In India Surrogacy is ungoverned by any laws. In the year 2009, Law Commission Report has stressed the need to regulate ART clinics. Advocate Piyush Jain, who handles Surrogacy-related cases, said a proper law should be in put in place to deal with issues arising out of this Assisted Reproductive Technology (ART). Though, Surrogacy is adopted by many reputed Institutions as a practice and the field is gaining momentum both economically and qualitatively in India but still it is unregulated. In this chapter the researcher has thrown light on the Social Scenario of Surrogacy in India. Now let’s us study the Legal Scenario of Surrogacy in India and the world in the next chapter.

CHAPTER V
LEGAL STAND OF SURROGACY IN
INDIA & THE WORLD

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fter Business Process, Knowledge Process and Legal Process Outsourcing, Genetic Pool Banks are the latest Outsourcing industry in India. The Neo Assisted Reproductive Technique “Surrogacy” can be termed as Outsourcing of Motherhood especially in reference of India. Surrogacy is that kind of an arrangement where a single parent or a childless couple takes the services of a woman to carry and delivers a child for them. The reasons of picking it as an option may vary. In the same manner as a number of other infertility treatments, Surrogacy is another wonderful chance for childless parents to fulfill their dream of completing their family.

In the past, Surrogacy arrangements were generally confined to kith and kin of close relatives, family, or friends, usually as an altruistic deed. But, with the introduction of
financial arrangements in the process, Surrogacy has extended its network beyond family, community, state, and even across the country. The concept of Surrogacy has turned a normal biological function of a woman’s body into a commercial contract. Surrogate services are advertised. Surrogates are recruited, and operating agencies make huge profits. Surrogate Mother’s have been called “Baby Factories,” conjuring up images of poor, illiterate women packed into bunks and forced by their husbands to bear Surrogate children for Westerners.

The Commercialization of Surrogacy has raised fears of a black market and of baby selling and breeding farms; turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product. An experience show that has with any other commercial dealing, the customer lays down his/ her conditions before purchasing the goods. And hence, the legal aspects surrounding Surrogacy have become very complex, diverse and are mostly unsettled. In most of the countries world over, the woman giving birth to a child is considered as the Child’s legal mother. However, in very few countries, the Intended Parents are be recognized as the legal parents from birth by the virtue of the fact that the Surrogate has contracted to give the birth of the Child for the Commissioned Parents.

India is one country amongst the few, which recognize the Intended/ Commissioning Parent/s as the legal parents. Many states now issue pre-birth orders through the courts placing the names of the Intended Parents on the birth certificate from the start. In others the possibility of Surrogacy is either not recognized, all contracts specifying different legal parents are void, or is prohibited. Thus, jurisdictions in various countries have held different views regarding the Legalization of Surrogacy. Under this Chapter the researcher has tried to elaborate the Legal Scenario of Surrogacy in India and the World.

INTERNATIONAL LEGAL SCENARIO

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While instances of Commercial Surrogacy have raised by leaps and bounds, its regulation or rather non-regulation has been a matter of concern. Within this flourishing market, even as clinics and other players continue to make huge profits, there are several ethical concerns that arise out of the increasing commercialization of women’s bodies and bodily labor; this includes concerns about the health and rights of the Surrogate and the child/children born out of Surrogacy.

There are currently a variety of approaches to Surrogacy globally. Responses to Surrogacy are, however, somewhat in a state of flux: several nations have introduced legislation recently and several others have bills currently under consideration. However, despite this, there are distinct identifiable policy approaches amongst various Nations and, within these, many similarities in terms of Legislation and Judicial trends can be seen.

Given such a context, the need for a comprehensive legal framework cannot be overemphasized. This is particularly evident in cases involving legal tussles about the citizenship status of children born through Transnational Surrogacy arrangements. Following are the joint initiatives taken by various International bodies to regulate Surrogacy universally.

**International Initiatives**

International Initiatives include various Conventions, Treaties, Multilateral instruments and Declarations signed by different countries jointly to regulate and check the flourishing business of baby selling. Further it incorporates various researches undertaken by International Universities to study the impact and Social utility of Surrogacy which is fruitful in making Legislative enactments.
The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993

At first sight the 1993 Hague Intercountry Adoption Convention would appear to be an ideal Instrument,\(^1\) with a few adaptations, to regulate International Surrogacy arrangements. Indeed it has been reported that where there is no provision for bespoke parental orders, adoption orders can be made as if the arrangement were an Intercountry adoption. However, the Hague Conference has noted the following problems arising making the 1993 Convention an inappropriate vehicle for International Surrogacy arrangements:

- Article 4(c)(3) states that commercial adoptions are prohibited under the Convention;

1 \(\text{http://www.hcch.net/index_en.php?act=conventions.text&cid=69}\)

- Article 4(c)(4) states that the consent of the mother must be given after the birth of the child. In Surrogacy cases the Surrogate mother will often have given her consent before the child has even been conceived;

- Article 4(b) sets out the Subsidiary Principle, namely that consideration must be given to the possibility that the child may be placed in the state of origin; this will not apply to many Surrogacy cases, particularly international cases.

- Article 29 sets out a general rule that there should be no contact between prospective adopters and the child’s parents; this is unlikely to be workable in Surrogacy cases as contact will have to take place when the Surrogacy arrangement is entered into and when any reproduction process or treatment takes place.

The 1996 Convention could also potentially be an appropriate vehicle for regulating being broadly accepted internationally. However, Article 4(a) the Convention specifically excludes from its scope “the establishment or contesting of a parent-child relationship”. It would be unlikely for such a fundamental provision of the Convention to be renegotiated, not least because of the likely dispute between state parties any proposed alteration would cause.

A Written Declaration by Council of Europe

A Written Declaration on Surrogate Motherhood by Council of Europe Signed by the Parliamentary Assembly which affirms that Surrogate Motherhood is incompatible with the dignity of the women and children concerned and is a violation of their Fundamental

\[\text{\textsuperscript{2} Id.}\]

Rights considering various other Conventions. The Signatories to the Declaration are Italy, Spain, Ukraine, France, Bulgaria, France, Republic of Moldova, Russian Federation, Croatia, Liechtenstein, Greece and Lithuania.\[\text{\textsuperscript{3}}\]

The Brussels II Revised Regulation, 2003

Harmonization within the European Union could be a positive first step towards a Global system of regulation. But it is doubtful whether this can be achieved through the Brussels II Revised Regulation.\[\text{\textsuperscript{4}}\] The Tenth Preamble states that the regulation is not concerned with issues of parenthood “nor to other questions linked to the status of persons.” Although the Regulation may be of some use in resolving disputes as to parental responsibility, it will not assist in resolving the wider disputes about parentage which can arise in Surrogacy cases.
The Hague Conference on Private International Law

The Hague conference on Private International Law begun to focus on the issue of International Surrogacy arrangements in 2010, in particular the status of such arrangements under Private International Law and the status of children born through International Surrogacy arrangements.


The issue was addressed in June 2010 at a meeting of the Special Commission on the practice and operation of the **Hague Child Protection Convention 1993**. The Special Commission noted that the number of International Surrogacy arrangements was on the increase. It also noted, however, that the 1993 Child Protection Convention would not be appropriate for regulating International Surrogacy cases. It recommended that the Hague Conference on Private International Law carry out a further study of the legal, especially the Private International Law issues surrounding International Surrogacy.

Work of the Council of Europe

An ‘Instruct’ was drafted by the Council of Europe to cover the rights and legal status of children and parental responsibility. It includes provisions relating to legal parentage in the context of medically assisted reproduction. The European Union is currently considering the possibility of facilitating the creation of simple status documents within in the EU for the recognition of legal parentage between EU member states. Research papers have suggested that the work should extend to Surrogacy arrangements; it may well be that the status documents provide a mechanism for the effective recognition of the rights of parents involved in Surrogacy arrangements.

Research by the University of Aberdeen “International Surrogacy Arrangements: An Urgent Need for a Legal Regulation at the International Level” (the Aberdeen Model)

_in July 2010, the Nuffied Foundation awarded a grant to Professor Paul Beaumont and Dr. Katarina Trimmings to conduct a study into private international law aspects of international surrogacy arrangements._ The ultimate goal of the research was to explore possible types of International regulation of Surrogacy arrangements, and to prepare a document that could assist in the process of preparation of a possible future International Convention on Surrogacy. The project was carried out in collaboration with the Hague Conference on Private International Law.

Laws of Various Countries
As the use of Surrogates has become more prevalent, Courts and Legislatures have been challenged by the legality of Surrogacy agreements. The majority of countries worldwide have yet to establish legislation regulating Surrogacy, but in the past two decades there has been an increase, mostly among common law jurisdictions, in the regulation of Surrogacy. Of the few countries that have legislation regulating Surrogacy, several, including Germany and Italy, prohibit all forms of Surrogacy.

In a developed country like the UK no contract or Surrogacy agreement is legally binding. In most states in the US, compensated Surrogacy arrangements are either illegal or unenforceable. In some states in Australia, arranging Commercial Surrogacy is a criminal offence and any Surrogacy agreement giving custody to others is void.

In Canada and New Zealand, Commercial Surrogacy has been illegal since 2004, although Altruistic Surrogacy is allowed. In France, Germany and Italy, Surrogacy, Commercial or not, is unlawful. In Israel, law only accepts the Surrogate mother as the Real mother and Commercial Surrogacy is illegal.

It is important here, to know that there is no National Policy regarding Surrogacy. Each state has come up with their own legal approach to this relatively new method of procreation. The laws vary from making Surrogacy contracts enforceable to criminalizing all forms of Commercial Surrogacy. In general many of the laws have been the result of cases, which have gone to courts, which has left judges to essentially write the laws with each ruling. Those laws usually are designed to protect women from exploitation and tend not to hold Genetic Fathers in the same regard as Birth Mothers. The cases shaping laws today tend to address the issue of whether a contract can be binding? Can a woman sign a contract regarding custody of a child not yet conceived with informed consent? Can
payment be made to a woman for reproductive services but not the final product of a Surrogacy? These questions are legally and morally baffling at best and so while legislature tries to keep up with the ever changing reproductive needs of its citizens many states are left with laws which require parents to adopt their own genetic child and other such actions which at first glance seem to make little sense.

Many states regulations are similar to their State’s Adoption Laws which are set up to protect Birth Mothers and prevent baby selling which is illegal in the many states. Those involved in Surrogate arrangements in those states define their financial reimbursement to the Surrogate as paying for the living and pregnancy expenses as permitted in adoption. Other states flat out prohibit Commercial Surrogacy, allowing only a Surrogate mother’s medical expenses to be paid for by the Intended Parents. There are states where Surrogacy is permitted by strictly defined in terms of custody and little to no reference of financial reimbursement is made. In most states Surrogacy is neither legal nor illegal. It is important to note the just because you may live in a state that lacks Surrogacy friendly legislatures that does not mean you may not partake in a Surrogacy arrangement legally. The laws regarding a Surrogacy depend on the state in which the birth takes place and how those laws are interpreted. At the time when the researcher was working on this chapter of thesis, several states as well as many foreign countries, were addressing their laws regarding Surrogacy. For this reason, it is impossible to define each country’s state law, because they are ever changing and new interpretations of law’s broad language are being made each month.

To avoid any misrepresentation to the readers, I should make it amply clear that the researcher has toiled endlessly and tried her best to equip the readers with the latest laws but it is for sure that out of them many will be outdated by the time readers will read this section. I have provided articles written about particular State’s Surrogacy Laws as per my latest research. Following are the laws relating to Surrogacy of various countries which are relatively accurate when written but can be outdated when read as frequent changes are
being made to them. The laws on Surrogacy vary markedly between different countries - and even within individual countries - in a murky system that can leave children and mothers vulnerable, particularly those in poorer countries. Here’s a look at the Legal Enactments in some Countries.  

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**ARKANSAS**

Under Act 647, through traditional arrangement, Arkansas allows the biological father and his wife to be the legal parents of the child even if the wife is genetically unrelated to the child. Even the father’s single or unmarried status is not an issue. As far as a single woman’s legal rights over the child are concerned, she can also be the legal mother if the child was conceived from unknown donor sperm.

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**AUSTRALIA**

Australia allows for individual state regulation of Surrogacy. Australia battled with social eruptions over Kirkman sisters case in Victoria, popularly known as ‘My Sister Baby’. This had sparked much community and legal debate & soon Australia states attempted to settle the legal complication in Surrogacy. Australia's first National Governmental inquiry into the issue of Surrogacy ended in 1985 and resulted in a Family Law Council recommendation that Australia adopt uniform legislation prohibiting Commercial Surrogacy.

Before National Legislation could be written, a second Governmental inquiry into the issue of Surrogacy was conducted, resulting in the National Bioethics Consultative Committee recommending National Legislation to permit, but regulate, Altruistic Surrogacy arrangements. Despite this recommendation, the Reproductive Technology Working Group, established by the Australian Health Minister's Advisory Committee, recommended...
that the states and territories prohibit Surrogacy and make all contracts for Surrogacy void through their own legislation.12

As a result, the Seven Australian states and territories have sought to develop and, in some cases, have adopted legislation regarding Surrogacy.13 At the time this note was written, the Standing Council of Attorneys-General had started a new initiative to harmonize the various Surrogacy laws.14 Whether it will be more successful in creating a uniform set of laws than the earlier efforts is yet to be seen.

10 Suzanne Harrison, *State Kidding Itself*, GOLD COAST BULL., July 27, 2007, at 27 (noting that residents in Queensland, where surrogacy is illegal, can “shop around for a state where surrogacy is legal” and discussing various state laws and federal initiatives).

11 Id. The issue of surrogacy was referred to the National Bioethics Consultative Committee by the Health and Social Welfare Ministers in May 1988, and the Committee's proposal for national legislation was completed in 1990. Id.

12 The Reproductive Technology Working Group's proposal was adopted by the Australian Health and Social Welfare Ministers in March 1991 with the suggestion that it be uniformly adopted by all Australian states and territories but uniform adoption has not yet occurred. Id.


- **Queensland**

Of the current state laws regarding Surrogacy, Queensland's law is the most controversial. *Under Queensland's Surrogate Parenthood Act of 1988, all forms of Surrogacy, Altruistic or Commercial, are prohibited*14 Furthermore, under the Act, a resident of Queensland can face a penalty of $10,000 or three years in prison for entering into a Surrogacy arrangement in Queensland,15 or for traveling to another state or nation and entering into a Surrogacy agreement.16 The Surrogate Parenthood Act prohibits any advertisements for Surrogacy and states that all contracts for Surrogacy are void.17 In 2008, a Queensland Parliamentary Select Committee recommended the decriminalization of Altruistic Surrogacy.18 The Queensland Government has not yet responded to the Committee's recommendations.19 If Queensland were to adopt the Committee's recommendation, it would move closer to the views held by the other Australian States.

- **Victoria**
While Victoria was the first state to introduce legislation dealing specifically with Surrogacy, that first statute has been replaced by the current Infertility Treatment Act of 1995. The Infertility Treatment Act of 1995 is slightly less harsh than the Queensland statute. Like Queensland, Commercial Surrogacy in Victoria is a crime and those who enter into commercial arrangements can be criminally penalized.

But because the 1995 Act only forbids Commercial Surrogacy and advertisements for Surrogacy, it passively permits Altruistic Surrogacy arrangements in some limited circumstances. These circumstances are so limited, however, that it makes certain types of Altruistic Surrogacy virtually impossible. Specifically, the 1995 Act prohibits a woman from undergoing In-Vitro Fertilization unless she is "unlikely to become pregnant"; in other words, she must be infertile.

Because most Surrogate Mothers are not themselves infertile, the Act forbids potential surrogate mothers from receiving In-Vitro Fertilization thus eliminating their ability to serve as Surrogates, unless they are willing to use more traditional forms of insemination. In December 2008, the Victorian legislature passed a new law that addresses these concerns.

While the Assisted Reproductive Treatment Act 2008 still prohibits Commercial Surrogacy and dictates that all such Surrogacy contracts are void, it allows the payment of specific payments, like medical or legal expenses.
Further, the law no longer requires that the Surrogate Mother be infertile, but rather the Intended mother must be infertile. Critics of the new law note that it fails to require Surrogate Mothers to have previously given birth before she may serve as a Surrogate. The Assisted Reproductive Treatment Act 2008 becomes effective on January 1, 2010.

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23 See Infertility Treatment Act, 1995, § 20 (Vic.) (providing the limited circumstances wherein donor procedures may be used);


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**Tasmania**

Tasmania's Surrogacy Contracts Act of 1993 prohibits Commercial Surrogacy but does not mention Altruistic Surrogacy arrangements. However, all Surrogacy contracts, regardless of whether they form Commercial or Altruistic Surrogacy arrangements, are void and unenforceable. The Act also prohibits third parties from arranging a Surrogacy contract and prohibits third parties from providing professional services to achieve a Surrogate pregnancy. Recent recommendations to amend the Surrogacy Contracts Act of 1993 have been proposed and include prohibiting third party professional services other than legal, medical, and psychological services. The proposal would also allow for the Family Court to supervise and sanction lawful, albeit unenforceable, Surrogacy contracts. The legislature has not yet taken action on any of these recommendations.

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**South Australia**
Similar to other Australian states’ legislation, South Australia’s Family Relationships Act of 1975, as amended, distinguishes between Commercial and Altruistic Surrogacy, allowing Altruistic Surrogacy while prohibiting Commercial Surrogacy. The South Australian Act does not penalize the immediate parties to a Surrogacy arrangement, but it does make third-party involvement in Surrogacy arrangements an offense. Additionally, South Australia’s Act provides that the woman who gives birth to the child, not the egg donor, is the child’s legal mother. Likewise, sperm donors other than the childbearing woman’s husband are not to be considered the child’s legal father.

Thus, gaining legal rights to the child born under a Surrogacy arrangement is difficult for the Intended Parents. Clinics in the Northern Territory operate under South Australia’s guidelines and legislation with the exception that only married or de facto infertile couples can access infertility treatments in the Northern Territory.

**New South Wales**

In December 2007, New South Wales (NSW) passed a law regulating Surrogacy, the Assisted Reproductive Technology Act 2007. While the Act is not currently in force, it will continue the general Australian trend of banning Commercial Surrogacy and advertising Surrogacy, but it permits Altruistic Surrogacy. Similarly, the Act makes all Surrogacy agreements void. Until this Act is put into force, NSW will be governed by guidelines established by the National Health and Medical Research Council, "a Commonwealth statutory authority." Although NSW does not have legislation currently in force, the Status of Children Act 1996 presumes that the woman who gave birth to the

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child is the child's mother even if another woman's egg was used to conceive the child, thus making it difficult for the Intended mother to gain legal rights to the child born under a Surrogacy arrangement.

- **Western Australia**

In December of 2008, Western Australia passed the Surrogacy Act. While currently not in force, the Surrogacy Act is expected to enter into force in 2009.

Under the Surrogacy Act, Commercial Surrogacy is prohibited, but Altruistic Surrogacy is allowed. In line with the regulations, a person may advertise or publish stories seeking a person to enter into an Altruistic Surrogacy arrangement. Further, the Altruistic Surrogate may be compensated for reasonable expenses including medical costs, earnings lost due to maternity leave, psychological counseling costs, or the premium payments for related insurance claims. While Surrogacy contracts are unenforceable under the Act, the law does allow for the reimbursement and payment of costs agreed to in the agreement. The Surrogacy Act also allows the court to issue orders of parental status for Intended Parents. Under the Act, the best interests of the child are the primary consideration when ordering parental status. However, the Act establishes a presumption that it is in the "best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary.

- **Australian Capital Territory**

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In 2004, the Australian Capital Territory (ACT) passed the Parentage Act 2004,\textsuperscript{52} which "provides for the parentage of children and for the regulation of substitute parentage agreements in the Act."\textsuperscript{53} These substitute parentage agreements are essentially Surrogacy contracts. Under the Parentage Act, Commercial Surrogacy is banned.\textsuperscript{54} Various restrictions are placed on Altruistic Surrogacy and it is only available in "very limited circumstances." While these ACT regulations ensure that the Intended Parents' rights to the child are protected by requiring a genetic link between one Intended Parent and forbidding a genetic link with either of the birth parents, the requirement of a genetic link with one intended parent prevents couples who both suffer from infertility from using Surrogacy as an option for having a child.

\begin{itemize}
  \item \textit{Federal Law}
\end{itemize}

While Surrogacy is currently governed by the individual state legislatures, Australia's Family Law Act provides that if state laws do not provide otherwise, the child is legally the Intended Parent's child at birth. Thus, the Australian Federal Government has exclusive jurisdiction between the birth of the child and the adoption of the child by the Intended Parents.\textsuperscript{55} However, under the current version of the Family Law Act, Intended Parents do not meet the definition of a parent and cannot be recognized as parents unless they complete the adoption process. Furthermore, under Federal Australian law, the Intended Parents cannot automatically become the child's legal parents because the woman who bears the child is the legal mother.\textsuperscript{56} Additionally, in cases where In-Vitro Fertilization is used, the husband or partner of the childbearing mother is considered the legal father if he consented to the use of In-Vitro Fertilization. If the husband or partner of the childbearing mother did not consent to the use of In-Vitro, no father is specified.

\textsuperscript{45} Surrogacy Act, 2008, §§ 8-9 (W. Aust.) (not in force).
\textsuperscript{46} Id.
\textsuperscript{47} Surrogacy Act, 2008, § 7 (W. Aust.) (not in force); SCAG PROPOSAL 2009, supra note 49, at 28.
\textsuperscript{48} Surrogacy Act, 2008, § 6(3) (W. Aust.) (not in force).
\textsuperscript{49} Surrogacy Act, 2008, § 13(2) (W. Aust.) (not in force); SCAG PROPOSAL 2009, supra note 49, at 28.
\textsuperscript{50} Parentage Act, 2004 (A.C.T.).
\textsuperscript{51} SCAG PROPOSAL 2009, supra note 49, at 24.
The differing Australian state laws on Surrogacy have led to confusion among the citizens of Australia. As a result, former **Federal Attorney-General Philip Ruddock** proposed legislation and urged states to adopt a National law on Surrogate births. In January 2009, the Australian Attorneys-General together with Health and Community Services published “**A Proposal for a National Model to Harmonize Regulation of Surrogacy**”. Under the proposed model, Commercial Surrogacy would be prohibited;" Surrogacy arrangements would need to be made before the child is conceived;" limited reimbursement, such as a reimbursement for medical treatment, would be allowed;"the parties would be required to undertake counseling;" and the intended parents would be allowed to apply for a parentage order recognizing the intended parents as the child's only legal parents," provided that the birth parents consent to the order." At the time of publication of this Note, this proposal was open for public comment."

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55 Family Law Act, 1975, § 60H (Austl.).
57 Ailis L. Burpee, Momma Drama: A Study Of How Canada's National Regulation Of Surrogacy Compares To Australia's Independent State Regulation Of Surrogacy, 2009

**CALIFORNIA**

California allows Commercial Surrogacy and implements Gestational Surrogacy contracts. The state helps the Intended Parents, not taking into account their sexual orientation or marital status, to gain legal child over the resulting, even before the delivery.

**CANADA**

Canada is one of the very few nations to enact a National legal framework governing Surrogacy. **In 2004, Canada enacted the Assisted Human Reproduction Act.** Through the Act, the Parliament of Canada recognizes and declares that the benefits of Assisted Human Reproductive Technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research.

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One of the reproductive technologies covered by the Assisted Human Reproduction Act is surrogacy. First and foremost, the Act prohibits commercial surrogacy. Specifically, the Act states that "no person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid." Additionally, the Act prohibits people from "accepting consideration for arranging for the services of a Surrogate Mother" or "offering to make such an arrangement for consideration.

The Act also establishes that "no person shall counsel or induce a female person to become a Surrogate Mother, or perform any medical procedure to assist a female person to become a Surrogate Mother, knowing or having reason to believe that the female person is under 21 years of age." Finally, the Act allows for altruistic surrogacy. Specifically, the Act allows an intended parent to "reimburse a Surrogate Mother for an expenditure incurred by her in relation to her Surrogacy" provided that "a receipt is provided to that person for the expenditure."

To assist in regulation, the Act provides for the establishment of the Assisted Human Reproduction Agency of Canada. The Agency is an entity separate from Health Canada. While "Health Canada is responsible for setting policy and developing the regulations stemming from the Act, the Agency's role is to administer the new regulations once they are finalized." The Assisted Human Reproduction Act, together with the Assisted Human Reproduction Agency, helps to establish uniformity in Canada.

**CHINA**

Surrogacy is banned but there is a flourishing black market, with about 10,000 babies born a year.

**FINLAND**

In the year 2007, all kinds of surrogacy arrangements were declared illegal. Commercial surrogacy was illegal even before that.

**FRANCE**
From the year 1994, Altruistic and Commercial Surrogacy, both the arrangements are not permitted by law. Even in 1991, the French Courts the Cassation stated the same views. They stated if an intended couple enters into any arrangement with a Surrogate Mother who is not willing to keep the resulting child after birth, the intended couples is not allowed to keep the child even after adopting it. Under Articles 6 and 1128 along with article 353 of the Code Civil, any sort of such an agreement is unlawful.

GEORGIA

Since the year 1992, sperm and ovum donation along with Surrogacy are permitted by law. According to law in Georgia, a Surrogate Mother or a donor does not have any legal parental rights over the resulting child.

GREECE

In Greece Surrogacy is permitted but few conditions have to be adhered. According to Law 4272, paragraph 17, both the couple or single woman or couple in partnership with signed notary deed and Surrogate have to reside in Greece. Under the applicable law, the Commissioning Mother should prove that she is unable to carry the child to term; the Commissioning Mother should not exceed the age of fifty (50).

In the said law, the Surrogate Mother if is married, then her Husband’s consent is mandatory for any Surrogacy arrangement. The consent must be in writing by signing the written agreement. The agreement can allow for compensation of expenses, but remuneration for the labor is strictly prohibited. In addition, the Surrogate must prove to the court that she is medically and mentally fit for undergoing a Surrogacy and that the fertilized ova does not belong to her.  

HONG KONG
In Hong Kong, under the Human Reproductive Technology Ordinance 2000, Commercial Surrogacy is unlawful. According to it, paying a Surrogate is not allowed, no Surrogate mother can gain financial benefits and no arrangements for Commercial Surrogacy can be entered into, within or outside Hong Kong.

**HUNGARY**

Hungarian law does not permits Commercial Surrogacy.

**ICELAND**

In Iceland, both Commercial and Altruistic arrangements of Surrogacy are unlawful.

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**IRELAND**

In Ireland, there are no Surrogacy laws. In the year 2005, a Commission appointed by the Government published a wide-ranging report on Assisted Human Reproduction. The recommendations in the report were on a wide scale on the same issue. As far as Surrogacy is concerned, the report stated that the couple opting for this procedure would be the parents of the resulting child according to Irish law. However, this procedure is still largely unregulated. Finally, after a lot of pressure from Irish citizens who had to visit other countries for a child via Surrogacy, the Minister for Justice, Equality and Defence in February 2012, was forced to publish guidelines.

**ISRAEL**

Israel the first country in the world to implement a form of state-controlled Surrogacy in which each and every contract must be approved directly by the state. In March 1996, the Israeli Government legalized Gestational Surrogacy under the *Embryo Carrying Agreements Law.* A committee set-up by the state allows that Israeli citizens of the same religion to file for Surrogacy arrangements. As per Israeli law, a Surrogate Mother should
be divorced, widowed or single. Only for infertile Heterosexual couples, Surrogacy is legal. Due to the numerous restrictions on Surrogacy under Israeli law, the Israeli intended parents have turned to International Surrogacy. India is the preferred destination because of its low costs.

ITALY

Altruistic and Commercial Surrogacy arrangements are unlawful in Italy.

JAPAN

The Science Council of Japan banned Surrogacy in March 2008. The council stated anyone- an agent, a doctor or a client, all would be punished on entering into a Commercial Surrogacy arrangements.

MICHIGAN

Michigan laws do not allow any form of Surrogacy agreement. Surrogacy is punishable law-either prison or fine.

NETHERLANDS AND BELGIUM

Netherlands and Belgium allow Altruistic Surrogacy and consider Commercial Surrogacy as unlawful. However, there is only once hospital for the same and that too with very strict rules.

NEW YORK

New York law does not permit Commercial Surrogacy because of public policies. There are penalties for the parties who enter into any such agreement. There are no legal enforcements or penalization behind altruistic arrangements. There are no pre-birth orders.
in New York, however, there is post-birth adoption substitute in the case of Altruistic Surrogacy through paternal or maternal filiations.

**NEW HAMPSHIRE**

In New Hampshire Surrogacy is legalized after the 2014 legislative reforms. All intended parents, irrespective of marital status, sexual orientation, or a genetic connection to the child, are able to establish their legal parental rights through pre-birth orders placing their names directly on the child's initial birth certificate. The Statute even allows for reasonable compensation to the Surrogate.

**NEW ZEALAND**

New Zealand permits Altruistic arrangement of Surrogacy.

**PAKISTAN**

Pakistan does not permit Surrogacy.

**PORTUGAL**

Commercial Surrogacy is banned in Portugal and is considered to be against the laws.

**QUEBEC**

*Under Quebec Civil Code, Commercial as well as Altruistic arrangements are null.* The law states that the Genetic mother of the child who is born to a Gestational Surrogate Mother will not be considered as his Legal mother, not even by the means of adoption. The case remains the same even if the child does not have a Legal mother in any condition.

**RUSSIAN FEDERATION**

Gestational and Commercial Surrogacy is legal in Russia but the cause for opting for Surrogacy should be medical such as repeated IVF attempts, uterine cavity synechia,
absence of uterus, failed pregnancy attempts in spite of high-quality embryos, cervix deformity. Children who are born through Surrogacy are registered by the Law on Acts on Civil Status and the Family Code of Russia. The Surrogate must give her consent for the same. No adoption process is necessary for the same. The birth certificate of the child does not have the name of the Surrogate. The child need not be genetically related to one of the intended parents.

If unmarried Heterosexual couples or single parents opt for Gestational Surrogacy for a child, the Court has the right to take the decision regarding the resulting child. A Moscow Court in August 2010 stated that if a single man opted for Gestational Surrogacy but with the use of donor eggs, he could be the only parent of the resulting child. The birth certificate would not contain the Surrogate’s name. Regardless of their sexual orientation, single men in Russia are considered the only parent of the Surrogate child and can exercise their parenthood child.

SAUDI ARABIA

*In Saudi Arabia, the religious authorities do not permit Surrogacy as an option.* They prefer opting for different kinds of medical practices for restoration of fertility in females and their ability to deliver a child. Recently, the first uterus transplant in the world was permitted by the Saudi authorities.

SERBIA

Serbia does not permit any kind of Surrogacy arrangement- Commercial or Altruistic.

SOUTH AFRICA

Surrogacy agreement between a Surrogate and ‘Commissioning Parents’ needs to be validated before fertilization by the High Court, under *South Africa Children’s Act of 2005*. This makes the intended parents, legal parents but a span of 60 days after delivery is given to the Genetic Surrogate if she wants to change her mind. Gay couples as well as Single parents can also be Intended parents. Single parents and a couple can opt for this
option only if they have any physical inability. Only that woman can become a Surrogate who has at least one living child. She has the right to terminate the pregnancy but only after consulting the Intended parents. If she is doing so due to non-medical reasons, she must be ready to make medical reimbursements.

**SPAIN**

Surrogacy is not legal in Spain. But the citizens can opt for Surrogacy outside the country where it is legal on the condition that the Surrogate Mother has nationality of that particular country. The reason is that the Biological Mother’s renouncement contract is not legally valid in Spain.

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**SWEDEN**

There are no clear laws regarding Surrogacy in Sweden. The Intended parents need to adopt the child from the Surrogate; nevertheless, she has the right to change her mind, before the adoption process. However, Biological father have complete right over the child. Fertility clinics in Sweden cannot make any Surrogacy arrangements.

**SWITZERLAND**

Surrogacy is illegal in Switzerland. People who make any such arrangements or clinics that perform In-Vitro Fertilization for Surrogacy can get punished. However, a Surrogate mother would be the child’s legal mother and cannot be punished.

**THAILAND**

In Asia, Thailand gained a lot of popularity because of Surrogacy. But from couple of months the Government there was facing a lot of agitation against Surrogacy and finally
Thailand’s Parliament passed legislation banning Commercial Surrogacy, putting a halt on foreign couples seeking to have children through Thai Surrogate mothers. The new law bans all foreign and same-sex couples from seeking Surrogacy services in the country.

Only married heterosexuals with at least one Thai partner are allowed to use Surrogates. According to the law, the Surrogate must be Thai lady not less than 25 years of age and must by the relative of either the Intended Father or Mother. The legislation completely prohibits any type of remuneration of the Services and shuts down Surrogate agents and unregistered clinics. It even bans the promotion and advertising of Surrogacy.

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**UKRAINE**

From the year 2002, Surrogacy or Surrogacy along with egg/sperm donation has been declared legal. The law clearly states that neither the Surrogate nor the donor but only the prospective parents have legal rights over the resulting child. A written consent of all the parties is necessary. The birth certificate will carry the names of the Intended parents and the child legally belongs to them. Single women as well as married couples can opt for Gestational Surrogacy. Although there is no concept of Lesbian or Gay marriages here but if such a couple picks up Surrogacy, they are treated as a single parent.

**UNITED KINGDOM**

In U.K. the medical community has themselves established a Voluntary Licensing Agency (VLA) which ensures that ART is practiced only by persons with adequate qualification and facilities. Regarding statutory laws in U.K., the first legislation dealing with different aspects of Surrogate Motherhood was given in 1985, called “The Surrogacy
The Surrogacy Arrangements Act, 1985 makes Commercial Surrogacy arrangements, unlawful. Though paying for more than medical Surrogacy expenses is not allowed but relationship status has recognition under Section 30 of the Human Fertilization and Embryology Act 1990. Couples can only partake in Altruistic Surrogacy and can consult non-profit organizations during the process. It is illegal for any woman to advertise herself as a Surrogate mother. Despite of financial considerations, there is no legal force behind Surrogacy arrangements. Once the Surrogate mother has given birth to the child, she is the legal care taker of her baby until an adoption has been finalized. However, even if she gives the child up initially, she has the legal right to claim it back for two years if she gave one of her eggs in the process. Even if the Surrogate is not genetically related to the child, she has the legal right over the child. Till the time an adoption order comes, she can legally practice her parenthood.

UNITED STATES

Surrogacy and its related issues come under the state jurisdiction and laws regarding Surrogacy differ largely in different states. While there is proper written legislation in some states, there are common simple laws in the others. 20 years ago, the famous ‘Baby M’ case in New Jersey, US made the world sit up and take note of the issue of Surrogacy. In US, the first formal agreement between the couple and Surrogate Mother was signed 1976. Soon brokers entered the scene and commercial exploitation followed.

In a case in 1987, Stern Vs Whitefield the superior court and then Supreme Court stripped of parental and visitation rights of Whitefield (the surrogate mother) and allowed stern parents (biological parents) to keep the baby. This case spurred most US states to enact legislation on surrogacy in 1995. There is facility of Surrogacy contracts in some of the states while there are such states too that completely rule out any such enforcements. Commercial Surrogacy is illegal in some states of US. There are some
Surrogacy-friendly states accept both Altruistic and Commercial Surrogacy and easily make it possible that the Intended parents have legal rights over the child.

However, there are some states that only permit this arrangement for married heterosexual couples. If seen in a broad sense, Gestational Surrogacy has more support in comparison to little no legal support for Traditional Surrogacy. Embryo research is not only included in one’s insurance cover in the US and is seen as a major drawback. It takes the cost of Surrogacy package quite high and US citizens opt for India as their Surrogacy destination. As far as legal matters are concerned, where the Surrogate stays, where the contract has taken place and where the delivery of the child takes place, play an important part. This means that if Intended parents live in a non-friendly state, they can pick a Surrogate who lives in a Surrogacy friendly state. Arkansas, California and Illinois come in the category of friendly states.

**International Jurisprudence**

International Surrogacy is a phenomenon which is truly global in its reach. Recent data shows that Intending parents entering into international arrangements come from all regions of the world. The States to which Intending parents are travelling are also geographically diverse and primarily include Eastern Europe, Asia and North America. The phenomenon is also global in that one arrangement may often involve more than two States.

The number of International Surrogacy arrangements entered into globally is impossible to determine. However, data from five agencies specializing in International Surrogacy shows a tremendous growth in the “market”: when comparing 2010 to 2006, the figures demonstrate a percentage increase of nearly 1,000% across the agencies. Cross-border Surrogacy arrangements are complicated with varying laws, medical practices or codes of ethics. Jurisdictions in various countries have held different views regarding the

In the US also, commercial surrogacy seems prohibited in many states. In the famous Baby M case\textsuperscript{66}, the New Jersey Supreme Court, though allowed custody to Commissioning parents in the “Best interest of the child”, came to the conclusion that Surrogacy contract is against public policy.

\textsuperscript{63} E.g., whilst only a “snapshot”, the information obtained by the Aberdeen University research project (supra note 15) from five “agencies” that specialise in international surrogacy (based in the United States of America, India and the United Kingdom), evidences that international surrogacy arrangements have been entered into by intending parents resident in Europe, Australasia, North and South America, Asia and Africa.

\textsuperscript{66} This is particularly the case where gamete donors are used: for example, intending parents resident in one State may use an egg donor in a different State and a surrogate mother in a third State (e.g., the documentary “Google Baby” illustrates such an example: <http://www.hbo.com/documentaries/google-baby/index.html#documentaries/google-baby/synopsis.html>, last consulted 16 March 2012). The involvement of more than two States may also arise where a woman is asked (or forced) to move from one State to another for the purposes of being a surrogate and the intending parents then reside in a third State: see supra note 12 regarding the trafficking concerns this may raise. A different example of a case involving three States (which also highlights the vulnerabilities of surrogate mothers) is: <http://reformtalk.blogspot.com/2011/10/international-surrogacy-debacle.html> (last consulted 16 March 2012).

\textsuperscript{60} See supra note 29.

It must be noted that in the US, Surrogacy laws are different in different states. Thus, in the growth and development of Surrogacy, pivotal role is played by the Legislators as well as Judiciary. At International level, there are many incidences of Surrogacy when Judiciary has set precedent for the welfare of all the parties involved in Surrogacy. Following are the few historical cases in context of International Surrogacy.

**BABY M CASE**

Many reproductive tourists, made international headlines by travelling from their native England to California to commission a child using a Gestational Surrogate.\textsuperscript{67} Elton John chose California as his Surrogacy destination because England does not allow Commercial Surrogacy. *Despite the high costs for Commercial Surrogacy in California, many regard the state as “the nation’s hub for Surrogate pregnancies” because of “its well -
established network of sperm banks, fertility clinics and social workers” and regulations favoring intended parents. 68

Unlike many countries, the United States has not banned Surrogacy on a national level. 69 Each state has its own policy on Surrogacy. This regulatory environment reflects mixed public sentiment regarding whether it is realistic for a mother to relinquish rights to a biological baby that she has carried to term as a Surrogate, regardless of earlier contractual and monetary agreements. This mixed sentiment arose in connection with a prominent, controversial case from 1985, the New Jersey Baby M case. 70


68 See Julie Watson, Surrogacy Scandal Raises Questions On Regulation Woman Used Flawed System To Broke r Babies, Dupe Couples. HOUSTON CHRONICLE, August 12, 2011.


70 Supra note 14, Chapter V

The Baby M case involved a Traditional Surrogacy arrangement in which the Surrogate Mother, Mary Beth Whitehead, refused to give up the baby. Experts predicted that the case was the beginning of the end of Surrogacy; but although the Baby M case caused uproar among the public and may have led to two failed federal attempts to prohibit or restrict Surrogacy arrangements, Surrogacy regulations continue to be governed at the state level. 71

The famed Baby M case in 1986 was the first US court ruling on the legitimacy of Surrogacy. After signing a contract with a married couple to be inseminated by the husband, to carry and give birth to the baby and relinquish parental rights for a fee, the Surrogate mother refused to hand over the child. Eventually, the couple prevailed in a landmark court ruling in the state of New Jersey. The biological mother gave up the baby, but had visitation rights.
The facts of the case are Mary Beth Whitehead entered into a contract with William Stern in which she agreed to be artificially inseminated with Stern's sperm. At the time, Mary Beth was married to Richard Whitehead, with whom she had two children. In the Surrogate Parenting Agreement, Mary Beth agreed that after the baby was born she would relinquish the baby to Stern and his wife Elizabeth and would permit the termination of her parental rights so that the Sterns could adopt the baby. In return the Sterns would pay Whitehead the sum of $10,000, plus expenses. Elizabeth Stern was not a party to the contract. Richard Whitehead did not object to the contract and acknowledged that his wife would be artificially inseminated by Stern's sperm. Prior to the Baby M case, Surrogacy agreements had been most often used when the wife of the adopting couple was infertile. But in the Baby M case Elizabeth Stern was not infertile. Instead the Sterns decided not to have Elizabeth bear a child due to the possibility that being pregnant would exacerbate her multiple sclerosis.

Under the Surrogate Parenting Agreement, Mary Beth was not entitled to payment of her $10,000 fee until after the child was born, surrendered to the Sterns, and her parental rights had been terminated. The contract also provided that the Whiteheads would receive no compensation if the child was miscarried prior to the fifth month of pregnancy and would receive only $1,000 if the child was miscarried after that time. Additionally, Whitehead renounced her right to have an ABORTION, unless it was medically necessary.

Whitehead gave birth to a baby girl named Melissa on March 27, 1986. She turned custody of the child over to the Sterns on March 30, 1986, but immediately regretted doing so. Alarmed by Whitehead's anxieties and fearing that she might commit suicide, the Sterns allowed her to have temporary custody of the child. After Whitehead refused to return the baby to the Sterns, William Stern filed an ex-parte application for an order to show cause why the Superior Court of New Jersey should not issue an order for SUMMARY

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**JUDGMENT** to enforce the Surrogacy contract and a verified complaint seeking specific enforcement of the contract. The complaint sought injunctive relief to obtain custody, termination of Whitehead’s parental rights, and an order allowing the Sterns to adopt Melissa.

The trial court issued a **TEMPORARY RESTRAINING ORDER** and an order requiring the Whiteheads to surrender Melissa to William Stern. The case then proceeded to a trial on the merits. The trial lasted 32 days and consisted of testimony from 23 lay witnesses and 15 expert witnesses. Ultimately, the trial judge declared the Surrogacy contract valid and enforceable, awarded custody of Melissa to William and Elizabeth Stern, and terminated Mary Beth Whitehead’s parental rights, although the judge permitted Mary Beth limited visitation rights pending her direct appeal to the New Jersey Supreme Court. Finally, in 1988 the New Jersey Supreme Court declared Surrogacy contracts void against state public policy but then determined that the best interests of the child born to the Surrogate mother required that custody of that child be awarded to the Biological father and his wife, with liberal, unsupervised, uninterrupted **VISITATION RIGHTS** later being granted to the Biological mother Mary Beth Whitehead. *Baby M* was the first case decided by a state court of final jurisdiction in which the lawfulness of a Surrogacy contract was addressed. States responded to the *Baby M* decision by passing a flurry of legislation. Further, the advent of Gestational Surrogacy technology diminished some of the concern surrounding a Surrogate’s possible refusal to give up the baby that existed at the time of the *Baby M* case. In the last half-decade, Gestational Surrogacy rates in the United States have risen almost 400%. Estimates compiled in 2010 suggest that 1,400 babies are now born via Surrogacy in the United States each year. Not only do a large number of Americans decide that Surrogacy is the right option for them, but a sizeable number of international couples choose to utilize American Surrogate Mothers to give birth to their children as well.
JOHNSON V. CALVERT

California is the capital of Commercial Surrogacy in the United States, and many California courts have upheld Surrogacy agreements. In one of the most notable cases, Johnson v. Calvert, the Supreme Court of California ruled that Commercial Surrogacy agreements were enforceable. In Johnson, the court determined that in cases of Gestational Surrogacy agreements, the conflict of rights to the child between the egg donor and the Surrogate must be resolved by looking to the intent of the parties at the time of the Surrogacy arrangement.

In 1990, the Californian Trial and Appellate Courts were called to decide between the claims of a Gestational Surrogate, an African American woman named Anna Johnson, and those of the white Commissioning couple, the Calverts. While the Calverts had provided both sperm and oöcytes, Johnson argued that her bearing and birthing of the child gave her superior claim to be its legitimate parent. The Lower Courts found in favour of the Calverts, on grounds that Johnson was a host rather than a mother to the child, and that the Uniform Parentage Act (1975) favoured Genetic Parenthood over Gestational Parenthood.

The California Supreme Court overturned the ruling, on the grounds that the Uniform Parentage Act did not give clear guidance regarding the distinction between Genetic and Gestational Motherhood. It based its determination strictly on contract law, looking to the intentions expressed in the contested Surrogacy contract.

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“[The Calverts --- affirmatively intended the birth of the child, and took the steps necessary to effect In-Vitro Fertilization. But for their acted-on intention, the child would not exist. Anna Johnson agreed to facilitate the procreation of the Calverts’ child. …We conclude that …she who intended to procreate the child - that is, she who intended to bring about the birth of a child that she intended to raise as her own - is the Natural mother under California law”.]

And thus, Johnson was ordered by the Court to complete the contract by relinquishing the child, rather than to pay damages. It’s apparent that California statutory law also accepts parenthood as determined by a Surrogacy agreement. Therefore, the names of unrelated intended parents may be placed on a birth certificate without an adoption procedure. Additionally, California law provides a variety of procedures prior to the finalization of a Surrogacy arrangement.

82 See CAL.FAM.CODE§ 7648.9 (West 2004); In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App 1998) (which held that the California statute, which makes a husband the lawful father of a child unrelated to him if he causes it to be created by artificial insemination, also applies to intended parents).

For example, a Surrogacy facilitator directs the Intended parents to place funds in either an independent, bonded escrow depository or a trust account maintained by an attorney.83

KIRKMAN SISTER’S CASE

The 1988 Baby M case in the US forced many to put on legal thinking caps, similarly this year also witnessed Australia battling with societal eruptions over the Kirkman sisters’ case in Victoria. Linda Kirkman agreed to gestate the Genetic Child of her older sister Maggie. The Baby girl, called Alice, was handed over to Maggie and her Husband at birth. This sparked much community and legal debate and soon Australian states attempted to settle the legal complications in Surrogacy. Now in Australia, Commercial Surrogacy is illegal, contracts in relation to Surrogacy arrangement unenforceable and any payment for soliciting a Surrogacy arrangement is illegal.
Surrogacy can lead to an array of legal complexities regarding motherhood was shown by *Jaycee B. v. Superior Court*[^85] Different countries have taken different stands to address this issue. In UK, the Surrogate Mother is the legal mother; *vide Section 27(1) of the Human Fertilisation and Embryology Act 1990*. Section 30 of the said Act at the same time provides that if the Surrogate Mother consents to the child to be treated as the child of the Commissioning Parents the court may make a parental order to that effect.

[^85]: California statute defines a surrogacy facilitator as “a person or organization that engages in either “[a]dvertising for the purpose of soliciting parties to an assisted reproduction agreement or acting as an intermediary between the parties to an assisted reproduction agreement, or charging a fee or other valuable consideration for services rendered relating to an assisted reproduction agreement.” See CAL. FAM. CODE§ 7960(a)(1), (2) (West 2011).

[^84]: CAL. FAM. CODE§ 7961(a) (West 2011). California law also makes clear that the surrogacy facilitator may not have a financial interest in the escrow company, and that the funds may only be disbursed in accordance with the reproduction agreement. CAL. FAM. CODE§ 7961(b) (West 2011). In addition to this funds regulation, legislation has been introduced in California that would further regulate surrogacy agreements. See An Act to Amend Section 7613 of, and to Add Section 7613.5 and 7962 to, the Family Code, Related to Assisted Reproduction, H.R.1217,2011-12 Sess. (Cal. 2011), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_12011250/ab_1217_bill_20110620_amended_sen_v95.pdf. If approved, this bill would enact a new section to the California Family Code that would forbid any medical or legal professional from medically evaluating or legally representing an intended parent or surrogate while acting as a surrogacy facilitator. This legislation seeks to prevent the conflict of interest that occurs when a surrogacy agency recruits, legally represents, and medically evaluates a surrogate. Although these protections are admirable, the Erickson admission suggests that someone intent on conducting unethical activity will actively sidestep such protections. See infra Part I.A (discussing the Erickson Baby-selling scheme).

[^86]: Law commission report, Surpa note 37, Chapter

This section also prohibits giving or taking of money or other benefit except than expenses reasonably incurred in consideration of the making of the order or handing over of the child. *In Jaycee’s Case*[^86] a child was born to a Surrogate Mother using sperm and eggs from anonymous donors because the infertile couple was unable to create their own embryo using the In-Vitro Fertilization techniques.

The couple chose to use anonymous donors rather than asking the Surrogate to use her own eggs because of the *Baby M Case* in New Jersey in which the Surrogate had eventually refused to hand over the baby saying that she was its Biological Mother and her right to raise the child pre-empted the Commissioning Parents’.
The child thus had five people who could lay claim to parenthood – a Genetic Mother, a Commissioning Mother, a Surrogate Mother, a Genetic Father and a Commissioning Father. One month prior to the birth of the baby Jaycee the Intended parents John and Luanne separated and John sought to rescind his obligations under the Surrogacy contract so as to avoid having to pay child support for Jaycee. Luanne sought both custody and support from her ex husband.

The Court battle continued and for three years Jaycee did not have a legal parent. A Californian Court granted temporary custody of the baby Jaycee to Luanne and ordered John to pay for child-support. In this section of the Chapter the researcher toiled hard to surface the International Legal Scenario and the International Jurisprudence of Surrogacy. Further, the researcher has discussed the Legislative and Judicial Development of Surrogacy in India and Few Special States.

INDIAN LEGAL SCENARIO

India is emerging as a leader in International Surrogacy and a sought after destination in Surrogacy-related fertility tourism. Surrogacy in India is a hot topic right now. With adoption becoming legally more difficult, and greater awareness of Surrogacy as an option, many couples and even individuals that cannot otherwise bear children are increasingly turning to Surrogacy as a possibility to fulfill their parenthood dreams.

There are varied causes of infertility amongst men and women; as a result this makes every case an entity in itself. Treatment to each couple cannot be generalized it varies and so also the success rate which declines with advancing woman’s age. The recent advances in Assisted Reproductive Technology has increased the overall success rate from 17% in
the past to reach 45% recently. Repeating the attempts results in better success rate which reaches 70-80% in four attempts collectively and this is the reason childless couples are opting for the latest Assisted Reproductive Technology in infertility treatment especially Surrogacy.

In general, couples first investigate Surrogacy in their home country. Some couples find that either the cost, or their country's legal environment, makes it very difficult to pursue Surrogacy and then start investigating options for Surrogacy abroad. The most common overseas option is Surrogacy in India, although there are other options. The Intended parents are interested in the low costs of International Surrogacy, and many are considering a Surrogate pregnancy in India. Indian Surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as Surrogates.

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Clinics charge patients roughly a third of the price compared with going through the procedure in the UK. The low cost of Surrogacy is one of the prime reasons which attract the foreigners. No doubt, Surrogacy is earning us a lot of dollars but there is always a probability of exploitation and malpractices in it. And therefore, the umbrella of legislation is needed to protect Surrogacy.

Legislation on Reproductive Technologies provides the means for preventing their misuse. However, the implementation of the Acts related to Reproductive Technologies raises several legal, ethical, moral and social issues. Human experience has shown that mere legislation against undesirable practices generally does not prevent them; such practices being pushed to the back-alleys. Legislation must be armed and strengthened by measures aimed at bringing about a sea change in societal perceptions of the female child and
women in general. The practice of Surrogacy in India has widely increased in last decade. And looking into the augmenting rate the Indian Government has taken few steps to regulate the industry. But they are insufficient to curb the immoral practices which are growing in guise of Surrogacy. Now let’s us study the Legislative Developments on Surrogacy in India in detail till Date.

**Legislative Developments**

In India, the Government has taken certain steps to address the issues relating to Surrogacy and to regulate the Surrogacy arrangements from time to time. But unfortunately till today there is no act which governs Surrogacy. The Indian scenario in this field is quite bleak. **Delhi Artificial Insemination (Human) Act 1995** is the only statutory act prevailing in India. There is no internal regulatory body like VLA in U.K, moreover Indian Infertility specialist have rather opposed the steps towards regulation of practice in this field. In India, Surrogacy got in vogue in last decade. India's first Surrogate baby was delivered on June 23rd, 1994, but the practice started receiving widespread international attention in 2004 when an Indian woman delivered a Surrogate child for her daughter in the U.K.

*Surrogacy in India gained more attention in 2007, when Oprah featured a U.S. couple pursuing surrogacy in India during her daytime television program.* And in last couple of years the scenario in surrogacy industry has capsized. Looking into the rising number of cases the Indian Government initiated certain measures to prevent its misuse, which can be apprehended by the Pyramid below.
ICMR GUIDELINES

India has witnessed an unprecedented and unregulated growth of IVF/Infertility/Assisted Reproduction Technology (ART) clinics and hospitals. With the estimated number of around 3000 clinics across the country and new clinics being added every day, India has occupied a place of prominence on the world IVF map.

Now, there are several clinics that perform such services - gauged by the number of advertisements in the local media as well as on the Internet - it is easy to select a clinic. However, the real problem arises after the birth of the baby. In India, in the absence of any clear laws on the issue so far, foreigners are unable to get legal assistance when it comes to

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taking their child back to their home country. Childless couples in India, too, face some issues. For example, whose name will be mentioned as parents on the birth certificate of the newborn or what should be done in case the Surrogate mother refuses to hand over the child?

To lay such doubts to rest, the Government of India had taken certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2005, and guidelines had been issued by the Indian Council of Medical Research (ICMR) working under the Ministry of Health and Family Welfare, Government of India\(^{89}\) after extensive public debate across the country involving all stakeholders.

Under these guidelines, there was no legal bar for the use of Assisted Reproductive Technology (ART) by a single or an unmarried woman, and the child born would have legal rights on the woman or man concerned. Though, the guidelines were non-statutory but still clinics that provide ART facilities take recourse to the guidelines set by the Indian Council for Medical Research that state that the Surrogate Mother has to sign a contract with the childless couple. But even then, counter lawyers, it is not clear whether such a contract has any legal sanctity.

\(^{89}\) National Guidelines for Assisted Reproductive Technology: Ethical issues in Surrogacy'- Paper presented by Dr. R.S. Sharma, DDG (SG), Division of RHN, Indian Council of Medical Research, New Delhi at the meeting-cum-workshop organized by the Ministry of Women and Child Development, Govt. of India on 25th June 2008 at India Islamic Centre, New Delhi.

\(^{90}\) The “National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India” were drafted by a Committee of Experts by including specialists from various disciplines such as biologists, gynecologists, social/legal representative and
representative from ART Clinics, which was formed by the collaboration of The Indian Council of Medical Research, New Delhi and National Academy of Medical Sciences, New Delhi. This code consists of guidelines about important issues affecting Scientists, Doctors and Patients. Following are the significant features\(^91\) of this draft:

- It is necessary that any kind of commercial part of a Donor program or Gestational Surrogacy is carried by the ART Center.
- For any ART process the approval of the spouse is mandatory.
- Sex determination at any point of time is prohibited; be it during fertilization or during the abortion of embryos. It can only be done in exceptional cases where there is risk of transfer of genetic anomaly determined during genetic testing of the biological parents or due to pre-implantation genetic diagnosis.
- A friend or a relative of either the husband or the wife is not permitted to offer his sperms. The ART clinic is responsible for obtaining sperms from the concerned banks.
- The committee allows semen to be taken only from the Semen Bank and not from any individual. Also, this Semen Bank must be an independent organization. In case, this bank has been set-up by an ART center, it should be a separate entity.
- A known woman or a relative cannot become a surrogate for a couple.
- Surrogacy through Assisted Conception must be opted for those patients for whom it is medically or physically not possible to carry the baby for full term.
- A child born by the way of Surrogacy has to be adopted legally by the Genetic parents.

\(^90\) For detail guidelines visit [http://icmr.nic.in/art/art_clinics.htm](http://icmr.nic.in/art/art_clinics.htm)


- Embryos can be stored for a span of around 5 years and can be used for other couples or for research purpose. But prior to this, the consent of the concerned couple is needed.

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Transfer or sale of gametes or human embryos in any form to anywhere outside India must be banned.

Human cloning must be prohibited.

The process of stem cell research and cloning on embryos, which are less than 15 days, should be performed.

A baby born by an Assisted Reproduction Technique is the legitimate child of a couple, is born within wedlock and has all the rights of support, parentage and inheritance.

Although it is not illegal that a single or an unmarried woman opts for Artificial Insemination with donor but it is internationally suggested that AID should be done only on married women, after the permission of her husband.  

It is the need of an hour that infertility should also be treated like any other diseases. The ART centers must have the authority to reimburse the expenditure, with assistance from the employer, the Government or health insurance company, however, this must be done only in case of one child.

Thus, taking into consideration the fact that more and more local and foreign nationals are opting for Surrogacy and IVF, Indian Government thought about coming out with some basic guidelines for ethical conduct of Surrogacy in India.

The ART Guidelines were charted out by The Indian Council of Medical Research that formed the basis for the IVF and Surrogacy clinics in India. In dearth of any enactment, the clinics are following these Guidelines till today but as they are Non Statutory so it totally depends on the sweet will of the clinics whether they follow it or not.


The Assisted Reproductive Technology (ART) Regulation Bill, 2008
The favored ‘Surrogacy Destination’ of the world, India, must have laws to back the business of Surrogacy and IVF as the issues relating to Surrogacy are complex and very complicated. However, till 2008 there were no legal provision dealing directly with Surrogacy, to govern the matters relating to the rights and interests of the Surrogate Mother, the Child, or the Commissioning Parents. The Government apparently planned to bring in new legislation to regulate Commercial Surrogacy and for the first time after a long wait for so many years, an expert team from the Indian Council of Medical Research (ICMR) came out with a Draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008, which was to be proposed in the Parliament.

The Draft (ART) bill, 2008\textsuperscript{93}, was posted on the websites of the Indian Council of Medical Research (ICMR) and the Ministry of Health and Family Welfare for comments from the general public. It was followed, and drawn, from, the functional and ethical National guidelines for Assisted Reproductive Technologies (ARTs) issued by the ICMR in 2005.

\textit{The draft Bill contained 50 clauses which were divided into nine chapters}. The Bill acknowledges Surrogacy agreements and their legal enforceability so that Surrogacy agreements were to be treated on par with other contracts and stated that the Principles of the Indian Contract Act 1872 and other laws shall be applicable to these kinds of agreements. The Bill further provided that single persons may also opt for Surrogacy arrangements.


A Brief about the chapterization of the Draft bill\textsuperscript{94} is as following:

Chapter I: It Contained the definitions of various terms used in the bill

Chapter II: It provided provisions for the Constitution of a National Advisory Board for ART and State Boards for ART for laying down policies, regulations and guidelines, and Registration Authorities for registering ART clinics.

Chapter III: It laid down procedure for registration of ART clinics.

Chapter IV: It prescribed duties of ART clinics.

Chapter V: It provided provisions for sourcing, storage, handling and record-keeping for gametes, embryos and Surrogates.

Chapter VI: It look into the provisions to regulate research on embryos.

Chapter VII: It discussed rights and duties of Patients, Donors, Surrogates and Children.

Chapter VIII: It deals with offences and penalties.

Chapter IX: It provide Miscellaneous provisions and includes power to search and seize records etc. and the power to make rules and regulations.

The draft bill binds Commissioning Parents to bear all medical expenses, including insurance, of the Surrogate Mother while she is carrying the child in her womb.

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94 Supra note 18

It further stated that the Surrogate Mother may “receive monetary compensation from the couple or individual, as the case may be”, but “shall relinquish all parental rights over the
child” once it is handed over to the Commissioning Parents.\footnote{Rao, Dilip. “New Bill to Regulate Surrogacy”, June 28, 2008, Law and other things, http://lawandothertings.blogspot.in/2008/06/new-bill-to-regulate-surrogacy.html Last visited on Jan 7 2009} It also include the provisions stating that the child’s birth certificate shall bear the names of his or her genetic parents. It very clearly mentions the age of the woman who can opt to be a Surrogate Mother. According to it the woman shall be not less than 21 and not more than 45 years of age. She should be Medically fit and cannot act as a Surrogate more than three times, while records of all envisages a regulatory mechanism comprising a registration authority for ART clinics, with state and central advisory boards over it. The News reports suggest that the bill was meant to protect couples seeking the technology from exploitation by unscrupulous medical professionals\footnote{Unnikrishnan CH. Bill to regulate IVF clinics to be tabled soon. LiveMint. com The Wall Street Journal 2008 Sep 24 [cited 2008 Dec 1]. Available from: http://www.livemint.com/2008/09/24001126/Bill-to-regulate-IVFclinics-t.html} an unethical marketing practices of ART clinics. It also purports to regulate Surrogacy and respond to social and ethical issues around parenting associated with ARTs.\footnote{Mukhopadhyay P. Surrogacy law on the anvil in India. One World South Asia 2008 Oct 18. [cited 2008 Dec 14]. Available from: http://southasia.oneworld.net/todaysheadlines/surrogacy-law-on-the-anvil-in-india/?searchterm=ARTBill} But the irony was that the draft bill was badly criticized and was claimed that the draft has simply been drawn to strike balance between Commercialization and function of Motherhood. A close inspection of the bill suggests that it is not meant to protect the rights of Surrogates and the child. On the contrary, the intention seems to be, to protect clinics from complaints in social disputes such as who the “Real Parent” of the child is. It does not protect women from dangerous technologies. It dwells on the infrastructure for clinics but underplays the side effects of the procedures. It specifies who may access the technologies but is unclear about whether these technologies are actually treatments for infertility. It also tries to safeguard the rights of the “Commissioning Couple”.\footnote{SHAH, Chaynika. Regulate technology, not lives: a critique of the draft ART (Regulation) Bill. Indian Journal of Medical Ethics, [S.l.], v. 6, n. 1, p. 32-35, jan. 2009. ISSN 0975-5691. Available at: <http://ijme.in/~ijmein/index.php/ijme/article/view/433/787>}

\footnote{228th Report : The Law Commission of India, 2009}
Surrogacy was held to be legal by the Supreme Court of India in Manji’s case of Japanese Baby in 2008, with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. The Assisted Reproductive Technology (ART) Regulation Bill, 2008 was still pending at that time. Looking into the gravity of the matter the Law Commission of India intervened, and specifically reviewed the Surrogacy Law keeping in mind that India is an International Surrogacy destination.

International Surrogacy involves bilateral issues, where the laws of both the nations have to be at par/uniformity else the concerns and interests of parties involved will remain unresolved and thus, giving due regard to the concerns and in order to prevent the commercialization of the Human Reproductive system, exploitation of women and the commodification of Children, The Law Commission of India submitted the 228th Report on “NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURREOGACY.” The following observations had been made by the Law Commission: -

- Surrogacy arrangement will continue to be governed by contract amongst parties. But the arrangement should not be for commercial purposes. It shall contain various terms pertaining to the consent of Surrogate, her husband and other family members, the compensation to be paid, the procedure to be followed etc.

- A Surrogacy arrangement should provide for financial support for Surrogate child in the event of death of the Commissioning couple or individual before delivery of the child, or divorce between the Intended parents and subsequent willingness of none to take delivery of the child.

- A Surrogacy contract should necessarily take care of life insurance cover for Surrogate mother.
One of the Intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the Intended parent is single, he or she should be a donor to be able to have a Surrogate child. Otherwise, Adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

Legislation itself should recognize a Surrogate child to be the legitimate Child of the Commissioning parents without there being any need for adoption or even declaration of Guardian.

The Birth certificate of the Surrogate child should contain the names of the commissioning parents only.

Right to Privacy of donor as well as Surrogate mother should be protected.

Sex-Selective Surrogacy should be prohibited.

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

The Law Commission is staunchly against Commercial surrogacy, though it has come largely in favor of Surrogacy in India. It has addressed issues like proper way of operating Surrogacy in Indian conditions. Another issue which is the concern of Law commission is Exploitation of the Surrogate.

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The Assisted Reproductive Technology (ART) Regulation Bill, 2010

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Taking into consideration the prevalence of Surrogacy in India and its related challenges as well as controversies, the Government of India formed a committee of experts to make draft for the Surrogacy and ART in India. This Expert committee submitted a copy of the proposed Assisted Reproductive Technology (ART) Regulation Bill, 2008 to the Government. The committee tried to cover the important and necessary dimensions of Surrogacy. This bill was pending with the government and was not presented in the Parliament. Irrespective of no legislation for the regulation of Surrogacy, the process was completed in a crystal clear and ethical manner; keeping into consideration the guidelines by ICMR.\(^\text{100}\) Looking into the growing cases of Surrogacy finally this bill was revised. \textit{The Ministry of Health and Family Welfare, Government of India drafted the revised bill “The Assisted Reproductive Technologies (Regulation) Bill, 2010”}.

Floated earlier in 2008, it envisages a National framework for the regulation and supervision of Assisted Reproductive Technology (ART). It legalizes Commercial Surrogacy for single persons, married or unmarried couples. Following are the few changes made by the Government in this revised bill:

- The bill proposes that the Surrogate should be of 21 to 35 years of age and she should not have had more than five successful live births in her life, including her own children.

- The woman should be medically examined and tested for sexually transmitted and communicable diseases which might be hazardous for the baby.

- She is also expected to declare in writing that she has not been the recipient of blood or blood products in the past 6 months.


- The bill envisaged the clause about Surrogate Mother and stated that anyone can act as a Surrogate in India—known or unknown, related or unrelated. However, in

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case of a relative acting as a Surrogate, she should belong to the same generation as the Commissioning Mother.

- As regards embryo transfer, the bill seeks to prohibit the Commissioning couple to obtain services of more than one Surrogate at a given time; also disallowing simultaneous transfer in the intending mother as well as Surrogate. A woman will be allowed to undergo embryo transfer only three times for a couple.

- It stated that the Surrogate Mother will have to enter into a legally enforceable Surrogacy agreement.

- It states that foreigners or NRIs coming to India to rent a womb will have to submit documentation confirming that their country of residence recognizes Surrogacy as legal and that it will give citizenship to the child born through the Surrogacy agreement from an Indian mother. This, perhaps, is in view of the two-year legal battle of the Surrogate sons, Nikolas and Leonard, born to the German couple Jan Balaz and Susan Lohlad. The two kids, born to an Indian Surrogate Mother in January 2008, were rendered stateless with neither German nor Indian Citizenship. Subsequently, the Supreme Court got them exit permits in May 2010.

- The Foreigner couples are also required to appoint a local guardian who will be legally responsible for taking care of Surrogate till the child is delivered to the Commissioning couple. In case the child is not accepted by the couple, it will be the local guardian’s responsibility to take care of the child.
Thus, the bill provided various guidelines for Surrogate Mothers and Intended Parents. It proposed stringent guidelines for foreigners and Non Resident Indian couple opting for Surrogacy in India. There were many cases hitting the headlines of newspaper which hustled the Government to revise the bill. One of such case was of the Gay Israeli Couple. After being stranded in Mumbai, a Gay Israeli couple was granted Israeli passports only after a DNA paternity established in May 2010 that gay Dan Goldberg was the father of Itai and Liron born to a Surrogate Mother in Mumbai. This followed a debate in Knesset (Israeli Parliament) and the Jerusalem District Court ruled in appeal that it was in the children’s best interest to hold the DNA test to establish their Paternity.

In Nutshell, the new ART Regulation Bill and Rules 2010 by the Government of India proposed to guarantee legal protection to the parties involved and mandate legally enforceable agreements between stakeholders; violation would be a cognizable offence punishable with imprisonment and fine. It was expected that legislation regarding Surrogacy in India will become stronger after this bill is passed, thus ensuring fairer practices. But unfortunately this bill was badly criticized claiming that it does not adequately provide for the rights and welfare of the Surrogates and therefore was again revised.

The Assisted Reproductive Technology (ART) Regulation Bill, 2013

Surrogacy in India continues to grow by the day; the proposed law to regulate it continues to remain in incipient stages. The present guidelines are a consequence of those originally framed by the Indian Council of Medical Research (ICMR). However; these do not have any legal sanctity and are not binding.

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The present Assisted Reproductive Technology (Regulation) Bill, 2013, was the revised version of the 2010 bill. The delay in enacting a legislation to regulate an industry that has been booming for almost a decade seems absurd because the bill was drafted as a response to demands for the regulation of the Surrogacy industry and even five years after the first draft, there seems no sign of legislation. What further escalates the situation is that each time the draft bill is sent around for circulation, in an attempt to redress existing loopholes, newer aberrations arise.

The draft Bill 2013 is an exhaustive document containing 100 sections addressing various issues relating to ART. The draft Bills and Rules of 2008 and 2010 were extensively circulated for public opinion, besides being sent to State Governments, institutions, statutory bodies, NGOs, medical professionals and other stakeholders, but the 2013 Bill was not circulated or placed in the public domain. Women’s health activists asked the Centre not to rush into finalizing the ‘Assisted Reproductive Technologies (Regulation) Bill, 2013’ and, instead, hold wider deliberations with women’s rights organizations, queer rights, human rights and legal rights organizations across the country.

Some of the features of the revised ART bill, 2013 are as follows:

- It offers directive about the number of pregnancies that can be allowed for a Surrogate mother.
- It contains the due compensation that should be offered to a Surrogate.
- It also tells about the age of the Surrogate.
- It also provides a frame about the allowing foreign nationals to use an Indian woman as a Surrogate.
- It also has directives dealing with consent of the spouse and health of the Surrogate.
- The bill also proposes punishment for violators of the law and also proposes what punishment should be given.\(^\text{105}\)

Various NGO’s and Women groups reviewed the Draft Bill. The Sama Resource Group for Women and Health, while appreciating the initiative of the Union Ministry of Health and Family Welfare (MoHFW) for making efforts to regulate the booming Assisted Reproductive Technologies (ART) industry, including Commercial Surrogacy(CS), in the country, said though the Bill acknowledges the importance and significance of ethical practices in the context of ART services, in the present form, it is inadequate in protecting and safeguarding the rights and health of women going for IVF techniques, recruited as Surrogates and children born through Commercial Surrogacy.

Many Public Spirited Lawyers and Medical Experts after perusal of the Draft Bill suggested that the bill must include provisions to regulate and monitor the different players in Surrogacy arrangements. Further it was claimed that it lacks setting the standards for medical practice and completely ignores the regulation of the third party agents who play pivotal role in arranging Surrogates such as Surrogacy agents, Tourism operators and Surrogacy home operators.\(^\text{106}\)


Various Social Activist criticized the draft bill and said that even if we acknowledge the initiative of the Union Ministry of Health and Family Welfare and the ICMR in coming up with the draft ART (Regulation) Bill, 2013, we think that instead of regulating the providers of the technology and safeguarding the rights and interests of the Surrogate Mothers, some of the Bill’s clauses tend to promote the interest of the private-sector technology providers. The Bill should have incorporated provisions to prevent misuse and malpractice, thereby making the providers accountable to the Surrogates and the laws of the land, but in its present form, it comes across as inadequate in protecting and ensuring the health and well-being of Surrogate Mothers.

Finally in the meetings of Departments and Ministries of the Government of India on 6th and 7th March, 2014 to discuss and review divergent views on the Draft Assisted Reproductive Technology (Regulation) Bill, 2013 (ART Bill, 2013), have resulted in a proposal to revise the draft ART Bill with significant changes. The most crucial proposal is to restrict Surrogacy in India to “infertile Indian married couples” only and it would not be allowed to foreigners unless he/she is married to an Indian citizen. Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCIs) shall, however, be eligible. The object sought to be achieved is to prevent exploitation of Indian women who may be tempted to take the risk in the face of financial hardships. At present, a new amended ART Draft Bill is awaited.

The Surrogacy (Regulation) Bill, 2014

An individual Member of Parliament has taken initiative to introduce a bill for regulating Surrogacy in the Lok Sabha, known as the house of commons or the lower house of the Parliament. The Bill No. 61 of 2014 named THE SURROGACY (REGULATION) BILL, 2014 had been introduced in the Lok Sabha on 08/08/2014 as gathered from the Lok Sabha website. This Bill was introduced by Dr. Kirit Premjibhai Solanki, MP from Gujarat.

Glaring Facts on “The Surrogacy (Regulation) Bill, 2014”

- The Bill is not sponsored by the Government instead it is introduced by an individual Member of Parliament.
- This Bill only deals with Surrogacy arrangements and not with Assisted Reproductive Technology.
- The Bill provides to allow Commercial Surrogacy arrangements for couples from abroad if they have an appointed guardian in India.
- The Bill does not discuss ART Banks, whereby Surrogate mother and egg donors can be identified.
- The Bill provides for insurance for Surrogate mother must be sponsored by the Commissioning couple.
- The Bill provides for Surrogacy for gay couples, after same sex relations are allowed in India.\(^{108}\)

JUDICIAL DEVELOPMENTS

Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law.\(^{109}\) The question of Judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers. The Judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. Supreme Court despite its constitutional limitation has come up with flying colors as a Champion of Justice in the true sense of the word. The Judicial activism has touched almost every aspect of life in India to do positive justice and in the process has gone beyond, what is prescribed by law or written in black and white. Only thing the Judiciary must keep in mind is that while going overboard to do justice to common man must not overstep the limitations prescribed by sacrosanct i.e. The Constitution.


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Black's Law Dictionary defines judicial activism as a "Philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Judicial activism means active role played by the judiciary in promoting justice. Judicial activism to define broadly is the assumption of an active role on the part of the judiciary. Ronald Dworkin, for example, rejects a “Strict interpretation” of the constitutional text because it limits constitutional rights “to those recognized by a limited group of people at a fixed date of history.”

According to Prof. Upendra Baxi, Judicial Activism is an inscriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc., others have criticized the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State negating the constitutional spirit etc.

In a modern democratic set up, Judicial activism should be looked upon as a mechanism to curb legislative adventurism and executive tyranny by enforcing Constitutional limits. That is, it is only when the Legislature and the Executive fail in their responsibility or try to avoid it, that Judicial activism has a role to play. In other words, Judicial activism is to be viewed as a “damage control” exercise, in which sense, it is only a temporary phase. Recent times have seen judiciary play a intrusive roles in the areas of constitutionally reserved for the other branches of governments. Issues in Judicial activism arise, when governance is apparently done by Mandamus. Thus, Judicial activism is premised on the fact that the Judges assume a role as Independent Policy makers or Independent “Trustees” on behalf of society that goes beyond their traditional role as interpreters of the constitution and laws. The concept of Judicial Activism is thus the polar opposite of Judicial Restraints.

110 https://www.academia.edu/2148025/JUDICIAL_ACTIVISM_IN_INDIA_MEANING_AND_IMPLICATIONS
111 http://www.slideshare.net/shantanu_leo/judicial-activism-of-the-supreme-court-of-india
Under this chapter the researcher has attempted to examine the legislative as well as judicial approach towards Surrogacy. As Stated above, the function of Judiciary cannot be confined in dogma where the courts were supposed to decide the matter pending before it within the scope of texts of law. In social-welfare nation, the Judiciary is supposed to act as protector of human rights and work to promote social justice through its decision in matters brought before it which is termed as Judicial Activism. Thus, Various Case laws cited in the chapter, which throw light on the status of Surrogacy, are the contribution of judiciary.

**Landmark Cases on Surrogacy in India**

Commercial Surrogacy has been legal in India since 2002. Surrogacy in India is relatively low cost and the legal environment is favorable. From past many years, Surrogacy was been used in India in the form of Assisted Reproduction method but it did not had any solid legal battle. Law in India gave its backing to Commercial Surrogacy in 2008. It was in this year, after baby Manji’s case that the Supreme Court of India declared Commercial Surrogacy legal in India. It has been seen in recent times that the demand of Commercial Surrogacy arrangement in India has increased many folds as foreign nationals are visiting the country in huge numbers to get their baby from the same method. Currently, there is dearth of Surrogacy laws in India. And therefore, in case of disputes the Courts have used their own discretion and set new precedent. Now let’s us study few landmark cases relating to Surrogacy in India.

**BABY MANJI CASE**

The legal complexities arising out of International Surrogacy Arrangements concerning the enforceability of Contracts, Motherhood, and Citizenship could leave the children born out of such contracts parentless and stateless or without citizenship.
The landmark Surrogacy case of **Baby Manji**\(^{112}\) in India is a case in the point. Before **Baby Manji**, Indian Courts had not faced a case relating to Surrogacy, in spite of the rising nature of Surrogacy contracts in India. In this case, a Japanese couple Ikufumi and Yuki Yamada traveled to India in late 2007 to discuss with fertility specialist **Dr. Nayna Patel**\(^{113}\) their desire to hire a Surrogate Mother to bear a child for them. The Doctor arranged a Surrogacy contract with Pritiben Mehta, a married Indian woman with children. Dr. Patel supervised the creation of an embryo from Ikufumi Yamada’s sperm and an egg harvested from an anonymous Indian woman. The embryo was then implanted into Mehta’s womb. In June 2008, the Yamadas divorced, and a month later Baby Manji was born to the Surrogate Mother on July 25, 2008. Due to some legal matters, the baby was brought to a hospital in Jaipur in August 2008. Because of marital discord, the couple refused taking-up the responsibility of the child. Although Ikufami wanted to raise the child, his ex-wife did not. Suddenly, Baby Manji had three mothers—the **Intended Mother** who had contracted for the Surrogacy, the **Egg Donor**, and the **Gestational Surrogate**—yet legally she had none. The Surrogacy Contract did not cover a situation such as this.

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\(^{112}\) Baby Manji Yamada Vs Union Of India and Anr, [2008] INSC 1656 (29 September 2008)

\(^{113}\) Points Kari, Commercial Surrogacy and fertility Tourism in India. Institution in Crisis, The Kenan Institute for Ethics, Duke University “Gynecologist Nayna Patel is the medical director of the Akanksha Infertility Clinic. Located in the small city of Anand in the northwestern Indian state of Gujarat, Akanksha has made a name for itself as the global hub of the commercial surrogacy industry.”
Nor did any existing laws help to clarify the matter. Both the parentage and the nationality of Baby Manji were impossible to determine under existing definitions of family and citizenship under Indian and Japanese law. The situation soon grew into a legal and diplomatic crisis. The case of Baby Manji illustrates the complexity and challenges faced by institutions in the face of emerging technologies. As stated Ikufumi wanted to raise the child and therefore, Ikufumi Yamada flew to India alone to bring back the baby. However, the Japanese Embassy in India refused to grant a passport or visa to the baby as the Japanese Civil Code only recognizes the woman who gives birth to the baby as the mother. The Code does not recognize surrogate children.

Under the terms of the agreement with the clinic, the Egg Donor’s responsibility had ended once she provided the egg, and the Surrogate had no responsibility toward the baby after giving birth. Yuki the intended Mother had also refused to take custody of Manji as she was separated from the Husband Ikufumi. She contended that she was unrelated to the baby biologically, genetically, and legally. This meant that Manji was not entitled to a Japanese passport. The embassy said that since Manji was born in India, she needed an Indian passport and a no objection certificate to leave the country.

Ikufumi then turned to the Indian government for help. At one point it looked as if he would have to adopt his own daughter. However, here too he hit a legal roadblock. India’s Guardians and Wards Act, 1890, does not allow single men to adopt baby girls. Manji was not allowed to leave the hospital with Ikufumi Yamada. Yamada then tried to file for an Indian passport for the baby. A birth certificate is required for a passport to be issued. In Indian law, the birth certificate has the name of both father and mother. Although Ikufumi was recognized as the genetic father, the Municipal Council of Anand was unsure whose name should appear as the mother. They, therefore, refused to grant Manji a birth certificate, and referred the case to the national level for advice.


115 Although surrogacy is not banned in Japan, the Japan Society of Obstetrics and Gynecology has issued nonbinding guidelines prohibiting the practice.
National offices also refused to issue a passport, since Yamada was not an Indian, and it was not clear whether Manji’s mother should be considered Indian. Yamada then hired **Indira Jaisingh, a noted attorney**, who filed an appeal with the Indian Government to issue documents for Manji, taking the stand that Manji had the **Right to live** with her Japanese family and should receive Japanese nationality. The Anand Municipality then issued a birth certificate to Manji Yamada, stating only her father’s name. Finally, the official process for the application for a travel document to Japan could proceed. In the meantime, since Ikufumi’s visa had expired, he had to return to Japan. So, Emiko Yamada, Manji’s Paternal Grandmother, travelled to India to care for Manji.

As soon as the birth certificate was granted, she filed a petition in Rajasthan High Court for temporary custody as Manji’s closest blood relative in India, until custody could be transferred to her son. The Court relegated her to the National Commission for Protection of Child Rights constituted under the **Commissions for Protection of Child Rights Act 2005**. On September 15, 2008, the Solicitor General told the Supreme Court that the decision about Manji’s passport was being deliberated upon by the Union Government. Indira Jaisingh, Yamada’s attorney, insisted that the voluntary guidelines issued by the ICMR intended babies born via Surrogacy to be considered the legitimate children of their Biological fathers. Later, the Rajasthan regional passport office issued Manji an identity certificate as part of a transit document, facilitating the way for procuring a travel visa for Japan. The certificate did not mention the baby’s nationality, mother’s name, or religion, and it was valid only for Japan. It was the first such identity certificate issued by the Indian Government to a Surrogate Child born in India.

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120 Supra note bhandari
Thereafter, on October 27, the Japanese Embassy issued a one-year visa to Manji on humanitarian grounds, enabling her and her Grandmother, Emiko, to fly to Osaka. Japanese authorities stated at that time that Manji could become a Japanese citizen “once a parent–child relationship has been established, either by the man recognizing his paternity, or through his adopting her”. It took nearly four months of legal wrangling before Indian Courts finally allowed the baby to leave India.

In the decision of the Supreme Court on 29 September 2008 in Baby Manji Yamada’s case, it was observed that ‘Commercial Surrogacy’ reaching ‘industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms: wombs for rent, outsourced pregnancies or baby farms’. It is presumably considered legitimate, because no Indian law prohibits Surrogacy. But then, as a retort, no law permits Surrogacy either. However, the changing face of law is now going to usher in a new ‘Rent-a-womb’ law, as India is set to be the only country in the world to legalize Commercial Surrogacy.

The Baby Manji case was significant for two main reasons. First, the Indian law on Surrogacy had been silent until that point, but the Supreme Court held in Baby Manji Yamada Petitioner vs Union of India & Anr that Commercial Surrogacy was legal in India. Second, it opened the floodgates of debate regarding the burgeoning Surrogacy contracts in India. In September 2008, India’s then Health Minister Anbumani Ramadoss called for National Surrogacy Legislation. Subsequently, the Draft Assisted Reproductive Technology (ART) (Regulation) Bill, 2008, was prepared by ICMR, and the public was invited to comment on it. Thereafter, certain changes were incorporated, and the revised Assisted Reproductive Technologies (Regulation) Bill, 2010, was sent to the health ministry. Until then, Surrogacy arrangements in India had been regulated by the guidelines issued by the ICMR. However, these guidelines are of voluntary nature, and are not enforceable in courts of law.

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The situation arising in Baby Manji’s case was sought to be remedied by inserting various provisions in The Draft Assisted Reproductive Technology Bill, 2010. **Article 35.4 of the Bill** says “In case a married or unmarried couple separates or gets divorced, as the case may be, after both the parties consented to the Assisted Reproductive Technology treatment but before the child is born, the child shall be the legitimate child of the couple.” Thus, from past many years, Surrogacy was been used in India in the form of Assisted Reproduction method but it did not had any solid legal battle. It was in the year 2008 after baby Manji’s case that the Supreme Court of India declared Commercial Surrogacy legal in India.

**JAN BALAZ CASE**

Another very popular case regarding citizenship dilemma in India was that of a German couple, Jan Balaz and Susan Anna Lohlad, and their twins, Nikolas and Leonard, born in India via Surrogacy. *In this landmark judgment, the Gujarat High Court has held the Surrogate Mother as the “Natural Mother” and her nationality has to be considered alone to decide the citizenship of new-born babies irrespective of the nationality of the father.*

The fact of the case\(^{123}\) was that a German couple faced a legal deadlock when they tried to return home to Germany with their twins. Germany’s state law does not recognize Surrogacy as a means to parenthood, and therefore, refused visas to the babies. The Indian Government, on the other hand, refused to grant the twins Indian citizenship on the ground that they were Surrogate children. After the Anand Municipality in Gujarat had registered the babies as children born of a foreign couple through an Indian Surrogate, getting travel documents for the babies became a problem. Balaz moved the Gujarat High Court, which ruled that since the Surrogate mother was an Indian national, the children would also be treated as Indian nationals and will be entitled to Indian passports.\(^{124}\)

\(^{123}\) Jan Balaz vs Anand Municipality, LPA 2151/2009, High Court of Gujarat.

\(^{124}\) Jaiswal S. *Commercial Surrogacy in India: An Ethical Assessment of Existing Legal Scenario from the Reproductive Rights, Gender, Technology and Development*, 16, 1 : 1–28, 2012
The Union Government challenged the High Court’s verdict in the Supreme Court, refusing to grant Indian citizenship to the babies on the ground that they were Surrogate Children. The SC then directed the Central Adoption Resources Agency to grant as a one-time measure the plea of the German couple for adoption of the twins as a special case. Balaz and his wife then went through the inter-country adoption process supervised by the Central Adoption Resources Agency (CARA). After all this, the German authorities finally relented and agreed to provide the necessary travel documents to the twins, while the Indian Government agreed to provide them with exit permits. The SC Bench also insisted that it did not want any repetition of such a case, and pushed for a law regulating Surrogacy. The twins born in January 2008 remained stateless citizens for two years until the German authorities and Indian Courts relented in May 2010.

The situation which arose in the Balaz case is addressed in the Draft ART Bill, 2010 by the inclusion of a provision in Article 34 Clause 19 that the foreign couple or individual Commissioning Surrogacy will have a letter from either the embassy of the country in India or from the foreign ministry of the country, stating that the country permits Surrogacy, and that the child will get his/her country’s citizenship, and will be permitted entry to the country of the parent’s origin or residence. Provisions in the Bill clearly reflect the lawmakers’ intention to legalize Commercial Surrogacy in India, and provide a legislative framework for it. The liberal legal scenario in India concerning Surrogacy and lack of any well-defined laws as of now encourage many Intended parents to flock to India to Commission Surrogacy.

RELEVANT CASES

The Judiciary in India has recognized the Reproductive Right of humans as a basic right and if reproductive right gets constitutional protection, Surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection. Therefore, indirectly Judiciary has supported Surrogacy through its innovative Judgments.

In *B.K. Parthasarthi v. Government of Andhra Pradesh*\(^{126}\), the Andhra Pradesh High Court upheld “The Right of Reproductive Autonomy” of an individual as a facet of his “Right to Privacy” and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*\(^{127}\), which characterized the “Right to Reproduce as one of the basic Civil Rights of Man”.

Even in *Javed v. State of Haryana*\(^{128}\), though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election, it refrained from stating that the right to procreation is not a basic human right.

**Recent Decisions**

Recently the Judiciary has passed few Judgments\(^{129}\) which allow single person to adopt a child which shall have a effect on Surrogacy arrangement even. The Supreme Court in *Stephanie Joan Becker vs State in 2013* permitted a single 53-year-old lady to adopt a female orphan child aged 10 by relaxing the rigour of the Guidelines of the Central Adoption Resource Authority (CARA). It said the proposed adoption would be beneficial to the child as experts were of the view that the adoption process would end in successful blending of the child in the U.S.

Likewise, in *Shabnam Hashmi vs. Union of India, 2014*, the Court upheld the recognition of the right to adopt and to be adopted as a fundamental right. It held that every person, irrespective of the religion he/she professes, is entitled to adopt.

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\(^{126}\) AIR 2000 A. P. 156

\(^{127}\) 316 US 535 JT 2008 (11) SC 15

\(^{128}\) (2003) 8 SCC 369

The latest verdict of the Supreme Court recognizing transgender as the third gender says “discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution.” Clearly, legal recognition means that they would be entitled to rights of adoption, succession, inheritance and other privileges under law.\textsuperscript{130}

The more pragmatic approach would be to make a law hedged with safeguards, checks and balances. The appropriate and desirable method would be to create a mechanism to judge the suitability of proposed Surrogate parents rather than to debar all single and foreign persons. This would also avoid any conflict with existing laws of adoption wherein foreign persons including single parents are allowed to adopt through a strict and rigorous mechanism provided by CARA. Simply trying to shut out Surrogacy for foreign nationals and single persons may not be the ideal way to stamp out the hopes of persons wishing to be a parent. Whether Indians or foreign nationals, law treats persons as individual parents when required.

A restrictive meaning to the word “person” cannot qualify or change the definition by restricting it to an Indian national. The celebrated view of the apex court in widening the horizons to prevent discrimination on grounds of sex or gender identity is a new thought process based on International Covenants of human rights.\textsuperscript{131} We cannot permit our thinking to be retrograde simply because of the problems accompanying Surrogacy. Administrators cannot usurp law making functions to be a law unto themselves.

\textsuperscript{130} Malhotra Anil, Ending discrimination in surrogacy laws, THE HINDU, May 3, 2014

\textsuperscript{131} Id.

\section*{Scenario in Different States}
After IT outsourcing, it's now "Pregnancy Outsourcing" which is on the rise in India. Indian Surrogacy market is rampantly growing. Indian Surrogates are in demand because of multiple reasons. At the outset, the Surrogacy industry marked its existence in Metros but now it has reached to smaller cities of different states.

One of the Primary factors of growth of Surrogacy industry is the lack of Regulatory Laws in India. At national level, there is no legislative enactment to regulate Surrogacy. Similarly till date not a single state has come forward with any act for regulating the flourishing Surrogacy market. Though, some states have taken few steps for curbing the evils of Surrogacy. The State Government of Delhi has enacted the Delhi Artificial Insemination (Human) Act, 1995 which, for the first time in India, legalizes the donation of semen and oocytes to infertile couples. Semen banks have been recognized under the supervisory authority of the DHS and the compulsory screening of gamete donors against HIV infection and specifically prohibits the segregation of X and Y chromosome for favouring the conception of a male child through artificial insemination.

The researcher has curtailed the research to some special states so let’s look into the legal Scenario of Surrogacy particularly in these States.

**GUJARAT**

**Gujarat is the paradise for infertile couples. It has become the hub of Surrogacy in India.** The low-cost technology, skilled doctors, scant bureaucracy and a plentiful supply of Surrogates have made Gujarat a preferred destination for fertility tourism, attracting nationals from Britain, the United States, Australia and Japan, to name a few. The Akanksha clinic in Anand is the best-known at home and abroad, giving the small town in Gujarat state the reputation as India's "Surrogacy Capital".

"The Surrogates in Anand have become empowered through giving this beautiful gift to others," says Akanksha's owner, IVF specialist Nayana Patel, who shot to fame in 2004.
after she helped a patient have a baby by using the woman's mother - the child's grandmother - as a Surrogate.

"With the money, they are able to buy a house, educate their children and even start a small business. These are things they could only dream of before. It's a win-win situation."132

Gujarat is fast turning into a Dream city for couples desperate to have children. But there is a flip side - the possibility of exploitation. And to fight this evil there must be a mechanism to monitor the Surrogacy cases in Gujarat. But it is an irony that the Government of Gujarat has till date not taken any initiative to make any law to regularize Surrogacy matters in the state.

MAHARASHTRA

Recently it marked the headlines of the newspapers that the Maharashtra Medical Council is planning to come up with the guidelines for Surrogacy arrangements. These guidelines shall have an impact on all Surrogacy arrangements taking place within Maharashtra. This was the first time that a State Government in India has come up trying to regulate the Surrogacy arrangements in India. State Governments had done little with regard to Surrogacy arrangements or even with regard to IVF centre. Earlier, the Tamil Nadu Government Directorate of Medical Services had required that all clinics providing IVF services to be registered with them. There is no clear number as to how many clinics had actually registered with them.

Maharashtra Medical Council is a Statutory Body, established by the law of the State i.e. Maharashtra Medical Council Act 1965. Mumbai, the capital city of State of Maharashtra accounts for a large chunk of all Surrogacy’s in India.

There has always been much criticism that Mumbai clinics had made Surrogacy very commercial. Many research workers and NGOs had earlier pointed to crude way of selection of Surrogate mothers from slums in Mumbai, and the possibility of being exploitation. Setting an example, Maharashtra has become the 1st state in India to draft a set of Guidelines for Surrogacy in the state. The Maharashtra Medical Council (MMC) appointed a two member team of Gynaecologists, which includes Pune’s Dr Sanjay Gupte and Mumbai’s Dr Bipin Pandit, to frame the Surrogacy rules that would be applicable in Maharashtra. This development is a result of a controversy earlier this year in 2014 when the Foreign Regional Registration Office (FRRO) reprimanded some top Surrogacy clinics that violated visa rules for couples applying for Surrogacy.

In addition, there have been blatant cases of violation from Mumbai. In 2012, a popular doctor known for International Surrogacy arrangements is now facing charges for repeated using a very young girl for egg donation in the year 2012. The charges state that she had been donating eggs at the same hospital even when she was a minor. The girl had died after her last egg donation. She was aged 18 years at the time of the death. The doctor has now obtained a pre-arrest bail before a session’s court. Her employer is also facing charges of abduction along with the doctor.

In April 2014, several clinics in Mumbai had been seen flouting the Ministry of External Affairs rules by providing medical services for foreign Commissioning couples, who have not obtained medical Surrogacy visa. The Surrogacy Guidelines by the Maharashtra Medical Council may curtail any possible conflicts with regard to Surrogacy arrangements. The Surrogacy Bill is still pending in Parliament. Meanwhile, there have been just a handful of Guidelines that the Indian Council of Medical Research (ICMR) had framed in 2005 and these are often ignored. MMC took a strong stand to come up with strict regulations so that violators could be punished.

**MMC’s President, Dr Kishore Taori** said that a new draft has been almost finalized and has been cleared. He said, “The Guidelines cover all stakeholders in the process of Surrogacy- mainly the Surrogate, the Couple Commissioning, the Procedure and the Doctor.”\(^{135}\) This move of the Maharashtra Medical Council is certainly laudable. Medical Councils and State governments need to take an active role that the IVF clinics stick to their core medical services, and not be involved with Surrogacy arrangements as an agency. But the Surrogacy guidelines drafted by the Maharashtra Medical Council is not available at their official website till the researcher last accessed it in October 2014. Earlier in the year 2011, the BJP leader Devendra Phadnavis moved a private member’s bill seeking laws to regulate Surrogate Motherhood in the State of Maharashtra.

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135 Id.
The bill, called the Assisted Reproductive Technology (Regulation) Bill, was presented on Dec 17, 2011. Seeking to prescribe laws for Surrogacy, Phadnavis’ bill stipulates that only married women between the age of 25 and 35 years should be allowed to become Surrogate mothers. Furthermore, she must get her husband’s consent to become a Surrogate Mother and cannot have more than five children, including her own that is, if she has her own two children, she can at best bear three surrogate children.

The Surrogate Mother will be bound by law not to engage in activities that might harm the foetus. A woman who is a Surrogate mother should register herself at an Assisted Reproductive Technology clinic, which should be set up to help Surrogate Mothers. The Couple who commission a Surrogate mother must bear all the medical and related expenses, and the child’s birth certificate should be in the name of the Commissioning couple. If the couple is from abroad, a local guardian should be employed, and the couple’s home country embassy must give a certificate stating that Surrogacy is acceptable in the home country. Phadnavis said that a national-level bill is needed to regulate Surrogacy across the country, but since such a bill has not been forthcoming, he would like Maharashtra to take the lead. “I know a lot of people think that Gujarat has the maximum cases of Surrogacy, but actually Maharashtra has more cases,” he said, adding, “There are even Surrogacy Agents who swindle women, and several websites inviting women to become Surrogate Mothers. Thus, there is an urgent need to bring in some laws to regulate the phenomena.”

But eventually this bill is still not able to become an act.

RAJASTHAN

The Predominant concern in population control has tended to overshadow the importance of sterility as medical problem. On an average 10-20% of all the married couples are infertile, face difficulty in starting a family and this creates a feeding of great personal failure particularly in India where religious and socio tradition have made it almost

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imperative for everyone to have children. Infertility though not life threatening, causes intense mental agony and trauma that can only be best described by infertile couples themselves. It is estimated that in 30% of infertile couple’s males as responsible in another 30% females are responsible whereas in the rest 40% couples both the partners are responsible for the infertility.\textsuperscript{137}

About 8% of infertile couples need serious medical interventions involving the use of advanced techniques such as IVF, ICSI, Laser etc. Such advanced treatment is expensive and not easily affordable to the majority of Indians. Further the successful practice of these techniques requires considerable technical expertise and expensive infrastructure. For the couples who are facing problem of childlessness and cannot afford treatment, the Chief Minister in budget speech 2012-13 has declared assistance to establish First Fertility Clinic in the districts which are not having even a one Fertility Clinic. \textit{Following the budget declaration 2012-13 of the Hon’ble Chief Minister the Government of Rajasthan gave a order pertaining to Fertility Clinics duly signed by the Director, Medical & Health Services, Rajasthan, Jaipur on January 03, 2013.} \textsuperscript{138}

The order provided the criteria to be followed by the district in establishing the First Fertility Clinic and Reimbursement to Childless couples. For the first fertility clinic to be established in the districts where not even one fertility clinic is there, the State Government will provide grant-in-aid of Rs. 1 Crore. These clinics will undertake to treat childless BPL couples free of Cost. Secondly assistance up to Rs. 20 thousand for procurement of Medicines to the childless couples whose annual income is up to Rs. 1 Lack per year on being treated by approved fertility clinic. The Guidelines further stated that the aided clinic should not promote Surrogacy, hiring of womb, or third party assistance, donor egg or sperm, as well as any expenditure on Surrogacy or third party assistance should not be allowed to be reimbursed by the State Government.

\textsuperscript{137} For Details See \url{http://rajswasthya.nic.in/SP-1\\%20Dt%2003.01.13.pdf}

\textsuperscript{138} Id.
It is evident that the Government of Rajasthan does not support Surrogacy. But here, the stark contradiction is that the Surrogacy business is at boom in Rajasthan. There are numerous IVF Clinics using Surrogates for helping infertile couples though not aided by Government. Surrogacy is on rise in Rajasthan but the saddest part of the story is that the Government of Rajasthan has till date not taken any initiative to regulate the practice of Surrogacy. There is mushroom growth of IVF Clinics in Rajasthan and many of it are enrolled as Assisted Reproductive Technology (ART) Clinics under National Registry of ART Clinics and Banks in India by Indian Council of Medical Research. Due to Lack of any regulatory Law at National as well as State level the Clinics are following the ICMR Guidelines as per there sweet will as this Guidelines are even not Mandatory to be followed.

MADHYA PRADESH

Surrogacy in Madhya Pradesh is evolving to be a very successful method of Assisted Reproductive Technique (ART). Over the years the concept has been understood and is being accepted socially. Cities in Madhya Pradesh, such as Bhopal and Indore, are frequented by childless couples from other parts of India and even abroad. The affable nature, Skilled Doctors, Sound Medical infrastructure and Easy availability of women, particularly those from a poorer economic background considering Surrogacy as a viable commercial opportunity. Many Institutions, either annexed to a Hospital or a Medical Center have recognized Surrogacy as a promising field. A number of Surrogacy programs came into practice in the past few years in Madhya Pradesh and the numbers are only growing. The success rate of Surrogacy has been constantly increasing over the years. In India, Madhya Pradesh is fast growing as one of the biggest player in the Surrogacy Market of India. The Success rate is of Surrogacy is recorded to be close to 50% in last few years.

http://www.icmr.nic.in/icmrnews/art/List%20of%20Enrolled%20ART%20Clinics%5B5%5D%202013.pdf
But the Legal Scenario of Surrogacy in Madhya Pradesh is same as in Rajasthan and Gujarat. Couple of years before, the Government of Madhya Pradesh planned to legitimize live-in relationships and the Surrogacy legal. These provisions were in the proposed agenda of the State’s Women Policy 2013. Bureaucrat Abha Aasthana led the committee that made the 39-page blueprint of the women policy. The agenda of the policy concentrates on 16 points of women empowerment. These points include protection of women from crime and domestic violence. It also deals with problems faced by rural women. It is also thinking of giving legal protection to children born of Surrogacy. This policy would be valid till 2017. But unfortunately it remained as a Day dream of the Madhya Pradesh Government. At present, there are no Laws to govern Surrogacy in the State. The State Government is unable to bring forward any Legislation to fight with the evils of Surrogacy. The Medical practitioners and other players involved in Surrogacy are busy earning huge profits out of the unregulated practice of Surrogacy in Madhya Pradesh.

Surrogacy carry social stigma in the society as it is equated with prostitution and by virtue of that it is argued that it should be disallowed on moral grounds. Surrogate mothers are kept in isolation from families and allowed to meet families in weekends, which are against the human rights. Hence, there are number of ethical, social, legal and psychological issues associated with Surrogacy, which require urgent need for framing and implementation of law.

With no legitimate law in India for Surrogacy at National as well as State level, it has become a matter of great debate. It is presumably considered legitimate because no Indian law prohibits Surrogacy. But then no law permits Surrogacy either. In the absence of any law to govern Surrogacy, the Indian Council of Medical Research Guidelines (2005) for accreditation, supervision and regulations of ART clinics in India are often violated. Exploitation, extortion and ethical abuses in surrogacy and trafficking are rampant and Surrogate mothers are in maximum cases misused with impunity.

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Amrita Pande is right that a law is required to regulate Commercial Surrogacy particularly to avoid conflict with pre-existing laws for example, the money paid to the Surrogate mother is potentially in violation of Sec. 17 of the Hindu Adoptions and Maintenance Act (1956) which bars payment or other reward in consideration of the adoption of any person. Her concern about the final form is that the primary purpose of such law shall be to protect Gestational Mothers from possible exploitation.

“With the country becoming a Hub for Surrogacy, there is an urgent need for a stringent legal framework to regulate it. The unregulated reproductive tourism industry of ‘Procreating’ through surrogacy is rapidly increasing in India, while there is still no legal provision to safeguard the interests of all the major stakeholders involved in the Surrogacy arrangement, i.e., the Surrogate Mother, the Child or the Commissioning Parents,” said Dr. Kumari.141

In the absence of any potent national legislation and inconsistent state policies globally, how such international agreements give effect to and shape the industry, is a matter of grave concern. After considering the history of Legislative development on Surrogacy it’s not an exaggeration to say that the Government of India and various States shall soon bring in legislation to regulate the rent-a-womb business which is thriving in India. And it becomes incumbent upon neutral bodies to ensure that ethical guidelines are adhered to and also to bring to light any violations. For this, well-formulated guidelines drafted with foresight and long-term perspectives are essential.