INDIAN LEGAL SCENARIO on the issue of surrogacy is at a very infancy stage and the proposed legislation is stuck at various legislative levels for past many years. Estimated value of commercial surrogacy industry in India ranges from Rs. 20 billion to $2.3 billion\textsuperscript{1}. Today, the small Gujarat town of Anand, well known for its milk products, has rapidly put itself on the global map as the most fertile ground for surrogacy tourism. All evidence suggests that the phenomenon has now spread from cities to smaller towns in India, with many of the centres calling themselves In Vitro Fertilisation clinics to avoid public scrutiny. Till date Surrogacy industry in contrast to many other countries in the world, are regulated by some guidelines given by the Indian Medical Council of India\textsuperscript{2}, dating back to 2006. The Indian Medical Council of India guidelines are more like normative principles that are required to be followed and not statutory instruments that invite penalties. Due to lack of execution and punitive force these guidelines are merely for accreditation, supervision and regulation of Assisted Reproductive Technology clinics in India. But the need for legislation became pressing with Indian Council of Medical Research guidelines being often violated and reportedly rampant exploitation of surrogate mothers and even cases of extortion.

The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at

\textsuperscript{1} Devadatt Kamat, Lavanya Regunathan Fischer, Motherhood for rent, The Hindu, October 30, 2012
\textsuperscript{2} National Guidelines For Accreditation, Supervision And Regulation Of Assisted Reproductive Technology Clinics In India, 2005
a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. Assisted Reproductive Technology and relinquish the cocooned approach.

The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones. Indian legislature has been striving since past many years to draft a perfect legislation to regulate the most popular surrogacy market of the world. In the quest for appropriate legislation, Ministry of Health & Family Welfare, Government of India and of the Indian Council for Medical Research has come up with various draft bills after extensive discussions but all in vein as till date a legislation to regulate usage of assisted reproductive techniques is still awaited. The only legislation in the field implemented till date is The Delhi Artificial Insemination (Human) Act, enacted by the Delhi Legislative Assembly in 1995, legalizes the donation of semen and ova. The Act calls for the registration of all sperm banks that store, sell, donate and supply semen. It also requires that all semen be tested for HIV infection and prohibits the segregation of sperm according to gender markers for the X or Y chromosome. It mandates the confidentiality of donors and recipients, and requires the written consent of both the woman who is receiving the sperm and her husband. Noncompliance with the Act results in strict punishment.
In the mean while considering the mushrooming of Assisted Reproductive Clinics in India, the Indian Council for Medical Research has issued guidelines to regulate the practice assisted reproductive technology in the clinics. Also the Law Commission of India has brought out a report\(^3\) on surrogacy and the urgent need for regulation entitled, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*\(^4\). Unfortunately, this report, too, is now over five years old and the draft legislation on the issue — *The Assisted Reproductive Technologies (Regulation) Bill, 2010*, after that *The Assisted Reproductive Technologies (Regulation) Bill, 2013*, and now *Assisted Reproductive Technology (ART) Regulation Bill, 2014* are still nowhere in sight as a legally enforceable statute.

With the growing menace of cross border surrogacy issues, Ministry of Home Affairs has recently issued a notice titled Instructions relating to foreign nationals intending to visit India for commissioning surrogacy\(^5\) changing the whole scenario of the Indian surrogacy market. To add on strength to these changes the latest notification by the Indian Medical Council of India\(^6\) has adopted strict norms and barred foreigners from seeking surrogacy services in India completely.

Let us now have a look at the various guidelines of Indian Council of Medical Research in this reference, which are being followed these days in India and also the proposed law in India till date.

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\(^3\) Law commission of India, Report 228, 2009  
\(^4\) http://lawcommissionofindia.nic.in/reports/report228.pdf  
\(^6\) Vide letter no. 5/10/8/2008-RHN dated 27/10/2015
3.1 National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics 2005

In absence of any legislation governing surrogacy the Indian Council of Medical Research developed draft National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2002\(^7\). The draft document was then subjected to extensive public debate throughout the country.

<table>
<thead>
<tr>
<th>Sl. no.</th>
<th>Issues</th>
<th>Opinion of the people (%)</th>
<th></th>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Doctor</td>
<td>Yes</td>
<td>No</td>
<td>No opinion</td>
<td>General public</td>
<td>Yes</td>
<td>No</td>
<td>No opinion</td>
</tr>
<tr>
<td>1</td>
<td>Whether surrogacy should be allowed in the Country?</td>
<td>96</td>
<td>2</td>
<td>2</td>
<td>92</td>
<td>3</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Whether commercial surrogacy should be allowed in the Country?</td>
<td>80</td>
<td>15</td>
<td>5</td>
<td>72</td>
<td>24</td>
<td>4</td>
<td></td>
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</tr>
<tr>
<td>3</td>
<td>Whether relatives/friends should be allowed to act as a surrogate mother?</td>
<td>45</td>
<td>52</td>
<td>3</td>
<td>14</td>
<td>83</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Whether the identity of the donor should be known to the infertile couple?</td>
<td>37</td>
<td>58</td>
<td>5</td>
<td>7</td>
<td>89</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Whether relatives/friends should be allowed for gamete donation?</td>
<td>44</td>
<td>54</td>
<td>2</td>
<td>8</td>
<td>91</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Whether you are satisfied or agreed with the points mentioned under the heading &quot;How may sperm and oocytes donors be sourced?&quot;</td>
<td>54</td>
<td>42</td>
<td>4</td>
<td>81</td>
<td>15</td>
<td>4</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Based on the opinion of this survey table\(^8\), comments and suggestions received from the various stakeholders including National Commission for Women and National Human Right Commission, the National guidelines were finalized and after the approval of the drafting committee the revised document was submitted to the Ministry of Health & Family Welfare, Government of India. The Ministry of Health & Family Welfare examined these guidelines and after slight modifications


\(^8\) Ibid
published the national guidelines of government of India in 2005.

These guidelines are the very first step in the direction of regulating surrogacy in India. Although these national guidelines for accreditation, supervision and regulation of assisted reproductive technology clinics in India, 2005 have tried to curb the malpractices involved in assisted reproductive techniques yet they have no legal sanctity and have no binding statutory force. Silent on major issues, they lack teeth and are often violated. Exploitation, extortion, and ethical abuses in surrogacy trafficking are rampant and surrogate mothers are often misused.

These guidelines have been drafted by Indian Council of Medical Research and National Academy of Medical Sciences, India. The drafting committee consisted of 18 members. Guidelines issued have been divided in 9 chapters discussing various issues involved in practising assisted reproductive technologies in India and lays down the basic requirements.

3.1.1 Surrogacy

3.1.1.1 Who can opt for Surrogacy

Under these guidelines only such patients can opt for surrogacy who have such medical or physical conditions because of which they cannot conceive. As per the guidelines

\[
\text{Surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term.}^{10}
\]
Hence only infertile or people who are by some other reasons are not able to bear a child are eligible for surrogacy as per the guidelines. Infertility has been defined in the guidelines as failure to conceive after at least one year of unprotected coitus. Criticizing these eligibility criteria, in a comment by SAMA group\(^\text{11}\) it is said that

> that ethical guidelines should not accept the social stigma attached to infertility as a norm. Societies have evolved social ways for childless couples to deal with infertility-with, for instance, adoption, foster-parthenthood, etc. The guidelines should ideally encourage adoption and foster parenthood

This provision has been extensively criticized and have been said to be reinforcing social prejudice\(^\text{12}\).

In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child, which is resorted to if biological natural parents and adoptive parents are different. It is argued that Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parents without any need for adoption or even declaration of guardianship\(^\text{13}\).

### 3.1.1.2 Who Can Become a Surrogate Mother

The accepted age for a sperm donor shall be between 21-45 years and for the egg donor woman between 18-35 yrs. The age limit for the surrogate mothers as per the guidelines is 45 years. The act limits the successful births to three for a woman

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\(^{12}\) Ibid

\(^{13}\) http://www.sensiblesurrogacy.com/surrogacy-in-india-guidelines/
acting as a surrogate in her life. Considering the health issues of the woman acting as surrogate mother the draft bill limits the chances of successful surrogacy to thrice in her lifetime. These chances are in addition to her children. The guidelines don’t provide any limit for maximum number of pregnancies during her lifetime.

In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate. A surrogate mother will be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.

3.1.1.3 Commercial Surrogacy

As per the guidelines Commercial surrogacy has been legalised by the Indian Council of Medical Research under the National Guidelines on Associated Reproductive Techniques. The guidelines allow commercial surrogacy and specify that payments to surrogate mothers should cover all genuine expenses associated with the pregnancy.

*Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy.*

*Documentary evidence of the financial arrangement for surrogacy must be available.* The
ART centre should not be involved in this monetary aspect\textsuperscript{14}.

Commercialisation of surrogacy has raised a major issue in the society. Medical ethicists are divided on the propriety of commercial surrogacy. Some liken commercial surrogacy to baby selling. Baby selling is when you have a born child that is sold to another person; here we’re talking about agreements made even before conception has occurred. Secondly, the genes are being provided by the couple that is hiring the surrogate. Thus, in a sense, it is their genetic child\textsuperscript{15}.

The guidelines require that the assisted reproductive technology centers should not be involved in this monetary aspect as well as advertisements regarding surrogacy. The guidelines allow a relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. 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. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced.

\textbf{3.1.1.4 Surrogacy Contract}

Surrogacy arrangement are governed by a contract amongst parties, which will contain all the terms requiring consent of the surrogate mother to bear the child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc.

\textsuperscript{14} Rule 3.10.3
\textsuperscript{15} http://archivehealthcare.financialexpress.com/200703/strategy05.shtml
It also provides a model agreement draft, which the surrogate has to sign.

Although as per the guidelines, before a pregnancy is commissioned a contract is signed between the parties involved but according to a recently published study by the Centre for Social Research, an Non Government Organisations dealing with women’s issues\textsuperscript{16},

88\% of surrogate mothers in Delhi and 76\% in Mumbai who were interviewed for the survey did not know the terms of their contract. In fact, 92\% of the surrogates in Delhi did not even have a copy of the contract and only 27\% of the clinics in Delhi and 11.4\% in Mumbai were party to the contract. The contract is usually signed between the surrogate mother, her husband and the commissioning parents.

3.1.1.5 **Who are the legal parents of child born out of surrogacy arrangements?**

As per the Indian Council of Medical Research the surrogate mother should not be biologically connected to the child\textsuperscript{17}

*Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate.*

The Indian Law recognises the Intended mother only as the legal mother in surrogacy arrangements. Also\textsuperscript{18}

\begin{footnotes}
5 \textsuperscript{16} Nikita Doval, Vidya.K., Apoorva, Surrogacy Industry Thrives In India Amid Regulatory Gaps, Live Mint E Newspaper, Nov 03 2014
\textsuperscript{17} Rule 1.2.33
\textsuperscript{18} \end{footnotes}
A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.

And

A child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance. Sperm/oocyte donors shall have no parental right or duties in relation to the child, and their anonymity shall be protected except in regard to what is mentioned under item 3.12.3.

make it very much clear that the intended parents only would be the legal parents of the child with all the attendance rights, parental responsibility etc. Guidelines states that the surrogate mother shall not be the legal mother and the birth certificate shall be in the name of the genetic parents and the surrogate mother shall relinquish in writing all the parental rights over the child. The guidelines requires the commissioning parents to adopt the child born through surrogacy unless they can establish through DNA fingerprinting, of which the records will be maintained in the clinic that the child is theirs.

The guidelines have been criticized for not considering the circumstances when the commissioning parents refuse to take the custody of the child. In case the Intended Parents refuse to take the responsibility of child then their refusal can be

18 Rule 3.10.1
19 Rule 3.16.1
20 http://surrogacylawsindia.com/faq.php?id=10&menu_id=73
challenged in the court on the basis of the surrogacy contract signed by them. Also the surrogate mother and the state shall in no way be responsible to take the responsibility of child. The ICMR Guidelines which at present are the governing guidelines for assisted reproductive technologies make no specific provision for this\textsuperscript{21}.

\subsection*{3.1.1.6 Confidentiality}

Under the ICMR guidelines, code of practice, confidentiality has to be maintained. It says\textsuperscript{22}, any information about the clients and donors should be kept confidential, but does not talk about the surrogates. The practices in the clinics and surrogate’s experiences show various ways in which the surrogates’ identities are revealed and known to the Commissioning Parents. However, very few surrogates knew about the Commissioning Parents. The clinics rarely put the surrogate and the Commissioning Parents in touch with each other. Unless Commissioning Parents insist on meeting or being in touch with a surrogate, she is unable to meet them. Commissioning Parents may exercise their preference in meeting their surrogate. However, it is not the prerogative of the surrogate. This is in contravention to the Bill as it expects the Commissioning Parents to negotiate the deal with the surrogate\textsuperscript{23}.

\subsection*{3.1.1.7 Code of Conduct}

In the third chapter these guidelines lay down the code of conduct for these clinics. The laid down code of conduct requires\textsuperscript{24}.

\begin{flushright}
\begin{tabular}{ll}
\textsuperscript{21} & \textit{Ibid}\textsuperscript{,} \\
\textsuperscript{22} & Rule 3.2.3 \\
\textsuperscript{23} & http://wcd.nic.in/research/jjnu2014.pdf \\
\textsuperscript{24} & Vij, \textit{Textbook of Forensic Medicine And Toxicology: Principles And Practice}, 2008, 433
\end{tabular}
\end{flushright}
1. The assisted reproductive technologies clinic must not be a party to any commercial element in donor programs or in gestational surrogacy.

2. That no assisted reproductive technology procedure shall be done without the spouse's consent.

3. Sex selection at any stage i.e. both before and after fertilization or abortion of embryos of any particular sex should not be permitted except to avoid the risk of transmission of a genetic abnormality assessed through genetic testing of biological parents or through pre-implantation genetic diagnosis.

4. Use of sperm donated by a relative or a known friend of either the wife or the husband should not be permitted. It will be the responsibility of the ART clinic to obtain sperm from appropriate banks.

5. The committee has recommended accepting semen only from Semen Bank and not from the individual. Hence it has also been recommended that Semen Bank should be an independent organization, if set up by an ART clinic it must operate as a separate identity.

6. No relative or a person known to the couple may act as surrogate.

7. Surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/undesirable to carry a baby to term.

8. The genetic (Biological) parents must adopt a child born through surrogacy.

9. After a specific consent, the embryos may be stored for five years and stored embryos may be used either for
other couple or for research after taking the consent of the couple to whom the embryos belongs.

10. The sale or transfer of human embryos or any part thereof, or of gametes in any form and in way that is directly or indirectly to any party outside the country must be prohibited.

11. Human cloning for delivering replicas must be banned.

12. Stem cell cloning and research on embryos (less than 15 days old) needs to be encouraged.

13. A child born through ART should be presumed to be the legitimate child to the couple, born within wedlock and all the attendant rights of parentage, support and inheritance.

14. Though there is no legal bar on an unmarried or single woman going for AID (Artificial insemination with donor), however it is universally recommended that AID should be performed only on married woman and that, too, with the written consent of her husband.

15. There is an urgent need to have infertility treated like any other disease the expense of dealing which by authorised ART clinics should be reimbursable e.g. by the Government or other employer or by the health insurance company, but for one child only.

3.1.1.8 Management of Infertility cases

Another important provision in the act is the protocol to approach and manage the infertile couples with regard to nature of defects has been clearly mentioned in the guidelines to avoid any kind of abuse of the procedure.
To avoid malpractices, the guidelines define pattern to be followed towards management of infertility with regard to nature of defects is summarised as under:\(^\text{25}\)

**OUTLINE OF MANAGEMENT PROTOCOL OF INFERTILE COUPLE:**

**INVESTIGATION**

- **SINGLE DEFECT**
  - EASILY CORRECTABLE
  - NOT EASILY CORRECTABLE

- **MULTIPLE DEFECTS**
  - FURTHER INVESTIGATIONS
  - SUPER OVULATION

- **NO DETECTABLE DEFECT**
  - PREGNANCY
  - NO PREGNANCY

- **PREGNANCY**
  - ART

- **NO PREGNANCY**
  - ADOPTION

Depending upon the personal competence and availability of facilities for investigation and treatment the guidelines categorise the Assisted Reproductive Clinics in three broad categories:\(^\text{26}\) i.e.

1. **Primary infertility care units** (Level 1A & Level 1B Clinics)
2. **Secondary infertility care units** (Level 2 Clinics)
3. **Tertiary infertility care units** (Level 3 Clinics)

The severity in the cause of infertility varies between couples. Sometimes, simple counselling or minor intervention

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25 Rule 2.2.3
26 Rule 2.5
will be all that is necessary. Others may require more aggressive treatment; such cases should be referred to speciality clinics. It is, therefore, recommended that infertility treatment should be offered at four levels. The infertility care units should be categorized into the four levels and authorized to offer treatments as described below. Patients should be referred by their gynaecologist or physician to whom they go first, if necessary, to the specific level of infertility care units where appropriate facilities for investigation and treatment for that patient would be available. Level 1B, Level 2 and level 3 infertility clinics may encourage appropriately qualified gynaecologists of Level 1A clinics to use their facilities, provided the clinic thus being used by a gynaecologist takes the responsibility of ensuring that all norms stated in this document including the maintenance of records are followed.

3.1.1.9 Sale of embryos

The guidelines rightly addressed the possible misuse of various assisted reproductive technology such as such as sale of embryos and stem cells, particularly in the context of the ban in several countries on research on embryos including the US and Germany.

As per the guidelines\textsuperscript{27}

\textit{Therefore sale or transfer of human embryos or any part thereof, or of gametes in any form and in any way – that is, directly or indirectly – to any party outside the country must be prohibited. Within the country, such embryos or gametes could be made available to bonafide researchers only as a gift, with both parties (the donor and the

\textsuperscript{27} Rule 1.6.11.3
donee) having no commercial transaction, interest or intent.

The guidelines strictly ban the sale of embryos or stem cells outside the country where as within the country no commercial transaction can be there in this respect.

Since assisted reproductive technology clinics are the only source of embryonic stem cells, which have a possible potential for use in therapeutic situations, the guidelines caution that the stand taken by foreign governments on embryo research opens up the possibility of embryos from developing countries that do not have appropriate national guidelines in this area being commercially exploited and sold to foreign countries. Therefore, the guidelines recommend that sale or transfer of human embryos or gametes to any party outside the country must be prohibited. Within the country, such embryos or gametes could be made available to bona fide researchers, with both parties the donor and the receiver having no commercial transaction, interest, or intent.

3.1.1.10 Separation of Assisted Reproductive Technology Bank and Assisted Reproductive Technology Clinic

To keep a check on the clinics the ICMR Clearly states that ART Bank and ART Clinic need to be independent of each other.

(1) The screening of gamete donors and surrogates; the collection, screening and storage of semen; and provision of oocyte donor and surrogates, shall be done by an ART bank registered as an

29 http://www.surrogacyindia.com/Laws.html
independent entity under the provisions of this Act

(2) An ART bank shall operate independently of any assisted reproductive technology (ART) clinic

These Guidelines have succeeded in creating a framework for participants in surrogacy processes and assumed a crucial role in filling some of the legal void. The guidelines approve of gestational surrogacy alone as against traditional surrogacy although it can be commercial or altruistic. The 2005 guidelines are not binding and lacks clarity in many respects which reduces their potential to provide guidance and minimise conflict. They also do not provide any overarching philosophical framework that would help in deciding the difficult ethical and regulatory dilemmas raised by surrogacy.

3.2 The Assisted Reproductive Technology (Regulation) Bill, 2008

In September 2008, citing the upswing in surrogacy agreements, the potential for commercial exploitation, and the issues raised in the Baby Manji case, India’s health minister, Anbumani Ramadoss, called for national surrogacy legislation. Ramadoss said,

In light of the recent controversy (involving a Japanese couple and an Indian surrogate mother), I think it’s time we had a law on surrogacy. It’s become more than sporadic and is lending itself to commercial exploitation like the kidney (transplant).

30 Rule 5.26.1-2
A week later, the ICMR presented a draft bill of binding national regulation\textsuperscript{33}. Indian council for medical research and Ministry of Health and Family Welfare posted a draft bill on their web sites with an aim to provide for a National framework for the regulation and supervision of assisted reproductive technology and matters connected therewith or incidental thereto.

It follows, and draws from, the functional and ethical guidelines for assisted reproductive technologies issued by the Indian Council for Medical Research in 2005. The bill seeks to regulate the practice of surrogacy to some extent. It purports to regulate surrogacy and respond to social and ethical issues around parenting associated with artificial reproductive techniques.

Let us now have a look at Assisted Reproductive Technology this bill.

According to this draft bill, Assisted Reproductive Technology clinics are to become the central hub of all surrogacy-related activity. They are tasked with obtaining all relevant information, informing all the parties involved of their rights and obligations, maintaining accurate records of all the transactions every step of the way. Requirements of confidentiality and other procedural obligations of all the institutions are also specified. The bill lays down conditions (such as age, usage, etc.) that potential gamete donors and surrogate mothers must meet\textsuperscript{34}.

\textbf{3.2.1 Surrogate Mother}

The present draft under consideration follows the guidelines laid down by the India Council of Medical Research and bars the

\begin{itemize}
\item \textsuperscript{33} The Assisted Reproductive Technology (Regulation) Bill, 2008
\item \textsuperscript{34} http://lawandotherthings.blogspot.in/2008/10/draft-art-bill-2008.html
\end{itemize}
surrogate mother to be genetically related to the child born out of the surrogacy arrangement. Hence the draft bill recognises gestational surrogacy alone and not traditional surrogacy. The draft bill defines surrogacy as

\[
an \text{ arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it to term and hand over the child to the person or persons for whom she is acting as a surrogate.}
\]

Three kinds of parents are involved in surrogacy: intending parents who seek the child, genetic parents who provide the genetic material for procreation and the surrogate mother who carries the fertilized womb until delivery. An individual can and often does wear more than one hat. For example, a man wanting to have his own child also provides the sperm to conceive the baby thus being both the intending as well as the genetic father. Likewise, a woman can not only provide the ovum but also carry the conceptus thus acting as both the genetic and surrogate mother. Several other combinations are also possible which is where controversy often arises. The bill draws clear lines to avoid these problems.

The Bill, making commercial surrogacy legal, prohibits the use of the egg of the surrogate mother for attaining pregnancy. This implies that an infertile couple will have to look for a surrogate as well as an egg donor; further, a woman with a healthy reproductive system (surrogate) will be subjected to a

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35 Clause 2(t)
36 Supra note 34
complicated, hazardous and expensive procedure like in vitro fertilisation rather than a simpler one like intra uterine insemination\textsuperscript{37}.

The draft bill 2008 specifies, the age of the surrogate mother to be not less than 21 years and not more than 45 years. And the proviso to the same section limits the successful live births to 3 in her total life term. To quote the draft bill \textsuperscript{38}

\begin{quote}
No woman under twenty one years of age and over forty five years of age shall be eligible to act as a surrogate mother under this Act.
Provided that no woman shall act as a surrogate for more than three successful live births in her life.
\end{quote}

This proviso calls for criticism as the inference which comes out of the terminology is that no woman shall act as a surrogate for over three live births in her life\textsuperscript{39}.

Draft bill has also done away with relatives as donors in the case of In Vitro Fertilisation. In other words, sisters, brothers or other members can no longer provide sperms or oocytes for the impregnation of a family member. The entire process has been anonymised, Dr Pushpa M. Bhargava, director, Center for Cellular and Molecular Biology, Hyderabad, the chief architect of the bill told \textit{OWSA}\textsuperscript{40}.

\begin{quote}
Relationships in our society are structured in such a way that there is often a moral problem in cases where relatives are surrogates or donors. For
\end{quote}

\begin{itemize}
\item \textsuperscript{37} Sarojini N B,Aastha Sharma, \textit{The draft ART (Regulation) Bill: in whose interest?}, Indian Journal of Medical Ethics Vol VI No 1 January-March, 2009
\item \textsuperscript{38} Clause 34(5)
\item \textsuperscript{40} Paromita Mukhopadhyay, \textit{Surrogacy law on the anvil in India}, One World South Asia, Oct 18, 2008
\end{itemize}
instance, a mother-in-law may ask a clinic to use a sample from her other son to impregnate her daughter-in-law. But later, if relations sour, the same mother-in-law may accuse her daughter in law of committing adultery. Hence, an independent semen bank will ensure transparency and anonymity.

On the Other hand Dr Nayana Patel who runs the famous Akanksha Infertility Clinic in Anand, Gujarat, does not agree. She said that doing away with family donors would only add to the anxiety of the patients41.

_Earlier, the biological parents were known hence there was an assurance about the genetic pool or the family traits. Now, in addition to the trauma involved in the treatment, the biological parents will be anonymous and difficult to track down._

Another requirement to qualify as a surrogate mother is that she should belong to the same genre of the commissioning couple. Neither can family members or relatives of the proposed parents act as surrogates unless they belong to the same generation.

In case the intended surrogate mother is married the act requires the consent of her husband. The draft says

_In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate42._

41 _Ibid_
42 Clause 34(16)
3.2.2 Commissioning Parents

The draft bill has recognised the right to procreate at equal footing for both couples as well as singles.

*Both the couple or individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable*\(^{43}\).

Although there is some ambiguity with reference to homosexual couples\(^{44}\) as the draft bill doesn’t mention so specifically but it could be inferred so from the following provision.

*couple, means the persons living together and having a sexual relationship that is legal in the country / countries of which they are citizens or they are living in*\(^{45}\)

The draft bill allows opting for surrogacy only to those couples who are practically not able to conceive by themselves. This condition has been incorporated in the bill as under \(^{46}\)

*No assisted reproductive technology clinic shall consider conception by surrogacy for patients for whom it would normally be possible to carry a baby to term. Provided that where it is determined that unsafe or undesirable medical implications of such conception may arise, the use of surrogacy may be permitted.*

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43 Id., at (1)
45 Clause 2(e)
46 Clause 20 (10)
The disparate impact is obvious: a woman desiring a child would thus have to show that she is not capable of bearing one; a single man of course is free to conceive as and when he pleases. There is a broader ethical question here: is it wrong to have ‘designer babies’, a phenomenon this provision is ostensibly meant to prevent? If two people consensually seek to conceive a child with the woman, for whatever reason, not wanting to go through the trouble of carrying it unto delivery, what is the state’s interest in preventing it given that it has no problem permitting surrogacy regardless of the family arrangement of the concerned individuals?  

3.2.3 Surrogacy Agreement

The draft bill under consideration, like ICMR guidelines, recognises commercial surrogacy and makes it mandatory to bring everything in written contract form. A step ahead from the guidelines the provisos of this piece of proposed legislation requires the commissioning parents to insure the surrogates paid for by them. Quoting the provision

*Both the couple or individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.*  

*All expenses, including those related to insurance, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is

47 Supra note 34  
48 Supra note 43
ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.\(^\text{49}\)

Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.\(^\text{50}\)

By making it mandatory to enter into a written contract, the drafters have brought the surrogacy arrangements under the ambit of *Indian Contract Act, 1872*. Hence any kind of breach of surrogacy contract could be redressed under the provisions of the *Indian Contract Act, 1872*.

The agreement has to be signed with free consent by all the parties to the contract. The provisions of the draft bill require mentioning specifically that the surrogate mother has agreed to relinquish her parental rights in the child born out of the surrogacy arrangement toward the commissioning parents in the surrogacy contract.

### 3.2.4 Legal Parentage

The provisions of the draft bill under discussion provide that where the commissioning parents are a married couple or an unmarried couple shall be deemed to the legitimate child of both of them. Similarly in case of single parent the child shall be the legitimate child of the commissioning mother of father as the case may be. Considering the situation in *Baby M* case, the proviso of the draft bill mention that in the case of separation or

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\(^{49}\) *Id.*, at (2)

\(^{50}\) *Id.*, at (3)
death of either of the commissioning parent the child shall be considered the legitimate child of both of them. The proviso embedding this rule is\textsuperscript{51}

\textit{In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple.}

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\textsuperscript{52}.

\textbf{3.2.5 Appointment of Guardians by Foreign Commissioning Parents}

Post \textit{Baby M} case the drafters were cautious about such situations hence they provided that in case the intended couples are NRIs or foreigners, they have to appoint a guardian to be legally responsible for taking care of the surrogate during the gestation period till the child is delivered to the foreigner or foreigner couple. The provision requires

\textsuperscript{51} Clause 35 (4)

\textsuperscript{52} Supra note 37
A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy as per clause 34.2, till the 28 child / children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the ART clinic through proper documentation that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party’s origin or residence as the case may be.53

But this provision is once again not sufficient to take care of the exigencies as there are no guidelines as to who can be the local guardian and the guardian’s exact responsibilities are. Also, the role of the local guardian in case of any mishap to the surrogate or the child does not find a mention in the legislation54.

Concerned activists feel that the Draft Bill tends to regularise and promote the interest of the providers of these technologies rather than regulate and monitor the current practices. The Bill is also inadequate in protecting and safeguarding the rights and health of the women who undergo these procedures, surrogates and egg donors and of the children

53 Clause 34 (19)
54 Ibid
born through these techniques. The Bill also actively promotes medical tourism in India for reproductive purposes. Though the Bill takes some step to regulate the process of surrogacy in the context of growing numbers of foreign couples coming to India, the equally important issue of Indian women also becoming egg ‘donors’ for foreign couples is not taken into consideration\textsuperscript{55}.

\section*{3.3 \textit{228}\textsuperscript{th} Report of law commission of India}

In the year 2009 the law commission of India submitted their 228\textsuperscript{th} report wherein they raised the issue of surrogacy laws in India. The study was taken up by the committee suomotu. The report was titled as \textit{Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy}. The most important point under consideration of the report was the rights and obligations of the parties to a surrogacy and rights of the surrogate child.

A seminar on \textit{Surrogacy – Bane or Boon} was held at the India International Centre on 13.02.2009. The discussion focused on the aforesaid draft Bill and Rules. The flaws in the draft bill observed by the committee were that the Bill neither creates, nor designates or authorizes any court or quasi-judicial forum for adjudication of disputes arising out of surrogacy, ART and surrogacy agreements. Disputes may, inter alia, relate to parentage, nationality, issuance of passport, grant of visa. There is already a conflict on adoption and guardianship as non-Hindus cannot adopt in India. Such disputes need to be resolved before a child is removed from India to a foreign country. It was suggested to create an institution \textit{Surrogacy Court} to overcome all the above mentioned problems.

\textsuperscript{55} \textit{Supra} note 37
3.3.1 The points highlighted in the discussion at the Seminar 56

(i) what would be the remedy available to biological parents to obtain exclusive legal custody of surrogate children,

(ii) how can the rights of the surrogate mother be waived completely,

(iii) how can the rights of the ovum or sperm donor be restricted,

(iv) how can the genetic constitution of the surrogate baby be established and recorded with authenticity,

(v) whether a single or a gay parent can be considered to be the custodial parent of a surrogate child,

(vi) what would be the status of divorced biological parents in respect of the custody of a surrogate child, and

(vii) Would a biological parent/s be considered the legal parent of the surrogate child?

3.3.2 The conclusions and recommendations of the committee

Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of 24 positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a

56 http://lawcommissionofindia.nic.in/reports/report228.pdf
pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.

The draft bill prepared by the ICMR is full of lacunae, nay, it is incomplete. However, it is a beacon to move forward in the direction of preparing legislation to regulate not only ART clinics but rights and obligations of all the parties to a surrogacy including rights of the surrogate child. Most important points in regard to the rights and obligations of the parties to a surrogacy and rights of the surrogate child the proposed legislation should include may be stated as under 57:

1. Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

2. A surrogacy arrangement 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.

3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

57 Ibid
4. 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. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

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

7. Right to privacy of donor as well as surrogate mother should be protected.

8. Sex-selective surrogacy should be prohibited.

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

3.4 Assisted Reproductive Technology (Regulation) Bill – 2010

The draft of Assisted Reproductive Technology (Regulation) Bill-2008 was subjected to extensive public debate globally by placing the draft Bill on the websites of the Ministry of Health & Family Welfare, Government of India and of the ICMR. The bill of 2008 was criticised for being profit oriented and devoid of protection to the surrogate mothers and the child born out of
such agreements. Based on the comments received from various stakeholders including the comments from other countries and as per the recommendations of the Drafting Committee, the draft Assisted Reproductive Technology (Regulation) Bill 2008 was revised and rewritten.

The Bill rejects the recommendation of the Law Commission in its Report No. 228, titled Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy which had highlighted the need for a legislation in this area and had suggested a ban on commercial surrogacy while accepting altruistic surrogacy in India.

Ministry of Health & Family Welfare and Indian Council of Medical Research submitted the revised draft Bill as Assisted Reproductive Technologies (regulation) Bill-2010\textsuperscript{58}. The new draft bill of 135-page was deemed to regulate India's heavily market-driven fertility industry, and introduced a number of policies ranging from clinic regulation to restrictions on Assisted Reproductive Technology access. The important deviations in the present draft are discussed underneath.

3.4.1 Surrogate Mother

The revised draft has made significant changes in the definition of a surrogate mother. The definition as per the new draft is:

\textit{surrogate mother means a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a}
man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple / individual that had asked for surrogacy

As per the revised definition it is mandatory for the surrogate mother entering into the contract of surrogacy in India to be an Indian by citizenship and must be residing in India only.

Considering the welfare of the surrogate mothers the draft bill prohibits assisted reproductive technology bank or clinic to send or receive an Indian surrogate abroad. Another addition in this definition in the similar direction is that the draft bill requires the surrogate mother to carry the pregnancy to viability i.e. as long as possible without any danger to her life. This definition had added new dimension to the surrogacy agreements by considering the rights of the surrogate mother.

This revised draft has reduced the maximum age limit of the intended surrogate mothers by 10 years. i.e. now a female is eligible to become a surrogate mother should not be less than 21 and not over 35 years.

Another change in the new draft bill is pertaining to the maximum limit of child births for the intended surrogate mother. The draft also mentions that the maximum number of embryo transfers per couple that a surrogate can undergo is three. But the maximum number of couples this is applicable to is not circumscribed. Once again, given the low success rates of ARTs, all embryos transfers, like cycles, may not result in successful

59 Clause 2 (bb)
births. Thus, a surrogate may go through many cycles and embryo transfers for many couples before achieving the acceptable limit of five successful live births; this will adversely impact her health. Hence, this provision makes only a superficial attempt at regulation, with enough scope for misuse and exploitation\textsuperscript{60}.

The present draft bill under discussion increased the number of permitted successful live births for a surrogate from three to five which is inclusive of the surrogate’s own children. But this provision inadequately addresses an aspect critical to the surrogate’s health as the draft bill is silent on the number of permitted Assisted Reproductive cycles she can undergo. Since the number of live births is not equivalent to the number of Assisted Reproductive cycles, as the success rates of the procedure are low, to effectively ensure that the surrogate’s health is not exploited, the maximum number of ART cycles she can undergo must also be specified\textsuperscript{61}.

According to the present Draft, payment to the surrogate is to be made in five instalments instead of three. The majority, i.e. 75 per cent of the payment is to be paid as the fifth instalment, following the delivery of the child. This is in complete contrast to the Draft 2008, in which there was provision for the majority of the payment i.e. 75 per cent to be made as the first instalment. This not only shows a clear priority accorded to the intended parents, but also betrays that the worth of the surrogate’s labour, pregnancy, related emotional and physical risks etc are

\textsuperscript{60} Nevadita Menon, The Regulation Of Surrogacy In India – Questions And Concerns: SAMA, Kafila, January 10, 2012

\textsuperscript{61} Ibid
considered reducible to and meaningless without a tangible reproductive output, the baby\textsuperscript{62}.

### 3.4.2 Commissioning Parents

The draft Bill states that assisted reproductive technologies will be available to all single persons, married couples and unmarried couples. However, couple is defined as\textsuperscript{63}

\begin{quote}
\textit{two persons living together and having a sexual relationship that is legal in India}
\end{quote}

In addition, the bill defines both married and unmarried couple, as being in a marriage or relationship respectively that is legal in the country of which they are citizens. As such, it is not clear how these three definitions will be read together, and if ARTs will be available for gay couples, particularly Indian gay couples. This needs to be clarified and ascertained from a rights perspective, without any discrimination, since homosexuality has been decriminalized but not legalized in India.

### 3.4.3 Foreign Commissioning Parents

In lieu of the recent and controversial cases of international surrogacy that have resulted in legal battles for citizenship status for the child, the Bill has made provisions to address this issue. The draft Bill now makes it mandatory for foreign couples to produce a certificate from their countries declaring that the respective countries permit surrogacy, and that the child will be considered a legal citizen. The draft says\textsuperscript{64}

\begin{quote}
the party seeking the surrogacy must ensure and establish to the assisted reproductive technology
\end{quote}


\textsuperscript{63} Clause 2 (h)

\textsuperscript{64} Clause 34 (19)
clinic through proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party’s origin or residence as the case may be.

As an increasing number of couples from other countries access surrogacy services in India, such a provision will be a useful legal framework. The Draft Bill should take concrete measures to address the legal needs of the surrogate women.

3.4.4 Surrogate Child

As the new draft bill has changed the requirement of the genetic relation of the commissioned child with the commissioning parents the surrogate mother has to give away her parental rights to the commissioning parents irrespective of their genetic link with the baby. As per the draft bill

The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of individual / individuals who commissioned the surrogacy, as parents.

65 Id., at (10)
The draft bill has also anticipated the condition where foreign couples fail to take delivery of the commissioned child from the surrogate mother after birth. In such a situation the local guardian appointed by the commissioning couple is put in the shoes of the commissioning parents. This provision also gives the local guardian authority to give the child to adoption agency in case the commissioning couple is not able to claim the child within a month of the birth of the child.\(^{66}\)

*If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally obliged to take delivery of the child and be free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one months of the birth of the child. During the transition period, the local guardian shall be responsible for the well-being of the child. In case of adoption or the legal guardian having to bring up the child, the child will be given Indian citizenship.*

This provision while protecting the rights of the child in such cases provides Indian citizenship from avoiding the child stateless in such a situation.

Though a welcome step, significant gaps in the protection of surrogate women and children still remain. Some of the provisions of this draft seem to undermine her rights of the

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\(^{66}\) *Ibid*
surrogate mother by favouring instead the intended parents. As an increasing number of couples from other countries access surrogacy services in India, such a provision will be a useful legal framework. The Draft Bill should take concrete measures to address the legal needs of the surrogate women.

Therefore, it can be concluded that while a legislation to regulate the untrammeled commercialism of ARTs and surrogacy in India is a much-needed step towards checking unethical medical practice, the human rights of the surrogate and the children—legal, financial, and health-related—need to be better protected.

3.5 The Ministry of Home Affairs guidelines of 9th July, 2012

Considering the problems faced in the cross border surrogacy arrangements Union Home Ministry of India has issued strict guidelines for the foreign nationals visiting India to seek surrogacy arrangements. This is said to be the archetypical step by the Home Ministry to regulate surrogacy in India. As of now, even though surrogacy as a subject is in the administrative concern and domain of the Ministry of Health and Family Welfare, regardless, it has been decided that till the enactment of a law on the Assisted Reproductive Technology Bill, 2013, the Guidelines issued by the Ministry of Home Affairs will prevail.

67 Supra note 62
68 Ministry of Home Affairs, File No.25022/74/2011-F-1
69 Union Home Ministry Issued Strict Guidelines for regulating surrogacy in India, Jagran Josh, 19 January, 2013
70 Anil Malhotra, Rewriting Surrogacy laws, Lawyers Update, June 2014
The Ministry of Home Affairs by Guidelines of 9th July, 2012, made significant changes to the Indian surrogacy market. It had laid down very effective rules in respect to the foreign nationals coming to India for surrogacy. The most considerable change made to the surrogacy practices in India is that only a man and a woman married for at least two years who would be required to take a medical visa for surrogacy in India. Hence, foreign single parent as well as homosexual surrogacy is as of now barred.

As per these guidelines now the foreign visitors to India for surrogacy shall have to obtain medical visa from their embassy. Foreign national can visit India and a commissioning couple seeking to take up surrogacy in India can sign a surrogacy agreement in a tourist VISA, but cannot provide samples to the clinic when they are in a tourist VISA. Further, the medical VISA would be granted only when the surrogacy agreement is submitted as annexure document along with the application. That means that the couple has to travel twice prior to taking up a surrogacy arrangement. Once for meeting with clinics and signing of the surrogacy agreement; and again for providing samples to the clinic. 

To safeguard the future of children born out the surrogacy arrangements by foreign couples the Union Home Ministry has taken a very welcoming decision. As per these guidelines the foreign ministry of the home country or the embassy in India of the commissioning foreign couple should certify recognizing surrogacy. In addition to this the commissioning couple has to

provide an official assurance from the embassy certifying that child or the children would be allowed entering home country as the biological child of couple.

Not only this, before the grant of surrogacy visa, the foreign couple needed to be told that before leaving India for their return journey, Exit permission from FRRO/FRO would be required. Before granting exit, the FRRO/FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child/children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement. A copy of the birth certificate(s) of the surrogate child/children will be retained by the FRRO/FRO along with photocopies of the passport and surrogacy visa of the foreign parents.72

3.6 Assisted Reproductive Technology (Regulation) Bill, 2013

Even after undergoing two revisions several loopholes have been observed in the proposed drafts in respect of regulation use of assisted reproductive technology procedures. The bill of 2010 couldn’t suffice justify the requirements of the society and was proposed to be revised once again. Now Assisted Reproductive Technology (Regulation) Bill, 2013 was drafted on the bases of the proposed recommendations of Ministry of Law & Justice. This proposed law is an extensive compilation of 100 clauses but unlike the earlier drafts this draft has been kept secret and is not open for public viewing. It has been made a part of Top

72 Ibid
Secret documents of the cabinet. This bill is said to be a complete departure from the previous bills.

Although the draft is not available anywhere we can have some idea about the act from the information brief presented by the SAMA resource for women and health\(^\text{73}\).

_{This brief is structured in a way that draws on Sama’s engagement through research reflecting the documented ground reality vis-à-vis the practice of surrogacy, interspersed with relevant sections from the Assisted Reproductive Technology (Regulation) Bill and Rules - 2013 and Ministry of Home Affairs (MHA) Guidelines providing a useful and critical overview about surrogacy in the country.}_

From the excerpts from this brief we can find that the new proposed draft bill if imposed will change the whole scenario of surrogacy industry in India. This new proposed legislation restricts the use of surrogacy to married heterosexual couples only\(^\text{74}\). The definition given in the new draft for couple is as under\(^\text{75}\).

_{a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage}_

This definition of couple effectively bars couples who are separated cannot access ARTs and is a severely restricted one or all people who are not in a heterosexual marital relationship.

\(^{73}\) Surrogacy Information Brief, SAMA resource for women and health, 2014
\(^{74}\) http://blog.indiansurrogacylaw.com/?s=ART+Bill+2013&submit=Search
\(^{75}\) Supra note 73 at 7
Therefore, as per the definition, gay couple(s) cannot access ARTs in India, once the Bill is implemented. This clause 8 in the draft bill is discriminatory, baseless, and a violation of rights to equality, freedom, and reproduction.

The current draft also prohibits genetic surrogacy. It makes the genetic surrogacy illegal. The definition underlines the fact that the surrogate mother is not the biological parent thus emphasizing that only those that contribute the genetic material can be considered to be biological parents.\footnote{Id., at 4}

The new draft bill proposes for the minimum age of the surrogate mother to be twenty one years but there is no upper capping mentioned in the clause.

The Draft Bill (Clause 46(14), states that no ART procedure shall be performed on a woman below the age of twenty one.\footnote{Ibid}

There seem to be an inherent contradiction about the age-cap as under Clause 60 (5) the Bill states that

\begin{quote}
No woman less than 21 yrs. and over 35 yrs. shall be eligible to act as a surrogate; provided that no woman shall act as a surrogate for more than three successful life births in her life, including her own children...\footnote{Ibid}
\end{quote}

There seems to be inherent assumption that a surrogate will have two children of her own and therefore more there is still possibility of three successful live births through IVF.
Another new initiative that appears in the draft bill is prohibition of brokers in the assisted reproductive procedures. This provision will protect the donors and the surrogates from unnecessary exploitation by the intermediaries. For effective implementation of this provision the violation of the provision would attract punitive action. In the words of the draft bill

*The use of individual brokers or paid intermediaries to obtain gamete donors or surrogates shall be an offence under this Act, punishable with imprisonment for a term which may extend to three years or fine which may extend to rupees five lakh or with both.*

Considering the trans-border complications in the surrogacy arrangements, the new draft bill has proposed very effective clauses. This draft has introduced the provisions of insurance of the surrogate mother and the child born out of the surrogacy arrangement. The provision says

*A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall insure the child or children born through the surrogacy, at the time of signing the agreement, till the age of twenty-one years or till the time of custody of the child or children is taken, whichever is earlier, for wellbeing and maintenance of the child or children.*
use at least one gamete of their own in creation of the embryos\textsuperscript{81}.

The present Bill also states that

\textit{the commissioning parent(s) shall ensure that the surrogate mother and the child she delivers are appropriately insured until the time the child(ren) is handed over to the commissioning parent(s)}

\textit{......till the surrogate is free of all health complications arising out of surrogacy.}

The present draft enumerated clearly the list of legal documents required by the foreign nationals regarding their respective country permitting surrogacy and that the child born from the surrogacy arrangement in India will be the legal citizen of the country of the commissioning couple in the clause 60 (17 (b))\textsuperscript{82}.

The use of Pre-implantation Genetic Diagnosis and sex selection for non-medical purposes is very controversial. Many moral and ethical issues are associated with Pre-implantation Genetic Diagnosis, such as the choice to be able to select the embryos of a particular sex, potential of parents to exercise excessive control over their children’s characteristics, costs and availability dependent on the financial status of the parents, safety, accuracy, regulation and monitoring. The use of Pre-implantation Genetic Diagnosis should be strictly monitored and it should be made clear that Pre-implantation Genetic Diagnosis will be available only where there is a significant risk of serious genetic condition being present in the embryo.

\textsuperscript{81} Id., at 11
\textsuperscript{82} Ibid
No assisted reproductive technology clinic shall offer to provide a couple with a child of a predetermined sex. Clause 51 (1)

It is prohibited for anyone to do any act, at any stage, to determine the sex of the child to be born through the process of assisted reproductive technology.

No assisted reproductive technology clinic shall carry out any assisted reproductive technology procedure to separate, or yield fractions enriched in sperm of X or Y variations.

The collection of blood samples from pregnant woman and subjecting the blood sample for sex selection in any form both within the country and outside the country shall be prohibited. 83

As per SAMA resource for women and health information brief, the recent 2013 Draft Bill acknowledges the importance and significance of ethical practices in the context of assisted reproductive technology services, in the present form, the Bill is inadequate in protecting and safeguarding the rights and health of women going for IVF techniques, recruited as surrogates and children born through commercial surrogacy. It also lacks setting the standards for medical practice and completely ignores the regulation of the third party agents who play pivotal role in arranging surrogates such as surrogacy agents, tourism operators and surrogacy homes operators, etc.

83 Id., at 15
3.7 Assisted Reproductive Technology (Regulation) Bill, 2014

Post Supreme Court of India’s dictum in the Public Interest Litigation filled by advocate Jayshree Wade, the government had made clear that action is being taken to stop the practice of commercial surrogacy in India and bar the Trans border surrogacy procedures and close the doors for foreign nationals for surrogacy services in India. In response to the questions raised by the honourable Supreme Court of India, the ministry said its proposed law shall allow only altruistic surrogacy to the infertile married Indian couples and not benefit foreigners, the Supreme Court was informed. In furtherance to this development on The Ministry of Health and Family Welfare, Government of India, has released a new copy of the Assisted Reproductive Technology (Regulation) Bill, 2014.

The Centre’s proposed Bill is likely to be tabled in the winter session of Parliament. As per this bill the foreigners and those not included in the couple category may be unable to avail the services of an Indian surrogate. Simply put, the Bill narrows the services to Indian couples or a foreigner married to an Indian citizen.

The new draft bill defines couple as

"couple" means a relationship between a male person and female person who live together in a

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85 Sec 2(p)
shared household through a relationship in the nature of marriage which is legal in India;

Hence a couple means a married man-woman pair, the bill also shuts the door on homosexuals and people in a live-in relationship. The older draft bill recognized 'couple' as two people living together in a sexual relationship that is legal in India. Since homosexuality is a crime in the country, it technically barred homosexual couples too.

The new bill has also made drastic changes in the eligibility criteria of the commissioning couples. The draft Bill proposed to allow surrogacy to overseas citizens of India, people of Indian Origin, non resident Indians and even to foreigners married to an Indian citizen. The draft Bill, however, states such couples will have to comply with certain conditions for commission surrogacy here. For instance, such couples will have to be married and the marriage should have sustained for a considerable period of time. They also have to produce a certificate saying the woman is unable to conceive her own child. A foreigner married to an Indian citizen shall have to come on a Medical Visa for surrogacy. The National Commission for Woman has recommended for ban on foreigners, including persons of Indian origin and OCI on taking up surrogacy in India as part of the consultative process in the opinions on bill. The reasoning given by the commission is that it would curb commercialization of surrogacy.

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86 Sushma Dey, Foreigners may be barred from commissioning surrogacy in India, The Times Of India, Oct 16, 2015

The Bill makes it mandatory for the couple to be married for a minimum of two years. They will also need to submit a certificate, duly attested by the appropriate government authority of that country, confirming that the woman is unable to conceive\(^{88}\). The eligible couple will have to produce a duly notarised agreement with the prospective Indian surrogate mother.

They also have to produce an undertaking that says they will take care of the child or children born through surrogacy. Commissioning surrogacy in India will not be easy for foreigners married to an Indian because there are other conditions to be fulfilled by them\(^ {89}\).

For safeguarding the surrogates, the new bill prescribes the minimum age of surrogate to be 23 years who has to be married and having one live child of at least three years of her own at the time of entering into an agreement to become a surrogate\(^ {90}\). The National women’s Commission recommended that single woman, irrespective of their marital status must be allow to be surrogate mothers. If only married woman can be surrogate mothers, it would restrict the reproductive autonomy of a woman is the reasoning\(^ {91}\).

The new draft proposes for proper regulation and supervision of assisted reproductive technology clinics and banks in the country to prevent misuse of this technology and for safe and ethical practice of these services. For effective

\(^{88}\) Sonam Saigal, Govt Plans Law for $400-Million Baby Industry, The Hindu, 10\(^{th}\) Dec 2015

\(^{89}\) Ibid

\(^{90}\) Sec 60 (5)

\(^{91}\) Supra note 87
implementation of the provisions the draft bill paves the way for setting up of national and state boards for assisted reproductive technology and makes registration of assisted reproductive clinics mandatory. To give tooth to the enforcing agencies the draft bill makes provisions for imprisonment of up to five years or a fine of Rs 10 lakh or both for violators. Not only this, but safeguarding the surrogates the act also provides for compensation to the surrogate mothers in case of any kind of failure on the part of the commissioning parents.

The present draft bill also imposes stricter responsibility on the assisted reproductive technology clinics by presuming negligence on their part in case of death or disability of the surrogates unless proved otherwise.

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