Chapter 7

Conclusion and recommendations

While analyzing the Draft bill various shortcomings were found by the researcher, so he recommend following legislative measures:-

• There should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child.

• There is a need of right-based legal framework for the surrogate mothers, as far as the ICMR guidelines are not enough.

• A clearly defined law needs to be drafted immediately which will pronounce in detail the Indian government’s stand on surrogacy; so that discrete activity leading to exploitation of the surrogate mother can be stopped.

• There should be a substantial regulation designed to protect the interests of the child.

• Legal recognition of termination and transfer of parenting rights.

• It is crucially important to maintain and monitor the anonymity of the surrogate mothers.

• The surrogate mother should be provided by the copy of the contract as she is a party in the agreement and her interests should be taken into account. It happens that very often decision is taken by the intended parents and clinic, while surrogate mother does not have any say in this matter.

• There should be an interpreter (other than doctor) for the communication linkage between the surrogate and intended parents in order to convey the message from surrogate mother time to time. As far as often doctors speak on behalf of surrogate mothers, but there is no guarantee that their interests are conveyed without any misinterpretation.

• Typically, after the birth the surrogate mother is left without any medical support, it is recommended that there should be a
provision of intensive care and medical check-ups of their reproductive organs during the 3 months after pregnancy.

- The commissioning couple should try to establish a relationship of trust with the surrogate, yet such a relationship creates reciprocal rights and duties and might create demands for an undesired relationship after the birth.

- The citizenship right of the surrogate baby is also of crucial importance. The Indian government needs to take a stand in terms of conferring the surrogate baby Indian citizenship as she/he is born in the womb of an Indian (the surrogate mother) and in India.

- The rights of the child should be protected and in case s/he is not taken by the commissioning parents, then the child should be given Indian citizenship.

- Health Insurance for both the surrogate mother and the child is essential to ensure a healthy life.

- There is a need of debate and discussion of the stance that public policy and the law should take toward surrogate mothering. Actually, there exists a range of choices from prohibition and regulation to active encouragement.

The following observations had been made by the Law Commission:

- 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. However, such an arrangement should not be for commercial purposes.

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

One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. 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.

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.

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

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

Sex-selective surrogacy should be prohibited.

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

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

how can the rights of the surrogate mother be waived completely,

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

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

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

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

Would a biological parent/s be considered the legal parent of the surrogate child?
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ICMR guidelines although had defined certain issues very meticulously but has certain controversial views. Researches permitted are those which are in public interest, but it fails to define “public interest”. It has redefined legitimacy of Indian Evidence Act 1872 that limits legitimacy of a child born to only within 280 days after dissolution of marriage (by death or divorce).¹

The guidelines should ideally encourage adoption and foster parenthood, and avoid statements such as: “Infertility, though not life threatening, causes intense mental agony and trauma that can only be best described by infertile couples themselves”. It should not accept the social stigma attached to infertility as a norm.

Guidelines should be broad and flexible in the commercial transfer of embryonic material, stem cells, etc. Chapter 3, talks only about written consent, but fails to make informed consent mandatory.

There are no clear guidelines for the groups other than married couples, who want to bear child like, homosexuals, divorced or single. Recently CARA (Central adoption resource agency) has sought to ban gay

¹ Sen Nirupam, ICMR spurs public debate on infertility clinic, current science, vol-83, No. 10, 2002 Nov. 25; p 1185
and lesbian couples from adopting children, in its newly framed guidelines. As now section 377 have been made more liberal and decriminalized, this issue should now be raised and hence accordingly the words “husband” and “wife” must be substituted by “male partner” and “female partner”.

Off-spring should not be allowed to know the donor even after 18 years just like adopted children.

Use of sperm / oocyte donated by a relative or a known friend of couple should be permitted, as these are the commonest sources of donor in IVF clinics all over the world today, and this will decrease the cost of treatment. Relative or a known person may act as a surrogate to discourage commercial surrogacy. The Doctors should discuss their charges with the patient and not display it. Requirements to have 13 separate rooms to run ART clinics is a big concern since the cost of IVF would go up drastically. Small space can be used for good results.

The guidelines are more or less like the one followed in the UK, which should not be the case considering the Indian mindset and scenario.

The ethical guidelines should go beyond technicalities and build effective safeguards so that the unequal power relationship between the providers and users of new technology is minimized. It is critical to envision future trends and lay down an ethical framework for biomedical research, especially in the new frontier of human reproduction that could change the very face of humanity.

Whatever shape this guideline takes when it comes out of the parliament in the form of an act the doctors should make it a practice to absorb certain precautions, so as to prevent various ethical social and legal issues which may arise pre and post delivery like - Should obtain signed request from wife & husband; Written informed consent from both and also from donor and his wife; Detail clinical records to be well preserved; Details of donor should be kept secret in AID; Female attainer nurse should be present at the time of insemination. The agreement made with the donor is that if the child birth resulted, donor would have parental rights and obligation associated with child.
The Indian ART Bill only permits gestational surrogacy arrangements, following the same model of relatedness as is prevalent in Northern Europe and America, with the intent to sever the possibilities of any long-term claims and relationships developing between the surrogate and the child she carries. But as gestation in surrogacy, as the accounts above suggest, establishes maternal connections through substances other than blood or reproductive tissue in Western India, gender ideologies in the region elevate gestation as a means through which women establish ties of relatedness with their offspring.

In this context, men are given primacy in procreation, where they are regarded as creators of children with women contributing the womb ‘vessel’ to carry or nurture the baby. Here, gestation, unlike in Northern Europe and America is regarded as the primary means through which motherhood is conferred.

Even the process of ‘giving away’ offspring, as a surrogate does, is not alien to indigenous caste-based conceptions of appropriate parenting. Children are given away for adoption amongst close kin (such as the bua (FZ), Mausi (MZ), Nana-Mama (mother’s brothers’) if the close relatives are infertile. Daughters are given away at marriage through economic prestation (dowry or dahej) and ritual gifting (kanya dan) to people who become kin. Like daughters born to be ‘given away’ at marriage, surrogate babies are also given away. In this context gestational surrogacy can be regarded as an expression of a more familiar form prevalent in existing kinship practice: surrogacy is appropriated into local kinship worlds at the same time that it is derided as an adulterous relationship, or undertaken ‘without choice’.

Attention to notions of relationality and the morally appropriate processes (ritual gifting, for example) through which people marry and become parents in western India is central to an understanding of how ‘regulatory’ the ART Bill is in reality. In terms of its ‘culture work’, the Bill, as argued in the lines above, thus reaffirms and appropriates for national

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purposes two indigenous, caste-based notions of procreation: i) of women’s role in conception as primarily defined by ‘nurturing’ and, ii) the idea that women’s reproductive bodies serve collective interests (of the family, community, caste). On the other hand, in enabling payments to be received and in legalising surrogacy, the Bill contributes to challenging the ideological devaluation of women’s childbearing (as ‘natural’, taken for granted and not being valued in monetary terms). We also see for the first time an alignment taking place between a state encouraging childbirth (in a context where it is more widely discouraged, as evident in its wider anti-natalist population policies) and the strongly natalist patrilineal ideologies still in place in much of rural India, where fertility is widely celebrated in the religious festivals such as Teej and Gangaur. Living in such contexts, Indian surrogates are in a similar position, as Israel, wherein surrogates have to reconcile their personal ideas regarding maternity within a wider context where, ‘reproduction is celebrated as the (Jewish-Israeli) women’s ‘national mission’... a product of both social pressure and explicit government encouragement’.

However until the legislation has the means to redress the pressures which propel women to undertake surrogacy as a ‘compulsion’ (lack of choice), it is unlikely that the instrument of consent alone, however comprehensively formulated, will ensure surrogate welfare. I suggest that the ethical formulations that accompany global bio-capital in the South will always be voluntary however much attention is paid to the ethical instruments themselves. I have looked at how these processes impact not only on the subjects of direct intervention (patients of clinical trials or surrogates) but also how the lives of people who share their local moral worlds are profoundly affected. Following Manson and O’Neill (2007) I suggest that it is not so much the detail of the instrument of consent itself that is important but equally the context in which it is applied and made relevant that should be of concern.

The idea of exploitation which is systemic is of significance when we consider the commercial aspects of trans-national surrogacy for surrogates in India. The commodification of surrogacy, while of benefit to

\footnote{Ibid}
the surrogate, has also opened channels for their monetary exploitation and corruption.

There has arisen a whole set of people — clinicians, nurses, middle-men, brokers, family members — who view the legalisation of surrogacy as a further opportunity to make money. The significance of this fact is reflected in emphasis of the ART bill on both the pressing need to regulate private fertility clinics and to encourage these clinics at the same time. State legislation, however, does not go far enough in enforcing checks on clinics, for instance, in examining their recruitment and selection procedures, the kinds of counseling provided, the quality of medical procedures carried out. Amendments to the guidelines have mainly focused on ensuring commissioning couples have more documentation (e.g., proof of citizenship for the intended child) which, though necessary, does not address the issue of monetary exploitation.

**Surrogacy only furthers Right to Life under Article 21 of the Constitution:**

The relation of the surrogated mother to the child she is carrying is nothing but womb leasing or womb for rent. After the birth of the child she has no right to keep the child because she is neither the mother (where both ova and sperm are from different persons) nor the owner of the genetic material. She is only a contractor who is willing to give the end product once the contract between her and the person is fulfilled. 

However, to deal with legal pre-requisites for a commercial surrogacy, there is no uniform law in India till today. The growing demand for surrogacy in India has also raised issues, including those of child rights. This led to the government drafting a bill which is called the Assisted Reproductive Technology (Regulation) Bill 2008. But the draft

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6 The proposed legislation provides for the following:

- A cap on the age of the surrogate mother (who has not exceeded 45 years of age); the surrogate mother must not carry more than five pregnancies to term (including her own children); and mandates medical insurance during pregnancy.
- It will prohibit any sort of contact between the surrogate mother and the child after birth. Any such contact is punishable by a fine or imprisonment for up to two years.
is still pending with the Union law ministry, whose approval will take it to the Union cabinet before being presented in the Indian parliament. However, even if the bill gets passed in the 2015, it will take another year before the resulting Act redefines commercial surrogacy in India.\(^7\) For the time being guidelines (as given in the year 2005) for accreditation, supervision and regulation of Assisted Reproductive Technology clinics formulated by the Indian Council of Medical Research and National Academy of Medical Sciences are used as a basic platform and the code for the purpose of conducting surrogacy in India.\(^8\)

Basically we will talk only about what are the advantages of a surrogacy program in India. One is the cost. In USA an average surrogacy procedure would cost 2,00,000 to 2,50,000 US dollars and as compared to India where an entire program would cost not more than 40 thousand US dollars inclusive of travel, hotel stay, legal fees and the whole package. Secondly, India is an English speaking country where most of the medical staff, the paramedical staff, and the support staff – all speak English. So, the clients especially from English speaking country are very comfortable here. Because of the recent economic boom in India have wonderful health care facilities that are comparable to the best in the world and one could compare it with a modern hospital in New York. Along with the doctors who have trained abroad and come down and are can be compared to the best in the world.

“I think with all this one cannot have a more favorable destination than India for surrogacy and all that need to do is now focusing on the right clinic so that you have a very smooth process and the exit process is also well thought of and is well oiled mechanism. And I am sure that if you are coming in through a medical tourism company they have huge experience working with us for three years and they can help your hand hold through the process.”

- Foreign couples should provide proof that the child born to a surrogate mother will automatically get the citizenship of the intended parents’ home country. This includes registering with their Embassy or High Commission in India, and providing a signed and notarised statement accepting the terms as laid out by the law.
- It proposes to set up a database of surrogate mothers throughout the country.
- It will limit the role of those monitor clinics (which are dealing with surrogacy and surrogate mothers) to conducting the actual IVF procedure, as opposed to their current role of arranging the entire process.

\(^7\)India’s Legislation of Commercial Surrogacy. Supra Note 14 at paragraph 3.
Surrogacy opens an option for the infertile couples, gay couples and single parents, to be parents, that too at an affordable cost. Attractions like low-cost egg donors, internationally trained doctors, cutting edge technology at surrogacy clinics and low cost of surrogate mothers in India, draw people from different parts of the world visit India for their dream to come true. Not only this, the surrogacy clinic staff is also well versed with english language, so there is no communication gap.

The growth in the ART methods is recognition of the fact that infertility as a medical condition is a huge impediment in the overall wellbeing of couples and cannot be overlooked especially in a patriarchal society like India. A woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues.

Contemporary Medical Technology has in recent times made extraordinary advances in responding to desire of women/men to have children. Assisted Reproductive Technology (ART) allows reproduction without actual physical contact between partners.

Whereas surrogacy has been technically feasible for decades, it has only recently become a thriving business and thereby created various socio-legal complications. In India alone, the volume of business amounted to roughly $ 2.3 Billion in 2012. In India, though no authentic DATA is available but we presume, it might have cross $ 7 Billion in the year 2014.

It is most unfortunate that this huge business is going on in the Country without any legislation to govern entire ART procedure. Though certain efforts were made to regularize it but it is the Professional body, The Indian Council for Medical Research came forward to prepare a detailed guideline on the issue.

National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India was first sincere effort in 2005. ICMR further prepared a Draft for “The Assisted Reproductive Technology (Regulation) Bill 2008” and further prepared a draft of “The Assisted Reproductive Technology (Regulation) Rules 2010” but in absence of any initiation from
the Government and any positive action of Law makers, the Bill is still pending without any discussion over it.

In 2009 Law Commission of India suo motu prepared its 228th Report on “Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy” discussing ethical, Social and legal aspects of Surrogacy and recommended for a comprehensive legislation on the subject matter.

India became most popular surrogacy destination, provides ART services to the Peoples across the Globe. Study of this growing industry has remained on the journalistic level till date. Some literary studies were also conducted, but the same have certain limitations, thus could not bring actual status in India. Very little empirical evidence exists around the effects of surrogacy on the woman’s health, family, and other social contexts and at the same time issue concerned with the legal complication arising out of this. Similarly, only a few examined Indian women’s decision-making process to become surrogates.

Since ART procedure is very personal and even in case of sperm donation the privacy of couple remains safe and society has no objection on the same, but this issue becomes of wide importance, when it associates with the Surrogacy arrangement or commonly said “Womb on rent”, Whereas public opinion is split as to whether surrogacy should be supported, though, intended parents and their children hardly face discrimination or any other lack of acceptance.

Since, there is no legislation in India to regulate the thriving industry of ART and Bill is pending long back and still waiting for Legislative approval, it is right time to discuss the shortcomings and limitations of proposed legislation.

Humble researcher set out to speak directly with the “workers” to see how they are affected by such “work.” He delineated its “structural reality, with real actors and real consequences,” and provided an intimate look at the lot of women serving as commercial surrogates at ART Clinics in Hyderabad. He also examined the social acceptability of ART including Surrogacy in the vicinity around those Surrogates and had long discussions with the intended parents across the globe. He also discussed with the clinicians, Surrogacy Advocates and the Agents. Although, a lot of the
information he gathered was beyond the scope of the present research, but certainly the experience he gained is above all the peripheries.

Researcher tried to examine the perception of scholars across the globe, in light of the information he gathered through primary sources and direct interaction with real actors, which is too in Indian Circumstances.

Western feminist, hold motherhood as a new branch of female prostitution with the help of scientists who want access to the womb for experimentation and power.... Women can sell reproductive capacities the same way old-time prostitutes sold sexual ones but without the stigma of whoring because there is no penile intrusion. It is the womb, not the vagina that is being bought. Although, primarily certain similarities between prostitution and surrogacy appears, but are superficial and relatively unimportant compared to the differences between the two cases. They are also characteristic features of most transactions where physical labour is traded for material compensation. It happens every day that we trade money for services without forming a 'deep personal or emotional relationship' with each other.

However, Study conducted by the researcher reveals entirely different notion about surrogacy. General perception about the surrogacy is more or less based upon misconceived information or on impression that the Surrogate conceives through actual physical contact. While discussing with the people of the vicinity of surrogates, Researcher explained them the procedure of Surrogacy, once, they could not believe, but on explaining through graphics, most of them realized their wrong perception. They even considered it as highest sacrifice. Though it is for money, still the sacrifice for the contentment of being mother/father of their genetic child for others is a Noble Cause. Undoubtedly, all the surrogates participated in the study, entered into this arrangement only for the money, but their sacrifice cannot be devalued and it should be regarded as a “Noble Cause”.

Western writers hold the surrogacy as wrong because it commodifies women's reproductive labour. The application of economic norms to the sphere of women's labour violates their claim to respect and consideration. But, beyond above theoretical analysis and opinion of western ideologist the surrogates are in high spirit being an instrument of
exultant to others, specifically with whom they don’t have any previous contact.

Pregnancy is the phenomenon, which develops an intimacy with the child in womb. During the pregnancy mother falls in love with the baby so also her family members waiting for the birth. It is common perception that intended parents are away from this feeling. The researcher does not agree with this perception as he met a number of intending mothers and observed their involvement in the process. An intended mother from USA Lilly Jafferson expressed her relations with the Surrogate “May be that's friendship but it felt like sisterhood”. The Socio-Psychological Phenomenon appears from the experience of Lilly, beyond any barricade of culture, religion or even of the language, appears as an Indian lady expecting her child. In this situation biological mother is secure about the future of intended child and also ensure the better life for rest of her family.

This also explains the 'change of perspective' that many surrogates experience as their pregnancy develops. The problem with surrogacy arrangements is therefore that it causes a woman to be pregnant while expecting her not to acknowledge the fact that she is expecting her child. It tries to divorce pregnancy from the conscious knowledge that you are going to give birth to your child. In this way the surrogate becomes a mere 'environment' or 'human incubator' for someone else's child.

The only solution to this problem is in the theory of “well being”, which have been adopted world-over to deal with in case of dispute about who the social parents of the child should be, Instead of asking who the 'real' parents of the child are one should rather consider who would be best able to care for the child. From the perspective of those who compete for the status of legal parents, however, there is no easy solution.

Some surrogacy agencies have reported a high percentage of successful transactions. It is said that in these cases all the parties to the contract are better off than before: the commissioning parents are somewhat poorer financially, but with their much desired child, while the surrogate is well compensated materially for her labour, without feeling that she has performed alienated labour. Does any moral harm result from these instances of surrogacy?
The most one can object to in these cases are that the surrogate's labour is 'dehumanising'. The distinguishing feature of human pregnancies is that they may also entail a conscious knowledge of the significance of this physiological state and an active expectation of, and preparation for, the birth of a child. It is easy to praise a successful arrangement in retrospect, but the danger always exists that an arrangement one is planning would cause moral harm to the surrogate and/or the commissioning parents. Unless one can ensure the legitimacy of the surrogate's bond with the child and her perspective on her pregnancy without thereby denying that of the commissioning couple, the surrogacy arrangement can always be said to be dehumanising or alienating.

Moreover, this perception of intended parents is generally based on the advice given by the professionals, who seldom want them to develop any kind of relation or even motivate them to make a distance with the prospective surrogates as Lilly stated. A large number of intended couples are following the advice, but some of them in abeyance of it developed intimacy with the surrogates, caused the development of mutual trust resulted into impact of Altruistic Surrogates, her near or dear, never complained about dehumanization of her reproductive labour. Russian Citizen Act 2011, however, give right to Surrogate to keep the child after birth, which may also added in India also, subject to fulfillment of certain conditions.

The negative aspects of surrogate motherhood need to be seriously considered. The basic questions are: Are wombs meant for renting, and are babies commodities to be planted and harvested? Are women child producing machines?

The Researcher tried to hold consultations across the country to address these core social issues which have wide importance for society. While the enactment of the law may be fine, much will, however, depend on whether and to what extent the government would be able to enforce the law.

Surrogates were referred to the surrogate clinics by agents hired by the doctor or by husbands and even by Neighbour women who had been Surrogates previously, even 2 of the participants themselves took the
initiative to be a surrogate. This phenomenon reflects the changing perception of the society.

All the participants in the study stated that their primary motivation was the financial compensation that was offered to them. Compensation ranges about Rs. 2,00,000/- to Rs. 2,50,000/- for successfully delivering a baby through surrogacy. The compensation for carrying twins ranged between Rs. 3,00,000/- and 4,50,000/-. However, the received compensation was different for each pregnancy and depended upon the commissioning parents’ economic background as well as the contracts that were signed between the parents and the clinic. However, it ranges between 10 to 20 percent of the total expanse on such procedure. Special attention is required to regulate the compensation to control the exploitation of surrogate and intended couples both.

Most of the Husbands supported their wives and some of them themselves initiated and motivated their wives and bring them to the clinics. Even In-Laws also supported, though not in all cases. In fact, mother in Laws are supporting against the common perception, not only morally but also by taking care of their children. Apart from the husband’s role in surrogacy, the role of other family members was also considered to be important. Often times parents of the surrogate, siblings and even in-laws participated in the surrogacy process. They either helped and supported the surrogate, or acted indifferently and even criticized for becoming a surrogate.

Commonly, after pregnancy was confirmed, participants lived in a surrogacy hostel for the duration of the pregnancy. Most of the Surrogates did not like staying in the surrogate home and constantly wanted to go back home to their children, but the fear that poverty of their house would have been bad for their pregnancy had been compelled them that it was safer to stay in the surrogate house. Surrogate mothers also like to stay there to avoid stigma and ostracism. These included living in the surrogacy hostel while engaging in false claims of alternative employment or even lying about theresult of the pregnancy.

While the major incentive cited for the creation of the surrogate hostel was the maintenance of the surrogate’s health, the information mentioned above points to an additional reason: To maintain seclusion of the pregnant surrogate, thus shielding her from the eyes of a disapproving
community. By providing a means of isolation, the surrogacy clinic is both meeting their own need for supervision of the pregnancy and meeting the need of the women to keep the surrogacy private. A third stakeholder in this arrangement is the community itself. By quarantining the practice of gestational surrogacy out of public view, it is a way to maintain the social norms of traditional reproduction, even as surrogacy becomes more and more common.

Earlier, several studies were showed how richer countries had outlawed the practice of paying women to be surrogates due to the danger that the large financial transaction would serve as a coercive factor in the decision to become a surrogate. When considering that gestational surrogacy has been labeled as potentially financially exploitative to birth mothers in the Global North, should surrogacy then be alternately interpreted as liberating for Indian women because they have no other sources of income?

The majority of women in the study did not seek out surrogacy. Rather, they were approached by someone else with the idea. This initial external pressure to consider surrogacy may legitimize surrogacy as a noble act and reduce the stigma associated with the practice—the women were not on the whole personally drawn to surrogacy and thus may rationalize their decision to participate by relying on the altruistic aspects of providing a baby to an otherwise infertile couple. That is to say, although the primary motivation for surrogacy was financial, further conceptualizing surrogacy as a noble act may allow the woman to more easily legitimize her decision to herself and her family.

One theme that emerged from the interviews was that the community at large opposed to gestational surrogacy. Many women reported apprehension to inform extended family members for fear of disapproval or retribution. Participants also reported having to relocate after community members (e.g., neighbors, fellow villagers etc.) found out about the surrogacy. This lack of support from community is in one aspect unsurprising, as many Indians view surrogacy as comparable to sex work. However, researcher found that the perception is based on the lack of knowledge and awareness. The in vitro fertilization (IVF) process involved in gestational surrogacy was not understood by all members of the community, and even when it was, the idea of a married mother carrying another couple’s baby was supported up to some extent.
Even so, systems of support were necessary for the gestational surrogacy process to occur at all. As explained previously, clinic staff, surrogacy agents, husbands, and family members were all involved in the process. Furthermore, all of these stakeholders benefited financially from the woman’s gestational surrogacy. The genetic parents paid the clinic. The surrogacy brokers received a finder’s fee.

It is important to note, that every participant’s surrogate pregnancy resulted in a Cesarean section, and many surrogates had undergone multiple Cesarean section procedures. Increased Cesarean sections are associated with increased risks, including mortality. Although conditions associated with Cesarean sections are rare, many are serious and include pelvic pain, bowel injury, cystostomy, urethral injury, placenta accreta and previa, reduced fetal growth, preterm birth and possibly stillbirth, decreased fertility, increased risk of ectopic pregnancy and spontaneous abortion. Thus, women need to be informed of these risks associated with Cesarean section delivery. Moreover, there should be a policy structured around the number of times that women may engage in this work and other reproductive services. In terms of practice, level of disclosure continues to be an important element.

All the respondents were of the opinion that child is necessary for a couple. Social stigma clearly appears in perception about Test tube baby, but majority of the respondent with some hesitation is ready to accept this method for their dear ones.

The society is not ready to accept a child through “rent a womb”, though a healthy number of persons accept it as an alternative method. General opinion is that the surrogacy should be permitted only to the persons unable to conceive or don’t have child but, not in favour of giving such permission to the persons, who want a child but don’t want to conceive, not associated with any kind of Medical deficiency, unmarried persons or gay Couples. Sex determination was also condemned.

The study reveals that conservative Indian Society though considers the surrogacy as an immoral mean of earning money differentiate it from the prostitution but at the same time a large Number of Peoples considers it a Noble cause or a mean to delivering contentment to the families, who are not able to have their own child.
Surprisingly, respondents were able to differentiate between the right of Biological mother and Biological parents and in reference to biological parents they gave preference to the right of the Genetic parents.

In India most of the surrogates are directly associated with or recruited by the ART Clinics unlike the Thailand, where intended surrogates publishes there advertisement on message-boards on internet. DATA emerging out of the study also supports this fact and accordingly the opinion is divided about the right of surrogate to select the Surgeon and majority of the people who participated in the study were not in consonant with the idea and majority of the respondents negate any such right.

Perception of the respondents regarding the right of the child born out of the surrogacy arrangements in the property of the Genetic parents is unanimous and all the respondent find absolute right as normal child in the family of Genetic parents, but right in the property of the Biological parents, was negated.

The practice of surrogacy exploits women economically, emotionally and physically. An important factor is that most women who get involved as surrogates do so because they are in desperate need of the money to maintain their family. In addition, agents are often involved and arrange contracts of questionable legality.

Further, the thought that if it were okay to think of children as property, then it would be okay to buy and sell them; and if it is not done to buy and sell them, then maybe it is not done to think of children as property. If some (surrogate) children are conceived as market commodities because there is a practice of paying money for relinquishing parental rights, then every child can be considered a commodity. As a matter of fact, we all are commodities, because we used to be children ourselves. If children are viewed as exchangeable market commodities, it might make the self-conception of those children as persons impossible. Therefore, if conceiving children as commodities has a negative effect on personhood, it means that baby selling, and surrogacy for that reason, is wrong. As a consequence: to permit surrogacy would be an irrational exception to the baby selling laws if that distinction is based on genetic relationship does not hold good. If legislation is passed which enables
legal surrogacy arrangement, then the laws against baby selling in general should also be reconsidered.

Therefore, the risks and the disadvantages involved in the surrogacy arrangements often prove detrimental to the interests of the surrogate mother, and the child thus resulting in the repugnancy of the human dignity vested with both the surrogate mother and the child.

Originally, surrogacy happened within families and friends. Known surrogates would give birth for infertile family members or friends. This was an altruistic deed as these surrogates were generally not paid for it. Over the last few decades however, there is a noticeable trend of the commercialization of surrogacy. Surrogacy turns a normal biological function of a woman’s body into a commercial contract. Surrogate services are advertised, surrogates are recruited and operating agencies make large profits. The commercialization of surrogacy raises fears of a black market and baby-selling, breeding farms, turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product. Commercial surrogacy challenges the conventional assumptions of maternal bonding which is based on the concept of natural and instinctive link between the mother and her foetus /child. Maternal bonding is effectively an emotion integral to the physiological process of child birth and is deeply rooted in the cultural context of motherhood.

Moreover, commercial surrogacy has given rise to several ethical issues. It seems not to be ethical for someone to create a human life with the intention of relinquishing it. The surrogate mother provides her ovum with the clear understanding that she has to avoid responsibility for the life she creates and she has to dissociate herself from the child in exchange of some other benefit such as money. In such a way, at the deepest level surrogate arrangements cannot be viewed as ethical, because they involve a change in motive for giving birth for the sake of some other benefits (money).

There are certain legal issues may arise out of the process of Artificial Insemination including matrimonial relations, Legitimacy of child, Child’s right to know Vs. Donor’s right of privacy, Rights of child in various personal Laws and property laws and many more.
In India, where no legislation enacted and at the same time judicial consideration of issues is also required to settle the issues. Though, some issues have been considered by the judiciary in various countries, so as to enable us to analyze the legal principles laid down in those matters, which may consider as settled issues.

In India, neither marriage nullifies on the ground of non-consummation of marriage in case of Artificial Insemination by wife, nor by wife in absence of Husband’s consent, it does amount to adultery.

The most important issue arises from the Artificial insemination is the legitimacy of the child.

Under Muslim Law Conception during lawful wedlock determines legitimacy of the child, though “acknowledgement of paternity” is another way to legitimize the children. Concept of maternity according to Quran does not extend to Surrogacy arrangement.

Section 112 of the evidence Act need to be reconsidered in light of these advances, as it presumes sexual intercourse is absolute essential for the conception of a child. In non access clause of this section it is specifically mentioned that if a man could not possibly have had sexual intercourse it cannot be his child. The Court held the presumption under section 112 of the evidence Act is irrebuttable and even denied to permit DNA test to ascertain the paternity and considered only non access as the tool of denial of paternity as provided under section 112. However, recently Hon’ble Apex Court has rebutted the presumption in light of DNA test, which also raised the question that in case of donated sperm, the DNA of the child will match with the donor, who never had access to the mother of the child in question. Similarly in case of Gay couples child born out by any procedure would not be considered as legitimate child of such couple.

India draws to her shores a large population of foreigners besides the NRIs for surrogacy. The commissioning parents of the child born of surrogacy, especially foreigners, face problems with respect to his/her citizenship. It is the conflict of law complicates situations.

As far as Citizenship of child concerned, obviously, in light of Surrogacy agreement, should be the Citizen of the country of the Commissioning parents, but, some countries do not recognize or even
condemned it, in such case the child will be stateless, unless the country in which the child born do not recognize as citizen. Gujrat High Court in Jan Balaz’s case held that “No presumption can be drawn that child born out of a surrogate mother, is legitimate child of commissioning parents, so as to have a legal right to parental support, inheritance and other privileges of a child born to a couple through their sexual intercourse.” The Court observed the babies born to surrogate mothers in India would be Indian Citizen by virtue of section 3 of The Citizenship Act and therefore entitled to get Passport.

Right to privacy though protected by the Constitution of India, but it is not absolute right and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

Right of privacy vis-a-vis right to know was also clarified by Hon’ble Apex Court that right of Privacy will prevail over right to know though for its disclosure would not be violative of either the rule of confidentiality or the Right of Privacy of others. Unfortunately, there is no law to regulate such identity of or genetic information, and about any critical circumstance, a law like Sweden or at least like U.K.

In the case of surrogacy, there may be questions about enforcing a contract with the surrogate mother, e.g. whether such contracts may be valid in view of the provisions of public policy, particularly under Section 23 of the Indian Contract Act, 1872; whether the child to be handed over can be considered a saleable commodity for consideration. A party may refuse to have its contract acted upon, or the child is not according to the specifications agreed upon in ordinary law of contract, the finished goods can be rejected and damages can be claimed in such situations.

Surrogacy, though an assisted one, being a method of procreation, Surrogacy Agreements must be afforded the Constitutional protection as “Right to privacy and Reproductive Autonomy”. The personal decision of the individual about the birth and babies called the right of reproductive autonomy, is a fact of a right of privacy. The State cannot intervene in matters of private ordering and matters as intimate as re-procreation. Surrogacy being one of the various methods of Assisted Reproductive Techniques stands sheltered under the umbrella provision of Art. 21 of the Constitution of India.
In India, the parties of surrogacy are backed by written agreement between the parties. These agreements are an expression of the proposal and acceptance between the parties. This document of concurrence also cites the amount made to the surrogate mother and hence, meets the requirement of consideration. Free consent of the parties is a prerequisite of the validity of the contract and therefore, the parties of the surrogacy agreement must enter into the arrangement in exercise of their free will.

Any contract to perform an illegal act is void. With respect to surrogacy, the aim is to ward off and forbid the selling of a baby. Indian Supreme Court also held that even the Commercial Surrogacy is legal in India. With above discussions one may infer that surrogacy agreement are not only entitled to Constitutional protection but are also valid under the domestic contract law.

The ICMR guidelines as well as the ART Bill Endeavour to put into order various points in question. These includes who can act as a surrogate mother, who can be the commissioning couple, what health and age requirements must be fulfilled before the potential surrogate mother is said to be fit to act as a surrogate mother, how the agreement may be entered into and what all issues must the agreement expressly addressed in its content etc. While the ART bill and the ICMR guidelines try to fill the voids, there exist many issues that arise from the practice which need to be focused on and plugged. These include issues of contractual remedies, determination of parentage of the child born and the child’s citizenship, among others.

A Legislation must include or explain certain possible instances with the help of illustrations, so as to avoid confusion such as If the instance is one that the commissioning couple which is genetically related to the child, splits and the respective parents separates, the Court may be willing to order specific performance of the contract as the child was born as a result of the intention of the commissioning couple. Also in a case where there has been a default in paying the agreed sum of money as a recompense to the surrogate mother, the court grant specific performance on part of the defaulting party. However, if there is a requirement of relinquishing rights over the child that is sought, the court may be vary of granting a relief of specific performance given the fact that under the prevailing domestic law it is birth mother who is considered to be the mother of the child. Thus in the event that a surrogate, on birth refuses to
hand-over the child to the commissioning couple, the court may not permit the specific performance of the contract.

Damages, may be tough call for the courts to take. This is due to sensitive nature of the practice and how it may take a step further from commercialization to actually baby-selling. For instance if the child is born with some abnormality or birth defect, and in case parents file a suit for damages, it would take the practice into the realm of trading of babies. However, by all means, Indian Courts would be cautious and vigilant to not allow mushrooming of any such system.

Certainly children are the assets of mankind beyond borders, thus their well being is the paramount concern of all laws pertaining to children. Recent hyper growth in reproductive tourism to the third world countries have ample scope of trafficking of children. Though, it may be a hyper-sensitive approach, but undoubtedly well-being of the children born in India is the prime concern of law. To protect the interest of children going out of the country maintenance of the track record of such children is necessary.

In many, if not most European countries, surrogacy is forbidden by law. Germany, France and Spain have enacted restrictions, with administrative and criminal sanctions. This indeed effectively averts surrogacies on their territories as it does in most if not all countries with rigid regulation. Some Countries have their legislation and in some other countries professional bodies have issued guidelines including India.

Guidelines should be broad and flexible in the commercial transfer of embryonic material, stem cells, etc. But it talks only about written consent, but fails to make informed consent mandatory, which is though, an essential element of a valid contract.

There are no clear guidelines for the groups other than married couples, who want to bear child like, homosexuals, divorced or single. Recently CARA (Central adoption resource agency) has sought to ban gay and lesbian couples from adopting childrens, in its newly framed guidelines. Off-spring should not be allowed to know the donor even after 18 years just like adopted children. Use of sperm / oocyte donated by a relative or a known friend of couple should be permitted, as these are the commonest sources of donor in IVF clinics all over the world today, and this will decrease the cost of treatment.
The guidelines are more or less like the one followed in the UK, which should not be the case considering the Indian mindset and scenario.

The ethical guidelines should go beyond technicalities and build effective safeguards so that the unequal power relationship between the providers and users of new technology is minimized. It is critical to envision future trends and lay down an ethical framework for biomedical research, especially in the new frontier of human reproduction that could change the very face of humanity.

Whatever shape this guideline takes when it comes out of the parliament in the form of an act the doctors should make it a practice to absorb certain precautions, so as to prevent various ethical social and legal issues which may arise pre and post delivery like- Should obtain signed request from wife & husband; Written informed consent from both and also from donor and his wife; Detail clinical records to be well preserved; Details of donor should be kept secret in AID; Female attainer nurse should be present at the time of insemination. The agreement made with the donor is that if the child birth resulted, donor would have parental rights and obligation associated with child.

ICMR Guidelines are detailed guidelines covers broadly all the important issues, but this is still a guideline issued by regulatory authority, have no legislative force Though several questions arises from the analysis of this guideline, but the same is an interim arrangement, so researcher didn’t focus on in-depth analysis of this guideline rather he focuses on analysis of the proposed ART Bill of 2008 and proposed regulation of 2010, which is unfortunately still are in pipeline.

The ART Bill only permits gestational surrogacy arrangements, with the intent to sever the possibilities of any long-term claims and relationships developing between the surrogate and the child she carries. But as gestation in surrogacy, as the accounts above suggest, establishes maternal connections through substances other than blood or reproductive tissue. In this context, men are given primacy in procreation, where they are regarded as creators of children with women contributing the womb ‘vessel’ to carry or nurture the baby.

Even the process of ‘giving away’ offspring, as a surrogate does, is not alien to indigenous caste-based conceptions of appropriate parenting. Children are given away for adoption and ritual gifting (kanya dan) to
people who become kin. Like daughters born to be ‘given away’ at marriage, surrogate babies are also given away. In this context gestational surrogacy can be regarded as an expression of a more familiar form prevalent in existing kinship practice. Surrogacy is appropriated into local kinship worlds at the same time that it is derided as an adulterous relationship, or undertaken ‘without choice’.

Attention to notions of relationality and the morally appropriate processes (ritual gifting, for example) through which people marry and become parents in India is central to an understanding of how ‘regulatory’ the ART Bill is in reality.

In light of the Assisted Reproductive Technology (ART) Bill draft proposed, it reflects that there is no standardization of the drugs used, no proper documentation of the procedure, insufficient information for patients about the side-effects of the drugs used, and no limit to the number of times a woman may be asked to go through the procedure. They do not disclose the fact that a successful cycle need not lead to a baby being born. Further, the clinics need not give exact information on the procedures and their possible side-effects.

A noticeable trend is that the ART clinics are becoming the central hub of all surrogacy-related activities. ART clinics are also required to treat all the information they obtain with utmost confidentiality. In practice this entails that ART clinics are not allowed to provide any information about surrogate mothers or potential surrogate mothers to any person. This creates a problem for intended parents since they have to turn to a middleman in order to find a surrogate mother. This is rather controversial, not just because of the involvement of agents, but also because it seems unfair that the intended parents, who are about to make a significant investment, have little control over the selection process. A better option could be to release personal information at the discretion of the surrogate.

The Draft Bill lacks the creation of a specialist legal authority for adjudication and determination of legal rights of parties by a judicial verdict and falls in conflict with the existing laws.

However until the legislation has the means to redress the pressures which propel women to undertake surrogacy as a ‘compulsion’
(lack of choice), it is unlikely that the instrument of consent alone, however comprehensively formulated, will ensure surrogate welfare.

The commodification of surrogacy, while of benefit to the surrogate, has also opened channels for their monetary exploitation and corruption. There has arisen a whole set of people — clinicians, nurses, middle-men, brokers, family members — who view the legalisation of surrogacy as a further opportunity to make money. Legislation, however, does not go far enough in enforcing checks on clinics, for instance, in examining their recruitment and selection procedures, the kinds of counselling provided, the quality of medical procedures carried out. Amendments to the guidelines have mainly focused on ensuring commissioning couples have more documentation (e.g., proof of citizenship for the intended child) which, though necessary, does not address the issue of monetary exploitation.

It is unrealistic to believe that all the harms associated with surrogacy can be eliminated. However, the harms associated with either the legalization or banning of surrogacy will be felt by society as a whole. Women as a group need to explore any and all possibilities which can minimize the harm to women. Women are identified by their ability to reproduce because, up to this point, only women can do so. The only way for women to seize and stay in control of any existing or new reproductive technology is to present viable legislation for the decision-making bodies of government to act upon. If women, as a group, do not allow themselves to compromise they may end up with an unbearable situation completely out of their control rather than a tolerable situation they helped develop.

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. 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 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.

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.

The researcher examined how 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.

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.

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

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 will. 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 on 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.

The discrimination against the surrogate which arises from the language (English) in which the agreement and consent form are written specifically when the English is not the first language of most surrogates and a majority is indeed illiterate rural women, the understanding of what consent entails is left to the 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’. 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; closely associated with their goodwill.

**MAYA UNNITHAN** 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 surrogate). 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.

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.

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.

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.

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.

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.” 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.

**Statelessness of children**

The fact that surrogacy to a large extent emerges as a cross-border phenomenon. The legislation of a large number of countries not only prohibits the surrogacy, but also prevent child born-out beyond their borders. Although, 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.

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. In the field of international corporate law, though, there is no reasonable difference between “legal arbitrage” and “regulatory arbitrage. 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.

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.

In these circumstances, though enforceability nowhere affects, 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 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.

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 Conventions 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 strong will appears to regularise this burgeoning industry from the Government, thus expectation of initiation of process for a convention appears to be difficult.

Many restrictive jurisdictions though attempt to dis-incentivize surrogacies abroad by refusing to issue a passport for the newborn child, but 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. 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 decision at all. 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).

However, step was taken by the foreign department and issue a notification required a declaration to the effect that their respective country recognizes the child born-out through this process beyond their borders and there is no legal bar in granting citizenship, supported by their respective embassies before issuing a Visa for ART in India.
The factual situation is somewhat different in cases where the child has already moved to the place where the intended parents live. In these cases, the child is living with her intended parents according to plan, but their parenthood lacks legal recognition. 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. 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 country, courts temper justice with mercy. However, once the child is safe, the domestic laws are widely enforced.

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. 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 still see the surrogate mother and her husband as legal parents. 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.

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.
The examination of the most pressing problems in recent legislation on surrogacy world over shows that only in rare cases does legal uncertainty eventually materialize at the expense of the children in question. However, questions remains that 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...

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

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. 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.

**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. This tells us a great deal about the unsettled question of which aspect eventually matters for a modern understanding 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. One might induce from this observation that parentage has to be open to contracting. To legalize surrogacy in this way might comply with children's rights as well as with the fundamental family law principles. 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. Adoption is a model of parenthood which is not based on genetic linkage but on someone’s intention.

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,
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. Despite 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 India. There is absolutely no information on the number of
surrogate children born annually or the total number of surrogate children
born till date. There is no information on the Infant Mortality Rate (IMR),
sex ratio of the surrogate children born on the total number of birth
certificates issued to the surrogate children. Besides, there is no
concerned official government authority at the any level collecting and
maintaining records on the same. There is no State-level official statistical
record on the status of surrogate children born in India annually or in each
State per annum.

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.

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.19 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.

Future research is needed to continue exploring the experiences of surrogates, as well as the role of recruiting agents and husbands. Future research is needed that examines the mental well-being of surrogates in India. Constructs such as depression, self-esteem, attachment to the fetus, and attitudes toward pregnancy will provide a clearer understanding of the impact of surrogacy post delivery. Longitudinal data are needed to understand the impact of this process on surrogates mentally, emotionally, physically, and financially in the long term. Finally, future research should explore the roles that recruiting agents from the surrogacy clinic play in this process. Other research Researcher has conducted about the recruitment process suggest surrogacy may be portrayed only in a positive light to successfully recruit women, rather than disclosing the actual experience of the process. Our work illuminated that many other systems support the women in the endeavor to be

gestational surrogates, so a further understanding of their level of satisfaction with the process is warranted.

A limitation of our study was its cross-sectional nature. Researchers interviewed women at one point in time about an experience that is likely to have a lasting and evolving contextual meaning to the woman over her lifetime. Therefore, this study cannot be generalized to the larger population of surrogate mothers. Future work should explore this role and its interpretation over time to understand the long-term impact on the women.

In conclusion, whatever the legal arrangements, the global availability and movement of reproductive technologies which assist procreation have ensured that surrogacy arrangements will continue to take place, bypassing the state if necessary. Arrangements between clinicians and surrogates were already in place several years before the ART bill in India was formulated – showing how the legislation is in response to, rather than pre-emptive of, trans-national surrogacy. The state needs to do more ‘work’ in regaining the trust of the people that it will uphold their welfare and move beyond the provision of informed consent which is inadequate given the compulsions and complexities of decision-making accompanying reproduction in India. To ban surrogacy in India runs the fear of pushing this practice ‘underground’ and further removed from any kind of legislation ensuring the welfare of those most vulnerable. The 18th Law Commission set up in 2009 to review the ART bill in respect to surrogacy states clearly that the prohibition of surrogacy is undesirable. Recognising surrogacy as a ‘supreme saviour’ of the distresses faced by infertile couples, it advocates active legislative intervention to facilitate the correct use of new technologies.

As discussed above, for the new legislation to fully act ‘as defender of human liberty and an instrument of the distribution of positive entitlements’ (18th Law Commission review 2009) the focus has to move beyond the standard bioethical instruments to consider the languages, economies, kinship and moralities which frame issues of reproductive choice and consent on-the-ground. Of further consideration is the extent to which the state and legislation are popularly perceived and trusted to work for the welfare of those they seek to regulate.
Researcher tried to best of his efforts to point out every possible avenue from a Lawyer’s perspective and looking into sheer need of legislative intervention long awaited. Since Bill is still pending, humble researcher find this occasion as an opportunity to present certain recommendations for consideration by the legislation while discussing the bill. Certain recommendations are as under:

1. Intended parents at least mother should stay with the Surrogate at least for a month to ensure her that her child will be safe.
2. Optional to surrogate to keep child with her birth should be provided as it is incorporated in Russian Citizen Act 2011
3. Theory of well-being is the sole of the custody of the children in Indian family Laws, the same principle should adopt in case of surrogacy.
4. Compensation to surrogates ranges between 10 to 20 percent of the total cost on such procedure. Special attention is required to regulate the compensation to control the exploitation of surrogate and intended couples both. Permission should be granted only in case where minimum 33% of the cost is provided to transfer the surrogates.
5. Wide awareness about the procedure is required to clarify that there is no physical contact between intended father and the surrogate to avoid social stigma associated with the surrogacy arrangements.
6. Future research is needed to continue exploring the experiences of surrogates, as well as the role of recruiting agents and husbands. Future research is needed that examines the mental well-being of surrogates in India
7. The surrogacy may be permitted only to the persons, who are unable to conceive or who don’t have child. Such permission should not be granted to the persons, who want a child but don’t want to conceive for personal reasons, not associated with any kind of Medical deficiency.
8. Gay/lesbian Couples should not be permitted to have child through ART procedure.
9. Sex Selection should not be permitted.
10. Child has all succession rights and intended parents need to submit a certificate of the embassy that their family law provides such right to the intended children.

11. It should be declared the child born out of this procedure shall be legitimate child of the intended parents and the same certificate should be required to obtain from the respective embassy in case of foreign nationals.

12. A child should not be left stateless, hence, only the intended parents of countries recognize the child as the citizen of the respective country of the intended parent should be permitted.

13. Anonymity to donor/Surrogate should be regarded and not be permitted to disclose in any condition, however, DNA profiles should be preserved to meet the future challenges, medical or legal.


15. Permission from Commission constituted under the Commission for child rights Act 2005 should be mandatory and the Commission for child rights should carried-out an inquiry putting well-being of child as paramount consideration, before granting such permission.

16. In case of split between intended parents during the pregnancy, the custody of the child should be determined through their family laws.

17. Insurance of surrogate and child must be prerequisite of a surrogacy arrangement with at least double of compensation determined.

18. Compensation agreed should be guaranteed by the state authorities with extended sum in the event of default by intended parents or frustration of contract.

19. There should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child.

20. There is a need of right-based legal framework for the surrogate mothers, as far as the ICMR guidelines are not enough.

21. A clearly defined law needs to be drafted immediately which will pronounce in detail the Indian government’s stand on surrogacy; so
that discrete activity leading to exploitation of the surrogate mother can be stopped.

22. There should be a substantial regulation designed to protect the interests of the child.

23. Legal recognition of termination and transfer of parenting rights.

24. It is crucially important to maintain and monitor the anonymity of the surrogate mothers.

25. The surrogate mother should be provided by the copy of the contract as she is a party in the agreement and her interests should be taken into account. It happens that very often decision is taken by the intended parents and clinic, while surrogate mother does not have any say in this matter.

26. There should be an interpreter (other than doctor) for the communication linkage between the surrogate and intended parents in order to convey the message from surrogate mother time to time. As far as often doctors speak on behalf of surrogate mothers, but there is no guarantee that their interests are conveyed without any misinterpretation.

27. Typically, after the birth the surrogate mother is left without any medical support, it is recommended that there should be a provision of intensive care and medical check-ups of their reproductive organs during the 3 months after pregnancy.

28. The commissioning couple should try to establish a relationship of trust with the surrogate, yet such a relationship creates reciprocal rights and duties and might create demands for an undesired relationship after the birth.

29. The citizenship right of the surrogate baby is also of crucial importance. The Indian government needs to take a stand in terms of conferring the surrogate baby Indian citizenship as she/he is born in the womb of an Indian (the surrogate mother) and in India.

30. The rights of the child should be protected and in case s/he is not taken by the commissioning parents, then the child should be given Indian citizenship.

31. Health Insurance for both the surrogate mother and the child is essential to ensure a healthy life.

32. There is a need of debate and discussion of the stance that public policy and the law should take toward surrogate mothering.
Actually, there exists a range of choices from prohibition and regulation to active encouragement.

33. 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. However, such an arrangement should not be for commercial purposes.

34. 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.

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

36. 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.

37. 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.

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

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

40. Sex-selective surrogacy should be prohibited.

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

42. What would be the remedy available to biological parents to obtain exclusive legal custody of surrogate children,

43. How can the rights of the surrogate mother be waived completely,
44. how can the rights of the ovum or sperm donor be restricted,
45. how can the genetic constitution of the surrogate baby be established and recorded with authenticity,
46. whether a single or a gay parent can be considered to be the custodial parent of a surrogate child,
47. what would be the status of divorced biological parents in respect of the custody of a surrogate child, and
48. would a biological parent/s be considered the legal parent of the surrogate child?

49. Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To determine the legality of surrogacy agreements, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would be within the domain of section 9 of the Code of Civil Procedure (CPC). Alternatively, the biological parent/s can also move an application under the Guardians and Wards Act 1890 for seeking an order of appointment or a declaration as the guardian of the surrogate child.

50. In the absence of any law to govern surrogacy, the 2005 Guidelines apply. But, being non-statutory, they are not enforceable or justiciable in a court of law. Under paragraph 3.10.1 of the Guidelines a child born through surrogacy must be adopted by the genetic (biological) parents. However, this may not be possible in case of those parents who cannot adopt in India.

51. Under Section 10 of the Contract Act, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is an enforceable contract. Thereafter, under section 9, CPC, it can be the subject of a civil suit before a civil court for adjudication of all disputes relating to the surrogacy agreement and for a declaration/injunction as to the relief prayed for.

52. As of today, it may be stated that a single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement. Japanese baby Manji Yamada’s case and the Israel gay couple’s case who fathered the child in India are clear examples to establish that this is possible. Under paragraph 3.16.1
of the Guidelines dealing with legitimacy of children born through ART (which was the basis of the claim in the Japanese baby’s case in the Supreme Court), this claim can be made. However, only in a petition for guardianship under the Guardians and Wards Act and/or in a suit for declaration in a civil court, the exclusive custodial rights can be adjudicated by a court of competent jurisdiction upon appreciation of evidence and considering all claims made in this regard.

53. Essentially, this is a question which will require determination in accordance with the surrogacy agreement between the parties. There would apparently be no bar to either of the divorced parents claiming custody of a surrogate child if the other parent does not claim the same. However, if the custody is contested, it may require adjudication by a court of competent jurisdiction.

54. In answer to this question it can be stated that the biological parents would be considered to be the legal parents of the child by virtue of the surrogacy agreement executed between them and the surrogate mother. Under paragraph 3.16.1 of the Guidelines dealing with legitimacy of the child born through ART, it is stated that “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”. Even in the 2008 draft Bill and Rules, a child born to a married couple, an unmarried couple, a single parent or a single man or woman, shall be the legitimate child of the couple, man or woman, as the case may be.

55. However, the moot question which may arise for determination is as to whether a judicial verdict determining rights of parties in a surrogacy arrangement is essential in respect of a foreign biological parent who wishes to take the surrogate child to his/her country of origin or permanent residence. It can be said that either a declaration from a civil court and/or a guardianship order ought to be a must to conclusively establish the rights of all parties and to prevent any future discrepancies arising in respect of any claims thereto.

56. Successful handling of surrogacy for with international parents requires special attention to addressing every country’s needs and legal circumstances and partnering with local
organizations and lawyers to provide a complete solution for prospective parents before and after the birth.

57. International parents should make sure to find an agency with such understanding of the laws to help determine which legal strategy would work best to ensure that they can return and gain full legal rights for both parents and newborns back home.

58. In India, there is a need to pass a new legislation by which commercial surrogacy related matters will be governed. Moreover, sufficient steps are necessary to take so that people can at least understand the positive sign (i.e. it is helpful for maintaining familiar peace) of legalization of commercial surrogacy and try to change their conservative approach.

59. Before the Parliament passes the Assisted Reproductive Technology (Regulation) Bill, 2010 the answers to these questions are to be found – i) Ethically, should women be paid for being surrogates? ii) Can the rights of women and children be bartered? iii) If the arrangements fall foul, will it amount to adultery?

60. The law should provide for the right to termination of pregnancy for the surrogate mother in case of any mental or physical trauma that she may experience during the pregnancy.

61. The minimum time up to which the surrogate mother should be allowed to nurse the child should be laid down as without such a provision the child’s health may suffer.

62. 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 will. 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.

63. Since, language is a major constraint in surrogacy agreement, The clinician should hold responsibility to prepare a copy of the agreement in local Language also signed and Notarized along with the Agreement to rule out the possibility of any kind of cheating.

64. 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”. An explanation to exclude Gay couples or unmarried man should be suffix.

65. Similarly 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” also requires modification.

66. Precondition may be imposed on intended parents to reach an agreement on child support before entrusting a surrogate mother to avoid critical condition in the case of split between intended parents.

It is unrealistic to believe that all the harms associated with surrogacy can be eliminated. However, the harms associated with either the legalization or banning of surrogacy will be felt by society as a whole. Women as a group need to explore any and all possibilities which can minimize the harm to women. Women are identified by their ability to reproduce because, up to this point, only women can do so. The only way for women to seize and stay in control of any existing or new reproductive technology is to present viable legislation for the decision-making bodies of government to act upon.

If women, as a group, do not allow themselves to compromise they may end up with an unbearable situation completely out of their control rather than a tolerable situation they helped to develop.

It becomes incumbent upon neutral bodies to ensure that ethical guidelines are adhered to and also to bring to light any violations. For this, well-formulated guidelines drafted with foresight and long-term perspectives are essential.

In conclusion, whatever the legal arrangements, the global availability and movement of reproductive technologies which assist procreation have ensured that surrogacy arrangements will continue to take place, bypassing the state if necessary. Arrangements between clinicians and surrogates were already in place several years before the ART bill in India was formulated – showing how the legislation is in response to, rather than pre-emptive of, trans-national surrogacy. The state needs to do more ‘work’ in regaining the trust of the people that it will uphold their welfare and move beyond the provision of informed consent which is inadequate given the compulsions and complexities of decision-making accompanying reproduction in India. To ban surrogacy in
India runs the fear of pushing this practice ‘underground’ and further removed from any kind of legislation ensuring the welfare of those most vulnerable. Recognising surrogacy as a ‘supreme saviour’ of the distresses faced by infertile couples, The Law Commission advocates active legislative intervention to facilitate the correct use of new technologies.

As this Research has shown, for the new legislation to fully act ‘as defender of human liberty and an instrument of the distribution of positive entitlements’ the focus has to move beyond the standard bioethical instruments to consider the languages, economies, kinship and moralities which frame issues of reproductive choice and consent on-the-ground. Of further consideration is the extent to which the state and legislation are popularly perceived and trusted to work for the welfare of those they seek to regulate.

At this juncture we are looking forward for a new legislation on ART that may meet-out the expectations of all the stakeholders, specifically the most important and so also the weakest part of this entire system, the Surrogates and intending couples on the other hand. It is also expected that the forthcoming legislation shall clear enough to meet-out the ambiguities involve in the system.