WOMEN, LAW AND MORALITY*

Hon'ble Dr. Justice Balbir Singh Chauhan**

Introduction

The revolutionary developments in re-productive technology, such as In-Vitro Fertilization (IVF), artificial insemination, and surrogate motherhood require serious consideration, as the same has posed new challenges to marital relations between spouses, and may have a serious impact on ethical and moral standard of the society. Traditional notions of morality and religion are under challenge and the law is having trouble in keeping pace with the new issues raised by these advances. The issues have to be examined in the light of the constitutional rights guaranteed to every person irrespective of his/her gender or his/her nationality. Article 21 of the Constitution of India has been given a very expensive interpretation defining the words 'life' and 'liberty' contained therein very widely.

Concepts of Law and Morality

Morality can be described as a set of values, common to society, which are normative, specifying the correct course of action in a situation, and the limits of what society considers acceptable.

Law is manifestation of the person competent to make law whether it is legislature or a king or a village *panchayat*.

It has always been a subject of debate as to whether there can be a law, which does not meet the test of morality.

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* Abstract of the speech delivered by Hon'ble Dr. Justice Balbir Singh Chauhan, Judge, Supreme Court of India at New Law College, Bharati Vidyapeeth Deemed University, Pune.

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The existence of unjust social practices, such as those enforcing the commission of *sati*, slavery and untouchability *etc.*, proves that morality and customs and traditions are not identical, and do not necessarily coincide with each other. Laws that serve to defend basic values, such as laws against murder, rape, malicious defamation of character, fraud, bribery, *etc.*, prove that the two can coincide.

Law is changed at the will of the Legislature. On the other hand, the moral values also consistently change with tie to reflect a change in attitudes.

There may be a case of violation of parking law that may be illegal but may not be immoral. Adultery is an offence punishable with 5 years rigorous imprisonment under section 497 Indian Penal Code, 1860 in India as well as a ground for divorce. However, the wife involved in such crime cannot be punished as an abettor. In United Kingdom, adultery is not a criminal offence though a very good ground for divorce. Therefore, law and morality can some time be seen particularly different, however, some times to be coinciding.

The morality basically describes the principles that govern our behaviour. Without these principles in place, societies cannot survive for long. Thus, morality ensure fair play and harmony between individuals and help make people good in order to have a good society and it keeps the people in a good relationship with the power that created us.

Therefore, for most of the people, morality is a set of rules that we ought to obey as the said rules tell us what is right or wrong.

There had been two schools of thoughts. One is natural law school espoused by St. Thomas Aquinas and Professor Lon Fuller. According to them, law must be in consonance with morality and one must disregard a law which is not in conformity with natural code. According to this school, the moral code comes from God, and thus is natural. Another theory is of positive law thinkers Jeremy Bentham and John Stuart Mill. According to them law must be enforced as it is even if it does not

meet the test of morality.

According to Bentham theory of utilitarianism *i.e.*, the greatest good for the greatest number of people, a person is free to act as per his own wish provided his act does not harm others. Philosopher Kant's moral system is based on rationality. Jeremy Bentham's ethical system is based on happiness of larger number of persons, *i.e.*, the greatest happiness for the greatest number of people. Thus, he developed a 'calculus of happiness' in order to calculate for any action or law what the consequences in terms of pleasure or pain would be. However, John Stuart Mill suggested that there were higher and lower pleasures and society should prefer the higher ones: "Better to be dissatisfied than a fool satisfied." By lower pleasures, he meant pleasures of flesh, and by higher pleasures, he meant pleasure of the intellect.

There may be victimless crimes which do not harm anyone, debated by Edwin Schur in *Crimes without Victims*. Criminal acts such as homosexuality, abortion and drug abuse do not harm the innocents and only those who partake of their own free will. Therefore, the Parliament and Judiciary should be very cautious and conscious about altering laws concerning morality.

Undoubtedly, morality necessarily becomes a persuasive source of law but cannot supplant the law. Morals may be created by one's society, religion or individual conscience. Morals are same as the ethics. There may be some moral principles which are universally applicable.

Difference between Law and Morality

Law would always be backed by legal sanction and if violated, a person may be punished. Morality is forced by compulsion. In such a fact-situation today both law and morality are facing challenges put forward by technology, fast urban life, secularism, equality before law, democracy and constitutionalism. Therefore, the law has the characteristics of binding whereas morality has the characteristic of being bound. Law is influenced by religion, and in a traditional society has never had a dominating character; but religion and morality had

played very dominant role. Therefore, one may say that law and morality had played very dominant role. Therefore, one may say that law and morality are two sides of the same coin. Morality seeks to influence our behaviour by way of our desires where law is the backup option and targets our desires where law is the backup option and targets our beliefs.

Issues like pornography, prostitution, and homosexuality are the areas of our own consciousness and hence it is an area of conflict between law and morality which still continues.

Live-in relationship also carries a moral ban on it in a traditional society. Law cannot be an instrument of moral standards rather law has to be independent of all sorts of moral dogmas except certain areas in which law is dominated by morality. Morality cannot play any role in legal areas like business law, company law, cyber law, tax laws, trade laws *etc*. Morality has got nothing to do with contents of law in such areas. However, it may have a vital role in laws like SITA (Suppression of Immoral Traffic in Women and Girls Act, 1956), and PITA (Immoral Traffic (Prevention) Act, 1956). Therefore, there cannot be any hard and fast rule of universal application in this regard. At the most, it can be concluded that the level of enforcement of moral standards depends upon case to case.

In *Manu Smriti*, woman had been put on the higher pedestal, as while dealing with the status of the women it says:

यत्रे : नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता I

यत्रे : तारचु न पूज्यत्ते स्वास्तित्रा फला क्रिया : II[1]

Where women are honoured, the deities are pleased; where they are dishonoured, all their religious acts become fruitless.

However, while dealing with her contractual rights, *Manu Smriti* provides:

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[1] Manu, Ch III – 56.

पिता रक्षति कौमारे भर्ता रक्षति यौवने : I

रक्षत्ति स्थाविरे पुला : न स्त्री स्वातंत्रय मर्हति II[2]

Her father protects her in childhood; her husband protects in her young age; her sons protect her in old age; she is never fit for independence.

Both the texts have to be re-conciled giving harmonious construction and to be read in such a manner that both may co-exist. Thus, Sir Henry Maine, a great scholar of Hindu law explained that woman had been deprived of right to enter into a contract being very emotional.

Woman's character has been described in ancient text as:

दणे : तुश्टा दणे : रूश्टा, तुश्टा रूश्टा दणे : दणे II

Thus, it was explained/preached that any contract to which a woman is a party may not subsist for long.

After 1960s, Europeans massively abandoned many traditional norms rooted in Christianity and replaced them with continuously evolving relative moral rules. In this view, sexual activity has been separated from pro-creation which led to a decline in the importance of morality and to depopulation, though it gave rise to the larger controversy on many issues such as elective abortion.

In England, the *Wolfenden Report 1957*, was produced after a long debate on the relationship between law and morality recommending the legislation of prostitution and homosexuality on the basis that law should not intervene in the private lives of citizens or seek to enforce any particular pattern of behaviour further than is necessary to protect others and individuals should be allowed as much freedom and privacy as is possible without compromising any other's morality.

In *U.K. Gillick* v. *West Norfolk and Wisbech Area Health*

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[2] Ch IX – 3.

Authority,[3] the Court addressed the questions regarding the validity of a circular issued by National Health Service-Family Planning Clinics of United Kingdom containing guidelines to area health authorities to give advice regarding contraception even to girls under the age of 16. Ms. Gillick sought declaration from the Court against the health authorities on the issuance of the said circular. She argued that the health service authorities in law had no competence to give advice to a girl below 16 years of age; as such advice would adversely affect the rights of her children. Further, it would affect Ms. Gillick in her capacity as a parent and custodian of her daughters as it would be against her rights to effectively discharge her duties as parent and custodian.

Ultimately, the House of Lords by majority of 3:2 rejected her claim as the House held that having regard to the reality that a child becomes increasingly independent as it grows older and that parental authority dwindles correspondingly, the law did not recognize any rule of absolute parental authority until a fixed age. Instead, parental rights were recognized by the law only as long as they were needed for the protection of the child and such rights yielded to the child's right to make its own decisions when it reached a sufficient understanding and intelligence to be capable of making up its own mind. Accordingly, it held that a doctor who in exercise of clinical judgment gave contraceptive advice and treatment to a girl under 16 years of age without her parental consent did not commit any offence under section 6(1) or section 28(1) of the Sexual Offences Act, 1956. The Court rejected the submissions made on behalf of Ms. Gilllick that if a girl was under 16 years of age, any physical examination or touching of her body without parental consent would be an assault by the examiner. The Court also rejected the submission that such provision for advice on the use of contraceptive to a girl under 16 would encourage participation in sexual activities, and this practice would offend basic principles of morality and religion which ought not to be sabotaged by the National Health Service.

However, rape within marriage is an offence in western

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[3] (1985) 3 All E R 402.

society. In *R* v. *R*,[4] the House of Lords examined the provisions of section 1(1) of Sexual Offences (Amendment) Act, 1976, in a case where the accused admitted to having forcible sexual intercourse with his wife. He was charged for rape and assault. The Court came to the conclusion that the supposed marital exemption in rape formed no part of the law of England. Therefore, there was no law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband. "Therefore, a husband could be convicted of rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse."

In *Lata Singh* v. *State of U.P. & Anr.*,[5] the Supreme Court entertained a writ petition under Article 32 of the Constitution of India, and quashed the complaint under sections 366 and 368 Indian Penal Code, 1860 lodged by the brother of the petitioner therein against the petitioner and her husband as she had married inter caste observing that a major girl: "(I)s free to marry anyone she likes or to live with anyone she likes."

In *S. Khushboo* v. *Kannimmal*,[6] the Supreme Court quashed criminal prosecution against the appellant for preaching in favour of live-in relationships, holding that a live-in-relationship by two adults of different sex, by consent, does not constitute any offence, punishable under any penal law. The Court rejected numerous arguments on the morality of such relationships as being of no concern to the legal issue before it.

Women's Right to Have Artificial Insemination

In *R.* v. *Human Fertilisation and Embryology Authority, Ex Parte Blood*,[7] the question arose regarding the interpretation of the provisions of the Human Embryology and Fertilisation Act, 1990 and provisions of the European Community Treaty. In the said case, Mr. and Mrs. Blood got married in 1991. They planned to have a family in 1994. However, before the applicant Mrs. Blood

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[4] (1992) 1 AC 599.
[5] AIR 2006 SC 2522.
[6] AIR 2010 SC 3196.
[7] (1997) 2 All ER 687.

could conceive, her husband contracted meningitis, and lapsed into a coma. On the request of Mrs. Blood sperms were collected by electro ejaculation for use by her at a later stage for artificial insemination, and were entrusted to the Infertility Research Trust for storage. The applicant wanted to use the said sperms for artificial insemination. However, the Human Fertilsation and Embryology Authority rejected her prayer for treatment in U.K. or to export the said sperm so that she may get artificial insemination in neighbouring country Belgium, on the ground that 1990 Act permitted such treatment only when donor and receiver come together, or the donor had given an effective consent in writing for using such sperms. The Court of Appeal ultimately held in favour of Mrs. Blood on the ground that there could not be a written consent by Mr. Blood but considering his wish to have a family before his death the sperm can be used by Mrs. Blood; and secondly Mrs. Blood had a right to get treatment in any country of European community. Therefore, not granting her permission would violate her right to get treatment outside U.K.; and as a special case the permission was granted. In fact it was a case where humanity could override the legal arguments. Mrs. Blood succeeded on humanitarian considerations. Such a case may give rise to various questions particularly relating to right of succession. Therefore, in such a case law must require that a donor must give an 'effective consent' in writing knowing full well the 'consequences and implications' of the same. They may be a case where a person has given the consent. He donates the sperm, but dies before the artificial insemination takes place. Therefore, it would amount to posthumous use of his sperm.

In *Re: R (Parentage)*[8] the husband and wife both went together for treatment, completed all legal formalities and after donating the sperm, they stood separated. However, the question arose as to whether the wife could have artificial insemination. The Court held that it was a case of treatment together because all the legal formalities stood completed and the treatment 'commenced together' when the sperm sample was taken. More so, the donor had subsequently not withdrawn his deemed consent.

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[8] (1996) 2 FLR 15.

Surrogacy, Law and Morals

The word 'surrogate' has been derived from the Latin word *subrogare* which means appointed to act in place of other. There are various types of surrogacy. 'Traditional surrogacy', popularly known as 'straight method surrogacy' which means that the surrogate is pregnant with her own biological child, but the child has been conceived with the intention of relinquishing the child to be raised by the other *i.e.*, by the biological father and possibly his spouse or partner. 'Gestational surrogacy' means that the surrogate becomes pregnant *via* an embryo transfer with a child of whom she is not the biological mother, and such a surrogate mother is called a 'gestational carrier'.

Surrogacy is also classified as 'altruistic' and 'commercial'. The first is when the surrogate mother does not intend to receive anything except the medical expenses, maternity, clothing, *etc.*; but commercial surrogacy is where the surrogate mother receives full consideration treating her action as a surrogate in a manner akin to a 'commercial surrogacy'. The availability of poor surrogate mothers has meant that 'commercial surrogacy' has reached industrial proportions. 'Commercial surrogacy' sometimes is referred to as 'wombs for rent', 'outsourced pregnancies' or 'baby farms'.

This may cause serious problem regarding the violation of child rights, non-implementation of laws providing for protection and development of children, and non compliance of policy decisions made on mitigating hardships and ensuring welfare for the children which can be examined by the authorities under the provisions of the Commission for Protection of Child Rights Act, 2005. In *Baby Manji Yamada's* case,[9] an identified woman donated the egg, which after fertilization with sperm of Mr. Yamada was introduced into the body of the surrogate mother. Thus, it was not a case of involvement of a 'couple' *i.e.*; Mrs. Yamada had no contribution in the birth of the child.

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[9] *Baby Manji Yamada* v. *Union of India & Anr.*, AIR 2009 SC 84.

US gay couple (Fister and Michael) rented a womb in Hyderabad. US Citizen Brad Fister (29) had come to Hyderabad in 2009 when he donated his sperm which was fused with an egg donated by an Indian egg donor. This is a first such case of two fathers.[10]

In-Vitro Fertilization (IVF) and Embryo Transfer (ET), commonly known as 'Test Tube Babies', require fertilization of an ovum outside the body, and consequently transfer of the embryo into the uterus of the woman. In-vitro is a Latin phrase meaning 'in glass', which is why it is known as 'Test Tube Baby'. India has played a great role in the development of IVF technology. Louise Brown, the world's first test tube baby, was born by this method on 25th July, 1978 in England, and India's first test tube baby, Durga was born in Kolkata on 3rd October, 1978.

In *Mahabharat*, Gandhari did not deliver a child, rather delivered a semi solid material which was divided by Maharishi Vyas into 100 pieces, and planted them in different pans/pots. Thus, 100 Kauravas were born. They may be described as the first test tube babies.

Such a technology is adopted where the woman has blocked fallopian tubes, ovulation problems, and mild degree of seminal problems for the man, or presence of seminal antibodies in the woman's body.

However, there have been very serious problems with regard to the use of IVF technology and surrogacy as fertility drugs have been stolen illegally; medical records have gone amiss; embryos have been stolen from the women and given to others or to researchers; women recruited as surrogate mothers have refused to part with the new born baby that they have conceived to assist couples to bear a child.

In fact, in the case of surrogacy, there have been many questions about enforcing a contract with the surrogate mother. Thus, the question arises as to whether such contacts may be valid in view of the provisions of public policy, particularly under section 23 of the Indian

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[10] Available at: articles.timesofindia.indiatimes.com

Contract Act, 1872, and whether the child to be handed over can be considered a commodity to be sold for consideration. It gives rise to several other questions. A party may refuse to have its contract acted upon, or the child is not according to the specifications agreed upon as in ordinary law of contract, the finished goods can be rejected and damages can be claimed in such situations. Whether surrogacy contracts are the same as other contracts? It raises a very serious issue of morality and gives rise to the question of whether insemination amounts to adultery and whether a surrogacy agreement is a case of exploitation of the helplessness of poor women who are selected surrogate mothers. Surrogacy also raises complex questions of succession by a child born of a surrogate mother, as under section 26 of the Special Marriage Act, 1954 and section 16 of the Hindu Marriage Act, 1955 children of voidable and void marriages cannot inherit the coparcenary properties of any relative, they can only claim share in self acquired property of the parents.[11]

Artificial insemination gives rise to conception that may not amount to consummation of marriage. In case the husband is impotent that creates a serious problem, as even though every individual has a right in a marriage to enjoy the sexual act the wife becomes entitled for divorce on the ground of impotency of her husband. The question also arises as to whether artificial insemination amounts to adultery.

In *Oxford* v. *Oxford*,[12] a Canadian Court held that as the wife was a surrogate mother, it was a clear cut case of adultery by the wife and on this ground the divorce was granted.

'Heterologous artificial insemination' with or without the consent of the husband may be contrary to the public policy and good morals. The child so born cannot be termed to have born out of legal wedlock and, therefore, such a child will be illegitimate.

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11 *Smt PEK Kalliani Amma & Ors.* v. *K. Devi & Ors.*, AIR 1996 SC 1963; *Bharatha Matha & Anr.* v. *R. Vijaya Renganathan & Ors.*, AIR 2010 SC 2685.

12 58 O L R 251 (1921).

Questions may also arise regarding the validity of such contracts with or without the consent of the husband as under the Contract Act only a major *i.e.*, who is 18 years of age as per the provisions of Indian Majority Act, 1875, is competent to enter into a contract. In India, in spite of several statutory provisions the marriages of the children are solemnized before attaining the majority and Rajasthan is particularly known for child marriages. There is no provision declaring a child born by a girl before she attained majority as illegitimate or illegal. Therefore, the question may arise as to whether the minor girl or parents or husband on her behalf can enter into the contract of surrogacy or artificial insemination.

Section 112 of the Indian Evidence Act, 1872 provides for a presumption of a child being legitimate, and such a presumption can only be displaced by a strong preponderance of evidence and not merely by balance of probabilities as the law has to live in favour of an innocent child from being bastardized. It is settled legal proposition that proof of non-access between the parties to marriage during the relevant period is the only way to rebut that presumption.[13]

So far as the Indian courts are concerned, the Supreme Court is considering the case of *Jan Balzaz*,[14] wherein a German couple got a child from a surrogate mother in India. The legal issues raised were centered on whether the surrogate mother is the legal mother of the child. The German authorities were not willing to give the citizenship to the child for the reason that surrogacy is not permitted in Germany. In such a situation, it was held that the solution for such a problem is to recognize the surrogate mother as the legal mother and take the child in adoption. However, such cases may depend on what are the terms and conditions which had been

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[13] *Mohabbat Ali Khan* v. *Muhammad Ibrahim Khan* & Ors., AIR 1929 PC 135; *Chilukuri Venkateshwarlu* v. *Chilukuri Venkatanarayana*, AIR 1954 SC 176; *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati*, AIR 1965 SC 364; *Perumal Nadar (Dead) by Lrs.* v. *Ponnuswami Nadar (Minor)*, AIR 1971 SC 2352; *Amarjit Kaur* v. *Harbhajan Singh & Anr.*, (2003) 10 SCC 228; *Sobha Hymavathi Devi* v. *Setti Gangadhara Swamy & Ors.*, AIR 2005 SC 800; *Shri Banarasi Dass* v. *Teeku Dutta (Mrs.) & Anr.*, (2005) 4 SCC 449.

[14] Against the judgment in *Jan Balaz* v. *Anand Municipality & 6 Others*, AIR 2010 Gujarat 21.

incorporated in the surrogacy contract. Even in case of adoption of such children, inter-country adoption law is very cumbersome and time consuming.[15]

In the case of *Baby Melissa* decided by the Supreme Court of New Jersey, Baby Melissa Stern was born on 17.3.1986 by surrogacy in New Jersey and a dispute arose between the surrogate mother and biological parents as the surrogate mother refused to give up the child. In 1987, the New Jersey Supreme Court awarded the custody of the child to the Stern family *i.e.*, the biological parents considering the best interest of the child and validation of the surrogacy contract. In 1988, the Supreme Court of New Jersey held that the surrogacy contract itself was void as it was against public policy. It was the first case in American courts relating to a surrogacy contract and its validity, and it also raised questions regarding the termination of parental rights. However, when Melissa Stern turned 18 in March 2004, she formally terminated the parental rights of surrogate mother and got adoption by biological parents. The child herself has done her post-graduate in King's College in London on her own on the law of surrogacy and ethical issues of surrogacy dealing with surrogacy issues relating to new technologies.

To another case, a gay couple had contracted surrogacy, and twin girls were born to the mother in October 2006, and the law suit was filed by the surrogate mother leaving aside the right to enter into such contracts.

In *Roe* v. *Wade*,[16] the American Supreme Court had decided that every woman has a right to take a decision how her body is to be used, and therefore a woman has a right to enter into the contract of commercial surrogacy. Such an issue requires serious consideration for the reason that large percentage of population is infertile and gay, lesbian and trans-gendered members of the society do not want to lose their freedom, and want to have babies to carry on their bloodline.

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[15] *L.K. Pandey* v. *Union of India*, AIR 1984 SC 469; AIR 1986 SC 272; AIR 1987 SC 232.

[16] 410 US 113 (1973).

In *Suchita Srivastava* v. *Chandigarh Admn.*,[17] the Supreme Court held: "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling State interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provision of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

The Westminster Parliament enacted the Human Fertilization and Embryology Act, 2008 to deal with most of the arising out of these developments. An attempt had been made to cover all the cases, as the Act had repealed all other existing laws on the issue, particularly the Human Fertilisation and Embryology Act, 1990 which was considered to be inadequate.

In Canada, commercial surrogacy arrangements were prohibited in 2004 by the Assisted Human Reproduction Act. Altruistic surrogacy remains legal.

In France since 1994 any surrogacy arrangement that is commercial or altruistic is illegal or unlawful, and sanctioned by the law.[18]

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17 (2009) 9 SCC 1 p14.
18 (*art 16-7 du code civil*).

In Georgia since 1997 ovum, sperm donation and surrogacy is legal. According to the law, a donor or surrogate mother has no parental rights over the child born.

In *Anna Johnson* v. *Mark Calvert*,[19] the genetic parents brought suit seeking a declaration that they were legal parents of child born out of surrogate mother. The Superior Court of Orange County ruled in favour of husband and wife. The surrogate mother appealed, the Court of Appeal affirmed the said judgment. However, the Supreme Court reversed the judgment of the appellate court and held that the woman was not 'natural mother' of the child for the reason that it was not her egg which stood fertilized before implanting in the womb of the natural mother.

This gives rise to the question as the whether a child is a saleable commodity. In the Roman Empire it was a right of the head of the family to treat his wife and children as saleable commodities. It is likely that such a concept would have been prevailing in our ancient society otherwise Raja Harishchandra could not sell Taramati and Raja Yudhishthira could not loose Draupadi in gambling. The origin of word *Kanyadan* in ancient times also gives an impression that there could have been a right of a father to give away the daughter as gift.

In 1810, a case was filed by Smt. Davetaya, in the Superior *Sadar Adalat* for the recovery of possession of her daughter Smt. Samkuria who had been sold away for Rs. 15/- by her husband Shri. Dayaram. The Division Bench of the said *Adalat* referred the matter to a Committee of *Pandits*, experts of Hindu law and Hindu *Dharam Shastras*. The Committee opined that it was an absolute right of the husband to alienate the wife provided she gave her consent. Accepting the opinion of the Committee, the Bench dismissed the case *vide* judgment and decree dated 26.1.1810 upholding the right of the husband to alienate the wife. Relevant Part of the judgment reads: "After consulting legal experts, it was found that the claim of the parents of the said lady is not legitimate. Her husband has the right to sell her off. In

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[19] (1993) 5 Cal 4th 84-85 P 2d 776.

such a situation this sale is considered to be valid. No objections can be raised against this according to *Shastras*. The file may be consigned to the record room."

Assisted Reproductive Technologies (Regulation) Bill, 2010

So far as India is concerned the Assisted Reproductive Technologies (Regulation) Bill, 2010 is pending consideration before Parliament, wherein a very comprehensive legislation has been prepared and the salient features thereof are: Constitution of State Boards (section 12); Restriction on sex selection (section 25); Restriction on sale of gametes, zygotes and embryos (section 29); Regulation of research on embryos (Chapter VI); Determination of status of the child (section 35); Right of the child to information about donors or surrogates (section 36); and Chapter VIII which deals with offences and penalties.

The Bill, while insisting on a number of measures to be taken to ensure the anonymity of the surrogate, states that the surrogate mother should register under her own name for the purpose of medical treatment and provide the name of the couple for whom she is acting as surrogate. If the legislation makes it mandatory for the surrogate to disclose her identity, then it is unclear as to how her privacy and anonymity will be maintained.

The legal parentage of children born through surrogacy has not been adequately tackled and situations where the intended couple no longer want the child, split up, pass away or abandon the child have not been addressed. The process of handing over the child from the surrogate to the intended parents has also not been adequately addressed. The legislation also clarifies that the name on the birth certificate will be that of the genetic parents, thus equating the term with intended parents/parent. Such a clause, although protecting the anonymity of the donor, presumes that the intended parents will also be the genetic parents.

The Bill states that a woman may act as a surrogate for three successful births in her lifetime, including a maximum of three attempts at pregnancy for a particular

couple. This takes the number of times she can undergo IVF cycles to a high figure, thus jeopardizing her physical and mental health.

The Bill is still ambiguous on certain key areas like the maximum age of women who can opt for ARTs and also:

- If the child becomes paralytic or physically challenged and the foreign parents avoid their responsibility who will take care of the child and the mother?
- After reaching an agreement, if the childless parents die, what will happen to the surrogate mother?
- Who will take the responsibility, if the foreign parents never come back to get their child?

For any surrogacy agreement to be viable, it should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Right to privacy of donor as well as surrogate mother should be protected. Sex-selective surrogacy should be prohibited. Disputes concerning custody which come before the courts are to be decided according to the welfare of the child in consideration of the functions of parenthood as to who is in best position to perform.

Under this Bill of 2010, a couple has been defined under section 2(e). Persons living together and having a sexual relationship may not be legal in the country *i.e.*, section 377 IPC, thus such persons are not permitted to have the benefit of these facilities. The Bill further provides that a surrogate mother requires the consent of her husband to act as such. Therefore, single unmarried woman cannot be volunteered to be a surrogate mother. Under section 34(9), the surrogate mother shall not undergo embryo transfer more than three times for the

same couple.[20]

The 2010 Bill talks of foreign couples coming to India for surrogacy to submit documents from their home country certifying that they permit surrogacy and the child born will be granted citizenship in the country of their nationality.

In the 228th *Report* submitted by the Law Commission of India in August, 2009, titled *Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy*, it was recommended that: "The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones." The Law Commission, in its concluding note in the said *Report*, had made the following key recommendations:

- Surrogacy arrangements should continue to be governed by contract amongst parties but should not be for commercial purposes.

- Surrogacy arrangements should provide for financial support for the surrogate child in the event of death, divorce or unwillingness of the commissioning couple/individual.

- Surrogacy contract should take care of Life Insurance Cover for the surrogate mother.

- The intended parents must be a donor in a surrogacy arrangement.

- Legislation should recognize a surrogate child as the legitimate child of the commissioning parent(s).

- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

- Right of privacy of donor as well as surrogate mother

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[20] This seems to be contrary to the national population policy providing a smaller family.

should be protected.

- Sex-selective surrogacy should be prohibited.

- Cases of abortions should be governed by the Medical Termination of Pregnancy Act, 1971 only.

Thus, the Law Commission has adopted a pragmatic approach in coming to the rescue of couples who could not conceive children by natural methods as it is estimated that 15% of couples around the world are infertile.

The Central Adoption Resource Authority (CARA) is an autonomous body under the Ministry of Women and Child Development, Government of India. Its mandate is to find a loving and caring family for every orphan/destitute/surrendered child in the country. CARA was initially set up in 1994 under the aegis of the Ministry of Welfare in pursuance of cabinet decision dated 9.5.1990. Pursuant to a decision of the Union Cabinet dated 2nd July 1998, the then Ministry of Social Justice and Empowerment conferred the autonomous status on CARA w.e.f. 18.3.1999 by registering it as a society under the Societies Registration Act, 1860. It was designated as Central Authority by the Ministry of Social Justice and Empowerment on 17.7.2003 for the implementation of the Hague Convention on Protection of Children & Cooperation in respect of Inter-country Adoption (1993). The Ministry of Women & Child Development has of late been mandated to look after the subject matters 'Adoption' and 'Juvenile Justice (Care & Protection of Children) Act, 2000' pursuant to 16th February, 2006 notification of Government of India regarding reallocation of the business.

In-country adoption of Indian children is governed by In-country Guidelines-2004 while inter-country adoption procedure is governed by a set of guidelines are a follow up of various directions given by the Supreme Court of India in *L.K. Pandey*'s case.[21] These Guidelines are amended and updated from time to time keeping in mind the welfare of such child. While CARA is engaged is

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[21] *Supra* Note 16.

clearing inter-country adoption of Indian children, its principal aim is to promote in-country adoption. In fact, CARA ensures that no Indian child is given for inter-country adoption without him/her having been considered by Indian families residing in India. CARA also provides financial assistance to various NGOs and Government run homes to promote quality child care to such children and place them in domestic adoption.

In *St. Theresa's Tender Loving Care Home* v. *Government of A.P.*,[22] the Supreme Court followed the decision in *L.K. Pandey*'s case[23] and stressed the importance of regulating inter-country adoptions to avoid the sale of children as if they were commodities and held that the best interests of the child must always be considered by the courts in cases of adoption.

Section 112 of the Indian Evidence Act, 1872 is based on the well-known maxim *pateris est quem nuptiae demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is that a child born of a married woman is deemed to be legitimate. The whole burden of proving otherwise falls on the person who is interested in making out the illegitimacy, as the law in general presumes against vice and immorality. It is well established in law that courts in India cannot orders blood or DNA tests in a routine manner wherever there is a question of lineage. Application made for such prayers in order to have roving inquries cannot be entertained. There must be a strong *prima facie* case that the husband must establish non-access in order to dispel the presumption of fact regarding parentage arising under section 112 of the Evidence Act, 1872. The court must carefully examine what would be the consequence of ordering the blood test. Furthermore, it must also be recalled that no one can be compelled to give sample of blood for analysis. It may also be remembered that section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Deoxyribo Nucleic Acid (DNA) as well as Ribo Nucleic Acid (RNA) tests were not even in contemplation of the Legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to

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22 *Ibid.*

23 (2003) 11 SCC 737.

escape from the conclusiveness of section 112 of the Evidence Act *e.g.*, if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrefutable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being basterdised if his mother and her spouse were living together during the time of conception. Hence, the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.[24]

Surrogacy enables the women to provide wombs for rent business. Such a concept may have acceptability in the society but may not have respectability. It creates serious problems that the surrogate mother must be mentally stable and unlikely to withdraw midway. There is no guarantee that the child born in such a manner is of his biological parents. In case the surrogate mother suffers miscarriage and enters into the contract with other persons and becomes pregnant or has natural pregnancy through her husband, such issues may be raised and for confirmation of genetic link, biological parents may seek DNA test. Such contracts may not be included under the contract law. Newly born babies may be abandoned by his biological parents. There may be problems if the surrogate mother becomes emotionally attached to the child and develops a sense of losing the child after giving birth to him. It creates a problem of unavoidable social and ethical issues. Contracts must be turned as who will be responsible for miscarriage or defects in the baby or what will happen if the surrogate mother becomes medically ill. A woman of child bearing age if suffers from damage or missing uterus may not be able to conceive a child and go for surrogacy but a rich

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[24] *Dukhtar Jahan* v. *Mohd. Farooq*, (1987) 1 SCC 624; *Goutam Kundu* v. *State of W.B.*, (1993) 3 SCC 418; *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit & Anr.*, (1999) 7 SCC 675; *Kamti Devi* v. *Poshi Ram*, (2001) 5 SCC 311; *Amarjit Kaur* v. *Harbhajan Singh*, (2003) 10 SCC 228; *Banarasi Dass* v. *Teeku Dutta*, (2005) 4 SCC 449; *Ramkanya Bai* v. *Bharatram*, (2010) 1 SCC 85.

woman may seek a surrogacy to keep her figure or avoid birth pains. This may give rise to some people to turn into making a living by bearing the children of others.

In case, surrogating is banned legally for any reason whatsoever either on the issue of ethics or morality or for any other reason, it would deprive the persons of the right to have their own children when medical means can remedy the situation. Such a case can be advanced on the ground of arbitrariness and violation of equal protection of law. Some people need the child and others need the money.

The law of surrogacy further creates a problem regarding the contract as to whether such kind of contract is permissible or against the public policy. What is the sanctity? Exception to section 375 IPC explains that the sexual intercourse with a wife below the age of 15 years may amount to rape. There is no law which declares that a child who had been given birth by a woman below the age of 15 or 16 years will be illegitimate. Illegitimacy of the child is decided only in void and voidable marriages. Law does not say that marriage with a girl of a particular age *i.e.*, 16 years is void or voidable. Therefore, the question does arise as to what would happen in a case where her parents or guardian enters into a contract with a third person for surrogacy. Whether she had a right to repudiate that contract during the period of pregnancy or she has a right to get rid of the pregnancy by terminating the same. Sections 3 and 4 of the Medical Termination of Pregnancy Act, 1971 also require the consent of the guardian if she is a minor. In such a case if she becomes pregnant by any of these means, the question would arise whether she can accuse anybody guilty for rape though neither she nor the another person indulged in any normal sexual activities.

In case the woman is not agreeable to fulfill the contract, whether the other party has a right to file a suit for specific performance of contract?

The Universal Declaration on the Human Genome & Human Rights, 1997 provides the control and regulation of human cloning. Article 11 thereof reads as under:

“Practices which are contrary to human Dignity, such as reproductive cloning of Human beings, shall not be permitted.”

Thus, in case the provisions of Article 11 are not given strict adherence, we will have clones that may create a problem of enforcing the law and order as well as morality.

Conclusion

To conclude, it may be stated that law regulates life. Morality is the surviving force that supports law and eventually disciplines life. The concept of living life decently, and protecting it from man oriented invasions, has been thematically introduced through judicial pronouncements by our courts, while explaining the dimensions of life and liberty guaranteed under Article 21 of the Constitution of India.

The narration herein above demonstrates that law is striving hard for legitimacy of children who arrive in this world through their strange man made efforts. The concerned parties have to observe moral norms so as to make them acceptable by the society at large. The raw edges of immorality have to be chiseled by public education and support. Law alone would not be able to control the will of the human race. It has to be a popular movement involving social scientists, statesmen and the observance of morals by the people themselves.

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