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COMMERCIAL SURROGACY



HUMAN DIGNITY AND COMMERCIAL SURROGACY

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Abstract

The paper analyzes and interprets commercial surrogacy against the background of human dignity. Beginning with the brief description of these terms, the paper has focussed on generic legal issues arising from such surrogacy, and whether they are in consonance with the notion of human dignity. International treaties and conventions have been used to justify or refute claims of commercial surrogacy as against internationally accepted rights regarding women and children. Furthermore, the paper has highlighted the specific legal issues and dignity concerns arising from surrogacy in India, and also compared it against the dignity legal framework in India. Lastly it has analysed the surrogacy legislation existing in India, and dealt with its adequacy in the Indian fertility market.

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INTRODUCTION: THE HUMAN DIGNITY CONTEXT²

Human Dignity, in its most crude form means intrinsic value of an individual. Originating from the Latin word *dignitas*, it refers to inner self-worth, commanding a certain degree of respect from people. Lacking a universal definition, human dignity has however been accepted universally by most states (directly, through the constitution, or indirectly through case-law) as a non-derogable right to be respected and protected. The Europeans and the Americans were amongst the foremost to recognise dignity in their Constitutions, followed by other parts of the world.³ Human dignity has formed the underlying principle and normative baseline of most international treaties and supra-national laws protecting human rights law. It is a unique value in itself, and forms the building block on which the framework of human rights is built.⁴ Thus, although the grant of dignity is dependent only on being human, it is formalised through numerous substantive human rights. The question of the existence or violation of human dignity can be measured in the form of existence or violation of a bundle of generic and specific human rights. In other words, courts interpret human rights through the lens of human dignity.⁵ More so, states ensure protection of human dignity through protection of tangible human rights, which is also the context of this research paper.

Debate over various legal issues and questions of their legality or illegality has sparked justifications based on human dignity. Due to its near universal recognition by States, it is required that legality of an issue in a State must not violate human dignity in any form.

² I would like to convey my special gratitude to Dr. Topidi for her expert guidance throughout the course of my research paper. She has been helpful in narrowing the research question, and in providing direction to my research for the paper. Her invaluable insights and recommendations have contributed greatly towards the organization and theme of the paper. I would also like to extend my sincere thanks to the librarian of Universitat Luzern for providing me with all the relevant resources and materials required by me. The research would have been incomplete without the fruitful and ingenious library resources. Furthermore, I would like to put across my heartfelt gratitude to Universitat Luzern for offering this one of a kind interdisciplinary course, where I was able to write a comprehensive paper on issues concerning human dignity. Lastly, I would like to thank my friends and family for being an important support to me, to be able to complete my paper.

³ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* 4 EJIL 19 655,664 (2008).

⁴ *Id.*, at 681.

⁵ *Ibid.*

Surrogacy is one such issue which has received different sorts of legal validation in different states, due to different interpretations of human dignity in their legal atmospheres. Commercial surrogacy, as a sub-category of surrogacy, has provoked greater concerns and is the scope of discussion of the paper.

To understand the legality and workability of commercial surrogacy, the various issues of human dignity affecting it become a pertinent topic of discussion. In order to be able to criticise or support such surrogacy and dignity issues, the meaning and scope of surrogacy must be first understood.

SURROGACY: MEANING & SCOPE

Surrogacy can be defined as a medically assisted method of having a child through the womb of another woman, due to reasons of infertility of the existing couple. Surrogacy has been practiced through two modes namely traditional and gestational surrogacy.⁶ The former deals with a kind of pregnancy in which a woman (the surrogate mother) provides her own egg, which is fertilized by artificial insemination for another couple; whereas the latter deals with pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized in the womb of another woman (the surrogate mother).⁷The gestational mode of implanting the embryo *in vitro* in the surrogate's womb is more commonly employed and preferred across jurisdictions over the traditional one.⁸

⁶ RACHEL COOK, SHELLEY DAY SCLATER & FELICITY KAGANAS, *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 211 (Hart Publishing, 2003).

⁷ 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy', Law Commission of India Report No. 228, ¶1.4; available at <http://lawcommissionofindia.nic.in/reports/report228.pdf>, [last visited May 11 2015]. [hereinafter 'Law Commission's 228th Report']

⁸ Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 25 (2009) [hereinafter 'Crossing Borders']; Yasmine Ergas, *Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy* 10 EMORY INTERNATIONAL LAW REVIEW (2013) [hereinafter 'Babies without Borders'].

Surrogacy is also studied with a distinction of altruistic and commercial surrogacy, the difference being the monetary factor.⁹ The former relates to a selfless act of surrogacy, and the latter relates to surrogacy as a service in return for money.

The medical assistance in baby-making has progressed to a very great extent since the past few decades due to advancements in reproductive techniques. Globalisation in such artificial methods took place as the need for such techniques grew. Factors such as availability of suppliers of genetic components (sperm and ova), intermediaries making sure availability of surrogates and the medical ease of surrogate child-bearing have been added to the global arena. Surrogacy, being one of such methods, has experienced a cross-border upheaval in the twenty first century, growing nearly to a significant increase of 1,000 percent between 2006 and 2010.¹⁰

Lacking an international consensus on its legality and enforceability, there is a limitation to the customary law governing surrogacy. Legislation regarding surrogacy has largely differed across jurisdictions due to the very same reason. The practice is largely completely prohibited throughout Europe (with certain exceptions), partly allowed in Asia and Africa and also largely prohibited in the U.S.A. This great number of countries have relied on human dignity, protection of women and children and human trafficking¹¹ to support their claims of illegality. Commercial surrogacy is permitted only in countries such as India, Russia, Thailand, Ukraine and a few U.S. states.

HUMAN DIGNITY & SURROGACY - GENERAL LEGAL ISSUES

Since the term human dignity finds a mention in nearly all international conventions¹² (general or special), governing substantive and procedural rights, general legal issues regarding commercial surrogacy are studied with respect to the same. The importance of the

⁹ 228th Law Commission Report, *Supra* note **Fehler! Textmarke nicht definiert.**, at ¶1.6.

¹⁰ Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, Prelim. Doc. No. 10 (March 2012).

¹¹ *Surrogate Motherhood: A violation of human rights*, European Centre for Law and Justice, report presented at the council of Europe, Strasbourg, 4 (April 26, 2012). [hereinafter '*Surrogate Motherhood*']

¹² Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, 34 UN GAOR Supp (No. 46), at 193, UN Doc A/34/46, Preamble; Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49), at 167, UN Doc A/44/49 (1989) [hereinafter '*CRC*'], Preamble; International Convention on the Rights and Dignity of Persons with Disabilities, GA Res A/61/611 (2006), Preamble, Arts 3, 8, 16, 24, and 25.

United Nations' conception of human dignity reflects in the General Assembly Resolution,¹³ which provides that all human rights instruments should be of a fundamental character and must derive from the inherent dignity and worth of human person. The International Bill of Rights, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights & the International Covenant on Economic, Social and Cultural Rights¹⁴, refer to the inherent dignity of a human, and purport to govern the equal and unalienable rights provided to man in consequence of such dignity. Although the term does not find a direct mention, its meaning can be implied from the foremost lines in the Preamble of these documents. With the further development of world legal systems, the term also finds a mention in latter conventions as a part of its substantive provisions.¹⁵

The study of commercial surrogacy in the human dignity context provides emphasis on rights of reproduction, non-discrimination, self-determination, ownership, and health-related rights, derived as a consequence of the International Bill of Rights. Critics have highlighted that the art of child-bearing being rented out to another woman goes against the basic tenets of dignity. They have perceived it as a moral quandary, involving use of a woman's capacity to reproduce. Others have refuted by counterclaiming dignity to also mean respect for rights of personhood and individual autonomy of choice possessed by a woman. Thus, some of the prominent legal issues which have cropped up in response to the wide range of rights are discussed below.

1. Dignity of the 'mother' and 'child' at risk

It has often been argued that commercial surrogacy puts the dignity of the biological mother and child at risk. The womb of the woman is treated as an incubator for fertilisation where she is to be paid off after her services have been utilised. Exporters and importers of gestates as well as commissioning agencies exist to that end, finding suitable clients and surrogates, willing to adjust at a suitable price. Also, usually clients (intending parents) are given more importance and their demands are given a higher preference, thereby

¹³ GA Res. 41/120, 4 Dec. 1986, quoted in A. CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 538 (2006).

¹⁴ Hereinafter 'UDHR', 'ICCPR', 'ICESCR' respectively.

¹⁵ Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14 – 25 (June 1993), UN Doc A/CONF 157/24.

demeaning the whole maternity process.¹⁶ Thus rather than fulfilling the need of child bearing, such a practice opens up a 'market' for negotiation and deliberation. Besides the general effects of surrogacy on the rights of the surrogate woman, commercial surrogacy has given rise to the often quoted '*commodification*' of a woman's body. The process is commoditized and a value is assigned to the womb of the surrogate.¹⁷ She is considered amenable to market value and her personhood is reduced to a matter of satisfying economic preferences.¹⁸

Since human dignity calls for a human being to be risen above any price by giving recognition to his/her absolute inner worth¹⁹, this quite evidently violates the human dignity of the surrogate. Human dignity also provides that no individual should be treated or regarded as a subject or a means to achieve something, and must not be discussed in terms of value.²⁰ Dignity marks this threshold, below which the treatment of a human being must never fall.

The dignity of the child comes into question as the child forms the subject matter of the surrogacy arrangement. The child is separated from the identity of the gestator, ova and sperm donor and is considered as the property of the intending parties.²¹ More so it is also considered a property which is to stay in the womb of the surrogate only for a specified time, and is transferred to the intending parents, post-pregnancy. Moreover, issues also arise with respect to nationality and citizenship of the child as the cases of Balaz twins²² and Baby Manji²³ (discussed later) have illustrated.

The dignity of the child also becomes an issue as the intending parents while choosing surrogacy, make demands for good-looking, academically successful and bright children. This

¹⁶ Babies Without Borders, *Supra* note Fehler! Textmarke nicht definiert., at 51.

¹⁷ Ishika Arora, *Wombs for Rent: Outsourcing Surrogacy to India* (2012), <http://prospectjournal.org/2012/01/10/wombs-for-rent-outsourcing-surrogacy-to-india-2/>.

¹⁸ MARGARET RADIN, CONTESTED COMMODITIES 6-8 (1996).

¹⁹ MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 73 (2000); IMMANUEL KANT, THE METAPHYSICS OF MORALS 186 (Mary Gregor ed., 1996).

²⁰ *Casebook on Human Dignity and Human Rights*, Bioethics Core Curriculum Casebook Series No. 1, UNESCO, Paris 144 (2011). (hereinafter '*The UNESCO Casebook*')

²¹ Babies Without Borders, *Supra* note Fehler! Textmarke nicht definiert., at 24.

²² *Jan Balaz v. Anand Municipality*, November 11, 2009, Letters Patent Appeal No. 2151 Of 2009 in Special Civil Application No. 3020 Of 2008 with Civil Application No. 11364 Of 2009 in Letters Patent Appeal No. 2151 Of 2009 with Special Civil Application No. 3020 of 2009.

²³ *Baby Manji Yamada v. Union Of India & Anr.* [2008] INSC 1656. [hereinafter '*Baby Manji's case*']

specially happens in the egg donation industry, where the indenting parents are willing to pay increased prices for expecting to have a child with better traits. This particularly commodifies children and is violative of provisions of RCR which provide for recognition of inherent dignity and unalienable rights of a child. Being selective of the traits and colour of the child is also violative of the rights of every child not be discriminated against on the basis of his colour and race.²⁴ Furthermore discrimination offends the dignity of the child as it undermines the capability and potential of the child to grow, and actual and potential discrimination are thus both prohibited.²⁵

2. *Rights of individual autonomy and beneficance*

Supporters of commercial surrogacy have argued that human dignity, as possessed by a woman provides her with the rights of self-determination and individual autonomy.²⁶ This arises from the fact that respect for dignity commands a higher priority to be given to individual choices in matters of social, political and legal life.²⁷ An individual is a morally and rationally responsible being with a desire to control his own life.²⁸ And thus the very fact that an individual choice, personal belief or way of life is disrespected demeans or humiliates the individual. It also derives from the civil and political rights which give the liberty to oneself to dispose of our bodies the way we desire. This stems from Article 1, ICCPR which defines self-determination as the right to take decisions about political, cultural and economic development. As autonomy includes informed consent, it thus gives the woman the right to choose on how she can use her labour and even decide the price for it.

Moreover, it is a practice which promotes the medical principle of *beneficance* as it helps overcome the disadvantage of male/female infertility and economically benefit the gestational surrogate.²⁹ Therefore, if the female is incapable of getting pregnant due to a variety of reasons, surrogacy forms the only way to maintain a biological link to the child.

²⁴ RCR, *Supra* note Fehler! Textmarke nicht definiert., Article 2(1).

²⁵ Committee on the Rights of Child, General Comment No. 1, 2001, CRC/GC/2001/1, para 10.

²⁶ ICESCR, *Supra* note Fehler! Textmarke nicht definiert., Article 1(1).

²⁷ Oscar Schachter, *Human Dignity as a Normative Concept*, 4 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 77 848, 849 (Oct., 1983). [hereinafter '*Normative Dignity*']

²⁸ MARSHA A. FREEMAN, BEATE RUDOLF & CHRISTINE CHINKIN, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 148 (OUP Oxford, Jan 2012). [hereinafter '*CEDAW Commentary*']

²⁹ Kristine Schanbacher, *India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women* 25 Hastings Women's L.J. 201, 2010 (2014).

Further, it is argued that separating the identity of the child from the gestational mother and linking it to the intending parents is also practiced in the methods of adoption³⁰ and other assisted reproductive techniques.³¹ These methods also provide a distinction between legal parents and birth parents.

However, arguments in favour of autonomy rest on the only assertion that all surrogates practice surrogacy as a matter of choice and are informed about the medical risks involved. Real life observation reflects that more often than not most women do not practice surrogacy as a matter of choice, and after entering into such an arrangement their lives are largely controlled by fertility clinics.³² Considering payment of a monetary compensation forms the essential part of 'commercial surrogacy', a high amount being offered also raises concerns over existence of a voluntary informed consent. Reasons of 'economic hardship' and 'family pressure' are one of the foremost to affect the autonomous decision in countries like India. It thus promotes the legacy of reproductive oppression of poor women in India.³³ In consonance with the same, the ICESCR recognizes the right of all people to choose work freely and to work under just and humane conditions.³⁴ CEDAW further recognises the plight of rural women, and their role in economic survival of their families, and provides for special care in application of the provisions the convention with respect to the same.³⁵

3. *Lack of international harmonisation of surrogacy laws*

A requirement for surrogacy laws exists on an international level due to international surrogacy arrangements involving more than one country of residence or domicile amongst the commissioning parents, donors and the gestational mothers.³⁶ Currently there is no international multi-lateral treaty governing legal aspect of commercial surrogacy such as

³⁰ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded May 29, 1993, 1870 U.N.T.S. 167.

³¹ *Babies Without Borders*, *Supra* note **Fehler! Textmarke nicht definiert.**, at 39.

³² Emily Stehr, Note, *International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation*, 35 HASTINGS INT'L & COMP. L. REV. 253, 254 (2012).

³³ Jyotsna Agnihotri Gupta, *Women's Bodies: The Site for the Ongoing Conquest by Reproductive Technologies*, 4 ISSUES IN REPROD. & GENETIC ENG'G 93 (1991).

³⁴ ICESCR, *Supra* note **Fehler! Textmarke nicht definiert.**, Article 6(1).

³⁵ CEDAW, *Supra* note **Fehler! Textmarke nicht definiert.**, Article 14(1).

³⁶ Anne-Marie Hutchinson OBE, *The Hague Convention on Surrogacy: Should we agree to disagree?*, ABA Section of Family Law, 2012 Fall CLE Conference, Philadelphia 3 (October 2012).

recognition of the surrogacy contract, parentage rights, citizenship of the child etc. The first step has been taken by the Permanent Bureau of the Hague Conference on Private International Law by preparing a comprehensive note titled 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements.'³⁷ They have decided to deliberate upon a number of themes namely cross-frontier surrogacy, inter-country adoption, child abduction, parental responsibility, and child support.³⁸

4. Abuse of surrogacy – further violation of human rights

a. Detrimental to the child

A surrogacy arrangement operates as a legally binding contract between the intending parents and the surrogate mother. As the contract ends, the child is handed over to the intending parents and the surrogate is paid an amount as compensation for bearing their child. Thus the contractual arrangement calls for a complete psychological detachment from the child post-pregnancy.³⁹ Medical and psychological studies have shown that this detachment not only affects the mother, but also harms the child as links created during pregnancy between the mother and the child are important for the child's development.⁴⁰ These links are both social and physical, created between the woman and foetus by interaction of their bodies.⁴¹ Furthermore, early childhood development provides emphasis to the importance of psychological bonds formed from birth and onwards.⁴²

A child's health and psychosocial well-being and perinatal care are included within his/her inherent right to life.⁴³ It is an obligation on State parties of the CRC to ensure, to the

³⁷HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.listing.

³⁸ Babies Without Borders, *Supra* note Fehler! Textmarke nicht definiert., at 44.

³⁹ R.J. Edelmann, *Surrogacy: the Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 130 (2004).

⁴⁰ Surrogate Motherhood, *Supra* note Fehler! Textmarke nicht definiert., at 9.

⁴¹ Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 189 RUTGERS L. REV. 165, 187 (1994).

⁴² M. M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, 35 JOURNAL OF MEDICAL ETHICS 3 171-175, 172 (Mar., 2009).

⁴³ Committee on the Rights of the Child, General Comment No. 7, 2005, CRC/C/GC/7/Rev.1, para. 10.

maximum extent possible, the survival and development of the child.⁴⁴ Considering the medical facts, separation of the child from the biological mother is thus violative of this principle.

b. Child Abandonment

With growing demands for surrogacy, instances of child abandonment have also risen due to reasons like biological defects in the child, medical illness, physical or psychological problems. There have been the cases of 'Baby Gammy'⁴⁵ in Thailand and an Indian case⁴⁶, both of which are examples of children being abandoned by Australian intending parents.⁴⁷ Child abandonment poses as a problem because of the special care and assistance required by childhood (due to physical and mental immaturity), recognised by the CRC.⁴⁸ The Convention also considers family, a fundamental group of society, to be the most instrumental in harmonious development of the child's personality.⁴⁹ Further problems arise with the presumption of 'best interests of the child'⁵⁰, which is to be upheld at all times and be read into while considering the integration of the child in the family environment. Thus, the dignity of the child provides her the right to have, live and grow in family, which is obviously violated in case of abandonment.

c. Trafficking

Exploitation of women and children has been considered to be a repulsive aspect of trade, and trafficking to be a fundamental offence to humanity and dignity.⁵¹ This is so because human rights law from the very beginning has prohibited the appropriation of humanity,

⁴⁴ CRC, *Supra* note Fehler! Textmarke nicht definiert., Article 6(2).

⁴⁵ Sarah Dean, Louise Cheer & Daniel Mills, 'I will take care of Gammy on my own: Thai surrogate mother says she will take care of the critically-ill Down's syndrome baby as fundraising for his medical care tops \$155,000', DAILY MAIL AUSTRALIA (1 August 2014).

⁴⁶ Surrogate baby left in India by Australian couple was not trafficked, investigation finds, The Guardian (October 9, 2014) <http://www.theguardian.com/australia-news/2014/oct/09/surrogate-baby-left-in-india-by-australian-couple-was-not-trafficked-investigation-finds>.

⁴⁷ *The Parentage / Surrogacy Project: An Updating Note*, The Permanent Bureau, Prel. Doc. No. 3A, General Affairs and Policy i (February, 2015).

⁴⁸ CRC, *Supra* note Fehler! Textmarke nicht definiert., Preamble.

⁴⁹ *Id.*

⁵⁰ CRC, *Supra* note Fehler! Textmarke nicht definiert., Article 20.

⁵¹ JOHN WINTERDYK, BENJAMIN PERRIN & PHILIP REICHEL, HUMAN TRAFFICKING: EXPLORING THE INTERNATIONAL NATURE, CONCERNS, AND COMPLEXITIES 104 (CRC Press, Dec 5, 2011). [hereinafter '*Human Trafficking*']

labour and legal personality.⁵² Moreover, trafficking goes against human security, an important right arising out of human dignity, and is therefore internationally prohibited.⁵³ It is, thus, a *jus cogens* norm, expressly barred by special conventions.⁵⁴

Pressed by poverty and unemployment, instances of human trafficking in gestational surrogates are often common sighted. It has been argued by certain human rights activists that the recruiting process of surrogates in India is evidently similar to the recruitment process used by human traffickers to coerce rural women into sex work in cities.⁵⁵ Lack of education, consent and counselling services for such women add to the sex trafficking. Such a condition, therefore, becomes violative of dignity of surrogates and poses a serious concern in India.

INDIA - A SPECIAL CASE FOR FERTILITY TOURISM WORLDWIDE

In order to analyse how India became a special case for fertility tourism, it is important to understand the nuances of initial and continual legitimisation of surrogacy in the Indian society. A brief analysis of its acceptability in the society and compatibility with the public policy of India is provided in the next sections.

1. Socio-cultural legitimisation of surrogacy in India

The Indian demography is marred by people from different religions and cultures including Hinduism, Islam, Christianity, Sikhism, Jainism and others. The presence and co-existence of these many religions is possible due to the religious tolerance professed by the secular country, and the constitutional right to practice, profess and propagate any religion guaranteed to all citizens⁵⁶. In the presence of such diversity, the Indian economy has been predominantly Hindu. This has been reflective in the statistics of the 2011 census⁵⁷, which

⁵² *Human Rights and Human Trafficking*, UN Human Rights Office of the High Commission, Factsheet No. 36 4 (New York, Geneva 2014).

⁵³ *Human Trafficking*, *Supra* note **Fehler! Textmarke nicht definiert.**, at 105.

⁵⁴ CEDAW, *Supra* note **Fehler! Textmarke nicht definiert.**, Article 6.

⁵⁵ *Surrogate Motherhood: A Violation of Human Rights*, Report Presented at the Council Of Europe, European Centre for Law and Justice 14 (Strasbourg, April 26 2012) available at <http://www.eclj.org>.

⁵⁶ Article 25, Indian Constitution (1949).

⁵⁷ <http://indianexpress.com/article/india/india-others/census-hindu-share-dips-below-80-muslim-share-grows-but-slower/>

marks about 78% approximately Hindus in India. Such predominance of Hinduism has had important implications on surrogacy and its development in India.

The Hindu mythology provides for instances of surrogacy⁵⁸ and reflects the reason for it being a common phenomenon in the Hindu society. It provides for a narrative of surrogacy in the Bhagvata Purana, an ancient Hindu text. Kansa, the king of Mathura, believed an oracle that he would be killed by one of his nephews, and subsequently imprisoned his sister Devaki and her husband Vasudev, and killed all sons born to them. Incessant prayers of Vasudev (to stop such cruelty) were heard by Lord Vishnu. Lord Vishnu had an embryo from Devaki's womb transferred to the womb of Yashoda, another wife of Vasudev. Yashoda gave birth to Lord Krishna, and secretly raised the child while Vasudev and Devaki told Kansa the child was born dead. Thus, the genetic child of Vasudeva and Devaki was incubated in and delivered from another womb. The roots of surrogacy in India can be therefore drawn to Hindu mythology, and it can be said that surrogacy derives its initial legitimacy from Hindu culture.

It must also be understood that the development of surrogacy in India further relates to the importance of motherhood in Hinduism.⁵⁹ It is a common belief in the patriarchal Hindu society that womanhood is defined by a woman's capacity to be a mother.⁶⁰ Women, who cannot reproduce and provide continuation to the family lineage, are generally looked down upon in the society. Moreover, infertility in general is viewed as a social stigma in Indian society.⁶¹ According to the ancient Indian philosophy, the biological purpose of life was to propagate one's own traits (genes) to the next generation.⁶² In the presence of such a

⁵⁸ Crossing Borders, *Supra* note Fehler! Textmarke nicht definiert., at 15, 16.

⁵⁹ Anjali Widge, *Sociocultural Attitudes Towards Infertility and Assisted Reproduction in India*, in *Current Practices And Controversies In Assisted Reproduction: Report Of A Meeting On Medical, Ethical And Social Aspects Of Assisted Reproduction* 226 (2001).

⁶⁰ *Ibid.*

⁶¹ R. S. Sharma, *Social, ethical, medical & legal aspects of surrogacy: an Indian scenario*, INDIAN J MED RES 140 (Supplement) 13-16 (November 2014).

⁶² PD GUPTA, LINO A. *MOTHERING A CAUSE: PRACTICAL KNOWLEDGE OF REPRODUCTION AND MOTHERHOOD* (Bikaner: Capricorn Publishing House, 2010).

culture, couples have preferred surrogacy to adoption to be able to give them an option of maintaining a biological link with the child and to be able to conduct the same in secrecy.⁶³

Medical science providing for techniques to fulfil such purpose has thus been well welcomed by Indian society. Advanced medical sciences have paved the way to cure the effect of infertility through Assisted Reproductive Technology (ART) such as *in vitro* fertilization (IVF) or intracytoplasmic sperm injection (ICSI).

This is how surrogacy began and continues to have legitimacy in a large part of the Indian society.

2. *Commercial surrogacy in India*

Commercial surrogacy in India has been favoured by numerous factors including governmental intervention in medical facilities, easy cross-border travel for foreigners and least regulations in the field of commercial surrogacy. The General Agreement of Trade in Services (GATS) has provided for inclusion of trade in medical services under the World Trade Organization agreements and has enabled private hospitals treating foreign patients to receive financial incentives.⁶⁴ The Indian External Affairs Ministry now provides for a special medical visa which permits foreigners to stay in the country for a longer duration. Joint public-private medical efforts and programmes have been instrumental in providing packages which incentivise foreigners.

In India's medical tourism industry, the reproductive segment has been estimated to capture a market of more than \$450 million a year.⁶⁵ India has become a booming market for commercial surrogacy in the past decade with figures rising to more than USD 2 billion in revenue annually.⁶⁶ Being one of the countries which legalises surrogacy, absence of any

⁶³ Aditya Bharadwaj, *Why Adoption is Not an Option in India: the Visibility of Infertility, the Secrecy of Donor Insemination, and Other Cultural Complexities*, 56 Soc. Sc. & Med. 1867 (2003).

⁶⁴ Shree Mulay & Emily Gibson, *Marketing of Assisted Human Reproduction and the Indian State*, 49 DEVELOPMENT 84, 85 (2006).

⁶⁵ Randeep Ramesh, *British Couples Desperate for Children Travel to India in Search of Surrogates: Ethics under Scrutiny as Would-be parents are Enticed by Lower Costs and Relaxed Laws*, GUARDIAN 26 (Mar. 20, 2006) available at <http://www.guardian.co.uk/world/2006/mar/20/health.topstories3>.

⁶⁶ Associated Foreign Press, *Wombs for Rent: Commercial Surrogacy Big Business in India*, The Express Tribune, (Feb. 25, 2013), available at <http://tribune.com.pk/story/512264/wombs-for-rent-commercial-surrogacy-big->

regulation and legislation has given rise to a wide unregulated market for 'sex tourism' in India.⁶⁷ Of the many reasons identified for it, cheap woman labour and an overall low cost of a surrogacy arrangement are the most prominent ones.

While India struggles amongst the world nations to justify its legal recognition of surrogacy, it also struggles internally to attain social validation for the same. Since its legalisation in 2002, India has been loomed with the presence of activists both supporting and refuting the claim for surrogacy. Moreover, the lack of appropriate guidelines and laws make it even more difficult for India to deal with post-pregnancy legal issues. Besides this, the acceptance of children born through surrogate pregnancy by the national State of the couple lacks certainty due to shortcomings of its illegality in such respective State.

SPECIFIC ISSUES

3. *Issues of cross-border surrogacy*

It has been provided that the rights of child include the right of every child to a life of dignity and self-fulfilment. Preservation of nationality, citizenship and family relations by the State are considered to be important identity rights for a child which she must not be deprived of under any circumstance.⁶⁸ Personality rights have been considered to be quintessential to human worth and person, and thus form significant dignity rights.⁶⁹

a. Parentage

Parentage issues arise in cases of cross-border travel from a jurisdiction accepting the legality of surrogacy, to the one considering it illegal. Speaking of India, as provided by the ICMR guidelines on surrogacy, the genetic parents of the child (not the sperm/oocyte donor) are marked as 'parents' on the birth certificate of the child.⁷⁰ However, the intending

business-in-india; Raywat Deonandan, *India's Assisted Reproduction Bill and the Maternal Surrogacy Industry*, 4 INT'L REV. SOC. SCI. & HUMAN. 169, 172(2012).

⁶⁷ Crossing Bodies, *Supra* note Fehler! Textmarke nicht definiert., at 15, 25.

⁶⁸ Racheal Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of Child*, UNICEF 114 (3rd edn, 2007).

⁶⁹ JILL MARSHALL, HUMAN RIGHTS LAW AND PERSONAL IDENTITY 39 (Cambridge University Press, 20).

⁷⁰ Code of Practice, Guidelines for ART Clinics in India, ¶ 3.5.4 ICMR/NAMS (2002).

parents of the child might not be the genetic parents if either the sperm or egg donor is different due to reasons of inability to produce it by the existing couple. The Balaz twins' case is reflective of the legal battle fought by the intending parents, where the receiving state (Germany) refused to accept German parentage and citizenship of their twins. The children faced legal issues due to the inconsistent legal framework in India, and the difference in laws in India and Germany. The apex Court of India finally ruled in favour of the Balaz couple, declaring them to be 'parents' and requesting the German government for their acceptance through adoption.⁷¹

b. Citizenship

Citizenship may become an issue when the requirements of attaining it by a State are not satisfied by an individual. An example of the above could be the instance of UK twins born from an Indian surrogate, who were initially denied the British passport on the ground of being born to an Indian citizen surrogate.⁷² Similar was the case with Baby Manji, a baby born from the husband's sperm and an egg donor, where since the couple divorced before the child's birth, the husband was prevented from taking the child back to Japan.⁷³ Even though both the cases were ultimately resolved to the benefit of the intending parents, these cases raise issues of citizenship if one of the genetic parents is an Indian citizen. As provided by the CRC, the State authorities are under an obligation to take steps to provide nationality to a child, and prevent a situation of 'statelessness' for him/her.⁷⁴ As also mentioned earlier, the 'best interest' provided in CRC, provides security from the risk of being denied family life, status and legitimate filiations for a child.⁷⁵

4. *Issues of discrimination amongst surrogates*

Dignity, arising from the fact of being human, subsumes in itself the fact that it would be accorded to each and every individual irrespective of gender, age, ethnicity, social relations

⁷¹ *Union of India & Ors. v. Jan Balaz and Ors.* Special Leave to Appeal (Civil) No.31639 of 2009 Supreme Court of India Order dated May 5, 2010

⁷² Sarah Pook, *Twins Born to Their Granny Win Entry to UK*, DAILY TELEGRAPH 9 (July 27, 2004), available at <http://www.telegraphindia.com/1040728/asp/nation/story-3551289.asp>.

⁷³ Baby Manji's case, *Supra* note 23.

⁷⁴ CRC, *Supra* note Fehler! Textmarke nicht definiert., Article 7(2).

⁷⁵ *Babies Without Borders*, *Supra* note Fehler! Textmarke nicht definiert., at 61.

etcetera. This derives from the fact that dignity bases itself on the ethics of equality, valuing all humans in light of their common humanity, rather than ethics of quality by valuing them only when it embodies certain humanly fitting characteristics.⁷⁶ Thus since dignity is not a conferment of individual worth, it is to be accorded to individuals without distinction.

Although gestational surrogacy requires only the womb of a surrogate, chances of discrimination of the ova donor cannot be reduced.⁷⁷ A Caucasian surrogate carrying the child cannot be discriminated against a non-Caucasian as she only provides her gestational womb and the physical traits of the child do not depend upon her characteristics. However, the ova donor, who is also a party in the surrogate arrangement, can be given a preference based on her colour and traits as also determinative of the traits of the child born out of such surrogacy. Recent research has also highlighted the importance of the gestators' physiological and genetic characteristics on foetal development⁷⁸, making both the gestator and the ova donor susceptible to discrimination. This continues to be one of the major reasons for cheap surrogacy costs in Asian countries as compared to the West. Furthermore racial hierarchies are visible amongst the surrogates in the Indian surrogate market. Surrogates who are fair-skinned, educated, Brahmin and English speakers are preferred as against the darker uneducated ones.⁷⁹ Semen banks and egg donor agencies provide for a wide range of selection from different ethnicities and races.⁸⁰ This would imply that certain racial and genetic characteristics would fetch higher prices, as opposed to the others. The social and economic disadvantage possessed by Indian women adds to their exploitation.

Such discrimination violates the basic tenets of dignity i.e. equality of dignity of all humans. It also concerns itself with CEDAW, of which India forms a state party, which recognises the

⁷⁶ The UNESCO Casebook, *Supra* note Fehler! Textmarke nicht definiert., at x.

⁷⁷ Babies Without Borders, *Supra* note Fehler! Textmarke nicht definiert., at 11.

⁷⁸ Douglas Almond And Janet Currie, *Killing Me Softly: The Foetal Origins Hypothesis*, JOURNAL OF ECONOMIC PERSPECTIVES 153– 72 (April 2011).

⁷⁹ Kristine Schanbacher, *India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women* 25 HASTINGS WOMEN'S L.J. 201 (2014).

⁸⁰ Crossing Borders, *Supra* note Fehler! Textmarke nicht definiert., at 19.

right of women to be free from discrimination of all kinds.⁸¹ It also encourages States to undertake steps to prevent such discrimination and guarantee rights of equality.

5. Health of surrogates

The right to social and health security, adequate health care and rights of reproduction are rights recognised as unalienable dignity rights. Any attempt at providing degrading living conditions and deprivation of basic medical and health facilities is indeed a violation of inherent dignity of an individual. Access to basic health services and sanitation along with a dignified medical treatment has been considered essential ingredients of a descent life by the UN.⁸² The sexual and reproductive health of the mothers and children has been considered as significant to promote their dignity.⁸³

Health of the surrogates is often compromised with, as birth of the child for the intending parents is the foremost priority in any surrogacy contract. It has been observed in some parts of India that instead of the permitted three embryos (permitted by surrogacy regulations), more than that have been implanted in the womb of a surrogate, putting her health at peril.⁸⁴ It has been recorded that pregnancy-related deaths account for one quarter of all fatalities among women aged fifteen to twenty-nine, with about two-thirds of them considered preventable.⁸⁵ It is only about thirty-six percent of women who receive health care within two days of giving birth.⁸⁶ Furthermore, health issues have also become pertinent regarding the relinquishing process of the psychological detachment of the child. Studies show that the mental health of the surrogate may suffer due to psychological anxiety arising from such detachment.⁸⁷ Counselling procedures for surrogates, to overcome this

⁸¹ CEDAW, *Supra* note Fehler! Textmarke nicht definiert., Article 2.

⁸² A life of dignity for all: accelerating progress towards the Millenium Development Goals and advancing UN Development Agenda beyond 2015, Report of Secretary General, 68th Session A/68/202 14 (July 26, 2013); CEDAW Commentary, *Supra* note Fehler! Textmarke nicht definiert., at 318.

⁸³ *Ibid.*

⁸⁴ Kishwar Desai, *India's Surrogate Mothers are Risking Their Lives. They Urgently Need Protection*, THE GUARDIAN (June 5,2012), <http://www.guardian.co.uk/commentisfree/2012/jun/05/india-surrogates-impoverished-die>.

⁸⁵ Allison Bailey, *Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy*, 26HYPATIA715, 730 (2011).

⁸⁶ *Id.*, at 731.

⁸⁷ Hazel Baslington, *The Societal Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL.61, 63–64 (2002).

emotional anxiety are a rarity to find. Thus, such health issues pose a threat to violation of important aspects of a woman's dignity.

Dealing with such health concerns, significant international rights and norms also get attracted. CEDAW provides women with the right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction.⁸⁸ Sexual health has been defined as physical, emotional, mental and social well-being in relation to sexuality.⁸⁹ The ICESCR recognises the right to enjoyment of the highest attainable standard of physical and mental health by everyone.⁹⁰ Furthermore, it ensures special protection to be accorded to mothers during a reasonable period before and after childbirth.⁹¹

6. Other dignity issues

Human dignity respecting the individual personal identity, implicitly also provides oneself the capacity to assert claims to protect dignity.⁹² An individual existing in a larger collective has the right to seek a locus to protect oneself against alleged violations of dignity. A significant concern regarding commercial surrogacy in India is that despite existence of internationally protected rights, their implementation at the grassroot level is minimal. As already seen, the rural women in India form the highest surrogate numbers' and it is indeed imperative for them to effectively exercise their rights and claim dignity in accordance with such rights. A denial of the same leads to further violation of their human dignity.

DIMENSIONS OF ALTRUISTIC SURROGACY AS OPPOSED TO COMMERCIAL SURROGACY

On the extremes of jurisdictions permitting and prohibiting commercial surrogacy, lies a dimension of altruistic surrogacy.⁹³ The basis of altruistic surrogacy rests on the notion of 'gift-giving' with respect to the child, and 'sisterhood' regarding the relationship with each

⁸⁸ CEDAW, *Supra* note Fehler! Textmarke nicht definiert., Article 11(1)(f).

⁸⁹ *Developing sexual health programmes: A framework for action*, WHO/RHR/HRP/10.22 iv (2010) http://whqlibdoc.who.int/hq/2010/WHO_RHR_HRP_10.22_eng.pdf last accessed May 23, 2015.

⁹⁰ ICESCR, *Supra* note Fehler! Textmarke nicht definiert., Article 12(1).

⁹¹ *Id.*, Article 10(2); CEDAW, *Supra* note Fehler! Textmarke nicht definiert., Article 12(2).

⁹² Normative Human Dignity, *Supra* note Fehler! Textmarke nicht definiert., at 851.

⁹³ Richard F. Storrow, *New Thinking On Commercial Surrogacy*, INDIANA LAW JOURNAL Vol. 88, 1281 (2013).

other.⁹⁴ Such form is permitted in the United Kingdom and Greece in the European Union, and Australia, Israel, New Zealand, South Africa, and several US states.⁹⁵ The reason for such States to only permit altruistic surrogacy is that the monetary element in commercial surrogacy commodifies the child and makes it affordable only for the wealthier class. Given the commitment of time, physical sacrifices involved in childbirth, and the fact that these are not for-profit surrogacies, altruistic surrogacy arrangements are rarer to find as compared to the commercial ones.⁹⁶

At large, voluntariness, selfless altruistic motive and absence of reward for rendering of services are the pillars of altruistic surrogacy, which provide for the basic points of distinction from a typical commercial surrogacy arrangement. Therefore, dignity concerns regarding exploitation of surrogates, issues of discrimination, and risk of abuse (trafficking) are at a low probability in such altruistic arrangements rather than that of its commercial counterpart. The discussions of the Government of Australia while legalising only 'altruistic surrogacy' (except the state of Tanzania) were directed towards the fact that commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones.⁹⁷ In Canada, the Assisted Human Reproduction Act⁹⁸ prohibits only commercial surrogacy because the Canadian Parliament believes that commercializing surrogacy is immoral and can lead to the exploitation of women.⁹⁹ Thus it has been principally argued by such States that since altruistic surrogacy is based on voluntary social motive the dimensions related to it do not raise the same concerns as commercialism.¹⁰⁰

⁹⁴ A. Pande, *Transnational commercial surrogacy in India: gifts for global sisters?*, REPRODUCTIVE MEDICINE ONLINE 23:618-625 (2011).

⁹⁵ *Human rights and ethical issues related to surrogacy*, Committee on Social Affairs, Health and Sustainable Development, Parliamentary Assembly, Council of Europe AS/Soc (2015) 131 (April 3, 2015). [hereinafter '*The Council of Europe Report*']

⁹⁶ Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy In India* 30 U. PA. J. INT'L L. 4 1429, 1436 (2008-2009).

⁹⁷ Jenni Millbank, *The New Surrogacy Parentage Laws In Australia: Cautious Regulation Or '25 Brick Walls'?*, 2 MELBOURNE UNIVERSITY LAW REVIEW 35, 13 (June, 2011).

⁹⁸ Assisted Human Reproduction Act (S.C. 2004, c. 2).

⁹⁹ Andre Picard, *Reproduction Watchdog Overdue for Delivery*, GLOBE & MAIL (TORONTO), A19 (Apr. 20, 2006).

¹⁰⁰ Janice G. Raymond, *Reproductive Gifts and Gift Giving: The Altruistic Woman*, 20 THE HASTINGS CENTRE REPORT 6, 7-11 (Nov. - Dec., 1990). [hereinafter '*The Altruistic Woman*']

Practically however, certain similarities do exist in the commercial and altruistic dimensions of surrogacy, consequently raising similar dignity concerns. One of such similarities includes detachment of the child from the mother. Such detachment of the child in utero, though strongly discouraged in a normal pregnancy, forms the basis of all surrogate pregnancies.¹⁰¹ This leads to preference of such surrogates where a woman's ability to psychologically detach is higher and conferment of parental rights to the commissioning couple easier.¹⁰²

States which ban all forms of surrogacy further contend a similarity in all such forms, as they regard surrogacy as a reification of human beings, and thus as a violation of the child's and the surrogate mother's human dignity.¹⁰³ Such dignity concerns can arise as the surrogate is objectified and used as a means to achieve the ends of the commissioning parents, even devoid of any financial gain.¹⁰⁴ Moreover, it cannot be generalised that the chances of exploitation reduce as altruistic surrogacy is devoid of the use of money.¹⁰⁵ Family relations amongst which altruistic surrogacy may be practiced, though do not offer physical coercion, but do provide a considerable scope for inducement where the family opinion may be engulfing.¹⁰⁶ This is particularly true for women holding economically vulnerable positions in hierarchal family positions.¹⁰⁷

ANALYSIS OF INDIAN SURROGACY FRAMEWORK WITH 'HUMAN DIGNITY' IN THE INDIAN CONTEXT

In order to be able to justify or oppose the state of affairs of commercial surrogacy in India, it is important to study the legal framework of India, along with its interpretation of human dignity in the Indian context.

¹⁰¹ Scott B. Rae, *Brave New families?: The Ethics of the New Reproductive Technologies*, 7 Charlotte Research Institute Statement DD135. [hereinafter '*Brave New Families*']

¹⁰² *Brave New Families*, *Supra* note 101.

¹⁰³ The Council of Europe Report, *Supra* note 95, at 2.

¹⁰⁴ M. M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, 35 JOURNAL OF MEDICAL ETHICS 3 171-175, 173 (Mar., 2009).

¹⁰⁵ The Altruistic Woman, *Supra* note 100, at 8.

¹⁰⁶ The Altruistic Woman, *Supra* note 100, at 9.

¹⁰⁷ Rakhi Ruparelia, *Giving away the gift of life: Surrogacy & Canadian Assisted Reproduction Act*, 12 CANADIAN JOURNAL OF FAMILY LAW 23 13 (2007).

It has been laid down as a precedent by the Apex court that it is obligatory for every law enforcement authority in India to uphold human rights because the recognition of the inherent dignity and of the equal and inalienable rights of the citizens is the foundation of freedom, justice and peace in the world.¹⁰⁸ The Preamble of the Constitution reads that every citizen has the right to live with liberty, fraternity and dignity. Part III of the Constitution of India provides fundamental rights to the citizens, which are considered unalienable and most elementary rights of a person. These rights are justiciable before the courts of law, and form the 'basic structure' of the Constitution.¹⁰⁹ Of these, Article 21 provides 'the right to life' to every individual (citizens and non-citizens) restricted only by procedure established by law. Through numerous cases decided, the judicial branch in India, a common law jurisdiction, has provided quite an elaborate interpretation of this right, including human dignity within its ambit.

While defining its scope, the Supreme Court of India¹¹⁰ has observed that the right to life enshrined in Art.21 does not restrict itself to mean mere animal existence. It implies a state much more than just physical survival and includes the right to live with human dignity and consequentially the bare necessities of life, such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Although availability of such facilities depends largely on the economic development of a State, these constitute, however, the very basis of a dignified life, which a State is mandated to provide and protect.¹¹¹ The Court¹¹² reiterated the same principle by remarking that 'inhibition against deprivation of life extends to those limits and faculties by which life is enjoyed'. It went on to interpret the right to life by saying that a dignified life includes a space to be provided for the growth of one's mental, physical and intellectual being.¹¹³ It does not mean a life of drudgery, but enjoyment of all graces of civilisation. Thus, beyond a vegetative state of body, an individual has the right to participate in social, cultural and political life of the country.

¹⁰⁸ *Kartar Singh V. State of Punjab*, (1988) 1 SCC 690.

¹⁰⁹ *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* AIR 1980 SC 1789.

¹¹⁰ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* AIR 1981 SC 746.

¹¹¹ S. Radhakrishnan, *Development of Human Rights in an Indian Context*, 36.2 INTERNATIONAL JOURNAL OF LEGAL INFORMATION 303, 312 (2008).

¹¹² *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180.

¹¹³ *Shantisagar Builders v. Narayanan Khimalal Totame* (1990) 1 SCC 520.

With respect to women, Article 51A of the Constitution recognises the fundamental duty of the State to renounce practices derogatory to dignity of women. Concerning human dignity of a child, courts have laid down that the right to life of children under Article 21 includes providing opportunities and facilities for them to help them develop in a healthy and intellectual manner and in conditions of freedom and dignity.¹¹⁴ These are the minimum conditions to be respected and not to be derogated by the Government at all times.

Considering the conditions of commercial surrogacy and the health of surrogates do not feature the best case scenario, the dignity of the surrogate cannot be upheld in India. The commercialization of surrogacy in India has given rise to a global market (essentially the commissioning couple) affected by ready availability of poor surrogates where forces of demand rise even further and raise competition in the supply forces, increasing the practice manifold. Not only does surrogacy in India increase commodification by attracting a global market, but also violates the ingredients of a dignified life. It neither provides the basic necessities of life, in terms of health, nor the necessities of intellectual and mental development. Moreover, the dignity of the surrogate is affected again as her right to participate in the social and cultural life, which is a quintessential to dignity, is not practised during the term of pregnancy.

Despite such dignity concerns, the Law Commission of India, in its 228th Report, has provided that Indian Courts have recognised the right of reproductive autonomy as a limb of the right to privacy.¹¹⁵ It is one of the basic civil rights of mankind, and has attained constitutional protection as the right to privacy is read into the right to life in Article 21 of the Constitution. Thus the right of surrogacy deriving from such constitutional protection can also be indirectly upheld by the Constitution.¹¹⁶ Furthermore the Indian Courts and ICMR Guidelines have provided that commercial surrogacy agreements would be interpreted according to the Indian Contract Act, 1872.

¹¹⁴*CERC v. Union of India* AIR 1995 SC 922.

¹¹⁵*B. K. Parthasarathi v. Government of Andhra Pradesh* AIR 2000 A. P. 156.

¹¹⁶ Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy Report No. 228 12 (AUGUST 2009).

REGULATION OF SURROGACY IN INDIA

7. *Inappropriate legislation*

In the light of such dignity concerns, adequate legislation is a pre-requisite for a country like India, which provides for one of the largest global markets in fertility tourism. The current Indian surrogacy market operates on non-binding recommendatory guidelines of the Indian Council of Medical Research (ICMR) for accreditation, supervision and regulation of ART clinics in India, issued in 2005.¹¹⁷ The non-statutory nature of guidelines has made it tougher to enforce them (as they remain non-justiciable), and medical clinics to incorporate them in surrogate contracts. These guidelines also suffer from a number of provisions inadequately dealing with the issue, coupled with some uncertain provisions.

Deliberation on the existing guidelines and the rapid development of the sex industry stimulated the legislative branch to draft a concrete bill governing legal issues concerning surrogacy. As one of the major changes in the Indian legal system, the India's Ministry of Health and Family Welfare, together with the Indian Council of Medical Research drafted the Assisted Reproductive Technologies Bill and Rules¹¹⁸ attempting to give India its first surrogacy legislation. The bill was drafted in September, 2008 and subsequently released for public comments.¹¹⁹ Due to lacunae in the draft, it could not be passed in the Parliament, and was revised twice in 2010¹²⁰ and 2014 respectively before a final draft was prepared. Based on the above-mentioned ICMR Guidelines, the bill was welcomed as one of the first major developments since the legalisation of surrogacy in 2002.¹²¹ It was also described as one of the foremost steps to regulate sex tourism in the country, which forms a major part of the country's monetary economy.

The bill purports to govern commercial surrogacy in India, and regulate unethical and unscrupulous medical conduct regarding the same. It provides for setting up of

¹¹⁷ National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005 Available at http://icmr.nic.in/art/art_clinics.htm [hereinafter 'ICMR Guidelines']

¹¹⁸ The Assisted Reproductive Technology (Regulation) Bill, 2008.

¹¹⁹ C.H. Unnikrishnan, Bill to regulate IVF clinics to be tabled soon, (Sept. 24, 2008) available at <http://www.livelimit.com/2008/09/24001126/Bill-to-regulate-IVFclinics-.html> [accessed on July 7, 2015].

¹²⁰ The Assisted Reproductive Technology (Regulation) Bill, 2010. [hereinafter 'ART'].

¹²¹ Sarojini N.B. & Aastha Sharma, *The draft ART (Regulation) Bill: in whose interest?*, INDIAN JOURNAL OF MEDICAL ETHICS Vol VI No 1 (January-March 2009).

administrative State level bodies and procedure regarding registration and duties of ART clinics.¹²² Some of the most important provisions in the draft are perhaps as follows:

1. **Pre-surrogacy concerns:** The provision requiring the clinic to provide professional counselling to the patient, information about advantages and disadvantages of the practice and seeking prior written consent before indulging in any of the ART techniques
2. **Financial support for surrogates:** The provision guaranteeing for the surrogate all expenses, including travel, medical and insurance, incurred during pregnancy and through delivery to be paid by the intending parents (commissioning parties')¹²³
3. **Rights made significant:** A much needed provision clarifying and specifying the rights of patients, donors, surrogates and children is present in the heart of the draft bill¹²⁴
4. **Age and birth cap:** It is the first time that some clarity has been obtained with respect to compensation to be given to a surrogate mother and an age cap of 21 to 45 has also been prescribed. Furthermore, it has been mentioned that a maximum of three live births is the upper limit for any surrogate.
5. **Clarity of parenthood:** The surrogate has to de-link all ties with the child respecting the terms of her contract, and the genetic commissioning parties will be 'parents' of the child.¹²⁵ He/she shall be the 'legitimate child' of the parties irrespective of divorce of the parties.

The bill also acknowledges a situation of use of embryo for research purposes after proper authorization and consent from the ICMR. The draft Act is followed by the ART Rules, 2008 which essentially deal with procedural safeguards regarding use of artificial techniques.

Taking a look at the ICMR Guidelines and the 2008 draft bill, the legal standing of a surrogacy agreement in India has been laid down and discussed by a seminar held at the India

¹²² Chapter – II, The Assisted Reproductive Technology (Regulation) Bill & Rules 2008 [hereinafter '*The Draft Bill*'].

¹²³ The Draft Bill, *Supra* note Fehler! Textmarke nicht definiert., Sec. 34(2).

¹²⁴ The Draft Bill, *Supra* note Fehler! Textmarke nicht definiert., CHAPTER – VII.

¹²⁵ The Draft Bill, *Supra* note Fehler! Textmarke nicht definiert.,

International Centre, New Delhi titled '*Surrogacy – Bane or Boon*'¹²⁶ and the 228th Law Commission Report¹²⁷. The important points to note here are as follows:

- The legality of an Indian surrogacy agreement is governed by the Indian Contract Act, 1872, and its enforceability would be governed by a 'civil suit' under Section 9 of the Indian Code of Civil Procedure, 1908.¹²⁸
- The biological parents can apply under the Guardians and Wards Act 1890 for seeking an order of appointment or a declaration as the guardian of the surrogate child.¹²⁹
- 2005 ICMR Guidelines, even though non-justiciable and non-enforceable apply to all surrogate arrangements in India.¹³⁰

8. *Critical Analysis of the ART Bill*

Although the bill has been appraised for being progressive in recognising the need of infertile couples¹³¹, it has been criticised too for containing numerous contradictions, which have largely served to be the reason for it being pending in the Parliament.

c. Appraisals

- i The bill restricts the ambit of commissioning parents to infertile couples (male/female or both) as an eligibility requirement for surrogacy.¹³² This prevents the unscrupulous demands for surrogacy, by couples who are fully biologically capable of having a child.
- ii Although the bill has a provision regarding the commercial aspect of surrogacy, the altruistic element is kept open. The draft bill mentions that although transport and medical expenses should mandatorily be provided to the surrogate by the commissioning couple, compensation for her services would be optional.

¹²⁶ *Surrogacy – Bane or Boon*, INDIA INTERNATIONAL CENTRE, New Delhi (February 13, 2009).

¹²⁷ Law Commission's 228th Report, *Supra* note **Fehler! Textmarke nicht definiert.**

¹²⁸ Law Commission's 228th Report, *Supra* note **Fehler! Textmarke nicht definiert.**, at ¶13.5(a).

¹²⁹ *Ibid.*

¹³⁰ Law Commission's 228th Report, *Supra* note **Fehler! Textmarke nicht definiert.**, at ¶13.5(b).

¹³¹ Maya Unnithan, *Thinking through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women*, JOURNAL OF LEGAL ANTHROPOLOGY Vol. 1. No.3, 287-313 (2013).

¹³² The Draft Bill, *Supra* note **Fehler! Textmarke nicht definiert.**, Sec. 2(l).

- iii Advertisements of surrogates by ART clinics are completely prohibited under the new Bill. Advertisements conducted by semen banks are permitted although regulated to the extent of not mentioning the details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy.¹³³ This is done majorly to reduce the commodification of surrogates in the fertility tourism market.
- iv The Bill provides for mandatory legal acceptance of the child born out of the surrogacy arrangement by the commissioning parents, even if affected by abnormalities or defects of any kind.¹³⁴ This is an important measure as CRC provides special protection and care measures to such children. It obligates State Parties to ensure dignity and promote self-reliance of a mentally and/or physically challenged child.¹³⁵

d. Shortcomings

- i The surrogate woman has to carry the child till the ‘full term’ of pregnancy, not giving her the right to abort the foetus.¹³⁶ As an exception to this, the bill provides for a situation of termination of pregnancy at will, conditional upon her refunding the expenses spent on her medical treatment till date.¹³⁷ Although this provision recognises the choice of surrogates to take decisions on their pregnancy, it puts a monetary condition of refund, which is impossible to fulfil for most surrogates. Considering the service of most surrogates is pressed by economic factors, the choice to avail the option of abortion is unfeasible and impracticable for them. The inequality in bargaining power and social deprivation makes the application of the provision redundant.
- ii The bill further provides for a non-obstante clause, mentioning that apart from medical, transport and insurance expenses of the surrogate, it shall be completely discretionary for the commissioning couple to provide monetary compensation to the surrogate for her services.¹³⁸ This provision, which is typical to any provision relating

¹³³ The Draft Bill, *Supra* note Fehler! Textmarke nicht definiert., Sec. 34(7).

¹³⁴ The Draft Bill, *Supra* note Fehler! Textmarke nicht definiert., Sec. 34(11).

¹³⁵ RCR, *Supra* note Fehler! Textmarke nicht definiert., Sec. 23(1).

¹³⁶ The Draft Bill, *Supra* note Fehler! Textmarke nicht definiert., Sec. 34(2).

¹³⁷ The Draft Bill, *Supra* note Fehler! Textmarke nicht definiert., FORM – J Appendix 1.

¹³⁸ The Draft Bill, *Supra* note Fehler! Textmarke nicht definiert., Sec. 34(3).

to commercial surrogacy, introduces the money element in a surrogacy arrangement, which remains to be determined by market forces of demand and supply. Moreover, the discretion also opens up a wide range of payment window, making it obvious for the payment to differ amongst surrogates providing the same service. Elements of discrimination on the basis of physical traits of surrogates also become imperative.

- iii Even though an age cap is put as an eligibility requirement, the health of the surrogate is at peril. As a surrogate should have conceived at least once in her lifetime, up to five successful births are permitted, and up to three surrogate births are permitted. Thus considering a woman has reached the upper limits of both i.e. eight births, the health of the surrogate can be affected to a great extent.
- iv Furthermore, the draft bill does not contain provisions addressing health issues post-pregnancy. Health concerns like the effects of foetus reduction, post-natal depression/trauma, potential harm of drugs and medical procedures essential for implantation of the womb, and the like, have not been dealt in the bill at all. Moreover, even if physical wellness of the surrogate is taken care of to a certain extent, the Bill fails to protect the mental well-being, especially post-natal. The Bill in fact, provides for immediate separation of the child with the surrogate and does not allow a minimum period for which a newly born is to be kept with the surrogate mother, possibly causing a huge psychological derailment.
- v The Bill does not deal with the adjudication aspects of surrogacy. It does not create, designate or authorize any court or quasi-judicial forum for resolution of disputes arising out of surrogacy, ART and surrogacy agreements.¹³⁹ Thus although issues of parentage, nationality and citizenship have been dealt with in the provisions of the draft, a mechanism to resolve disputes regarding the same remains uncertain. Further areas like issuance of passport and grant of visa have not been dealt at all in the draft.¹⁴⁰
- vi Lastly, the Bill fails to deal with one of the major setbacks in the Indian surrogacy industry, i.e. the stigma attached to surrogacy.¹⁴¹ One of the major reasons for this is the commercial aspect of surrogacy as it is considered menial in carrying a child in the

¹³⁹ Law Commission's 228th Report, *Supra* note **Fehler! Textmarke nicht definiert.**, at para.3.2,

¹⁴⁰ *Ibid.*

¹⁴¹ AMRITA PANDE, *WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA* 178 (Columbia University Press, 2014).

womb and leaving it for exchange of money. It proves to be the reason forcing surrogates to live in dormitories, leaving their villages and hiding the fact of surrogacy.

The Assisted Reproductive Technologies (Regulation) Bill, 2014 though similar in other aspects to the 2010 draft bill, deliberates on two important provisions regarding whether the legislation will allow single parents and foreign nationals to have children through surrogates in India. Although the 2014 draft bill has not been tabled in the Parliament, and is not available in the public domain, it seeks to ban these two categories of people from being commissioning parents in a surrogacy arrangement.¹⁴² This has been done primarily to curb trafficking in women and children and unjust treatment of surrogate mothers including concerns for their health.

Such a move by the Indian Ministry of Health brings with it certain criticisms and implications. The government's support for such a ban can be understood in the light of trafficking in women and children raising important dignity concerns (as discussed earlier), and increasing concerns regarding the global nature of surrogacy. However, it can be argued that prohibiting a certain class of people from commissioning surrogacy is not a guarantor of curbing such practices, and strengthening norms governing the surrogacy arrangement is the need of the hour for India.

Moreover an important implication of the draft bill would be the huge reduction in money generated from global fertility tourism in India. This would have effects on the GROSS Domestic Product among other things.

FINDINGS & CONCLUSION

The paper has comprehensively discussed a number of dignity concerns regarding commercial surrogacy in general, and India in particular. As a consequence of such research, the legal issues of health, discrimination, abandonment, beneficence and self-determination have come to the forefront of the surrogacy debate. It has been observed that such issues

¹⁴² Smriti Kak Ramachandran, *New law would deny surrogacy for single parents* THE HINDU, New Delhi (October 4, 2014) last accessed on (July 9, 2015).

have attacked the basic constituents of dignity being intrinsic value of a human, and it being equally provided to all.

It has been also observed that commercial surrogacy has raised different issues in a domestic set up, as opposed to a global set-up. This is so because of the difference in legality of commercial surrogacy across different jurisdictions. In addition to the basic domestic issues, issues of parentage, citizenship and nationality have arisen more often in the global surrogacy market. However, both the domestic and global geographical zones have posed human dignity concerns for the surrogate and the child. It has also been observed that altruistic surrogacy also raises similar dignity issues in certain respects, and lesser concerns in other respects.

Dignity and rights emanating from dignity have continued to be violated in the situation of a typical surrogacy arrangement. The price for the surrogate's services, her health or the ability to have an informed decision have posed an actual and potential threat to dignity of the surrogate. Even though dignity concerns of the child have highly faired, the child is still protected under the 'best interest' doctrine and given the prime importance. Ignorance of the surrogate's rights and interests has been evident in laws of states legalising surrogacy. Remedies to the surrogate in case of non-payment of health costs, protection of medical condition of the surrogate post-pregnancy and bargaining power of the surrogate vis-a-vis commissioning parents are largely areas affecting the surrogate's rights.

Law Commission in its 228th Report¹⁴³ to the Parliament has suggested a change in the Indian surrogacy framework by highlighting the concerns in the Indian commercial surrogacy market. It provides for a mention of acceptance of surrogacy in India due to the right of reproductive autonomy (a part of privacy right) read into the right to life with dignity by Indian courts. While praising the advancement of ART techniques in India, the Report brings across various legal and moral issues arising in the practice of commercial surrogacy. It also puts forth the inadequacy of legislation dealing with commercial surrogacy in India, and suggests legalisation of altruistic surrogacy instead.¹⁴⁴

¹⁴³ Law Commission's 228th Report, *Supra* note Fehler! Textmarke nicht definiert..

¹⁴⁴ Law Commission's 228th Report, *Supra* note Fehler! Textmarke nicht definiert., at para. 4.1.

The constitutional status to reproductive autonomy has been given, however, a much greater stance and has justified the stance of commercial surrogacy in India. To evince the same the above-mentioned recommendation of the Law Commission regarding abolition of commercial surrogacy has subsequently been rejected by the legislature.

Despite existence of such validity, the workability of commercial surrogacy in India seems dubious. The inadequacy of Indian regulations and laws, issues of parentage and citizenship arising in cross-border surrogacy have furthered the dubious future. Not only have India's existing non-binding ICMR regulations lacked substance and implementation, the new draft bill has considerably failed in creation of an all-encompassing legislation. The bill has lacked protection to be provided to uphold the dignity of the surrogate and child, and has thus made commercial surrogacy inapt with the dignity framework in India.

Towards the end, it is important to note that even though human dignity lacks a formalistic and definitive content, it forms the cornerstone and birthplace of all human rights. Thus civil, political, social, economic and cultural rights are all derivative rights, derived from the existence of dignity in a human being. Commercial surrogacy has violated the basic tenets of inner worth and such derivative rights, and thus cannot be justified on the basis of human dignity.