Chapter 6

Limitations of efforts made in India

With the growing technical possibilities of assisted reproduction, the once monolithic idea of parenthood falls into pieces. Motherhood in particular splits up into genetic, gestational, and social motherhood – three roles that, once bound together, can now be taken over by two or even three different women. An increasingly popular and socially somewhat accepted model involving multiple mothers for one child is surrogacy: A surrogate mother commits herself to carry an embryo for another woman who for reasons of reluctance, age, or medical conditions cannot or does not want to do so. Usually, one of the intended parents gives his sperm for the fertilization of an egg that may stem either from the surrogate mother herself (traditional surrogacy) or from the intended mother or an egg donor (gestational surrogacy).

Whereas public opinion is split as to whether surrogacy should be supported, intended parents and their children hardly face discrimination or any other lack of acceptance.

As the law of parentage is striving to meet the challenges of new reproductive technologies, dealing with cross-border surrogacies emerges as one of the most pressing topics in international family law. The current legal situation as regards surrogacy is quite diverse – throughout the world but also within Europe. Legal diversity has recently made a lot of people engage in so-called “procreative tourism”:

Coming from a country with a rather strict approach, they commission women in one of the more liberal countries like India to bear a child for them, and once the baby is born, they try to take it to their home country, thereby obviating the surrogacy ban that prevents them from entrusting a surrogate mother at home. European courts are struggling with a coherent approach on how to treat those citizens who have gone abroad to have a baby. Meanwhile, legal research and the

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1 As only in rare cases are both intended parents lacking in fertility, it is only once in a blue moon that the sperm comes from a donor
Hague Conference on Private International Law are thinking about a convention in order to ease the cross-border recognition of surrogacy.

Researcher tried to explore the views of various Clinician on the aspect of necessity of regulation and all of them were of the opinion that some form of regulation are required, and though the ICMR Guidelines provides sufficient regulatory provisions for the same, but they don't deny the necessity of further improvement on some of the issues. Although the debate surrounding issues such as the regulation of ART and by whom is still unsettled, most clinicians in the Western world believe that some form of regulation of ART is necessary. At the present time many countries, even in the Western hemisphere, have not established legislation pertaining to the various aspects of the practice of ART.

In a number of countries including India ART is practiced according to regulations which have been laid down by professional bodies. In some parts of the world such bodies are appointed by government (Ministry of Health and/or Social Security) or by medical associations. In other countries, reproductive scientific centres impose their own ethical standards. In most Asian countries, however, ART is still practiced free of any statutory legislation, regulations, or voluntary guidelines, in most Asian countries, practicing groups set their own standards. Furthermore, a cause for concern is the fact that a registry of all centres performing ART exists only in five of the countries. The data about ART programmes, including pregnancy rates, in all other countries, if available, is partial at best. Concern should be further heightened by the fact that supervision, or any kind of quality control on clinics and laboratories offering ART, exists in only few countries. Under these circumstances, where there is no promulgation of laboratory standards, and as ART programme success is closely related to quality control in human embryo laboratories, it is obvious that much progress is still to be expected in this aspect of ART in Asia.

Fortunately, ICMR Guidelines provides sufficient standards for the control of Physical infrastructure including Embryo Laboratory, but execution or rather implementation of the guideline is still required close scrutiny. While his visit to Hyderabad researcher found that only 10% of the ART Clinics were registered with the National Registry of ART clinics.
He reproduces the report published in Times of India to understand the real scenario of the ART Clinics in Hyderabad:

The burgeoning fertility industry of India currently going through rapid growth is also trying to deal with its fair share of malpractice with many fertility clinics out to make a quick buck by duping vulnerable couples who are eager to become parents.

Several clinics in India continue to perform various IVF and surrogacy procedures despite lacking the necessary infrastructure facilities and medical expertise, top officials said. Efforts to regulate the industry are not proving to be very successful, officials said as clinics are unwilling to come under the scanner with only six out of 60 clinics in Hyderabad registering itself with the Indian Council of Medical Research (ICMR) since January.2

Many experts said this is now sowing doubts about the quality of expertise offered at the city's fertility clinics.

When non-registered clinics in the city were contacted, many said that they had already sent in their applications and are awaiting their identification numbers, but ICMR officials were not sure about it.

"Complications like distress, blood infections and a condition called ovarian hyper stimulation syndrome (OHSS) have been reported which is fatal for both the mother and the unborn child," Sekhar, a well-known expert with a city facility added.

The Assisted Reproductive Technology (ART) industry in Hyderabad is massive with experts estimating that surrogacy sector alone garners an annual revenue of Rs 14 crore. However, dubious centres are duping vulnerable couples of not only their money but also having drastic impact on the health of the mother and child.

A top fertility specialist in the city recalls a number of cases where distraught couples have approached him to salvage

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2 Times of India, Hyderabad ed. July 16, 2013
cases of 'embryo mix-up' or extreme reaction to hormonal injections that have been administered at other smaller and clandestine clinics.

"ART methods require high medical expertise and procedures must be performed in specific environments under constant monitoring", Dr Nirmala Agarwal, another IVF expert said.³

In fact, the ICMR launched the National Registry of Assisted Reproductive Technology (ART) clinics in India as the first step of implementation of the soon-to-be-tabled Assisted Reproductive Technology (ART) Bill in Parliament.

"Forming a database of all ART clinics and banks is the first step of regulation of this industry. This will enable the people to choose the right centres and also help the government to keep a check on the defaulting ones," said Hyderabad based Dr Pushpa M Bhargava, who is a part of the drafting committee of the ART bill.

The ART bill has detailed out the various committees to be formed to oversee all ART procedures, guidelines, rights of the parties involved and the penalties in case of non adherence. The bill, which has been pending with the government for five years now, is likely to be tabled this year in Parliament.⁴

In India, there are around 3,00,000 ART Clinics performs various ART procedures and a large number of them performs Complicated processes, but as per the list published by the National Registry of ART Clinics only 148 were confirmed as ART Clinic.⁵

Though, it is specifically mentioned on the list that Enrollment Number has been given to those ART Clinics who have successfully submitted their duly filled prescribed proforma for minimum infrastructure facilities, trained manpower and procedure being

³ Ibid
⁴ Ibid
undertaken at the ART Clinic. The Enrollment Number is not the certificate of quality in regard to services provided by the enrolled ART Clinic. The information provided by the enrolled ART Clinics has not yet been verified by the Experts Committee of the ICMR. The process of verification of their claim, by the ICMR Experts Committee, is in process currently.

Situation is really critical, that the regulatory body is not aware of the standard of the clinics and services they are providing. A billion Dollar business is going on without any proper monitoring, regulations and care, specifically when it is directly connected with the health of the persons and rights of children. Without hesitation it can be easily said that practically entire ART Business is running in dark and the Government left the mothers and children, on the disposal of ART clinics.

Unfortunately, while discussing with the clinicians, most of them refused to cooperate as they were of the opinion that any kind of publication about their clinic may cause trouble to them. Few of them provided support to the researcher, but it was limited to fill the questionnaire and informal discussion about the procedure, its complications, regulatory mechanism, requirement of a comprehensive legislation etc. Some of them were afraid of the negative publicity of ART Clinics in Hyderabad just because of the Act of Unauthorised ART Clinics. “There have been a number of cases in the city where surrogate mothers have died because they were not treated properly at the right time,” said Dr Samit Sekhar, a senior embryologist in Hyderabad.

Focusing on the Assisted Reproductive Technology (Regulation) Bill and Rules 2010 (2008) in India, this research suggests that, although progressive in some respects, the bill only partially addresses the concerns raised above. Further, ethical procedures relating to surrogacy appear to co-exist with structural violence in a manner similar to clinical trials in India, and with the growth of global bio-capital more generally.

Parties to an agreement are bound by the terms of agreement, but as appears from the field study of the researcher that no surrogate had any opportunity to consult an Advocate of his choice and at the same time no copy of the agreement was supplied to them so as to enable them to contest for their rights and further specific performance of the
agreement. Though, intending parents always have an opportunity to take the shelter of the Court.

In this manner the limitations of the Bill stem firstly, from its attempts to introduce Euro-American notions of autonomy (with an emphasis on the distinctiveness and separateness of the subject) and informed consent into a setting with very different cultural values. A second limitation is that the proposed law offers quality medical healthcare services for those who can afford ART intervention in a context of significant class and gender based inequalities in access to reproductive healthcare, thus determining who can fully participate in reproduction and enjoy the rewards of this labour. When seen from the perspective of poor Indian women and men who are infertile, the access to ART becomes a privilege: the rights of some individuals and couples to reproduce and exercise procreative agency is valued and not others.6

The researcher examined how, though intended to minimize health inequities for surrogates, the Bill promotes inequality between women of different childbearing capacities based on their ability to pay for and access quality health services as the automatic access to healthcare for surrogates is qualified in the 2010 draft Bill where quality medical care is contingent on their proving that their symptoms stem from their surrogacy.

The emerging scholarship on the political, social-cultural and moral meanings of surrogacy outside the Euro-American context rightly focuses on how surrogates and trans-national couples negotiate the processes and cultural work involved.

This Research extended this work by approaching the issue of surrogacy from the perspective of poor infertile women living in the same social and moral world as the surrogate and for whom private sector infertility services are inaccessible due to the high costs involved.7 Even though conditions of secondary sterility are easily treatable through the existing public health infrastructure these services are virtually non-existent in the public health sector in India where the focus has

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7 As the researcher visited the surrogates and vicinity around them in and around Hyderabad.
historically been on controlling the fertility of poor women rather than on fertility promotion.

It draws upon ethnographic research that intersects with, rather than overlaps with the population of women who are or have been gestational surrogates, to bring attention to wider processes of structural inequality in thinking through the proposed law.

The emerging legislation on surrogacy in India is used as a means to reflect on the first two of three interrelated conceptual issues: reproductive stratification, relational autonomy and the commodification of reproduction. Toward this end it draws on anthropological studies of surrogacy as lived experience, feminist notions of relational autonomy and the idea of informed consent as a primarily ‘communicative transaction’ where it is the quality of information that is provided and how it is received that is critical in ensuring the process as ethical.

An analysis of these texts as well as field based material, lead us to suggest:

i) That despite an explicit framing which acknowledges the rights of the infertile to bear children, the Bill promotes this right selectively, for those who have the resources to pay for assisted reproductive services, and,

ii) That even though the Bill ostensibly focuses on the welfare of Indian surrogates, legal guarantees are not deep enough to ensure surrogate women’s relationally determined autonomy to choose.\(^8\)

The ART Bill Serves Whose Interest

The ART regulation Bill and Rules, as drafted by the Indian Council of Medical Research in 2008 (and its modified version of 2010) set out guidelines ranging from the duties of clinics to the rights and duties of patients, donors, surrogates and children. Part I of the 2008 Bill sets out the definitions and provisions in nine chapters on subjects ranging from the registration and duties of clinics to the regulation of research, offences and penalties. Chapter 7 is devoted to ‘the rights and duties of patients, donors, surrogates and children’. In addition, Part 2 of the Bill

\(^8\) MAYA UNNITHAN, Supra Note 6
describes in greater detail the rules as set out in Part 1, and Part 3 provides samples of the schedules, forms and contracts pertaining to the parties involved in the processes of assisted reproduction, including forms for the agreement for surrogacy, consent for donor eggs and information on the surrogate. The ART regulation Bill of 2010 covers only part I of the 2008 Bill.9

Protection to Surrogates:

The ART process is quite complicated and even after due care certain birth defects may occurs in the child, in such a case, the Bill safeguards the rights of Surrogates as meeting the surrogacy requirements in the case of a child born with birth defects. It also states that she can terminate her pregnancy at will10. However, the clause on the termination of the pregnancy at will, needs to be considered in relation to a condition suffixed that all payments received by the surrogate be refunded in such an event, except in case of medical complication.

The provision certainly pushes the surrogates of back-foot as given the extreme poverty and indebtedness which drives surrogacy in the first place, it is unrealistic to believe that the surrogate’s choice to terminate her pregnancy will be exercised or that she has any real bargaining power when it comes to negotiating the terms and amount of money, as the researcher found during his discussion with 21 Surrogates that they all were compel to chose the option to enter into surrogacy arrangement in extreme poverty conditions.

On the option of Commissioning Couple, the Bill subjects surrogates to invasive procedures such as foetal reduction in the event of multiple pregnancies, and Caesarean sections if recommended by the doctors. More routinely, the surrogate consents to a continuous medical regimen of injections, blood tests, screening and diagnostic procedures.

Less explicit, but of major implication, is the discrimination against the surrogate which arises from the language (English) in which the agreement and consent form are written. Given that English is not the first language of most surrogates and that a majority is indeed illiterate rural women, the understanding of what consent entails is left to the

9 MAYA UNNITHAN, Supra Note 6
10 Appendix 1 for Form J, Agreement for Surrogacy
vagaries of a conscientious translator. In legal terms it is important to note that the surrogate is not provided any legal support by the state, with the clinic acting as legal representative including as representative with any commercial agency. Given that the clinics also act as providers of counseling services, it may be apt to regard the surrogate as a ‘captive of the clinic’. 11

Clinicians, however negate the probability in light of recent development in Technology, which enabled the Doctors to carry-out the procedure with almost no risk. They also point-out that they are providing legal services and necessary counseling to surrogates with utmost care and to protect their interest; other-wise in case of even a single mis-happening the clinics will lose their reputation both the ways, among the intended couples and prospective surrogates. In this manner they are moving on the edge of sword.

Maya Unnithan12 criticized the bill for predominantly upholding the research and promotion of ART services and the interests of the providers, especially private clinics. Other important criticisms of the bill raised by these scholars and activists include,

i) the fact that in denying the surrogate the possibility to register as the birthing mother, the Bill protects the rights of the buyer,

ii) in ensuring that the surrogate underwrites all the major risks of the procedures, including her own death, natal and postnatal complications, foetal reduction, any risk of HIV transmission, the bill clearly protects the interests of the clinics and sperm banks,

iii) the health risks to the surrogate are further disregarded in the clause that enables her to have three surrogate births and three cycles of ova transfer (increased to 5 live births with no specification of the number of IVF cycles, in the 2010 version of the Bill) and,

iv) in favouring a quick transfer of baby from surrogate to commissioning parents, the bill downplays the developmental needs of the baby (though it may be easing the bonding-related anxieties of commissioning parents as well as the commercial

11 MAYA UNNITHAN, Supra note 2
12 Ibid
The rights of the newborn baby are further undermined in terms of its survival, right to a safe home and the automatic right to know its identity (only if sought out and not before 18 years unless for medical purposes). Even the rights of the child to citizenship were not addressed until 2008.\(^{13}\)

I.B. Verma of a Feminist organisation VAMA, criticizes the bill and says “It is drafted to serve the Interest of money, not the person”.

On plane thinking Researcher fails to disassociate himself from such opinion as India have particularly the few instances in which the surrogacy guidelines (2005) have been invoked are particularly revealing of what and for whom recourse to the law is taken. Of the two cases known so far, both were in 2008 and concerned the custodial rights of the commissioning parents (in one case a Japanese father and in the other a German couple) and their difficulty in securing travel documents, visas and citizenship from their own countries for the surrogate children, Baby Manji\(^{14}\) in the first case and German twins\(^{15}\) in the other. In both instances, the social parents were eventually able to adopt these children in their respective countries. The surrogacy bill was tightened, especially as a response to the experience of the German couple, permitting surrogacy arrangements to take place only if proof of citizenship for the child was presented by the intended parents. In both cases, the guidelines revealed lacunae regarding the ability of the surrogacy legislation to protect the rights of the new born baby to an assured and safe home (as identified by the 18\(^{th}\) Law Commission Review in 2009). One of the few modifications in the 2010 version of the Bill is the mandatory requirement for foreign couples to produce a certificate from their countries ensuring the child will be considered a legal citizen of that country.

Other clauses in the ART Bill(s) reveal it as a document through which ‘culture work’ is carried out as I suggest in the following lines. In only recognising gestational surrogacy but not traditional surrogacy where the eggs of the surrogate (rather than those of a donor or of the commissioning woman) are used, the Bill reinforces biologically

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\(^{13}\) Ibid

\(^{14}\) Baby Manji Yamada Vs. Union Of India AIR 2009 SC 84

\(^{15}\) Jan Balaz
deterministic models of motherhood by emphasising that it is genetic substance of the commissioning couple rather than the gestation by the surrogate which defines motherhood.\textsuperscript{16}

In contrast to Israel where the law specifically demands that surrogates are single and unmarried women except under ‘severe circumstances, the main criterion for a woman to legally undertake surrogacy in ART Bill is that she has to have already given birth to a healthy child. Given the Indian context where childbearing is mostly undertaken by women after marriage, in reality, only divorced or widowed women, rather than unmarried single women, would be considered as surrogates.

The rules regarding the surrogate’s marital status, as specified in the Indian ART bill, determine who can participate in surrogacy and who cannot, and become important in understanding how the bill works both to maintain as well as to shift widely prevalent ideas of appropriate parenthood. The Bill upholds hetero-normative ideals of parenthood in its reference to married couples, although there is an acknowledgement that women who are single can both commission and undertake surrogacy. Same-sex couples living in India or other places where such alliances are regarded as illegal are excluded from seeking surrogacy.

Finally, any analysis of the impact of the surrogacy legislation on the ground would also need to be situated in terms of the historically informed ability of local people to seek recourse in the law, which is limited, as is their trust in the State. State legislation and policies to do with conception in India demonstrate a long history of, and stubborn focus on, drastic measures to limit the population birth rate (for example, through the two-child norm to gain political office, as well as the promotion of tubectomy despite the rhetoric of contraceptive choice, as acknowledged in the National Population Programme. However, in contrast to state population policies thus far which have emphasised family planning programmes to restrict fertility, the law and policies to do with surrogacy promote and celebrate fertility, representing a watershed shift in State population perspectives. But in a context where the state and the law have been regarded suspiciously and circumvented, to what

\textsuperscript{16} MAYA UNNITHAN, Supra note 6
extent will the policies supposedly promoting surrogate welfare make a difference with regard to women’s autonomy on the ground?

Another way of putting it would be to think of surrogacy legislation in terms of the limits of the State to exercise biopower as witnessed in the recent challenges it has faced to regulate sex selective abortion despite a history of legislation to do with the Pre-Conception and Prenatal Diagnostic Testing Acts (PNDT Act 1994, PC-PNDT Act 2002) which were promulgated to deter sex determination and related abortion.

The existing bill does not take adequate measures beyond the standard protocols to ensure that the potential surrogate has full knowledge of the implications of her consent. There is little evidence that Indian surrogates’ human rights and physical or psychological health are adequately protected. In the study conducted by the researcher it appears that most of the commissioning Couples after getting the child don’t want to continue any kind of contact, on the contrary some of them provided fake contact details to surrogates.

An intended mother from USA, Lilly Jaferson, while discussing with the researcher in Hyderabad, specifically stated that the Surrogacy Advocates in USA cautioned her about the consequences and therefore not to make any kind of contact with the Surrogate.

Though, the Public opinion about the post Natal care of the surrogate imposes a responsibility on intending parents as well as on clinics undertook the surrogacy for a substantial period, se 1 year, as the majority in the survey conducted by the researcher is of the opinion.17

Commercial surrogacy complicates practices of consent further, as it is suggested that a high payment to a surrogate is likely to compromise her capacity to give informed consent by encouraging her to minimize the risks involved in the procedures. This is one of the main reasons why, the Indian legislation falls short of the International Federation of Social Work (IFSW) ethical standards, as it institutionalises commercial surrogacy by allowing payments.

Researcher met an Australian Homosexual at Hyderabad and also gone through a recent news piece that has caught everyone’s eye is that

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an Israeli homosexual couple has got a surrogate child from India. Everywhere, people seem to be pleased about it, but when analyzed legally, it leaves us in a very befuddled state of mind.

A Senior ART Surgeon, who made the couple’s dream of having a child come true, confirmed that almost 16 homosexual couples of different nationalities (such as Swedish, French etc.) have approached him for the surrogacy. Reasons for choosing India as a destination are also quite obvious - less paper work and also, cost of whole treatment is much lesser than other countries.

In the light of the aforesaid, it is pertinent to note that under Section 377 of Indian Penal Code, 1860 (“IPC”), “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.”

Since as per IPC homosexuality is treated as an act that entails criminal liability in India, how can a foreign homosexual couple be legally allowed to get a surrogate child? It is often alleged that Section 377 of IPC violates the fundamental rights of homosexuals in India. Despite the existence of literature drawn from Hindu, Buddhist, Muslim as well as modern fiction to testify the presence of same-sex affinity in various forms, homosexuality is still considered a taboo by both the civil society and the government in India.

However, there are certain confusing definitions in the bill which need further explanation and clarifications. Section 32(1) of the Bill, which is the enabling provision, states: “That subject to the provisions of this Act and the rules and regulations made there under, Assisted Reproductive Technology (“ART”) shall be available to all persons including single persons, married couples and unmarried couples”.

Therefore, it becomes pertinent to understand that how a couple is defined here. Under Section 2(e) of the Bill, a 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”.
This definition is inclusive in nature and covers all kinds of couples, whether they are homosexuals or not. Furthermore, the definition does not prevent the citizens of a country (where homosexual marriage is legal), from having a surrogate child. So, if section 377 of IPC is amended so as to be in consonance with the scheme of the Bill (as and when it is passed by both the houses to give it a legal effect), there will be no impediment in including same-sex couples within the definition of ‘couple’ as defined under Section 2(e) of the Bill. The effect of the definition appears to do away with the legal limitation imposed by Section 377 of IPC, and is not just a mere co-incidence of legal drafting.

As we ponder upon some other definitions in the Bill, an “unmarried couple” is defined under Section 2(w) to mean: “A man and a woman, both of marriageable age, living together with mutual consent but without getting married.”

So when these two definitions are read simultaneously, it clearly delineates that for an unmarried couple to get a surrogate child, they have to be heterosexual; but on the other hand, no such condition is applicable to married couples i.e. they might be homosexual or heterosexual.

This leaves us in sheer confusion as Section 32(1) is not restricted, but extended to include 'single persons', 'married couples' and 'unmarried couples' as well. There is perhaps a window left open for a foreign married homosexual couple who, according to the two definitions under the Bill, are a ‘couple’ having a valid married status under their jurisdiction. The non-exhaustive language used herein should allow the courts to fill in the gap.

**Discrimination**

Since a homosexual relationship or marriage is not legal in India, this Bill by ICMR seems discriminatory in nature towards Indian homosexuals as homosexuality is legally prohibited in the country. On the other hand, homosexuals from the countries (where homosexual marriages are legal) can freely come to India and get a surrogate child. Moreover, an Indian homosexual couple cannot have a surrogate child; an Indian homosexual person can do so only by invoking his status as a ‘single person’ under the Bill, and not as a homosexual. Marital status of a
homosexual individual, therefore, does not matter either for having a surrogate child.

In addition, Section 34 (10) of the Bill states that “The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of the genetic parents / parent of the baby.” This implies that the child belongs to them (him) who contribute(s) to the genetic make-up of the child (excludes anonymous donors). Only one of the two partners in a homosexual couple can make such a contribution; under Section 33(3) of the Bill states that: “A donor shall relinquish all parental rights over the child which may be conceived from his or her gamete.” For this purpose and therefore, the child will bear only the name of the contributing partner of the homosexual couples.

The question now is: ‘is marital status going to be a restrictive factor preventing Indian unmarried homosexual couples from having a surrogate child?’ In the light of above stated, the answer for this question would certainly be no, but still there is a discriminating factor against Indian homosexual couples and in favor of foreign homosexual couples (who can legally get a surrogate child as per ICMR).

This kind of problem can be conveniently solved by passing the bill only when the status of the Indian homosexual couples is brought at par with the foreign homosexual couples; either legalize homosexual relationships/ marriages in India or else, put such restrictions on a foreign homosexual married couple as are faced by Indian homosexuals (where the issue of getting a surrogate child is concerned).

**Limitation in Cross-border surrogacy arrangements**

Whereas the industry works quite smoothly on the national level, problems arise with respect to cross-border business. There is considerable legal diversity as to medically assisted reproduction all over the world leading to difficulties for courts which have to decide on the recognition of foreign official certificates and judicial decisions. Surrogacy is sometimes seen as a legitimate way to overcome infertility and to realize the desire for a child in mixed as well as in same-sex
At the same time, surrogacy opponents point out the degradation of children to a merchant good and the exploitation of needy women. Legal diversity leads to legal uncertainty, which in turn is mirrored by intended families experiencing a stage of factual precariousness as private international law lacks a coherent approach on the applicable law and the recognition of awards.

LEGAL DIVERSITY IN INTERNATIONAL SURROGACY LAW

Surrogacy laws are everything but internationally coherent: Regulations range from a total ban to liberal approaches, whereas some countries do not rule on surrogacy at all. At the same time, there is a lot of movement in the field: Some of the rigid regulators currently consider allowing surrogacy at least in certain specified cases in order to cope with the factual problems of legal arbitrage, while some of the liberal countries try to ban foreigners from the market in order to prevent a systematic violation of women’s rights. This leads to intended parents travelling to the most favourable jurisdiction but still facing severe problems when returning home.

Procreational legal arbitrage

The fact that surrogacy to a large extent emerges as a cross-border phenomenon is partly due to intended parents trying to exploit price differences. However, the so called “procreative tourism” is also a result of maximum legal diversity in the international realm. The legislative power of restrictive countries factually ends at their borders: So far, there is a considerable number of their citizens whom they could not effectively prevent from obtaining a baby abroad. In theory, they might consider to punish intended parents for obtaining the baby abroad; however, so far this has not seemed to be feasible for those legislators who have thought about it; an example is France where a commission proposed in 2008 that children born to a non-authorized surrogate should pay for their parents’ mistake.

The phenomenon of legal arbitrage is well known from other fields of law where it works perfectly well because the rather restrictive countries rarely attempt to rule on activities outside their borders.\textsuperscript{21} This is, however, different in the ethically coined realm of family law. Here, the jurisdictions with strict approaches regarding surrogacy do not want their citizens to evade their rules. Family Law, however, is the only means which the legislator can use to prevent reproductive tourism.

Reproductive tourism may also be considered as a “safety valve that reduces moral conflict” – apparently according to the principle “out of sight, out of mind”. Their law eventually catches the refugees as soon as they return to its reach, i.e., as soon as the intended parents bring the newborn baby home. The result is a clash between two quite different systems of family law, which materializes in the home country authorities not recognizing the legal effects surrounding surrogacy in general and parenthood in particular which the intended parents were aiming at. If the child was born in a jus-soli country like the United States, the child will be easily issued with a passport and often be able to follow the intended parents to their home country. In this case, problems do not arise before the new family could settle at home. If, however, child nationality depends on parentage, this means that the intended parents need their own jurisdiction to acknowledge their parenthood right from the beginning because without at least one of them being recognized as a legal parent, the child will not be issued with a passport from the local embassy at his place of birth.\textsuperscript{22} To establish legal parentage here is anything but quick and easy: In the vast majority of jurisdictions, motherhood is initially attached to the woman who carried the child.\textsuperscript{23} Furthermore, many surrogate mothers are married, which makes the laws of most countries\textsuperscript{24} presume her husband to be the father. This impedes the child in getting the same passport as his intended parents who thus have to challenge the parenthood of the surrogate or her husband.

\textsuperscript{21} In the field of international corporate law. There is no reasonable difference between “legal arbitrage” and “regulatory arbitrage”.
\textsuperscript{22} § 4 section 1 of the German Citizenship Act (Staatsangehörigkeitsgesetz, StAG). accessed on www.sachsen.de/en/1444.html on 14/4/2014
\textsuperscript{24} § 1592 No. 1 of the German Civil Code (BGB) ibid
Motherhood is contestable almost nowhere;\textsuperscript{25} and while fatherhood is contestable almost everywhere, this takes a significant amount of time – time that intended parents are not willing to spend in a foreign country. They will thus apply for a passport on the uncertain ground of general legal principles or try to be immediately entered on the birth certificate – which, in turn, is not recognized by many European authorities and courts due to reasons of public policy.

The question thus arises whether intended parenthood should be internationally recognized so that the babies do not end up “stateless and parentless”. This issue is not only of momentary importance: It will remain urgent even if some European countries permit certain forms of surrogacy in the near future, because as long as there is any legal diversity in the field, legal arbitrage and therefore the problem of recognition will remain.

The surrogacy professionals clarifies that there is no need of a DNA test in order to get the birth certificate in surrogacy. It is only done if a consulate asks to confirm paternity or maternity of the new born. With affordable cost of surrogacy in India, internationally trained doctors and latest technology in surrogacy clinics, couples from different countries are coming to India for surrogacy.

Doing a DNA test is not a pre requisite for getting a birth certificate. The birth certificate is issued by the concerned municipal corporation based on the application that the genetic parents themselves fill out. It is only certain consulates ask for DNA ID, paternity check and only on those specific requests is a DNA ID check done to confirm paternity or maternity as may be.

The issue of citizenship was not directly dealt with, but after Jan Balaz Case, Government took certain steps to ensure the well being of children born in India through ART Procedure. As a step to curb such issues from cropping up wherein the commissioning couple’s place of domicile doesn’t recognise surrogacy and the issue of determination of citizenship of the children born come up, the Ministry of Home Affairs, Government of India brought about a change in Visa regulations, in

\textsuperscript{25} One example of legislation that opens motherhood to being declared void is Greece; see Art.1464 of the Greek Civil Code accessed on www.ladwise.landesa.org/record/1066 on 14/4/2014.
2013.\textsuperscript{26} Imposes a number of conditions. Among others are the condition that the couple must have been married for at least two years and letter from the embassy of the their respective country must be enclosed with the visa application stating clearly that “(a) the country recognises surrogacy and (b) the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning surrogate.”\textsuperscript{27}

**Enforceability in Court of Law**

Sample contract in the proforma annexed to the ICMR Guidelines and also provided in the proposed ART bill a sentence specifically drawn the attention of the researcher provides:

“Any party may attempt to enforce this Agreement in court. However, all Parties understand that a court may refuse to enforce this Agreement, in whole or in part. The Parties assume the risk of unenforceability in entering into this Agreement”

In these circumstances, though enforceability nowhere affects, m wealthy nations. It is an open secret that it is first and foremost well-off people from industrialized countries who can afford to commission a surrogate and that it is frequently\textsuperscript{30} indigent women from Third World countries who – often under substantial pressure – “opt” for surrogacy in order to improve the living conditions for themselves, their husbands, and their children.

There is disagreement amongst legal scholars as to the extent to which surrogate mothers voluntarily and without any pressure agree to carry a baby for the intended parents “the experience of being a surrogate mother is neither problem-free nor necessarily as horrendous” as stated by a surrogate mother at Hyderabad during the study, she said that leaving the baby was the worst part of their experience; however, there was a general notion that unhappy feelings soon disappeared.

\textsuperscript{26} Ministry of Home Affairs, Government of India, Type of Visa for foreign Nationals intending to visit India for commissioning Surrogacy and condition for grant Visa for the purpose , available at http://mha1.nic.in/pdfs/CS-GrntVISA-29112.pdf (last visited on march 27, 2014)
\textsuperscript{27} Ibid
Does Private International Law helps anyway...?

A recent proposal for legislation by certain feminist groups would – if implemented – ban foreigners from surrogacy in India. Critics and pressure groups have promptly issued a warning that this might diminish the surrogacy business by 90% and cause significant economic damage to a whole commercial sector.

When it is widely accepted an intervention of Government of India is warranted to protect the interest of the Surrogate mother through the process provided in Private international Law. Bilateral treaties and International Convention on this issue may create difference.

Response of Indian Authorities is invariably hopeless, as even after developing as a hub of Medical tourism specifically ART, the legislation is dealing the issue as Tabu and similarly no will appears to regularise this burgeoning industry from the Government, thus expectation of initiation of process for a convention appears to be a full moon in a black-night.

Against this background of lacking, incoherent, and changing regulation, European courts struggle to deal with the growing number of cases in which surrogacies have already taken place and the intended parents fight for the legal recognition of their parenthood.

Legal problems occasionally occur with respect to cases where child immigration and thus the recognition of parenthood is complicated by a missing genetic linkage of the child to either of the parents. However, the vast majority of cases tried in European courts concern situations in which the child is consanguineous with the intended father, but the intended parents are not willing to run through the time-consuming process of paternity acknowledgment and/or adoption before taking the baby home.

These cases either relate to denied passport applications at embassies located in iussanguinis countries (“child abroad”) or to the rejected establishment of parenthood in the parents’ home country (“child at home”). Examining overall patterns from cases recently dealt with by European courts, it is important to differentiate those two types of cases as the respective judicial decisions appear to be remarkably different in nature.
Child abroad

Many restrictive jurisdictions attempt to disincentivize surrogacies abroad by refusing to issue a passport for the newborn child, thus preventing the child from entering its territory. The calculus behind this policy is not meant to disadvantage the child—however, it factually complicates the process of child immigration to the intended parents’ home country. Hence, the authorities in those countries and their embassies abroad perceive this legal situation as being highly unsatisfactory because they are advised to prevent similar cases in the future by denying the child and—indirectly—the intended parents the right to enter the country in cases where prevention has already failed.

Within the last few years the numbers of cases contesting dismissive decisions from embassies and similar authorities has been steadily low, but however remarkable. In 2008, the English case X & Y (Foreign Surrogacy)28 caused a public stir as two children born in the Ukraine had to bring suit in order to be allowed to enter the United Kingdom. In Jan Balaz v. Union of India (2009), the intended parents did not succeed as the High Court of Gujarat decided that twins born through surrogacy were Indian citizens and did not assume German nationality from the intended parents.29

Strictly rights-based decisions, however, do not eventually prevent the intended parents from taking the baby home. Courts and other state authorities try to acknowledge the confused situation even if they are afraid to set precedents. In an attempt to cope with the deadlock, they often slur over the legal question of child nationality and sooner or later allow for child immigration. Their reasoning shows that they shrink back from perpetuating the current situation, instead they stress the exceptionality of their decision. The intended parents’ passport application is often not legally successful as the child is not issued with a passport from their home country. But courts and authorities have regularly permitted them to take the baby home “outside the rules”, issued a one-time travel permit, or settled the dispute without any judicial

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decision at all.\textsuperscript{30} Sometimes, the children born through surrogacy have had to stay in their birth countries for about a year, but there is no known case in which a child would have eventually had to stay and was never allowed to follow the intended parents to their country as appears from both the Indian cases (Jan Balaz and Manji Yamada).

**Child at home**

The factual situation is somewhat different in cases where the child has already moved to the place where the intended parents live. Court decisions in these cases are no longer under the immediate pressure of the intended family living under unfamiliar circumstances. Such cases occur where the baby was born in a ius-soli country like the United States and could easily enter the parents’ European home country or where the intended parents succeeded in carrying the baby home after somehow evading the embassy or border controls. In these cases, the child is living with her intended parents according to plan, but their parenthood lacks legal recognition. Here, one does not observe patterns of non-bureaucratic decisions; instead, courts are rather relentless and tend to show rigour by sticking to their restrictive surrogacy laws, denying motherhood for the intended mother and referring the intended father to a formal acknowledgement of paternity. On several occasions, intended parents have unavailingly attempted to achieve recognition of a foreign birth certificate that identified them as the legal parents. Courts refer the intended parents to an acknowledgement of paternity and the adoption procedure explicitly disregarding the birth certificate for reasons of law or public policy.\textsuperscript{31,40} At the same time, it should be noted that a few decisions point in a different direction, recognizing foreign decisions on the parenthood of the genetic father even under the public policy restriction.\textsuperscript{41}

It can thus be concluded that, when the best interests of the child are at stake because the newborn child has become stuck in a foreign

\textsuperscript{30} Royal High Court of Justice, Supra Note 28
\textsuperscript{31} Administrative Court (VG) of Cologne, decision dated February 20, 2013, file no. 10 K 6710/11 http://ti.me/VY75g9 (last accessed 18.1.2014)
country, courts temper justice with mercy. However, once the child is safe, the domestic laws are widely enforced; 42 exceptions prove the rule.

Consequences Of Legal Diversity In The Recognition Of Parenthood

Even though the courts obviously do their best to cushion the negative effects of international surrogacy cases on the involved children, critics argue that the problems with which young families are confronted are still considerable and have to be dealt with by an international approach.

The first disadvantage children face after being born to a surrogate mother is often an extension of their stay in an underdeveloped country that the intended parents are not living in. For example, a French couple might have to stay a couple of months or even a year with the newborn child in India until the husband of the surrogate has contested his fatherhood, the intended father has acknowledged paternity, and the French embassy has eventually issued a French passport for the child. Sure enough, some local authorities issue birth certificates identifying the intended parents as the only parents of the child (even if this is against the local law), which in turn increases the chances to veil the surrogacy and to obtain a passport for the child at the foreign embassy. Anyway, this is not a solution that satisfies a lawyer.

At least, many surrogacies take place in countries which have agreed to a visa waiver programme with the intended parents’ home country, enabling the intended parents to take the (legally foreign) baby home without any waiting period, though in absence of any legislation on this issue and failure in entering into a bilateral or collateral treaties in this behalf, India is not among them.

The second considerable difficulty children face arises at home out of the at least temporarily open questions of parentage: The legal uncertainty as to who is assigned with legal parenthood over the child may translate into questions of custody and child maintenance. The intended parents will need the right to exercise child custody soon after child immigration to their home country, be it for consultations or for an application for a day nursery. Anyway, child custody largely depends on parental status. Thus, as long as paternity is not acknowledged and the
intended mother has not adopted the child, most jurisdictions\textsuperscript{33} still see the surrogate mother and her husband as legal parents. If a personal custody decision cannot to be postponed, family courts will often assign a legal guardian to make those decisions until parenthood is established.\textsuperscript{45} The situation is further complicated where the intended parents split up before parenthood is legally arranged. If the intended parents terminate their relationship, the child will need support. The worst-case scenario here would be the intended parents denying responsibility and the child being reliant on his legal parents who live far away under possibly quite different living conditions.

Some surrogacy organizations will try to avoid such a situation by asking intended parents to reach an agreement on child support before entrusting a surrogate mother, but this is not the rule.

Anyway, there is no known case where the intended parents have denied the responsibility for child support because of a split-up before or immediately after childbirth.\textsuperscript{34} If this happened, the child would most likely not be returned to the legal parents but – with their consent – be put up for adoption. However, in the vast majority of cases, parenthood questions will be solved before custody and maintenance problems arise – either due to a timely acknowledgement of paternity or because the registrar who is in charge of the domestic birth registration does not (want to) notice the possibility that the baby could have been carried by someone other than the intended mother.

After all, it is questionable to which extent the concerned children will really sense the complications their parents face. If immigration is delayed they may suffer from being looked after by only one intended parent instead of two. If quick immigration works out but legal parentage cannot be established immediately, they will barely notice anything. Of course, if their parents separate before their parenthood is legally acknowledged they may incur significant disadvantages. However, such a case has not yet become public. Thus, the main factual difficulties which are the result of legal diversity are apparently caused by the intended

\textsuperscript{33} One example for a jurisdiction immediately assigning motherhood to the intended mother is the Ukraine; see Art. 139 of the Ukrainian Family Code accessed on www.refworld.org/docid/4c4575d92.html on 14/4/2014
\textsuperscript{34} Even in the case of Baby Manji, the (genetic) father tried to meet his obligations
parents. Here, it is important to remember that the rather rigid legislators have deliberately chosen to follow a restrictive approach and have hazarded the consequences on the intended parents.

Thus, the fact that the intended parents face severe difficulties with cross-border surrogacies does not necessarily call for criticism as they know in advance that they are following illegal plans. One can even argue that only from the struggle of those cases comes the power of prevention – and comes the invisible advantage that surrogacy mandates from citizens of countries with rather strict legislation so far remain a fringe phenomenon.

LEX FERENDA

The examination of the most pressing problems in recent European legislation on surrogacy shows that only in rare cases does legal uncertainty eventually materialize at the expense of the children in question. However, one might ask whether any international legal approach can still smooth out unfavourable effects for the persons involved without undermining the legitimate decisions of rigid regulators. Is there a need for an international convention on cross-border surrogacy…? Does parenthood have to be redefined with regard to the intention of would-be parents, or do the existing legal measures suffice for the protection of the child…?

A new Hague Convention

The Hague Conference on Private International Law is currently attempting to map out a convention on issues arising from international surrogacy arrangements.

Building on previous work from two reports on this topic from 2011 and 2012 and drawing from a study carried out by a research team from the University of Aberdeen published in 2013, the Conference has recently issued four questionnaires on the private international law

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issues surrounding the status of children with particular emphasis on international surrogacy arrangements. A draft convention in 2015 would be the next logical step here. The goal of such an international treaty – to protect children from the downsides of legal diversity – is honourable. However, the practical feasibility of such a convention remains questionable. An international convention brings about legal certainty, which is also brought about with the recognition of foreign decisions. As regards surrogacy, this means that the home legislations of intended parents would have to recognize certain assessments from the courts or authorities in the country where the surrogacy took place. Most likely, these assessments first and foremost concern questions of parentage as these are central to the legal problems of today. However, to ratify a new Hague Convention on international surrogacy cases would not only mean a pullback from the regulation of families living abroad, it would indeed open the floodgates to national definitions of parentage as the domestic family law could then most easily be evaded by shifting registry decisions abroad. It seems highly unlikely that the rather restrictive European jurisdictions are willing to sacrifice a fundamental principle of family law to international regulatory competition.

**Leeway for cross-border recognition of surrogacy**

There are a number of renowned voices in the international realm who see sufficient leeway for a surrogacy-friendly interpretation of the prevailing Western family laws.

Their main reasoning can be traced back to Art. 8 ECHR, which protects private and family life, and to Arts. 7, 8, and 9 of the UN Convention on the Rights of the Child.

The idea is that the rules on parenthood have to be reinterpreted so that in surrogacy cases the intended mother is to be immediately considered to be the legal mother even though this conflicts with the letter of the law. According to this approach, public policy should no longer be used to ward off the application of foreign parenthood laws but be liberalized in respect of the children’s rights mentioned above.

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However, by acknowledged legal methodology, the cited conventions can influence the interpretation of national family laws on maternity but not overrule them.\textsuperscript{38}

Furthermore, Art. 8 ECHR as well as Art. 3 UNCRC are not violated as long as the children born through surrogacy can live with their intended parents, because here, the question of how parenthood is established turns out to be a mere technicality that the children do not effectively suffer from. Even if a child has marginally suffered, the reasoning with the interests of the children might be circular: As was described above, the idea of preventive law is to discourage certain behaviour, accepting negative effects where prevention does not work. By accepting very few children to live abroad for a while\textsuperscript{39} and to be possibly left without child support (no case is known so far!) the legislator scares many people off from international surrogacy and prevents many future children from ending up in a similar situation. This calculus is reasonable not least because it is still scientifically plausible that the separation of a child from his birth mother significantly impairs his welfare. Whether or not this is perceived to be a favourable legal policy is anyway not a question of legal methodology but a decision by the respective legislator.

\textbf{Shifting the parenthood rationale from genetic linkage to intention}

Of course, the legislators in different countries might want to think about a redefinition of parentage. It is a valid question to ask whether parenthood should stick to genetic linkage or be shifted or complemented by parenthood through intention. The question comes up because it is only a quite recent development that motherhood can be split between the woman giving the egg and the one carrying the child. Most current European family laws irrevocably assign motherhood to the latter. The reason here is – quite surprisingly – not predominantly a closer link between the gestational mother and the child but the preventive argument mentioned above. This tells us a great deal about the unsettled question of which aspect eventually matters for a modern understanding

\textsuperscript{38} In some countries such as in Austria, the said conventions were indeed elevated to constitutional status; however, in other legislations, the constitution overrules the convention.

\textsuperscript{39} In the view of the law, the child does not live “abroad” because as long as the surrogate is his mother, her country is his country
of parenthood. Is it the genetic link, the social relationship, the bare intention, or a mixture of the latter…?

A view on recent European jurisdiction shows that there is a growing perception that children have a right to at least know about their genetic origin. The performance of such a right is somewhat hampered in the international realm as long as surrogacy friendly states do not record data from surrogate mothers. Apparently, responsibility through genetic linkage is widely perceived as disposable as long as someone else is willing to take over.68 One might induce from this observation that parentage has to be open to contracting. However, this argument turns out to be weak: As contracting on parentage is highly susceptible to child trafficking and thereby severely violating the value of human dignity from Art. 1 of the Charter of Fundamental Rights of the European Union, any agreement could be put on hold until some state authority has approved it. Such state approval seems necessary because human trafficking has to be prevented, because even the intention to be parents might sometimes be (too) fungible, and because with the children, there is a voiceless third party involved which needs someone to speak up for her. To legalize surrogacy in this way might comply with children’s rights as well as with the fundamental family law principles of most, if not all European countries. In fact, a legal model for such an intentional parenthood already exists in coexistence with the parentage based on genetic linkage: it is nothing other than adoption.

Relying on adoption

Adoption is a model of parenthood which is not based on genetic linkage but on someone’s intention. Today, it functions as an emergency mechanism for cases in which the genetic parents can – for whatever reason – no longer take the responsibility to care for the child. This is quite similar to what can be observed in surrogacy cases: There is some kind of a factual emergency when the intended parents try to import a baby and acquire legal parenthood even though they know they were not allowed to do so. The baby is not responsible for this awkward situation, and the law has to deal with this. Given that the intended parents deliberately chose to create the emergency, it is only just and equitable to gear the legal mechanism which deals with the situation exclusively to the well-being of the innocent child and not to the goals of the parents. This is
exactly what adoption procedures all over the world look like. It is important to notice here that the best interests of the child do not necessarily argue for assigning the child to the intended parents.

They can indeed follow the surrogate (and possibly her husband) in their status as legal parents; however, only subject to the necessary condition that this is the best solution for the child. Here, the law provides a possibility for double parenthood, sure enough the sequential and not the simultaneous way.

Critics might argue that subsuming surrogacy under adoption cannot provide certainty for the intended parents that they will eventually obtain the child because – at least in theory – the child might be given to someone else. However, the question is how much certainty someone deserves who orders a child to be born as a (legal) orphan. Also, any deviation from the best interests of the child as the sole guideline for the allocation of the child result would seem iniquitous as it would mean that intended parents can take home a child whose interests would be better served by being assigned to someone else. Apart from that, it is also the rights of the surrogate which argue against “parental certainty” for the intended parents: It is a factum that many surrogates do their job only under serious financial and social pressure and that their assurance to be fine with relinquishing the child does not express their real feelings; if this does not anyway lead to a complete prohibition of commercial surrogacy, at least it calls for the surrogate’s right to eventually decide whether to keep the child only after birth. However, if the surrogate mother is granted this right, the law has to assign initial motherhood to the woman who gives birth. The proponents of surrogacy thus have to decide whether they want to keep this understanding of motherhood or whether they are really willing to entitle intended parents to enforce the surrogacy agreement, if need be in the delivery room.

Further, the absence of an effective binding law on surrogacy in India makes the situation grim as during the pendency of the Bill there is no mechanism or no official government-appointed body responsible for maintaining records on the issue.

The draft law on surrogacy in India, the ART Bill 2010, provides for maintaining records under its relevant provisions. There is a duty imposed
on the ART clinics to maintain accurate records on the manner, technique and use of ART technologies, the individual or intending couple or surrogate mother, in respect of whom it was used. The ART Bill provides for maintaining and preserving records, and the setting up of the National ART Registry.

Further, the ART Bill also provides for setting up of a National Advisory Board for Assisted Reproductive Technology established by the Central Government and State Advisory Board for Assisted Reproductive Technology by the State Government for regulating the conduct of ART procedures or treatment, including surrogacy by fertility or ART clinics, and for ensuring necessary compliance with the law.

In addition to these, the Bill provides for the constitution of a State level ART Registration Authority for granting registration to the ART Clinics for their functioning and to exercise supervision over the ART clinics and to check any malpractice by such clinics. As the Bill awaits its enforcement, these provisions remain non-functional.

But despite these laudable provisions, there is no clear measure on the data or facts or figures on the surrogate children born till date at the State level and other related information.

Attempts have been made to understand the size and scheme of the large-scale operation of surrogacy as a burgeoning IVF Industry, and a brief empirical study has been conducted on the plight of surrogate mothers in South India.

A sample of surrogate mothers based in Bangalore had been studied through the interview schedule but as the issue of surrogacy is heavily guarded by privacy concerns, in order to know the correct proportion of this thriving business of surrogacy, RTIs had been filed at the regional level in Karnataka as well as at the apex national level for securing accurate and exact information on surrogate mothers and surrogate children and other incidental issues concerning surrogacy in India.

There is absolutely no information on the number of surrogate children born in Karnataka annually or the total number of surrogate

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40 Sec 22 of ART Bill 2010
41 Section 22 (1) of ART Bill 2010
42 Section 3, Section 6 of ART Bill 2010.
children born in Karnataka till date. There is no information on the Infant Mortality Rate (IMR), sex ratio of the surrogate children born in Karnataka; and there is also no information on the total number of birth certificates issued to the surrogate children in that State. Besides, there is no concerned official government authority at the State level collecting and maintaining records on the same.

Regarding the RTI filed with the Office of the Project Director (RCH), the Directorate of Health and Family Welfare Services, Government of Karnataka replied: “No separate report of surrogate children is maintained in any of the hospitals of Karnataka, hence report of total number of surrogate child born in Karnataka and report of Infant Mortality Rate (IMR) of surrogate child born in Karnataka is not available.”

On the RTI filed with the Joint Director, Statistics, Birth and Death, the BBMP head office, Bangalore replied that there was no information on the Infant Mortality Rate (IMR), sex ratio and total number of surrogate children born in Karnataka.

Besides, on the RTIs filed with the Karnataka State Commissions, namely, the Human Rights Commission, Child Rights Commission, Women’s Commission, these Commission denied having any information on the same by summarily dispensing with the queries and stating that no information was available on the mentioned subject (surrogacy or surrogate mother or surrogate child) and thus replied that all the queries should be treated as negative.

The Karnataka State Human Rights Commission replied that

“neither complaint or case relating to surrogacy or surrogate mother or surrogate child has been received and nor sue moto action has been taken up. As such no information is available and thus replies to all the queries may be treated as negative.”

The Karnataka State Commission for Protection of Child Rights replied that “no complaints related to surrogate child has been registered in the Commission and not much work has been done in the Commission on this topic”.
Thus there is no State-level official statistical record on the status of surrogate children born in India annually or in each State per annum.

Despite all these developments, there is unfortunately no data or facts and figures on the same.

However, in the recent past, the Indian Society for Assisted Reproduction has taken the initiative of collecting the data by establishing the National ART Registry of India which has been instrumental in collecting and publishing data related to Assisted Reproduction Technology carried out in India since the year 2001. But there are certain limitations in this. Firstly, this is a voluntary process as the data is submitted by the ART clinics voluntarily to the ISAR. Neither has the ISAR powers to check the authenticity and nor has it powers to enforce all clinics to submit data. Hence the NARI does not cover all the ART clinics as well as does not have all the information concerning surrogacy. Further, the last data published by the ISAR under the NARI is of the year 2006.

Correspondingly, RTIs were filed with the National Commission for the Protection of Child Rights (NCPCR), National Commission of Women (NCW), National Human Rights Commission (NHRC) at the national level in order to ascertain necessary facts and figures on surrogate mothers. However, these have also not yielded any result.

Meanwhile the NCW has informed that it “had approved one research study on surrogate mothers in Gujarat by an NGO based in Delhi and also held one Consultation on Surrogacy and ART to discuss the rights of surrogate mothers in the year 2008 but despite this the NCW has not issued any Guidelines on the same”.

It is also important to note that none of these bodies have taken sue moto cognizance of the matter even when they have the necessary statutory powers to do so in the light of the rampant legal, health and ethical issues concerning surrogate mothers and children.

Thus there is a serious lacuna and omission on the part of the government to maintain the necessary and accurate records as well as facts and figures on the surrogate child, particularly when surrogacy is not only regularised in India but is rampantly practiced and the government
earns a whopping amount of revenue from the same. Information and record-keeping must be considered by the government as the immediate recourse.

Today, legal arbitrage persuades droves of Europeans to cross borders in order to have access to surrogacy services which are prohibited under their home legislation.

Once the intended parents attempt to return home with the newborn child, legal diversity translates into problems of legal recognition for the parental status acquired under the foreign legislation. These problems can hardly be satisfactorily solved by European courts; the judges thus tend to avoid precedents and look for informal and non-legal solutions as long as the child is still in her country of birth. The consequences of legal diversity and stagnant jurisdiction, however, turn out to be less serious than one might think: No baby born through surrogacy is known to have permanently stayed in her country of birth, and there is so far no public case in which the length of an acknowledgment of paternity or adoption procedure has made the child lose a claim for child support.

As to the lex ferenda, legal research does not have to decide whether to follow a restrictive or a rather open approach towards surrogacy. The range of possible legislative decisions goes from penalizing the placement of a surrogacy order to the recognition of foreign decisions on parentage to entirely permitting surrogacy. Legal research should point out that, as long as there is any legal diversity and procreative tourism is not criminalized, there will definitely be legal arbitrage and the circumvention of domestic laws. For any European legislator which has decided to prohibit surrogacy, the adoption procedures are completely sufficient to meet the interests of the persons involved, placing the welfare of the child clearly above the interests of the intended parents. In order to protect weaker individuals, i.e., the children and the surrogate mothers, the focus of the discussion anyway deserves to be rather on the protection of their rights than on legalizing the technically possible. And even if some European legislators should decide to liberalize their laws they cannot evade answering the fundamental question whether they will keep their current definition of motherhood or entitle the intended
parents to wrest away the newborn child from the surrogate right in the maternity room.

Surrogacy is a $US 2.8 billion trade across the world and India’s commercial surrogacy is a $ 2.5 billion industry in the country.\(^{43}\) This is as per the estimate of the Confederation of Indian Industry.

It is an admitted and well-known fact that in India surrogacy is legal in the commercial form with the Supreme Court judgment since the year 2002 in the absence of an effective binding law. The proposed law regulating surrogacy in India—the Assisted Reproductive Technologies (ART) Draft Bill 2010— is awaiting its long due enforcement.

The Law Commission of India submitted the 228\(^{th}\) Law Commission Report titled “Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy” to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India On 5\(^{th}\) of August, 2009. The report expressed the view of the Law Commission on the Indian Counsel for Medical Research Guidelines 2005 on Surrogacy, the draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008 and the Seminar on “Surrogacy – Bane or Boon”. The report had also made recommendations to be kept in mind while legislating on surrogacy.

Though the report has highlighted several issues on surrogacy, the report has failed to move in deeper into the aspects of surrogacy. The report is highly superficial and fell far below the expectations for providing recommendations taking into consideration the Indian situation.

The report has failed to notice many glowing issues which require immediate attention. The Report lacks clarity in thought and has found it best to limit itself to what is happening today, instead of suggesting a better tomorrow. The report has not considered the prevailing socio-economic situation in India, which has lead to present boom in Surrogacy. The report has not also been able to identify the future of surrogacy in India, and has not made recommendations for regulating the practice of surrogacy.

Paragraph 1.7 of the Report is extracted hereunder:

“1.7 In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that. The usual fee is around $25,000 to $30,000 in India which is around $1/3rd of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice. ART industry is now a 25,000 crore rupee pot of gold. Hyderabad, a small town in Gujarat, has acquired a distinct reputation as a place for outsourcing commercial surrogacy. It seems that wombs in India are on rent which translates into babies for foreigners and dollars for Indian surrogate mothers.”

A specific mention has been made regarding “Commissioning Agent” in the above extract from the report. In the immediate sentence preceding this sentence, mention has been made about the “Commissioning Couple”. The meaning of “Commissioning Agent” is nowhere explained in the report and causes great confusion as to who is making the payment to the surrogate mother. The mention of ‘commissioning agent’ assumes importance for the reason it signifies the existence of an agent communicating in-between the surrogate mother and the intended parent. This practice is not appreciated internationally and is not in line with the Indian Council for Medical Research Guidelines, 2005.

In the same paragraph, i.e., in 1.7 of the Report, it has been stated that the usual fee for surrogacy in India is around $ 25000 to $ 30000. This again lacks clarity for the reason that the sentence preceding that was dealing with surrogate mothers. This fee referred to in the Report is the total cost which the Intended Parents would be required to spend on surrogacy in India, and not just for the Surrogate mother.
Again, in paragraph 1.7 of the Law Commission Report, specific observation has been made that the Assistant Reproductive Technology Industry is worth about Rs.25 crores. This figure is not based on any official report and lacks accuracy.

Paragraphs 1.9, 1.10 and 1.11 has been extracted hereunder:

“1.9 As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article 16.1 of the Universal Declaration of Human Rights 1948 says, inter alia, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family”. The Judiciary in India too has recognized the reproductive right of humans as a basic right. For instance, in B. K. Parthasarthi v. Government of Andhra Pradesh, the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as a facet of his “right to privacy” and agreed with the decision of the US Supreme Court in Jack T. Skinner v. State of Oklahoma, which characterised the right to reproduce as “one of the basic civil rights of man”. Even in Javed v. State of Haryana, though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained from stating that the right to procreation is not a basic human right.

1.10 Now, if reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection. However, jurisdictions in various countries have held different views regarding the legalization of surrogacy. In England, surrogacy arrangements are legal and the Surrogacy Arrangements Act 1985 prohibits advertising and other aspects of commercial surrogacy. In the US also, commercial surrogacy seems prohibited in many states. In the famous Baby M case, the New Jersey Supreme Court, though allowed custody to commissioning parents in the “best interest of the child”, came to the conclusion that surrogacy contract is against
public policy. It must be noted that in the US, surrogacy laws are different in different states.

1.11 If the 1988 Baby M case in the US forced many to put on legal thinking caps, then that year also saw Australia battling with societal eruptions over the Kirkman sisters’ case in Victoria. Linda Kirkman agreed to gestate the genetic child of her older sister Maggie. The baby girl, called Alice, was handed over to Maggie and her husband at birth. This sparked much community and legal debate and soon Australian states attempted to settle the legal complications in surrogacy. Now in Australia, commercial surrogacy is illegal, contracts in relation to surrogacy arrangement unenforceable and any payment for soliciting a surrogacy arrangement is illegal.”

In paragraph 1.10 of the Report, the Law Commission of India has rightly pointed out that the right to procreate is held to be a constitutional right by the Supreme Court and High Courts in India. But the Law Commission has gone to the extent of assuming “if reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection.” The Law Commission has failed to realize that the issue involved in the case of surrogacy is much larger than the ambit of these decisions as these decisions have not considered the rights of a third party i.e. “surrogate mother”. The right to procreation is the constitutional right, but this right does not include the role of a third party, the surrogate mother. Therefore, a simple analogy of the sort done by the Law Commission Report cannot be extended to a third party reproduction without considering its own pros and cons.

The report has failed to note that the problems surrounding Surrogacy in India are not limited to the domestic issues, but goes to an international level. The proposed legislation on surrogacy is required to be addressing the international requirements of surrogacy, and not only domestic. India has made a mark in the recent times for surrogacy in the international level, and is required to address this need of its new found importance. Legislation on surrogacy which does not cater to the needs of the international arena is merely incomplete.
The proposed legislation on surrogacy is required to take into consideration the surrogacy arrangement models followed world-over and has to choose the right combination of the different models, so as to serve Indian scenario. Though the world’s second IVF baby was born in India in 1978, Indian Courts did not have many opportunities to deal the complex questions of law about paternity and nationality. The Indian Law on surrogacy is yet on a pre-mature stage, and not many issues have transgressed into the form of litigation except for one or two. This scene therefore gives the Indian law makers an opportunity to learn from the experience world-over through the decision of the courts abroad. The problems that arise over surrogacy are admittedly very complex, and therefore a world-class legislation competent to handle every such issue is the need of the hour.

The proposed legislation on surrogacy is required to address the issues that the Intended Parents, both from India and abroad, who are taking up surrogacy in India. The draft should cater the needs of the intended parents on the lines of nationality, paternity of the child etc.

The report has failed to make any mention on the rights of the Intended Parents in a surrogacy arrangement. The present situation demands that the drafters have in mind not only the domestic intended parents, but also intended parents world over. Intended parents are bothered to a great extent about their rights before they enter into a surrogacy arrangement. The intended parents opt for surrogacy only as a last resort, with great longing for a child. This desire is what compels the intended parents choose alternative means of reproduction such as surrogacy.

The availability of surrogate mothers at less costly compensation is the stimulation for intended parents from abroad who choose surrogacy India. This being so, it is of utmost importance that specific measures are given for the rights of the surrogate mother. Also, measures should be taken for protection of those rights of the surrogate mother.

Legal Counseling of the surrogate mother plays a very important role in the process of surrogacy as it helps surrogate mothers understand the actual process in surrogacy. It is required that the legal counseling of the surrogate mother is given by a lawyer or by a social activist, explaining
to her the process of surrogacy and also her rights and liabilities. Moreover, the legal counseling is the best method to identify that the surrogate mothers are not forced into surrogacy by her family members. Therefore, it should be recommended that the surrogate mothers should attend the counseling with her relatives.

The Law Commission of India has failed to address the need of an international surrogacy agreement. The international surrogacy agreement is required to serve the needs of the intended parents as well as the surrogate mother, so as to protect their interest. The international surrogacy agreement should be enforceable in the Indian Courts, and should be acceptable by the embassy of the nation of the intended parents.

The Law Commission report has failed to highlight the need for a national database of surrogacy being done in India. Such statistics is of required to keep track of the statistics in the field of surrogacy.

The Law Commission had submitted the report without having done a field study of the present situation prevalent in India with regard to surrogate mothers and Assisted Reproductive Technique Hospitals. Therefore the findings of the Law Commission cannot be clearly serving the needs of today with regard to surrogacy.

The Part IV of the Law Commission Report is extracted hereunder:

"Iv. Conclusion and Recommendation

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 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 pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.”

The above paragraph from the Law Commission Report has caused undue confusion from many international intended parents and journalists, especially because of the last line stating that commercial surrogacy arrangements required to be prohibited. This sentence has paved way for so many doubts including whether the commercial surrogacy arrangements are going to be banned in India.

The only observation which can formed from the above is that the Law Commission intends to recommend a system which is a line between the one followed in the United States and the United Kingdom. The Law Commission recommends that the birth certificate shall be in the name of Intended Parents, and it also recommends that the commercial surrogacy needs to be prohibited. This means that the only those reasonable expenses for the surrogate mother to bear the child shall be given by the intended parents. However, this issue is largely unclear and requires deliberation from the Law Commission of India.

The Law Commission has fallen off from its expectations by making no recommendations regulating the medical institutions who undertake surrogacy. The absence of such recommendations was conspicuously felt.

The Law Commission turned blind eye to the amendments required to various other existing legislations. For example, the Indian Evidence Act, 1872 gives a conclusive presumption that it shall be presumed that the husband of woman who gives birth to the child is presumed to be the father of the child. This legislation requires amendment, so as to accept the later scientific developments.

The Law Commission of India in it 228th Report has made a feeble impact in its recommendations compared to the need of the hour. India Legislation has got a long way to go in evolving the right sort of system suitting Indian conditions for surrogacy.