

**MERIT AND MONEY: - THE SITUATED ETHICS OF TRANSNATIONAL  
COMMERCIAL SURROGACY**

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**Abstract:**

*The desire to have a child have been there since the ancient times and ancient India was no exception to it. That is why we find different kinds of son ships prevailing in the classical Hindu law and the laws pertaining to adoption so developed. However, with the advancement of time and technology, the desire to have a child transformed into a child biologically connected to the intended parents. This all was possible because of the artificial reproduction techniques coming to the fore and surrogacy becoming a go to technique for such intending couples and even single persons. The concept and practice of surrogacy flourished like anything in India and soon it got the epitaph of world capital of surrogacy. The lack of specified laws and easy availability of the surrogate mothers made it a favourite destination even for the foreign couples. The flourishing market came to a standstill with certain restrictions being imposed on the practice of surrogacy in India. In the instant academic venture an effort has been made to understand that how these changes have affected the booming industry of surrogacy, the rationale behind them and the ethical and legal concerns associated with them.*

*Keywords: ART, surrogacy, commercial surrogacy, trans-national surrogacy.*

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## **Introduction:**

Surrogacy is not a very new term for the Indian society; it's been followed from the ancient times and is almost familiar within every section of the society all around the world. According to the dictionary language surrogacy basically means, an arrangement by which a woman gives birth to a baby on behalf of a woman who is physically unable to have babies herself, and then gives the baby to her<sup>1</sup>. Surrogacy is also appropriate for the person who has an impossible condition or there is a very much danger situation for mother to get pregnant<sup>2</sup>. In general, there are four major types of surrogacy that is, Natural surrogacy, Gestational surrogacy, commercial surrogacy and altruistic surrogacy.

- **Natural / partial surrogacy**

In this concept of surrogacy there exist a genetic relation with the embryo, the person who donates the sperm for the child becomes the commissioning father. The women can get pregnant through the ways like sexual intercourse, intrauterine insemination (IUI) or In Vitro Fertilisation (IVF)<sup>3</sup>.

- **Gestational surrogacy**

In the case of gestational surrogacy or full surrogacy, there is a carrier of the embryo who gives her womb to carry the embryo and is not genetically related to the embryo. This type of pregnancy is conceived by the implantation of the fertilized embryo inside the surrogate's uterus. Here in this case the embryo is fertilized by the commissioning parents or by some other anonymous parents.<sup>4</sup>

- **Commercial surrogacy**

In this concept of surrogacy, the surrogate gets paid to carry the fertilized embryo in her womb. In the lay man's language, it is known as renting of the womb. Commercial surrogacy refers to

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<sup>1</sup> Collins dictionary/ surrogacy

<sup>2</sup> Human Fertilisation Embryology Authority. (2014). Surrogacy., What is surrogacy?., Is surrogacy for me?. Retrieved on January 01, 2015 at 21:46 from <http://www.hfea.gov.uk/fertility-treatment-optionssurrogacy.html#1>

<sup>3</sup> Nigam, A. (2013). Surrogacy: An Indian Perspective. Retrieved on January 04, 2015 at 13:36 from <http://www.tcoq.in/articles/1/1/surrogacy-an-indian-perspective.html>

<sup>4</sup> Ibid.

any surrogacy arrangement in which the surrogate mother is compensated for her services beyond reimbursement of medical expenses.<sup>5</sup>

- **Altruistic surrogacy**

In Altruistic Surrogacy, no financial benefits are given to surrogate. There are only medical expenses given in monetary terms as compensation by commissioning parents<sup>6</sup>. This concept is very different from the concept of commercial surrogacy, here the surrogate does not get any monetary benefit for carrying the fertilized embryo inside her. In most altruistic surrogacy agreements, the surrogate is a close relation to the intended parents (family member/close friend).<sup>7</sup>

Around 2002 India allowed and adopted the concept of commercial surrogacy but the legislature didn't give its assent over the concept of commercial surrogacy , rejecting the plea to give it a legal status further in 2008 the supreme court gave its assent for the adaptation of the concept in reference to the case of Baby Manji Yamada vs. Union of India (UOI) and Another<sup>8</sup>.

In reference to the present situation, there are number of countries around the world which has given a legal status to the concept of commercial surrogacy but at the same time there are some countries around the world which consider commercial surrogacy against their morals and ethics as well as consider it to be against the violation of the public laws.

### **Transnational Surrogacy: Laws and Operation**

It moreover included the birth of family and connections that included cross-cultural exchanges and clashes between shapes of propagation and birthing. Transnational Commercial Surrogacy and the (Un)Making of Kinfolk in India locks in with the thought of rising shapes of families and implications of connection in a transnational world

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<sup>5</sup> <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-commercial-surrogacy/>

<sup>6</sup> Ibid.

<sup>7</sup> <https://info.worldwidesurrogacy.org/blog/commercial-surrogacy-vs.-altruistic-surrogacy>

<sup>8</sup> Baby Manji Yamada vs. Union of India & Another. (2008) 13 SCC 518. Mukherjee,S. (2011). Legal and Ethical Issues of Commercial Surrogacy: An Overview. Indian Legal Aspects of Commercial Surrogacy. Retrieved on January 16, 2015 at 14:41 from

[http://www.academia.edu/1955503/LEGAL\\_AND\\_ETHICAL\\_ISSUES\\_OF\\_COMMERCIAL\\_SURROGACY\\_IN\\_INDIA\\_AN\\_OVERVIEW](http://www.academia.edu/1955503/LEGAL_AND_ETHICAL_ISSUES_OF_COMMERCIAL_SURROGACY_IN_INDIA_AN_OVERVIEW), <http://indiankanoon.org/doc/854968/> and

[http://jils.ac.in/wpcontent/uploads/2011/12/5\\_Jwala-Thapa\\_new-style\\_completed1.pdf](http://jils.ac.in/wpcontent/uploads/2011/12/5_Jwala-Thapa_new-style_completed1.pdf)

through ethnographic investigate, connection, sexual orientation thinks about science and innovation considers.

This draws a conclusion upon the concept of transnational commercial surrogacy in reference with the global politics of reproduction and the question raised in the light of ethics, morality in the view of reproductive rights of women.

Surrogacy was there since 2002 in India but never did it was given the legal status, In India, history was created by allowing the commercial surrogacy in the year 2002.

Surrogacy can be also traced back to the epics like Mahabharata, where Rohini bared the child for Devaki and Vasudev<sup>9</sup>, but in 2018 parliament passed a bill in regards to the matter of surrogacy , where in the parliament suggested for the ban of transnational commercial surrogacy and opening up to the concept of domestic altruistic surrogacy. This followed up through a controversial trajectory statements and lead to great debating and discussing forums. The very notion, which gave consent to the foreign couples who visited India with the purpose of hiring surrogates was rejected with this bill. This bill was mend with the purpose to prevent the exploitation of women and their reproductive rights.

There are certain guidelines adhering to the 228<sup>th</sup> law commission report of India where in few points were made referring to the surrogacy bill that is-

- It debarred the foreign couples from hiring the surrogate mothers from the country.
- Gay, lesbian and transgender couples were also barred from the adoption of this process
- Provisions were suggested there would be no such violation of rights with the life of donor as well as surrogate mother.
- Sex selective surrogacy concept was prohibited in the recommendations.
- Abortion cases should be only governed by Medical Termination of Pregnancy Act, 1971.<sup>10</sup>

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<sup>9</sup> Nigam, A. (2013). Surrogacy: An Indian Perspective. Retrieved on January 04, 2015 at 13:36 from <http://www.tcog.in/articles/1/1/surrogacy-an-indian-perspective.html>

<sup>10</sup> Law Commission of India. (2009). Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy. 228th Report. Ministry of Law. Retrieved on January 14, 2015 at 23:31 from <http://surrogacylawsindia.com/admin/userfiles/file/report228.pdf>

European nations, get to to fruitlessness administrations are decreased by fertility rates. This has brought about into going by of the couples in a few other countries where there are negligible rates for the surrogacy. Each nation has the partitioned laws on the surrogacy, numerous permit it and many taboo it. Within the nations like Germany, Sweden, France and U.K. etc. surrogacy is prohibited. There's a quick development in international surrogacy, but there are no uniform rules or controls which ought to be followed by all the nations with respect to this matter. A few nations too request that DNA of the surrogate child should at least match with one of the commissioning guardians. In U.S.A., there are different legal customs which got to be performed within the cases of surrogacy. This makes numerous issues and stretch to the commissioning guardians since of the time taking conventions.

In India, Commercial Surrogacy is being sanctioned since 2002 and it is being an emerging nation in this innovation. The hones of surrogacy are moderately cheaper than the other nations. So, the individuals from remote nations are attacking here to have the child by this handle. This has too made the clinical hones in competition and due to it the rates are expanding by the fast development in these hones. There's a boycott on surrogacy where the commissioning parent/s are cheerful couples, single man, single lady, non-hitched couples and all the couples from the nations where the surrogacy is prohibited/illegal.

### **Research Objectives:**

1. To understand the concept of commercial surrogacy.
2. To analyze the legal status of commercial surrogacy in India.
3. To determine the issues prevailing with the existing laws.

### **Research Questions:**

1. Whether the legislature of commercial surrogacy violates the principles of other natural laws?
2. Why is transnational commercial surrogacy banned in India?
3. Whether the concept governing in case of implementing the laws is still stuck with the question of merit, ethics and money?

### **Surrogacy a Poem:**

“Our friendship started differently, than most friendships I've had. We had to search each other out, because of something sad. A precious child to fill your hearts, Is what you're longing for. Infertility has made it hard, to open up that door. And so a search began for you, to find a helping heart. So similar to my own search, not knowing where to start. For me, the search is special, it requires such great care. A couple to have a child... the fruit my search must bear. Now we've found each other, so much more real it seems. Through faith and hope and honesty, we're moving toward your dream. But the dream we have, it is the same, a dream that's filled with firsts. First smiles, first laughs, first steps, first words. All starting with a birth. Often times I find myself wondering what it's like, to have to trust a stranger with such a precious life. And though I can't imagine, all that you've been through, I hope you know I'll do my best to bring a child to you. Surrogacy is something not everyone can do. But I've been so blessed in my life, I'm drawn to helping you. Some people call us Angels, us surro-moms to be. But I don't feel angelic, I just feel like me. Our journey is just starting, and no one knows the end. I pray it brings to you a child, and brings to me a friend”.<sup>11</sup>

### **Surrogacy Laws and Operation:**

There has been lots of debates and discussion going on with regards to the issues of the legitimacy of surrogacy in various countries. It is rather a tumultuous point of law as there are only a handful of nations recognizing it and there is also a lack of uniformity in the principles being followed in these nations with respect to the phenomenon of surrogate birth.<sup>12</sup> The United Kingdom was the first country to enact the legislation, It passed the Surrogacy Arrangements Act in 1985 whose main aim was to abolish commercial surrogacy<sup>13</sup>. The relevant sections and provisions of Human Fertilization and Embryology Act, 2000 states that any commissioning parents is legally considered to be the legal parents provided if the commissioning parents are genetically related to each other<sup>14</sup>. The very first instance of surrogacy was captured in 1986 in

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<sup>11</sup> Lain. (2009). A Dream (Surrogacy Poem). Retrieved on March 10, 2020 at 14:36 from <http://www.theirbunmyoven.com/2009/02/poem.html>

<sup>12</sup> Reetu and Basabdupta, “Surrogate Birth”, AIR 2009 Jour 108.

<sup>13</sup> Peter de Cruz, *Nutshells: Medical Law* (2nd Edn., Sweet and Maxwell Publications, London 2005) 168.

<sup>14</sup> Julie McCandless\* and Sally Sheldon , 2010. ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’. Modern Law Review 73(2) 175-207

the case of Baby M , In re<sup>15</sup> where the supreme court of New Jersey defined the custody of the child and answered the question raised upon the motherhood stating that the surrogate mother who conceived the child via artificial insemination has visitation right only and the natural father was awarded custody of Baby M but the rights of adopted mother was denied.<sup>16</sup> Further this decision of the court acted as a guideline for other cases and prohibited the process of surrogacy in the state unless and until any lady voluntarily willingly accepts for the process of surrogacy without any payment. As per the laws of Florida it has been explicitly mentioned that both gestation and traditional form of surrogacy agreements are allowed under its ambit and it is no more restricted to the married heterosexual couples only.<sup>17</sup> Virginia and Washington allow uncompensated surrogacy arrangements but deems illegal and unenforceable any agreement involving any payment to the surrogate mother other than medical and legal expenses.<sup>18</sup> California is generally accepting of surrogacy agreements, particularly when the couple seeking surrogacy has contributed some of the genetic material. Therefore, California's policy on surrogacy is based on genetics.<sup>19</sup>

The Australian Capital Territory has the most liberal surrogacy laws among all Australian States.<sup>20</sup> The Canadian law prohibits for the commercial surrogacy as per given by the 2004 Assisted Human Reproduction Act though it permits for the Altruistic surrogacy . In the province of Quebec, *any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.*<sup>21</sup> In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements.<sup>22</sup>

### **Commercial Surrogacy in India:**

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<sup>15</sup> 537 A 2d 1227 : 109 NJ 396 (New Jersey, 2-3-1988)

<sup>16</sup> <<http://www.answers.com/surrogate-mother>> last accessed 10/03/2020

<sup>17</sup> <https://surrogate.com/surrogacy-by-state/florida-surrogacy/florida-surrogacy-laws/> last accessed 10/03/2020

<sup>18</sup> Uniform Parentage Act, 2000, Section 803.

<sup>19</sup> Hari Dev Kohli, *Law and Illegitimate Child* (Anmol Publishers, New Delhi 2003) 55.

<sup>20</sup> Artificial Conception Amendment Act, 2000, Gazette on 28-9-2000.

<sup>21</sup> Civil Code of Québec, 1991, C. 64, Article 541.

<sup>22</sup> <<http://www.japantoday.com/jp/news/430424>> last accessed 10/03/2020

*“Childless Asian and British couples are rushing to Anand in Gujarat as the city famous for its thriving dairy industry is fast becoming a hub for outsourcing surrogacy.”<sup>23</sup> — Indian Express Report, 10-12-2007.*

*“The commissioning parents pay anything between Rs 40-45 lakhs for a surrogate baby, but these women get barely Rs 2-3 lakhs.”<sup>24</sup> — Ranjana Kumari, Director of CSR*

*“If this was really as bad as they (the Government) have made it out to be, then you wouldn’t find so many of us here. Some of us are here for the second time. The option of carrying a child inside me to give joy to another woman and improve my own financial situation has empowered me.”<sup>25</sup> — Manisha, aged 36, a surrogate expecting twins*

All of these statements highlights the situation how India evolved as a hub of commercial surrogacy, the second statement somehow tries to prove that due to the weak links in the regulatory framework and loopholes is the reason behind the exploitation of the surrogates in India, the surrogates are only paid somewhat around 5-10% of amount from the commissioning parents and the third statements shows a perceived reaction to that abuse as disproportionate. The death of Pramila Vaghela, a surrogate mother who died in an Ahmedabad hospital recently after delivering a surrogate baby generated little public attention.<sup>26</sup> Whereas just a few months ago, news reports celebrated the “blessing” and “miracle of science” that made the birth of Aamir Khan's baby possible.<sup>27</sup> India is fast becoming the surrogacy capital of the world; commercial surrogacy already having become a multi-million US dollar industry and

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<sup>23</sup> “Anand in Gujarat Surrogacy Hub for Childless Brits” Express India, 10-12-2007 [http://expressindia.indianexpress.com/karnatakapol08/story\\_page.php?id=248727](http://expressindia.indianexpress.com/karnatakapol08/story_page.php?id=248727) last accessed 10/03/2020.

<sup>24</sup> “As India emerges as a hub for surrogacy, surrogate mothers are underpaid and uncared for” DNA, 17-7-2013 <http://www.dnaindia.com/india/report-as-india-emerges-as-a-hub-for-surrogacy-surrogate-mothers-are-underpaid-and-uncared-for-1862252> last accessed 10/03/2020.

<sup>25</sup> “Aditi Raja, Surrogacy (Regulation) Bill, 2016: Money, jobs frame another side of debate” Indian Express <http://indianexpress.com/article/india/india-news-india/surrogacy-regulation-bill-2016-money-jobs-frame-another-side-of-debate/> last accessed 10/03/2020

<sup>26</sup> R. Smitha, *Pramila's Family claims yet to get contract money*, DNA India, 26-5-2012, <http://newindianexpress.com/editorials/Article542128.ece>.

<sup>27</sup> Shara Ashraf & Navdeep Kaur Marwah, Hindustan Times, 6-12-2011, <http://www.hindustantimes.com/Entertainment/Bollywood/Aamir-Khan-flooded-with-queries-on-IVF-surrogacy/Article1-778618.aspx>.

estimated to generate USD 2.3 billion per year by 2012.<sup>28</sup> India was given the tag of the market for commercial surrogacy or fertility market for the tourist who wanted to hire any surrogate which estimated somewhere to be around Rs. 25000 in today's date. In the case of Baby Manji Yamada<sup>29</sup> the supreme court opined that “*commercial surrogacy*” reaching “*industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms like wombs for rent, outsourced pregnancies or baby farms*”<sup>30</sup>. Surrogacy in India is neither illegitimate nor prohibitory as no laws in India absolutely discards it nor permits it. However, the modern laws usher upon the new concept of “rent a womb law” or commercial surrogacy law as legalized in India in 2002. Couples from all over the world flock this place in the hope of realizing their dreams of parenthood through an easily affordable surrogate mother.<sup>31</sup> Proliferation of commercial surrogacy arrangements is fueled by lack of legal framework on the subject, abundant supply of cheap surrogate services<sup>32</sup>. In India, a typical surrogacy process costs about USD 25-30,000 which is around one third of that in developed countries.<sup>33</sup> In 2005, the Indian Council of Medical Research (ICMR) issued *guidelines* to check the use of Assisted Reproductive Technology (ART)<sup>34</sup>. But these guidelines are silent on many major issues and therefore, “exploitation, extortion and ethical abuses in surrogacy trafficking are rampant, go undeterred and surrogate mothers are misused with impunity”<sup>35</sup>. In the case of *Jan Balaz v. Anand Municipality*<sup>36</sup> the question before the court of law was whether a child born in India from a surrogate mother would be recognized as an Indian national where in the gestational mother is an Indian and the biological father is a foreign nationalist in such a case will the child get the citizenship of India. The court in this case due to the absence of legislative principles governing the cases of surrogacy concluded that neither the genetic mother nor the wife of the biological father would be considered as a natural mother. This decision threw a new angle to the

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<sup>28</sup> Jason Burke, *India's surrogate mothers face new rules to restrict "pot of gold"*. The Guardian, 30-7-2010, available at <http://www.guardian.co.uk/world/2010/jul30/india-surrogate-mothers-law>.

<sup>29</sup> *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518, 523, para 13.

<sup>30</sup> Ibid.

<sup>31</sup> Sreeja Jaiswal, *Commercial Surrogacy in India: Assessment of Existing Legal Scenario from the Perspective of Women's Autonomy and Reproductive Rights*, 16 Gender. Tech. & Dev. 1, 2 (2012).

<sup>32</sup> Sreeja Jaiswal, *Commercial Surrogacy in India: Assessment of Existing Legal Scenario from the Perspective of Women's Autonomy and Reproductive Rights*, 16 Gender. Tech. & Dev. at 2.

<sup>33</sup> Law Commission of India, *Report No. 228. Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to A Surrogacy* (2009).

<sup>34</sup> National Guidelines for Accrediation, Supervision and Regulation of ART Clinics in India.

<sup>35</sup> Kshitij Bansal, “The Legality of Surrogacy, Legal News and Views” Vol. 25, No. 3, March 2011.

<sup>36</sup> *Jan Balaz v. Anand Municipality* 2009 SCC OnLine Guj 10446 : AIR 2010 Guj 21

Indian legislation making the terms of surrogacy more difficult to understand, court had completely ignored the terms of a contractual relationship between the commissioning parents and the surrogate mother, stressing on the fact that the child was delivered by the surrogate and still would have the rights as same as a biological child with regards to inheritance and successions. Further the decision was appealed before the Apex court and it was ordered to frame the issues referring to the matter of concern that is legality of commercial surrogacy which needs to pass through the test of Article 21 of the Indian constitution upon the grounds of violation. (a) the dignity of Indian womanhood, (b) commoditization of human life due to importation of human embryo, *secondly*, the Constitution under Article 23 for trafficking in human beings and whether renting of womb was involved; *thirdly* the Indian Contract Act under Section 23 prohibiting immoral and anti-public policy acts, and *fourthly* violation of human rights of the child as the same would face psychological and emotional problems. Besides the Court posed issues regarding determination of the motherhood amongst genetic, gestational and commissioning parents<sup>37</sup>. However, it is *important to juxtapose* the same with right to privacy under Article 21 of the Constitution which was held by the Apex Court in *R. Rajagopal v. State of T.N.*<sup>38</sup> the court opined that it is necessary to respect the privacy of the surrogates relating to their marriage, motherhood, procreation , child rearing etc. However, whether reproductive choices of a person are part of right to life and personal liberty is still a matter that has not been adjudicated by the Apex Court. Furthermore, women in India have been earning healthy livelihood by gestating (many consider the same to be form of physical labour), which further complicates the analysis under the article, since right to livelihood is also considered to be a part of Article 21.<sup>39</sup>

Commercial surrogacy is not only an issue of money and merits, it also deals with ethics and morality. Yet, it's become a fundamental reality in the society. The ethical and moral problems aren't going to be resolved quickly, so it's important to consider how the legal framework should handle things like "share a womb." Unfortunately, the regulatory bill introduced by the policy makers suffers from lots of irregularities and loopholes and these irregularities were apparently seen in the drafted bill of Assisted Reproductive Technologies (Regulation) Bill, 2010 which opens up the gate for number of criticism.

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<sup>37</sup> *Union of India v. Jan Balaz*, Civil Appeal No. 8714 of 2010, order dated 14-10-2015 (SC)

<sup>38</sup> *R. Rajagopal v. State of T.N.* (1994) 6 SCC 632

<sup>39</sup> *Olga Tellis v. Bombay Municipal Corp.,* (1985) 3 SCC 545.

This has made the current form of the Bill insufficient to adequately protect the interests of surrogate mothers; however, a mechanism can be developed to minimize exploitative practices.

### **Transnational Commercial Surrogacy and Ethical Issues:**

Supporters of surrogacy arrangements, such as Richard Posner, premise their argument on the fact that it is an exercise in procreative choice, economic autonomy and a woman's freedom to contract.<sup>40</sup> This method of outsourcing pregnancy through a rented womb was a sensational as well as a controversial topic that pulled questions upon its legality as well as ethnicity. This trade's business volume is estimated to be around \$500 million and the numbers of cases of surrogacy are believed to be increasing at galloping rate in India.<sup>41</sup>

Further under the ART bill of 2020 the surrogacy agreements were legally considered to be surrogacy contracts, which was deemed to be recognized under the ambit of the Indian Contract Act, 1872 but on the other side it was also argued that such a contract is prohibited under the ambit of Indian Contract Act 1872 as the very nature of the contract was against public policy which includes public morality and conscience. However, section 23 of the Indian Contract Act explicitly states that: -

*What consideration and objects are lawful, and what not? —The consideration or object of an agreement is lawful, unless—The consideration or object of an agreement is lawful, unless—"it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.<sup>42</sup> In all of these cases the object and the consideration of the agreement is deemed to be unlawful and hence every agreement wherein the purpose / object or the considered is unlawful automatically the agreement becomes void.*

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<sup>40</sup> Richard Posner, *Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. Contemp. Health L. & Poly, 21, 24 (1989).

<sup>41</sup> <http://www.merineWS.com/catFull.jsp?articleID=136421> last accessed 10/03/2020

<sup>42</sup> Section 23 of the Indian Contract Act

In the honor of the section 23 of the Indian Contracts Act 1872 it has been argued by the people that the very purpose of commercial surrogacy is immoral as due to the reason of renting of the womb which raise questions upon “motherhood” as well as the involvement of giving up the material rights and the selling of babies for money and henceforth surrogacy must be banned.

But this area of matter remains a grey arena of matter and due to this reason every society, every country all around the world have a different thinking about it differ approach towards this concept and therefore have responded in a different way all around the world. Almost all the developing countries around the world have given a thumbs up to the idea of commercial surrogacy, such as countries like Argentina, South Africa have legalized commercial surrogacy in their countries but the matter of surrogacy differs from case by case, it is reviewed based upon the ethnic committee. Severing a woman's tie with a child by contract as in case of surrogate agreements dismisses bonds between the surrogate and child that can be created by pregnancy.<sup>43</sup>

When Child bearing or the act of pregnancy is modified and served through the process of commercial surrogacy motherhood necessarily tends to commoditization. Moreover, there are number of cases where there has been instances that the mother does not desires to do so but due the reason of money she forces herself to do so. This however concludes that treating human life like any other commodity and surrogacy contracts as contracts for the sale of goods, which is not desirable and morally as well as ethically also not acceptable.<sup>44</sup>

At the same time, it has been universally acknowledged that It is also universally accepted at the same time that morality varies from time to time, and from place to place. It's not moral, but it represents society's will and can therefore only be modified by society's will. There is no point in arguing for or against the moral codes of established cultures. Society is quite arbitrary in deciding its moral codes. Change should be attempted only through delicate moves and by consent.<sup>45</sup> Our very own law and morality obviously prohibits unnatural activities but morality must concern with people living together and promoting peace and harmony in their communities, societies and countries. Unlike most types of actions, however, a reason is required to breach these prohibitions so as not to behave immorally. Only when the cumulative

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<sup>43</sup> Babu Sarkar, Commercial Surrogacy: Is it Morally and Ethically Acceptable in India? (2011) PL December S-11

<sup>44</sup> Ibid.

<sup>45</sup> *The Sunday Statesman*, Kolkata, 5-7-2009, 6

direct and indirect results would be greater is it acceptable to breach moral rules. Public morality must therefore accept surrogacy because it offers endless barren mothers the opportunity to enjoy motherhood.

That's where Lord Patrick Devlin rightfully mentioned in his article 'Morals and the Criminal Law' that "*No act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption or exploitation ... It is not the duty of law to concern itself with immorality as such ... it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive and injurious*"<sup>46</sup>. With regards to this contention the move towards legalizing commercial surrogacy must be welcomed as the decision with respect to commercial surrogacy leads to no negativity and detrimental in a way but rather works for the upliftment for the society and anything that helps in the upliftment in the society and brings about a change in the society must not be covered under the shield of morality and the policies of ethnicity. However strong the moral indignation is not a valid basis for violating the fundamental rights of dignity and privacy of individuals. Constitutional morality in our culture will outweigh the public morality claim, even if it is the majority view. Though ethically and morally it is considered that commercial surrogacy must be banned but if we go through the pure facts and statistical analysis it will show that in a world plagued by abject poverty, how will the government body ensure that people don't consent to surrogacy just to eat two square meals a day? On the other hand when it comes to the question of legal recognition it is a controversial question that riggers women's right to make decision about their bodies as well as procreation as guaranteed under Article 21 of the Indian constitution So, it is better to give legality to this concept of surrogate contract because "prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational"<sup>47</sup>. So, in the end, such legalization would create opportunities for poor women to earn a better living.

### **Conclusion and Suggestive Model for Commercial Surrogacy:**

The Government's proposed model would cause further damage to the aspirations of countless couples apart from surrogate livelihoods. It would be very difficult for couples to find relatives,

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<sup>46</sup> R.M. Dworkin (Ed.), *The Philosophy of Law* (Oxford University Press) 68

<sup>47</sup> *The Hindu*, Kolkata, Monday, 10-8-2009, 13

especially with breaking down traditional family ties and the rise of nuclear families, to find someone willing to make such an undertaking. Therefore, a model (adopting some of practices followed in Israel and some from the Ukrainian law) suggested by scholar Victoria Guzman for US to adopt, seems to be suitable for India as well<sup>48</sup>. At this point of time it is very important to form a proper legitimate committee that would help in screening, reviewing and approving the terms and condition of a surrogate contract between the commission parents and the surrogate. The committee could oversee adequate legal representation from both sides, and ascertain that all potential issues that may crop up during the entire procedure.<sup>49</sup> This model would help in stopping the unwanted exploitations of the surrogates and fundamentally would bring about a change in the society pertaining to psychological and sociological change in the minds of the people that stresses upon the factor that such form of labor does not amount to engaging in some body selling activity.

However, following points should be taken into consideration while legislating a bill for surrogacy –

- The surrogacy agreement should mention the clause pertaining to the financial support provided to the surrogate mother.
- All of the surrogacy cases leading to the termination of pregnancy must be governed by the Medical Termination of Pregnancy Act, 1971.
- The terms as such legal guardian as well as the rights and duties of the legal guardians must be properly defined in the bill.
- To govern all such matters a special court or a bench of legal authorities must be appointed to deal with such matters.

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<sup>48</sup> Victoria R. Guzman, "A comparison of surrogacy laws of the US to other countries: Should there be a uniform Federal Law permitting commercial surrogacy" 38 Hous J Int'l L 619 at p. 645-49 (2016).

<sup>49</sup> Ibid.