



THE FACETS OF SURROGACY IN INDIA

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• INTRODUCTION

“Of all the rights of women, the greatest is to be a mother.”

Over the recent years surrogacy has become the best and most viable option for couples and persons who wish to be single parents. It seems like a win-win situation where the desperate and infertile parents get a child of their own bloodline and the surrogate mother who is in most cases poverty stricken, gets money in order to run her family.¹ India has been a favourite for couples all over the world opting for surrogacy due to its cheap medical tourism industry.

The surrogacy industry in India is based on exploitation of surrogate mothers in order to earn profits. Surrogate mothers are looked at as baby-making machines and proper sanitary and medical precautions are not taken to ensure their safety and welfare.² Various unethical practices are exercised by the medical industry, in order to produce as many off springs as possible. Thus, the fertility industry looks at surrogacy not as a remedial treatment but a profit-making sector of business. The poor

conditions of the surrogate industry in India are in need of huge reform. With the House passing the recent Surrogacy (Regulation) Bill, 2016, there has been a lot of debate about the impact of this Bill on the surrogacy industry.³ The question of the hour is whether the practice of surrogacy must be abolished in India?

• SURROGACY AND ITS TYPES

In the case of , K Kalaiselvi v.Chennai Port Trust⁴, surrogacy was defined as “the well known method of reproduction whereby the woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother or she may be a gestational carrier.”

A the medical expenses of the surrogate mother are taken care of by the intending parents and the surrogate mother also receives a remuneration by the intending parents.

There are three basic types of this procedure, namely:⁵

1. Straight/Traditional Surrogacy:

The egg of the surrogate mother is fertilized by the sperm of the intended father. In some cases, the egg of the

¹ Legal Desire Quarterly Journal Vol-1, Issue 1, October, 2013, Surrogacy a bane or boon,ISSN: 2347-35250.

² Ministry of Health and Family Welfare, Delhi Mumbai Surrogacy study Final Report: <http://wcd.nic.in/Schemes/research/dtd14092015/DelhiMumbaiSurrogacystudyFinalreport.pdf>

³The Hindu, A setback for surrogacy in India:,25th Aug,2016.<http://www.thehindu.com/opinion/oped/a-setback-for-surrogacy-in-india/article7927730.ece>

⁴ K Kalaiselvi v.Chennai Port Trust,

⁵ Indian Journal of Public Health, Surrogacy and women's right to health in India: Issues and perspective, Vol.57,2013.



surrogate mother is fertilized by the sperm of an anonymous donor.

2. Gestational Surrogacy :

The ovum of the intended mother is fertilized by the sperm of the intended father or an anonymous donor and then planted into the womb of a surrogate mother. This process is called In Vitro Fertilized-Embryo Transfer.

Surrogacy can be further divided into, altruistic and commercial surrogacy.⁶

In altruistic surrogacy, the surrogate mother is not paid any remuneration for her services apart from the payment of her medical bills, while in commercial surrogacy the surrogate mother receives remuneration for her services in addition to the payment of medical bills.

- **HISTORICAL EVOLUTION**

Robert Edwards is known as the father of modern day surrogacy⁷. It is due to his efforts, the first IVF baby, Louis Brown was born on 25th June, 1978. The world's second IVF baby and India's first surrogate baby, Kanupriya also known as Durga, was born in Kolkata on 3rd October, 1978.⁸ Elizabeth Carr was the first surrogate baby born in

America in the year, 1981. Since then, surrogacy became the most viable option for childless couples to have children of their own.

- **CURRENT SITUATION**

Indian medical industry provides the option of surrogacy at low medical costs with less legal hassles and plenty of surrogate mothers available, majority of the patients are foreigners majorly from countries like UK, USA, Australia and Canada.⁹ India is also known as the surrogacy capital of the world with a net revenue of the reproductive tourism industry being approximately \$2.3 Billion dollars.¹⁰ The chart below represents the type of clients typically visiting the Indian surrogacy industry.

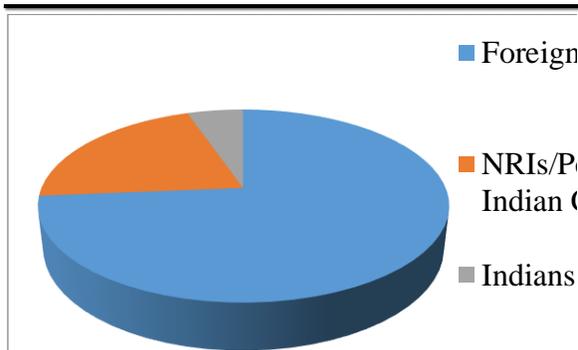
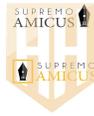
⁶ Surrogacy Laws India: www.surrogacylawsindia.com

⁷ Andrea O' Reilly, Encyclopedia of Motherhood, Vol.1, Sage Publications, Inc, U.S.A. (2010).

⁸ Andrea O' Reilly, Encyclopedia of Motherhood, Vol.1, Sage Publications, Inc, U.S.A. (2010).

⁹ International Journal of Recent Research in Commerce Economics and Management (IJRRCEM) Vol. 2, Issue 4, Womb on Rent: Surrogacy Tourism in India-Ethical or Commercial.

¹⁰ R.S Sharma, Social, ethical, medical & legal aspects of surrogacy: an Indian scenario



was born ,the couple refused to accept the baby on the grounds of divorce. Custody of the baby was given to his grandmother.

In this case, Supreme Court stated the need of legally regulating the surrogacy industry in India and on the basis of the SC’s strong recommendation the Assisted Reproductive Technology Bill¹⁴ was formulated in 2008 and 2010, however it was never passed as a law.

Finally, in 2016 ,due to the various unethical malpractices instituted by the surrogacy industry, the Surrogacy (Regulation) Bill,2016¹⁵ was introduced. The Bill has been passed by the Cabinet in 2016.Key objective of this bill is to ensure welfare of surrogate woman.

• **LEGAL**

In 2002, guidelines were issued by the Indian Council of Medical Research¹¹ to make sure that surrogacy was backed by some extra-legal rules even though they were not enforceable in Court. The 228th Law Commission of India’s¹² report also issued guidelines for regulating surrogacy practices.

The biggest legal development that took place with respect to the matter of surrogacy was in the matter of Baby Manji¹³,’s case. In this case, a Japanese couple opted to have a baby through surrogacy in India .However, the baby

A. THE CONSTITUTIONAL PERSPECTIVE

The Constitution of India is the supreme law governing the country.¹⁶ In order, to formulate a legislation for surrogacy laws, we must ensure that it is in tune with the Constitution. The first question that comes to our mind with respect to this is, whether the

¹¹ Indian Council of Medical Research, Ethical Guidelines for Biomedical Research on Human Participants, New Delhi (2006). <http://icmr.nic.in/ethical_guidelines.pdf>

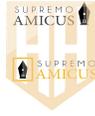
¹² Law Commission of India, —Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy,Report No. 228

¹³ Baby Manji v. Union of India, (2008) 13 SCC 518

¹⁴ Assisted Reproductive Technologies Bill: [http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202014.pdf](http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf)

¹⁵ Surrogacy Regulation Bill, 2016: [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf)

¹⁶ Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr (1973) 4 SCC 225



Constitution recognizes the act of surrogacy in any way.¹⁷ Although, there is no specific 'mention of surrogacy in the Indian Constitution, in the American case of *Johnson v. Calvert*¹⁸, right to reproduce was considered as a basic civil right. This can be enforced in India since it is a common law country.

Part III of the Constitution offers fundamental rights to the citizens. In *Consumer Education and Research Centre v. Union of India*¹⁹, the Apex Court stated that Article 21 does not connote mere animal existence but comprises of a human life with dignity and all the necessities required to live a stable life. The Article 21 guarantees right to life and liberty to the citizens of India. Right to privacy is also included in Art. 21. Right to procreation is a basic human right and must come under the ambit of right to privacy of a citizen. This has been substantiated in *B. K. Parthasarathi v. Government of Andhra Pradesh*²⁰, where the Andhra Pradesh High Court stated that the right of reproductive independence of an individual as a part of his right to privacy. The Supreme Court of India in *Suchita Srivastava v. Chandigarh Administration*²¹, has upheld that a woman's right to make reproductive choices is also a dimension of personal liberty under Article 21 of the Constitution of India.

B. THE CONTRACT OF SURROGACY.

A contract can be defined as an agreement enforceable by law that defines the rights and duties of parties involved in it, thereby reflecting the intentions and obligations of the parties. When two parties, i.e., the commissioning parents and surrogate mother, agree to perform the process of surrogacy, they require clear understanding between them regarding their rights and duties towards each other. A surrogacy agreement takes place when an offer made by the intending parents, generally through infertility clinics that act as agents, is accepted by the surrogate mother. The main objective of such agreements is that it will be enforced in case any dispute arises with respect to the rights and duties of the parties as well as the object of the agreement.²²

The surrogacy contracts are essential to ensure that the rights of the surrogate mothers are protected. It must be noted that in India surrogacy contracts are governed by the Indian Contract Act.²³ Indian Courts have always adopted a pro-contract and pro-commercial approach and have therefore stated in various decisions, that surrogacy contracts are in the realm of Indian Contracts Act, however they do not

¹⁷ Re Baby M, 537 A.2d 1227

¹⁸ *Johnson v. Calvert*, 851 P.2d 776 (1993).

¹⁹ *Consumer Education & Research ... vs Union Of India & Others*, 1995 AIR 922.

²⁰ *B. K. Parthasarathi v. Government of Andhra Pradesh*, 1999 (5) ALT 715.

²¹ *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235

²² Debora L. Spar, *The Baby Business*, Harvard Law School Press, Harvard (2006).

²³ Dr. Lily Srivastava, *Law and Medicine*.(2015)



keep a check on the enforceability of the contracts but merely regulate them.²⁴In *P Geetha Nagar v, Kerala Livestock Development Board*²⁵, the court clarified that surrogacy is not illegal in India and noted India's significance as a 'surrogacy destination'.

In *Jan Balaz v. Anand Municipality*²⁶, the High Court stressed upon the need of special legislation to govern several issues of public welfare and policy importance that arise in such disputes, like rights of a surrogate mother, guardianship, responsibilities of the fertility clinic, etc. There have been many arguments stating that enforcement of surrogacy contracts will lead to exploitation of women and baby-selling. Many critics have stated that commercial surrogacy contracts must be held as illegal and contracts pertaining to altruistic surrogacy, must be held valid.

According to the researcher, surrogacy contracts must be enforceable and valid. This should be done in order to protect the rights of the surrogate mother. While making such contracts it should be made mandatory for surrogate mothers to get legal advice in order to avoid exploitation and fraud. Since many unethical practices are used by the medical industry, bringing surrogacy contracts under the ambit of

law will help in regulating this industry. This will also ensure that the gestational mother is protected and her legal position is secure. Similarly, enforceability of such contracts will be in the best interests of the child as well and such agreements will help courts to better understand the intentions of both parties in case of disputes and custody issues. According to the guidelines issued by the ICMR and the report of Law Commission of India, surrogacy contracts must be made legally enforceable.

C. COMPARITIVE STUDY OF ART BILL,2010 AND SURROGACY REGULATING BILL,2016.

After, the direction issued by the government in *Baby Manji's case*²⁷, the Parliament formulated the Assisted Reproductive Technology Bill which is still pending. In 2016, the Surrogacy(Regulation) Bill,2016 was introduced in the Parliament and it was approved by the Parliament. However, when compared, the ART Bill has a much wider scope than the Surrogacy (Regulation) Bill. While the former deals with various assistive reproductive techniques and thus regulation of ART and surrogacy clinics, the latter only restricts itself to surrogacy.²⁸

- A major flaw in both legislations is that neither of them protect the rights of the

²⁴ Legal Service India, The Surrogacy Contracts. <http://www.legalserviceindia.com/article/1434-Surrogacy-Contracts.html>

²⁵ *P Geetha Nagar v, Kerala Livestock Development Board*, SCC, 2015 SCC OnLine Ker 71.

²⁶ *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21.

²⁷ *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 51

²⁸ NUJS, Analysing the status of the surrogate mother under The ART Bill, 2010.



surrogate mothers, even though the key objective of the Acts was to protect them.

- There is no provision in the legislation proposed in 2016 for written informed consent of the surrogate mother.
- The bill does not specify the maximum number of IVF Cycles a surrogate mother can go through in a year .
- Even though the ART Bill puts a limit on the number of IVF cycles a woman can be subjected to , it fails to formulate provisions in order to ensure the welfare and safety of the surrogate mothers.

The Surrogacy(Regulation)Bill,2016 prohibits commercial surrogacy²⁹. The makers of this bill were of the mindset that surrogacy should arise out of love and family bonding rather than a monetary or business-like transaction ,i.e it should be altruistic and not commercial.³⁰ The key reason for this is to stop the exploitation of women by the surrogate industry.

- It is essential to understand that in today's day and age banning commercial surrogacy is not the solution to stop exploitation of women.
- This will only lead to the creation of a surrogacy black market, where the conditions will be comparatively worse.

Thus, what we need is not banning of commercial surrogacy but strict regulation laws in order to ensure best interests of both parties. Such a provision may surrogate mothers deprive them of their livelihood and they may be forced into acts such as sex work or prostitution.³¹

The ART Bill legally recognizes commercial surrogacy.³² But There is no mention of compensatory provisions in case the health of surrogate mothers is harmed during pregnancy or in case the pregnancy results in her death.

A major point of discussion is the Debaring single persons, homosexuals and foreign nationals from being parents.

The Surrogacy(Regulation)Bill,2016 states that surrogacy will not be allowed for homosexual couples, single parents, couples in live-in relationships, foreigners, couples with children and persons who have attempted commercial surrogacy.³³

- Banning foreign nationals from opting for surrogacy in India may cause a huge blow to the medical tourism industry in India.
- A pre- requisite of this bill is that a couple must be married for a minimum of 5 years in order to opt for surrogacy.

²⁹ The Surrogacy Regulation Bill,2016. http://www.dhr.gov.in/sites/default/files/surrogacyregbill_0.pdf.

³⁰ The Indian Express,What is surrogacy?Everything you need to know.March 6,2017
: <http://indianexpress.com/article/lifestyle/health/draft-surrogacy-bill-2016-what-is-surrogacy-all-you-need-to-know-2994140/>

³¹ Centre for Reproductive rights: Avani Mehta Sood,Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India.<http://www.reproductiverights.org>

³² Amy Antoinette Mcgregor & Anr . vs . Directorate of Family Welfare Govt . of NCT of Delh 205(2013)DLT96

³³ The Modern Surrogacy: www.themodernsurrogacy.com



- The surrogate mother must be a close relative of the couple who must be sympathetic to the situation. The bill fails to give a clear definition of “close relative”.
- In a society like India , where surrogacy is still a taboo, it will be very difficult for couples to find a close relative who will be ready to be a surrogate mother.

The Surrogacy Regulation ,Bill is silent on various other issues such as :³⁴

- breastfeeding of the child after birth
- the registration of the birth certificate with the names of the intending parents.
- the terms of confidentiality agreements between parties
- mandatory health screening of surrogate mother
- background check of both parties
- compensation terms in case of any health hazards caused to surrogate mother due to the pregnancy etc.

It is also ignorant with respect to the rights of the surrogate child as there is no provision for the child on reaching majority to know about his surrogate mother or his genetic details. There are some provisions that are beneficial as well such as the provision ensuring that the surrogate child has the same rights as the natural child or the provision relating to maintenance records of surrogacy for 25 years. Both the Acts were made to ensure that there is no exploitation of women and to ensure their welfare and provision , however the Acts fail to safeguard the interests

of the surrogate mother and surrogate child. Relevant provisions have not been made to protect the rights of both the parties. Although formulated to curb the exploitation of women and baby selling, they exhibit the general policy of state banning or censoring an activity almost completely, instead of looking at ways to use laws to regulate and improve the situation.³⁵

• INTERNATIONAL COMPARISONS

In order to better understand the position of India , it is important to understand the global stance on the issue of surrogacy.

A. UNITED STATES OF AMERICA

In America, surrogacy falls under the state jurisdiction .Thus, there are some pro- surrogacy states and some states that do not legally recognize surrogacy. The surrogacy friendly states are California, Illinois, Arkansas, Maryland and New Hampshire. These states legally recognize surrogacy and enforce surrogacy contracts, The primary factors in a surrogacy contract are the duration of the contract, the residing place of surrogate mother, the residence of intended parents and the birth place. A beneficial policy is that even if intending parents are in a state that is anti-surrogacy they can have a child through surrogacy if the birth mother is in a surrogate friendly state.

³⁵ U R Smerdon, Crossing bodies, crossing borders: International surrogacy between the United States and India.2016



³⁶States forbidding or against Surrogacy are Arizona, Delaware , District of Columbia, Indiana ,Louisiana and Michigan.³⁷

B. UNITED KINGDOM

Kim Cotton, a British mother of two agreed to have a baby for an infertile Swedish couple however, after the birth of the baby she refused to give the baby to the couple³⁸.As a result of this landmark case, the Surrogacy Arrangements Act, 1985 was introduced. Thereafter the Human Fertilization & Embryology Act, 1990, was passed. The S.30 of this Act recognized the act of surrogacy, however it is still considered illegal. However in the case of Re X and Y³⁹ the UK Courts ratified international surrogacy. In this case, British parents had conceived through a married Ukrainian Surrogate. Although the UK law treated the Ukrainian surrogate and her husband as the legal parents, the Ukrainian Law, held the genetic parents, i.e., the UK couple to be the real parents,. Thus the Court adopted the principle of the “best interest of the children “and ratified the surrogacy. Regardless of the biological connection, the surrogate mother is treated as the actual mother of the child , unless adoption orders are passed.

C. SOUTH AFRICA

The South Africa Children's Act, 2005 empowered the intending parents and

the surrogate to have their surrogacy contract approved by the High Court even before treatment. This permits the intending parents to be perceived as legitimate guardians from the beginning of the process. If the surrogate mother is the hereditary mother she has upto 60 days after birth to alter her opinion. The law permits single individuals and gay couples to opt for surrogacy.⁴⁰

In the event that there is just a single parent, he/she should be biologically connected with the kid. If there is a couple they both must be genetically identified with the child unless that is physically inconceivable because of fruitlessness or if they are gay people. The Commissioning parents must be physically unfit to birth a child autonomously. The surrogate mother must have one living kid.⁴¹ The surrogate mother has the privilege to singularly end the pregnancy, however she should inform the intending parents, and in the event that she is ending for a non-medical reason, might be obliged reimburse any monetary benefits received.

• **ETHICAL AND SOCIAL ASPECT**

The moral, ethical and religious objections to surrogacy are based on the contention that life is a creation of God and human beings go against the will of God by interfering with the natural

³⁶ Johnson v. Calvert, 851 P.2d 776 (1993).

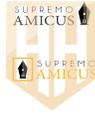
³⁷ Beasley v. Beasley, 359 Pa. Superior Ct. 20 (1986).

³⁸ Baby Cotton Case, (1985)FLR 845

³⁹ Re X and Y [2014] EWHC 3135

⁴⁰ E x parte: WH and Others (29936/11) [2011] ZAGPPHC 185S

⁴¹ Surrogacy advisory group v. Minister of social development, (6) SA 514 (GNP)



processes.⁴² Another serious objection is that the wastage of male or female embryos during surrogacy trials is similar to murder, since human life begins with the process of fertilization.⁴³ However, there are many supporters of surrogacy as well. The people pro-surrogacy believe it to be a good practice as it facilitates the good of the infertile couples. Even supporters of the practice believe that there is a strong need of regulation of surrogacy in the country and a proper mechanism must be developed to resolve surrogacy related disputes.⁴⁴ The root cause of surrogacy related problems is that the surrogate woman is put in danger. She faces irreparable psychological and physical harm. The intermediaries involved in the task of surrogacy, i.e., the hospitals and doctors make use of various unethical practices.⁴⁵ They do not take care of the health of the women and look at them as baby making machines. Immense psychological damage is caused to the surrogate child when he comes to know about his parentage. This may cause harm to the child as well. Their main objective is to sell as many babies as they can, i.e., commodification of children even if it harms health of surrogates.⁴⁶

⁴² Andrew Bainham & Martin Richards, *What is a Parent?: A Socio-Legal Analysis*, Hart Publishing, Oxford, U.K. (1999).

⁴³ Sama - Resource Group for Women and Health, *Unravelling the Fertility Industry: Challenges and Strategies for Movement Building International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies*, SAMA, New Delhi (2010)

⁴⁴ Anjali Widge, —*Socio-Cultural Attitudes Towards Infertility and Assisted Reproduction in India* (2014)

• WHETHER NECESSARY OR UNNECESSARY ?

Although, the researcher agrees that surrogacy is important in order for infertile parents to have children, it must also be noted that surrogacy is not the only option for infertile persons. There are nearly 12 million orphans in India. Infertile couples, same sex couples and single parents should give adoption a chance as well. We must ask ourselves why is it so important to have a child of our own bloodline rather than adopting an underprivileged child and changing his life for the better. The adoption process in India needs to be reformed as it is very slow and tedious, in order to ensure a better life for the orphans. If commercial surrogacy is banned and the adoption laws are reformed, there will be a significant growth in the number of people opting for adoption. For many, adoption is not an option.

It is important to note that the practice of surrogacy is not necessary. There are various other scientific advancements which will help them to have children. The door of surrogacy may be closed, however various other assisted

⁴⁵ Dr. Nandita Adhikari, *Law and Medicine*, Central Law Publications, Allahabad (2007).

⁴⁶ Times of India, *Telangana: 6 more doctors suspended for unethical medical practices* Nov 5, 2016: <http://timesofindia.indiatimes.com/city/hyderabad/6-more-doctors-suspended-for-unethical-medical-practices/articleshow/55258561.cms>



reproductive technologies will still be available to the intending parents. But putting an end to the practice of surrogacy will have a huge impact on India's medical tourism industry. It was cause a huge blow to a lot of fertility clinics and medical experts in the field of ART. Surrogate mothers will be significantly affected as well as they will be deprived of their financial and economic independence .

• **SUGGESTIONS AND RECOMMENDATIONS**

Instead of banning surrogacy, we must enforce strict policies to regulate it. This will be very beneficial for the surrogate mothers as they will have a stable income and their physical and mental health will be taken care of. The recent Bill does not take into consideration the various ICMR guidelines or the Law Commission Report. A new bill must be formulated keeping the best interests of the child and the birth mother in mind.

Appropriate provisions must be added in order to ensure adequate measures are taken by hospitals for the welfare and safety of the child and the birth mother.

The surrogacy contracts must be made legally enforceable and it must be made mandatory for every surrogate mother to get legal advice and professional counseling before signing on the agreements.

There must be a legislation in force in order to govern the issue of surrogacy in India and to ensure that the intending parents get the legal status of parents of

the child in the eyes of law. Provisions must also made that in case the birth mother decides to not terminate her parental rights, she must return monetary remuneration awarded to her for her services. The Courts must always keep the best interests of the child in mind while deciding surrogacy cases. Adequate laws relating to the citizenship of the child must also be devised. It must be ensures that. same-sex couples, single parents, married and unmarried couples, single persons as well as foreign nationals can opt for surrogacy in India. Strict provisions must be formulated for the exploitation of women, abandonment of children and medical malpractices.

• **CONCLUSION**

The question whether surrogacy is necessary or unnecessary has different views. We can look at surrogacy as an absolute unnecessary practice, based solely on the orthodox premise of having a child that is biologically connected to the parents. We can give adoption preference over surrogacy as it will help in te development of the country and help in the upliftment of the needy children, or we can look at the practice of surrogacy as absolutely necessary in order to facilitate the happiness of the infertile couples and poverty- stricken surrogate mothers. However, what is important to understand is that the surrogacy industry is in immense need of a regulatory framework. The draft bills consist of major flaws which may result in the complete shut down of the surrogacy industry. However, we do not need to ban surrogacy, we just need



to legally recognize and regulate it. In the light of the scientific innovations and technological advancements, it has become imperative for the Government to re-examine the legal framework and introduce new legal provisions to cope up with the emerging challenges.

