CHAPTER- 4

LEGAL IMPLICATIONS AND LEGAL FRAMEWORK
OF SURROGACY IN INDIA

4.1 Introduction: Presently there is no law for regulating surrogacy arrangement in India.\(^1\) India stands in sharp contrast to other countries where either surrogacy provisions are outlawed or strictly regulated.\(^2\) Due to non regulation of surrogacy India is now stealthily integrating with global reproduction tourism industry which is estimated to be three million crore in US alone.\(^3\) As far as India is concerned, the reproductive tourism industry is worth $ 2.3 billion. India is also known as surrogacy capital of the world.\(^4\) 70% of surrogacy cases in India are of foreigners, 25% are of Non resident Indians (NRI’s) and People of Indian Origin (PIO’s) and only 5% are of local nationals.\(^5\) In response to ever rising demand of surrogacy many of the clinics have started offering surrogacy even in the absence of the expert doctors.\(^6\) Numbers of advertisements are put up by the clinics regarding the different success stories of their cases.\(^7\) The unregulated fertility clinics also indulge in medical malpractices. In many of the clinics, surrogacy is depicted as the guaranteed option for the couples seeking IVF and surrogacy treatment. Some clinics also offer money back policies.\(^8\)

\(^1\) Lily Srivastava, *Law and Medicine* at 86 (2010).
\(^3\) Mohan Rao, “Why All Non- Altruistic Surrogacy should be Banned”, *Economic and Political Weekly*, Vol. XLVII, No. 21, 15-17 at 17 (26\(^{th}\) May 2012).
\(^4\) “India Introduces Legislation to Ban Surrogacy Tourism”, *International Medical Travel Journal*, (7\(^{th}\) December 2015), Available at [www.imtj.com](http://www.imtj.com).
The rights of minor girls and women are violated in the garb of surrogacy arrangements. A 17 years old girl, Sushma Pandey died due to the procedures conducted on her by a fertility clinic in Mumbai in relation to egg harvesting. Another woman Premila Vaghela, died due to complications of giving birth to premature child for the American couple. The preference for male children and demand for the same caste surrogates are also rampant in India. There is an instance of a couple from Tamil Nadu who waited for three years so that surrogate from the same caste could deliver the child on their behalf. One can even find the couples who ask for the photographs of the surrogate before finalizing contract through the ART clinics in order to ensure colour, appearance etc. of surrogate. Not only the big cities but the small villages are also becoming potential markets for surrogacy arrangements.

Surrogacy has become a contentious issue due to use of this arrangement by number of persons like divorced, single, married, gay, disabled persons etc. Many surrogacy rackets have also been unearthed by the police authorities in different cases. These rackets are proof of fact of absence of law and regulation of surrogacy in India. One such racket involves an Israeli Paedophile, who was in jail for one year for the offence of sexually abusing a girl child. He was able to adopt the girl with the help of a surrogate from India. The Indian government was having no information about how the girl was adopted and how that man succeeded in taking away that girl from India. Further the more fateful was that the girl had already become Israeli citizen, so it became difficult for Indian government to intervene. Further, the Israeli government failed to take the custody of the girl from that person as the laws in that country do not

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10“His Surrogate Mother Dead, Baby Boy Alright”, The Indian Express, 18th May 2012 (Friday), Available at http://www.indianexpress.com/news/his-surrogate-mother-dead-baby-boy--all-right--950923.
13Shimona Kanwar, “Couple Seek Educated, Same Community Surrogate”, Times of Chandigarh, at 2, 13th December 2010 (Tuesday).
14Shimona Kanwar, “City Sees Rent a Womb Surge”, Times of Chandigarh, at 1, 13th December 2011 (Tuesday).
authorize so.16 Another case involves Sonawane, who was an employee of Shanti Bhavan orphanage for disabled children in Ulhasnagar, Mumbai. She was part of the racket in which needy and underprivileged women from Mumbai and Pune were asked to give birth to children who genetically belongs to them. After birth the children were sold to the childless couples.17

Another immediate instance of such racket was unearthed in a popular case known as Mona Thakur case. This case started basically with investigations in to rape complaint filed by Mona Thakur against her boy friend Raj kumar.18 She disclosed that she was a divorcee and since 2007 she was living alone. However, she again moved with her ex husband and maintained physical relationship. She also maintained intimacy with her boyfriend. Meanwhile she got pregnant in 2010. However, the paternity of the child was not clear. She wanted to abort the child and went to Atit Bharat clinic in Ahmedabad.19 There she met a nurse named Niru Rathi. The nurse convinced Mona that there was no need to abort the child. She told her that the child could be given to the childless couple who would be arranged by the doctor. She also informed her that she would receive payment for giving the child to the intended parents.20 Mona agreed without entering in to the contract. The baby boy was born in 2011 and was handed over to the couple informing that he genetically belonged to them. It was also admitted by her before the police that sex determination was also conducted and she was paid two lakh for the child.

Further surrogacy also resulted in fraudulent practices as some of the intended parents did not want to disclose the arrangement before any one. One such example is a death case of eight month pregnant surrogate in Mohali hospital. Surrogacy was actually agreed between the parties. However, surrogate was registered in the name of

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18 Ujjwala Nayudu, “Surrogacy as Cover for Trading in Babies”, The Indian Express, at 9, 8th January 2013 (Tuesday).
the intended mother named Pinky. The fraud came in to light only after investigations in the death case of surrogate was made by the investigating authorities. 21

Keeping in mind all these situations the Ministry of Home Affairs had intervened and issued regulations in regard to surrogacy. However, there are contradictions in different decisions taken by the government one after another. Further the requirements issued by the Indian government are different in approach than the Assisted Reproductive Technology (Regulation) Bill. 22 The government issued two notifications with regard to surrogacy arrangements by the foreigners. These regulations made surrogacy by gay, single men and women, non married couples from other country as illegal. 23 It provides that the foreigners visiting India for the purpose of surrogacy are required to apply for the medical visa and not the tourist visa. 24 It is further required that the man and woman must be duly married and must have previous two year subsisting marriage. 25 Moreover, they require a letter from the embassy with the visa application which must declare that their country recognize surrogacy and the child born out of surrogacy arrangement will be treated as the biological child of the couple. 26 They are also required to file undertaking that they will take care of the child. 27


It is further provided that the treatment can only be undertaken in a registered ART clinic and the list in this regard must be prepared by the home ministry.\textsuperscript{28} It is required on the part on the intended parents to get exit permit from Indian Foreigners Regional Registration Office after birth of the child. It also includes DNA test in order to confirm that the child belongs to the intended couple. Moreover, all the required documents are also required to be verified by the authorities.\textsuperscript{29} However, in spite of the fact that these notifications were issued for securing the interest of the child as well as surrogate, it raised the concern about the babies who were still in the womb along with giving a major blow to the multi million industry.\textsuperscript{30} The ban resulted in to such a situation that children who were in womb would not be able to attain either Indian or foreign citizenship after their birth. It was due to the fact that foreign commissioning parents had not fulfilled the requirements laid down by authorities through notification.\textsuperscript{31} The case against the disallowing of surrogacy to single person was filed by Sudanese citizen in Punjab and Haryana High Court. However, the court refused to allow the petition on the ground that it could only be clarified after the formulation of law that who could undertake surrogacy in India.\textsuperscript{32}

However, on the one hand the government is restricting the entering of surrogacy contract by foreigners but on the other making further regulations for giving relaxation in these restrictions. The government recently took another decision of importing the human embryos for artificial reproduction including surrogacy. It allowed the foreign couples to send frozen embryos to India so that surrogate in India could give birth to child on their behalf.\textsuperscript{33} In yet another decision, the government allowed the overseas citizens of India and person of Indian origin to undertake surrogacy without the medical visas.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{28} “Same Sex Couples can not Hire Surrogates”, \textit{The Tribune}, at 22, 19\textsuperscript{th} January 2013 (Saturday).
\item \textsuperscript{29} Rahul Tripathi, “Government Set to Allow Visas to Singles Too for Surrogacy”, \textit{The Indian Express}, 28\textsuperscript{th} May 2013 (Tuesday), Available at http://www.indianexpress.com/news/govt-settoallow-visasto-singletoo-forsurrogacy/1121434/.
\item \textsuperscript{30a} Australians Fear Over India’s Amended Surrogacy Rules”, \textit{The Indian Express}, 5\textsuperscript{th} March 2013 (Tuesday), Available at http://www.indianexpress.com/news/australians-fear-over-indias-amended-surrogacy-rules/1083335/.
\item \textsuperscript{31a} “New Indian Surrogacy Laws Risks Making Children Stateless”, Available at http://thefamilylawfirm.blogspot.in/2013/03/new-indian-surrogacy-law-risks-making.html.
\item \textsuperscript{32} Shihabeldin v. Union of India and Others 2014 (3) R.C.R. (Criminal) 154 at para 8.
\item \textsuperscript{33} Surabhi and Ababtika Ghosh, “In Boost to Infertility Treatment, Government Allows Import of Frozen Embryos”, \textit{The Indian Express}, at 1, 16\textsuperscript{th} January 2014 (Thursday).
\item \textsuperscript{34a} No Visa Needed for PIOs Coming for Surrogacy: Just Permission from Foreign Registration Office will Do”, \textit{The Hindu}, at 10, 7\textsuperscript{th} March, 2014 (Friday).
\end{itemize}
Further development in this regard is filing of a PIL by an advocate Jayashree Wad before the Supreme Court to look into the matter of commercial surrogacy as the country is becoming a baby factory and large number of foreign couples are coming to India in search of surrogate mothers. A Bench comprising Justice Ranjan Gogoi and Justice N. V. Ramana while hearing the PIL expressed their concern that the practice of commercial surrogacy is still continuing as various issues related to it are not covered under the law. The Supreme Court observed that government is still allowing the trading of human embryos. According to Supreme Court the commercial surrogacy should not be allowed. The court asked the government to bring commercial surrogacy within the ambit of law. The court raised 14 specific issues in relation to surrogacy. It asked the government to clarify that who would be legal mother in case of surrogacy. Whether it would be surrogate or woman having genetic relation or it would include both. The Bench also asked that whether commercial surrogacy amounts to economic and psychological exploitation of the surrogate mother and whether the practice is inconsistent with the dignity of a woman. The court also considered the 2013 notification of government regarding import of human embryos but refused to stay it. 

As a result of warning by the Supreme Court to the government, the haste action on the part of the government resulted in the amendment of the notification of 2013 regarding import of human embryos in which the import of human embryos is prohibited except for research purposes based on the guidelines of Department of Health Research. Further the directions were issued to the doctors of various clinics by Indian Council of medical research in which it was requested that clinics in India would no more undertake surrogacy services for foreigners. Further the government filed an affidavit before the Supreme Court in response to the issues raised by the Bench of Supreme Court, that only altruistic surrogacy would be permitted in India. The affidavit also specified that the option of surrogacy would only be available to the infertile married couple in India. It would not be available to foreigners. The government submitted that in case of married infertile couples also firstly case would

35 Jayashree Wad v. Union of India and ors, Writ Petition (Civil) 95 of 2015.
37 Letter no. 5/10/8/2008-RHN Dated 27/10/2015 issued by Dr. R.S. Sharma, Head Division of Reproductive Biology and Maternal Health, ICMR).
be examined by the competent authority and then they would be allowed to undertake the arrangements. The government assured further that adequate provisions would be made in the law to prohibit and penalize commercial surrogacy. According to the government under the new law penalty would be imposed on couples who refused to take custody of surrogate child with disability. The government also informed Supreme Court that commerce ministry had restricted the import of human embryo for any purpose either for research or for surrogacy.\(^{38}\) Further the notification had been issued by Ministry of Home Affairs in which it is made clear that no visa and no permission would be given to foreign nationals and overseas citizen of India cardholders (OCI) to commission surrogacy.\(^{39}\) Further it had been made clear through notification that exit permit would not be issued to the children born through surrogacy except the cases in which the surrogacy is already commissioned. Such cases would also be decided on case to case basis by FRROs and FROs. It also provides for cancellation of visa and permission for surrogacy even if it is already granted to the foreign nationals and OCI’s.

Further the Department of Health Research, Ministry of Health and Family Welfare had issued the instructions that commercial surrogacy is not to be supported.\(^{40}\) The instructions prohibit the import of human embryo by surrogacy clinics for offering surrogacy services. It is provided that state health authority will give case to case permission in such cases in which surrogacy had already been commissioned or import of human embryos had already been undertaken. Further the instructions provides that the guidelines for Accreditation, Supervision and Regulation of ART Clinics in India will remain in force till the enactment of the legislation and if there is some thing contrary in the guidelines, then these instructions will have an overriding effect. However, these notifications and rules have raised a hue and cry among the commissioning parents and surrogates that surrogacy should not be banned.\(^{41}\) Moreover, the stand of the government in changing the policy in a hurried manner is

\(^{38}\) Affidavit by government before Supreme Court dated 28\(^{th}\) October 2015.


\(^{40}\) Letter no. V. 25011/119/2015-HR, dated 4\(^{th}\) November 2015, Available at www.dhr.gov.in/latest
govt.instructionsonARTsurrogacybill.pdf.

\(^{41}\) Bindu Shajan Perappadan, “Rent—a-womb: A Setback for Surrogacy in India?” The Hindu, at 10, 29\(^{th}\) November, 2015 (Sunday).
criticized by the experts also. The expert emphasize that there is need to stop the inherent chances of exploitation of the surrogates in the surrogacy process rather than banning the foreigners from undertaking surrogacy in India.

4.2 Legal Implications of Surrogacy in India: In order to know the legal position of surrogacy in India, it is essential to know about the legal implications and framework of surrogacy agreements. For this purpose different provisions of law which are associated with the surrogacy agreements like contract, adoption, citizenship, succession, legitimacy etc. are required to be analyzed.

4.2.1 Contract and Surrogacy: A surrogacy contract generally involves three parties. On the one hand, it involves intended parents i.e. a man and a woman who want to employ the services of a woman due to their inability of giving birth. On the other hand, it involves another woman i.e. surrogate who agrees to conceive a child for the intended parents either through artificial insemination with sperm of man or in vitro fertilization using ova and sperm of the intended parents. It is usually agreed in the surrogacy contract that the intended parents will bear all the expenses during pregnancy and till delivery of child including the insurance for the surrogate. It is also included in the contract that the surrogate will not formulate any kind of psychological and emotional attachment with the child. It is further provided in the contract that she has to relinquish the custody of child after birth. The compensation is generally paid to the surrogate apart from other expenses incurred during the surrogacy process. The contract may also include clauses that may put certain kind of restriction on the surrogate such as restriction as to smoking, drinking, sexual intercourse etc. It is also generally found in the clauses of the contract that the couple

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42"New Surrogacy Bill Replete with Lacunae, Say Experts", The Tribune, at 10, 7th November 2015 (Saturday).
has a right to force the surrogate mother to submit to an abortion. However, there is a possibility of dispute between the parties even after mentioning all these clauses. There can be situation like non compliance with conditions by the surrogate, refusal to hand over the child due to personal bonding or refusal on the part of intended parents to take the custody of child due to deformity or defect in child, death or divorce of the intended parents. Thus all these situations can lead to a very serious and important question of determination of legality and enforceability of surrogacy contracts.

4.2.1.1 Enforceability of Surrogacy Contracts: When the terms and conditions of a surrogacy contract are laid down between the parties, the next question which is to be considered is regarding the enforceability of the contract. In other words it has to be seen that whether the surrogacy contract will be binding between the parties or not. The term binding means two different but related things. Firstly it means that the contract is valid as between the parties and secondly it means that the rights and obligations set forth in that contract will be enforced by the state on behalf of one of the parties. Thus in case of surrogacy contracts it has to be seen that whether these arrangements are to be enforced and respected by the state or whether there is a need for prohibiting these arrangements.

4.2.1.1.1 Legal Requirements of Valid Contract: In order to examine the validity and enforceability of surrogacy contract, it is essential to analyze the legal requirements for a valid and enforceable contract. The law which deals with a valid and enforceable contract between the parties in India is Indian Contract Act, 1872. Thus a surrogacy contract must satisfy the requirements of the present Act in order to be declared as valid and enforceable. First of all in order to form a valid contract, there must be an offer, acceptance and consideration. In a contract for surrogacy, there is offer

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52 Section 2 (a) of Indian Contract Act, 1872.
53 Id., section 2 (b).
from the side of the intended parents who act as offerors. They offer a woman, the offeree, to carry a child on their behalf to which she will not have a legal claim. Further money is also offered to her apart from other expenses for providing service as a surrogate. The acceptance occurs when the surrogate signs the contract and undertakes pregnancy in order to carry child for the intended parents. Consideration in case of surrogacy contracts is involved in two ways. Firstly in the form of payment of compensation to the surrogate and secondly in the form of forbearance to abstain from certain acts prohibited through surrogacy agreement. In those cases where compensation is not given to the surrogate i.e. it is altruistic form of surrogacy, there is existence of consideration in form of love and affection for the intended parents for whom she is delivering the child. Thus by examining basic contractual terms, it is evident that surrogacy contracts encompass the necessary elements of a valid contract.

4.2.1.1.2 Criteria for Enforceability of Surrogacy Contract: Once it is clear that surrogacy contract is valid, the other question which is to considered further is regarding enforceability of such a valid contract. If the contract is to be declared as enforceable, it has to undergo the test of Section 23 of the Indian Contract Act, 1872. Further it is required that the contract of surrogacy is entered in to by the surrogate voluntarily and out of her free will. A contract is a consensual act and parties are free to settle any terms as they please. However, in a contract of surrogacy it is often believed that it is based on unequal bargaining power between the parties. It is presumed that surrogate mother has freedom to contract however; it does not necessarily guarantee her the freedom to negotiate the terms and conditions of the contract. It is generally believed that it is biological father who sets all the terms and conditions in surrogacy contract. It is further believed that enforcement of a

54 Id., section 2 (d).
56 Supra note 52 section 25 (1).
58 Section 23 of Indian Contract Act, 1872 reads: The consideration or object of an agreement is lawful, unless-it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
A surrogacy contract is legitimization of a process where a wealthy individual is purchasing an underprivileged woman for some period for undertaking pregnancy on his behalf. During such period, such person exercise control over her and also prescribes the way she should live. However, on the other hand it is believed that it is not right to invalidate the enforcement of surrogacy contract simply on the basis that these are undertaken by underprivileged woman. These women also have right to enter in to a contract. In fact they actually gain from the arrangement. Moreover, it is not right to ascertain that woman will not be willing to act as a surrogate unless she is so desperate or without alternatives.

Thus the fact that money is exchanged for a child, or at least for the child's gestation, is one of the most controversial aspects of reproductive surrogacy. However, the surrogacy contract must not be declared unenforceable simply on the basis that consideration is involved in it. In fact the contract based on the principle of fair dealing requires that every person or party in the contract must perform. In case of surrogacy contract the surrogate is performing her part by delivering the child to the intended parents. The intended parents must also perform their part by providing monetary help and compensation for her services. So even though surrogacy contract involves monetary compensation, it should not be declared unenforceable.

4.2.1.2.1 Forbidden by Law: Currently no law is regulating surrogacy in India. As the surrogacy contract has not been directly declared as unenforceable by law, it is deemed to be enforceable and fully valid. Some of the efforts have been made indirectly by different authorities to regulate the surrogacy arrangements. The Indian Council of Medical Research in collaboration with ministry of health and family welfare issued guidelines for surrogacy arrangements. However, it is not mandatory to follow these guidelines. The Law Commission of India also recommended the

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64After several years of discussion and debate, primarily among the ICMR, the National Academy of Medical Sciences, and practitioners of ART, the Ministry of Health and Family Welfare published the non-binding National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2005.
enforceability of surrogacy agreements but it laid stress on enforceability of altruistic surrogacy contracts where money is not exchanged between the parties. The other effort in this direction is The Draft Assisted Reproductive Technologies Bill which was introduced firstly in 2008, then in 2010 and redrafted in 2013 and again in 2014. It also recognizes the legality and the enforceability of surrogacy agreements. Thus surrogacy arrangements are valid and enforceable as it is not directly prohibited by law.

Further the issue arises that whether surrogacy should be allowed to gay or lesbian couples as in some countries these relationships are allowed. However, the Indian law prohibits these relationships and makes it an offence. However, in a case Delhi High Court held that the law prohibiting these relationships is unconstitutional. The court further held that the relationship should be allowed to gay or lesbians couples as prohibition is violative of Art 14, 15 19 & 21 of the Constitution of India. However, the Supreme Court of India overruled the judgment of Delhi High court and held that gay and lesbian sex is criminal offence and the law i.e. 377 of Indian Penal Code does not suffer from the vices of unconstitutionality. The court held that High Court and Supreme Court are empowered to declare void any law, but the court is not empowered to strike down a law merely by falling in to disuse or perception of society having changed as regards the legitimacy of its purpose and need. The decision of the Supreme Court makes it very clear that gay or lesbian relationships are not allowed to any person whether he is Indian or foreigner. Thus same rules and law should be applied to surrogacy agreements and gay or lesbian couples of other countries should also be prohibited from undertaking surrogacy in India.

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65See For Details Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, 228th Report (August 2009) Available at http://www.lawcommissionofindia.nic.in.
66For Further Details, See Section 60 (1), Assisted Reproductive Technology (Regulation), Bill, 2014.
67Section 377 Indian Penal Code provides that “Whoever voluntarily has carnal intercourse against the order of the nature with any man, woman or animal shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.”
68Naz Foundation v. Govt. of NCT of Delhi 2009 (3) R.C.R. (Criminal) 523.
69Id., para 125, 127 & 132.
70Suresh Kumar Kaushal and another v. Naz Foundation and Others 2014 (1) R.C.R. (Criminal) 286.
71Id., para 33.
4.2.1.2.2 Defeat the Provisions of Law: The other question which needs to be considered in case of surrogacy arrangement is that though these arrangements are not directly prohibited by law, yet can it be declared as invalid on the ground that it defeats the provisions of other law applicable in the country. Likewise it has to be seen whether it is in conflict with the provisions of Hindu Adoption and Maintenance Act, 1956. Section 17 of the Hindu Adoption and Maintenance Act prohibits certain payments involved in the process of adoption. Section 5 of the Act provides that any adoption made in contravention of the provisions of the Act shall be void. Therefore, if a consideration is involved in adoption, it shall be void. The surrogacy arrangements also involve consideration in the form of compensation, legal and medical expenses. So it is required to be considered whether surrogacy arrangements can also be declared as invalid on the basis of exchange of payment.

For this purpose it has to be seen that whether the surrogacy contracts are equivalent to adoption, then only the principles applicable to adoption can be made applicable to the surrogacy contracts. The process of adoption can not be compared with surrogacy contracts. Adoption is the method by which the state attempts to provide a suitable home for children whose biological parents are unable or unwilling to care for them. On the other hand surrogacy agreement is entered in to between the parties before the birth or even pregnancy of the woman serving as a surrogate. It is the desire of the intended parent that child must take birth through surrogate due to their inability to give birth. Thus the criterion which is applicable to adoption that invalidates the payments between parties can not be applied to the surrogacy contracts. On the basis of abovementioned discussion it is clear that the surrogacy arrangements do not defeat the provisions of other law.

Another aspect which is required to be considered is that whether sex determination should be allowed in the case of surrogacy. As per law it is prohibited in India through Pre- Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

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74 Id. at 15.
75 For details see Section 3, 4 (4) & (5), 5 (2) and 6 which prohibits sex selection and communication about the sex of the fetus to any person.
These provisions should also be applied in the case of surrogacy. However, the problem could arise in case of foreigners undertaking surrogacy in India as the law is not applicable in case of foreigners. One such case has happened in Delhi where a couple from Australia filed writ petition for grant of no objection in conducting prenatal sex determination and further a direction that it is ultra vires with respect to applicability of surrogacy process.\textsuperscript{76} Their main contention was that in order to have a balanced family they desire determination of sex of the child as they wanted to have one girl and one boy child to be born through surrogacy.\textsuperscript{77} However, the court dismissed the petition on the ground that there is misconceiving of hostile discrimination and unreasonable classification by the petitioner.\textsuperscript{78} Further the court found that the assumption of the petitioner that it is possible to identify the gender of the fetus before impregnation has no basis in science of genetics or any established principle of sexual reproduction.\textsuperscript{79} Thus following the decision it could be ascertained that the Act should also be applied in case of surrogacy either undertaken by Indians or foreigners.

4.2.1.1.2.3 Involves Injury to Person or Society: It has to be seen further whether surrogacy contract involves injury to person or society. It is difficult to identify any harm to society so far as surrogacy arrangements are concerned. In case of surrogacy arrangements the pregnancy is not accidental. It is indeed conceived through care and commitment towards the expectant child. There is no abandonment of the child by either party to the contract. On the other hand, it is the desire of the intended parents to get a child who belongs to them genetically. Moreover, surrogate is not forced to enter in to agreement and carry the child.\textsuperscript{80} She agrees on the basis of a contract between the parties. Both parties stand to gain from the surrogacy contract. The surrogate is getting financial compensation and intended parents get the custody of the child.\textsuperscript{81} Thus in any way it can not be analyzed that surrogacy contract involves any kind of injury to the person or society. Moreover, there is very little existence of

\textsuperscript{76} Amy Antoinette Mcgregor and another v. Directorate of Family Welfare Govt. of NCT of Delhi and another 2013 (205) DLT 96.
\textsuperscript{77} Id., para 1.
\textsuperscript{78} Id., para 13 and 14.
\textsuperscript{79} Id., para 8.
evidence which shows that commercial surrogacy agreements actually exploit women. On the other hand there are enough studies that demonstrate that surrogate mothers are not exploited. The studies reveal that surrogates have positive feelings about their experiences and want to undertake the arrangement again.\(^8^2\) Thus surrogacy does not involve injury to women. Moreover, this fear can be overcome if altruistic form of surrogacy is adopted.\(^8^3\)

4.2.1.1.2.4 Immoral: Other consideration in relation to surrogacy arrangement is immorality. Surrogacy contract is often compared with prostitution and adultery. However, surrogacy contracts are less like prostitution and more like other service contracts that individuals enter into for purely financial reasons.\(^8^4\) The surrogate is not providing physical enjoyment to a person as in the case of prostitution. She on the other hand is giving a lifetime of joy to the intended parents by fulfilling their desire of becoming parents.\(^8^5\) So it can not be compared with prostitution. As far as adultery is concerned, surrogacy can not be considered as adulterous act. In case of surrogacy different techniques such as in vitro fertilization, artificial insemination etc. is used to undertake pregnancy. It is in no way associated with sexual intercourse with the person. So in any way it can not be treated as adultery. Further in order to avoid the presumption of adultery in case of surrogacy arrangements, it must be made compulsory through the provisions of law that if the woman acting as a surrogate is married then the consent of husband is mandatory. In such situation it will not be compared with adultery.

4.2.1.1.2.5 Against Public Policy: The term public policy has not been defined under the Act. The term in the broadest sense mean that sometimes the courts refuse to enforce a contract on the consideration of involvement of public interest.\(^8^6\) The circumstances in which a contract can be struck down on the basis of public policy

\(^8^3\) Jennifer L. Watson, “Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mother be Compensated for Their Services?” 6 Whittier J. Child & Fam. Advoc., 529- 54 at 545 (2006-07).
\(^8^6\) Avtar Singh, Contract and Specific Relief, at 274 (2008).
have been laid down clearly in England. These include marriage brokerage contract, creation of perpetuity, contract in restraint of trade, wagering contract or assisting king’s enemies.\textsuperscript{87} So the heads covered under public policy are generally related with relationship of employer and employee. The Indian courts have also followed the same approach as is adopted by English courts. The courts have taken the view that public policy is an illusive concept. It is in the interest of the society not to develop new principles under the head as it can lead to instability in the society.\textsuperscript{88} Taking in to account the reasoning of the court in dealing with public policy, the surrogacy agreements can not be covered under the term public policy.

In case of a surrogacy contract, it is often argued that women sell their body for delivering child on behalf of other. It is further argued that it leads to commodification of women and child which is against the public interest. However, in reality a woman who serves as a surrogate is not selling her womb. She is rather giving a gift to the parents in form of child by providing her service as a surrogate. It can not in any way commoditize her reproductive capacity.\textsuperscript{89} The compensation and expenses incurred on her is a form of gratitude by the intended parents. Moreover, facilitation and encouragement of good prenatal care is also consistent with public policy.\textsuperscript{90} The payment of surrogate reasonable medical expenses is also in the best interests of surrogate. It discourages the intended parents from demanding unnecessary but expensive or painful medical tests and procedures from the surrogate as the payment has to be made by them.\textsuperscript{91} Thus in any way surrogacy arrangement can not be considered against public policy.

4.2.1.2 Remedies Available: After analyzing the contractual validity and enforceability of the surrogacy contracts the other consideration is in regard to the kind of remedy which should be available in case of breach of a surrogacy contract.\textsuperscript{92} In order to see a remedy for breach of surrogacy contract, the reference can be made

\begin{footnotes}
\footnote{87}{Ibid., See Janson v. Driejonstein Consolidated Mines Ltd. (1902) AC 484.}
\footnote{88}{Supra note 86 at 276.}
\footnote{90}{Diana Greco Attener and Patricia Fried, “Surrogate Motherhood at a Legal Crossroad: An Analysis of Proposed Legislation in New York”, 2 St. John’s J. Legal Comm., 97-120 at 103 (1986-87).}
\footnote{91}{M. Trebilcock, The Limits of Freedom of Contract, at 4 (1993).}
\end{footnotes}
to the remedies which are available in case of breach of a contract. In case of breach of a contract remedies which are available are specific performance of the contract, damages or compensation. An action of damages is always available as a matter of right when a contract is broken. In order to provide damages the nature of approximately just things are taken in to account. The criterion of distress, loss or enjoyment is rarely awarded for the purpose of damages in the contract. The specific performance of the contract can be granted by the court in a situation where money compensation is not adequate. In case of a surrogacy contract a surrogate provides a service of giving birth to the child. In this contract certain limitations can also be imposed on surrogate till the child is delivered to the intended parents. She can thus be forced to relinquish custody of the child and if she refuses then the contract can be specifically enforced up to this extent. However, she can not be forced to carry the child up to delivery.

In order to avoid conflict between any parties, the surrogacy contract must clearly mention the consequence of breach of the contract by either of the party. In case the surrogate refuses to carry with pregnancy without any medical reasons, then it must be made certain that she has to return all the expenses including insurance which is incurred by the intended parents before and after pregnancy along with reasonable compensation. In case breach is made by the intended parents and they refuse to carry with the contract before the pregnancy of the surrogate, then the compensation for breach must be paid to the surrogate along with the amount already incurred on different expenses. In case the surrogate is already pregnant, the intended parents must be under obligation not to make a breach of contract. It must also be made mandatory that they have to accept the custody of the child even in case of defect or

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96 Ibid.
97 Supra note 52 section 20 (1). Also See Section 10.
100 Johnson v. Calvert 851 P. 2d 776.
deformity. The penalty in the form of punishment must be imposed on the intended parents who refuse to take the custody of child after birth. It must also be made mandatory for the surrogate to relinquish the custody of the child after delivery. The penalty must be levied in form of punishment to the intended parents who refuse to take the delivery of the child.

4.2.2 Constitutional Protection of Surrogacy Contracts: The Constitution of India makes no specific mention of right of a person to employ services of surrogate to become parents. The courts in India have also not specifically decided about this right. However, reference can be made to the decision of the Supreme Court of United States of America. It was held by the court that the concept of liberty which is part of due process clause of fourteenth amendment is wide enough to include all the rights which are not mentioned specifically.\(^{101}\) In this case the court has recognized the woman’s right to terminate the pregnancy. The Court found that the right is rooted in the right of privacy.\(^ {102}\) In \textit{Skinner v. Oklahoma},\(^ {103}\) the court struck down an Oklahoma law providing for the sterilization of certain recidivist felons. It invalidates the law on grounds of equal protection. The court justified the application of strict scrutiny on basis that procreation is basic civil right of a man. It is fundamental to the very existence of human race. The Court laid down that the right of procreation is very essential to the exercise of other fundamental rights. According to the court the arbitrary state interference with this right would infringe constitutionally protected values.\(^ {104}\) The court has also recognized the right of fetus to live.\(^ {105}\)

So far as Indian position in this regard is concerned the reference can be made to Article 21 of the Indian Constitution. It is counterpart of the Due Process Clause in U.S. It uses the term personal liberty. The framers of the Indian Constitution intended to narrow the protection afforded by the provision to only certain kinds of liberties related to the life and person of an individual.\(^ {106}\) Nevertheless, the Supreme Court has

\(^{103}\) 316 U.S. 535 (1942).
\(^{105}\) \textit{Webster v. Reproduction Health Services} (1989) USA.
interpreted the term personal liberty in a broad manner to include right to privacy.\textsuperscript{107} It has been defined as the state of being free from intrusion or disturbance in one’s personal life.\textsuperscript{108} The principle evolved by the court is that the right to privacy is lost only if public interest is involved or if the information is already within the public domain.\textsuperscript{109} On the other hand the court has also recognized the right of fetus to grow and born.\textsuperscript{110} Thus in order to maintain harmony between both these rights, the restrictions can be imposed by the state.\textsuperscript{111} The right to privacy is further elaborated by High court as including right to procreate or right to reproductive autonomy.\textsuperscript{112} It gives an opportunity to the individual to realize his reproductive choice and health.\textsuperscript{113}

Right to reproduce traditionally finds its origin in the right to found a family. The Universal Declaration of Human Rights, 1948 and International Covenant on Civil and Political Rights, 1966 gives men and women of full age, the right to found a family.\textsuperscript{114} There is no doubt that a woman’s right to make reproductive choices is also a dimension of Article 21 of the constitution. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating.\textsuperscript{115}

Thus reproductive right includes a woman’s entitlement to carry a pregnancy to full term, give birth and subsequently raise a child.\textsuperscript{116} In \textit{Roe v. Wade}\textsuperscript{117} the U.S. court has decided that every woman has the right to take a decision with respect to how to use her body. Thus in this capacity she has the right to enter in to surrogacy contract. If right to privacy includes right to avoid reproduction, it must also include right to


\textsuperscript{108} District Registrar and Collector \textit{v. Canara Bank}, 2005 (1) SCC 496 para at 517.


\textsuperscript{110} \textit{Lila Gupta \textit{v. Laxmi Narain AIR 1978 SC 1351 para 5 at 1353.}

\textsuperscript{111} \textit{Awashthi and Katia, Law Relating to Protection of Human Rights}, at 1045 (2005).


\textsuperscript{115} \textit{Rupsa Mallik, “Reproductive Technologies in India: Confronting Differences”, Sarai Reader}, 120-123 at 121 (2003).


\textsuperscript{117} 410 U.S. 113 (1973).
submit to a medical procedure that may bring pregnancy rather than preventing it.\textsuperscript{118} The fertile married couple has right to add children through coital reproduction. So infertile married couple must also have right in this regard. Failure to protect and accord constitutional protection will affect the very existence and survival of human race.\textsuperscript{119} The conscious and intentional exertion of right to procreate must be given more protection than the accidental and unintended action of procreation.\textsuperscript{120} Thus the right of intended parents to have children through surrogacy process must also be recognized. If the procreative right of intended parents exists, it must not only apply to them but also to the surrogate who is involved in the procreative process.\textsuperscript{121} Considering this aspect in relation to surrogate mother it can be recognized that she also have right of reproductive autonomy i.e. to decide whether she will serve as a surrogate for giving birth to child for intended parents or not.\textsuperscript{122}

As it is clear that the surrogate has the reproductive autonomy, the next question which need to be considered is that whether the restrictions can be imposed on her by the intended parents during the time of pregnancy or not. It has to be seen that whether she has the right to abort the child with in the limits of the law even if the parents are unwilling.\textsuperscript{123} The contract between the surrogate mother and the intended parents may provide about the fulfillment of all the desires of the intended parents. In such situation the intended parents can force her to carry the pregnancy even if it carries risk to her health. The similar question in case of surrogacy contract is that if the intended parents do not want to carry forward the pregnancy due to some defect in the child, whether abortion can take place without the consent of the surrogate.\textsuperscript{124}


In finding the answer to all these problems the reference can be made to the express provisions of law which are provided under the Medical Termination of pregnancy Act, 1971 and Indian Penal Code, 1860. Under Indian Penal Code causing miscarriage is regarded as criminal offence. The Medical Termination of Pregnancy Act is a kind of exception to it. Under the Act, a woman is permitted to terminate the pregnancy on the basis of opinion of two registered medical practitioner that continuance of pregnancy involves a risk to life of pregnant woman or can cause grave injury to her physically or mentally. Thus the termination of pregnancy is only permitted when the conditions specified in applicable statutes are fulfilled. In case of surrogacy contract also the same provisions must be made applicable. Further there is also a state interest in protecting the prospective child. So keeping in mind this interest, some restrictions can be imposed on the surrogate also. It is in the form that she should not perform any act which can harm the child. Thus reproductive autonomy of surrogate can be restricted only for protecting the interest of the child.

4.2.3 Citizenship and Surrogacy: The issue of citizenship arises particularly in case of surrogacy arrangements undertaken by the nationals of foreign country. The matter gets more complicated when foreign country prohibits the entering in to surrogacy arrangements. In such a situation it becomes difficult for the foreign nationals to get citizenship of their native country for the child. Further the situation becomes more complicated as there is neither any convention nor any agreement for regulation of surrogacy at national and international level.

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125 Amita Pathak, “Right to Life of Foetus or Right to Abortion of Surrogate Mother”, Available at www.legalindia.in.
126 For Further Details See Section 312-315 Indian Penal Code, 1860.
127 Section 3 (2), Medical Termination of Pregnancy Act, 1971.
129 In the case of Javed v. State of Haryana, A.I.R. 2003 S.C. 3057, the Supreme Court was confronted with the question of the validity of the two-child norm, sought to be enforced at the Panchayat level in Haryana, in the interests of population control. As is the case in American legal discussion within the reproductive rights framework, the issue yet again, was the balancing of the individual's reproductive autonomy with community interests, represented by population control in this case. The Court held that the law is not violative of the right to reproductive autonomy.
As far as Indian citizenship is concerned, it can be made applicable in case either of the parents is born in India. In such a situation the child will be treated as Indian citizen. However, in such a situation the foreign national has to opt for adopting a child. But the adoption is also a complicated procedure. Further in case of adoption by foreign nationals, rules of inter country adoption has to be followed. However, these rules are restricted only to orphan, destitute children and not to the children who are born out of surrogacy arrangements. In this situation in order that the child born out of surrogacy arrangements must get citizenship of a foreign country, the restrictions can be imposed on them in this regard before entering in to the contract of surrogacy. It must be made compulsory for them to get order of the foreign court or regulatory authority to insure all the rights of the child. If this issue of citizenship is not resolved by the intended parents, then they should not be allowed entry in to India for the purpose of undertaking surrogacy arrangements. The arrangement in this regard can be made either by amending Indian Citizenship Act or incorporating provisions in this regard in Assisted Reproductive Technologies Bill.

4.2.4 Adoption and Surrogacy: In India, there is lack of comprehensive law on adoption. The Hindu Adoption and Maintenance Act, 1956 provides about the adoption provisions. It regulates the adoption only by Hindus. Under this Act the father is regarded as the natural guardian of the child and after him, the mother is regarded as natural guardian. A male and female Hindu can adopt a child subject to the provisions mentioned under the Act. If the adoption is by a male and the child to be adopted is female then the adoptive father must be at least 21 years older than the person to be adopted and it is equally applicable in case of females. The adoption is neither recognized by Muslim law nor by Parsi or Christian law. Thus in case of Muslims, Christians and Parsis, the court has to be approached for appointment as

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134 Section 3 (1) (C) (ii), Indian Citizenship Act, 1955.
138 Anil Malhotra, “Indian Personal Law is Valid in Norway Too”, The Tribune, at 9, 30th January 2012 (Tuesday).
139 Section 7 and 8 of Hindu Marriage Act, 1955.
guardian of child under the provisions of the Guardians and Wards Act, 1890. Under the Act guardianship is permitted and not the adoption. The court always takes in to account the welfare of the child as compared to legal right of a person to be appointed as guardian. It also considers the ties of affection and capacity for building up a good carrier for infant. The Act however, provides only for the foster care and after attaining majority, the child has right to break all the ties and has no inheritance right. Another way of adoption is Juvenile Justice (Care and Protection) Act, 2001 which has introduced adoption as one of the modes to rehabilitate a child in need of care and protection. This is a secular provisions and the same view point has been followed by the Supreme Court in the case of Shabnam Hashmi v. Union of India. In this case the court has held that the provision in the Act in regard to adoption is independent of personal laws and beliefs. The court further held that any person irrespective of religion is free to adopt the child instead of following personal law.

However, these provisions do not include the adoption of a surrogate child. In case of surrogacy the agreements can be undertaken both by Hindus and non Hindus. In case of surrogacy undertaken by the Hindus, there is need to determine whether the child is required to be adopted or some how he will be treated as the natural born child of the parents undertaking surrogacy even if he is not genetically related with the intended parents. In case of non Hindus it has to be determined that whether they will only be acting as the guardian of child born out of surrogacy arrangement or whether they need to adopt the child or they will also be recognized as natural parents of the child. This situation can be settled by recognizing the intended parents as the natural parents of the child even if born through surrogacy. In this situation there is no need to adopt the child as he will be treated as natural born child of the intended parents and will have all the rights which are available to the natural born child.

141 Veena Kapoor v. Varinder Kumar AIR 1982 SC 792 para 2 at 793.
144 (2014) 4SCC 1.
145 Ibid., part B at 1.
146 Supra note 144 at 2.
147 ART Bill provides provision regarding entering the name of the intended parents in the birth certificate which itself would mean that in all cases irrespective of religion they will be treated as natural or birth parents.
In case the child is adopted by a foreign couple, they have to fulfil the requirements of immigration.  

India is a party to Hague convention on protection of children and co-operation in respect of inter country adoption. It prescribes the qualifications of prospective parents should be at least 30 and not more than 55 years of age. In case of married couples, it should not be combined age of more than 90 years. However, the requirements can be released in case of adoption of older children, siblings and children with special needs. In case parent is single, up to age of 45 it can adopt. The child must at least be 21 years younger than the person adopting. If the adoption is by married couple, it must be in stable relationship for at least 5 years. It has been made obligatory for Central Adoption Resource Authority to issue guidelines on family adoptions so that children in crisis situation are not deprived of caring family for implementing the convention. In case of foreigners, the adoption process has to be followed in respective countries of nationality or permanent residence of proposed adoptive parents. All foreign embassies and high commissions are guided by their own procedure which are entirely different from that of Indian law and procedure. However, these arrangements are not for the surrogate child but for the abandoned, destitute, orphan children.

Thus the question in case of surrogacy that needs determination is whether in case of foreigners the couples or any person entering surrogacy is required to adopt the child or some other procedure is required to be adopted. The ART Bill does not specifically deal with the situation. In this situation the notifications which are made by the Indian government in regard to giving of medical visas and exit permit only after fulfillment of certain conditions by the intended parents can be considered and implemented in the form of law. In such situation it must be recognized that if

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153 ART Bill provides that the foreign couple or individual must produce a letter before the registered ART clinic either from the embassy or from the foreign ministry of the country that surrogacy is permitted there and the child born through the surrogacy arrangement in India will be given entry as a biological child of the intended foreign parent.
154 See Supra note 26.
all the conditions are fulfilled by the intended parents in their country, the child must be treated as their own child.

4.2.5 Legitimacy, Succession and Surrogacy: The next question which arises in case of surrogacy arrangement is legitimacy and succession of the child.\textsuperscript{155} As far as Indian position of legitimacy is concerned, if the child is born out of a valid marriage, the legitimacy of such child is presumed.\textsuperscript{156} In such a situation, the child has right to inherit the property of the parents as well as the relatives. In case the child is born out of void marriage which is declared as null and void, he is considered as a legitimate child for the purpose of law.\textsuperscript{157} However, in such a situation, he can inherit the self acquired property of the parents only.\textsuperscript{158} The child is considered related to his parents only.\textsuperscript{159} If the marriage is voidable but neither party has avoided then it is considered as valid marriage. Therefore the child born through this marriage is also considered as legitimate.\textsuperscript{160} In case of voidable marriage also the child can claim share in self acquired property of their parents.\textsuperscript{161} The legitimacy of the child is not affected even if the marriage is avoided between the parties.\textsuperscript{162} In case of a surrogate child also same provisions must be maintained.

However, the provision in the Indian Evidence Act, 1872 limits the legitimacy of a child only with in 280 days of dissolution of marriage either due to death or divorce of the parties. With the change of technologies, the scientific advancement has been made to such an extent that now it is possible to freeze the embryos during the lifetime of the couple.\textsuperscript{163} This frozen embryo can be used after the prescribed period mentioned in the Act. This technology can further be utilized in case of surrogacy arrangements also. So in such a situation there is a need to make a change in the law so far as it relates to presumption of legitimacy of child. In case of a surrogate child,

\textsuperscript{156}Section 112, \textit{Indian Evidence Act}, 1872.
\textsuperscript{158}Paras Diwan, \textit{Law of Marriage and Divorce}, at 276 (2002). See \textit{Bhartatha Matha and Another v. R. Vijaya Ranganathan and Others} A\textsc{ir} 2010 SC 2685.
\textsuperscript{159}Section 3 (1) (j), \textit{Hindu Succession Act}, 1956.
\textsuperscript{160}A. N. Saha, \textit{Marriage and Divorce}, at 350 (2002).
\textsuperscript{161}\textit{Supra} note 139 section 16 (3).
the provision can be made through law that he will for all the purposes be treated as legitimate child.\textsuperscript{164} He must be given all the rights which are given to a natural born child in case of succession.\textsuperscript{165} For this purpose the name of the child born out of surrogacy arrangement must be entered as a biological child of intended parents in the birth certificate. In India, Births, Deaths and Marriage Registration Act, 1899 authorize the registrar birth and deaths to issue birth certificates.\textsuperscript{166} So the provision must be made so that name of the child born out of surrogacy arrangements can be entered in to the register as prescribed by the Act.

\textbf{4.3 Legal Framework of Surrogacy in India:} Although there is no law for regulating surrogacy, there have been different efforts made by different authorities in this regard. These efforts among other include National Guidelines, Law Commission of India Report, and Assisted Reproductive Technologies Bill. In order to know the legal framework of surrogacy in India, all these regulations are required to be studied.

\textbf{4.3.1 National Guidelines for Accreditation, Supervision & Regulation of ART Clinics:} After several years of discussion and debate, primarily among the Indian Council of Medical Research, the National Academy of Medical Sciences, and practitioners of ART, the Ministry of Health and Family Welfare published the National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in 2005.\textsuperscript{167} The guidelines have been laid down in order to ensure the accreditation, regulation and supervision of ART clinics so that international standards are followed and there is no malpractice. The preamble to the guidelines makes it clear that there is a mushrooming of infertility clinics in India. The clinics are providing services in the private sector. Further it is made clear that the providing of service is highly questionable due to the lack of adequately trained manpower and infrastructure


\textsuperscript{166} G.V. Mahesh Nath and P. Devi Manasa, “A Critique on Surrogacy Contracts”, \textit{Andhra Law Times}, 2012 (1) 28-34 at 32.
facilities for delivering highly sophisticated technologies.\textsuperscript{168} It defines the term “surrogacy” as an arrangement in which a woman agrees to carry the pregnancy that is not related either to her or husband with intention to carry it to term and hand over the child to genetic parents for whom she is acting as surrogate.\textsuperscript{169} The guidelines also define the term “surrogacy with oocyte donation” which is a process whereby a woman allows the insemination by sperm of a male partner of a couple with the view to carry pregnancy to term and hand over the child to couple.\textsuperscript{170} The guidelines mention that ART procedure carries small risk to mother as well as child. It also makes it clear that the ART procedure must be initiated only after the patient understand the risk and still willing to undertake the procedure.\textsuperscript{171} The guidelines also mentions about the semen bank which has to maintain all the information regarding the surrogate. For this purpose the bank can take the charges from the intended parents. However, it is provided that the bank will not compensate the surrogate for providing services to the intended parents.\textsuperscript{172}

### 4.3.1.1 Responsibilities of ART Clinic:

It is made clear through the provisions that ART clinics undertaking infertility treatment must be registered and supervised by state accreditation or appropriate authority.\textsuperscript{173} The clinics are under obligation to maintain confidentiality.\textsuperscript{174} However, it must disclose all the information to patient about the treatment along with all the possible side effects.\textsuperscript{175} Further the clinic must obtain the consent in regard to each and every treatment undertaken on the patient from time to time.\textsuperscript{176} For this purpose the counseling has also been made mandatory.\textsuperscript{177} The guidelines restrict the use of gametes and embryos by the clinic. It provides that not more than three embryos must be placed in one treatment cycle. Further the embryos must not be derived from gametes of more than one man or

\textsuperscript{167}National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, Indian Council of Medical Research (ICMR), Ministry of Health and Family Welfare, Government of India, New Delhi (2005).

\textsuperscript{168} Ibid, at ix, (Forword by Prasanna Hota, Secretary Ministry of Health and Family Welfare Government of India).

\textsuperscript{169} Supra note 167 section 1.2.30.

\textsuperscript{170} Id., section 1.2.39.

\textsuperscript{171} Id., section 2.4.

\textsuperscript{172} Id., section 3.9.2.

\textsuperscript{173} Id., section 3.15.

\textsuperscript{174} Id., section 3.2.3.

\textsuperscript{175} Id., section 3.2.4.

\textsuperscript{176} Id., section 3.2.5.

\textsuperscript{177} Id., section 3.2.6.
woman in one treatment cycle. The guidelines prohibit the use of sperm which is
donated by a relative or a friend of either of intended parents. It is the responsibility of
the ART clinic to obtain sperm from appropriate banks.

The provision has been made for disclosing the information regarding the birth of
the child. However, it can be made available only when child has attained the age of
18 years. It is the responsibility of the clinic to create awareness among the
intended parents about this right of the child. The ART clinics are under obligation
to maintain all the records regarding arrangements entered into by the parties with the
clinic. The clinic is prohibited from becoming party to the commercial transaction
in case of gestational surrogacy. The charges for treatment have to be displayed by
the clinic and no extra charges can be taken beyond the charges disclosed to the
patient in the beginning of the treatment. Further the surrogacy arrangement must
only be considered for such patients in whose case it is medically not possible to
undertake pregnancy. The clinics are prohibited from giving any advertisements
regarding surrogacy. The responsibility for such advertisement is that of the intended
parents or the semen bank.

4.3.1.2 Rights and Responsibilities in Respect to Surrogate: A surrogate mother
carrying pregnancy for intended parents must register herself as a patient. She must
specifically mention that she is serving as a surrogate mother. Further she is under
obligation to provide all the necessary information about the genetic parents such as
names, addresses, etc. A surrogate mother can not act as egg donor. She should not
be over forty five years of age. She is also prohibited from undertaking surrogacy
arrangements for more than three times in her lifetime. A relative, a known person,
as well as a person unknown to the couple can act as a surrogate mother for the
couple. However, in case a relative is acting as a surrogate, the relative should belong

\[178 \text{Id., section 3.2.7.} \]
\[179 \text{Id., section 3.3.6.} \]
\[180 \text{Id., section 3.4.8.} \]
\[181 \text{Id., section 3.3.7.} \]
\[182 \text{Id., section 3.5.3.} \]
\[183 \text{Id., section 3.3.8.} \]
\[184 \text{Id., section 3.10.2.} \]
\[185 \text{Id., section 3.10.4.} \]
\[186 \text{Id., section 3.10.5.} \]
to the same generation as the women desiring the child through surrogacy.  

It is necessary to obtain the consent of husband if the surrogate is married. The surrogate must also be tested for HIV. She must provide a written certificate that she has not had intravenous drugs administered through a shared syringe or any blood transfusions. She must also declare that she and her husband had no extramarital relationship in the last six months. She must also declare that she will not use intravenous drugs or receive blood transfusions except through a certified blood bank. It is made clear through the guidelines that the negotiations for the making of contract including the compensation must be decided between the parties independently. However, the payments to surrogate mother should cover all genuine expenses associated with the pregnancy. It has been made obligatory for the surrogate to relinquish all the parental rights regarding the child in writing. She has been given a right to terminate the pregnancy at her will. However, in such a case she has to refund all the certified and documentary expenses which are incurred by the intended parents for the purpose of pregnancy of the surrogate.

4.3.1.3 Rights and Responsibilities of Parents: The guidelines provides that any person whether male or female is authorized to undertake surrogacy arrangements. The child born out of surrogacy arrangement will be treated as the legitimate child of the person undertaking arrangement. The child shall have all legal right including parental support, inheritance which is available to natural born child. It is provided that the birth certificate shall bear the name of the genetic parents. They must also be provided with the certificate by the clinic in which the name and address of the surrogate mother is mentioned. It is further provided that there is a need to adopt the child by the genetic parents unless they can establish through genetic (DNA)
fingerprinting that the child belongs to them.  

4.3.2 Ethical Guidelines for Bio Medical Research on Human Participants: The Indian Council of Medical Research has further issued ethical guidelines for biomedical research in 2006. It provides for statement of specific principles on assisted reproduction. According to these guidelines surrogacy is an arrangement in which woman agrees to carry the pregnancy which is genetically unrelated either to her or her husband. According to these guidelines the surrogacy must be made a legally enforceable contract. According to the council, the surrogacy must be resorted to only when it is medically certified that intended mother is unable to carry pregnancy due to infertility. The parents have to adopt the child and in such a case for claiming custody, DNA must be conducted to establish genetic relation. The council is of the opinion that the intended parents have the preferential right to adopt the child. However, the maternal consent for giving in adoption is also necessary.

The guidelines provide that the intended parents must provide for all the expenses incurred during pregnancy, delivery and till the child is handed over to them by way of adoption. The monetary compensation must be provided and it must be decided between the parties. The guidelines further provide that the child born will be considered as the legitimate child of the intended parents. Further it provided that the child will have the right to obtain all the information regarding the surrogate mother on attaining the age of 18. However, it will not include disclosure of personal information except in medical emergency. Further the intended parents are not under obligation to provide such information to the child. The guidelines make it obligatory for the clinic to maintain confidentiality regarding the surrogate and surrogacy arrangements.

4.3.3 Law Commission of India Report: The Law Commission of India had taken up the matter of surrogate motherhood for consideration on its own. The commission was of the opinion that non intervention of law in this matter will affect the human

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200 Id., section 3.10.1.
201 Ethical Guidelines for Biomedical Research on Human Participants, Indian Council of Medical Research at 102 (2006), Available at www.icmr.nic.in.
202 Id., at 103.
liberty. Considering all aspects of surrogacy contracts, the commission presented its report in 2009. The report considered the issue that India has become a reproductive tourism destination due to lack of regulation. The commission in its report highlighted some of legal and moral issues associated with surrogacy. The moral issues were mainly associated with commodification of surrogate and child, breaking of the bond between the mother and the child, exploitation of poor women especially in developing country like India. On the other hand, the legal issues involved the reproductive rights and its extent in relation to surrogacy arrangements. For this purpose the Commission took into account Article 16.1 of the Universal Declaration of Human Rights 1948, which provides that men and women of full age have right to marry and found a family without any limitation of race, nationality or religion.

The commission suggested that this right involves right of reproduction which had been recognized in India by Andhra Pradesh High Court and also by U.S. Supreme Court. The commission suggested that if the reproduction rights get constitutional status, the right of infertile couple to undertake surrogacy arrangements must also be recognized. The commission however, raised a caution that in spite of constitutional protection given to right to reproduction, surrogacy has not been made legal by all the countries.

The commission also took into account the draft Bill prepared by Indian Council of Medical Research. The commission found many lacunas in the Bill and suggested that these must be rectified before finally putting it in the form of legislation. The commission recommended that though surrogacy arrangements must be recognized yet it must not be for commercial purpose. The commission was of the opinion that

204 Supra note 65.
205 Id., para 1.7 at 11.
206 Id., para 1.8 at 11.
207 Id., para 1.9 at 11.
208 Id., at 11-12.
209 Id., para 1.9 at 12.
210 Id., para 1.10 at 12.
211 Id., para 1.11 at 13.
212 Id., para 4.2 at 25.
213 Id., para 4.2.1 at 25.
surrogate must be provided financial support in case of death or divorce of commissioning parents before the delivery of the child.\textsuperscript{214} It was further recommended that the surrogacy contract must take care of the insurance cover for the surrogate.\textsuperscript{215} It must also be insured that one of the intended parent is donor of the genetic material. The law commission was of the opinion that it will help in creating a bond of love and affection and will further help in reducing various kind of child abuse.\textsuperscript{216} The commission further recommended that child must be recognized as a legitimate child of the commissioning parents.\textsuperscript{217} The commission was of the view that there must not be any need for the adoption or guardianship of the child born out of surrogacy arrangements. For this purpose, the commission recommended that the birth certificate of child must contain the name of commissioning parents.\textsuperscript{218} The commission also stressed that the privacy of the surrogate must be protected in all the situations.\textsuperscript{219}

4.3.4 Assisted Reproductive Technology (Regulation) Bill and Surrogacy: The present Bill aims at proper regulation and supervision of ART clinics and Banks. It also aims to prevent the misuse of technology including surrogacy. It has been drafted to provide safe and ethical practice of ART services.\textsuperscript{220} The draft of the Bill was framed firstly in 2008 and it was reframed again in 2010 and yet again in 2013. However, the Bill of 2013 was not made public and treated by governmental officials as highly confidential.\textsuperscript{221} Yet another draft is formulated in the form of Assisted Reproductive Technologies (Regulation) Bill, 2014 which has been made open for the comments and suggestions from general public and stakeholders.\textsuperscript{222} The Bill defines the term ‘surrogacy’ as “arrangements in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, with the intention to carry it and hand over the child to

\textsuperscript{214} Id., para 4.2.2 at 25.
\textsuperscript{215} Id., para 4.2.3 at 26.
\textsuperscript{216} Id., para 4.2.4 at 26.
\textsuperscript{217} Id., para 4.2.5 at 26.
\textsuperscript{218} Id., para 4.2.6 at 26.
\textsuperscript{219} Id., para 4.2.7 at 26.
\textsuperscript{221} Anil Malhotra, “Ending Discrimination in Surrogacy Laws”, The Hindu, at 7, 3rd May 2014 (Saturday).
\textsuperscript{222} Anil Malhotra, “Giving Birth to Dictatorship in Surrogacy”, The Tribune, at 9, 3rd December 2015 (Thursday).
the commissioning couple for whom she is acting as a surrogate. According to the Bill, a ‘surrogate mother’ means “a woman who is citizen of India and is resident of India, agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the commissioning couple that had asked for surrogacy.

The Bill also provides for the definition of ‘surrogacy agreement’. According to the provisions of the Bill it means an agreement between the commissioning couple availing of assisted reproductive technology and the surrogate mother. The Bill also provides the definition of commissioning couple as “an infertile married couple, who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining service’s that the assisted reproductive technology clinic or the assisted reproductive technology bank is authorized to provide.” The Bill defines the term couple as “a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage which is legal in India.” The Bill also provides the meaning of Non Resident Indians (NRI), Overseas Citizens of India (OCI), Persons of Indian Origin (PIO). According to the provisions of the Bill, the surrogacy agreement will be binding between the parties. The Bill prohibits the use of individual brokers or paid intermediaries in a contract of surrogacy.

4.3.4.1 Authorities under the Bill: The Bill provides for the establishment of National Board which shall be a body corporate having perpetual succession and common seal. It is vested with the power of civil court in a suit and proceedings before the board will be treated as judicial proceedings. The board is empowered to take measures to develop new policies in the area of ART and also to assist the state
boards in accreditation and regulation of services of ART clinics and banks.\(^\text{234}\) It is empowered to regulate the duties and responsibilities of counselor for surrogate mother to explore the range of outcomes and possible long term effects and to evaluate the psychological risks and vulnerabilities as well as possible effects of surrogacy on exiting relationship and relationship with her own children.\(^\text{235}\) It is also empowered to put regulation regarding performa, consent and agreement forms for surrogacy.\(^\text{236}\) The Bill also provides for establishment of National registry which will be acting as national data base for all the details of ART clinics and banks.\(^\text{237}\) It has been empowered to inspect any premises using ART even without prior intimation.\(^\text{238}\) The Bill also provides for the establishment of state board for laying down the policies and plans for assisted reproduction in the state.\(^\text{239}\) The Bill also provides for the establishment of registration authority for registration and accreditation of ART clinics and banks.\(^\text{240}\)

### 4.3.4.2 Duties of ART Clinics and Banks: The Bill imposes a number of duties on the ART clinics and ART Banks.\(^\text{241}\) It is the duty of the ART clinic and Bank to ensure that surrogate mother is eligible for undertaking the procedure. It must also be ensured that she is medically examined so that there remains no danger either to commissioning parent or child.\(^\text{242}\) The ART clinics and banks must also ensure that information regarding the surrogate is kept confidential.\(^\text{243}\) The Bill makes it mandatory for the ART clinics to recommend surrogacy only to those couples in whose case it is impossible to carry a baby to the term or otherwise it is unsafe and involves medical complications.\(^\text{244}\) Under the Bill, ART clinics can not obtain or use the sperm or oocyte which is either donated by the relative or known person or friend of the parties seeking ART treatment.\(^\text{245}\) The Bill provides that ART clinics are required to provide professional counseling to commissioning couple about all the

\(^{233}\) Id., section (16).  
\(^{234}\) Id., section (17).  
\(^{235}\) Id., section (17) (2) (e) (iii).  
\(^{236}\) Id., section (17) (2) (h).  
\(^{237}\) Id., section (21).  
\(^{238}\) Id., section (21) (6).  
\(^{239}\) Id., section (22).  
\(^{240}\) Id., section (36).  
\(^{241}\) Id., chapter IV, section 46-51.  
\(^{242}\) Id., section 46 (1).  
\(^{243}\) Id., section 46 (9).  
\(^{244}\) Id., section 46 (10).
implications and chances of success of assisted reproductive technology procedures in the clinic in India and internationally.

The ART clinics are also required to inform commissioning couple of the advantages, disadvantages and cost of the procedures, their medical side effects, and risks including the risk of multiple pregnancies, the possibility of adoption, and any such other matter as may help the commissioning couple arrive at a informed decision.\textsuperscript{246} The ART clinics are also under the responsibility to aware the commissioning couple about the rights of child born through use of ART’s.\textsuperscript{247} The Bill also provides that the clinics must explain to commissioning couple, availability of different treatments and reasons for recommending a particular treatment, and must clearly explain the advantages, disadvantages, limitations and cost of any recommended or explained treatment or procedure.\textsuperscript{248} The Bill also provides for setting up of mechanism for looking in to the complaints by ART clinics and banks.\textsuperscript{249} Further ART clinics are prohibited from giving advertisement for finding a surrogate for the intended parents and it can be done only by the ART bank.\textsuperscript{250} The screening of the surrogate will also be made by the ART bank.\textsuperscript{251} It is also provided by the provisions of the Bill that the surrogate can be compensated financially by the ART bank.\textsuperscript{252} The ART clinics must obtain the written consent of all the parties seeking ART’s.\textsuperscript{253} It is further provided that all the consent forms and agreements shall be in the local language of the parties including surrogate mother so that all have awareness regarding the contents of the consent form and agreements.\textsuperscript{254}

It has also been mandatory for the ART clinics to keep record of all the individuals, couples and surrogates involved in surrogacy contract.\textsuperscript{255} The Bill also provides for proper handling of gametes and embryos by the ART clinics which among other includes non mixing of sperms, foetal reduction in case of multiple pregnancies,

\begin{footnotesize}
\textsuperscript{246} Id., section 46 (12).
\textsuperscript{247} Id., section 46 (6).
\textsuperscript{248} Id., section 46 (7).
\textsuperscript{249} Id., section 46 (8).
\textsuperscript{250} Id., section 46 (13).
\textsuperscript{251} Id., section 46 (16).
\textsuperscript{252} Id., section 52 (1).
\textsuperscript{253} Id., section 52 (7)
\textsuperscript{254} Id., section 47 (1).
\textsuperscript{255} Id., section 47 (5).
\end{footnotesize}
number of oocytes to be placed will be such as are prescribed by national or state board.\textsuperscript{256} The Bill also contains the provisions regarding prohibition of sex selection by the clinics.\textsuperscript{257} The Bill provides that the ART bank will obtain all the information regarding name, identity and address of the surrogate mother and such information must be kept confidential by the ART bank.\textsuperscript{258} It has been made mandatory for the ART clinics to give a detailed periodic report of surrogate mother on whom the procedure has been tried along with possible outcome and complications.\textsuperscript{259} Apart from this, the clinics are under the responsibility to send records of agreement between surrogate mother, commissioning parents and ART clinics to the birth registration authority.\textsuperscript{260} The Bill provides that in case of death or disability of the surrogate, a presumption will be raised against the ART clinic that it has acted negligently.\textsuperscript{261}

4.3.4.3 Rights and Duties in Relation to Surrogacy: A number of rights and duties are provided through the provisions of the Bill in relation to the parties to the surrogacy arrangements.\textsuperscript{262} The Bill provides that the contract entered into between the parties to surrogacy will be legally enforceable.\textsuperscript{263}

4.3.4.3.1 Rights and Duties of the Intended Parents: The Bill makes it obligatory for the intended parents to bear all the expenses including insurance during the pregnancy and after delivery as per the medical advice.\textsuperscript{264} It is the responsibility of the commissioning couple to insure the child and surrogate mother till the child is handed over or till the surrogate is free from all the health related problems due to surrogacy.\textsuperscript{265} It is also provided that if any complications arose to the surrogate during pregnancy and it is likely to be continued till rest of her life, then it should also be appropriately covered with insurance.\textsuperscript{266} The Bill provides that the name of intended

\textsuperscript{255} Id., section 48.  
\textsuperscript{256} Id., section 49.  
\textsuperscript{257} Id., section 51.  
\textsuperscript{258} Id., section 52 (12).  
\textsuperscript{259} Id., section 60 (33) (a).  
\textsuperscript{260} Id., section 60 (33) (b).  
\textsuperscript{261} Id., section 34 (a).  
\textsuperscript{262} Id., section 58.  
\textsuperscript{263} Id., section 60 (1).  
\textsuperscript{264} Id., section 60 (2) (a).  
\textsuperscript{265} Id., section 60 (27).  
\textsuperscript{266} Id., section 60 (2) (b).
parents is to be entered in the birth certificate of the child born through surrogacy.\textsuperscript{267} The Bill makes it a legal obligation for the intended parents to accept the child irrespective of any deformity in the child.\textsuperscript{268} It is also provided that if abnormality is detected during the period of gestation, then it is the responsibility of the commissioning parents to insure the child. Further the arrangements of compensation to the child must be made to overcome exigencies like accidental death of the commissioning parents during or after the delivery of the child.\textsuperscript{269} In case of non acceptance, parents will be liable for an offence. The intended parents are further required to provide a certificate to the surrogate that must clearly mention that she had acted as a surrogate for them.\textsuperscript{270} According to the provisions of the Bill, a couple or the individual can have service of only one surrogate at one time.\textsuperscript{271} The Bill prohibits the simultaneous transfer of embryos in the woman and the surrogate.\textsuperscript{272} The commissioning parents are also required to submit a certificate that child is genetically linked to them and they will not involve the child in any kind of pornography or paedophilia.\textsuperscript{273}

4.3.4.3.2 Rights and Duties of Surrogate: It is provided through the provisions of the Bill that only a woman who is citizen of India can act as surrogate. The ART clinic is under obligation not to send any such woman to a foreign country for the purpose of surrogacy.\textsuperscript{274} The Bill provides that any woman who is between the age of 23-35 years can act as a surrogate.\textsuperscript{275} She can be married, divorcee or a widowed woman.\textsuperscript{276} She is also required to have her own child aged 3 yrs. However, she will not be eligible to act as a surrogate for more than one successive live births and the interval between her own child pregnancy and surrogate pregnancy should be at least two years.\textsuperscript{277} In case the surrogate is married then the consent of her husband is also made

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\begin{enumerate}
\item \textsuperscript{267}Id., section 60 (10).
\item \textsuperscript{268}Id., section 60 (11) (b).
\item \textsuperscript{269} Id., section 60 (11) (c).
\item \textsuperscript{270}Id., section 60 (20).
\item \textsuperscript{271}Id., section 60 (23).
\item \textsuperscript{272}Id., section 60 (24).
\item \textsuperscript{273} Id., section 60 (17) (b).
\item \textsuperscript{274}Id., section 60 (25).
\item \textsuperscript{275}Id., section 60 (5). Also see Aditi Tandon, “Draft Law to Regulate Surrogacy Finalized”, \textit{The Tribune}, at 24, 14\textsuperscript{th} July 2012 (Saturday).
\item \textsuperscript{276}Aditi Tandon, “Draft Bill Bars Foreigners from Hiring Surrogates in India”, \textit{The Tribune}, at 10, 23\textsuperscript{rd} October 2015 (Friday).
\item \textsuperscript{277}Supra note 223, section 60 (5) (a).
\end{enumerate}
mandatory through the provisions of the Bill. It is provided that Aadhar card will be used as a proof of identity of surrogate mother. It is also provided that he will take care of the well being of the child during surrogacy agreement and till the surrogate is not free from the obligations of the surrogacy agreement.

The Bill also provides that the surrogate mother will not act as oocyte donor for the couple or the individual for whom she is undertaking surrogacy. She must be medically examined for any disease as it can pose a danger to the child. It is obligatory on the part of surrogate to declare in writing that she has not received blood transfusion for last 6 months. The surrogate has to register as a patient in her own name and medical facility provided to her should clearly declare that she is serving as a surrogate mother. Further the names, addresses of the parents or couple for whom she is serving as surrogate must also be declared along with the copy of the agreement. The Bill provides that in case of failure of first embryo transfer, the surrogate can again go for another embryo transfer on the basis of financial terms mutually decided between the parties. However, no surrogate is allowed to undergo embryo transfer more than three times for the same couple. A surrogate is bound not to engage in any act which could harm the fetus including unprotected sex during the pregnancy or till the child is handed over to the intended parents.

The Bill also provides the details of certain acts that can harm the fetus like surrogate mother shall not have drug intravenously administered into her through a shared syringe, surrogate mother shall not undergo blood transfusion without medical supervision and guidance, and surrogate mother should not accept blood from any source except from certified blood bank, surrogate mother and her husband must not have extra marital relationship during the gestation period. The Bill provides for the giving of appropriate compensation to the surrogate. It is also provided that the appropriate compensation must be paid to the surrogate in case of her death or disease.

278 Id., section 60 (19) (a).
279 Id., section 60 (32).
280 Id., section 60 (19) (b).
281 Id., section 60 (17) (a).
282 Id., section 60 (6).
283 Id., section 60 (8).
284 Id., section 60 (9).
285 Id., section 60 (26).
286 Id., section 60 (26) (a), (b) (c), (d).
due to pregnancy.\textsuperscript{287} It is further provided that the life of the surrogate must be protected over the unborn child at the time of delivery and in such a case she must be provided with full amount of compensation as agreed between the parties.\textsuperscript{288} The Bill makes it mandatory for the surrogate mother to relinquish all the rights in relation to the child after delivery.\textsuperscript{289}

4.3.4.4 Requirements in Case of Foreign Parents Seeking Surrogacy: The Bill specifically provides about the requirements in case the surrogacy arrangements are undertaken by the Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen. The Bill provides that foreigners will not be allowed to undertake surrogacy in India.\textsuperscript{290} It is required that Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen must be married and the marriage should have sustained at least for two years.\textsuperscript{291} They are required to obtain the requisite prior permission from the FRRO/ FRO concerned for commissioning surrogacy.\textsuperscript{292} They are also required to submit a certificate conveying that the woman is unable to conceive their own child and the certificate must be attested by the appropriate government authority of that country. They are also required to appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy, till the child is delivered to the commissioning couple or the local guardian.

Further they are required to produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother.\textsuperscript{293} They are also required to produce an undertaking that they will take care of the child born through surrogacy.\textsuperscript{294} They must ensure and establish to ART clinic through a letter either from the embassy of the country in India or from the appropriate Government Authority, that the child born through surrogacy in India will be permitted entry in the
country as a biological child of the commissioning couple and that they are able to take the child born through surrogacy.\textsuperscript{295} The Bill requires Medical Visa for surrogacy (MED-S) in case surrogacy is commissioned by a foreigner who is married to an Indian citizen.\textsuperscript{296} The Bill also provides for the situation where such commissioning parents fail to take delivery of the child born through surrogacy. In such a situation, the Bill provides that it will be the legal obligation of the local guardian to take delivery of the child. It is further provided that the local guardian is also free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one month of the birth of the child.\textsuperscript{297} However, during the transition period, the local guardian is responsible for the well-being of the child.\textsuperscript{298}

The Bill also advocates the formulation of appropriate guidelines regarding the duties, responsibilities and other related issues of the local guardian.\textsuperscript{299} It is further provided that the Insurance agency will be responsible for the well being and maintenance of the child till twenty one years as per the coverage of the insurance in the agreement.\textsuperscript{300} The Bill also provides for giving appropriate penalty to such commissioning couples who commissioned surrogacy in India and failed to take the custody without any genuine reason.\textsuperscript{301} It is provided that the treatment should be done only at one of the registered ART clinic which is recognized by the National Registry and Indian Council of Medical Research.\textsuperscript{302} They also require exit permission from the FRRO/FRO concerned for the child born through surrogacy before leaving India.\textsuperscript{303} They are further required to carry a certificate from ART clinic that the child’s custody is taken after fulfilling all the liabilities towards the Indian surrogate.\textsuperscript{304} It is provided that a copy of the Birth Certificate of the surrogate child will be retained by the Foreigners Regional Registration Officer/ Foreigners

\textsuperscript{295} Id., section 60 (21) (b).
\textsuperscript{296} Id., section 60 (12).
\textsuperscript{297} Id., section 60 (21) (c) (i).
\textsuperscript{298} Id., section 60 (21) (c) (i) (a).
\textsuperscript{299} Id., section 60 (21) (c) (i) (b).
\textsuperscript{300} Id., section 60 (21) (c) (i) (c).
\textsuperscript{301} Id., section 60 (21) (c) (i) (d).
\textsuperscript{302} Id., section 60 (21) (c) (i) (e).
\textsuperscript{303} Id., section 60 (15).
\textsuperscript{304} Id., section 60 (21) (c) (i) (g).
Registration Officer along with photocopies of the passport.\textsuperscript{305} The Bill also provides that if the child is given in adoption to an adoption agency, he will be allowed to claim the provisions of the Indian Citizenship Act, 1955 in respect of matters relating to Indian citizenship.\textsuperscript{306} The Bill provides that the minimum compensation which is to be paid to a surrogate mother by an Overseas Citizen of India, People of Indian Origin Cardholder, Non Resident Indians and foreigner married to an Indian citizen will be different than the amount paid by an Indian commissioning couple.\textsuperscript{307}

4.3.4.5 Status of Child Born through Surrogacy: The Bill declares that the child will be the legitimate child and will have all the rights alike legitimate child.\textsuperscript{308} In case the child is born to the married couple, he will be deemed as born with in the wedlock. In case the child is born to ever married or divorced woman, then also he will be presumed as a legitimate child for all the purposes.\textsuperscript{309} It is also provided that the birth certificate of the child must also show intended parents as his parents.\textsuperscript{310} However, the Bill provides that if the child is born to the Overseas Citizen of India, People of Indian Origin or foreigner married to an Indian citizen as intended parents, then he will not be treated as Indian citizen.\textsuperscript{311} The Bill further provides that the child has the right to ask for any information regarding his birth on attaining the age of eighteen years.\textsuperscript{312} However, it will not include personal identification of the surrogate except in case of life threatening disease. The information can only be obtained after the consent of the surrogate mother.\textsuperscript{313}

4.3.4.6 Anomalies in the Bill: Even though a number of arrangements are made in the Bill regarding the interest of the parties involved, yet there are enough gaps in the present Bill that need to be addressed before it takes the shape of a law.

- The Bill restrains the foreigners from undertaking surrogacy. However, surrogacy is allowed to overseas citizens of India, persons of Indian origin, foreigners married to Indian women which is discriminatory in nature.
• The Bill declares that the payment can be exchanged between the surrogates on the one hand and the intended parents on the other. However, the Bill does not specify the minimum and maximum limit of compensation to be provided to the surrogate. The Bill only mentions that appropriate formula and mechanism will be developed under rules for payment of compensation to the surrogate in different stages.\textsuperscript{314} What is the formula and how it will be developed is not yet clarified.

• The Bill does not mention a situation where the surrogate after pregnancy refuses to carry the child without any reason. In this case the question arises whether the compensation should be paid to her or not. If it is to be paid then what will be the extent of compensation. Whether in this situation the contract can be specifically enforced. Whether she can be forced to give custody of the child or not. All these questions are left unaddressed in the provisions of the Bill.

• The Bill on the one hand mentions that the commissioning parents are bound to provide insurance to the surrogate until the child is delivered to them.\textsuperscript{315} On the other hand, the Bill provides that the insurance if it is applicable in a particular case of surrogacy has to be borne by the commissioning parents.\textsuperscript{316} Thus there is a contradiction to the extent that whether the insurance is required to be paid to the surrogate or it is dependent on the discretion of the commissioning parents to provide the same.

• The Bill specifically provides for counseling to the commissioning parents about all the complications, side effects, risks, possibilities of adoption etc.\textsuperscript{317} It also provides for a detail explanation to the commissioning parents regarding the details of all the treatments which can be availed by the commissioning parents.\textsuperscript{318} However, the Bill do not mention any provision for counseling of the surrogate. Thus Bill presumes the informed consent on the part of the surrogate. However, the informed consent can not be presumed from the side of the surrogate. Firstly, the surrogate is not able to understand the medical processes until and unless it is explained by the doctors or experts.

\textsuperscript{314} Id., section 60 (3) (a) & (b).
\textsuperscript{315} Id., section 60 (27).
\textsuperscript{316} Id., section 60 (2) (a).
\textsuperscript{317} Id., section 46 (6).
\textsuperscript{318} Id., section 46 (8).
As the Bill imposes no duty of the clinic to give any details of the procedures to be used on the surrogate, it can lead to undue harassment of the surrogate on whom different medical techniques can be examined by the clinics in consonance with commissioning parents. Secondly, the provisions of the Bill provide that any woman who is married or ever married and also have her own child can act as a surrogate. In both cases informed consent can not be presumed on the part of the surrogate. If she is married and have her own children, then also the informed consent can not be presumed as each pregnancy is different from the other. One can not presume the same kind of pregnancy every time i.e. if first pregnancy was without any complications, it can not be presumed that other will also be without any complication.

- The draft Bill provides some contradictory provisions in relation to protecting the anonymity of the surrogate. On the one hand, it provides that all the information regarding the surrogate must be kept confidential by ART clinic as well as ART bank and should not be disclosed to any person. However, on the other hand, the Bill states that she has to register herself as a patient in her own name and must specifically mention that she is serving as a surrogate. Other provisions of the Bill provide that the intended parents have to certify that the surrogate mother has provided service to them. Moreover, the agreement of surrogacy is also to be made between the commissioning parents and surrogate in which all the personal details has to be disclosed by the surrogate.\(^{319}\) The provisions in relation to appointment of local guardian in case of overseas citizen of India, people of Indian origin or foreigner married to an Indian citizen undertaking surrogacy arrangements are also in contradiction to provisions of maintaining confidentiality in relation to surrogate.

- The provisions of the Bill provide that the surrogate will not carry more than three successful embryo transfers for the same couple.\(^ {320}\) However, the Bill does not mention the number of couples for whom she can carry embryo transfer.

\(^{319}\) Id., section 60 (1).

\(^{320}\) Id., section 60 (9), Also See Kamaljit Kaur and Jishnu M. Nair, “Women’s Right to Reproductive Health: Socio- Legal Critique on Surrogacy with Reference to Union Territory Chandigarh”, 2012 RLR (1) 12, 109-124 at 121.
• The Bill lays more emphasis on rights of the commissioning parents as compared to rights of the surrogate or the child. The Bill provides that surrogate has to relinquish the custody of child to commissioning parents after the birth. The Bill further requires the surrogate mother not to get too involved with the baby in her body. In doing so the Bill ignores the right of physical and psychological attachment of the surrogate with the child. Moreover, the Bill also ignores the child’s right to breast feeding and bonding with the surrogate mother even though she is not genetically related to the child. Breast Milk is considered as an ideal food for infants as it provides numerous benefits such as nutrition as well as immunity against different diseases.

• The Bill provides that if the surrogacy is adopted by overseas citizen of India, people of Indian origin or foreigner married to an Indian citizen, they have to take the custody of the child irrespective of the deformity of the child. However, the other provision of the Bill mentions that if they fail to take custody then the local guardian will be under obligation to take the custody of child. Further it is provided that after taking custody, the local guardian is free to give the child in adoption. Thus there is contradiction in these two provisions and it also undermines the rights of the child as custody in such case will go to adopted parents not the intended parents. The Bill also prescribes penalty for the commissioning parents if they have not taken custody of the child. However, the penalty can be imposed only when there is no justifiable reason for refusal to take custody. Further the insurance agency is made bound to take care such child till the age of 21 yrs. Thus the burden is shifted from commissioning parents to local guardian and insurance agency which is not correct.

• The Bill has neither designated nor authorized or proposes to create any court or judicial forum to resolve the issue that may require adjudication in the problems arising out of surrogacy contract except for the offences mentioned.

322 Imrana Qadeer, “Benefits and Threats of International Trade in Health: A Case of Surrogacy in India”, Global Social Policy, 10 (3) 302-05 at 304 (2010).
324 Supra note 223, section 60 (11) (b).
325 Id., section 60 (11) (c).
in the provisions of the Bill. The Bill provides for the establishment of national and state boards and registration authority for the purpose of putting regulation on the ART clinics and ART banks. However, these authorities are not competent to determine the issues of nationality, citizenship, grant of passport or visa and the problem of disputed parentage or custody of the child.

4.3.4.7 Suggestions for Improvements in the Bill

- The Bill does not mention the minimum and maximum amount of compensation that should be provided to the surrogate. The Bill should fix the minimum and maximum limit of compensation to be given to the surrogate.

- The Bill is providing about maintaining confidentiality in relation to surrogate and the contract entered into by different parties with the surrogate. However, there is a need of transparency in the surrogacy contract in order to make this arrangement morally acceptable. Thus it should not be unduly kept confidential as to how the contract has been entered into and performed between the parties. Thus instead of maintaining confidentiality, the Bill must provide for transparency.

- The Bill makes no provision in regard to cost for the treatment undertaken by infertile individual or the couple in their clinic. However, it is generally seen that clinics have fixed different charges for the same treatment on the false pretext of more success rates in their clinic. It leads to undue exploitation of the infertile couple who has to bear the burden of paying more in order to get more success rate for the birth of a child with the help of clinic. So the Bill must provide for fixation of maximum limit of the amount for the purpose of specific treatment given to individual or couple for each clinic undertaking ART services.

- The Bill must contain the provisions for knowing the background and economic status of the intended parents in order to ascertain the welfare of the child.

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326 Id., section 60 (11) (c) (i) (c).
327 Id., section 71, Also See Y.F. Jayakumar, “Socio- Legal Aspects of Surrogacy in India”, IJLJ, 1 (2) 86-102 at 100 (2012).
328 “Proposed Bill Needs to Address Gaps”, The Tribune, at 13, 25th February 2012 (Saturday).
• The Bill must specifically mentions about giving counseling to the surrogate regarding the undertaking of surrogacy, medical procedures to be adopted by the doctors or experts, any risks of pregnancy etc.
• Some specific amount of insurance to the surrogate must be mentioned in the Bill and it must made compulsory to pay the same in all the cases of surrogacy.
• The Bill must make it mandatory for the all the commissioning parents to take custody of the child born through surrogacy agreement.
• The Bill must be specifically clear about the issue of disputed parentage, citizenship, custody and rights of succession of the child.
• The Bill should specify the enforceability of the contract in different situations like denial by the surrogate in handing over the child, refusal by parents for taking custody of the child, dispute in relation to financial transactions. For this purpose the Bill must designate judicial authority for resolving the dispute between the parties to the surrogacy arrangement.
• The Bill must recognize the child’s right to breast feed and nutrition and must make necessary provisions so that his right is not violated.

Thus taking in to account the recent situations and happenings in the area of surrogacy arrangements, it is required that immediately a law should come in to existence. However, the Bill which is to become law must incorporate all the suggestions given by different authorities and experts. The law must take in to account the welfare of all the parties. It must also consider all the legal aspects and consequences of surrogacy arrangements. Moreover, instead of maintaining confidentiality, there is a need for transparency in the surrogacy contracts. If the confidentiality is maintained, the unlawful practices and undue profits made by ART clinics could not be curbed. It will lead to more and more exploitation of the parties involved especially the surrogate. Moreover, transparency will help in changing mind set of society towards surrogacy arrangements. In that situation surrogacy will become legally and socially acceptable arrangement.