of equality, privacy and dignity.

¹⁰⁸⁸ *Suresh Kumar Koushal and another v. NAZ Foundation and others*, (2014) 1 SCC 1,

In this Case Mr. Kushal the appellant contended if the declaration of the Delhi Court upheld then the same would pose as detrimental to India's social and structural fabric and harm the institution of marriage. Therefore, the Supreme Court said the section 377 of IPC merely identifies certain acts which if committed would constitute the offence and it does not criminalize the particular group of people or identity or orientation. The Apex Court left it to the legislature to consider the desirability of deleting or amending the said provision.

¹⁰⁸⁹ The Hindu, 'Five-judge Constitution Bench to take a call on Section 377', New Delhi, February 2, 2016, *C.f.* <http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece>

¹⁰⁹⁰ *National Legal Services Authority v. Union of India and ors*, *C.f.* <http://supremecourtfindia.nic.in/outtoday/wc40012.pdf>

The recent Transgender Persons (Protection of Rights) Bill, 2016¹⁰⁹¹ has been made with the aim to protect the rights of the transgender person and prohibits the discrimination against them. Section 16 of the Bill, 2016 also includes the provision of grant of medical care facility so it may ART facility to them.

The Supreme Court of Nepal in the case of *Sunil Babu Pant & Ors. v. Nepal Government*,¹⁰⁹² held that, the homosexuals and third gender people are also human beings. Hence, they are entitled to all fundamental rights given by the Part III of the Constitution and the State should recognize their fundamental rights. The Supreme Court of Pakistan in *Dr. Mohammad Aslam Khaki & Anr. v. Senior Superintendent of Police (Operation) Rawalpindi & Ors*¹⁰⁹³ held that the third gender is entitled to all rights given by the Constitution to its citizen including the right to life and dignity without any discrimination.

According to the Ethics Committee of the American Society for Reproductive Medicine (ASRM) that, it is the ethical duty to provide the access of the assisted reproductive technology services to the single individuals, unmarried heterosexual couples, gay and lesbian couples¹⁰⁹⁴ and to transgender people.¹⁰⁹⁵ The Ethics Committee also said that they should not be discriminated on the basis of parent's marital/partner status, gender identity or sexual orientation.

In India, according to the Indian Psychiatric Society [IPS] and the World Psychiatric Society [WPS] does not consider the homosexuality as disease of persons, hence the homosexual parents should not be treated as diseased parents. It is a true fact that the child can be born out of homosexual relationship, does it mean that they don't have a right to become parents of the child? And the law which prohibits surrogacy as a

¹⁰⁹¹ The Transgender Persons (Protection Of Rights) Bill, 2016 has been introduced in Lok Sabha on 02/08/2016. C. f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/210_2016_LS_Eng.pdf

¹⁰⁹² Ibid, *Sunil Babu Pant & Ors. v. Nepal Government* (Writ Petition No.917 of 2007) decided on 21st December, 2007,, C.f. <http://supremecourtfindia.nic.in/outtoday/wc40012.pdf> ,

¹⁰⁹³ *Dr. Mohammad Aslam Khaki & Anr. v. Senior Superintendent of Police (Operation) Rawalpindi & Ors* (Constitution Petition No.43 of 2009), decided on 22nd March, 2011, C.f. <http://supremecourtfindia.nic.in/outtoday/wc40012.pdf>

¹⁰⁹⁴ Supra note 127,

¹⁰⁹⁵ The Ethics Committee of the American Society for Reproductive Medicine on, "Access to fertility services by transgender persons: an Ethics Committee opinion" November, 2015, C.f. https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/Access_to_care_for_transgender_persons.pdf, Visited on 22/10/15 at 5.30pm

reproductive right is clearly violates the Article 14 and 21 of the Constitution of India.¹⁰⁹⁶

According to Dr B.S. Chavan,¹⁰⁹⁷ that the family togetherness, means having a father, mother and brother, sister, is important for the upbringing of any child and this type of family environment cannot be provided by gay or lesbian couples or single individual person. He also said, the children born to such couples or individuals may lack confidence. This is not in the interest of children and will also have a negative impact on society.¹⁰⁹⁸ However, according to the American Psychological Association¹⁰⁹⁹ that, there is no scientific evidence that parenting effectiveness is related to parental sexual orientation. Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.

The New draft of the Assisted Reproductive Technology (Regulation) Bill, 2014, published on 30th September, 2015, restricted the commissioning of surrogacy to the all married infertile couples only. Thus, this Bill prohibited the single person, unmarried couple and gay and lesbian couples from the entering into surrogacy arrangement.¹¹⁰⁰

Presently, according to the recent notification issued on 4th November 2015 by the Ministry of Health and Family Welfare Department, that only an Indian infertile married couples are allowed to avail the service of surrogacy in India.¹¹⁰¹ Therefore, now all foreign couples (including gay, lesbian or single persons, unmarried or married heterosexual couples) are not allowed to obtain service surrogacy in Indian ART clinic.

¹⁰⁹⁶ Maharashtra Times, Pune, "Rights to Enjoy Happiness" September 4, 2016, p. n. 12.

¹⁰⁹⁷ Dr B.S. Chavan, Head, Psychiatry Department, Govt. Medical College Hospital, Chandigarh.

¹⁰⁹⁸ Anil Malhotra, Legalizing surrogacy —Boon or bane? July 14, 2010 at 09:47, *C.f.* <http://indialawyers.wordpress.com/2010/07/14/legalising-surrogacy-%E2%80%94-boon-or-bane/#comments>, visited on 20/10/2012 at 2.30 pm.

¹⁰⁹⁹ *Supra* note 127

¹¹⁰⁰ Section 58 (1) of the Assisted Reproductive Technology (Regulation) Bill, 2014, at p. 41, available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

¹¹⁰¹ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm., This notification is issued after submission of affidavit by the Union of India in the case of Jayashree Wad v. Union of India & Ors. W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), *C.f.* <http://courtnic.nic.in/courtnicsc.asp>

Recently, on February 2, 2016 in the Curative petition *Naz Foundation v. Suresh Kumar Koushal & Ors*,¹¹⁰² the Supreme Court of India referred a batch of curative petitions against Section 377 of the Indian Penal Code, 1860 which penalizes consensual sexual acts of Lesbian, Gay, Bisexual and Transgender (LGBT) adults in private, to a five-judge Constitution Bench for in-depth hearing. It is also observed by the three judge bench that the threat imposed by the provision amounts to denial of the rights to privacy and dignity which results in a gross miscarriage of justice.

Thus, this curative petition has given the hope for recognition of the fundamental rights, including the right to access of the assisted reproductive technology services including surrogacy right to the gay, lesbian bio-sexual and transgender persons without the discrimination on gender identity and sexual orientation.

It is also very clear that, the right to take benefit of scientific progress and technology is the reproductive right of every individual and which is also guaranteed by the Article 15 of the International Covenant on Economic, Social and Cultural Rights and several other international human rights conventions. Therefore, the right to have the access of the assisted reproductive technology is the right of the every individual person.

As observed by the Supreme Court of India in *National Human Rights Commission v. State of Arunachal Pradesh*¹¹⁰³ that, “We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights of the citizens. Every person is entitled to equality before the law and equal protection of the laws.

Therefore, as a researcher would like to say that there is a need of recognition of all fundamental rights, including the access of assisted reproductive technology rights to every individual without any kind of discrimination, then only there will be justice seen to be done towards the single person, gay, lesbian, transgender person, because all are equal before the law, therefore, equal protection should be granted to them, as the right to equality is the basic structure of the our Constitution.

¹¹⁰² The Hindu, ‘Five-judge Constitution Bench to take a call on Section 377’, New Delhi, February 2, 2016, *C.f.* <http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece>

¹¹⁰³ *AIR 1996 SC 1234*

5.2.5. Rights of Foreign Nationals:

Right to become parents of the child is natural, fundamental human right possessed by the every individual irrespective of their race, caste, nationality, sex, language, etc. This right is guaranteed by the several international human rights instruments,¹¹⁰⁴ Article 21 right to life and personal liberty of the Constitution of India and approved by the judiciary through its various judgments. Article 14 of the Constitution of India states about the equality before law and equal protection of law and Article 15 of the Constitution prohibits the discrimination on the basis of sex.

Recently, in India there is a huge debate on the issue, whether to allow the service of surrogacy to foreign nationals in India or not? In surrogacy transaction, it is found that the surrogate women's position is socially and economically vulnerable, and this advantage is taken by the upper class people especially foreign peoples. It is said that, the Indian women are renting their womb to foreigners because of the need of money. The surrogates are poor, illiterate are not aware of their legal rights therefore, they are physically and economically exploited by the foreign nationals. According to Amrita Pande's research conducted in Arman Clinic, India, shows that 30 out of 41 couples were the foreign nationals and only 11 couples were the Indian.¹¹⁰⁵ The Confederation of Indian Industry (CII) has reported in 2012 that the, every year 10,000 foreign couples visit to India for surrogacy arrangement and this industry generates the business of \$2 billion a year.¹¹⁰⁶ As per the Dr. Mishra¹¹⁰⁷ around 48 to 50 percent commissioning parents are coming from western countries, remaining are the Non-Resident Indians (NRIs) and local peoples.¹¹⁰⁸ Recently, Dr. Nayana Patel's Infertility Clinic has reached milestone birth of the '**1000th Surrogacy Baby**' at her clinic¹¹⁰⁹ and majority couples were the foreigners. The practice of surrogacy has been already challenged on various social, ethical and legal issues. It is termed as unethical

¹¹⁰⁴ *Supra note 10*

¹¹⁰⁵ Amrita Pande, "Wombs in Labor: Transnational Surrogacy in India." Columbia University Press, New York, 2014, at Appendix C: Descriptive tables, Table AP. 1, Surrogates at Arman Clinic in India.

¹¹⁰⁶ THE HINDUSTAN TIMES, 'Commercial surrogacy: The half mothers of Anand,' Namita Kohli, Hindustan Times, <http://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html>, Visited on 10/11/2015 at 2.30 pm

¹¹⁰⁷ Dr. Manasi Mishra - Head, Research Division, Centre for Social Research.

¹¹⁰⁸ Centre for Social Research (CSR), Report of the National Conference on Surrogacy, "A Policy Dialogue on Issues around Surrogacy in India" held on 22nd to 23rd September 2014 in Delhi, C.f. https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view

¹¹⁰⁹ P. C. Vinod Kumar, The Weekend Leader, Vol. 6, Issue 42., 19th Oct., 2015, available at <http://www.theweekendleader.com/Success/2280/joy-to-couples.html> visited on 20/10/2015 at 2.00 pm

practice which violates the dignity of the womanhood under article 21 of the Constitution of India. In transnational surrogacy arrangement the issue of abandonment of the child has become frequent and serious. The recent abandonment of the *Baby Gammy Case* has given a huge shock to the whole world. The question is, what can surrogate do if the commissioning couple abandoned the child on the ground that it is abnormal of physically/mentally challenged?¹¹¹⁰ In transnational surrogacy arrangement the problems of legal parentage, custody, nationality and citizenship of the children were challenged in the cases of *Israeli Gay Couple Case*,¹¹¹¹ *Baby Manji Case*,¹¹¹² and in *Jan Balaz case*.¹¹¹³

The right to enter into surrogacy arrangement by the foreign nationals in India was confirmed by the Indian Council of Medical Research National Guidelines, 2005¹¹¹⁴ and also by the draft of the Assisted Reproductive Technology Regulation Bills, 2008,¹¹¹⁵ 2010¹¹¹⁶ and 2013.¹¹¹⁷ Thereafter, the Indian Visa Regulation Policy, 2012 prohibited the foreign single person, Gay Couples and unmarried couples from entering into a surrogacy arrangement and were allowed only to the heterosexual married couple on medical Visa.

After that on 30th September, 2015 the Indian Government issued the new draft of the Assisted Reproductive Technology Bill, 2014 which have permitted the service of surrogacy in India to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs), and a Foreigner married to an Indian citizen¹¹¹⁸ However, according to the Adv. Anurag Chawla,¹¹¹⁹ that, the Bill has created

¹¹¹⁰ Jayashree Wad Vs. Union of India & others W.P. (Civil) No. 95/2015 (Pending in the Supreme Court of India), C.f. <http://courtnic.nic.in/courtnicsc.asp>

¹¹¹¹ The Times of India, Mumbai, 18-11-2008

¹¹¹² *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84

¹¹¹³ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010

¹¹¹⁴ *Supra note 139*

¹¹¹⁵ *Supra note 141*

¹¹¹⁶ *Supra note 142*

¹¹¹⁷ *Supra note 143*

¹¹¹⁸ The Assisted Reproductive Technologies (Regulation) Bill-2014, at p. 44 available at: <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm.

In case of an Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and a foreigner married to an Indian citizen, for commissioning surrogacy in India shall be married and the marriage should have sustained at least for two years and also submit a certificate conveying that the woman is unable to conceive their own child and the certificate shall be attested by the appropriate government authority of that country.

¹¹¹⁹ Advocate at Delhi

discrimination between two groups of foreign couples by allowing access of surrogacy to OCI, PIO or NRI, and a foreigner married to an Indian citizen and banning other foreigners. If the object of the Bill is to prohibit unethical practices of surrogacy, then, how it will stop by banning one group of people.¹¹²⁰

Recently, in the case of *Jayashree Wad v. Union of India & Ors, with Jan Balaz Case*¹¹²¹ the petitioner argued that, the commercial surrogacy contract is illegal, unethical and against public policy of India as violative of fundamental rights guaranteed to the Indian women under Article 21 of the Constitution of India. Therefore, it is very necessary in the public interest to stop the entry of all foreign couples including individuals under Section 3 of Foreigner Act, 1946 from entering into a surrogacy arrangement in order to protect the rights of the womanhood as guaranteed under article 21 of the Constitution of India. The trade in human embryo under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 is unethical, void and *ultra vires* to the article 21 of the Constitution of India. Accordingly, the Government of India issued the notification¹¹²² and the Supreme Court of India passed an order¹¹²³ regarding the prohibition of Commercial surrogacy in India, prohibition of import of the human embryo and a ban on all foreign nationals from entering into a surrogacy arrangement in India and thus, the matter is sustained for further order till the passing of the ART Bill, 2016¹¹²⁴ by the Parliament. However, the recent Surrogacy Bill, 2016 allowed only an Indian infertile married couple to enter into a surrogacy arrangement and banned all foreigners, including OCI, PIO, NRI and Foreigner married to Indian Citizen.

1120 THE HINDUSTAN TIMES, 'Commercial surrogacy: The half mothers of Anand,' Namita Kohli, Hindustan Times, <http://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html>, Visited on 10/11/2015 at 2.30 pm. Because the Section 60 (31) of the ART Bill, 2014 provides that, "the minimum compensation to be paid to a surrogate mother by an Overseas Citizen of India, People of Indian Origin Cardholder, Non Resident Indians and foreigner married to an Indian citizen shall be different than the amount to be paid by an Indian commissioning couple."

¹¹²¹ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹¹²² Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015', issued by the Department of Health Research, Government of India, on 4th November, 2015, p. 3 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> , visited on 10/11/2015 at 4.00 pm

¹¹²³ *UNION OF INDIA & ANR V. JAN BALAZ & ORS.* (Pending in Civil Appeal No(s). 8714/2010 WITH *JAYASHREE WAD V. UNION OF INDIAN & OTHERS* W.P. (C) No. 95/2015, C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹¹²⁴ The ART Bill, 2016 is not yet published by the Government on public domain.

After the study of all facts regarding right to enter into the surrogacy arrangement by the foreign nationals. It is very significant to note that, reproductive right, i.e. right to become parents of child included in the right to privacy as guaranteed by the Constitution of India under Article 21 of the right to life and personal liberty and this right is available to all persons irrespective any nationality. It means it is applicable to citizens as well as noncitizens. The right to parent is recognized by the several human rights conventions where India was also a party for it.¹¹²⁵ Therefore, it is the duty of the State to follow the rules of international law. In *Sudan National Shihabeldin Case*,¹¹²⁶ It was argued that banning to foreign nationals from entering into surrogacy arrangement is the violation of the right to life and personal liberty under Article 21 of the Constitution of India. It is the unreasonable and unjust classification treats equals unequally, which violates the equality before the law and equal protection of laws under Article 14 of the Constitution. It was contended that imposing a ban on surrogacy by the foreign single persons or foreign unmarried couples amounts to an unreasonable, unjust and arbitrary classification, which has no nexus to the object sought to be achieved.

Therefore, according to researcher the government of India has to consider the rights of foreign nationals for availing surrogacy service to them as it may impact badly on the image of India in the world. And simultaneously, it is also necessary to regulate the surrogacy strictly by enacting concrete surrogacy law in order to protect the surrogate from exploitation and also protect the rights of surrogate child.

¹¹²⁵Article 16 (1) of the *Universal Declaration of Human Rights 1948* says, that “men and women of full age without any limitation due to race, nationality or religion, have the right to marry and start a family.”Article 23 of the *International Covenant on Civil and Political Rights, 1966* provides that the right of men and women of marriageable age to marry and to found a family. Article 10 of the *International Covenant on Economic, Social and Cultural Rights, 1966*, recognizes that the family is the “natural and fundamental group unit of society”, hence it should be protected.

¹¹²⁶ The Indian Express, “Sudan national moves HC against surrogacy norms,” Updated: April 9, 2014 3:24 pm, C.f. <http://indianexpress.com/article/india/india-others/sudan-national-moves-hc-against-surrogacy-norms/>

A Sudan national Shihabeldin bachelor came to India in 2013 to become a single parent through surrogacy. However, he was not allowed to do so because of the New Visa Regulation Guidelines issued on July 9, 2012, by the Ministry of Home Affairs (MHA) restricting single foreign nationals and unmarried couples from coming to India for purposes of surrogacy on medical visas.

5.2.6. Surrogacy, Human Trafficking and Indian Constitutional Law:

Article 23 (1) of the Constitution of India prohibits the ‘traffic in human beings’ and also declares any contravention of this provision shall be an offence punishable in accordance with law. The object of this provision is to prohibit the unsocial practices in the society. Thus, it tries to protect the individual not only against the State but also against the private individual.

The expression ‘traffic in human beings’ commonly known as slavery, implies buying and selling of human beings as if they are chattels and such practice is Constitutionally abolished. Traffic in women for immoral purposes also covered by this expression.¹¹²⁷ The practice of commercial surrogacy has been challenged as immoral because it amounts to commodification of women’s body, in which the surrogate mothers are selling their bodies and their babies. It is even alleged that the doctors who are practicing in surrogacy area, are selling the babies to the commissioning couple, therefore, they should be charged with the offence of human trafficking.

Thus, there are several questions raised by the surrogacy arrangement, whether the commercial surrogacy is the sale of the child?¹¹²⁸ And whether the sale of child amounts to the human trafficking?¹¹²⁹ And whether it amounts to offence under Transplantation of Human Organs Act, 1994?¹¹³⁰ Whether the import of human embryo amounts to human trafficking?

However, it is said that surrogacy does not amount to the sale of the child, because embryo belong to its parents and not the surrogate. In surrogacy transaction the surrogate selling her labour, her gestational services like any other services in the employment. Hence, it does not amount to baby selling and human trafficking. In today’s surrogacy world, however, various surrogacy rackets and the exploitation of surrogate women are occurring. The United Nations Development Programme in 2009 itself warned that trafficking of women for commercial surrogacy would

¹¹²⁷ M.P. Jain, “Indian Constitutional Law” at p. 1303, Sixth EDN. Reprint 2012, LexisNexis, Butterworth’s Wadhwa, Nagpur, at p. 1304

¹¹²⁸ See chapter IV, *commercial surrogacy and sale of the child*

¹¹²⁹ Ibid

¹¹³⁰ Ibid at p. 50, The Transplantation of Human Organs Act, 1994, prohibits the sale, loaning, and commercialization of the trade of human organ.

eventually develop.¹¹³¹ In October 2011, just two years later *'Baby 101'* surrogacy racket caught by Thai police, where fourteen Vietnamese women have been rescued from sexual slavery in the Surrogacy baby trafficking ring in Thailand.¹¹³² In India, a fertility specialist charged of selling of newborn baby and running the surrogacy racket in Bangalore.¹¹³³ Unfortunately, the present the Assisted Reproductive Technology (Regulation) Bill, 2014 is lacking the clause of the human trafficking¹¹³⁴

The Constitution of India prohibits the human trafficking with the object to curb unsocial practices in society, but the concept of surrogacy is new to this world and it is a debatable issue whether commercial surrogacy amounts to baby selling or not, but the illegal surrogacy rackets should be prohibited by making stringent punishment and making special provision in the Draft of ART Bill, 2014 for the prohibition of the human trafficking in a surrogacy arrangement. The new Surrogacy Bill, 2016 has made provision of the surrogacy rackets for the purpose of selling, purchasing and trading human embryos and gametes punishable not less than 10 year and fine up to 10 lakh rupees.¹¹³⁵

Recently in *Jayashree Wad v. Union of Indian & Ors*,¹¹³⁶ it was declared that the human embryo is human life in miniature form and permitting trade in the same amounts to trafficking in human beings and the same is prohibited by law. The

¹¹³¹ Adv. Anil Malhotra, Taming the International Commercial Surrogacy Industry, pub. 23 Oct. 2014, available at <http://www.bmj.com/content/349/bmj.g6334>, visited on 25/12/2014 at 9.30. pm

¹¹³² The Life Site, "Fourteen women rescued from 'eugenics surrogate' baby trafficking ring in Thailand," Fri Feb 25, 2011 - 6:37 pm, available at <https://www.lifesitenews.com/news/fourteen-women-rescued-from-eugenics-surrogate-baby-trafficking-ring-in-tha>

¹¹³³ THE HINDU, "Fertility specialist held on charge of selling newborn, running surrogacy racket" October 12, 2014 00:20 IST available at <http://www.thehindu.com/news/cities/bangalore/fertility-specialist-held-on-charge-of-selling-newborn-running-surrogacy-racket/article6492156>

¹¹³⁴ The Assisted Reproductive Technology Bill, 2014 has omitted the significant provisions regarding various offences in its list of offences such as human trafficking, abduction of surrogate mothers, baby selling.

¹¹³⁵ The Surrogacy (Regulation) Bill, 2016, C.f. http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842, at p. 14, Visited on 21/11/2016 at 3.00 pm. Section 14 (1) (e) states that the sell human embryo or gametes for the purpose of surrogacy and run an agency, a racket or an organisation for selling, purchasing or trading in human embryos or gametes for the purpose of surrogacy.

¹¹³⁶ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with *Jayashree Wad v. Union of Indian & Others* W.P. (C) No. 95/2015,) C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>,

According to the Notification No. 52 (RE-2013) / 2009-2014 dated 02.12.2013 issued by the Ministry of Commerce and Industry under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 were permitting the trade in human embryo. Thereafter, the order of the Supreme Court of India, the Government removed the said notification and prohibited the import of human embryo.

foreign couples or individuals directly or through IVF centers import such embryo is amounting to trafficking in human beings. Therefore, it is challenged as unethical, unconstitutional practice under Article 21 of the Constitution of India. After the order of the Supreme Court against the government, accordingly the Government of India issued the notification on 4th November 2015 for the prohibition of import of the embryo except for research purpose. Thus, today import of the human embryo is also amounts to human trafficking.

5.3. JUDICIAL APPROACH TOWARDS SURROGACY

5.3.1. Indian Judiciary towards Surrogacy:

The protector of HUMAN RIGHTS in a country is the judiciary.....

The surrogacy arrangement is signified as a last medical ‘solution’ to the problem of infertility, but it has most often identified as a ‘social, ethical and legal problem.’ Therefore, it is the great task in the hands of the judiciary to solve the problems of the surrogacy and balance the rights of parties of the surrogacy. Basically, there are three major cases relating to surrogacy, which are challenged before the judiciary of India.

CHART NO. 13 THREE MAJOR SURROGACY CASES IN INDIA



1. *Baby Manji Yamada v. Union of India & Anr.*,¹¹³⁷

A Japanese couple, Dr. Ikufumi and Dr. Yuki Yamada had entered into a surrogacy agreement with Mrs. Pritben Mehata a surrogate mother in Dr. Nayana Patel Infertility Centre in 2007. The embryo was created from the sperm of the Ikufumi Yamada and egg harvested from Indian unanimous Indian donor. The embryo was implanted into the womb of Prtibhen Mehta. But unfortunately in June 2008, the Yamada couple divorced due to matrimonial discord and on 25th July 2008 Baby Manji was born to the surrogate mother. Dr. Ikufumi Yamada wanted to raise the child, but his ex-wife Yuki did not want the baby as she realized that she is unrelated

¹¹³⁷ *Baby Manji Yamada v. Union of India & Anr.* AIR 2009 SC 84

A Satya, a Jaipur-based social justice and child welfare organization filed a habeas corpus writ petition in the Rajasthan High Court and claimed that Manji was a victim of a “child-trafficking racket” organized by Dr. Patel through her for the profit infertility clinic.

to the baby biologically, genetically, and even legally. The anonymous egg donor (the genetic mother) had neither rights, nor responsibilities towards the baby. The responsibility of the surrogate mother had ended when the baby was born. However, the Baby Manji had three mothers the commissioning mother, surrogate mother and egg donor, but none of the mothers had claimed parental right over the Baby. Baby Manji was moved to Arya Hospital in Jaipur, Rajasthan, once her health had improved because it was unclear who would receive custody.

Dr. Ikufumi Yamada wanted to take the baby to Japan. However, the Japanese Embassy refused to grant Manji a Japanese passport or visa. Because the Japanese Civil Code didn't recognize the surrogate children. In this case, the woman who birthed Manji was Indian, not Japanese, which meant Manji was not entitled to a Japanese passport. Dr. Ikufumi Yamada a genetic father of the baby was required to adopt the child, but again 120 years old law the Guardians and Wards Act, 1890 does not allow single men to adopt a baby but gives the guardianship only. Dr. Yamada approached for Indian passport for Manji, however, it required a birth Certificate before issuing it. And as per Indian law, a birth certificate requires the names of both mother and father. Akanksha Infertility Clinic certified that Dr. Ikufumi Yamada is Manji's genetic father, but the vital records registrar was uncertain which mother should appear on the document. Therefore, the Municipal Council of Anand refused to grant Manji's birth certificate. The Passport authority also refused to issue a passport. Mr. Yamada filed an appeal to the Indian government to issue documents for Manji and claimed the records made clear that Dr. Yamada is the father of the Baby Manji and Manji had the right to live with her Japanese family and should receive Japanese nationality. Thereafter the Anand Municipality issued a birth certificate to Manji Yamada stating only her father's name.

Meanwhile, Manji's paternal grandmother, Emiko Yamada, had traveled to India to care for Manji in the hospital because her son Dr. Ikufumi Yamada had returned to Japan upon the expiration of his visa. After getting the birth certificate of baby Manji a grandmother Emiko Yamada filed writ petition in Rajasthan High Court. The certain directions given by a division Bench of the Rajasthan High Court relating to the production/custody of a child Manji Yamada were challenged by Emiko Yamada in this case. Thus, the baby Manji case has raised the issues of legal parentage,

nationality and custody of the surrogate child. The Supreme Court of India directed that the National Commission for Protection of Child Rights is the appropriate authority to deal with the issue of the Child. The Supreme Court held that the Dr. Ikufumi Yamada, is the genetic father of the child so, given custodial rights of the child and directed the Government to deal with matter, thereafter, the Regional Passport Office, Rajasthan issued a certificate of identity as part of a transit document and not the passport to Manaji Yamada as she returned with her grandmother. The identity certificate did not contain nationality, mother's name or religion of the baby.

Thus, in this case the Court recognized surrogacy agreement as valid in India because the Court neither said the surrogacy contract is invalid nor declared it is valid under the Indian Contract law. The Court granted the custody of the child to the single parent Dr. Ikufumi Yamada. But the Apex Court in the absence of law, abstained from giving any guidelines for the validity of the surrogacy arrangement.

2. *Jan Balaz v. Anand Municipality*¹¹³⁸

The question before the Gujarat High Court was whether a child born in India to a surrogate mother, an Indian national, whose biological father is a foreign national, would get citizenship in India, by birth? And for this question even there is no precedent in this country.

¹¹³⁸ *AIR 2010 Guj.21*

The petitioner Jan Balaz and his wife Susanne Anna Lohle were the German nationals. Due to biological reasons, the wife of the petitioner was not in a position to conceive a child and even not in a position to reproduce ova (eggs). Therefore, through a scientific process the petitioner's sperm was fertilized with the donor's ova and the fertilized embryo was implanted to the uterus of the surrogate mother. The twin baby sons – Nikolas and Leonard were born in 2008 to Indian surrogate mother. In this case the German couple had entered into a surrogacy agreement in Anand, Gujarat. The twin and registered as children born of a foreign couple through the Indian surrogate mother. Jan Balaz moved to the Gujarat High Court for claiming the citizenship and passport of babies since babies are born in India and are citizens of India, Germany would not recognize them as its citizens. Denial of Passports of the babies is illegal and violative of Article 21 of the Constitution of India.

In this case the Court said a lot of legal, moral and ethical issues arise out of the surrogacy arrangement, but which have no precedents in this country. However, the primary concern is the rights of two newborn innocent babies than the rights of the biological parents, surrogate mother, or the donor of the ova. The Gujarat High Court raised various issues such as, Is the ova donor is the real mother or the gestational surrogate? Are the babies motherless, can we brand them as legal orphans or Stateless babies? The legitimacy of the babies is also a live issue. Can we brand them as illegitimate babies? The Court said there are so many ethical and legal questions have come up for consideration in this case, but there are no clear answers in this country.

In this case, petitioner claimed that since babies are born in India, so they are entitled to claim Indian citizenship and passport. Therefore, denial of the passport of babies is illegal and violative of the Article 21 of the Constitution of India.

The Gujarat High Court has held that since, the surrogate mother is an Indian national hence, the children are entitled to get Indian citizenship by birth as per section 3 (1) (c) (ii) of the Indian Citizenship Act, 1955 because one of their parents is an Indian Citizen. The Court considered the California Supreme Court decision in *Johnson v. Calvert*,¹¹³⁹ and in U.S Court decision in *Buzanca v. Buzanca*¹¹⁴⁰ where the commissioning parents were recognized as the natural parents of the child. The New Jersey Supreme Court, in *Re Baby Mellissa case*¹¹⁴¹ gave custody to the natural father of the child and visitation rights to the surrogate mother but denied the rights of the adopted mother.

In the absence of any legislation to the contrary, the Court recognized the gestational surrogate as the natural mother of the children, as a view established in Japan.¹¹⁴² The Court said a gestational mother who has blood relations with the child is more deserving to be called as the natural mother because she has carried the embryo for a full 10 months in her womb, nurtured the babies through the umbilical cord.

Therefore, the Court directed to Government to release the passport of the minors. However, the Government of India challenged this decision in *Union of India v. Jan Balaz Case*¹¹⁴³ which is still pending in the Supreme Court of India. The German authorities also refused visas to twin's baby on the ground that German law did not recognize surrogacy as a means of parenthood. Ultimately, Jan Balaz and Susan Lohald went through an inter country adoption process under the aegis of CARA (Central Adoption Resource Authority). Thus, after the intervention of the Supreme

¹¹³⁹ (1993) 5 CAL 484

The California Supreme Court held that gestational surrogate has no parental rights to a child born to her since a gestational surrogacy contract is legal and enforceable. The intended mother is the natural mother under the Californian law.

¹¹⁴⁰ 61 CAL. Appl. 4th 1410 (1998), The U.S. Court held that when a married couple uses non-genetically related embryo and sperm implanted into a surrogate intended to procreate a child, they are lawful parents of the child.

¹¹⁴¹ 537 A.2d 1227 (NJ.02/03/1988)

¹¹⁴² According to the Civil Code of Japan, a mother who gives the birth to the Child is the natural mother of the child.

¹¹⁴³ *Union of India & Anr. v. Jan Balaz & Ors.* (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010

Court of India, the Indian Government on May 26, 2010 granted the exit permits to Germany to the surrogate twins.

After the detailed study of this case, it is found that due to the absence of the precedent and the surrogacy legislation in India, the Court faced the difficulties in deciding the matter of the surrogacy. Still the Gujarat High Court recognized the surrogate mother as a natural mother and granted the Indian citizenship to the child of German couple. The surrogacy arrangement involves the lot of social, ethical and legal issues and the major problem is with the international surrogacy arrangement that many of the countries do not recognize the surrogacy arrangement as legal hence; it does not grant the citizenship and visa to the child, therefore, sometimes the child remains as Stateless. However, in this case the Gujarat High Court tried to protect the 'best interest of the child' as guaranteed by the United Nations Convention on Rights of Child [UNCRC] and also other international human rights conventions.¹¹⁴⁴ Therefore, now there is an urgent need for either of the precedent or the stringent legislation on surrogacy which will tackle the problem of surrogacy.

3. ***Jayashree Wad v. Union of India & Ors with Union of India Anr. v. Jan Balaz & Ors***¹¹⁴⁵

The Petitioner¹¹⁴⁶ has filed the writ petition, under Article 32 of the Constitution of India to issue a writ in the nature of writ/directions/mandamus to declare that: i) The commercial surrogacy contracts are opposed to public policy, unethical and the violative of Indian Womanhood under Article 21 of the Constitution of India as amounting to exploitation of the surrogate woman. ii) To prohibit all the doctors, hospitals and other institutions from aiding and assisting in commercial surrogacy. iii) To prohibit entry of foreigners for surrogacy. iv) The Notification No. 52 (RE-2013) /

¹¹⁴⁴ According to the Article 26 (1) of the Universal Declaration of Human Rights, 1948 clearly provides that the all action concerning the child, whether taken by the public or private social institutions, courts of law or administrative or legislative bodies that the *best interest of the child* shall be a prime consideration

¹¹⁴⁵ *Union of India & Anr. v. Jan Balaz & Ors. (Pending in the Supreme Court of India in Civil Appeal No(S). 8714/2010 with Jayashree Wad v. Union of Indian & Others W.P. (C) No. 95/2015,)* C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

The Supreme Court has connected both the cases.

¹¹⁴⁶ Jayashree Wad is a practicing Advocate-on-Record of the Supreme Court of India.

2009-2014 dated 02.12.2013¹¹⁴⁷ issued by the Ministry of Commerce and Industry under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 regarding the import of the human embryo is void and *ultra vires* under said Act, 1992. The import of human embryo amounts the human trafficking because human embryo is not the goods, but a human being in miniature form.

On 14th October 2015, a bench of *Justices Ranjan Gogoi and N. V. Ramana* has suggested the ban on commercial surrogacy and import on human embryos,¹¹⁴⁸ the Court framed the fourteen issues on the commercial surrogacy¹¹⁴⁹ and issued notice to the Central government to file response on it.¹¹⁵⁰

Accordingly, the Government of India instead of filing a response to the issues of the cases has submitted the affidavit in the Supreme Court and on 4th November 2015

¹¹⁴⁷ Notification No.52 (RE – 2013)/2009-2014, ‘Policy for import of Human Embryo’, issued on 2nd December, 2013 by the Ministry of Commerce & Industry, Department of Commerce, New Delhi, available at <http://dgft.gov.in/Exim/2000/NOT/NOT13/not5213.htm>

¹¹⁴⁸ THE TIMES OF INDIA , ‘SC Suggests Ban on Commercial Surrogacy,’ Amit Anand Choudhary, TNN | Oct 15, 2015, 02.55AM IST, C.f. <http://timesofindia.indiatimes.com/india/SC-suggests-ban-on-commercial-surrogacy/articleshow/49365734.cms>

¹¹⁴⁹ http://courtnic.nic.in/supremecourt/casestatus_new/querycheck_conn.asp,

Issues framed by the Supreme Court in both cases such as: 1. Whether in commercial surrogacy the surrogate mother is the only mother of surrogate child? 2. Whether a lady who donates her egg in connection with a commercial surrogacy can be said to be the mother? 3. Whether both “surrogate mother” and “genetic mother” (who has donated the egg) can both be said to be the mother of the surrogate child. 4. Whether commercial surrogacy involved the sale of the child in view of the fact that the surrogate mother relinquishes her parental rights for money? 5. Whether commercial surrogacy amounts to renting of a womb? 6. Whether commercial surrogacy is immoral and is opposed to public policy and therefore void u/s 23 of the Contract Act. 7. Whether commercial surrogacy as practiced in India amounts to economic and psychological exploitation of surrogate mother? 8. Whether commercial surrogacy is inconsistent with the dignity of Indian womanhood and therefore violative of Article 21 of the Constitution? 9. Whether commercial surrogacy involves trafficking in human beings as it involves the sale of a surrogate child, the relinquishment of the surrogate's parental rights for money and involves rent of womb thus violating Article 23 of the Constitution. 10. Whether commercial surrogacy should be prohibited? 11. Whether import of human embryo amounts to commoditization of human life and thus violates article 21? Whether the notification dated 2.12.2013 of the GOI issued under S.5 of the Foreign Trade (Development & Regulation) Act is violative of Articles 21 & 23? 13. Whether human rights of a surrogate child born out of commercial surrogate are violated and as such child would face psychological & emotional problems. 14. The legal system does not seem to have answers to the following questions: (a) What happens if the surrogate dies during the child birth? (b) What can surrogate do if commissioning couple refuses to take a child on the ground that it is abnormal of physically/mentally challenged. (c) Case when surrogate refuses to hand over the child. (d) Remuneration of surrogate. (e) Who will bear the medical bills if surrogate falls ill. (f) What happens to unused eggs or embryos and who supervises their fate. (g) Should surrogacy arrangements be disclosed to the child. If so, when?”

¹¹⁵⁰ India TV News, New Delhi, “SC issues notice to Govt. on PIL seeking ban on commercialization of surrogacy” 15/10/2015, C.f. <http://www.indiatvnews.com/news/india/sc-notice-to-govt-on-pil-seeking-ban-on-commercial-surrogacy-48018.html?asd>, Visited on 25/10/2015

published the notification regarding the commissioning of surrogacy in India¹¹⁵¹ and the Supreme Court has passed the order on 2nd December 2015¹¹⁵² of the same. As per the notification of the Ministry of Health and Family Welfare, Government of India, and the order of the Supreme Court, in India the Commercial surrogacy and the import of human embryo have been prohibited. It has also banned the entry of all foreign nationals from entering into a surrogacy arrangement in India.

However, the notification issued by the government regarding the commissioning of surrogacy in India came into conflict with the Section 60 (11) (a) to (c) of the Assisted Reproductive Technology (Regulation) Bill, 2014¹¹⁵³ which permits the commissioning of surrogacy to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen.

According to the latest hearing of the Court on 27th April, 2016, the Solicitor General Shri. Ranjit Kumar on behalf of the Union of India said that the Assisted Reproductive Technology (Regulation) Bill, 2016" has been finalized for being placed before the Parliament. He also said that as far as a disharmony of the section 60 (11) (a) to (c) of the ART Bill, 2014 with the clause 2 (ii) of the Notification issued on 4th November 2015 by the Government has to be reconciled with the New Assisted Reproductive Technology Bill, 2016. The Supreme Court said that all the matters regarding the petition will be heard after the Bill becomes an Act of Parliament with or without modification.¹¹⁵⁴

Therefore, presently, only an Indian citizen can enter into a surrogacy arrangement in India.

¹¹⁵¹ Latest Circular Regarding Commissioning of Surrogacy –Instructions 2015’, issued by the Department of Health Research, Ministry of Health and Family Welfare, Government of India, on 4th November, 2015, p. 3 available at <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>, visited on 10/11/2015 at 4.00 pm

¹¹⁵² C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

¹¹⁵³ The Assisted Reproductive Technology (Regulation) Bill, 2014, available at <http://icmr.nic.in/dhr/ART%20Bill.pdf> visited on 15/10/2015 at 2.00 pm

The Ministry of Health and Family Welfare, has published the notification regarding commissioning of surrogacy on 4th November 2015 and the ART Bill, 2014 is published on 30th September 2015 and invited the comments and suggestions of the public in general and stakeholders within 45 days from the date of publication of Bill, 2014. Therefore, said notification come into conflict with the ART Bill, 2014.

¹¹⁵⁴ C. f. <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>

In both the cases the Court finds the difficulties of deciding the matter because of the absence of law on surrogacy. However, the Court has to give the guidelines on surrogacy and can make the law as made in the cases of *D. K. Basu v. State of West Bengal*,¹¹⁵⁵ and in *Vishakha v. State of Rajasthan & Ors.*¹¹⁵⁶ But the Court sustained the matter till the enactment of ART Bill, 2016.

5.3.2. GLOBAL JUDICIAL APPROACH TOWARDS SURROGACY

The USA Supreme Court in the case of *Jack T Skinner v. State of Oklahoma*¹¹⁵⁷ characterized the 'right to reproduce' as "one of the basic civil rights of man".

1. LEGAL ISSUES IN AMERICA

1. *Baby M Case*¹¹⁵⁸

The first surrogacy agreement took place in the State of USA in the Baby M case (1964). Mary Beth Whitehead became a traditional surrogate mother for William Stern and his wife, Elizabeth. However, after the birth of a female child, she changed her mind and wanted to keep her biological daughter because she was the egg donor. The New Jersey Superior Court validated the contract of surrogacy between the parties and passed a verdict of custody of Baby M to Sterns, the intended parents in the "best interest of the child," whereas Mary Beth (the surrogate) received only visitation rights. In *Re-Baby M case* the New Jersey Supreme Court on February 3, 1988, held that the 'surrogacy contract' was opposed to public policy and therefore invalid. But the *obiter dicta* confirmed the rights of custody to Sterns and gave only visitation rights to Mary. In March 2004, Baby M (Melissa Stern) herself legally terminated the parental rights of Mary Beth.

2. *Jaycee B. v. Superior Court*¹¹⁵⁹

¹¹⁵⁵ AIR 1997 SC 610

¹¹⁵⁶ AIR 1997 SC 3011

¹¹⁵⁷ 316 US 535 (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi, 2015, p. 115)

¹¹⁵⁸ 537 A.2d 1227 (Law Commission of India, "228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a Surrogacy," (Aug, 2009), available at <http://lawcommissionofindia.nic.in/reports/report228.pdf> at p. 12, visited on 15/05/2011 on 14.00 pm.)

¹¹⁵⁹ 42 Cal.App.4Th 718 (1996) (Law Commission of India, "228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a

A child was born to a surrogate mother using sperm and eggs from anonymous donors because the infertile couple was unable to create their own embryo. One month prior to the birth of the baby Jaycee the intended parents John and Luanne separated and John sought to rescind his obligations under the surrogacy contract so as to avoid having to pay child support for Jaycee. Finally, after the three years Court battle, the Californian Court granted transitory custody of Jaycee to Luanne and Court ordered John to pay maintenance.

3. *Angelia G Robinson v. Donald Robinson Hollingsworth*¹¹⁶⁰

In this case Angelia, the sister of Donald, acted as a surrogate for her brother Donald and his gay partner Sean. The Gay couple used the ovum of an anonymous donor and the sperm of Sean. On December 23, 2009 the New Jersey judge recognized the rights of the gestational mother as the child's legal mother even though she was not genetically related to them. Thereafter, in 2011 awarded full custody of the child to the biological father, Mr. Sean, with visitation rights to the surrogate mother considering the children's best interests.¹¹⁶¹

4. *AHW and PW v. GHB and Ors.*¹¹⁶²

In this case issue was whether a Court may issue a pre-birth order directing a delivering physician to list the man and woman (Petitioners) who provided the embryo carried by a surrogate (Defendant) as the legal parents on a child's birth certificate? The Attorney General's office stated that as per New Jersey statutes and directions of the New Jersey Courts in the case of *Baby M*, if defendant GHB chooses to surrender the infant, GHB was required to certify the same and then the original

Surrogacy,” (Aug, 2009), available at <http://lawcommissionofindia.nic.in/reports/report228.pdf> at p. 13, visited on 15/05/2011 on 14.00 pm.)

¹¹⁶⁰ The New York Times, “New Jersey Judge Calls Surrogate Legal Mother of Twins” by Stephanie Saul, DEC. 30, 2009, *C.f.* http://www.nytimes.com/2009/12/31/us/31surrogate.html?_r=0

¹¹⁶¹ Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medico legal Issues’, 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 116

¹¹⁶² 339 N. J. Super. 495, 772 A.2d 948, <http://caselaw.findlaw.com/nj-superior-court/1121664.html>
G.H.B., hereinafter “Gina,” is the unmarried sister of plaintiff A.H.W., “Andrea,” and the sister-in-law of P.W., “Peter.” The biological parents, Andrea and Peter, entered into a gestational surrogacy contract with Gina. Gina, without financial compensation, agreed to have the embryos implanted into her uterus that were created from the sperm of her brother-in-law, Peter, and the ova of her sister, Andrea. Plaintiffs filed a complaint seeking a pre-birth order establishing them as the legal mother and father of unborn Baby A, and placing their names on the on the child's birth certificate.

birth certificate will list AHW and PW. If she changes her mind after the baby is born, at least her right to litigate for parental rights remains intact.

5. *Re-Parentage of TJS*¹¹⁶³

On October 24, 2012, the six judges of the New Jersey Supreme Court said that the Uniform Parentage Act, in resting maternity on biology or genetics, the child who is genetically the child of the anonymous ovum donor and biologically the child of AF, who gave birth to the child. Therefore, the Court denied the intended mother to place her name instead that of the surrogate mother on the birth certificate of the baby. The intended mother would require to adopt the baby born to the surrogate in order to be a legal mother.

6. *Anna Johnson v. Mark Calvert*¹¹⁶⁴

A surrogate Anna Johnson had entered into a contract with the genetic parents, Mark Calvert and his wife Crispina for gestating a fertilized egg of the couple implanted in the surrogate. However, before the child was born, in July 1990, Anna sent the genetic couple a letter demanding the balance of the payments due to her or else she would refuse to give up the child. This led to a lawsuit in August 1990 by Mark and Crispina for the affirmation of the legal parents of the unborn baby. The surrogate Anna also filed a case for declaring herself as a mother of the Baby. The child was born on September, 19, 1990.

On May 20, 1993 the California Court declared that, Mark and Crispina both are as a baby's legal, genetic parents and the surrogate Anna has no parental claim over the

¹¹⁶³

54A.3d

263

(2012),C.f.

<http://www.leagle.com/decision/In%20NJCO%2020121024367/IN%20RE%20T.J.S.>

In this case the plaintiffs TJS and ALS are a married couple entered into a surrogacy contract with AF surrogate. The TJS donated sperm to fertilize the ovum of an anonymous donor and the embryo was implanted into the uterus of AF a surrogate who subsequently gave birth to a child in July 2009. Just prior to and in expectancy of the child's birth, the plaintiffs sought an order from the Superior Court to direct that the child's birth certificate identify ALS as the child's mother. A few days later, the trial Court entered the order in the form that plaintiffs had requested. However, after a birth certificate that complied with the court's order was issued, a motion seeking to have the court vacate its order was filed by the Department of Health and Human Services, Bureau of Vital Statistics. The trial Court granted the Department's application and vacated the order that had been entered prior to the child's birth based on Parentage Act. The judgment of the Court was challenged in the New Jersey Supreme Court.

¹¹⁶⁴ 5 Cal.4th 84, 851 P.2d 776, (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 118)

surrogate Baby. The Court held that the surrogacy contract is legally hence enforceable against claims of Anna's.

7. *TMH v. DMT Case*¹¹⁶⁵

In this case, the issue involved the parental rights of a lesbian couple. One of the lesbian couple TMH's eggs was fertilized and the embryo was implanted in DMT who gave birth to the child on January 4, 2004. The lesbian couple TMH and DMT lived together for approximately two and a half years. However, the couple separated in 2006. THM sued DMT in case DMT through her attorney argued that as per Florida Statute F.S. 742.14 TMH as an egg donor had waived and lost her rights as a parent. The Fifth District Court of Appeal held that Section 742.14, Florida Statutes (2008) did not apply to TMH's case. The court in this case gave a significant finding that the right to procreate and parent a child is a fundamental, constitutionally protected right. Thus, the court ruled that both TMH and DMT had constitutionally protected rights as parents. However, DMT Challenged the decision in the Supreme Court in *DMT v. TMH Case*¹¹⁶⁶, in this case the court held that TMH's right as a parent is constitutionally protected. TMH had signed this form as birth mother's partner and not as an individual providing the egg for a couple.

8. *Surrogacy Parenting Associates v. Commonwealth of Kentucky Case*¹¹⁶⁷

The suit alleged that SPA's surrogate parenting procedure is in violation of the Kentucky statutes which prohibits the sale, purchase or procurement for sale or purchase of "any child for the purpose of adoption. It also prohibits the filing a petition for voluntary termination of parental rights "prior to five (5) days after the birth of a child. The Supreme Court in this case held that surrogate parenting does not violate statutes as such services are not to be considered as a sale or purchase of the child, but as a service for a fee which is pre-determined.

9. *In Re: Marriage of John A Buzzanca v. Luanne H. Buzzanca*¹¹⁶⁸

¹¹⁶⁵ 79 So. 3d 787, (Fla. Dist. Ct. App. 2011), decided on December 23rd, 2011, (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 119)

¹¹⁶⁶ 79 So. 3d 787, (Fla. Dist. Ct. App. 2011).

¹¹⁶⁷ 704 S.W.2d 209 (Ky. 1986) C.f.
http://ky.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19860206_0040273.KY.htm/qx

A case highlights how changing times have changed the outlook towards parenting. Baby Jaycee was born because Luanne and John Buzzanca agreed to have an embryo genetically unrelated to either of them implanted in a surrogate. This implantation was successful but unfortunately the couple split up leading to the issue as to who could be called as the legal parents of the baby. The Court held that even though the commissioning parents were not biologically related to the infant, they were still her legal parents.

10. *Lamaritata v. Lucas*¹¹⁶⁹

In this case the Court of Appeal of Florida on August 16, 2002, held that a person who gives sperm for a woman to conceive a child by artificial insemination is not a parent and has no parental rights over the child. Thus, the sperm donor has no legal rights.

11. *S.N.V. v. N.M.V. & B. V.*¹¹⁷⁰

In the Colorado Court of Appeals, it is stated that SNV was conceived through sexual intercourse between the Plaintiff and the respondent (NMV). However, NMV and his wife argued that birth mother was a mere surrogate. The Court held that the NMV's wife is entitled to claim as a legal motherhood under presumptions in the Colorado Uniform Parentage Act. Because she was married to the husband at the time of SNV's conception and birth, and accepted SNV into her home and has held him out to her family and community as her own child.

¹¹⁶⁸ 61 CAL. Appl. 4th 1410 (1998), *C.f.* http://ky.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19860206_0040273.KY.htm/qx

¹¹⁶⁹ 823 So. 2d 316 (Fla. 2d DCA 2002), *C.f.* <http://archive.law.fsu.edu/library/flsupct/sc12-261/sc12-261AAARTA.pdf>

¹¹⁷⁰ Colorado Court Of Appeals No. 10CA1302, Adams County District Court Nos. 09DR2343 & 09JV2609 *C.* *f.* https://www.courts.state.co.us/Courts/Court_Of_Appeals/Opinion/2011/10CA1302.pdf, In this case two women claimed to be the mother of the same child. One of the women is the biological mother, while the other claims to be a legal mother under the presumptions set forth in the Colorado Uniform Parentage Act (UPA).

12. *Robert Nolan v. Kristen Labree*¹¹⁷¹

The case relates to a child genetically related to Robert Nolan and his wife, Celia Nolan but was born to the surrogate mother, Kristen Labree. In this case the District Court refused to declare the maternity of Celia Nolan over the child born to the surrogate. A birth certificate issued to Nolans listed Kristen Labree as the mother of the child. However, the Maine Supreme Judicial Court has vacated the District Court ruling and held that Nolans can obtain a new birth certificate listing them as the sole parents of their son.

13. *Kehoe Twins' Case*¹¹⁷²

Amy Kehoe and Scott Kehoe a married couple entered into a surrogacy agreement with Ms Baker. The twins Ethan and Bridge were delivered on July 28, 2009. But a month later the children were removed by court order from the couples, because of Amy Kehoe had paranoid schizophrenia and her psychiatrist described the diagnosis as a 'psychotic disorder. Amy admitted of being arrested on charges of using cocaine. Although the psychiatrist gave a written evidence that Amy would be a good mother as her condition had been fully controlled for eight years and she had no current symptoms. The surrogate mother Ms. Baker took legal steps to recover the twins. In this case the Michigan Court held that surrogacy contracts are unenforceable and the surrogate mother was deemed to be the twin's legal mother at birth and the court ordered their return to her.

After study of the legal issues in the America State, it is found that due to different States there are varied decisions on parental rights. Generally, for the interest of the child the commissioning parents are recognized as parents. But in many cases surrogate mothers a birth mother is also recognized as a legal mother due to the Uniform Parentage Act.

2. LEGAL ISSUES IN UNITED KINGDOM

¹¹⁷¹ 2012 ME 61, 52 A.3d 923, (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 121)

¹¹⁷² Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 123

1. *R and S v. T Case*¹¹⁷³

A High Court Judge has granted parental orders to a British couple of their surrogate twins born in Ukraine.¹¹⁷⁴ The twins were created by using the sperms of the British man along with the anonymous egg donor. As per the laws in Ukraine, legal parents are the biological parents. But in the UK, the surrogate mother is regarded in law as the twin's mother, even though she has no genetic link with the child. The problem started when they tried to leave the country along with the twins, even the United Kingdom (UK) authorities regarded the Ukrainian surrogate as the legal mother of the children, despite the fact that the names of the British couple were entered as parents on the birth certificate. Therefore, the children born of the surrogate had no legal parents and they had no entitlement to citizenship anywhere in the world.

2. *Miss. N's Case*¹¹⁷⁵

In this case Miss. N had agreed to be surrogate for the couple Mr. W and Mrs. W. The surrogate refused to give up the baby for several reasons she came to know from Mrs. W that her husband was controlling and violent towards her and had once tried to strangle her with a car seat belt. A baby girl was born to the Miss. N (identified as T by the court) who decided to keep the baby. The court also ruled in favor of the surrogate by allowing her to keep the child, stating that the surrogate mother had a legal right to keep the child.

3. *Re-G Case*¹¹⁷⁶

Baby M was conceived by Mrs. J (a British surrogate mother), who entered into a noncommercial surrogacy arrangement with a married couple, Mr. and Mrs. G who were Turkish natives. Baby M was conceived using the sperm from Mr. G and an egg

¹¹⁷³ [2015] EWFC 22 (Fam), *C.f.* www.familylaw.co.uk/news_and_comment/r-v-s-t-2015-ewfc-22#judgment

¹¹⁷⁴ <http://www.marilynstowe.co.uk/2015/03/16/twins-born-to-surrogacy-in-ukraine/>

¹¹⁷⁵ <http://www.dailymail.co.uk/news/article-1356176/Surrogate-mother-wins-case-baby-giving-birth.html>

The husband Mr. W had a teenage daughter from his previous relationship and wife Mrs. W had three children from a previous marriage. The couple wanted to have a child, but the wife was unable to do so as she had undergone a cancer treatment. The child was conceived using a crude technique to inseminate the surrogate with Mr W's sperm. The surrogate Miss N was paid £4500. In Britain, the judges consider the best interest of the child.

¹¹⁷⁶ [2007] EWHC 2814 (Fam), *C.f.* <http://www.familylawweek.co.uk/site.aspx?i=ed984>

from Mrs. J. Shortly before the birth the commissioning parents came to England and rented a Flat in the locality. Baby M was born in the month of September 29, 2006. Her birth was registered at the local District Registry and Mrs. J was named as the mother and Mr. G as the father. Two days later Mr. and Mrs. G filed an application for a parental order under Section 30 of HFEA, 1990 with an incorrect assertion that they were domiciled in the United Kingdom. Apart from this, Mrs. J, the surrogate mother, remained married to her estranged husband; PJ raised the possibility of him to be considered by the English Court as the legal parent of the surrogate Baby.

Justice McFarlane rejected the claim of parental order to the commissioning parents as they were domiciled in Turkey and not in the UK. However, the Court allowed an application under inter -country adoption as per the terms of the Convention on Protection of Children and Cooperation in respect of Inter-country Adoption concluded at the Hague on 29th May 1993.

4. *Re X and Y case*¹¹⁷⁷

In this case on October 27, 2011 the Courts granted the parental orders to applicants Mr. and Mrs. A., under Section 54 (1) of the Human Fertilization and Embryology Act, 2008 of two children X (boy) and Y (girl) born in India through Indian surrogate mothers. The Court said the payments are not at disproportionate, and it is plainly in the interests of these two children that they should be brought up by Mr. and Mrs. A as their parents.

5. *D and L Case*¹¹⁷⁸

This case relates to parental orders of twin surrogate children D and L in which the First Applicant is a British citizen. In order to obtain a parental order under the HFEA 2008, they would have to prove that the surrogate mother had given her consent, which could only be given at least six weeks after the birth. However, in this case the surrogate could not be found to consent to the parental orders. The court retrospectively authorized the payment of the sum of \$29,000 paid by the applicants for the arrangement of the birth of the twins and being satisfied that no other money

¹¹⁷⁷ [2011]EWHC 3147(Fam). Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 125

¹¹⁷⁸ [2012] EWHC 2631 (Fam).

or benefit has been given or received by the applicants. It was ordered that there be parental orders that the children D and L shall be treated as the children of the Applicants.

5. LEGAL ISSUES IN AUSTRALIA

***Kirkman Sisters Case*¹¹⁷⁹**

The case of the Kirkman sisters (1988) is popularly known as 'My sister's Baby' in which Linda Kirkman agreed to gestate the genetic child of her older sister, Maggie. This was the First IVF case of Australia. After the birth of the baby girl, Alice, was given to Maggie. This information was flashed in the Australian community.

3. LEGAL ISSUE IN FRANCE

***Mennesson v. France and Labassee v. France*¹¹⁸⁰**

This case the France's Court held that children born to a surrogate are not French. It confirmed that France legally banned surrogacy and any such children born *via* surrogacy will not be given French citizenship. Sylvie Mennesson her husband entered into the surrogacy contract in California in 2000. The High Court of France ruled that the girls cannot be listed in France's civil registry. Therefore, the two couples appealed to The European Court of Human Rights Court. The European Court of Human Rights gave a verdict in favor of the intended commissioning parents. On June 27, 2014 France decided to legally recognize children born to surrogates.

4. LEGAL ISSUE IN PAKISTAN

***Farooq Siddiqui and his wife Yasmin v. Farzana Naheed*¹¹⁸¹**

¹¹⁷⁹ Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medico legal Issues', 1st Edn., Jaypee Brothers Medical Publishers Pvt. Ltd, New Delhi , 2015, p. 128 Presently, in Australia the commercial surrogacy is illegal and surrogate contract is unenforceable and any payment for to the surrogate is banned by the law.

¹¹⁸⁰ Mennesson v. France (application no. 65192/11C) and Labassee v. France (application no. 65941/11) the applications are not yet finalized. C.f. hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4804617...

The European Court of Human Rights held that there had been a violation of the European Convention on Human Rights, in particular the children's right to respect to private life. but there is no violation of the right of the children or intended parents to respect of family life.

It is the first noted surrogacy case in Pakistan. Farzana Naheed gave birth to a baby girl Fatima in February 2005. Farzana, a Pakistani woman claimed that she was the wedded wife of Farooq Siddiqui, the Pakistani American. But Farooq Siddiqui alleged that Ms. Farzana Naheed acted as a surrogate mother for him. However, he failed to prove his contention that Ms. Farzana Naheed had acted as a surrogate mother after being paid one million rupees. In this the Court granted the custody of the daughter to the Farzana Nasheed after a seven-year-long legal battle from 2005-2012. Later on Farooq Siddiqui, approached in the Supreme Court of Pakistan with the request to recover his seven-year-old daughter, Fatima, from the custody of her 'surrogate mother' Farzana Naheed.¹¹⁸²

Researcher in this Para found that based on the legal issues that arose from surrogacy practices in countries around the world, different judgments were given. In the *Baby M case*¹¹⁸³ the court passed a verdict of custody of Baby M to the intended parents in the "best interest of the child" as the 'surrogacy contract' was opposed to public policy. In the *Re-Parentage of TJS case*¹¹⁸⁴, the New Jersey Supreme Court denied the intended mother to place her name on a birth certificate of the baby instead of the surrogate mother. In the *Johnson v. Calvert case*¹¹⁸⁵, the baby born out of the gestational surrogacy arrangements was to remain in the custody of his genetic parents as decided by the Court. The surrogate woman is regarded as the mother of the child in the UK. In Australia commercial surrogacy is illegal and regulations have been formed, sparked by the case of the *Kirkman sisters*¹¹⁸⁶. In the *TMI v. DMT*¹¹⁸⁷

¹¹⁸¹ DAWN, "Surrogate mother wins long drawn child custody battle"Malik Asad — Published Nov. 28, 2012 12:20am, C.f. <http://www.dawn.com/news/767309/surrogate-mother-wins-long-drawn-child-custody-battle-2>

The Rawalpindi Bench of the Lahore High Court stated that there was no law on surrogacy in Pakistan. There was no proof that the sperm that fertilized the egg had originated from Siddiqui. The custody of the child was given to Farzana while dismissing Farooq Siddiqui's petition seeking custody of the child. Since Farooq denied that he was wedded to Farzana. Pakistan does not have a law-making framework that regulates surrogacy and a surrogacy arrangement is not recognized because then the legitimacy of procreation outside a marriage contract will be questioned as Zina (Adultery). Same is an offence as per Pakistan Penal Code, 1860. The court relies on the Guardian and Wards Act, 1890 to award custody of the child irrespective of surrogacy agreement.

¹¹⁸² The Express TRIBUNE, "Wife or surrogate mother?: Apex court takes up unusual child custody battle," By Azam Khan Published: October 21, 2012, C.f. <http://tribune.com.pk/story/454670/wife-or-surrogate-mother-apex-court-takes-up-unusual-child-custody-battle>

¹¹⁸³ 537 A.2d 1227 (NJ.02/03/1988).

¹¹⁸⁴ (Gehna Vaishnavi, Navneet Takkar, 'Surrogacy Medicolegal Issues'New Delhi : Jaypee Brothers Medical Publishers Pvt Ltd, 1st Edn., 2015, p. 91)

¹¹⁸⁵ 851 P. 2d 776 (Cal. 1993).

¹¹⁸⁶ (1988) C.f. http://www.health.wa.gov.au/chiefmedicalofficer/docs/2014_04_24FINRRAGE.pdf

case the court gave the verdict that the right to procreate and parent of the child is a fundamental, constitutionally protected right even for the lesbian couple. The Baby Gammy case severely rocked Thailand when an unhealthy offspring was abandoned, leading to the decision to form new legislation in context to surrogacy. Similarly, in Pakistan surrogacy is not recognized and amounts to adultery.

Recently, in the international press, it was reported that the famous television Star, Sofia Vergara, is fighting a court battle with ex-fiancée for the custody of frozen embryos. As reported in *The Tribune* recently, a Chinese team has been successful in editing human embryos and changing the genomes of embryos. Thus, the surrogacy has made a huge impact all over the globe.

5.4. CONCLUSION:

After writing this chapter, I really feel it is golden chapter of the entire thesis as it donates the oxygen to the survival of surrogacy. In this chapter, we discussed the human rights which are owned by all human beings irrespective of their race, caste, nationality, sex, language, etc. simply because they are human beings. The reproductive right is the natural human right of the every individual which required to be recognized through the law by the Parliament of India.

Presently, there is no any international human right convention, which specifically talks about the surrogacy. However, there are so many international human rights instruments which are clearly provided the reproductive rights such as *Article 16 of the Universal Declaration of Human Rights, Para 7.3 of the International Conference on Population and Development (ICPD)*. Thus, the reproductive rights are recognized as basic natural human rights by various human rights instruments. Therefore, reproductive rights also include surrogacy as a right to procreate with the help of science and technology.

At international level CEDAW gives the protection to women from all kinds of discrimination, it also protects the reproductive rights of women. With the view to

¹¹⁸⁷ 79 So. 3d 787, (Fla. Dist. Ct. App. 2011).

protect the '*best interest of the every child*' the Convention on Rights of Children (CRC) is enacted by the United Nations.

In India, the reproductive right is protected by the Indian Constitution under Article 21 right to life and personal liberty. The Constitution also guarantees the right to equality under Article 14 and prohibits the discrimination on the grounds of religion, race, caste, sex, place of birth or any of them. The Indian judiciary has also recognized the 'right to reproductive autonomy' as an aspect of the right to privacy in *B. K. Parthasarathi v. Government of Andhra Pradesh* (AIR 2000 AP 156). The Supreme Court of India in *Javed v. State of Haryana* ((2003) 8 SCC 369) has refrained from stating that the right to procreation is not a basic human right. The Law Commission of India in its 228 Report on surrogacy, 2009 agreed that if the Constitution of India under 21 guarantees reproductive rights of the individual, then the surrogacy, which provides the chance to infertile couples to become parents should also to be the protected by the Constitution of India.

But the surrogacy arrangement involves the several social, ethical and legal issues. Basically, it is challenged as unethical practice as amounting to commodification, exploitation of women. In this Chapter, the researcher has studied the different legal issues of the surrogacy involved in the various cases around the world and judiciary by its pronouncements has tried to solve these problems. Mostly in international surrogacy arrangement, the problems of citizenship, parental rights, custody of the child arise. Therefore, according to researcher surrogacy is an international level problem; hence it has also to be solved at international level by enacting international surrogacy law.

Besides this, the reproductive rights of the single persons should be protected. The reproductive right of the gay, lesbian couple should also be protected without the discrimination on the ground of gender identity or sexual orientation. Recently, the Supreme Court of India has opened the curative petitions in the *Naz Foundation case* in order avoid a miscarriage of justice with them. As same sex couples rights are protected by the international human rights instruments and the Constitution of India under Article 21 and it also guarantees the reproductive rights of every individual.

Finally, today there is imperative need of surrogacy law, the Supreme Court of India has sustained the matter of surrogacy in *Jayashree Wad case* as it involves the various complicated issues which need to be solved through legislation. However, in the absence law the Supreme Court of India may give the surrogacy regulation guidelines just as given in the *Vishakha's Case*.

Therefore, in order to protect the interest of the parties and for regulation of the surrogacy arrangement, the Parliament has to enact the law of assisted reproductive technology as early as. *As surrogacy is the last ray of hope, of becoming parents of their own genetic child.*