

## CHAPTER –I

### 1. INTRODUCTION:

#### *“Surrogacy is a Human Victory over the Nature”<sup>1</sup>*

Motherhood is the most respected and idealized stages in a woman's life. In India,<sup>2</sup> a woman is respected only as a wife, if she bears a male child. As quoted below:

*“A Woman becomes complete when she gives birth to her own child and to be called mother. But unfortunately this gift is not equally distributed by god to every woman. There are many women who suffer infertility due to reasons like meeting with an accident, irregularity in reproductive system or infertility in a spouse. But science has overcome these causes of infertility and has come out with great solution or as we can say an option to replace adoption that’s surrogacy. A boon for childless couples who want their own child”.*<sup>3</sup>

Marriage is a sacramental institution, where every couple has the desire to have the child. However, this desire remains unfulfilled due to infertility. According to the Assisted Reproductive Technology (Regulation) Bill, 2010, in the world around 15 percent couples are found infertile.<sup>4</sup> *The World Health Organization (WHO)* has declared the infertility as a disease and reported that, India has an estimated 19-20 million infertile couples.<sup>5</sup> Thus, the infertility has become one of the most common medical and social problems. Infertility has become the reason for the marriage collapse, divorce, desertion and may result in heavy psychological consequences. In

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<sup>1</sup>Charushila , “Surrogacy -- A Hope”, *C.f.* <http://www.lawyersclubindia.com/articles/Surrogacy-A-Hope-3319.asp#.VJVY-cDnA> as visited on 13/12/2014 at 7 p.m

<sup>2</sup> Because of India is s a patriarchal society. *See book of Kamla Basin, “What is Patriarchy,”* Edn. 1993, Reprinted 2014, Women Unlimited Edition, New Delhi. at p. 6

<sup>3</sup>*Supra note 1*

<sup>4</sup> The Assisted Reproductive Technologies (Regulation) Bill-2010, at p. 1 available at: [www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf](http://www.icmr.nic.in/.../ART%20REGULATION%20Draft%20Bill1.pdf).

<sup>5</sup> Gehna Vaishnavi, Navneet Takkar, ‘Surrogacy Medico legal Issues’, [New Delhi: Jaypee Brothers Medical Publishers PVT. Ltd.,] 1st Edn., 2015, p. 5

India, from the ancient time the desire to have the child is satisfied by adopting the child, but today adoption law is not universal like western countries.

With the enormous advancement of science and technology has provided various ART techniques<sup>6</sup> such as Artificial Insemination (AI),<sup>7</sup> *In Vitro Fertilization (IVF)*<sup>8</sup> or *Intracytoplasmic Sperm Injection (ICSI)*<sup>9</sup> or Surrogacy<sup>10</sup>. Recently, the surrogacy has become the best option for infertile couples, single person and gay and lesbian persons of their own genetic babies. “The one of the most important medical advances is the birth of the *World’s first IVF child, Loieuse Joy Broun in Great Britain on July 25, 1978* and the *world’s second and India’s first IVF baby Kanupriya alias Durga was born in Kolkata on October 3, 1978.*”<sup>11</sup> On 23<sup>rd</sup> June, 1994 the first Indian surrogate child was born in GG Hospital Chennai.<sup>12</sup>

The term surrogacy means where a woman consented to bear the child with the intention to relinquish the baby upon the birth to the commissioning couple. The surrogacy is classified as traditional,<sup>13</sup> gestational,<sup>14</sup> altruistic,<sup>15</sup> or commercial<sup>16</sup> surrogacy. In commercial surrogacy a surrogate mother is hired and compensated for carrying the child of the commissioning couple where as in altruistic surrogate does not receive any monetary compensation.

According to the *International Committee Monitoring Assisted Reproductive Technologies (ICMART)*, 2015 reported that, present World’s total IVF babies now soars beyond 6 million.<sup>17</sup> In India the record of ART data is not available. Recently,

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<sup>6</sup> *Infra at p. 30*

<sup>7</sup> *Infra at p. 31*

<sup>8</sup> *Infra at p. 32*

<sup>9</sup> *Infra at p. 35*

<sup>10</sup> *Infra at p. 40*

<sup>11</sup> *Infra at p.*

<sup>12</sup> Surrogacy India Guide, available at <http://www.globaldoctoroptions.com/book/export/html/432> visited on 12/12/2013

<sup>13</sup> *Infra at p. 56*

<sup>14</sup> *Infra at p. 57*

<sup>15</sup> *Infra at p. 60*

<sup>16</sup> *Infra at p. 60*

<sup>17</sup> European Society of Human Reproduction and Embryology [ESHRE], Focus on Reproduction, September 2015, p. 17 available at <https://www.eshre.eu/Publications/Focus-on-Reproduction.aspx> visited on 12/10/2015.

however, Dr. Nayana Patel's Akansha Infertility Centre, Anand has reached milestone birth of the '1000<sup>th</sup> Surrogacy Baby.'<sup>18</sup>

Today, India has become an international hub for commercial surrogacy and had business an annual worth of at least \$445 million (Rs 2,900cr).<sup>19</sup> According to the National Commission for women (NCW) around 3,000 clinics across India are offering surrogacy services.<sup>20</sup> According to the report of the Confederation of Indian Industry (CII) in 2012 that, every year 10,000 foreign couples visit to India for surrogacy arrangement and the industry generates the business of \$2 billion a year.<sup>21</sup> The conference of the Centre for Social Research (CSR) reported that around 48 to 50 percent commissioning parents are coming from western countries, remaining are the Non-Resident Indians (NRIs) and local people.<sup>22</sup> In India, prior to the notification of government on 4<sup>th</sup> November, 2015 regarding ban on foreigners for surrogacy, it reported in approximately 80 % births of the surrogate children of the foreigners.<sup>23</sup>

Today's world is called as the '*Google Babies World*', because, various agencies, through the internet are providing the online shopping of the surrogate, Ova and sperms with beautiful surrogacy packages. There are various players are associated with the surrogacy industry at a national and international level like travel agencies, industry of hospitality, law firms, agents, departments of medical tourism, and surrogacy shelter homes. Because of the growth in the surrogacy business, many women are turning for becoming a surrogate, so it may be called as '*Third World of*

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<sup>18</sup> P. C. Vinoj Kumar, The Weekend Leader, Vol. 6, Issue 42., 19<sup>th</sup> Oct., 2015, available at <http://www.theweekendleader.com/Success/2280/joy-to-couples.html> visited on 20/10/2015 at 2.00 pm

<sup>19</sup> HINDUSTAN TIMES, 'Govt bans import of human embryos for commercial surrogacy', New Delhi, Oct 28, 2015 16:29 IST, c.f <http://www.hindustantimes.com/india/nda-government-banns-import-of-human-embryos/story-al90kP6PLcG77Zuk7LOFjM.htm>, visited on 29/10/15, at 11.30 am.

<sup>20</sup> SAMA Report 2012, 'Birthing A Market, A Study on Commercial Surrogacy', P. 7 available at [http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama\\_Birthing\\_A\\_Market.pdf](http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing_A_Market.pdf) visited on 23/10/2013 at 11.00 am

<sup>21</sup> 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

<sup>22</sup> 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](https://drive.google.com/file/d/0B-f1XIdg1JC_ZmlsZXQwY3VvcW8/view)

<sup>23</sup> The HINDU, Dr. Soumya Swaminathan (Director General, Indian Council of Medical Research), "Why the Surrogacy Bill is necessary," C.f. <http://www.thehindu.com/opinion/op-ed/why-the-surrogacy-bill-is-necessary/article9040755.ece>

*Surrogate*'.<sup>24</sup> Sometimes it is also called as one kind of profession like any other profession.

Therefore, India has become the world's top most '***International Reproductive Tourism Destination***' as such '***No Law Prohibit and No Law Permit***' because of easy accessibility of a huge group of women are wishing to become surrogate mothers, an excellent medical practitioners, cheap costs of surrogacy, and close observation of surrogates.<sup>25</sup>

At present surrogacy seems to be a better option for infertile couples to fulfill their parenting dream. The last three decades, there is a huge growth of infertility clinics and surrogacy centers. Such clinics are growing like mushroom around the country.

In the case of ***Baby Manji Yamada v. Union of India***,<sup>26</sup> the Supreme Court observed that the "commercial surrogacy" arriving as the "industry proportions is sometime referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms."

In some of the States of USA, the commercial surrogacy recognized as illegal and unenforceable. In Australia, the commercial surrogacy is treated as a criminal offence. Since 2004, only altruistic surrogacy has been allowed in Canada and New Zealand. The surrogacy arrangement is unlawful in France, Germany and Italy. Now days the surrogacy has become an international level problem.

The lifeline of the surrogacy is the ***Article 21 of the Constitution of India, which*** confirms the reproductive rights to every individual irrespective any gender or any nationality of the person.<sup>27</sup> This right is also recognized in most of the previous and recent international human rights instruments as well as the regional treaties.

The practice of surrogacy is alleged as illegal, unethical and immoral practice. The surrogacy agreement involves the various social, ethical, legal, psychological and medical issues. The general issues such as, whether to become a surrogate mother is legal in India? Whether the surrogate child born to an Indian surrogate mother in cross

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<sup>24</sup> *Infra at p. 210*

<sup>25</sup> Anil Malhotra, Ranjit Malhotra, 'Surrogacy in India, *A Law in the Making*', (1<sup>st</sup> Edn. Universal Law Publication Co.), New Delhi, 2013., P. 15

<sup>26</sup> AIR 2009 SC 84

<sup>27</sup> *Infra at p. 288*

broader surrogacy arrangement can be an Indian citizen or not? Whose name will be entered as a legal parent on the birth certificate of the surrogate child? What will happen if the surrogate mother declines to give the custody of the child or blackmails to the commissioning couple for it? Or if the commissioning parents refuses to take custody the child, who will be responsible to take custody of the child? Whether the commissioning parents are under legal obligation to take custody of the disabled child? It is also alleged that surrogacy amounts to the commodification of women, sale of the child. It is like the prostitution, slavery. The commodification of women violates the status and dignity of both the surrogate women and the surrogate child. The problems of exploitation, compensation of surrogate women and the custody, parentage, citizenship, abandonment of the surrogate child and human trafficking has become severe, consequences of ban on the commercial surrogacy.

Presently, in India '*No Law and No Precedent*' is available for solving these conflicting interests. The commercial surrogacy was legalized in India since 2002.<sup>28</sup>

In 2005, the Indian Council of Medical Science (ICMR)<sup>29</sup> has provided the National Guidelines for accreditation supervision and regulation of the assisted reproductive technology in India. But being non statutory body these rules are frequently violated by the ART clinics. In 2009, the *Law Commission of India 228<sup>th</sup> Report*<sup>30</sup> has recommended the need of surrogacy legislation for regulation of ART and for defining the rights and liabilities of the parties of surrogacy arrangements.

There are several drafts of *Assisted Reproductive Technology (Regulation) Bills, 2008*,<sup>31</sup> *2010*<sup>32</sup> were prepared for the regulation of ART industry. But these Bills were suffered from many drawbacks. The Government has passed the New Indian Visa Regulation, 2012 for prohibition of foreign single persons and homosexual couples for surrogacy in India. *The ART Bill, 2014*<sup>33</sup> was published on 30<sup>th</sup> September 2015 for the general public and stakeholders comments and suggestions. The Supreme Court of India has sustained the matter of surrogacy in *Jayashree Wad case* with *Jan*

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<sup>28</sup> *Infra at p. 98*

<sup>29</sup> *Infra at p.99*

<sup>30</sup> *Infra at p. 107*

<sup>31</sup> *Infra at p. 104*

<sup>32</sup> *Infra at p. 109*

<sup>33</sup>*Infra at p. 118*

*Balza Case*<sup>34</sup> as it involves the various complicated issues which need to be solved through legislation.

The *notification issued on 4<sup>th</sup> November 2015*<sup>35</sup> by the Ministry of Health and Family Welfare, Government of India, regarding not to support commercial surrogacy and prohibited all foreigners for availing the service of surrogacy in India.

On 24<sup>th</sup> August, 2016, the draft of the Surrogacy (Regulation) Bill, 2016 was presented by the External Affairs Minister Sushma Swaraj in a press conference with the object to prevent unethical practices of surrogacy, prevention of exploitation of the surrogate mother and protection of the rights of surrogate children.<sup>36</sup> The Bill, 2016 has banned the commercial surrogacy and legalized altruistic surrogacy, which is restricted only to Indian heterosexual married couple only who have completed 5 years of their marriage.

Recently, *on 21<sup>st</sup> November, 2016 the Surrogacy (Regulation) Bill, 2016*<sup>37</sup> is introduced in the House of Lok Sabha of the Parliament.<sup>38</sup> Presently, we do not have any statutory law on surrogacy for regulation of it. Therefore, one can assume that the surrogacy law is still in the womb of the Parliament.

## 1.1. SIGNIFICANCE OF THE STUDY

### *“Surrogacy a ray of hope to a childless couple”*

Now, we are entering into a new age, where it is scientifically possible that, the baby can be created in a Petri dish from the egg of a woman and sperm of a man which results into embryos and that can be transferred into women to gestate. “It is reported that infertility affects about 1 out of 6 couples.”<sup>39</sup> Hence, surrogacy is a good option

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<sup>34</sup> *Infra at p. 321*

<sup>35</sup> *Infra at p. 131*

<sup>36</sup> DECCAN HERALD, “Govt. clears bill seeking complete ban on commercial surrogacy”, New Delhi, Aug 24, 2016, (PTI), C. f., <http://www.deccanherald.com/content/566651/bill-proposes-complete-ban-commercial.html>, visited on 25/08/ 2016 at 11.00 pm

<sup>37</sup> *Infra at p. 134*

<sup>38</sup> 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](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842), Visited on 21/11/2016 at 3.00 pm

<sup>39</sup> Rent a womb, available at: <http://www.delhi-ivf.com/surogacy>, visited on 12/10/2011 at 2.00 pm

for infertile couples, unmarried couples, and single persons, gay and lesbian. So, now everyone can have babies. Despite of the controversial ethical and legal issues charged on the surrogacy, a surrogacy has been gaining a lot of popularity in the world. Currently in the media, surrogacy has become a hot topic. Surrogacy finds a good place in newspapers, magazines, TV shows and movies. However, before the exploitation of the surrogate, some issues are needed to be properly settled. There are various, social, ethical, moral and legal issues are connected with the surrogacy, which may cause great debate in the society such as:

1. Should women be paid for being surrogates?
2. Is India promoting, “reproductive tourism?”
3. Does the law protect the surrogate Mother?
4. What will happen if the surrogate women refuse to relinquish the child?
5. Who will be responsible to take custody of the child, if the child has the serious disabilities?<sup>40</sup>
6. Is surrogacy leading to the destruction family structure of India?
7. Who is the real and legal mother of the child born out of surrogacy arrangement?
8. Whether the surrogacy agreement amounts to exploitation of the surrogate women?
9. Whether the surrogacy arrangement amounts to the sale of the child?
10. Whether the surrogacy arrangement is immoral, unethical, against the public policy?
11. Whether the surrogacy agreement is the violation of the dignity of the womanhood guaranteed by the Article 21 of the Constitution of India?
12. What will be the consequences of the ban on commercial surrogacy?

Today, India has become the top most international surrogacy destination. The commercial surrogacy is legal in India, where a surrogate woman is compensated for carrying a child for another. The surrogacy centers are rapidly increasing in India, and there is no specific law which will regulate and control these surrogacy agencies and assisted reproductive technologies. The issues arise out of cross broader surrogacy has also become an international problem. In most of the foreign countries, surrogacy law is still insufficiently settled. There are some of the countries where surrogacy is banned such as China, France, Italy, Canada, Australia, Germany and USA banned

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40 Ethical Problems Surrounding surrogate Motherhood, available at <http://yale.edu/ynhti/curriculum/units/2000/7/00.07.05.x.html>

the provisions of the surrogate mothers. Hence, it becomes necessary to study the laws of surrogacy prevailing in various countries. However, the Indian Council of Medical Research (ICMR) had given guidelines in 2005 but those are not strictly adhered by assisted reproductive clinics.

The Indian Council of Medical Research (ICMR) has prepared the draft of, ‘The Assisted Reproductive Technologies (Regulation) Bill 2008’, but it suffered from many defects. Thereafter, on 5<sup>th</sup> August 2009 the Law Commission of India in its report No. 228<sup>th</sup> suggested the need for legislation to regulate assisted reproductive technology clinics as well as the rights and obligations of the parties to a surrogacy. After that, the drafts of ‘The Assisted Reproductive Technologies (Regulation) Bills – 2010 and 2014’ were prepared and published by the Government of India. However, all the drafts of the ART Bills, 2008, 2010, 2014 and the new Surrogacy (Regulation) Bill, 2016 are criticized from several ways. The Apex Court and the High Courts of India has finding the difficulties in deciding the matters of surrogacy due to lack of legislation. There is no legislation or precedent on surrogacy in this country.

The private Bills named *The Surrogacy (Regulation) Bill, 2014*, had by Dr. Kirit Premjibhai Solanki, Member of Parliament from Gujarat. *The Maharashtra Assisted Reproductive Technology (Regulation) Bill, 2011* were prepared due to the initiative of the Devendra Fadanvis. However, both the private Bills failed to become the law.

The government of India has, has issued a notification on 4<sup>th</sup> November, 2015 which has banned the commercial surrogacy and also prohibited all foreign couples for commissioning surrogacy in India.

Recently, *on 21<sup>st</sup> November, 2016 the Surrogacy (Regulation) Bill, 2016* has introduced in the House of Lok Sabha of the Parliament. The Bill, 2016 has banned the commercial surrogacy and legalized altruistic surrogacy, which is restricted only to Indian heterosexual married couple only who have completed 5 years of their marriage.<sup>41</sup>

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<sup>41</sup> 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](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf#page=10&zoom=auto,-12,842), Visited on 21/11/2016 at 3.00 pm

It is also reflected that the government itself is in confusion about the provisions in the surrogacy law. Therefore, it becomes a very necessary to study the various issues and the rights of the parties of surrogacy arrangements.

## **1.2. OBJECTIVES OF THE STUDY**

As the researcher is academician, one of the main objects of this research study is to have sound intellectual grounding in the area of the role of social, ethical and moral issues in legalizing surrogacy in India. Following are the notable objects of research:-

- To study the importance and significance of the Assisted Reproductive Technology, in the modern era.
- To understand the working of the practice of surrogacy in India and suggest a better mechanism for India.
- To study the ART Bill 2008, 2010, 2014 and the recent Surrogacy (Regulation) Bill, 2016 for regulation and supervision of the assisted reproductive technologies, and surrogacy and hurdles this came in the way of enacting it.
- To study the working of the commissioning of the surrogacy along with government notifications.
- To study the Social, Legal, Moral and Ethical issues surrounding the surrogacy and to find out whether it is a boon or a bane.
- To study the various international human rights laws for protection of the rights of the parties of the surrogacy and the surrogate child.
- To provide different remedies which can supplement and not supplant to the remedy by way of surrogacy.
- To analyze and compare the mechanisms adopted in various countries and to identify the best experiences and make a mold which would be most suitable for Indian economical, socio-cultural, and politico-legal system.
- To find out the consequences and effects of surrogacy as a growing role in India.

- To describe the role of the Legislature, Judiciary, Administrative bodies, Medical Science, etc., with reference to surrogacy institutions in India which are dealing with framing, interpreting, implementing or notion of surrogacy policy.

To achieve the above objectives, the researcher has confined the scope of his research to the legal aspects of the surrogacy along with the social and ethical issues attached to it.

### **1.3. HYPOTHESIS OF RESEARCH**

- 1) Surrogacy is a problem in the present social, legal and commercial set up in India.
- 2) Surrogacy is low cost and the legal environment favourable for the commissioning parents.
- 3) Surrogacy is affecting reproductive rights of women in general and health rights, in particular directly or indirectly.
- 4) There is ominous need of comprehensive legislation for regulation and control of surrogacy in India. Presently in India no statutory law existing on the surrogacy arrangement. The ICMR guidelines 2005 are not sufficient to address the problems arising out of surrogacy. By way of this hypothesis the researcher wants to find out whether special law is needed for proper regulation and supervision of the surrogacy arrangement in India? Or Whether the Surrogacy (Regulation) Bill – 2016 is required to be reviewed?
- 5) The Hon'ble Apex Court of India has failed to fill the gap existing in the Indian legislative policy on surrogacy. Yet, the Supreme Court of India has not provided any guideline for regulating the surrogacy Clinics and for protecting the rights of parties to surrogacy arrangement and the imposition of duties on them. The researcher wants to find out that whether the Supreme Court will succeed in filling the gap prevailing in the Indian legislative policy on surrogacy?

- 6) There are no internationally recognized laws for surrogacy, so many parents and children can be left vulnerable or even Stateless, and hence it is a violation of human rights.

#### **1.4. RESEARCH METHODOLOGY OF THE STUDY**

The methodology adopted for the purpose of this research study was mainly doctrinal approach with the qualitative and quantitative research. The researcher has gathered the information from various books, journals, research papers, research reports. In order to understand the jurisprudence of surrogacy throughout the world in comparison with position in India, the research work primarily reviewed and analyzed the related literature consisting of reports and publications of various organizations, Surrogate Centers, Social Centers, research institutes, Firms etc., working in the area of Surrogacy. Recent position was being studied with the use of the internet, journals, reports, booklets, newsletters, photographs, films and newspaper clippings, etc. Hence, the literature review was the main method of data collection. The study focused on various Human Rights Reports, U.N. Conventions and other national and international statutes dealing with surrogacy and related aspects. The relevant data was gathered from various websites, e-newspapers, e-journals, foreign books, periodicals, reports of NGO's and the opinions of doctors, surrogate mothers, commissioning couples on T. V programs, or published newspapers, etc. The researcher had collected some reported and pending cases in the various Courts of India and the foreign judgments.

Based on the qualitative data gathered from literature review and different thymes relevant to the research was studied and analyzed and conclusions drawn with workable suggestions and recommendations. The study mainly resorted to the use of secondary sources of literature and adhered to historical and an analytical method of research. In short, the research was doctrinal in nature.

#### **1.5. SCOPE OF THE STUDY**

The finding of the research study will help to identify the problems faced by the community in the present and future because of the issues of the surrogacy. If the suggestions and recommendations are taken by the government positively, we can

expect of the proper legislation for regulation and supervision of the practice of surrogacy in India. The arrangement of surrogacy is achieved through scientific research and reproductive technology in the recent years. It is being practiced without the being proper law and legislation, consequently the interests of agencies are exploiting women by making her a machine for a creation of children for the childless couple and earning money making it as a trade or business, The micro level study of the subject is purely restricted to the “*Social, Ethical Issues for Legalizing Surrogacy in India*”. Whereas, when the study is taken at the macro level, the scope is essentially extended to the allies topics around which the surrogate women and surrogate children are revolving in the present set of the society.

The scope of the study of this topic is purely taken up on a micro level, but somewhat, macro level study is also made because it is important to evaluate the impact the social, ethical, moral and legal issues from the perspective of the Indian society. In the present setup derived purposeful result for framing up required law on legislation on the subject.

The scope of this study is also equally significant to educate the society for the childless couple and single persons, homosexual couple’s reproductive rights and the remedies available to have their own biological children. In the event of infertility either in wife or in husband as well as too educates such society on their available legal rights. Thus, the study of this subject is not only purposeful for the law, but also in social, moral, ethical, legal issues, medical and psychological issues. Therefore, the scope of this study may be turned as Socio-legal research. Future research may be taken up through the various branches of social sciences.

## **1.6. LIMITATION OF THE STUDY**

The study of the several issues of the surrogacy is a cumbersome subject matter. Because of the absence of the proper codified surrogacy law, the practice of surrogacy has become very complex as it involves various issues such as legal, social, ethical, medical, commercial and psychological issues. Therefore, it also requires the interdisciplinary, multidisciplinary research.

However, the researcher has limited the study to the selected topic of the social, ethical and legal issues in the surrogacy arrangement along with the study of the Constitutional and judicial approach towards it.

### **1.7. REVIEW OF LITERATURE:**

The researcher has collected the colossal volumes of literature and studied the various surrogacy laws, Acts of the different countries like US, UK, Australia, European Countries, Russia, South Africa, Israel, China, Japan and Thailand, including the several drafts of Surrogacy laws, rules, regulations, Guidelines and notifications of the India. The researcher has studied the articles of various authors from the Journals, e-journals, and newspapers. In addition to this, the researcher has gathered the information from the published research papers, research reports of the several Non-Governmental organizations, social centers, research institutes and law firms through the internet. The researcher also scrutinized the numerous international conventions, regional treaties, protocols of various countries in respect of surrogacy and reproductive rights. Besides this, the researcher gone through the various case laws developed by the Indian and foreign Judiciary.

There are a number of foreign and Indian books published on the surrogate Motherhood, Surrogacy issues such as medico-legal, social and ethical, economical and its related topics.

The book of *“Surrogacy Medico- legal Issues”* written by an advocate Gehna Vaishnavi and a doctor Navneet Tatkhar, contains the judicial pronouncements of eminent jurists around the globe in relation to surrogacy and portrays the new definition as to what now constitutes a ‘family’. The law as studied in the book safeguards all aspects of surrogacy and helps to make a right decision. The book includes foreign judgments and Indian judicial precedents which have set benchmarks as to how to deal with this issue. A worldwide perspective of all such laws as regards, this issue concerning each and every aspect dealing with surrogacy has been incorporated in the book. The book also highlights the pain of families struggling to have children without being bothered about the consequences. It will also be

informative for the development of statutes in India. It also states the rise of Indian economy due to surrogacy cannot be hidden. India provides best medical facilities and expert medical faculty in much cheaper rates as compared to USA. In *Amrita Pande's book on "Wombs in Labor: Transnational Surrogacy in India"*, is based on fieldwork conducted between 2006 and 2011. The research has included the interviews with 52 surrogates, their husbands and in-laws, 12 intending parents, three doctors, three surrogacy brokers, three hostels matrons, and servile nurses. The book provides the analysis of existing debates on assisted reproductive technology. It deals with the contradictory history of the rise and spread of surrogacy in India. It means the Indian state is aggressively anti-natalist, and despite of the ostensible change in population policies over time, the sterilization of women, especially young, lower-class women, remains the mainstay of these policies. The book states the involvement and awareness of the surrogate about the surrogacy processes, the contract, and payment, as well as their experience of surrogacy before the actual delivery. It reflects that a perfect commercial surrogate is not found ready-made, but is actively produced in fertility clinics and surrogacy hostels. Surrogacy is remarkable as a form of labor in the way it requires the laborer to be both a mother and worker. One of the most unusual aspects of surrogacy as labor is its extreme corporality: the resources, the skills, and the ultimate product are derived primarily from the body of the laborer. The body is central, and hence the body is monitored, disciplined, and controlled. In the Concluding section, the book has revealed many paradoxes of the surrogacy. In order to consider about the future policy options, it evaluates the paradoxical nature of surrogacy in general as well as concerns specific to the form that commercial surrogacy takes in India. The book discussed the two possible choices of surrogacy: an outright ban (national, transnational) on surrogacy or a regulatory framework. Pande suggested the former is not just unfeasible but also undesirable in the Indian context. Instead of a ban, she advocated for a better understanding of this complex labor market and subsequently its transformation through policies based on the real lived experiences of the surrogates. Finally, it is said that a global issue like transnational surrogacy cannot be dealt with nationally and regulations cannot preclude international awareness and dialogue.

The book of *“Outsourcing the Womb”* given by ‘France Winddance Twine,’ has provided the critical examination of assisted reproductive technologies (ART and the gestational surrogacy industry in a global market. This book provides a comparative analysis of the use of assisted reproductive technologies in Egypt, India, Israel, and the United States. By providing a comparative analysis of this industry across several national contexts the book disentangles the roles that race, religion, class inequality, religious law, and global capitalism play in the surrogacy market. This book draws on case studies from Egypt, India, Israel, and the United States to examine the ways that race, class, gender, religion, nationality, and legal regimes structure the experience of contract pregnancy. A comparative analysis of this industry in both developing nations such as India as well as the United States and Israel provides a more compelling, critical and complex view of a form of women’s labor that is being outsourced and constitutes a growing segment of the medical tourism industry.

The researcher has studied the book on *“Surrogacy in India a Law in the Making”* of the authors of Adv. Anil Malhotra and Ranjit Malhotra. This book discusses the complicated Procedures of adoption in India. The statutory Hindu Laws do not permit adoption to non-Hindus. However, the wombs on rent are easily available. The commercial surrogacy is developed in such way that which resulted into approximately 200,000 ART Clinics across the country are offering artificial insemination, in-vitro fertilization and surrogacy. In this book the researcher has gathered the information about the Assisted Reproductive Technology Bill, 2010. The medical Visa Regulations, 2012 prohibited the foreign homosexuals for commissioning surrogacy in India and allowed only foreign married heterosexual couples only on medical Visa. The book provides the provision of the application of section 9 of the Civil Procedure Code, 1908 for enforcement of the surrogacy agreement in the absence of the surrogacy law.

The author ‘Field Maratha’ in the book of *“Surrogate Motherhood- the Legal and Human Issues”* sorted out the legal issues involved in the surrogate motherhood. In most states it still is not decided what rules will apply to surrogacy. It is stated that the legal solution to the surrogacy is not enough, but the Problem rest on value judgment. It is also said that the task of the public generally, and not just of Lawyers, politicians, or courts, to resolve those issues of value. It states about the spectrum of positions that

might be adapted to deal with surrogacy and the reasoning that might support them. The contracts made before birth should be unenforceable in the context of surrogate motherhood, just as they already are in the context of adoption. Moreover, a mother who withdraws from a surrogacy contract should be entitled to retain custody of her child without having to prove to a court that she would be a better parent than the biological father.

## **1.8. CHAPTERIZATION AND SCHEME OF PRESENTATION**

The Research study of this thesis work has been divided into six chapters, including the introduction, the gist of this chapter is appended below to have a bird's eye view of the total work.

### **Chapter –II**

The researcher in the chapter of “*Conceptualization and the Evolution Of Surrogacy*” has focused on various factors such as historical background of surrogacy in India and abroad, the meaning and definitions of surrogacy, surrogate mother, types of surrogacy, reasons for surrogacy, who is having right to become a surrogate mother, who is having right to take benefit of the service of surrogacy in India and the procedure of surrogacy and its health risk and the arguments for and against the surrogacy. The researcher has also studied the success rate and cost of surrogacy. In this chapter the researcher has also studied the meaning of assisted reproductive technologies and its available various techniques, as the surrogacy is also the one form of assisted reproductive technology. While doing the study of assisted reproductive technology the researcher has also gone through the researcher has also focused on the various health risk factors after the use of ART procedure and IVF surrogacy and lastly the chapter closes with a conclusion.

### **Chapter-III**

In the chapter of “*Dimensions and Prospective of Legislation on Surrogacy*” the researcher has studied the various regulations, notifications, laws, guidelines, such as

ICMR Guidelines 2005 and the draft of the Assisted Reproductive Technology Bills, 2008, 2010, and 2014 and its criticism.

The researcher has also focused on the *New Indian Visa Regulations, 2012*, the Law of Commission of India Report of the 228<sup>th</sup> on surrogacy as well as the notifications, 2015 of the Ministry of Health and Family Welfare, Government of India. The recent Surrogacy (Regulation) Bill, 2016 deals with silent features and criticism on it, the international scenario of surrogacy laws and finally conclusion of this chapter. Till today, no law on the surrogacy has been passed by the Parliament for the regulation of the surrogacy industry.

#### **Chapter-IV**

In Chapter-IV, titled as “*Social, Ethical and Legal Issues in Surrogacy Arrangement*,” the researcher finds that the surrogacy arrangement has centrally four issues such as the right to procreate, commercialization of surrogacy, exploitation of the surrogate women and the status of the surrogate children.

In this chapter the researcher has mainly concentrated on the social, ethical and legal issues in surrogacy. The researcher has commenced the study of this chapter with relationship amongst surrogacy, law and morality.

Thereafter, the researcher has in detailed critically analyzed the various issues of exploitation of surrogate women. It has also discussed the exploitation of surrogate women in payment of compensation, abortion. The researcher has studied the concept of informed consent of surrogate women status of abortion, sex selection test. The researcher has studied the most vital part of the entire research that the whether the surrogacy contract is immoral, unethical contracts as it commodification of women, sale of the child, therefore against the public policy. It has also discussed the whether the surrogacy amounts to prostitution or adultery, human trafficking and forced slavery.

Apart from this the researcher has discussed, whether surrogacy arrangement will destroy the family structure of India. It has studied the various legal issues such as who is having legal parental rights of the child and who is real and legal mother of the

surrogate of the child. In this chapter also discussed the issues arising out of cross border such as citizenship, nationality, legal parentage, custody, abandonment, and the legitimacy of the child. The researcher has made the study of the contractual aspect of the surrogacy the agreement, i.e. whether the surrogacy agreement is against the public policy? And finally the chapter ends with the overall conclusion on it.

## **Chapter- V**

Researcher under the chapter of “*International Conventions, Constitution of India and Judiciary towards Surrogacy*” has been discussed 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 various foreign and Indian case laws regarding the development of surrogacy laws.

## **Chapter VI**

The final and concluding Chapter six is the “*Conclusion and Suggestions.*” The researcher has made reasonable attempts to emphasize that the Society needs the reproductive technology. The right to procreate is the fundamental, natural human right of every person. It is guaranteed by the several international human rights instruments as well as the Article 21 right to life and personal liberty of the Indian Constitution. Every person has the fundamental right to marry and create a family.

Hence, it is very important to understand, the need of surrogacy from the Indian perspective.

Therefore, the legalization of surrogacy is the necessary in order to protect the reproductive liberty of the people and for giving social justice to them.