ASSISTED REPRODUCTIVE TECHNOLOGY AND LAW-A STUDY WITH SPECIAL REFERENCE TO THE LEGAL REGULATION OF SURROGACY

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DOCTOR OF PHILOSOPHY

by

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DECLARATION

I hereby declare that this thesis entitled **'Assisted Reproductive Technology and Law-A Study with Special Reference to the Legal Regulation of Surrogacy'** is the outcome of the original work carried out by me under the guidance and supervision of Dr.Sonia K Das, Assistant Professor, Govt Law College, Thrissur. This has not been submitted either in part, or in whole, for any degree, diploma, associateship, or any other title or recognition from any University/ Institution.

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This is to certify that the important research findings included in the thesis entitled **'Assisted Reproductive Technology and Law-A Study with Special Reference to the Legal Regulation of Surrogacy'** has been presented in a pre-submission seminar held at The National University of Advanced Legal Studies, Kalamassery, Ernakulam on 20/8/2015.

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This is to certify that all the corrections and modifications suggested by the Research committee during the pre-submission seminar of the research work held at The National University of Advanced Legal Studies, Kalamassery, Ernakulam on 20/8/2015 have been incorporated by Smt. Shinsy P S in her thesis entitled **'Assisted Reproductive Technology and Law-A Study with Special Reference to the Legal Regulation of Surrogacy'**.

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PREFACE

India is being identified as a global surrogacy destination as it became a lenient spot for assisted reproductive technology treatments with its cost effectiveness and legislative vacuum regarding surrogacy.The marked increase in disputes over the surrogacy arrangement is a testimony to the need of keen provisions for this transformative field of current day. Without having a law, while giving relief to the parties, court have always, more visible from its judgments, sounded a note of necessity to have a legislation on assisted reproductive technology and also laid down verdicts beneficial for the future of innocent babies born out of these arrangements in matters like custody, nationality and citizenship controversies.

At present , a legislative vacuum exists in India as far as surrogacy is concerned .As this is not a natural reproductive process with the involvement of only genetic parents,there arise various legal issues which deserves adequate attention. Unending rise of issues may evolve from surrogacy without legal regulation due to the conflicts of interests of parties and complications regarding the nationality of a child born in Indian soil of an Indian mother and foreign father etc. Through the Bill named Assisted Reproductive Technology (Regulation) Bill 2014 , surrogacy is getting regulated in India.There are so many legal issues on surrogacy such as constitutionality of surrogacy, rights of surrogate women and commissioning parents in surrogacy, the rights of baby born under surrogate arrangement,element of exploitation in surrogacy etc. which should be thoroughly evaluated.A humble

attempt to explore these aspects has been made here. The entire analysis of ART and law with special reference to legal regulation of surrogacy in India seems to be significant after tracing the exact loopholes related to it in Draft Assisted Reproductive Technology (Regulation) Bill 2014.

I have no words to describe how much I owe to my supervising guide Dr.Sonia K Das, Assistant Professor , Govt Law college, Thrissur without whose support and guidance, the research could not have been completed.In every stage of the research work,she encouraged me with her learned suggestions and constant guidance. The support she had given to make the study fruitful was the most precious blessing bestowed on me.

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I am greatly indebted to all the research scholars of The NUALS who contributed much to provoke my thought process by their criticisms as well as suggestions during the pre -phd course work seminars.My thanks are also due to the

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I am really grateful to the faculty of The NUALS for their kind support and blessings during my research.A special thanks to office staff of The NUALS especially Shefeena Madam, Section officer,who deserves special mention for their kindness shown to me during the time.

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ABBREVIATIONS

AI	Artificial insemination
AID	Artificial insemination with semen obtained by donor
AIH	Artificial insemination with semen obtained by husband
AIR	All India Report
ALL.E.R	All England Report
AM.J. Int'L	American Journal of International Law
Ariz.L.Rev	Arizona Law Review
ART	Assisted Reproductive Technology
B.U.L.R	Boston University Law Review
Bri.Med.J	British Medical Journal
CA	Court of Appeal
Columb.L.Rev	Columbia Law Review
DNA	Deoxy Rybo Nuclic Acid
ECHR	European Convention on Human Rights
EPW	Economic and Political Weekly
EU	European Union
F.L.R	Foreign Law Reports
Fla.L.Rev	Florida Law Review
Geo.W.L.J	George Washington Law Review
GIFT	Gamete Intrafallopian transfer
HC	High Court
H.L.R	Harvard Law Review
HL	House of Lords
ICMR	Indian Council of Medical Research

ICPD	International Conference on Population and Development
ICSI	Intra Cytoplasmic Sperm Injection
ILR	Indian Law Review
IND.L.J	Indiana Law Journal
IVF	In vitro fertilization
J	Journal
KHC	Kerala High Court Case
KLT	Kerala Law Times
MR	Maharashtra
MTP	Medical Termination of Pregnancy
N.C.L. Rev	North Carolina Law Review
N.Y.U. J. Int'l L. & Pol	NewYork University Journal of International Law and Politics.
Neb.L.R	Nebalon Law Review
PGD	Preimplantation genetic diagnosis
SC	Supreme Court
SCC	Supreme Court Cases
Tex.L.R	Texas Law Review
U.Chi.L.R	University of Chicago Law Review
UKHL	United Kingdom House of Lords
U.N.S.W.L.J	University of New South Wales
U.S.F.L.R	University of San Francisco Law Review
UN	United Nations
US	United States

Va.L.Rev	Virginia Law Review
Vand. L. Rev.	Vanderbilt Law Review
WH..L.R	Whittier Law Review
WHO	World Health Organisation
Wis.Women's.L.J	Wisconsin Women's Law Journal
Wm. & Mary J.Women	William & Mary Journal of Women
Y.L.J	Yale Law Journal
YLFJ	Yale Journal of Law & Feminism
ZIFT	Zygote Intra fallopian transfer

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CHAPTER 1
INTRODUCTION

"The fight is not for women's status but for human worth.The claim is not to end inequality of women but to restore universal justice.The bid is not for loaves and fishes for the forsaken gender,but for cosmic harmony which never comes till woman comes"

Justice V R Krishna Iyer[1]

Women are the precious entities of the world. They are having multifaceted roles in family as well as in society and each role she has to act distinctly. Right of every woman to be secure in their persons, identities and choices should be recognized and confirmed. Her role in family, the foundation stone of society ,is multifarious and her enormously rich contribution to it cannot be underestimated. Social development depends on overall family welfare. In earlier times, women were considered and treated as lesser beings due to the widely adverse approaches of the members of the male dominated society. Nowadays, despite modern women being exceptionally qualified and brilliant in all fields some sort of inhibition, which is an unconsciously inherent byproduct of earlier male dominated thought process is still seen prevalent. The exact essence of empowerment will remain far off until the women themselves be aware of their potential as respectable human beings. They have to be conscious and determined to enjoy every stage of her life without any intervention.

1 *See* Justice V R Krishna Iyer ,*Law and Life*(1st ed., 1979) p.31

Overall development of the world is based on the concept of gender justice.Role of women is crucial for the rise of every nation**.** From the very first unit of society,one should remember and respect the fact that universal justice could be achieved only through gender equality.The twenty-third special session of the UN General Assembly on "Women 2000: gender equality, development and peace for the twenty-first century" emphasized her role by stating that "women, individually and collectively, have been major actors in the rise of civil society throughout the world, stimulating pressure for increased awareness of the gender equality dimensions of all issues, and demanding a role in national and global decision making process." The creation and maintenance of a non-discriminatory, as well as gender sensitive legal environment is necessary for every country.Most prominent factor for the advancement of feminine power is the idea of gender justice.It alone can empower women and enable them to initiate reforms in society through their individual change which later may lead to a structural change.

1.1 AUTONOMY –A CONCEPTUAL PROBE

The concept of gender justice always revolves on the notion of autonomy. It can be viewed as a form of independence. Jackson states autonomy is not a static or innate quality, rather a person's capacity to make meaningful choices about their lives may fluctuate according to a complex matrix of social, economic and psychological factors.[2] To respect the autonomy of an individual is

2 E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (2001)p. 4 cited in Jill Marshall, "Giving Birth but Refusing Motherhood: Conceptions of Autonomy Re-visited" ,(2008) 4 Issue 2 *International Journal of Law in Context* 169, 170 accessed at http://www.academia.edu on 16/6/2015.

to employ the four core ethical principles for dealing with others, namely, those of beneficence, non-male ficence, justice and utility.[3]

The concept of autonomy with regard to women and development was first mentioned in Bangkok,in 1979 ,during a workshop on feminist ideology and structures for women held by the Asian and pacific centre for women and development based in Kuala Lumpur.Autonomy was defined as the power to control women's lives.The term power is used not in the sense of domination over others but as a) a sense of internal strength and confidence to face life b)the right to determine their choices in life c)the ability to influence the social processes that affect their lives and d)influence on the direction of social change.[4] The concept played a crucial role at the beginning of the new feminist movement,and expressed the main goal namely liberation of women from all dependencies.[5]

Four elements of autonomy was recognized by Schrijvers[6] as the criteria for the presence of opportunities for women in Srilanka to resist violence by their menfolk,rather to prevent them from being battered,which she redefined as dimensions of autonomy. These are

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3 *See* R S Downie and K C Calman , *Healthy respect :Ethics in Health Care* (2nd ed.,1994) p.54.

4 Dubel,*Women and Development:To Integrate and Disintegrate*(1st ed.,1983)p.63.

5 Jyotsna Agnihorti Gupta,*New Reproductive Technologies, Women's Health and Autonomy -Indo-Dutch Studies on Development Alternatives series* (1st ed.,2000) p. 22.

6 *See* Joke Schrijvers,*Mothers of life:Motherhood &Marginalization in the North Central Province of Sri Lanka* ((1st ed.,1985)p.173.

1. The control over female sexuality and fertility;the social moulding of motherhood;
2. The division of labour between sexes ;access to ,and control over, labour,property,knowledge and power positions;
3. The inter-relationships among women;cooperation and organization;and
4. the gender ideology,i.e.the ruling ideology with regard to masculinity and feminity;women's self image.

In a nutshell it can be claimed that role of autonomy is crucial for the development of every woman and gender justice can be advanced only with the help of autonomy of females.

1.2 REPRODUCTIVE AUTONOMY

Reproduction has been viewed as the key duty of women both socially and historically.As Aristotle pointed out,women reproduce citizens ,not only in the sense of rearing and raising them,but quite literally by producing them.[7]Reproduction involves not only procreation but also the nurture and care of a growing child. There is also additional social reproduction by means of care work for the family and household, transmitting culture and maintaining social bonds and community.[8] In capitalist patriarchy due to this involvement,they are confined to the household work and their activities are not considered as a sacred work of human being.[9]

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7 *See* Joan Judge,"Citizens or Mothers of Citizens?Gender and the Meaning of Modern Chinese Citizenship",in Merle Goldman and Elizebeth.J.Perry (eds)*Changing Meaning of Citizenship in Modern China*(1st ed.,2002) p. 23.

8 *See* Sarojini N &Vrinda Marwa, "Reinventing Reproduction,Reconceiving Challenges-An Examination of Assisted Reproductive Technologies in India", (2011) 46 *EPW* 97.

9 *See generally supra* n.5 at 39 .

As it is the biological peculiarity of women to procreate, autonomy in reproduction also vests in them. Reproduction is, without much questioning, often considered as falling under the heading of private and family life.[10] Then the reproductive autonomy is understood as

a) The right of women to choose whether to have children or not and if so, the right to decide on the number of children they want,when and with whom;

b) Freedom to choose the means and methods to exercise their choice regarding fertility management ;

c) Access to good information on means and methods.[11]Woman should get autonomy in her life especially in the field of reproduction as it is her body carrying a baby if she gets pregnant.

In a capitalist patriarchy ,due to their involvement with reproduction ,including childbearing and child rearing which confines them mainly to the domestic domain,women are defined to "nature',while men operate in the political and public spheres of social life.The activities of women ,in giving birth and nurturing children ,are not seen as a truly human activity, As the conscious interaction of a human being with nature ,but rather as an activity of nature ,which produces plants and animals unconsciously and has no control over this process.

10 Marleen Eijkholt, "The Right to Found a Family as a Stillborn Right to Procreate", (2010) *Medical Law Review* 127. *See also*, *Pretty* v. *UK Application No. 2346/02* [2002] 2 *FLR* 45. The Grand Chamber held that:"private life", which is a broad term encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development, and to establish and develop relationships with other human beings and the outside world .

11 *See supra* n.8 at 26.

1.3 REPRODUCTIVE RIGHTS

Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.[12]Reproductive rights includes nondiscrimination in access to reproductive technologies,ensuring access to comprehensive reproductive health care services and information and the respect and protection of women's right to make her own decision about child bearing including use of reproductive and genetic technologies .These rights are based on the concept of reproductive autonomy which implies women have a right to reproductive choice,[13] to be able to contracept[14],abort or get pregnant.[15]Reproductive rights focus on various issues such as conception,pregnancy,child birth etc which affects women more directly than they affect men. They are most relevant in the context of abortion, contraception, freedom from sterilisation, and freedom from coercion in pregnancy management, but also with regard to access to infertility treatment, freedom to engage in reproductive contracts or multiple party interventions, and in relation to receiving funding for procreative assistance.[16]

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12 *See* International Conference on Population and Development (ICPD) Programme of Action(1994)para 7.3.

13 *See generally Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

14 *See generally Griswold* v. C*onnecticut*, 381 U.S. 479 (1965).

15 *See generally Roe* v. *Wade*, 410 U.S. 113 (1973).

16 *See* Daniel Sperling , "Male and Female He Created Them: Procreative Liberty, Its Conceptual Deficiencies and The Legal Right to Access Fertility Care of Males" ,(2011) 7 Issue 3 *International Journal of Law in Context* 375,379 accessed at *http://www. ssrn.com* on 16/6/2015.

1.4 REPRODUCTIVE FREEDOM

The concept of reproductive freedom and rights is not very different from the concept of autonomy.[17] Van Staveren[18] distinguishes six entitlements related to reproductive freedom:

1.access to contraceptives

2. access to decision- making regarding children

3.access to sex education and information on sexuality.

4.access to (reproductive) health care for parents and for children;

5.access to alternative roles,other than motherhood/fatherhood

6.access to economic resources.

It can be well said that the concept of reproductive freedom is almost similar to the concept of autonomy having several levels ,such as that of a strategy or a goal in itself.However reproductive freedom in one sphere of life while the concept of "autonomy" is more comprehensive and may be used particular not only in the context of reproduction but in all areas of women's lives.[19]

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17 *See supra* n.5 at 29.

18 I.P Vanstarven, "A Political Economy of Reproduction", 1994(3) *Development* 20,22.

19 *See supra* n.5 at 29.

1.5 LINK OF REPRODUCTIVE FREEDOM AND RIGHTS TO REPRODUCTIVE AUTONOMY.

Both the concepts are based upon women's power to make choices(autonomy).Giving people, especially women, the ability to make choices in their reproductive lives has implications that go far beyond individuals to society as a whole. The exercise of choice in one domain opens up the possibility of choice in others. For women, the ability to choose whether, when, and how often to have children implies the ability to define their own personal development in terms other than childbearing.[20] Autonomy also requires a wide array of social supports that guarantee the preconditions of self realization such as shelter, food, daycare, healthcare and education.[21]Autonomy presumes the availability to each person of meaningful work and relationships as well as the opportunities for political, social and cultural engagements.[22] It relates to the freedom to procreate and to make intimate decisions regarding procreation and parenthood deriving from our recognition of its instrumental worth to one's self and one's life.[23] The choice in reproduction is closely linked with dignity , and self identity .[24]So it is a matter of self respect and confidence.

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20 Tomris Turmenvol, "Reproductive Rights:How to Move Forward" (2000)4 *Health and Human Rights* 31 accessed at *http:// www.jstor.org* on 5/12/2011.

21 *See* Rhonda Copelon, " Losing the Negative Right of Privacy :Building Sexual and Reproductive Freedom", (1990-1991) 18 *Newyork Review of Law and Social Change* 46.

22 *See* R.Petchesky,*Abortion and Women's Choice:The State,Sexuality and Reproductive Freedom*(2nd ed.,1990) p.390.

23 *See* Priaulx, Nicolette , " Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters", (2008) 16 *Medical Law Review* 169,178.

24 *See generally* JA Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (1st ed., 1994) p.30. Robertson derived the concept of right to procreate from the principle of dignity. He argues that reproduction is central to personal identity, and therefore deserving of such protection. *See also Mcfarlane* v. *Tayside Health Board* (2000)2AC 59 (HL)114.In this case,Lord Millet noted that autonomy can be viewed as an

1.6 FEMINIST JURISPRUDENTIAL PERSPECTIVES OF RIGHT TO PROCREATE

It is a fact that fundamental issues in choices of women is a central issue to feminist jurisprudential theories.[25] They are more concerned on the effects and influence of the inequality in reproductive roles on their status in society.Women's place in the home, workforce and civil society has been directly traced to the biological fact that it is women and not men that have babies.[26]Their bodies and biological peculiarities are used to control their destiny.Feminist

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aspect of human dignity and that the protection of autonomy can also be viewed as the protection of human dignity.

25 Feminist Jurisprudence is defined as the analysis of law from the perspectives of all women.*See* Patrica Smith (ed) *Feminist Jurisprudence* (1st ed.,1993)p.3.Per Catherinne Mackinnon.

Feminist Jurisprudence can be divided in to five categories

a) Liberal Feminist Jurisprudence: The main idea behind the concept is to provide equal civil rights and equal opportunities for all irrespective of sex.

b) Radical Feminist Jurisprudence:The main object of it is to reverse the institutional structures of domination and to reconstruct gender thereby eliminating patriarchy.

c) Cultural Feminist Jurisprudence:As per this particular school, it is necessary to change institutions to reflect and accommodate the value that should properly be accorded to characteristics and virtues traditionally associated with women.

d) Marxist Feminist Jurisprudence: This school elaborates division of human activity into public and private sphere and women confining to the latter as the reason for women's lower status. The solution is the replacement of capitalist system with socialist system.

e) Post Modern Feminist Jurisprudence: There is no single solution for subordination of women as per the school.If women comes to the forefront in any field, the barriers she has to cross will be far more than a man of similar circumstances .Special opportunities and privileges which can be considered as compensatory discrimination is mandatory for her upliftment.Ultimate aim of the school is to have equal status with men. *See* Francis E Olsen,*Feminist Legal Theory* (1st ed.,1995)pp.1-15.

26 *See* E Jackson, "Degendering Reproduction?",(2008) *Med Law Rev* 16 (3) 346 accessed at *http://medlaw.oxfordjournals.org* on 16/6/2015.

jurisprudential movement attempted to break the mould and make women not to be a prisoner of their biological capacity.[27]

Feminists jurisprudential thoughts argued for a right to procreate to protect choices of whether and when to reproduce.[28] As a result, the right represented two inherently contradictory claims. It was used (positively) in claims related to procreation and to support a desire to procreate,as well as (negatively) in claims where there was a desire not to procreate.[29] The right to procreate is "a right to control own role in procreation unless the state has a compelling reason for denying this control".[30] Nothing would advance women's welfare more than respecting their reproductive autonomy.

Laslett and Brenner [31]pointed that renewing life is a form of work, a kind of production, as fundamental to the perpetuation of society.[32] In *Parkinson* v. *St James and Seacroft University Hospital NHS Trust* ,[33] the sheer hard work involved in pregnancy, childbirth and in being a mother elucidates

> From the moment a woman conceives, profound physical changes take place in her body and continue to take place not

27 *See* Lieber, Katherine B, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?", (1992)68 *Indiana Law Journal* 205 ,211-212.

28 S McLean, "The Right to Reproduce"in T Campbell and others (eds), *Human Rights: From Rhetoric to Reality* (1st ed.,1986) p.103.

29 R Dworkin, *Life's Dominion. An Argument about Abortion and Euthanasia* (1st ed.,1993) p.148.

30 *See ibid.*

31 *See* Laslett, Barbara and Johanna brenner,"Gender and Social Reproduction: Historical Perspectives." (1989)15 *Annual Review of Sociology* pp.381-404.

32 *See id* at p.383.

33 (2001] 3 W.L.R. 376, C.A.

> only for the duration of the pregnancy but for some time thereafter. Those physical changes bring with them a risk to life and health greater than in her non-pregnant state…along with those physical changes go psychological changes…some may amount to a recognised psychiatric disorder, while others may be regarded as beneficial, and many are somewhere in between….Along with these physical and psychological consequences goes a severe curtailment of personal autonomy. Literally, one's life is no longer just one's own but also someone else's…continuing the pregnancy brings a host of lesser infringements of autonomy related to the physical changes in the body or responsibility towards the growing child.

The mothering role of women is reproduced in society irrespective of whether women become mothers or not and the ideology of motherhood is dependent on the way a society constructs it.Motherhood is seen to be positively significant in many traditional societies, since women's reproductive capacity is something which women consider their source of power, and as defining their identity and status.It is also considered a resource for women who are denied the experience. This is true of childless women who centre their whole life on the fact that they cannot become mothers or bear children and have to pay a social cost for it.[34] Cultural feminist jurisprudence follows that motherhood should be placed within the context of women's lives as one of the greatest pleasures, worries and burden of females[35]. It is remarkable that in many of these theories

34 Anjali Widge, "Sociocultural Attitudes towards Infertility and Assisted Reproduction in India",p.62 in Effy Vayena,Patrick J. Rowe,P. David Griffin(eds),Current Practices and Controversies in Assisted Reproduction,Report of a meeting on"Medical, Ethical and Social Aspects of Assisted Reproduction"held at WHO Headquarters in Geneva, Switzerland17–21 September 2001. The ideology of motherhood in Indian society explains why fertility is so important. Feminine identity is defined by the ideology of motherhood, being fertile is important and infertility is a huge problem. Though the control of fertility might be a problem for the state, yet infertility is very important in the cultural context as kinship and family ties depend on the progeny.

35 *See* Lennon, Kathleen, "Feminist Perspectives on the Body" in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2010)accessed at *http://plato.stanford.edu* ;*See also*,Shireen Hassim, "Gender, Social Location and Feminist Politics in South Africa" (1991) *Transformation* 15 accessed at *http://kznhass-history.net* on 6/7/2014.

that the reproductive capacity of women is either implicitly or explicitly associated with powerlessness,without a clear explanation for the same[36]. Women's role in parenting most often constrains their ability to pursue careers and ambitious life. When it become possible for a women to gain control over their reproductive capacities, prior step towards her destiny can be traced.Her body and biological peculiarity is a major burden for which she has to compensate her future in many ways. "Women achieve autonomy by actively choosing not to be immersed in their biology, including choosing not to become pregnant, not to have children and not to become mothers."[37]Studies revealed that women who have extensive knowledge of fertility-regulating techniques will exercise reproductive autonomy more effectively than those who must obtain information from others.And also women who exercise reproductive autonomy will also function more autonomously in other areas of their lives.[38]

1.7 REPRODUCTIVE CHOICE OF WOMEN- GROWING PATHS

Reproduction is the basic instinct of living beings and man is not different from other creatures in this respect. It is also true that the issue of reproduction has always been central to women's lives.In all cultures and ages women have sought ways and means to either prevent conception, or get rid of unwanted

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36 *See supra* n.8 at 37 . *See also* Robin West, "Jurisprudence and Gender", (1988) 55 *U. CHI. L. REV*. 1, 30 (citing S Firestone, *The Dialectic of Sex* (1st ed.,1980)). Here Pregnancy is considered as a dangerous, physically consuming,existentially intrusive, and physically invasive assault upon the body which in turn leads to a dangerous, consuming,intrusive, invasive assault on the mother's self-identity that best captures women's own sense of the injury and danger of pregnancy.

37 *See* Jill Marshall ,*supra* n.2 at 176.

38 *See* C. H. Browner; Sondra T. Perdue, "Women's Secrets: Bases for Reproductive and Social Autonomy in a Mexican Community" (1988)15 *Medical Anthropology*. 84,97 accessed at *http://links.jstor.org* on 2/12/2011.

pregnancy,to voluntarily remain child free,or to deal with involuntary childlessness.[39]Reproductive choice should be respected inspite of other factors such as the lack of understanding of the sexual act as well as the apprehensions about her capacity to carry the preganancy to its full term and the assumption of maternal responsibilities thereafter.[40] Whether the Right of women to choose their life,autonomy in their reproductive capacity be subjected to restrictions; Is it completely personal or individual ; these are the major questions which comes in one's mind while thinking upon the choice in repro duction.No doubt in the matter that women gets power from their reproductive capacities only when they could control their fertility.[41]Here an analysis of varied aspects of reproductive choice of women and evaluation of its extent is being made.

1.7.1 Reproductive Choice v. Contraception

In contraception cases,Court is liberal as it is a matter of family planning.In *Griswold* v. *Connecticut* [42] the Court is receptive to a claim that Connecticut law prohibiting the use, or advice concerning the use, of contraceptives violated the right to privacy of married persons and was therefore unconstitutional. The constitutional Protection afforded the use of contraception flows from both personal and relational privacy.The former protects a woman's right to prevent the bodily invasions and alterations that are the inevitable

39 *See supra* n.2 at p.13.

40 *See Suchitha Srivastava and anr* v. *Chandigarh Administration* (2009)9 SCC 1,13.

41 *See* Joke Schrijvers, *supra* n.6. He writes on the biological aspects of motherhood which is experienced by women as both power and powerlessness.

42 *See supra* n.14.

consequence of conception,pregnancy,childbirth,while the latter shelters her choice to enter in to or extricate herself from such an inmate personal relationship.[43] Another notable thing is that but denial to have child or preventive measures undertaking without the consent of the husband amounts to cruelty towards the partner who wish to be a parent.[44]Although there are many contraceptives available., sterilisation is the most widely used contraceptive method. Sterilization involves the termination of the ability to produce children.It may be the result of a surgical operation or the incidental consequence of an operation to remove a diseased reproductive organ or to cure the malfunction of such an organ.When the reproductive organs are not diseased,most sterilization are effected by vasectomy for males and tubal litigation for females.[45]Sterilization can be voluntary and can be regarded as a matter of reproductive choice.States shall permit voluntary sterilization.[46] Sometimes

43 *See* Radhika Rao, "Property, Privacy, and the Human Body", 2000(80)*B.U.L Review* 359,391.

44 *See generally Forbes* v.*Forbes*(1955)2All.E.R 311; *See also Sandeep Kumar* v. *Sangeeta* FAO No. 75-M of 2009 1 (The High Court of Punjab and Haryana).In this case wife used to consume contraceptive pills against husband's wish to have a child and Court held it amounts to matrimonial cruelty) . *See Samar Ghosh* v. *Jaya Ghosh* 2007 (5) SCALE 1,Court held wife's unilateral decision not to have a child amounted to mental cruelty towards the Husband. Observing that a uniform standard could not be laid down, the Supreme Court enumerated instances of human behaviour that would be relevant in dealing with cases of "mental cruelty". The First two grounds among them are a) A husband undergoing sterilisation without medical reasons and without the consent or knowledge of his wife may lead to mental cruelty.b)A wife undergoing sterilisation or abortion without medical reasons or without the consent or knowledge of the husband may lead to mental cruelty..

45 *See generally Bravery* v. *Bravery* (1954)3All.E.R 59; *Forbes* v. *Forbes(*1955)2All.E.R 311:*See* Sheldon v.Sheldon (1996)2All.E.R.257. the Court found the Oklahoma statute (Habitual Criminal Sterilization Act) unconstitutional that it mandated involuntary sterilization.*But see Buck* v. *Bell* 274 U.S. 200 (1927).In this case also the question was whether the state could lawfully sterilize an individual without consent. statutory law allowing the involuntary sterilization of the mentally defective was held constitutional.It was held involuntary sterilization of the mentally defective, was not a violation of the Fourteenth Amendment's Due Process Clause or Equal Protection Clause.*See*, *id* at 207.

46 *See In re guardianship of B*,190 Misc.2D 581; *See also*,*Skinner* v. *Oklahoma*,*Supra* n.13.

couples find the spacing methods of contraception inconvenient or unacceptable and sterilisation after having desired number of children.But spousal involvement in giving consent cannot be neglected.Courts have long been recognized that sterilization is an extreme course of action.[47]Making a choice in reproduction ,not to have children or more children is a matter of personal choice.And if couples seeks it as a matter of family planning or financial stability with their consent,nobody cant interfere in it.Even a single person can do it voluntarily.But if he or she marries without conveying the same,it will lead to matrimonial cruelty and thus a valid ground for seeking divorce.It is also to be noted that if the husband has undergone sterilization surgery without telling his wife about it, was considered to be an act most disruptive of the married state and she was the victim of it.[48]And also women can have the power to exercise the right to bodily integrity. The right of bodily integrity protects a woman's sole right to bar the fetus from entering her body by means of contraception and to rid her body of the fetus by means of abortion.[49]But bitter truth is that Reproductive Choice is not always unrestricted and it may often subjected to certain limitations in the field of marital affairs .

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47 *See* Robert .D.Miller,*Problems in Health Care Law*(9th ed.,2006)p.741.

48 *See Bravery* ,*supra* n.45 at 71.(Dissenting Comments of Lord Denning)

49 *See* Radhika Rao, "Reconceiving Privacy: Relationships and Reproductive Technology" (1998)45 *U.C.L.A Law Review* 1077 ,1112.

1.7.2 Reproductive Choice v. Abortion

The most relevant and impactful reproductive choices eclipse the abortion choice.[50]The determination of whether to have a child or children is a major life decision. Crucial question which arises here is that whether there is a right to terminate pregnancy or freedom of choice in determining it .It is true that every human being of adult years and sound mind has a right to determine what shall be done with his own body.[51]In U.S. abortion was permitted with the consent of the pregnant women ,at all stages prior to "quickening".[52]There has been long debates on abortion rights and *Roe* v. *Wade*[53] , an American case law opened a way to expand the competing and compelling facets of the right. In this Supreme Court decision,Court overturned a Texas interpretation of abortion law[54] and made abortion legal in the United States. In the *Roe* v. *Wade* decision ,it was held that a woman, with her doctor, could choose abortion in earlier months of

50 Mariama A. Jefferson, "Reproductive Choice: The Reproductive Choice Debate Must Include More than Abortion", 2010[4) *Charleston Law Review* 774 ,791.

51 *See Schloendorff* v. *Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914). The plaintiff asserted that physicians performed surgery on her without her consent. Justice Cardozo, writing for the majority, stated that "the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done with [her] own body…."

52 It is the earliest perception of foetal movement by a mother in the second trimester of pregnancy.The judicial recognition of abortion right was got in 1973 in *Roe* v. *Wade*.*See supra* n.15.

53 *Ibid.*In *Roe* v. *Wade*, Court discussed the matter into three stages.a)During the first trimester of pregnancy ,the right of privacy of a women and her physician precluded most state regulation of abortions performed by the licenced physicians.b)From the end of the first trimester until viability,state could regulate to protect maternal health.c)After viability,states had a compelling interest in the life of the unborn child,so that abortions could be prohibited except when necessary to preserve the life or health of the mother.

54 Texas criminal abortion law prohibited all abortions which are not necessary to save the life of the mother .In Roe,it was declared violative of the due process clause of the fourteenth amendment.

pregnancy without legal restriction, and with restrictions in later months, based on the right to privacy. In this celebrated case, Blackburn J. observed "The right of personal privacy includes the abortion decision,but that this right is not unqualified and must be considered against important state interests in regulation".[55] Like contraception, Abortion also coming under the purview of personal privacy. In *Planned Parenthood* v. *Casey* [56] the Court emphasized that the abortion right "stands at [the] intersection of two lines of decisions".[57]One's attitudes towards life , family,values affects the same.[58]

Pregnancy is a stage where women may be exposed to various physical invasions as well as risks. According to Justice Blackmun,

> [C]ompelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical

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55 *See Roe* v. *Wade ,supra* n.15 at 153. *See also Doe* v. *Bolton* 410 U.S. 179 (1973). In this case, a married woman challenged the constitutionality of Georgia's laws criminalizing abortion. Under Georgia law, abortions were prohibited unless a doctor determined that the pregnancy would endanger tile woman's life or health, the fetus likely would be born with a birth defect, or if the pregnancy resulted from rape. *Id.* at 183. Argument of the case is that under Georgia law, she was forced to either relinquish her right to decide whether to bear a child or seek an illegal abortion. *Id.* at 185. The Supreme Court struck down the Georgia law as unconstitutional. *Id.* at 201.

56 505 U.S. 833 (1992).

57 *See Planned Parenthood* v. *Casey*, 505 U.S. 833(1992)at 857.

58 As Justice Blackmun wrote in *Roe* v. *Wade*, *supra* n.15 at 116.

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

> changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts.[59]

Before the fetus reaches viability[60],woman gets her right to have bortion without any undue burden of following the viability rule.[61]

In India,The Bombay High Court refused permission to abort a 26 week fetus with a serious heart defect after rejecting the mother's plea to terminate the pregnancy in a case torn between trauma and ethical issues. Dismissing an application by Niketa Mehta, the court observed that medical experts did not

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59 *See Planned Parenthood* v. *Casey,supra* n.57 at 927 . It is observed that the joint opinion in *Casey* can be broken down into several sections.First, it reviews *Roe* v *Wade* and its constitutional foundations at great length. It examines the 'liberty' interest as found in the Constitution, reiterating that the right to abortion is a protected interest. Second, the joint opinion makes an extensive review of stare decisis. Third, the joint opinion affirms what it labels the essential holding" in *Roe* v. *Wade* and then provides a new test with which to review the constitutionality of state laws regulating abortion.*See Kevin Yamnamoto, & Shelby A.D. Moore,* " A Trust Analysis of a Gestational Carrier's Right to Abortion" , (2001-2002) 70 *Fordham L. Rev*. 93 ,139.

60 *See* Radhika Rao, "Equal Liberty: Assisted ReproductiveTechnology and Reproductive Equality" 2008(76) *The George Washington Law Review* 1457,1470.Rao observes

> Viability is important not simply because it correlates with sentience, but because it marks the moment of independence,of an autonomous existence. At viability, it is reasonable to regard the fetus as a separate entity rather than an appendage that is part of the woman's body because it no longer needs her in order to survive. At this point, it may be treated as an autonomous entity, a distinct being with interests in its own right. Accordingly, viability connects the legal status of the fetus with its dependence upon the woman's body, confirming the importance of bodily integrity and sex equality to the abortion right.

61 In *Roe* v.*Wade* ,it was observed, "Viability" is that point where the fetus is potentially able to live outside the mother's womb, albeit with artificial aid. Viability for a fetus outside the womb was approximately twenty-eight weeks gestation. *See Roe* v.*Wade*,*supra* n.15 at 160. By 1992,viability was possible at twenty-three to twenty-four weeks. *See Planned Parenthood* v. *Casey, supra* n.57 at 860.

express any categorical opinion that if the child is born it would suffer from serious handicaps.[62] Petitioners also sought an amendment to the Medical Termination of Pregnancy Act 1971[63] so that pregnancy can be terminated even after 20 weeks if doctors believe that the child, if born, will have serious abnormalities, so as to render it handicapped.[64]

Another notable fact is that whether there arise a property right[65] in the uterus rather than a right to privacy.[66] To an extent women have property rights in their uterus,because it is an organ of her for which she can demand complete autonomy.But the increased empathy for the fetus stemming from it tends to

62 *See Dr.Nikhil Dattar &Ors* v. *Union of India* (2008)110 Bom.L.R 3293.

63 In India Abortion is a criminal offence as per S.312 Of Indian Penal Code.In 1971, Medical Termination of Pregnancy Act 1971 was enacted which is an exception to IPC S.312.It permits abortion where continuance of pregnancy cause grave injury to mental and physical health of the mother.

64 As per the Medical termination Act (MTP)1971,A pregnancy can be terminated after twenty weeks only if there was a fatal risk to the mother and not to the fetus.Niketha Mehta in her 26th week of pregnancy approached the court for an abortion for the reason that foetus has a congenital heart block.Court then constituted a committee of doctors .They also were not sure on the matter that if a cardiac surgery would be required after the birth,or there was any "substantive risk "for the child.The Mehtas sought amendment to MTP Act ,which disallows abortion on the ground of feared abnormality in the child after 20th weeks of pregnancy.Court pointed out that even if Mehtas were to seek permission for abortion before 20 weeks, medical opinions did not support the need for abortion in their case.But MTP Act 1971 is amended in 2014.As per the amendment ,upto 24 weeks of pregnancy,abortion is permissible if womens as well as fetal life is at risk.

65 Grotius recognized a person's property right in his or her "life" and "limbs".*See* Adam Mossoff, "What Is Property? Putting the Pieces Back Together",(2003) 45 *Ariz. L. Rev* 371, 372 ;To John Locke "every one has a property in their own Person." *Id* at 388; James Madison also envisaged the same.*See* James Madison, *Property*, in The writings of James Madison (G. Hunt ed. 1906) 101, quoted i*n* Laura S. Underkuffler, "*On Property: An Essay"*, (1990) 100 *Y. L. J.* 127,135.

66 *See generally* Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy", (1890)4 *Harv. L. Rev*. 193 Here it has been stated that the individual shall have full protection in person and in property is a principle as old as the common law.

simultaneously decrease respect for women's autonomy.[67] While abortion as a reproductive choice differs vastly from involuntary sterilization and contraceptives, it has become the focal point of the reproductive choice discussion. When one raises the issue of reproductive choice, many individuals instinctively think of abortion.[68] But it includes so many other issues which often overrided by the abortion disputes.[69]

1.7.3 Reproductive Choice v. Assisted Reproductive Technology

Motivation to have children of one's own is the most cherished dream of every human beings.For those,who were unable for the completion of that desire due to physical or medical causes,adoption is considered as the only option before the advancement of Assisted reproductive technologies.[70]Lengthy process of adoption and resulting nongenetic similar child forced many of infertile couples to live a life without the joy of parenthood.Recent advances made the hopes and aspirations of them fulfilled through assisted conception techniques and it is a welcoming change that they can try the distinct techniques if there exists a chance to conceive.The process of assisted reproductive technologies not only brings a new life to the world but also makes worth living to many life

67 *See* Susan Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body* (1st ed.,1993)p. 86.

68 *See supra* n. 50 at 790.

69 *See generally ibid.*

70 Assisted reproductive technology (ART) is a term used by medical and legal practitioners to describe the medical procedures and research to assist individuals in the process of human conception or fertilization. *See* Charles.P. Kindregan, jr. & Maureen Mcbrien, *Assisted Reproductive Technology: A Lawyers Guide to Emerging Law and Science* (1st ed.,2006) p. 5.

of infertiles. ART had brought a new reproductive choice to every women which they lacked before its arrival.

With the emergence of new reproductive technologies, however, women are faced with new challenges and choices. [71]Some regard these choices as new reproductive freedoms while others view them as other ways for society to continue to control women through their reproductive capacities.[72]Some scholars like Robertson contended that the Constitution of America confers a fundamental right to reproductive autonomy which includes not only the right to avoid reproduction, but also the right to reproduce with the assistance of technology.[73]In India also,it can be viewed under the constitutional protection and within the purview of right to privacy under Art 21. Infertility is always considers as a failure of body and causes a feeling of exclusion from others having children.[74] If fertile persons possess a right to reproduce, infertile persons are be extended the same rights through the vehicle of assisted reproductive

71 *See generally* Tim Bayne & Avery Kolers, "Parenthood and Procreation", Stanford Encyclopedia Of Philosophy (May 30, 2006) accessed at *http://plato.stanford.edu* on 2/3/2012. Author remarks that the rise of "Assisted Reproductive Technologies" (ARTs),increasing multiculturalism, and the explosion of interest in "applied"philosophy have all contributed to a rise of interest in philosophical questions surrounding parenthood and procreation.

72 *See* Ruth Hubbard, *New Reproductive Technologies, in* Simon & Schuster ,*Our bodies,Ourselves*,(1st ed.,1971) p.317.

73 *See generally* John A. Robertson, "Genetic Selection of Offspring Characteristics", (1996) 76 *B.U. L. Rev*. 421;John A. Robertson, "Liberty, Identity, and Human Cloning", (1998) 76 *Tex. L. Rev*. 1371.

74 *See* Report of the Committee of Inquiry into Human Fertilization and Embryology(1984) para 2.4.

technologies.[75] There is not only just the right to not to reproduce, but also the right to reproduce with the assistance of technology. New dimension to the process of procreation is being explored by advances in the science of reproductive technology.[76] Reproductive technology is so advanced, individuals today have several contemporary choices such as: whether to delay childbirth beyond the traditional childbearing years, what process of conception to use, how many children to bear in one pregnancy, whether to cyropreserve embryos for future use, and whose reproductive materials (i.e.sperm and ova) to use in the conception process.[77] Unlike contraception and abortion, assisted reproduction does not involve the removal of anything from the body.[78] Pregnancy indisputably takes place within a women's body.But as reproductive power finds its way in to the hands of medical professionals,lobbyists and policy makers,the geographies of pregnancy are shifting and the boundaries need to be redrawn legally.[79]Human reproduction has been changed tremendously by medical science and only thing to remember is the law which intends to regulate the area

75 *See* John A. Robertson, *Children of Choice: Freedom and The New Reproductive Technologies* (1st ed.,1994) pp. 99-100.

76 S*ee supra* n.72 at 8.Author states , Advances in the science of reproductive technology in recent decades have made the potential for procreation of children a reality for thousands of people who in prior times would be childless. This has created nontraditional methods of conceiving and giving birth to children, which in turn has created a new dimension . . . for people who either cannot or do not choose to have children by the traditional method .

77 *See supra* n.50.

78 *See supra* n.49 at 1112-1113.

79 Ashish Virk ,Aman A.Cheema",Baby Business and Strangers:The Ethical and Feminist Geographies of Surrogacy with Meticulous Reference to Legal Impediments for Indian Homosexuals",2009(2) ILR 49.

should balance competing interests and views in the area of particular sensitivity. [80]

The debate over the issues of women's autonomy and impacts on ART become more complicated among every sphere as women are even more strongly affected by these technologies.[81] Today,reproductive technologies are marketed like setting an offer to infertile women to be a 'complete'woman.They are putting agendas to make exploitation while employing patriarchal ideas about womanhood as motherhood. Their bodies have historically been sites over which others can exert control.[82]

After the evolution of reproductive technology ,debates over the changes in the family norms which mandates an alteration in the existing social structure often demands a total rethinking on the use of technology.[83] Undoubtedly Assisted reproductive technologies have redefined concepts of family and motherhood thereby increasing the number of players involved in conception.[84]One has to carefully analyse the effects of ARTs on women as it may influence each and every stage of her life assigning new frontiers of rights as well as obligations.

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80 Marc Stauch and Kay Wheat with John Tingle,*Sourcebook on Medical Law* (1st ed.,1998) p.348.

81 *See supra* n.5 at 27.

82 *See supra* n.8 at 108.

83 S*ee generally* Joke Schrijivers,*supra* n. 6 at 7-8.

84 Helena Ragon and Sharla K .Willis, "Reproduction and Assisted Reproductive Technologies" in Gary.L.Alberecht,Ray Fitzpatrick and Susan c.Scrimshaw(eds),*The Handbook of Social studies in Health and Medicine.*(1st ed.,2000)p.3.

Above all,the choice of women in reproduction involves controversial unending questions that needs an exact response. Right to reproduce implies more than a duty not to interfere with existing capacities and actually includes the duty not to force reproduction in the same way as not enforcing nonreproduction. In a regime of reproductive rights, there is room for both state and private actors to express their own moral views about reproductive choice or to take steps to minimize perceived harm.[85]There is a need for both legislative and judicial intervention to clarify the many stressing issues on reproductive choice.[86]

While moving more specifically towards the concepts of Assisted Reproduction and Surrogacy,one cannot claim it as a current development while tracing history.Both the processes were mentioned in ancient times also. In Mahabharatha,Gandhary, wife of Dritharashtra,conceived,but the pregnancy went on for nearly two years.;after which she was delievered a mass.Vyasa found that 101 cells were in that mass.they were put in a nutrient medium and were grown *in vitro* till full term.100 cells were developed into male and one cell developed as female.[87]King Draupada was given medicine by Rishi and collected semen ,processed it with an intention to do AIH for kings wife who refused it. Rishi then put the semen in to yajnakunda from which drushtadyumna and draupadi were born. There is another story regarding seventh pregnancy of

85 *See* John A. Robertson,, "Assisted Reproductive Technology and the Family", (1996)47*Hastings Law Journal* 912,915.

86 *See supra* n.50.

87 Male childrens were Duryodhana,Dussasana etc and female was Dussheela.

Devaki,the embryo was transferred to the womb of rohini to prevent the baby from Kamsa.[88]

Surrogacy arrangements are often recognized as an alternative reproductive method and infertile couple where female partner is unable to gestate may see the arrangement appealing to their situation.Earliest form of contractual surrogacy arrangement in the state of modern developments of ART can be traced in California in mid -70's where an attorney named Neil Keane drafted the surrogate agreement where provisions of medical and legal expenses,consent has been incorporated.After that he was approached by infertile couples to help them to find right surrogate mother.He became ready to help them making first surrogacy story as a California precedent.To define the legality of what he did ,he wrote letter to attorney general of Michigan ,Physician and a Judge.Judge only replied that there is no reason that exists to make the agreement illegal and he opinioned that there is no legal obligation to give the surrogate women a fee other than legal and medical expenses for the arrangement.[89]Later in *Doe* v.*Kelly* [90],Michigan court held, even though a couple might legally use a surrogate to conceive a child, any payment made to the surrogate in exchange for the release of her parental rights to the child was illegal under State law.In every society,making reproduction a money earning thing is

88 *See* Prathibha Ganesh Chavan, "Psychological and Legal aspects of Surrogate Motherhood" ,AIR 2008 (J) 103.

89 Lisa L. Behm, "Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United states" (1997-1999) 2 *DePaul J. Health Care L.* 559,561.

90 307 N.W.2d 438 (Mich. App. 1981).

often viewed badly.That is why ,most of the surrogacy arrangements tends to have a hesitant response as an unbelievable thing.One should not stigmatize surrogate women who entered in to the surrogacy agreement for getting financial gain which is essential for her and family to survive and relinquishes her parental rights to the infertile couple.They are taking money for their work but doing a much more rewardable thing to the couple who were desperate to have a baby which cannot be seen in an underestimating and degrading level. Mindset of society should be changed broadly so as to absorb the positive elements in ART as well as surrogacy and enable the State to have an effective mechanism to address the issues of the concerned fields.

1.8 FEMINIST JURISPRUDENTIAL PERSPECTIVE ON SURROGACY

There is no unified theory of feminist jurisprudence[91] on surrogacy which exactly makes an exact answer to surrogacy disputes. As technological advances create new reproductive methods, women are faced with new challenges and choices. Some among them view surrogacy as a reproductive choice available to women, yet others view it as a form of slavery or prostitution highly exploitative of women.[92]Some regard these choices as new reproductive freedoms, while others feel that the autonomy and the physical integrity of women are being compromised. As a result, feminists jurisprudence are widely divided on the morality and legality of surrogacy.[93]

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91 *See supra* n.25.

92 Katherine B. Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?",(1992) 68 *IND. L.J.* 205.

93 Christine L. Kerian, "Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?",(1997) 12 *Wis. Women's L.J.* 113,158.

Feminist jurists of one set believes that the thing that needs continuous attention to avoid inequality between genders, is power.Special attention should be given to power inequalities whether it be via political power,economic resources or whatever.[94]Another concern is that women's suffering is very hard to translate into legal arguments. A need is to focus on women's pleasures and pains which is much different from men's.It is somewhat significant than the power focus.[95]Pragmatic theory of feminist jurisprudence states that human beings cannot have the mental ability to guess what is always best for women,for every situations arise in their life.Each solutions take may have disadvantages.Only thing to be done is the resolution of an issue in a pragmatic mode.[96]Persons like McKinnon views power inequality is a huge problem in female lives and surrogacy is an another instance of male control over women's bodies.They believes it as similar to prostitution in that women's bodies are taken and paid for the use of men.[97]

Radical feminist jurisprudence confronts women's oppression with a revolutionary analysis that goes to the root causes of male domination defines men as responsible for and gaining from women's subordination.It emphazized the sexual and reproductive capitals of women,focuses on the commonness of

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94 Catharine A.Mackinnon, "Sexual harassment of working women 110-116 cited in Mary Becker,"Four feminist approaches and the double bind of surrogacy", (1993)69 *Chic-Kent Law Rev* 303,304.

95 *Id.* at 305.

96 Margaret Jane Radin, "The Pragmatic and Feminist", (1990)63 *S.CAL. L.REV* 1699.

97 *See supra* n.94 at 307.

women's condition across the class,race and national boundaries. Radical cultural sets tied women's oppression directly to their reproductive capacities and roles (e.g. pregnancy and mothering) supported surrogacy bans on the grounds that the contract of surrogate motherhood is dehumanizing as it commodifies birthing, reduces women to incubators, and alienates surrogate mother from their reproductive labour.Surrogacy will once again make the society to value women primarily for their reproductive capacities and will make womb a "commodity".[98]There arise a strong possibility of economic coercion and surrogacy will occur for the benefit of the rich at the expense of poorer women. To Radical libertanian schools ,surrogacy was not reproductive slavery. If handled properly, it might actually strengthen connections between infertile couples, surrogates, and their children. Surrogacy has the potential to produce new familial models that challenge the traditional hetero-patriarchal family.While Liberal feminist jurisprudence followers typically characterized surrogacy as a natural extension of women's reproductive liberty and personal autonomy.If women could contract freely to sell their productive labor for wages, then they should be at liberty to sell their reproductive services .It views surrogacy as a manifestation of women's liberation and nobody has any right to prevent her from doing it.Surrogate women is taking care of the baby to give it to another woman who so desperately wants to be a mom. Surrogacy is a good practice to them because of the reason that it is beneficial to all of the parties involved.Surrogate women is giving a gift

98 *See generally* Norma J. Wilder, "Society's Response to the New Reproductive Technologies: The Feminist Perspectives", (1986) 59 *S.CAL. L. REV*. 1043.

of life to infertile couple Inspite of this, liberal feminists view "surrogate" children as beneficiaries of surrogacy arrangements.[99]Marxist and socialist feminist jurisprudential thoughts tried to explore the implicit economic inequalities in surrogacy arrangements. Surrogacy arrangements are made under capitalist patriarchy mask how race, gender, and class shape a person's particular relationship to the means of reproduction. It invoked Marx's theory of alienation to account for the ways women are alienated from the "products" of their reproductive labor(child).To them,surrogacy surrenders the individuality of women. To them,Capitalist class relationships are the root cause of female oppression, exploitation and discrimination. Men are socialized into exploitative relationships in relation to work and they carry this socialization over into the home and their relationship to women.[100]

A more genuine concern is given by Hedonic feminist jurisprudence approachers who felt that the real experience of surrogate women,their sufferings while handing over the baby ,vulnerability of the sections should be

99 Rosemarie Tong," Feminist Perspectives and Gestational Motherhood:The Search for a Unified Legal Focus, in *Reproduction, Ethics and the Law* "55, 68-69 (Joan C. Callahan ed., 1995) cited in *supra* n. 92.

100 Rosemarie Tong elaborates the difference between the Marxist and Radical views on surrogacy;

> [w]hereas Marxist feminists emphasize that under capitalism there is always a price high enough to entice even the most resistant person to sell what is most precious to him or her, radical feminists emphasize that, under patriarchy, there is always an appeal strong enough to convince the most hesitant woman that it is her duty to help an infertile couple have a child.

See id. at 65

carefully evaluated.[101] It is a fact that concern should be for their lives improvement which makes them to be a surrogate than criticizing their act. One need to seek remedies to improve the lives of women who are willing to rent their womb for extreme necessity.Urgent need is to improve the quality of their life in all spheres and to make them empowered and determined to live their life in a more dignified mode. For that a thorough study on the varied regulatory aspect of surrogacy is to be adequately done.

1.9 SIGNIFICANCE OF THE STUDY

Infertility is the most prominent medical problem world is now largely witnessing. Due to the advancement of medical technologies, infertile couples can be taken care of the curative aspects of infertility. Their sufferings of infertility can be avoided through medicines, surgery or new Assisted Reproductive Technologies such as Artificial Insemination (AI),*In vitro fertilization* (*IVF*) or Intra Cytoplasmic Sperm Injection (ICSI).Surrogacy is a fast developing area of Assisted Reproductive Technologies where female partner is physically or medically incapable to gestate.India is a country where surrogacy is going to be get legalized. As this is not a natural reproductive process with the involvement of only genetic parents,there arise various legal issues which are of utmost relevance.In this present situation,constitutionality of surrogacy, its human right perspectives, rights of Surrogate women and commissioning parents in surrogacy, the rights of baby born under surrogate arrangement,harmful influences, abuse and exploitation through surrogacy if

101 *Supra* n.94 at 308.*See also* Robin West, "Difference in Women's Hedonic Lives:A Phenomonological Critique of Feminist Legal Theory"(1987)3 *Wis.Womens L.J* 81.

done without proper criteria's as well as restrains ,there are unending rise of issues on surrogacy. While legalizing it, each and every aspect of it should be considered. Neglecting dangerous aspects of it may cause potential harm to the entire society .To avoid rash sense of reproductive tourism in India, effective checks on surrogacy is to be evolved. It can be acheived only through a thorough study on Assisted Reproductive Technology and the Law-A study with special reference to the legal regulation of surrogacy.Legality of surrogacy, complexities in it involving third party to the process of reproduction, comparative perspective of surrogacy with foreign countries, the loopholes and inadequacies in existing Draft Assisted Reproductive Technology (Regulation) Bill 2014 in India with reference to surrogacy, can be effectively analyzed and remedial measures can be suggested which is very relevant in the present situation of India where a fertility market is traced and rapidly progressing via surrogacy.

1.10 INTERNATIONAL RELEVANCE

As there is a huge advancement of assisted reproductive techniques all over the world, surrogacy is becoming a fast developing area utilizing the magic of ART. It is recognized all over the world and the legal issues relating to surrogacy has been debated both nationally and internationally which needs an exact response which is intended throughout the study.How the surrogacy can lead to legal complexities of motherhood, how the rights and duties of parties to surrogacy can be determined, whether it is legally valid to surrogate for parties of other countries, legal validity of paying money for

surrogacy, rights of parties under surrogate agreement-all these or more than these issues are connected with it. It is high time to explore the process in comparison with other countries. Different countries have taken different stands to surrogacy.Approaches towards it is quite different in many countries. For example ,in India as per Assisted Reproductive Technology Bill 2014 and in United States as per Gestational Surrogacy Act 2004, surrogate mother is not a legal mother. But in UK, she is considered to be the legal mother as per Human fertilization and embryology Act 1990.In Australia, commercial surrogacy is banned where as in India there is no provision dealing with such ban. Issues of human trafficking and forced surrogacy is also traced in some countries such as revealed in *Babe 101*,the news of an illegal surrogacy ring which was operational in Thailand,Combodia.vietnam and Taiwan.A study of surrogacy in a comparative perspective is relevant for the purpose of analyzing complexities and confusions regarding it and to evolve suggestive measures to overcome the harmful practices.

1.11 NATIONAL RELEVANCE

At present ,there is a legislative vacuum in India as far as surrogacy is concerned . There is only Indian Council of Medical Research (ICMR) guidelines for accreditation, supervision and regulation of ART clinics 2005 which is silent on the conflicting rights of parties to surrogacy . Cases like *Baby Manji Yamada* v. *Union of India,* AIR 2008 SC 1656, *Jane Balaz* v. *Anand Municipality* AIR 2010 Guj 21 had revealed the complexities arising from a surrogacy agreement where the conflicts of interests of parties,complications

regarding the nationality of a child born in Indian soil of an Indian mother and foreign father etc. Through the cases, Court noted the urgent need of comprehensive legislation on the subject and recognition of crucial issues such as legal validity of surrogate agreement, citizenship and identity of the child, rights of the parties to surrogacy etc.Law commission of India(Report No.228) which is on the "Need for legislation to regulate Assisted Reproductive Technology clinics as well as rights and obligations of parties to surrogacy''(2009) also is not upto a regulatory purpose as it does not have any statutory force. Through the Bill named Assisted Reproductive Technology (Regulation) Bill 2014 ,process of surrogacy is going to get legalized in India. In this backdrop , the human rights of various parties to surrogacy ,fundamental rights involved in it, the rights of baby born under surrogate arrangement,harmful influences, abuse and exploitation through surrogacy if done without proper criteria as well as restraints ,a comparative perspective of legal regulation of surrogacy in different countries etc are of much relevance.

1.12 OBJECTIVES OF THE STUDY

Well defined objectives are essential for systematic study .Following are the objectives of the study

- to analyse the concept of Assisted reproductive Technology with kinds and categories.
- to evaluate the human rights issues of women involved in surrogacy arrangements.

- to examine the legality of surrogacy arrangements and rights and obligations of parties to surrogacy.
- to comparatively analyse the law regulating surrogacy in various countries.
- to trace the constitutional and legal rights of surrogates
- to critically analyse the existing legal frameworks for surrogacy in India
- to explore the judicial attitudes regarding surrogacy
- to find out the lacunae's in Assisted Reproductive Technology (Regulation) Bill, 2014 with reference to surrogacy.
- to give effective suggestions to control and remedy the complex problems regarding surrogacy**.**

1.13 METHODOLOGY

Methodology adopted throughout the study is doctrinal in nature which comprises of Books,Articles,Case Laws, International Conventions and Declarations, Reports of Law Commission, Newspaper and Magazine reports, Statutory materials as well as Online resources.

1.14 THEMATIC BREAK UP

Chapter 1 of the study deals with Introduction.

Chapter 2 focus on Assisted Reproductive Technologies-An analysis.

Chapter 3 elaborates Assisted Reproductive Technology Vis- a -Vis Right to Health of Women.

Chapter 4 explores on Surrogacy -Human Right Perspectives.

Chapter 5 deals with Surrogacy in India –Constitutional Perspectives.

Chapter 6 examines the Legal Enforceability of Surrogate Agreement- Analysis.

Chapter 7 evaluates Rights of Parties to Surrogacy.

Chapter 8 deals with Legal Regulation of Surrogacy in India-A Critical analysis.

Chapter 9 comments on Other Legal Regulatory Measures for Commercial Surrogacy in India.

Chapter 10 focus on Comparative Analysis on Surrogacy Arrangements.

Chapter 11 is the concluding part which deals with Conclusion and Suggestions of the study.

CHAPTER 2

ASSISTED REPRODUCTIVE TECHNOLOGY : AN ANALYSIS

In every society ,the concept of reproduction has got great significance. To be a parent is a normal biological desire**.** "Fertility is a highly personal and sensitive area of human life. Popular prejudice stigmatizes men who are sterile as unmanly. Women who are unable to conceive may be encouraged to feel that they are unable to fulfill their proper role."[1]It is also true that although women share the dreams ,capabilities and weaknesses of all human beings,they are denoted as an inferior group in the name of biological peculiarity of being pregnant.[2]As in the case of infertility problem,they are the prior victims of criticisms**.** Infertility is commonly defined as the inability to initiate, sustain or support the pregnancy.[3] Infertile couples often suffer a bundle of social criticisms for it. The neglecting fact lies on the point that infertility is not a thing to be seen as something mysterious, nor a cause of shame, nor necessarily something that has to be endured without attempted cure[4]. Assisted reproductive technologies (ARTs) have provided new ways to cure the alienation and marginalization caused by infertility in a society which often give emphasis on procreation.

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1 Jonathan Montgomery, *Health Care Law* (2nd ed.,2003) p. 394.

2 *See* Gloria Steinem**,***Outrageous Acts and Everyday Rebellions*(1983) *accessed at http:www://books.google.co.in* on 23/6/2015.

3 *See* American Heritage Dictionary (4th ed.,2000)p.898.

4 *See* Report of the Committee of Inquiry into Human Fertilization and Embryology (1984) para 2.4. This report is popularly known as Warnock Report as it was under the chairmanship of Dame Mary Warnock.

2.1 INFERTILITY-MAJOR CAUSES

Infertility can be caused by one's own reproductive dysfunction such as low sperm count or blocked fallopian tubes, reproductive dysfunction of partner etc. It is also defined as a condition of the reproductive system often diagnosed after a couple has one year of unprotected, well timed intercourse, or if the woman suffers from multiple miscarriages.[5] Infertility can be caused by genetic or environmental factors, combinations of two, or endocrine or immune system of disorders. Sometimes it may be a consequence of ageing.[6]

In males, defective formation of spermatozoa[7] can cause sterility. In females, Infertility can be caused by problems in ovary[8],fallopian tubes[9],uterus[10],cervix[11] and vagina.[12]

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5 Shaun D.Pattinson ,*Medical Law and Ethics* (1st ed.,2006) p. 240;*See also,* B.Umadethan,*Principles and Practice of Forensic Medicine* (1st ed.,2008)p. 319.

6 *See* Boukje M. Van ,Noord-Zaadstra et al., "Delaying Childbearing: Effect of Age on Fecundity and Outcome of Pregnancy", (1991) 302 *Brit. Med. J.* 1361, 1363-1364.

7 Defective formation of spermatozoa can be due to conditions like hydrocoele,varicocele,undescended testes,thermal factors,infection like mumps, tuberculosis, clumping of sperms, diabetes,hypothyroidism,impotency etc.*See* B.Umadethan,*supra* n.5.

8 Ovarian problems can be because of the the Insufficiency or imbalance of luteinizing and follicle stimulating hormones(LH&FSH),anovulation,Obesity,High levels of serum,prolactin, ovarian cysts ,insufficiency of corpus luteum,luteinized unruptured follicular syndrom(trapped ovum). *Ibid.*

9 Defective ovum pick up,impaired tubal motility,partial or complete obstruction can be the problems with fallopian tube.*Ibid.*

10 Uterine Tumours can be associated with infertility.*Ibid.*

11 Anatomical defects in cervix,cervical mucas with sperm antibodies ,infection can also results in infertility. *See ibid.*

12 Atresia,stenosis,septum and infection in vagina also cause infertility in females. *See ibid.*

2.2 INFERTILITY EXPERIENCE-AN EVALUATION

At least 15% of married couples who attempt to conceive experience some difficulty.[13] In Warnock Report, it was observed

> For those who long for children,the realization that they are unable to found a family can be shattering.It can disrupt their picture of the whole of their future lives.They may feel that they will be unable to fulfill their own and other peoples expectations.They may feel themselves excluded from a whole range of human activity and particularly the activities of their childrearing contemporaries.In addition to the social pressures to have children,there is,for many,a powerful urge to perpetuate their genes through a new generation.This desire cannot be assuaged by adoption.

Infertility can be a major life crisis for those who are experiencing it .The infertility experience may involve many unforeseen losses for individuals, their intimates, and society as a whole. These include loss of parenting experience, loss of stability in the personal relationships, loss of self confidence, loss of future expectations on family etc.Having children is always seen as a mandatory requirement for family and is also a socially expected role for preservation of human species.[14]The Canadian Law Commission referred the experiences of infertile couples as

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13 *See* Warnock report , *supra* n.4.*See also* Jennifer L.Carow, "*Davis* v.*Davis*:An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology", (1994) 43 *Depaul L.Rev* 523,526.

14 *See generally* Daniels K, "Management of the Psychosocial Aspects of Infertility",(1992) 32 *Australia and New Zealand Journal of Obstetrics and Gynaecology* 57,58-59.

> There is often a loss of self esteem mixed with feelings of grief, anger and sometimes guilt about the sources of infertility. Many also experience a sense of isolation from family members and friends. People told us that infertility is not something that is easy to deal with and move on from, because having children is so firmly embedded in the everyday social and family interactions in which most of us take part. As friends and siblings go through life ,milestones in their children's lives…. Continuously remind those without children of their childlessness.[15]

Those who are infertile suffer from contradictory societal attitudes towards their infertility On the otherhand,there may be enormous pressure on them from family and friends to have a child and join the community which is often based on child rearing. They may be suspected of having a sense of desperation-that they somehow need children-"as a sort of artificial limb.[16] In that sense, Assisted Reproductive Technology takes its pace which is controversial yet significant.

2.3 ASSISTED REPRODUCTIVE TECHNOLOGY-AN ANALYSIS

Assisted Reproductive Technology includes all techniques that attempt to obtain pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo in to the reproductive tract.[17] ARTs ,in medical parlance,are defined as any fertility procedures in

15 Canadian Royal Commission on New Reproductive Technologies (1993) cited in Jonathan Herring, *Medical Law and Ethics*(3rd ed.,2010)p.344.

16. Lesch, "Is the Desire for a Child Too Strong?or Is There a Right to a Child of One's Own" ,in Hildt and Mileth (eds), *In Vitro fertilization in the 1990's* (1sted.,1998)p.73.

17 Section 2(c) of ART (Regulation) Bill 2014 is followed .

which both eggs and sperm are manipulated outside the body in laboratory.Technically ,fertility drugs that stimulate egg production in ovaries and intrauterine insemination or IUI which also known as Artificial insemination-in which sperm is injected into the uterus ,do not qualify as ART because the processes occur inside a women's body and each process by itself only involves the manipulation of eggs or sperm, not both.[18]

If social pressure to be a "mother" does not exist,ARTs would never have gained the importance that they have now. The people are willing to go to financially ,emotionally and physically in order to have a child using ART.[19] It includes various technologies which may be used to initiate pregnancy or to increase likelihood of pregnancy.[20] ART includes procedures like Intra-Uterine or Artificial Insemination (IUI),*In Vitro Fertilization* (*IVF*) and Intra Cytoplasmic Sperm Injection (1CSI),embryo freezing etc.Surrogacy arrangements which utilizes ART are also grouped within the ambit of it .The major reasons for using this new techniques,can be be loosely grouped into three categories

(1) options used to overcome biological infertility- For those who are biologically impaired to have baby due to blocked fallopian tube, lack of semen quality etc.

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18 *See* Jessica Arons,"Future choice:Assisted reproductive Technologies and the Law",Centre for American Progress(2007) accessed at *http://www.ameri canprogres. org* accessed on12/3/2012.

19 *See* Johnathan Herring ,*supra* n.15.

20 There can be employment of methods like Artificial insemination(AI),use of fertility enhancing drugs and *In vitro fertilization(IVF)*.

(2) options desired for particularized personal reasons- For those who seek personal convenience, selection of off springs etc.

(3) options employed to accomodate systematic but socially rather than physically rooted infertility- For those who wants to separate the process of procreation from sexual relations[21]

2.4 DIFFERENT ASSISTED REPRODUCTIVE TECHNIQUES.

To bear a child aided by modern science, a mother in future has a choice of two methods;*In vitro* fertilization or conception by Artificial insemination.[22] ART encompasses several distinct techniques, though they often are used in combination[23].

2.4.1 Artificial Insemination :It means the deposit of semen in to the genital canal of women through a syringe. The seminal fluid is prepared by washing the semen with special media and injected into the uterine cavity .It is also being termed as intrauterine insemination. This method is used when female has no fertility problem and the male has slight deficiency in the sperm count or motility.[24]Artificial insemination can be of three types

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21 Marjorie Maguire Shultz, "Reproductive Technology and Intent-based Parenthood:An Opportunity for Gender Neutrality",(1990) 1990 *Wis. L. Rev*. 297,311,*See also*, *id.* at pp. 312-315.

22 Helga Kuhse &Peter Singer(eds),*Bioethics-An Anthology*(1st ed.,1999)p.68.

23 *See* Lori B Andrews & Lisa Douglass ,"Alternative Reproduction"(1992)65 *S. Cal. L. Rev* 623, 624-625.

24 *See* Martin Gallin &Philip Newman, "whose child is this?" (1979-80)8 *Human Rights* 14.Artificial insemination is used in the following situations.

- Azoospermia in the Husband(absence of all sperm cells)
- Sever oligozoospermia(Where the husband has a few motile cells in his sperm.)
- Heriditory disease on the part of the husband

1 Artificial insemination with semen obtained from husband(A.I.H): It is performed when the husband is impotent but fertile; vaginismus on the part of the wife ;both of them are normal but conception does not take place due to obscure reasons.[25]

2 Artificial insemination with semen obtained from donor (A.I.D) : It is performed when the husband is sterile, or suffers heriditory disease or if there is Rh factor incompatiability. Sperm donation can be used in Artificial insemination, *In vitro* fertilization ,Gamete Intra fallopian transfer Zygote Intra fallopian transfer etc. [26]

3 Mixed Artificial insemination (Mixed AI): In Mixed Artificial insemination ,donor semen is mixed with semen of infertile husband[27].

2.4.2 *In Vitro* Fertilization (*IVF*).

In vitro fertilization (IVF) is a procedure by which a female egg[28] is fertilized outside the womb by male sperm, with the intent that the resulting zygote will later be transplanted into the female reproductive system of either the intended mother or another woman who is serving as a surrogate [29]. *In vitro*

- Rh factor incompatiability.
- Insanity in the husbands family(spouses taking no chances.)

25 *See* B.Umadethan , *supra* n.5 at 320.

26 *Ibid.*

27 In cases of oligozoospermia of husband,AIM is preferred.

28 For female egg, Use of egg donors may be done in IVF.Egg donation involves more risk than sperm donation as it involves use of multiple drugs and surgery.

29 *See* Charles P.Kindregan Jr. & Maureen Mcbrien, *Assisted Reproductive Technology: A Lawyers Guide to Emerging Law and Science* (1st ed.,2006)p.75.

fertilization is most probably done in a women with blocked fallopian tubes,ovulation problems,presence of sperm antibodies and in unexplained infertility cases.World witnessed an awesome medical achievement through *In vitro* fertilization when the first test tube baby of the world Louis Brown was born in Manchestor,England on July 25 ,1978 .Until *In vitro* fertilization became a reality, the possibility of achieving a pregnancy for women with tubal problems was not great .[30] The science of *In vitro* fertilization procedure begins when doctors use hormonal stimulation to cause woman's ovaries to produce multiple eggs.[31] To stimulate the ovary,fertility enhancement drugs is used. It can be injectible as well as oral.These drugs are used not only combined with Artificial Insemination or *In vitro* fertilization,but also taken orally to cure the women who are not or irregularly ovulating.[32] These drug therapy may increase the probability of conception and the number of embryos which to be fertilized in pregnancy. In a nutshell , *In vitro* fertilization can described as a process with four phases

a) Ovarian Stimulation and monitoring

b) Egg collection

c) Fertilization and embryo culture

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30 *See* Warnock report , *supra* n.4 para 5.1.

31 *See* Paula Walters, "His,Hers or Theirs-Custody,Control and Contracts:Allocating Decisional Authority over Frozen Embryos",(1999) 29 *Setonhall L. Review* 937,938.

32 *See generally* Emily Galpern,"Assisted Reproductive Technologies: Overview and Perspective Using a Reproductive Justice Framework" in Reproductive Health and Human rights Gender and Justice Program,Centre for Genetics and Society (2007) accessed at *http://geneticsandsociety.org* on 6/1/2012.

d) Embryo transfer.[33]

This process is described by the Supreme Court of New Jersey as such:

> An *in vitro fertilization* procedure requires a woman to undergo a series of hormonal injections to stimulate the production of mature oocytes (eggs cells or ova). The medication causes the ovaries to release multiple egg cells [more] . . . than . . . normally produced. The egg cells are retrieved from the woman's body and . . . [e]gg cells ready for insemination are then combined with a sperm sample . . . .Successful fertilization results in a zygote that develops into a. . . preembryo . . . [which is] either returned to the woman's uterus . . . or cryoopreserved . . . and stored for future possible use .[34]

The *IVF* have a variety of related treatments which is being discussed below.

2.4.2.1 *Gamete Intra Fallopian Transfer(GIFT) and Zygote Intra Fallopian Transfer(ZIFT*)

Gamete Intra Fallopian Transfer(GIFT) is also known as *In vivo* fertilization. Instead of combining sperm and ovum in the laboratory dish, they are placed in fallopian tube for fertilization[35].Indication of GIFT is unexplained infertility and endometriosis.[36]In Zygote Intra fallopian transfer(ZIFT),eggs are fertilized in a petri dish and the resulting zygote is transplanted into the fallopian

33 *See generally* Judith F. Daar , "ART and the Search for Perfectionism:On Selecting Gender, Genes, and Gametes" ,9(2005-2006*) J.Gender ,Race & Just* 242,243.

34 *See supra* n. 29 at 76 (Citing *J.B* v.*M.B*,783 A.2d 707,709(N.J.2001)).

35 For it,women should have atleast one healthy and potent fallopian tube. *See* B.Umadethan,*supra* n.5 at 322.

36 *Ibid.*

tube. Indication for Zygote Intra Fallopian Transfer(ZIFT) is low sperm count or poor motility. Both Gamete Intra Fallopian transfer(GIFT) and Zygote Intra Fallopian Transfer(ZIFT) require laproscopy and implantation of gametes or Zygote is done with the help of a laproscopic catheter.[37]

2.4.2.2 *Cryopreservation and Assisted Hatching*

This is a process of slowly freezing bodily materials for future use.Embryos,eggs,sperms can be frozen and later be implanted at the optimum time in women's cycle.[38]If there are repeated implantation failures or in special cases where the wall of the embryo is thick,Assisted Hatching is used. For it,a small hole is made in the wall of the embryo using a needle ,special chemicals or laser beam for facilitating implantation and better success rate.[39]

2.4.2.3 *Egg Retrieval*

When *In vitro* fertilization becomes more expensive, there arise a wide practice to give hormonal drugs to stimulate the ovary to produce multiple eggs for increasing chances of pregnancy.[40]There is another technique called ooplasmic transfer which involves egg retrieval from *In vitro* fertilization

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37 *Ibid.*

38 When individual undergoing some treatment or processes which can make them sterile or infertile ,this can be made to preserve their right to procreate.Im women most possible instance of egg cryopreservation is for women undergoing chemotherapy who wants to retain their procreative choice.High water content off egg can cause freezing bit difficult but new technique like vitrification makes the entire process less complicated. *See generally supra* n. 31.

39 *See* B.Umadathen, *supra* n.5 at 322.

40 Normally, there will be one mature egg in one menstrual cycle.Through hormonal drugs it multiple eggs get stimulated.These drugs hyperstimulates and controls the timings of releasing mature eggs in ovaries. *See generally supra* n.32.

undergoing women and another women who donates ooplasm[41].Then the egg get fertilized with sperm and be implanted in to the intended women's womb .[42]

2.4.2.4 *Intra Cytoplasmic Sperm Injection (ICSI)*

Involves manually injecting a single sperm into the cytoplasm (the material outside of the nucleus) of an egg. It is used when a man has a low sperm count, no sperm present in the ejaculate, low sperm motility, sperm that are abnormally shaped,or when *In vitro* fertilization has previously been unsuccessful.

2.4.2.5 *Preimplantation Genetic Diagnosis (PGD)*

PGD[43] can accompany *IVF*, and tests the embryo for particular genetic traits, such as medical condition or sex.

2.4.2.6 *Surrogacy*

Surrogacy[44] is a method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will

41 Cytoplasm of egg cell that means the material outside the nucleus.

42 The child gets three genetic parents in this procedure because it has DNA from both women because of the mitochondrial DNA present in the ooplasm of the donor and The DNA from sperm donor. *See generally supra* n.31.

43 PGD was used to detect inherited chromosomal abnormalities and single gene disorders such as cystic fibrosis,haemophilia etc.PGD also became useful to detect suitable embryo for implantation based on having the correct complement of chromosomes.DNA analysis also can be done to detect specific gene mutations.. *See supra* n.33 at 248.

44 This word is of Latin origin(surrogatus) which means substitute.Warnock Report defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth. The Black's Law Dictionary categorizes surrogacy into two classes,Gestational surrogacy and traditional surrogacy. It is defined as follows.

not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. It is a hiring of womb of a women by another.[45]Surrogacy can be an option for infertile parents who wish to have a child that is biologically related to them.

The growth in the ART methods is recognition of the fact that infertility as a medical condition is a huge impediment in the overall wellbeing of couples and cannot be overlooked especially in a patriarchal society like India. The Law Commission Report on Surrogacy highlights the situation in India as a woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. The problem however arises when the parents are unable to construct the child through the conventional biological means. Then infertility is seen as a major problem as kinship and family ties are dependent on progeny. Herein surrogacy comes as a supreme savior.[46] The use of artificial insemination and the recent development

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Gestational surrogacy. A pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child.

Traditional surrogacy. A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person .*See The Black' Law Dictionary*(8th ed.,2004)p. 1485.

45 There can be the option of surrogacy when the women has a severe pelvic disease which can not be remedied or she has no uterus.It is also useful for a women who had multiple miscarriages or her pregnancy is medically undesirable .*See* ,Warnock report , *supra* n.4 para 8.2.

46 *See* Law Commission Report (Report No. 228) ,"The Need for legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy"(2009) accessed at *http://www. lawcommissionofindia.nic.in* on 12/4/2012.

of *in vitro* fertilisation have eliminated the necessity for sexual intercourse in order to establish a surrogate pregnancy. Surrogacy can take a number of forms. The commissioning mother may be the genetic mother, in that she provides the egg, or she may make no contribution to the establishment of the pregnancy.[47] The genetic father may be the husband of the commissioning mother, or of the carrying mother; or he may be an anonymous donor. There are thus many possible combinations of persons who are relevant to the child's conception, birth and early environment. Of these various forms perhaps the most likely are surrogacy involving artificial insemination, where the carrying mother is the genetic mother inseminated with semen from the male partner of the commissioning couple, and surrogacy using *in vitro* fertilization where both egg and semen come from the commissioning couple, and the resultant embryo is transferred to and implants in the carrying mother.[48]

Surrogacy can be commercial as well as altruistic.[49] Many unpredictable events can be there between the period of entering in to a surrogacy agreement and time to hand over the child.Sometimes surrogate women changes her mind

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47 *See* Warnock report, *supra* n.4 para 8.1.

48 *Ibid.*

49 "Altruistic surrogacy" is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses). "Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents.*See*, *supra* n.46.

due to maternal feelings[50],some times commissioning parties attitude changes .[51] It is a complex issue and it can lead to an array of complicated questions relating to its constitutionality, moral and socio legal controversies, health aspects, commodification of womb as well as child ,contractual terminologies, commercial exploitations which are much difficult to answer. It involves conflicts of interests in parties, complexities regarding motherhood, parentage, rights of parties, child rights etc.It is a delicate issue which is to be effectively discussed and evaluated further.

2.5 CRITICISMS OF ASSISTED REPRODUCTIVE TECHNOLOGY PROCEDURES

Most common objections to assisted reproductive technology often are for its unnaturalness. In Artificial insemination, both forms ,i.e insemination by Husband or Donor are severly criticized. Opposition to Artificial insemination by Husband (AIH) is founded on the view that it represents an unwarranted deviation from natural processes of intercourse. Those who hold this view argue that the unitive and procreative aspects of sexual intercourse should not be separated. Supporters of Artificial insemination by Husband (AIH) denies all the allegations by stating that if normal pregnancy is not possible, it is the best option of having child of their own and nothing wrong in it as it involves the semen of the husband itself. Objections of Artificial insemination by Donor

50 . She disagree to hand over the baby.*See generally Baby M Case* 109 N.J 396 (1986).

51 This may occur when commissioning couples get separated .*See generally Baby Manji Yamada* v. *Union of India (UOI) and anr*(2008)13 SCC 518.Even when the baby found to be handicapped,the complications may occur. Commissioning couples may refuse to take the baby.Surrogate also may rejects the same.

(AID) are derived from the view that it represents the introduction of a third party into what ought to be an exclusive relationship. This is held to be morally wrong in itself, whatever the motives of those involved may be. But it is also seen as a threat to the relationship and to the family which is based on it. The threat arises because the child would be biologically the wife's and the donor's, and the husband would have played no physical part in its procreation. Some go so far as to suggest that the introduction of a third party into the marriage means that Artificial insemination by Donor is in fact comparable to adultery, in that it violates the exclusive physical union of man and wife, and represents a break in the marriage vows.

Not only AI, all the techniques of ART such as IVF,PGD, Surrogacy receives active criticism. Views are like that it is potentially harmful to the society and may cause the marketing of baby as a product of own choice and selection[52].IVF is severly criticized for usage of fertility drugs ,ovarian hyper stimulation and its health effects and for medical dangers for IVF child,[53]PGD is for possibility of sex selection and selective abortion , surrogacy for its commodification of womb as well as child.[54]

Forms of ART involves creation of number of embryos from which normally one or two are selected and implanted.So spare embryos are often destroyed which receives active criticism as embryos having a right to life .The remedy for this is the promotion of the usage of single embryo but it will make

52 *See generally* Johnathan Herring , *supra* n.15 at 378.

53 *See,infra* Chapter 3.

54 *See generally* Johnathan Herring , *supra* n.15 at 378,379.

the reduction in the success chance in ART procedure so that the supporters denies it and holds the view that spare embryos could be stored and made available for donation to other couples.[55]ART is also objected for its cost factor as well as failure but it can be denied on the point that every treatment will have financial expenses, success and failures. And the object to create new life cannot be underestimated.

2.6 JUSTIFICATIONS ON ASSISTED REPRODUCTIVE TECHNOLOGIES

Supporters of ART denies all the allegations by emphasizing that in treatments involving donor semen there is no personal relationship between the women and the donor ,and identity of him is normally unknown to her. To them, If her husband is willing for donor insemination, others have no right to forbid it. By opening the door for non-coital procreation, artificial insemination also makes available a reproductive process that enables deliberate single parenting and other non-traditional family planning alternatives. Beyond single parenting, this reproductive process presents procreative choice for same-sex couples—arguably fueling the public policy debate concerning the suitability of homosexual couples forming families and raising children. [56]Supporters view Assisted reproductive technology,a gift to the infertiles as it enables them to experience the joy of being a parent which otherwise would not be possible.They

55 *See generally* Johnathan Herring ,*id.* at 349.

56 *See* Mariama A. Jefferson, "Reproductive Choice: The Reproductive Choice Debate Must Include More than Abortion", 2010(4) *Charleston Law Review* 774 ,796.

clearly formulates that ART is a treatment to cure biological incapability to have a child through a variety of medical procedures.It should be viewed likewise, not on the basis of morality or social policy.

2.7 FEMINIST JURISPRUDENTIAL PERSPECTIVES ON ASSISTED REPRODUCTION

Different schools of feminist jurisprudence views Assisted Reproduction distinctly. Radical feminist jurisprudence confronts reproduction as a process where women's physical integrity is being compromised and make the oppression of her more facilitating in ART methods which assist her to get pregnant whereas libertarians views ART more positively as it can liberate women by providing more choices and a clear manifestation of womens liberation There is no doubt on the matter that ART made new biological possibilities and that also generates new personal and social options. Apart from the thirst for scientific understanding for its own sake, reproductive technological development was initially driven by the desire to assist those who were biologically unable to reproduce.[57] There can be two extremes of the matter. At the two extremes are a)those who claim the technologies to be emancipator in nature ;and (b) others who see them as an instrument in the hands of capitalism and patriarchy ,reducing women's role to reproduction and thereby furthering their subordination and exploitation.[58] To the supporters of ART ,these

57 *See supra* n. 21.

58 *See* Sarojini.N.B,Dharashree Das ,*ARTs:Voices from Progressive Movements in Making Babies:Birth Markets in India* (1st ed.,2010)p. 23.

technologies liberate women from the burden of motherhood and thus act as an instrument through which women's emancipation can be achieved.[59]It changed the traditional concept of family and gave option for single women to get pregnant. It is not an antifeminist concept[60].It is also viewed that ART will provide solutions to infertile women for their childlessness which otherwise often put them into social ridicule. Some regards ART as a massive social experiment but produces children who might have definite opinions about it in future.[61] And there is no evidence of creating new family norms.[62] Another notable change through ART is that the choice to conceive and ,ultimately ,to give birth nowadays does not carry an obligatory expectation of marriage.[63] It

59 *See* Firestone .S,*The Diaelectics of Sex*(1st ed.,1971).

60 *See generally* Lublin N,*Pandoras box:Feminism Confronts Reproductive Technology* (1st ed.,1998).

61 ART'S are nothing "a massive social experiment and children are being born from this experiment.These children will not be children forever ,but will be adults with definite opinions about the ethics of reproductive technology." *See supra* n.22.

62 *See* Derek Morgan &Robert G.Lee,*Blackstones Guide to the Human Fertilization and Embryology Act 1990* (1990) cited in Marsha Garrison, "Regulating Reproduction", (2008) 76 *George Washington Law Review* 1623,1624 .

> For a purpose of a parental status,the differences between sexual and technological conception are like the differences between restaurents and buses-they are irrelevant to the values and policy goals that underlie the choice of a decision making standard.Parentage law regulates the formation of family relationships,not the mechanics of conception.The law has never cared whether sperm and ovum ,met in a fallopian tube or in the uterus;there is no obvious reason why it should care if sperm and ovum meet in a petri dish.What matters are the relational interests that ultimately result.And there is simply no evidence that technological conception creating genuinely new family forms.

See also Kerry Lynn Macintosh,*Illegal beings –Human Clones and the Law* (1st ed.,2005) p.19.

63 .*See* ,*Goodridge* v..*Dept of Public Health*. 798 N.E.2d 941(2003).

also widened the scope of family planning[64]. Ultimately to the supporters, Assisted reproductive technologies (ARTs) provide new ways to cure the alienation and marginalization caused by the traditional emphasis on reproduction.[65]ART has done much to improve the reproductive options of women so that even single women as well as lesbians can have child which otherwise would not have been possible. Thus ART would not amount to antifeminsm, it is a liberating mechanism.[66]

Opposing sets are concerned more about the fact that through ART , women are sometimes coerced in to reproduction.And the techniques promotes the reinforcement patriarchal and biomedical view of fertility.[67] ART reinforces the message that women's primary purpose is to be a mother and makes a feeling that reproduction is essential for a women to survive in society. It is rightly pointed out by Callahan and Roberts that reproduction-assisting technologies….contribute to the subordination of women by continuing to tie

64 Family planning means having children by choice and not by chance.Its goal is not to enable people to have the number of children they want, when they want to have them. This objective covers prevention of unintended pregnancy as well as pursuit of infertility treatment by couples having difficulty conceiving.The choice of whether or not to conceive involves who will be the parent or parents, when to conceive, with whom to conceive, how to manage the impending pregnancy, how to provide for the potential child, where to raise this child, and in what type of family to do so .*See* Simon & Schuster, *Our bodies,Ourselves*(1st ed.,1971))p. 239.

65 *See* Justin Trent,Assisted Reproductive Technologies (2006)7 *Geo. J. Gender & L.* 1143 accessed at *http://heinonline.org* on 10/4/2012.

66 *See generally* Jonathan Herring, *supra* n. 15 at 352.

67. *See supra* n.4. They concludes at certain particular points that these technologies are created by patriarchy with the ultimate goal of gender subjugation.They take control over child birth away from women,have an adverse impact on their health and reinforce a socially constructed understanding of what it means to be a woman.

the value of women to reproduction…[68] They also have argued that total rejection of ARTs should be needed because they reinforce existing unequal social relations rather than enhance women's reproductive choices.[69] Reproductive technology is an ultimate product of the male reality. The values expressed in the technology-objectification ,domination-are the typical of male dominated culture. The technology is male-generated and buttresses male power over women.[70] Another argument against ART is that it reflects a preoccupation with genetical link which often promotes couples to have a child of their (at least of one) own.[71] There is another view that ART makes child a commodity or a product[72] which changes demographics and social mores.[73]

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68 *See generally* Callahan Daniel, "Rationing Medical Progress:The Way to Affordable Health Care",32(2) *New England Journal of Medicine* pp. 1810-1813

69 *See* Corea,G,*The Mother Machine:Reproductive Technologies from Artificial Insemination to Artificial Wombs*(1st ed.,1985) p.4.*See also* Farquhar,D,*The Other Machine:Discourse and Reproductive Technologies(*1st ed.,1996) p.97. Farquhar argues ARTs are the manifestations of patriarchal domination and exploitation of women's bodies by men who envy women's procreative power.

70 *See* Corea ,*ibid. See also* Jennifer Parks, "Rethinking Radical Politics in the Context of ART" (2009) 23(1) *Bioethics* pp.20-27.She argues that there is nothing in ART itself which is inevitably anti-women but it makes conficts in society.It produces two contradictory images of what families are and can be :on one hand, it promptes a radical conception of family as unbounded by traditional,"age-appropriate,heterosexual limits:on the other hand;it reinforces the primacy of reproductive functioning that one typically associates with traditional heterosexual families.

71 *See supra* n.1 at 352.

72 *See* Kerry Lynn ,*supra* n.62 at 18. When parents purchase medical services in order to reproduce,the involvement of technology and money will cause them to view their children as products and commodities.

73 *See* Debora Spar,*The Baby Business :Elite Eggs,Designer Genes,and the Thriving Commerce of Conception* (1st ed.,2006) "…Changing demographics and social mores,combined with exploding technological prospects ,suggests that the increasing numbers of people will want to exert control over conception.They will want to exert control over conception.They will want to control when they conceive,how they conceive,and even ,increasingly, the characteristics of the children they raise as their own."

2.8 CONCLUSION

It is not found anywhere that any of the feminist jurisprudence thoughts whether supporting or opposing ART agrees on the situation prevailing in every society which considers infertile women blameworthy and nonfeminine. Most of these schools are of the view that infertility is not a problem which to be cured necessarily. Feminist views always respects the women's wishes to have children but not under compulsion and also wishes to promote their reproductive autonomy and freedom of choice.

Men and women experiencing infertility react differently towards it. Women tend to show their reactions more visiblly than men.They are facing it as a most upsetting life event . Women gets all the sufferings and discomforts (both physical and mental health) from whatever means of ART used. It should be the woman should reach a conclusion whether she go with childlessness or go for an option of having a child through ART. It is also a known fact that ,at any cost ,women want to get pregnant because she suffers all the pains and invasions,all the indignities and depressions due to infertility. To her,Infertilty is a most emotionally haunting experience .She always ready to bear all the pains only for getting a child,i.e to exercise her right to reproduction.

When Assisted reproductive technology's expanded ,they are embraced by the medical profession as well as public as a "miracle cure" for an aberration caused by nature.[74]It is not in dispute that the development of reproductive

74 *See* Derek Morgan ,*supra* n.62.

technologies has enabled the humans to access their very genesis and it caused a wave which still impacts on the understanding of ourselves.[75] "ARTs, like other medical technologies, do not exist in a vacuum, and legal institutions cannot assess their risks and benefits without reference to the ways that physicians and patients use these technologies in practice. The challenges posed by new socio economic and political developments in a globalized world constantly require new responses and strategies at a practical level;at an analytical level,they require re-examining old concepts and theoretical paradigms and developing new ones."[76] Bitter truth lies on the point that ART has a potential to make liberation of women but also can be used to obstruct or undermine the same. It is often a double edged sword.[77] One cannot deny Assisted reproductive technology totally because it alone can help the people who are suffering the pain of childlessness.Legislation on ART should cover possible dilemmas of ART and strict regulation alone can protect justice to all involved in the process.

75 Robert Winston,*The IVF Revolution:The definitive Guide to Assisted Reproductive Techniques* (1st ed.,1999)p.137.

76 Mohanty,Chanda Talpade , "Under Western Eyes Revisited:Feminist Solidarity through Anticapitalist Struggles" ,(2002)28 (2) *Sign*s 499,518.

77 *See ibid.*

CHAPTER 3

ASSISTED REPRODUCTIVE TECHNOLOGY VIS- A -VIS RIGHT TO HEALTH OF WOMEN

Health is considered as the most basic and essential asset of human life. The World Health Organization (WHO) defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[1]The World Health Organization's Ottawa Charter for Health Promotion[2] sees health as a multidimensional concept and emphasized a social model of health. It defines health as a positive concept emphasising social and personal resources, as well as physical capacities. Universal declaration of human rights 1948 envisages right to health principle.[3] Right to health is an inclusive right.It includes a variety of rights. The Committee on Economic,

1 *See* Preamble to the Constitution of the World Health Organization adopted by the International Health Conference,New York on 19-22 June 1946.It further states the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race,religion, political belief, economic or social condition. The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States. The achievement of any State in the promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger. Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development. The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health. Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people. Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures. *See http://www.who.in* accessed on 23/4/2013.

2 *See http:// www.who.in* accessed on 2/3/2013.

3 Article 25 (1) of UDHR affirms that everyone has a right to a standard of living adequate for the health of himself and his family, including food, clothing,housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights, calls these rights as the "underlying determinants of health". They include safe drinking water and adequate sanitation,safe food,adequate nutrition and housing,healthy working and environmental conditions, health-related education and information,gender equality etc .There are so many International Conventions which guarantees for the right to health.[4]

Besides the International Conventions, Cairo Programme of Action 1994 states that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to healthcare services, including those related to reproductive health care.[5]It is considered as the most fundamental need of society.Copenhagen Conference 1980, states that promoting and attaining the goals of universal and equitable access to the highest attainable standard of physical and mental health, and the access of all to primary health care, making particular efforts to rectify

4 The International Convention on the Elimination of all Forms of Racial Discrimination 1965 (Art.5),The International Covenant on Civil and Political Rights (ICCPR) 1966(Art 6), The International Convention on the Elimination of All Forms of Racial Discrimination 1965 (Art 5 (*e*) (iv)),The International Covenant on Economic, Social and Cultural Rights 1966 (Art 12),The Convention on the Rights of the Child 1989 (Article 24), The WHO Technical Standards (Mental Health Care Law:Ten Basic Principles and Guidelines for the Promotion of Human Rights of Persons with Mental Disorders) 1996, The Convention on the Elimination of All Forms of Discrimination against Women 1979 (Arts 10,11 (1) (f), 12 and 14 (2) (b)),International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (Arts 28, 43 (*e*) and 45 (c)) ,Convention on the Rights of Persons with Disabilities 2006 (Art 25) etc.

5 Principle 8 and para. 8.6. Cairo Programme of Action 1994 promotes the advancement and fulfillment of rights of women and equality of gender. *See http://www.un.org* accessed on 23/5/2015.

inequalities relating to social conditions and without distinction as to race, national origin, gender, age or disability is their mission.[6]The explicit recognition of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.It is determined to ensure equal access to and equal treatment of women and men in health care and enhance women's sexual and reproductive health as well as health.[7]

Women have the right to the enjoyment of the highest attainable standard of physical and mental health. The enjoyment of this right is vital to their life and well-being and their ability to participate in all areas of public and private life . Women's health involves their emotional, social and physical well-being and is determined by the social, political and economic context of their lives, as well as by biology.It further envisages that to attain optimal health and equality, including the sharing of family responsibilities, development and peace are necessary conditions.[8]

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6 Commitment 6. The Conference projects the health and developmental issues of women to enhance gender equality. *See http://www.un.org* accessed on 23/5/2015.

7 Beijing Declaration,para 17 &30.It has linked women's developmental issues to human rights.Reproductive rights as well as health issues were effectively addressed in the conference.*See http://www.un.org* accessed on 23/5/2015.

8 The Fourth World Conference on Women - Platform for Action (The FWCW Platform) 1995(Beijing Declaration).

Paragraph 89*:* Women have the right to the enjoyment of the highest attainable standard of physical and mental health. Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

Paragraph 92*:* Women's right to the enjoyment of the highest standard of health must be secured throughout the whole life cycle in equality with men.

As per the international treaties and conferences [9] mentioned above,the State is obliged to respect the right of women by avoiding things which curtails her rights.More specifically , the state is bound to refrain from taking steps which affects these rights.State should also prevent causes which denies her from accessing health facilities.State is also obliged to fulfill and promote appropriate legislative,administrative and judicial measures to make her to realize the exact sense of right to health guaranteed to her.[10]Urgent need is to

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Paragraph 96: The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.

Paragraph 106*:* Governments [should] ... Ensure that all health services and workers conform to human rights and to ethical, professional and gendersensitive standards in the delivery of women's health services aimed at ensuring responsible, voluntary and informed consent; encourage the development, implementation and dissemination of codes of medical ethics as well as ethical principles that govern other health professionals.

Paragraph 108*:* Governments [should]... Encourage all sectors of society ... to develop compassionate and supportive, non-discriminatory HIV/AIDS-related policies and practices that protect the rights of infected individuals. *See http://www.un.org* accessed on 23/5/2015

9 Most of the conventions and declarations envisages health principle. The World Conference on Human Rights (WCHR) 1993 (Vienna Declaration) in its para 41 recognises the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life-span .It reaffirms, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.Vienna Declaration and Programme of Action(Adopted by the World Conference on Human Rights on 25 June 1993) further states that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in the political, civil, economic, social and cultural life, at the national, regional and international levels, and eradication of all forms of discrimination on grounds of sex are priority objectives of the international community. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

10 *See generally* Manisha Gupte, 'Women's Right to Health Care: Reiterating State Obligation' (2004),Background document of the presentation at the National Public Hearing on Right to Health Care accessed at *http://www.cehat.org* on 23/5/2012.

evolve proper strategies for the changing arena of health problems of the new era.

3.1 INDIAN CONSTITUTION AND RIGHT TO HEALTH

The Preamble to the Constitution which gives a broad direction for the Indian Republic, refers to social, economic and political justice and.equality of status and of opportunity. Concept of social justice is a dynamic concept which makes the life of rule of law significant. The idea of welfare state postulates the importance of the concept of social justice and its claims more prominent.It denotes the equal treatment to all citizens without any social distinction based on caste,colour,race,sex etc.It is affirmed that justice in terms of all resources,opportunities should be ensured under the concept.Under the term Social Justice, one can bring in the question of access to health care facilities and the principle of justice involved in the equality of access to these facilities. Articles 41, 42 and 47 of the Directive Principles enshrined in Part IV of the Constitution provide the basis to evolve the right to health and health care.[11]

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11 Art 41: Right to work, to education and to public assistance in certain cases: The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Art 42: Provision for just and humane conditions of work and maternity relief: The State shall make provision for securing just and humane conditions of work and for maternity relief.

Art 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Constitution further states that the State must try to ensure that its policies are based on people's (men and women equally) right to an adequate means of livelihood; ensure equitable distribution of wealth and prevent the concentration of wealth and means of production; equal remuneration regardless of sex; ensure that the existing system do not abuse the health and strength of men and women, and children and that they are not pushed by economic necessity to work in occupations that is detrimental to their age.[12]There is also having provisions for early childhood care.[13]Constitution mandates the state to ensure justice to all members of society. Children are to be given opportunities and facilities to develop in a healthy manner[14] and to make youth be protected from exploitation.[15]

The Supreme Court of India held in *Paschim Banga Khet Samity* v. *State of West Bengal* [16]that Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. In *Parmanand Katara* v. *Union of India* [17],the Court declared the right to medical treatment is a fundamental right of the people which is under the right to health enumerated under Article 21 of the Constitution. There are many

12 *See* Art 39.

13 *See* Art 45.

14 *See* Art 39(f).

15 *See ibid.*

16 (1996)4SCC 37.

17 AIR 1989 SC 2039.

decisions of court which enhances right to health of citizens.[18]Indian judiciary is always keen to preserve the right to health of citizens and State is bound to respect ,protect and promote the wellbeing if its citizens.

3.2 WOMEN AND HEALTH

Health is complex and dependent on a host of factors. The dynamic interplay of social and environmental factors have introduced significant implications on health. "Women's life experiences as gendered beings result in multiple and, significantly, interrelated health needs. But gender identities are played out from various location positions like caste and class. The multiple burdens of 'production and reproduction' borne from a position of disadvantage has telling consequences on women's well-being."[19] Besides from the complexities associated with the right to health in general, ample consideration of the right to health of women should have at least two additional dimensions. Firstly,Women's right to health must be considered from a gender perspective. Next,the prohibition against discrimination must be kept in mind.[20] The Convention on the Elimination of All Forms of Discrimination against Women 1979 clearly formulates a strong basis for ensuring women's

18 *See State of Punjab* v. *MohinderSingh Chawla* AIR 1980 SC 470; *See also Upendrabaxi* v.*State of U.P* (1986)4 SCC 106 ;*Consumer Education and Research Centre* v.*Union of India* (1995)3SCC 42; *Virender Gaur* v. *State of Haryana* 1995 (2) SCC 577; *Common Cause* v. *Union of India* AIR 1996 SC 929;*Kirloskar Brothers Ltd.*v.*ESI Corporation* (1996)2 SCC 42; *State of Punjab* v.*Ram Lubhaya Bagga.*AIR 1998 SC 1703.

19 Sunilkumar M Kamalapur and Somanath Reddy,"Women's Health in India:An Analysis",(2013) 2(10) *International Research Journal of Social Sciences* 11, 12.

20 Both dimensions are considered in Article 12(1) & 2 of CEDAW.

right to health relating to family planning.[21] Recommendations for State action according to the General Recommendation 24 on Article 12 of CEDAW clearly states that , States Parties should implement a comprehensive national strategy to promote women's health throughout their lifespan. This will include interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women, and will ensure universal access for all women to a full range of high quality and affordable health care, including sexual and reproductive health services. It further remarked that the States Parties should allocate adequate budgetary, human and administrative resources to ensure that women's health receives a share of the overall health budget comparable with that for men's health, taking into account their different health needs. It should place a gender perspective at the centre of all policies and programmes affecting women's health and should involve women in the planning, implementation and monitoring of such policies and programmes and in the provision of health services to women as per the comment. Requirement of all health services to be consistent with the human rights of women,including the rights to autonomy, privacy, confidentiality, informed consent and choice is also required by the comment.

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21 CEDAW ,Art 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Health issues of women in reproduction also should be carefully dealt with. Reproductive rights are considered by many women as being at the very core of women's rights. Throughout history, women's reproductive functions have been used to control women themselves. When one examine the issues like why women are denied numerous life opportunities, why women are stopped from attending school once they attain puberty, why they are not allowed to move around freely or why they are restricted from taking up employment or from pursuing a career, why they are married off early without a say in the choice of the partner, may return again and again to the very same answer that it is because women have bodies that can be impregnated.[22]Reproductive rights are an essential component of women's rights. Further access to reproductive health services is only one part of the right to reproductive health, just as access to health services is only one aspect of the right to health. In brief,one can say in order to have good reproductive health ,women have to have good general health and the physical, economic and social conditions that make possible good health overall.[23]

3.3 REPRODUCTIVE HEALTH

Reproductive health is a concept which implies that people have the ability to reproduce, to regulate their fertility and to practice and enjoy sexual

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22 *See* Asian Forum for Human Rights and Development, Report of a Consultation on Reproductive Rights and Human Rights (Bangkok, 1997) accessed at *http://www.reproductive rights.org* on 12/5/2014 pp. 1-23.

23 *Ibid.*

relationships. It further implies that reproduction is carried to a successful outcome through infant and child survival,growth, and healthy development. It ultimately implies that women can go safely through pregnancy and childbirth, that fertility regulation can be achieved without health hazards and that people are safe in having sex. [24] There arise the principle of maternal and child health care.Maternal and Child Health strategy is to prevent malnutrition ,infection and unregulated fertility.It has both general measures[25] and specific measures.[26]Reproductive health principles also must ensure that the technologies used are safe for women and children, facilitating additional research needs for safety assurance, accuracy and competency in resources and services.[27] It is not in dispute that women have been the targets of various reproductive technologies which supposedly improve the reproductive health and contraceptive choice[28]. Assisted Reproductive Technology also have some grey areas of health risk factors on women's lives.

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24 *See* Mahmoud Fathalla, "Reproductive Health- A Global Overview", (1991) 1 *Annalsny. Acad. Sciences* 626.

25 They are ,Health education for all that covers the preventive ,promotive,curative and rehabilitative care.Improvement of nutritional status of the mother and child by supplementing and fortified food supply.Provision of clean drinking water.improvement of environment sanitation,immunization of mother and child against communicable diseases.Organisation of Efficient referral system. *See* D.C.Dutta,*Text Book of Obstetrics*(4th ed.,2000 reprint)p.643.

26 *See id* at 643 . Specific measures are such as Pre Pregnancy health care and counseling(p.109),Antenatal (p.100)Intra natal(p.118) ,postnatal care(p.153) ,encouragement of breast feeding through baby friendly environment (p.489),Neonatal immunization and family planning services.

27 *See generally* Charles P.Kindregan Jr. & Maureen Mcbrien, *Assisted Reproductive Technology: A Lawyers Guide to Emerging Law and Science* (1sted.,2006)p.75.

28 *See* Mohan Rao,*Reproductive Health and Women's lives in India* (2nd ed., 2002)pp. 43-44.

3.4 HEALTH RISKS TO WOMEN INVOLVING IN ASSISTED REPRODUCTIVE TECHNOLOGIES

Most of the health risks of women in ART are relating to Ovarian stimulation and egg retrieval. Risks may arise in IVF and embryo transfer.Leroy walters [29]describes the kinds of risks to the woman in IVF And embryo transfer.It involves

- Pretreatment of the women with hormones to induce superovulation,a therapy which occationally produces ovarian cysts.
- Removal of oocytes by means of laproscopy,a surgical procedure which requires general anesthesia
- Potential damage to the uterus during embryo transfer
- The risks which accompany careful monitoring of pregnancy-for example amniocentesis
- The risk of ectopic pregnancy

In a nutshell, the process of ART if used without ample care and available checks for suppressing the mentioned risks will cause drastic negative effects.Ultimately it violates the principle of right to health enshrined in the Constitution of India and Major International Covenants.

29 *See* Walters, LeRoy, Ethical Issues in Human In Vitro Fertilization and Embryo Transfer in Milunsky, Aubrey, Annas, George J., (eds) *Genetics and the Law* (1985) pp. 215-225.

3.5 OVARIAN STIMULATION AND EGG RETRIEVAL –HEALTH RISKS

A woman may undergo ovarian stimulation[30] and egg retrieval for her own use, or for donating her eggs or be compensated for providing them to another woman or couple for their reproductive use or to donate her eggs or be compensated for providing them for use in embryonic stem cell research[31] . Which hormones and drugs a woman uses is determined by her health care provider and is based on various factors, including age, ovarian responsiveness and the purpose of the egg retrieval.[32]Typically, egg retrieval requires a commitment to a three week regimen of hormone therapy involving daily injections and frequent visits to the doctor's office to undergo blood testing and

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30 Ovarian Hyperstimulation effects can be classified into two
A) Moderate-It causes discomfort, abdominal fluid buildup nausea/vomiting etc..B)Severe (100-200/100,000 stimulation cycles).It makes complications in patients condition. Grade A severe cases have enlarged ovaries, clearly evidenced abdominal swelling, shortness of breath, nausea and vomiting, but blood chemistry is normal. Patients with Grade A (moderate stimulation) severe hyperstimulation syndrome are generally treated as outpatients.Grade B is more severe. Enough fluid has been lost from the blood vessels that the concentration of red blood cells is markedly increased. The white blood cell count may be higher than normal. The blood flow to the kidneys may be less than normal, leading to a buildup of creatinine, a breakdown product from the muscles, and a decreased production of urine. These patients must be kept in the hospital and monitored closely.Grade C patients are those with serious complications, such as a blood clot or kidney failure. They need hospitalization and appropriate treatment. *See infra* n.36.

31 The removing the mature eggs from a donor is done with a surgery(the insertion of an aspirating needle through the wall of the vagina and into the ovary.It is done with anesthesia. Both the surgery and the anesthesia carry certain risks. But the risks are low. Ovarian torsion, in which an ovary twists around its supporting ligament and cuts off its blood supply, is another rare complication in women undergoing IVF and there is no evidence that egg retrieval surgery poses any risk to a woman's future fertility.

32 *See* Lars Noah, "Assisted Reproduction Technologies and the Pitfalls of Unregulated Biomedical Innovation", (2003)55 *Fla. L. Rev*. 603, 656. Women are given drugs that induce ovulation by stimulating the follicles to release mature ova .Hormonal products may offer the only mechanism to trigger ovulation for some women and their inconsistent physiological reaction to these therapeutics makes the risk-benefit calculus of ovarian stimulation in to a very unpredictable thing.

ultrasounds.[33]Donors may experience abdominal swelling ,pressure in ovarian area,mood swings due to ovarian stimulation.Due to enhanced ovulation,there are instances of accidental pregnancy of donors also.[34]The most prominent side effect of this ovarian stimulation is ovarian hyperstimulation syndrome (OHSS).[35] The development of ovarian hyper-stimulation syndrome depends on

33 *See generally* s*upra* n. 27 .*See* also *http://www.stanford .edu*. accessed on 12/5/2012 Women generally receive three classes of drugs during the ovarian hyperstimulation phase of donation.Prior to the three drug regimen ,some donors may also take birth control pills in order to regulate their menstrual cycles. First stage of hormonal drug regimen ,some may use birth control pills to regulate their menstrual cycles.The first stage of drug regimen uses a class of drugs (termed gonadotrophin-releasing hormone agonist analogues).It is used to suppress the release of luteinizing hormone (LH) by the pituitary gland ,which normally triggers eggs to mature within the body.An artificial menopause is created through it so as to control the timing of egg maturation and ovulation as per the concerns of doctor via administration of other medicines. Among the commercial form of gonadotrophin releasing hormonal drugs ,Lupron is the drug most commonly used to shut down a woman's ovaries for *IVF*, allowing the doctor to control the timing of her ovulation. Reported side effects of Lupron used for other conditions include rash, sensation of burning, tingling, itching,headache and migraine, dizziness, hives, hair loss, severe joint pain, difficulty breathing, chestpain, nausea, depression, emotional instability, loss of sex drive, dimness of vision, fainting,weakness, amnesia, hypertension, muscular pain, bone pain, nausea/vomiting, asthma, abdominal pain, insomnia, swelling of hands, general edema, chronic enlargement of the thyroid, liver function abnormality, vision abnormality, anxiety, and vertigo. The second stage of drug regimen starts with the daily injection of either follicle stimulating Hormone (FSH) or Human menopausal gonodotropin (Hmg).This will encourage the development of multiple egg follicles,allowing the physician to retrieve several mature eggs at one time. Commercial forms of follicle stimulating Hormone are Gonal/f,Pergonol,Humegon,Urofollytropin/Metro,Clomid tablets etc.In next stage,the drug used is human chorionic gonadotrophin.Once it is known that eggs have matured,ovulation is triggered through a single injection of human chorionic gonadotrophin.And after 34-36 hours after this injection ,eggs are retrieved.Commercial forms of human chorionic gonadotrophin include Pregnyl,APL,Oxidrel etc. During treatement , egg donors are required to abstain from sexual intercourse to avoid pregnancy due to elevated fertility through fertility drugs. Some times ,it get neglected and accidental pregnancy occurs.

35 *See supra*.n.27. It is a serious complication marked by chest and abdominal fluid buildup and cystic enlargement of the ovaries.Patients with it may experience dehydration,blood clotting disorders, and kidney damage. In terms of IVF cycles, moderate OHSS occurs in about 3-6% of women undergoing treatment, while mild OHSS occurs in 20-33%. The fertility drug clomiphene is not usually responsible for severe OHSS, but has been found to have an 8%incidence rate of moderate OHSS.

a large number of follicles in the ovary being exposed to human Chorionic Gonadotropin (hCG), which is used as a surrogate for luteinizing hormone in order to induce the follicles to ovulate. To avoid OHSS,two things can be possible .One is by controlling the number of follicles that develop in the ovary and modifying their exposure to hCG. Second is to tailor the stimulation protocol to the individual donors with the goal of avoiding ovarian hyperstimulation in each. Keen measures to understand just what it is that triggers OHSS is needed here.[36]In order to prevent the risk,there are some strategies. One is on identifying and excluding those women from treatment who are most at risk [37]and, for those women who do undergo ovarian stimulation, modifying the treatment according to the characteristics of the individual patient. [38]There is also indicated that the use of fertility drugs may lead to an increased risk of hormone-dependent cancers—in particular, breast, ovarian, and uterine (endometrial) cancers.[39]This is a graph which indicates the link between Clomiphene usage and risk of ovarian, breast, and endo-metrial cancers.[40]

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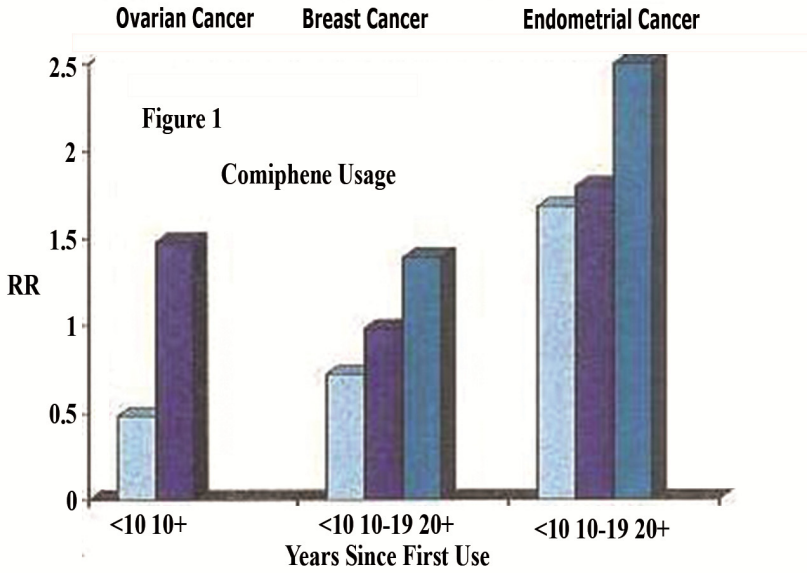
36 *See* National Academy of Sciences Workshop Report on"Assessing the Medical Risks of Human Oocyte Donation for Stem Cell Research" p.57-58 accessed at *http://www.nap.edu* on 16/5/2012.

37 *Ibid*.This includes exclusion of women with polycystic ovarian syndrome,.Some also excludes patients who exhibit polycystic ovaries on ultrasound but no biochemical changes—normal follicle-stimulating hormone and luteinizing hormone.Some doctors even exclude women with elevated levels of androgens of luteinizing hormone.

38 *Ibid.*

39. Studies have revealed that Clomiphene usage has got a link with the risk of ovarian, breast, and endo-metrial cancers..*See* Howkins &Bourne ,*Shaws Textbook of Gynaecology* (12th ed.,2001 reprint) p.312. Infertility is treated with Clomiphene .Clomiphene with dexamethazene increases the ovulation rate. Clomiphene Citrate is commonly used as a selective eastrogen receptive modulator(to induce ovulation) and small dose of 10 grams per day for 5 days may be prescribed. Sometimes more doses for more days prescribed and traces of the medicine can remain for another few days.It is most commonly used for six cycles but prolonged usage for one to two year is also recognized.This drug enhances the chances of uterine cancer if used more than one year.It is better to discontinue the use



(Source: National Academy of Sciences Workshop Report on"Assessing the Medical Risks of Human Oocyte Donation for Stem Cell Research"p,23 accessed at *http://www.nap.edu* on 16/5/2012.Report acknowledges that the data in the graph is obtained from a personal communication to Louise Brinton, National Cancer Institute(2006))

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within 6 to 8 months and also the consumption of overdose.It is an approved drug for ovulation inducement but controlled application and careful administration on obese or PCOD patients is advised.*See generally* Michelle D. Althuis, Kamran S. Moghissi et al, "Uterine Cancer after Use of Clomiphene Citrate to Induce Ovulation", (2005) 161(7)*AM J Epidemiology* 607-615.

40 *See ibid.See also supra* n.36.It is been observed that

- There is some potential links between the egg retrieval process and the risks of breast, ovarian and endometrial cancers, as well as the risk of future infertility:
- It is known that the three cancers are affected by hormones, but it is not known whether the interaction causes higher rates of cancer, or even perhaps lower rates.
- Data suggests that infertility, not ovulation induction drugs, increases a woman's risk of all three cancers.
- There is no current evidence that fertility drugs increase a woman's risk of breast or ovarian cancer.
- There is some evidence that the hormones increase the risk of endometrial cancers.
- Additionally, there is no compelling data proving an increased risk of infertility due to ovulation induction and egg retrieval.Nor does the evidence show an increased risk for early menopause, the depletion of the follicle pool, or significant instances of infection
- There is some risk of anti ovarian antibodies being produced because of the trauma to the ovary from being pierced by a needle.It is unclear whether these antigens play any role in future IVF procedures or infertility.

While considering the effects of egg retrieval on womens health,women may suffer (rarely) structural damage to the organs in close proximity to the ovaries.[41]The chances of surgical risks also cannot be neglected.[42]Any way it can be well said that the IVF assessors have underestimated the possibility of jeopardizing women's health because they have neglected epistemological and ethical problems such as choosing criteria for decisions under uncertainty.[43] IVF also enhances the chances of multiple births.[44] Multiple births causes significant health risks to mother and children.[45] Pre mature birth,low weight also cause harm to the life of the offspring.[46]Multiple gestation also poses long- and short-

.41 Injury to the bladder,bowel ,uterus or other pelvic structures being referred here.This may happen approximately one in 1000 surgeries.

42 Above mentioned Surgical risks may include acute ovarian trauma, infection ,infertility,lacerations,bleeding etc…Anesthetical complications may occur very rarely.

43 Inmaculada de Melo-Martin, "*In Vitro* Fertilization and Women's Health" , [1998)9 *Risk. Health, Safety & Environment* 201**,** 227.

44 Medical community have identified such pregnancies as failures, rather than successes of the IVF enterprise.*See* Nanette Elster, "Less is More: The Risks of Multiple Births*",(*2000)74(4) *Fertility and Sterility* 617, 618 .Among the three prominent reasons for Multiple births,IVF is the third one. The first factor is the trend toward delaying childbearing, which has led to older maternal age. With advancing maternal age comes an increased incidence of multiples, mostly twins. It is estimated that about 20% of the increase in multiple births is attributable to the age factor.*See* Carson Strong, "Too Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities*",* (2003) 31 *J.L.Med.ethics* 272.Ovarian hyperstimulation and *IVF* treatment also enhances the chance for multifoetal pregnancy.Most Unfortunate side effect of *IVF* is that of the multifoetal pregnancy. *See generally* Siddharth Khanijou, "Multifetal pregnancy reduction in assisted reproductive technologies: a license to kill?" (2004-2005)8 *Depaul Journal of Health Care Law* 403 ,406-407.

45 *See* Tamara L. Callahan et al.,"The Economic Impact of Multiple-Gestation Pregnancies and the Contribution of Assisted-Reproduction Techniques to Their Incidence",(1994)331 *New Eng. J. Med*. 244, 247 "[M]ultiple-gestation pregnancies result in substantially increased hospital charges for both mothers and neonates, producing a dramatic increase in total medical costs as compared with the costs of singleton pregnancies."; *See also*,Donna L. Hoyert et al., "Multiple Births. , Regardless of how Conceived, tend to be High-risk Births. About Half of all Twins and the Great Majority of Triplets are Born Preterm or Low Birth Weight", *Annual Summary of Vital Statistics* (2001) 108 *Pediatrics* 1241, 1246.

46 *See* Strong ,*supra* n.44 at 2.Those that survive have an increased incidence of serious complications and physical or mental disabilities including: lung development problems,

term medical risks to women. Preterm labor is the most common maternal complication of a multifetal pregnancy which often requires treatment with labor arresting drugs that have side-effects such as respiratory distress.[47] Other complications include premature delivery, pregnancy-induced hypertension, toxemia, gestational diabetes, vaginal uterine hemorrhage, preeclampsia, anemia, and premature rupture of membranes.[48] Prolonged bed rest to prevent pre-term labour can be insisted to the women.Some times women may get hospitalized for hypertension or bleeding.[49]There can be incompetent cervix, caesarian section, and postpartum hemorrhage.[50] Postpartum hemorrhage, combined with anemia, leads to the increased need for blood transfusions in patients with multifetal pregnancies.[51]These sort of health risks are prominent in the case of employing ART to women.

3.6 MENTAL HEALTH OF WOMEN IN ART

In pregnancy, despite of physical complications,there may arise mild psychological problems such as anxiety,depression etc.World over, more women than men, suffer from common mental disorders.[52] It is not uncommon in case

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cranial hemorrhaging, hyaline membrane disease, bronchopulmonar dysplasia, intraventricular hemorrhage, and necrotizing enterocolitis. Children born through a multifetal pregnancy also suffer from a higherincidence of congenital malformations, the most common being intersex, anencephaly, hydrocephaly, omphalocele, anal atresia,and fistula.

47 *See ibid.*

48 *See* Elster ,*supra* n.44.

49 Prolonged bed rest can cause loss of weight,atrophy etc. *See id* at 618.

50 *See* Elster,*supra* n.44.

51 *See ibid.*

52 *See* World Health Organization , "Women's Mental Health -An Evidence Based Review" (2000). The splitting of body from mind and the identification of women and their health

of women in pregnancy also. Several mental health issues arise from social, psychological and physiological differences on account of gender and need specific attention.[53]Research indicates that mothers with multiples are more likely to suffer from depression,because of the fatigue and stress arising from child care.[54]Women involved in ART may suffer psychological –tension on future fertility as well as the concern on child . Psychological risks to egg donors can occur in the screening, donation, and post-donation stages. In Screening Stage psychological distress from being excluded from donating, During donation, psychological side effects from medications and retrieval and in Post-donation, worry and regret present for a minority of donors can be occurred.[55]

3.7 ART-ASSOCIATED BIRTH DEFECTS

There are some risks both to mothers and babies born through ART.[56]Most common adverse effect is low birth weight and high rate of

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with the body in general and reproductive functioning in particular has led to a neglect of women's mental health and its social structural determinants.

53 *See* Kohen D,"Psychiatric Services for Women", (2001) 7 *Advances in Psychiatric Treatment* 328,329.

54 *See supra* n.36.

55. *See ibid.*

56 *See* Human genetic Commission Report on Making babies:Reproductive decisions and genetic technologies(2006) para 5.7 p.55 accessed at *http://www.hgc.govt.uk* on 4/4/2012. It was observed that there are risks , may be small ,both to mothers and children born through ARTs. Multiple births are more common following ART than natural conception. Children resulting from multiple pregnancies are more often born prematurely, and as a result have an increased risk of physical problems and learning difficulties. Particular risks,such as increased likelihood of hypertensive problems and infection with transmissible conditions or unknown genetic disease may attach to treatments in which donated gametes are used.

premature birth as discussed earlier.[57]Specific birth defects associated with ART'S are chromosomal defects and abnormal imprinting[58] in birth defect syndroms.Studies revealed that there is an increased risk of Chromosomal abnormalities [59] and ART can be associated with rare imprinting derangements.[60]

3.8 CONCLUSION

From the above detailed discussion,it is well established that process of ART although having better impacts on infertility also have negative health impacts on one's health.Increased risk of hormone dependent cancers to mother and genetic defects as well as birth defects to baby is making ART a subject of criticism. It is true that the employment of these technologies cannot be avoided as the world is having large percentage of people suffering from infertility problems.It is their basic constitutional as well as human right to have offsprings.Assisted reproductive technology is a remarkable innovation which should be thoroughly appreciated by all. But its harmful potential should be projected,communicated and remedied if possible with practical notions. In

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57 *See* Elster,*supra* n.44.International data confirm the high rates of prematurity, low birth weight, and infant death.*See generally* Nancy S. Green, "Risks of Birth Defects and Other Adverse Outcomes Associated With Assisted Reproductive Technology" (2004)114(1) *Pediatrics* pp. 256 -259 .*See also* Rev. Phillip, "Hidden Costs of Fertility" (2005-2006) 48 *St. John's J. Legal Comment* 45-56.

58 Imprinting is an "epigenetic" level of gene regulation involving genetic alterations affecting regulatory mechanisms rather than DNA sequence. Imprinted genes are differentially expressed on maternally and paternally inherited chromosomes and are differentially regulated immediately post fertilization.

59 *See* Van Steirteghem A, "Bonduelle M, Devroey P, Liebaers I, Follow-up of Children Born after ICSI", *(*2002)8 *Hum Reprod .Update* 111– 116.

60 *See* Nancy S. Green,*supra* n.57.

order to establish her(Women involved in ART) rights as well as obligations, while formulating all the responses and paradigms regarding ART & Women's health ,a feminine approach is to be welcomed.It alone can wipe the tears of women involved in the process effectively.Communicating of exact risks and possibilities in ART to the patient should be a mandatory thing. If a balanced and just approach to the use of these technologies is evolved properly progressives must enter the fray as soon as possible.[61] Above all,the state is constitutionally bound to look after the well being and health of its citizens so that it became obligatory to the Government to evolve new strategies for ART and to avoid its possible misuses through legal regulation.

61 *See* Arons, J , "Future Choice:Assisted Reproductive Technologies and the Law", Centre for American Progress (2007) accessed at *http://. www.americanprogress* org accessed on 12/3/2012.

CHAPTER 4
SURROGACY -HUMAN RIGHT PERSPECTIVES

Human rights are the most cherished rights of human beings guaranteed irrespective of any differences.Without human rights,nothing can be achieved in one's life.It is like an ocean where parameters are impossible to calculate.Women as a human being is entitled to enjoy her human rights in society.But occasions of infringement of her human right is a harsh reality she faces even today. A gender perspective approach of human rights is to be formulated worldwide for enhancing feminine power. The significant human right documents envisaging women rights has been enumerated below to substantiate the prominence of gender perspectives on human rights internationally.

4.1 INTERNATIONAL HUMAN RIGHT DOCUMENTS

4.1.1 Charter of United Nations

Charter of United Nations states in its Art 1 that the purposes of the United Nations are to maintain international peace and security and to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.[1]It clearly states in its Article 55 that in order to create of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle

1 Art 1 of Charter of United Nations.

of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems and international cultural and educational co-operation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[2]The Charter highlights the significance of conferring the enjoyment of rights to every human being without any discrimination of any kind thereby it can promote for entire human development.In that sense,surrogate women while entering in to surrogacy should be treated without discrimination of any kind and the conditions for her well being during the period also should be conferred.

4.1.2 Universal Declaration of Human Rights

Preamble of Universal Declaration of Human rights 1948 states that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.In its preamble it reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.[3]Without any distinction of any kind such as race,colour,sex,language etc, everyone is entitled to all the rights and freedoms

2 Art 55 of Charter of United Nations.

3 *See* Preamble of Universal Declaration of Human rights(Herein termed as UDHR).

enumerated in UDHR Declaration.[4] Article 3 states that everyone has the right to life, liberty and security of person.[5] UDHR guarantees gender equality by stating that women have the right to be treated equally under the law and to be protected by the law without discrimination.[6]While reading the other clauses of UDHR promoting gender equality and human rights of women,it can be well concluded that it seeks to have widest possible protective measure to assist institutions like family,marriage and also the stages of childhood and motherhood.[7]These principles are extended to surrogacy also as the prior stage of the feeling of motherhood starts with the period of pregnancy and later stage ,the delivery phase.

4 Art 2 of UDHR.

5 Art 3 of UDHR.

6 *See* Art 7 of UDHR 1948.

7 Art 16& Art.25 of UDHR.

a. Art 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

b. Art 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

4.1.3 International Covenant on Civil and Political Rights 1966(ICCPR)

Article 2 of the Convention directs the State Party to the Covenant to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language,religion, political or other opinion, national or social origin, property, birth or other status.Art.3 ensures the equal right of men and women to the enjoyment of all civil and political rights.Right to live without any discrimination is also guaranteed under it.[8]In its Art.23 of the Covenant recognizes family as a primary unit which needs adequate protection[9].Under the Convention, all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[10]As per the principles enumerated

8 *See* Art 14 of ICCPR 1966.

9 Art 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children

10 Art 26.

above,surrogate women should entitled to have her rights without any discrimination.Equal and effective protection against discrimination on any grounds is also conferred upon her.

4.1.4 International Covenant on Economic, Social, and Cultural Rights 1966(ICEPR)

International Covenant on Economic, Social, and Cultural Rights ensures the right of self-determination in its Article 1[11] and equal rights of men and women in its Article 3.[12] It ensures the right to have family in its Art 10 which states to realize the need to ensure the widest possible protection and assistance to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.It also furthers to guarantee special protection to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.[13] Entire Covenant incorporates the provisions necessary for the economic, social and cultural development of human beings.These

11 Art 1 :All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

12 Article 3 :The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

13 Art 10.Art 10(3) states that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

protective provisions of well being also can be extended to a surrogate women who needs special protection and care during the period of surrogacy.

4.1.5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979

The Convention on the Elimination of All Forms of Discrimination Against Women defines the right of women to be free from discrimination and incorporated key principles to protect this right. It came into force bearing in mind that the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.[14]It also recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.[15]CEDAW is the only human rights treaty that affirms the reproductive rights of women. The Convention defines discrimination against women as "...any distinction, exclusion or restriction

14 *See* Preamble of CEDAW.

15 *Ibid.*

made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Article 2 emphasizes the role of state parties to protect women from discrimination[16]. Article 12 of CEDAW states that women have the right to the highest attainable level of physical and mental health and the right to equal access to health services,including family planning[17].CEDAW also has

16 Art 2 :States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

g) To repeal all national penal provisions which constitute discrimination against women.

17 Article 12 of CEDAW.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal

incorporated provision to protect right to work without underestimating the concept of maternity and motherhood.[18]All these rights are the same for surrogate mother as her right to physical and mental health, full development of the potentialities , respect for human dignity deserves more attention in the field of human rights.

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period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation

18 Art.11.:States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

a) The right to work as an inalienable right of all human beings;

b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

4.1.6 Convention on the Right to Child 1989

The Convention recognizes the human rights of children, and children is defined as any person under the age of eighteen. It is the only international human rights treaty which includes civil, political, economic, social and cultural rights. It sets out in detail what every child needs to have for a safe, happy and fulfilled childhood.[19]These rights are based on what a child needs to survive, grow, participate and fulfill their potential. Article 3 of United Nations Convention on the Right to Child 1989 speaks for best interest of child.[20]It also explained that human rights are founded on respect for the dignity and worth of each individual, regardless of race, gender, language, religion, opinions, wealth or ability and therefore apply to every human being .The right of a child to know and be cared for by his or her parents and State parties duty to undertake to respect the right of the child to preserve his or her identity was envisaged under the convention.[21]Convention envisages right of child to health ,to have health

19 *http://www.unicef.org.uk* accessed on 2/5/2014.

20 3.1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

3.2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3.3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

21 *See* Art 8(1) of the UN Convention on the rights of the Child.

facilities ,pre and postnatal care to mothers etc.[22] In surrogacy ,the presumption is that surrogate mother cannot claim the baby she delivered.The best interests of the child should get adequate concern as the baby is handing over to the commissioning parents.focus should be on the ability of the commissioning parents to take care of the baby in a proper way. The right of child in surrogacy also needs to be effectively considered as it involves questions of safe and fulfilled childhood,development of fullest potentialities, right to dignity ,right to health etc.

4.1.7 Mexico Conference 1975

World Conference of the International Women's Year (Mexico conference 1975)incorporated provisions for maternal and child health,Integration of women in development,social security as well as family security provisions to enhance their rights in society.Art 11 and 12 of the conference deals with respect for physical integrity and reproductive choice to decide freely and responsibly the numbering and spacing of children is a necessary right of parents.As the

22 *See* Art 24.

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to a such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: a) To diminish infant and child mortality;
b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
d) To ensure appropriate pre-natal and post-natal health care for mothers

Convention envisages maternal health and social security,the provisions should be looked more broadly to accommodate the health perspectives of surrogate mother.

4.1.8 Copenhagen Conference 1980

This conference had dealt with health and the development issues of women,her right against exploitation and the problems of migrant and disabled women etc.Conference enumerates the significance of women's role in a developmental process which enhances the concept of gender equality.The rights against exploitation of surrogate mother ,her right to development can be linked to the provisions of the Conference.

4.1.9 Nairobi Conference 1985

World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace (Nairobi Conference or third world conference 1985)had projected the employement,health ,education issues of women.It also addressed the provisions for migrant & disabled women , women in poverty ,detention,refugee women etc.In the final document of the Nairobi conference forward –looking strategies (FLS),it was stated 'special measures are necessary to enhance women's autonomy, bringing women into the mainstream of the development process on equal basis with men.'[23]In surrogacy ,there is an urgent need to have special measures to protect and preserve her rights as well as duties. Special measures

23 *See generally* Third World Conference of the UN decade for women 1985,Agenda 8 accessed at *http://www.un.org* on 30/12/2011.

to enhance her power of decision making and eradication of poverty can make the life of them better.

4.1.10 Vienna Declaration 1993

For the first time ever, violations of women's human rights were specifically recognized by the United Nations at its World Conference on Human Rights in June 1993. The final Declaration and Vienna Declaration that arose out of the Vienna conference (the Vienna Declaration) specifically recognizes "the human rights of women" as an inalienable, integral and indivisible part of universal human rights.Declaration affirms equal status of men and women,protection from sexual harassement, exploitation and gender based violence etc. The concept of human rights of women involved in surrogacy can be effectively considered with the help of these provisions such as protection from exploitation and gender based violence etc .

4.1.11 Cairo Consensus 1994

In 1994, the International Conference on Population and Development in Cairo (ICPD) articulated and affirmed the relationship between advancement and fulfilment of rights and gender equality and equity. It also clarified the concepts of women's empowerment, gender equity, and reproductive health and rights. The Programme of Action of ICPD asserted that the empowerment and autonomy of women and the improvement of their political, social, economic and health status was a highly important end in itself as well as essential for the achievement of sustainable development. The empowerment of women and the

improvement of their political social, economic and health status are highly important ends in themselves. Human development cannot be sustained unless women are guaranteed equal rights and equal status with men. In this process women should be seen not merely as the beneficiaries of change but as the agents of change as well. This entails an enhancement of their own gender awareness.[24] The Cairo Programme of Action clearly explores the concept of reproductive rights in its Chapter 7 which states that such rights "rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of reproductive and sexual health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion, and violence as expressed in human rights documents Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences.Surrogate mother also should have all the rights to make decisions concerning reproduction free of discrimination, coercion, and violence as mentioned in Cairo Consensus.

4.1.12 Beijing Conference 1995

In 1995, the Fourth World Conference on Women in Beijing generated global commitments to advance a wider range of women's rights .Beijing was

24 *See* para 7 of Cairo Conference accessed at *http://www.unfpa.org* on 4/2/2012.

the first global conference in which women in development issues were closely and explicitly linked to women's human rights. The Platform for Action also is the first global political agreement in which the CEDAW Convention is clearly reflected. It states ,the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.Applying Attaining the goals of sustainable, equitable development requires that individuals are able to exercise control over their sexual and reproductive lives. This includes the rights to:

- Reproductive health as a component of overall health, throughout the life cycle,for both men and women.
- Reproductive decision-making, including voluntary choice in marriage, family formation and determination of the number, timing and spacing of one's children and the right to have access to the information and means needed to exercise voluntary choice.
- Equality and equity for men and women, to enable individuals to make free and informed choices in all spheres of life, free from discrimination based on gender.Sexual and reproductive security, including freedom from sexual violence and coercion, and the right to privacy.[25]

Beijing +5 Declaration on women 2000:Gender Equality, Development, Peace for 21st century affirms the necessity of advancement of women in

25 Fourth World Conference of the UN decade for women 1995 accessed at *http://www.un.org* on 25/12/2011.

gender issues.[26]The Declaration recommends advancement in the areas of attitude and practice, governance, alliances and coalition, social and economic justice and peace.[27]In 2005,Beijing +10 Declaration reviewed former Declaration and its implementation and it recognized the current challenges and forward looking strategies for advancement of women.A fifteen year and twenty year review is conducted in Beijing +15 and +20 Declaration.[28]The Beijing +20 Declaration examined current challenges that affects its implementation and achievement of women empowerment and gender issues.[29] In surrogacy also,the women should get power to exercise control over their sexual and reproductive lives and no one can coerce her for renting her womb without her consent.Advancement of women and achievement of women empowerment is possible only when women be aware of her rights,freedoms as well as security measures.

4.1.13 Universal Declaration on the Human Genome and Human Rights 1997

Article 1 of the Declaration states that human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.[30]Everyone has a right to respect for their dignity and for their rights

26 *See http://www.unwomen.org* accessed on 30/5/2016.
27 *See id.*
28 *See id.*
29 *See id.*
30 Art 1.

regardless of their genetic characteristics[31] and dignity makes it imperative that not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity.[32] Human genome can be subjected to mutations on many circumstances.[33]It should not be in its natural state give rise to financial gain.[34]Article 5 of Declaration deals with provisions for prior and informed consent ,capacity to give consent of persons concerned and their rights in general.[35] No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity as per Art 6 of the

31 Art 2(a).

32 Art 2(b).

33 Art 3.

34 Art 4.

35 Art 5.

(a) Research, treatment or diagnosis affecting an individual's genome shall be undertaken only after rigorous and prior assessment of the potential risks and benefits pertaining thereto and in accordance with any other requirement of national law.

(b) In all cases, the prior, free and informed consent of the person concerned shall be obtained. If the latter is not in a position to consent, consent or authorization shall be obtained in the manner prescribed by law, guided by the person's best interest.

(c) The right of each individual to decide whether or not to be informed of the results of genetic examination and the resulting consequences should be respected.

(d) In the case of research, protocols shall, in addition, be submitted for prior review in accordance with relevant national and international research standards or guidelines.

(e) If according to the law a person does not have the capacity to consent, research affecting his or her genome may only be carried out for his or her direct health benefit, subject to the authorization and the protective conditions prescribed by law. Research which does not have an expected direct health benefit may only be undertaken by way of exception, with the utmost restraint, exposing the person only to a minimal risk and minimal burden and if the research is intended to contribute to the health benefit of other persons in the same age category or with the same genetic condition, subject to the conditions prescribed by law, and provided such research is compatible with the protection of the individual's human rights.

Declaration.[36] Genetic data associated with an identifiable person and stored or processed for the purposes of research or any other purpose must be held confidential in the conditions set by law. [37] For compelling reasons within the bounds of public international law and the international law of human rights only,the imitations to the principles of consent and confidentiality can be prescribed by law.[38]There is an overriding effect of human dignity over any research of human genome.[39]Practices contrary to human dignity is prohibited under the declaration.[40]Declaration also highlights the states duty to initiate measures to foster the intellectual and material conditions favourable to freedom in the conduct of research on the human genome [41] and also to take appropriate steps to provide the framework for the free exercise of Research on the human genom.[42]While linking the features of Genome Declarartion to surrogacy,the two major things to elaborate is that genetic data of persons involved in donation of gametes should be confidential unless under extreme medical necessities. Second thing is that practices contrary to human dignity under the name of surrogacy like forceful human trafficking for surrogacy should not be thereby encouraged.

36 Art 6.
37 Art 7.
38 Art 9.
39 Art 10.
40 Art 11.
41 Art 14.
42 Art 15.

4.1.14 Maternity Protection Convention, 2000.

The Convention is applied to working women.[43]It prescribe remunerated nursing breaks for nursing mothers.[44]Convention enumerates the provisions for health protection,nondiscrimination and employement protection,,benefits for maternity etc.[45]This Convention which exclusively dealing with the value of maternity and motherhood is a significant piece among other conventions.The value of maternity and motherhood should not be underestimated in surrogacy also.Those women who were acting as a surrogate is doing a sacrifice and the exact essence of the deed should be better emphasized.

4.1.15 Millennium Development Goals, 2000

Millennium Development Goals, 2000 was established after the UN Millennium Summit, 2000 which have raised priorities for UN work on

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43 Art 2

1. This Convention applies to all employed women, including those in atypical forms of dependent work.
2. However, each Member which ratifies this Convention may, after consulting the representative organizations of employers and workers concerned, exclude wholly or partly from the scope of the Convention limited categories of workers when its application to them would raise special problems of a substantial nature.
3. Each Member which avails itself of the possibility afforded in the preceding paragraph shall, in its first report on the application of the Convention under article 22 of the Constitution of the International Labour Organization, list the categories of workers thus excluded and the reasons for their exclusion. In its subsequent reports, the Member shall describe the measures taken with a view to progressively extending the provisions of the Convention to these categories

44 Art 10

1. A woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.
2. The period during which nursing breaks or the reduction of daily hours of work are allowed, their number, the duration of nursing breaks and the procedures for the reduction of daily hours of work shall be determined by national law and practice. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly

45 Art 3 ,Art 6 &Art 8 respectively.

International development .It focus to achieve significant improvements in the life of the people by the year 2015.Eight MDG'S are

1 Eradicate extreme poverty and hunger

2Achieve universal primary education

3 Promote gender equality and empower women

4 Reduce child mortality

5 Improve maternal health

6 Combat HIV/AIDS,Malaria, and other diseases

7 Ensure environmental sustainability

8 Develop a global partnership for development

In a nutshell,Millennium Development Goals 2000 has incorporated in its sixth principle, the concept of maternal health and its advancement in every parts of the country by the year 2015.Whether the countries developed their strategies for its advancement is a crucial question to address as the world is witnessing the middle of the year 2015 now.As the first principle denotes for eradication of extreme poverty and hunger,it is not overemphasized to say that surrogacy is a byproduct of poverty.Third principle states that gender equality and empowerment of women should be promoted.Surrogacy is not an empowerment but a last choice of surrogate woman for survival.Fifth principle stands for maternal health.That is also a big question for surrogate mother. In a nutshell,it is submitted here that if India fulfills the goals mentioned above,there will be significant reduction in number of surrogate mothers.

4.1.16 Universal Declaration on Bioethics and Human Rights 2005

Universal Declaration on Bioethics and Human Rights 2005 recognizes the fact that ethical issues raised by the rapid advances in science and their technological applications should be examined with due respect to the dignity of the human person.Declaration clearly addresses the ethical issues related to medicine, life sciences and associated technologies as applied to human beings, taking into account their social, legal and environmental dimensions.[46]It elaborates its major objectives through Article 2 of the Declaration.[47]

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46 Art 1.

47 Art 2:

(a) to provide a universal framework of principles and procedures to guide States in the formulation of their legislation, policies or other instruments in the field of bioethics;

(b) to guide the actions of individuals, groups, communities, institutions and corporations, public and private;

(c) to promote respect for human dignity and protect human rights, by ensuring respect for the life of human beings, and fundamental freedoms, consistent with international human rights law;

(d) to recognize the importance of freedom of scientific research and the benefits derived from scientific and technological developments, while stressing the need for such research and developments to occur within the framework of ethical principles set out in this Declaration and to respect human dignity, human rights and fundamental freedoms;

(e) to foster multidisciplinary and pluralistic dialogue about bioethical issues between all stakeholders and within society as a whole;

(f) to promote equitable access to medical, scientific and technological developments as well as the greatest possible flow and the rapid sharing of knowledge concerning those developments and the sharing of benefits, with particular attention to the needs of developing countries;

(g) to safeguard and promote the interests of the present and future generations;

(h) to underline the importance of biodiversity and its conservation as a common concern of humankind.

Declaration also enhances respects for human dignity, human rights and fundamental freedoms and considers the priority to interests and welfare of the individual over the sole interest of science or society.[48]It also evokes a principle of maximum benefit and minimum harm. That means,minimum harm to the parties affected while applying and advancing scientific knowledge, medical practice and associated technologies and maximum benefit to the patients, research participants and other affected individuals while advancing scientific knowledge, medical practice and associated technologies.[49]The declaration speaks for autonomy and individual responsibility.[50]It directs that while doing any preventive, diagnostic and therapeutic medical intervention,it should be carried out with the prior, free and informed consent of the person concerned, based on adequate information. These consent can be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.[51]

Declaration also highlights the significance of respect for human vulnerability and personal integrity through its Article 8[52] and privacy and

48 Art 3.

49 Art 4. In applying and advancing scientific knowledge, medical practice and associated technologies, direct and indirect benefits to patients, research participants and other affected individuals should be maximized and any possible harm to such individuals should be minimized.

50 Art 5.

51 Art 6(1).

52 Art 8 : Respect for human vulnerability and personal integrity
In applying and advancing scientific knowledge, medical practice and associated technologies, human vulnerability should be taken into account. Individuals and groups of special vulnerability should be protected and the personal integrity of such individuals respected.

confidentiality through its Article 9.[53]As per the Declaration, the fundamental equality of all human beings in dignity and rights is to be respected so that they are treated justly and equitably.[54]No one should be discriminated against or stigmatized on any grounds, in violation of human dignity, human rights and fundamental freedoms as per the Declaration.[55]Declaration promotes the principle social responsibility towards the promotion of health. This should be a central purpose of all governments.[56]

In Art 14(2),it declares as the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race,religion, political belief, economic or social condition,the progress in science and technology should

(a) access to quality health care and essential medicines, especially for the health of women and children, because health is essential to life itself and must be considered to be a social and human good;

(b) access to adequate nutrition and water;

(c) improvement of living conditions and the environment;

(d) elimination of the marginalization and the exclusion of persons on the basis of any grounds;

(e) reduction of poverty and illiteracy.

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53 Art 9: Privacy and confidentiality

51 The privacy of the persons concerned and the confidentiality of their personal information should be respected. To the greatest extent possible, such information should not be used or disclosed for purposes other than those for which it was collected or consented to, consistent with international law, in particular international human rights law.

54 Art 10.

55 Art 11.

56 Art 14(1).

Universal Declaration on Bioethics and Human Rights 2005 considered the role of states as crucial requirement for the promotion of the principles of declaration,[57]significance of bioethics knowledge, training, information [58]as well as international cooperation.[59]While considering the principles of Universal Declaration on Bioethics and Human Rights 2005 to surrogacy, the concept of informed consent gets priority. Surrogate women and her informed consent often lacks adequate mention in surrogacy arrangements. In the case of surrogacy also, the doing any preventive, diagnostic and therapeutic medical intervention, must be carried out with the prior, free and informed consent of her and effective communication in this regard must be fulfilled. It should absorb the rule of maximum benefit and minimum harm to the parties involved. There should be a respect for human vulnerability ,privacy and confidentiality of surrogate mother .And above all, a respect for the life of surrogate women and her fundamental freedoms be promoted in accordance with the declaration.

4.2 Reproductive Rights as Human Rights

After 45 years after UDHR framed ,the UN World Conference on Human Rights in Vienna confirmed that women's rights were human rights. It is embarrassing that first UN document of human rights never recognized women's reproductive rights as human rights.[60]In 1968 ,Teheran International

57 Art 22.

58 Art 23.

59 Art 24.

60 Art.5 :All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and

human right conference only recognized reproductive rights as human rights and the right to decide freely and responsibly the numbering and spacing of children is a necessary right of parents. World population action adopted at Bucharest defines right to reproductive decision making as all couples and individuals have the basic right to decide freely and responsibly the numbering and spacing of their children and to have the information ,education and means to do so ;the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children ,and their responsibilities towards the community.[61]Other documents like Cairo Programme of Action 1994,Maternity Convention 2000, Millennium Development Goals, 2000 also envisaged the same.

Rebecca cook argues that in order to ensure human rights of women ,International human rights treaties require international and domestic application to make women to be free from all forms of discrimination, achieve their rights to liberty and security, to marriage and foundation of families, to private and family life, increased information and education, and have access to health care and the benefits of scientific progress. She further argues that women's reproductive freedom under international human rights law is a composite right founded on these separate rights. A minimalist approach

regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

61 Clause 14 f.

toreproductive freedom is that it serves women's interest in surviving pregnancy and protecting against health damage from unintended pregnancy.[62]

Alston[63] has proposed that, to be effective under international law, a purported human right should:

a reflect a fundamentally important social value;

b be relevant, inevitably to varying degrees, throughout a world of diverse value systems;

c be eligible for recognition on the grounds that it is an interpretation of U.N. Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law;

d be consistent with, but not merely repetitive of, the existing body of international human rights law

e be capable of achieving a very high degree of international consensus;

f be compatible or at least not dearly incompatible with the general practice of states; and

g be sufficiently precise as to give rise to identifiable rights and. Obligations.

62 Rebecca J. Cook, "International Protection of Women's Reproductive Rights", (1991-1992) 24 *N.Y.U. J. Int'l L. & Pol* . 645, 653.

63 Philip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control", (1984)78 *AM.J. Int'L* . 607 at 615 cited in Rebecca J. Cook, "International Protection of Women's Reproductive Rights", (1991- 1992) 24 *N.Y.U. J. Int'l L. & Pol* 645,657.

In that sense, reproductive right fulfills all these requirements and hence needs more adequate immediate international attention . Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence [64]. What actually occurring is that human right violation of women especially her reproductive rights infringement is often considered as a taken for granted thing.Hidden dangers of that tendency is to be effectively addressed and eradicated.[65]

4.3 Surrogacy and Human Rights

Despite of all the treaties,declarations, conventions on human rights of women,their protective as well as promotive clauses for welfare of women and enhancement of her human rights,bitter truth is that women are not free from discrimination,exploitation and violence anywhere.Their human rights are not at all fully protected as envisaged under the above mentioned documents.If the discussion is moving towards the rights of women in surrogacy

64 *See* ICPD Programme of Action(1994)para 7.3.

65 *See* Katherine T. Bartlett, *Feminist Legal Methods,* (1990) 103 *HARV. L. REV*. 829, 843.

> "[w]ithout the woman question, differences associated with women are taken for granted and, unexamined,may serve as ajustification for laws that disadvantage women... In exposing the hidden effect of laws that do not explicitly discriminate on the basis of sex, the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate."*See id.*

arrangements,there can be so many inferences where various human rights of surrogate women involved in these arrangements is at stake.

4.3.1 Right to Health of Surrogate women in Surrogacy.

Their right to health is not at all considered during the repeated drug usage for consistent pregnancy,deliberate caesarian section for the safe handing over of baby (most probably after 32 weeks), repeated embryo transfers after the prior failure ,selective fetal reduction etc. Their post natal sufferings as well as well being is not at all effectively considered in most of the surrogacy arrangements.[66]They are subjected to hormonal drugs as well as injections about which they are not at all sufficiently informed. For the convenience and minimizing the risk,they are having deliberate caesarian section which makes their postnatal recovery complicated as well as more time consuming.

4.3.2 Right to Dignity and Self Determination of Surrogate women in Surrogacy.

Without having exact knowledge of what is going on their body, unaware of surrogacy agreement wordings in english which is not familiar to them containing clauses detrimental to their interests,they sign on the contract for getting money for the survival of their family which is the only attraction for getting in to the surrogacy arrangements.Without conveying the exact risks of these arrangements,making somebody to get pregnant for others and live an isolated life for nine months, and after getting the baby,leaving her without any

66 *See supra* Chapter 3.

post natal care with the a fee negotiated between the intended parents and surrogate women upon which brokers as well as intermediaries benefits is a complete negation of surrogate women's right to live with human dignity and self determination.[67]

4.3.3 Right to Legal Assistance of Surrogate women in Surrogacy.

There is no concern towards the right to legal assistance of surrogate women.Surrogacy agreement should be translated to a language known to surrogate women and she should get adequate legal assistance free of cost throughout the surrogacy arrangements.She should get aware of the actual terms of the surrogacy agreement and her rights as well as duties including the monetary compensation fixed for her service.

4.3.4 Right to Access to Information of Surrogate women in Surrogacy.

In surrogacy, there is a lack of effective communication to her. She should effectively conveyed about the risks and complications which may occur during the medical procedures of surrogate pregnancy or delivery.A complete picture of embryo transfer, scanning,injections,hormonal treatments etc should be communicated adequately.

4.3.5 Right to get Monetary Compensation of Surrogate women in Surrogacy.

She is entitled to get adequate compensation for her services .Compensation should be fixed in surrogacy arrangement.She should get the

67 *See generally infra* Chapter 5.

fixed amount other than the medical expenses. If a life threatening situation occurs during pregnancy or delivery,the life of surrogate mother shall be protected over that of unborn child and she is entitled to get full payment agreed for surrogacy.

4.3.6 Right to get Insured of Surrogate women in Surrogacy.

Any couple who commissioned surrogacy should pay premium for insurance coverage to the surrogate mother she deliver until baby handed over and the surrogate mother be free from health complications arising out of the pregnancy and delivery. There should be a specific mention on the events of death and health complexities or disabilities of the surrogate women during the period of pregnancy and delivery or the complication arising from the up to one year.Insurance should not be viewed as a charity to surrogate women by couple who commissioned surrogacy.It should be viewed as her specific human right where couple who commissioned surrogacy are mandatorily obliged to comply.

4.4 Conclusion

All the conventions affirms that motherhood is a stage which needs special care and assistance but in surrogacy arrangements surrogate women will get abandoned without any post natal concerns and the special care and assistance often lacks after the delivery of the baby. And other human rights specified above also are at stake.She should get effective support for the future health problems arising after the delivery with ample care and caution and that responsibility should be fixed in the surrogacy agreements upon the commissioning parents.

Surrogacy arrangement is a complicated netwok of rights of parties involved.In surrogacy arrangement ,surrogate women is the least protected party .Effective addressal of her rights is not at all done anywhere.An approach which highlights the significance of surrogate women in these arrangements in a time where there there is growing rates of infertility is in urgent need.There is no way of avoiding third party introduction in reproductive process if the infertile couple unable to have a baby normally due to physical as well as medical incapability.That is why the purpose behind the arrangement is not underestimating here as it may lead to the birth of a baby for infertile couple who were desperate to have it .Only thing demanding is the role of that women who became ready to bear that baby also should be respected.Their honour should not get disturbed. In *Bodhisattwa Gautam* v.*Subhra Chakraborty* [68] Case , the Court observed that women have the right to be respected and treated as equal citizens. Court states "Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world."[69] It is rightly to conclude with the observation of the Second World Conference on Human Rights 1993 (Vienna) which declare that ,the human rights of women and of the girl child are an inalienable, integral and

68 (1996) 1 SCC 490.

69 *Id.* at para 9.

indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

CHAPTER 5
SURROGACY IN INDIA- CONSTITUTIONAL PERSPECTIVE

In India where exists a legislative vacuum regarding the area of surrogacy does not mean the rareness of the arrangements but reveals the shortsightedness of legislatures. Surrogacy arrangements not at all remains an uncommon thing as the world witnesses tremendous increase in the number of infertile couples as well as treatments.Surrogacy became prevalent today and it strikes a host of legal issues and conflicts.[1] These arrangements poses a number of constitutional and legal questions which need to be addressed effectively.In order to determine the legal limitations as well as parameters, it is necessary to explore the concept of surrogacy arrangements with its constitutional and legal implication.

5.1 CONSTITUTIONAL IMPLICATIONS ON SURROGACY

Surrogacy arrangements are largely opposed as its constitutionality is in a fluctuating mode. Hence an attempt to analyze its constitutionality is being made.While analyzing the constitutional protections to surrogacy arrangements,there are no clear answers.There is no express provisions in Indian constitution which envisages the right to bear a child for others (traditionally or gestationally).Here an attempt to analyse the constitutional provisions has been made which can be connected to the surrogacy issue.

1 Lisa L. Behm , " Legal ,Moral and International Perspectives on Surrogate Motherhood.:The Call for a Uniform Regulatory Scheme in United States" ,(1997-99)2 *Depaul J.Health Care Law* 557,563.

5.1.1 Article 14 and Surrogacy

Article 14 of Constitution of India declares that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The first expression 'equality before law' is taken from common law is a declaration of equality of all persons in the eyes of law ,implying absence of any special privilege to any person.Second expression is taken from United States which directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favour or discrimination.[2] Right to equality is having plenty of significant dimensions.In 1973,through the judgment of *E P Royappa* v. *State of Tamil Nadu*,[3] the Supreme Court had elaborated the traditional concept of equality which was based on reasonable classification and has laid down a new concept of equality. Justice Bhagwati delivering the judgment on behalf of himself, Chandrachud and Krishna Iyer , JJ. propounded the new concept of equality in the following words;

> Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrine limits. From a positivistic point of view, equality is antithesis to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belong to the rule of law in public while the other, to the whim and caprice of the absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of article 14.[4]

2 Mahendra Pal Singh,*V.N Shukla's Constitution of India* (12th ed.,2013)p. 48.

3 (1974)4 SCC 696.

4 *Ibid.*

In *Maganlal Chhaganlal (p)ltd* v.*Municipal corporation of greater Bombay*[5] ,Justice Bhagvathi in a concurring opinion emphasized the significance of Art 14 and its vital role.[6]To achieve the goal enshrined in constitution, enhancement of equality is a mandatory requirement.

Art 14 of the Constitution is a shining star among the fundamental rights which guarantees equality to every citizen and equal protection of laws to all persons.[7] It is essential for social democracy.Social democracy means a way of life which recognizes liberty,equality and fraternity as principles of life.They are trinity.One cannot diverse one another.Without equality,liberty would produce supremacy of the few over the many.Equality without liberty would denude the individual of his initiative to improve excellence.Without fraternity,liberty and equality would not nurture as their natural habitat.[8]To enhance the principle of equality,other two notions(liberty and fraternity) will contribute a lot.

While moving on to the horizons of equality clause to the surrogacy arrangements, one can trace many areas having the said concern. It is an indisputable fact that in India, Assisted reproductive technologies are rapidly developing. Proponents of surrogacy always claimed that the treatments like

5 (1974)2 SCC 402.

6 While speaking for himself and Justice Krishna Iyer, Justice Bhagvathi stated that Art 14 enunciates a vital principle which lies at the core of republicanism and shines like a beacon light pointing towards the goal of classless egalitarian socio-economic order which we promised to build for ourselves when we made a tryst with destiny on that fateful day when we adopted our constitution. *See Id.* at 435.

7 *Dalmia cement ltd and other* v. *Union of India and others* 1996 KHC 1668 para 18.

8 *See id.* at para 16.

artificial insemination through donor semen are available as a means to overcome male infertility; surrogacy should be recognized as a remedy for female fertility. Otherwise it is a violation of equality clause.[9] Court in *Baby M Case* held, donation should not be equated to surrogacy as their substantial difference in time commitment and the physical and psychological strain between carrying a child to term and merely donating sperm. These two situations are so diverse so that they could not form a basis for equal protection problem.[10]

To enter into a surrogacy arrangements sometimes characterizes as women choice and not to be questioned as it is a matter of reproductive autonomy.[11] Supporters claimed it as a means of women emancipation and should not be interfered by any one as it is a matter of personal choice.[12]When a surrogate women agrees to become a surrogate, her rights should not be underestimated, She should not be discriminated from any pregnant women as

9 *See supra* n.1 at 565. *See also* Christian L.Kerian ,"Surrogacy: A last resort alternative for infertile women or a commodification of women's bodies and children?", 1997(12)*Wis. Women's L.J* 113,122.

10 *Re baby M* (1988) 537A.2d 1227,1254-1255.*See also* Warnock Report, para 8.1. Report states that, in surrogacy,the intrusion is worse than in the case of AID, since the contribution of the carrying mother is greater, more intimate and personal,than the contribution of a semen donor.

11 *See* Warnock report ,Para 8.13 which states If infertility is a condition which should, where possible, be remedied, it is argued that surrogacy must not be ruled out, since it offers to some couples their only chance of having a child genetically related to one or both of them. In particular,it may well be the only way that the husband of an infertile woman can have a child. Moreover, the bearing of a child for another can be seen, not as an undertaking that trivialises or commercialises pregnancy, but, on the contrary, as a deliberate and thoughtful act of generosity on the part of one woman to another. If there are risks attached to pregnancy, then the generosity is all the greater.

12 *See generally supra* Chapter 1

her pain and suffering is not below(may be above when depart the child) they suffers which otherwise be a violation of the right to equality. Their cause should not be undermined by any one as it makes a life to come on earth whether by accepting money from intended parents or not. That purpose is noble even if they are doing for economic needs and should be effectively addressed.

While advocates of surrogacy acknowledge the procreative rights of both the intended mother and the gestational surrogate, opponents feel that the procreative choice of a gestational surrogate in conceiving, delivering, and transferring a child to its genetic parents is not the constitutional equivalent of exercising her procreative choice to bear her own child.[13] They states;

> … right to procreate is fundamental, and any ban on that right is subject to strict scrutiny.With strict scrutiny, a state must show that it had a compelling interest in creating its ban, and that the statute was narrowly drawn.With assisted reproductive technology, a state would have to allege differences between unmarried and married individuals, or between men and woman [sic], sufficient to demonstrate a compelling interest in denying unmarried individuals... statutory protection with assisted reproductive technologies. The second step would require a state to demonstrate that the ban was neither over nor under-inclusive.[14]

13 Vanessa S. Browne-Barbour, "Bartering for Babies: Are Preconception Agreements in the Best Interest of Children", (2004)26 *Whittier Law Review* 429, 469.

14 Catherine DeLair, "Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women", (2000) 4 *Depaul J.Health Care Law* 147, 181.

In India from 1 November 2012 onwards ,same sex couples are prevented from seeking surrogacy service of India.[15] Married couples of two years only can seek service of Indian surrogates in India. Requirement of medical visa is also required.[16] It cannot be claimed that gay people were discriminated from married couples for surrogacy because Art 14 does not forbid reasonable classification of persons. Another notable fact is that the Draft Assisted Reproductive Technology (Regulation) Bill 2014 restricted Surrogacy to Indian infertile couples and Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen. It excludes surrogacy to entire foreigners outside this distinction mentioned which is quite welcoming and remarkable as previous Assisted Reproductive Technology (Regulation) Bills fails to do that key reform. It cannot be claimed that gay people were discriminated from married couples for surrogacy as per medical visa requirements in the notification(2012) of the Government and Other foreigners were discriminated from Indian infertile couples and Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen as per the Draft Assisted Reproductive Technology (Regulation) Bill 2014 because Art 14 does not forbid reasonable classification of persons. Only thing to concern is classification should not be arbitrary, artificial and evasive. It must always rest upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. To have classification reasonable, it must fulfill two conditions-

15 *See infra* Chapter 9.

16 *See infra* Chapter 9 for more details.

1 The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group. ;and

2 The differentia must have a rational relation to the object sought to be achieved by the Act.[17]

Above mentioned classification by Indian Government is welcoming as it may reduce the rash commercial surrogacy tourism in India where any foreigner can hire Indian wombs. Thereby just and reasonable for current scenario of surrogacy in India.

Infertile couples have the right to procreate and to receive whatever medical assistance they require and that, as a logical extension, they have the right to raise any child that results from any medical or collaborative assistance.[18]Right to third party assistance in married couples are totally different from unmarried gay couples. In India, where legal status of homosexual is in flux, so that their right to third party assistance can be overrided because of legal uncertainty or recognition on their own status. Classification making gay people and married normal couple is reasonable and cannot be regarded as arbitrary. Single men or women should not also be encouraged to use the aid of surrogacy as they can have children by normal means. A legislation which makes surrogacy only for married infertile couples can be framed to embrace the exact essence of forming a surrogacy arrangements.

17 *K Thimmappa* v. *Chairman Central Board of Directors SBI*,AIR 2001SC 467.

18 *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 652 (1974); *See also* , *Paris Adult Theatre* I v. *Slaton*, 413 U.S. 49 (1972**).**

5.1.2 Article 21 and Surrogacy

Art 21 of Indian Constitution says that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law'. It includes a wide set of rights. While evaluating surrogacy arrangements versus right to life, it can be linked in many ways. Right to privacy in procreation, right to privacy in decision making process in one's reproductive lives, right to live with human dignity which encompasses all the necessities of life which goes along with it etc.[18A]

5.1.2.1 Right to privacy under Article 21 and Surrogacy

The right to privacy is an integral component of privacy interests that extend from control of personal information to autonomous decision-making respecting personal space and bodily integrity.[19] It preserves a sphere of decentralized decision making, creating a zone of immunity surrounding close relationships.[20] Privacy has twin strands[21] ie self autonomy[22] and spatial autonomy.[23] In both strands, the integral component remains the same "autonomy".

18A *See infra* pp.122,123.

19 Jennifer Foster and Barbara Slater, "Privacy and Assisted Human Reproduction: A Discussion Paper" accessed at *http://hli.ualberta.ca* on 5/1/2012.

20 *See* Radhika Rao, "Reconceiving Privacy: Relationships and Reproductive Technology" (1998)45 *U.C.L.A Law Review* 1077.

21 Marybeth Herald, "A Room of One's Own:Morality and Sexual Privacy after *Lawrence* v.*Texas*", (2003) 16 *YLJF* 1,34.

22 Matters relating to preferences and innate in ones identity such as sexual orientation,state of body and mind such as potency or illness etc includes in it.

23 The self autonomy is supplemented with physical aspect of spatial autonomy.There are limits to governmental intervention in private domain where individual is free to choose like relationships in family.

It can also be said that privacy is an autonomy or control over the intimacies of personal identity.[24] Privacy can be personal privacy as well as relational privacy.[25] Personal privacy is meant here to be the individual privacy.Relational privacy involves the liberty relating to intimate relationships . It is extremely difficult to define the term privacy as it includes a wide spectrum of ranges.The Report of the committee on Privacy (Justice report) 1970[26] defines privacy as that area of life which in any given circumstances ,a reasonable man with an understanding of the legitimate needs of the community ,would think it wrong to invade. Right to Reproductive choices is also a part of privacy. Neither Indian constitution nor American Constitution explicitly recognizes the right to procreative choices .It can be come under right to privacy or personal liberty which is protected by the due process clause in America[27] as well as the counter part of due process clause, Article 21 of Indian Constitution.[28]Right to procreate

24 *See* K.K.Mathew, "Right to Be Let Alone" (1979)4 S.C.C.(J)1.

25 *See* Radhika Rao, "Property, Privacy, and the Human Body", 2000(80)*B.U.L Review* 359, 388. The constitutional right of privacy consists of two principal components: the right of personal privacy, which is sometimes characterized as a right to bodily integrity or a garden-variety liberty interest, and the right of relational privacy .she affirms The right of personal privacy preserves the integrity of the body,safeguarding its inviolability. *See id.* at 389.

26 Report of the committee on Privacy, UK ,Cmnd 5012(1972).

27 *See generally Griswold* v. C*onnecticut*, 381 U.S. 479 (1965).In this case,Connecticut law was challenged o for that it violated right to marital privacy.Court read right to privacy withion the Due process clause clause of the fourteenth Amendment and invalidated the Connecticut law.

28 Art.21 uses the term personal liberty instead of liberty.It reads "No person shall be deprived of his life or personal liberty ,except according to the procedure established by law".*See Kharak singh* v. *State of U.P* AIR 1963 SC 1295. It was held that personal liberty was not only limited to bodily restraint or confinement to prisons only ,but was used as a compendious term including within itself all the variety of rights which go to make up the personal liberty of man other than those dealt within the Article 19. *But See Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597 .The supreme court was interpreted the term Personal liberty in a broader manner to include freedoms even the specific freedoms that have been granted under Art.19 of the Constitution.The decision in this case was based on Subba Rao J.'S dissenting opinion in *Kharak Singh case*.

is a most personal and private right in the sphere of life. It is a matter of one's privacy. A woman's right to bodily autonomy in matters concerning reproduction is protected by the constitutional guarantees of liberty and privacy. In *B. K. Parthasarthi* v. *Government of Andhra Pradesh*[29], 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 *Skinner* v. *State of Oklahoma*[30], which characterised the right to reproduce as "one of the basic civil rights of man". In *Suchita Srivastava and anr.* v. *Chandigarh Administration*[31],apex Court observed ,a woman's right to make reproductive choices is also a dimension of" personal liberty,' as understood under Art 21.[32]Under Art 21 ,citizen has a right to safeguard the privacy of his own, his family ,marriage, procreation ,motherhood. child bearing and education among other matters. Right to privacy includes the right to take decisions regarding child birth.[33]Privacy primarily concerns the individual. It therefore relates to an overlaps with the concept of liberty. While deciding the *case of Suchita Srivastava*[34] Court stretched the walls of Art 21 and placed the concept of procreative liberty within the purview of Art 21. Justifiably, reproductive

29 AIR 2000 A. P. 156.

30 316 U.S. 535 (1942) .Recognizing procreation as a fundamental right, Justice Douglas,writing for the majority, stated that "[w]e are dealing here with legislation which involves one of the basic civil rights of man.Marriage and procreation are fundamental to the very existence andsurvival of the race."The Court struck down the statute on equal protection grounds, reasoning that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment" . *But see Javed* v. *State of Haryana* ,(2003)8SCC 369 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 toprocreation is not a basic human right.

31 (2009)9SCC1.

32. *See id.* at 15.

33 *Ibid.*

34 (2009)9SCC1

rights are within the emanations of the right to privacy.[35]Proponents of surrogacy contend that right to procreate in normal way is a protected right, and then procreation through surrogacy or other medically available option should also be protected. It is recognized that that the matters relating to marriage, procreation, child rearing are to be free from government intrusion.[36]Opponents of surrogacy claimed that right to procreative liberty applies exclusively to martial affairs. In that sense ,non traditional means of reproduction are beyond the purview constitutional protection.[37]To them, fundamental right of privacy in child bearing matters is intended to guarantee the right of an individual to control his or her own reproduce faculties, not to commission and monitor the pregnancy of a third party.[38]In addition to the right to third-party assistance, proponents argue that the right to raise a child cannot be easily divorced from the acts and decisions leading to the existence of the person to be reared. Rearing is a protected right in part because it is a natural or inherent part of the reproductive process. Some measure of freedom in putting oneself into a position to rear must be protected if rearing is to occur. The inference is close enough to conclude that the Court has recognized a right of married persons to conceive and bear for the purpose of rearing.[39]It can be held under their right to privacy.

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35 *See Griswold* ,*supra* n.27 at 486. The disagreement of members of the majority as to the constitutional underpinning of the claim is less important than the fact that they agreed that a right to privacy had a constitutional basis and that the justification for the Connecticut act was inadequate.*See also*, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972)

36 *See supra* n.1.

37 *See* Shari O Briess, " Commercial Conception:A Breeding Ground for Surrogacy", (1986)65 *N.C.L. Rev* 127,152. *See also Re baby M* Case, *supra* n.10 .In *Re Baby M Case*, Court observed that right to procreate is recognized as a constitutional right, but it did not extend to surrogacy because the custody, care companionship and nurturing that follow birth are not parts of the right to procreation

38 *See ibid.*

39 J.A Robertson, " Procreative Liberty and the Control of Conception ,Pregnancy and Childbirth*",* (1983) 69 *Va. L. Rev*.405,417.

It is hereby submitted that right to privacy can be extended to the right of infertile couples to procreate with the aid of ART which may require third party assistance and cannot be held as unconstitutional as it is most private sphere of life.Only thing to remember that in surrogacy ,surrogates identity should not be revealed except with her consent or by court order in necessary circumstances which otherwise may lead to a case of clear infringement of her privacy right.Everybody has a right to determine what is going with her body and surrogate women if chooses surrogacy herself for whatever means,there is a duty to safeguard her right to privacy.She should be effectively counselled about the medical invasions on her body,intended parents right which may interfere with her privacy and an informed consent is needed for all the processes throughout the arrangement.[40]

It is a remarkable fact that the right to privacy cannot be treated as an absolute right.[41]The right to privacy is not absolute and subjected to state restriction. In *Roe* v. *Wade* , Blackburn J. observed "The right of personal privacy includes the abortion decision,but that this right is not unqualified and

40 *See infra* Chapter 9.

41 *See Gobind* v. *State of Madhyapradesh*,AIR 1975 S.C.1378,1384 ,Court said; "yet,too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the constitution".*See also Sharda* v. *Dharampal*,AIR 2003 SC 3450 ,When there is no right to privacy specifically conferred by Art.21 and with the extensive interpretation of the phrase "personal liberty "this right has been read into Art.21 ,it cannot be treated as absolute right.

must be considered against important state interests in regulation.[42]State can restrict or regulate any activity in the interest of public. Justice Mathew, conceptualized the right to privacy as part of penumbral zones of fundamental rights.More importantly, it was laid down that for restriction on right to privacy to be valid ,it must be imposed for the protection of states interest.[43] In that sense, State can regulate the process of surrogacy also so as to enable the needy people to utilize the process within the framework prescribed by the state and to avoid activities against the public interest.

5.1.2.2 Right to live with human dignity and Surrogacy

Immanuel Kant observes, a human being is bound not to disregard his or her own dignity and he states "humanity in his person is the object of the respect which he can demand from every other human being, but which he also must not forfeit.[44]Assisted reproductive technologies created significant impact on human lives and in today's world one cannot simply abandon the technological innovations as it sometimes becomes a necessity to embrace.[45]

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42 *See Roe* v. *Wade* 410 U.S. 113,153 (1973). There is also *Doe* v. *Bolton* 410 U.S. 179 (1973).,the companion case to *Roe* v. *Wade* and was decided at the same time. In *Bolton,* a married woman challenged the constitutionality of Georgia's laws criminalizing abortion. Under Georgia law, abortions were prohibited unless a doctor determined that the pregnancy would endanger tile woman's life or health, the fetus likely would be born with a birth defect, or if the pregnancy resulted from rape. Doe argued that she was forced to either relinquish her right to decide whether to bear a child or seek an illegal abortion.. The Supreme Court struck down the Georgia law as unconstitutional.

43 *See R.Rajagopal* v. *State of Tamilnadu* A I R 1995 SC 264; *See also Saroj rani* v.*Sudarsh Kumar Chadha* AIR 1984 SC 1562; *Tokugma Yepthomi* v. *Apollo Hospital Enterprises* A.I.R 1999 S.C 49 . In these cases,Court examined the clash between the right to privacy and other individual rights.

44 Immanuel kant , *The Metaphysics of Morals* (1sted .,1996) pp. 186-187.

45 *See generally* Mohanty,Chanda Talpade , "Under Western Eyes Revisited: Feminist Solidarity through Anticapitalist Struggles" ,(2002)28 (2) *Sign*s 499.

Art 21 of Indian Contitution recognizes right to live with human dignity in right to life. In *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi and Ors*.[46],the Honourable Supreme Court through Justice Bhagwati observed that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingle with fellow human beings.He also stated "the magnitude and content of the components of this right would depend upon the extent of the economic development of the country" and emphasized that "It must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self".[47]

Right to life means to live a meaningful dignified life.It is not merely animal existence.It should be a life free from exploitation. It is the fundamental right of every one in India to live a life with human dignity.[48] Court also held ,while arriving at the proper meaning and content of the right to life, the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content. A constitutional provision must be construed, not in a narrow and constricted

46 (1981)1 SCC 608 ,613.

47 *See id* at 614-615.

48 *Ibid.*

sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges. This principle applies with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.[49]

To emphasise the significance of right to live with dignity, Justice Subba Rao quoted the passage from *Munn* v.*Illinois*[50]in *Kharak Singh* v *State of Uttar Pradesh* [51]

> By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world.

In *Naz Foundation* v. *Government of NCT and Others*[52]Court observed;

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49 *Id.*at 618, *See also Bandhu Mukthi Morcha* v *Union of India* (1984)3SCC 161.

50 94 US 113(1877).

51 1964 (1) SCR 332 ,345.

52 *Naz Foundation* v. *Government of NCT and Others* 2010 KHC 7063 accessed at *http://www.Indian kanoon.org* on 19/5/2015.

> At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will, and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others.[53]

In the very same case ,Court took the aid of broad view of Canadian Supreme Court in *Law* v. *Canada (Ministry of Employment and Immigration)*, which states ;

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.[54]

In brief,the concept of right to live with human dignity does not permit devaluing or ignoring any person from utilizing their capacities for the enjoyment of their needs and the entire concept is rooted on the recognition of physical integrity of the human being irrespective of the fact that whether he can provide any utility to the society.[55]Legislations should foresee the matter as it

53 *Id* at para 26.

54 *Id.* at para 28.

55 *See generally Naz Foundation Case, supra* n.52 para 26 and 28.

may deal with distinct issues of one's physical integrity,dignity and the utility towards capabilities.

While moving on to the extension of this right to surrogacy arrangements,the situation of India should be considered.In India, women from poor background tend to be a surrogate for their life expenses,to make their family to survive, or for the welfare of children,husbands etc.The money they are getting for surrogacy is large to them because their ordinary daily wage is so less.Financial pressure makes them to be a surrogate does not mean to make their life and health at risk without following security measures to them while going for surrogacy.Surrogate women should get adequate compensation,medical facilties,hygienic and nondiscriminatory atmosphere of living throughout the pregnancy and delievery as well as recovering time which otherwise be a violation of their right to live with human dignity. Mere exploitation of their health and wellbeing should be avoided.[56] It is also argued by the critics that it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child. The objection is not diminished, indeed it is strengthened, where the woman entered an agreement to conceive a child, with the sole purpose of handing the child over to the commissioning couple after birth.[57]But it is suggesting here that whether women may use it under financial problems or not ,purpose behind the act should not become immoral as it enables a baby to come upon the hands of needy

56. *See generally supra* Chapter 3.

57 Warnock Report ,para 8.10.

parents.[58]As surrogacy is a last resort for an infertile couple where female partner is unable to gestate due to medical or physical reasons ,State should permit the same with strict criterias which can help not only the needy infertile couple but also a women (Surrogate)who were extreme need of money to go for such an arrangement without hesitation on its legality. State must ensure her a hygienic and nondiscriminatory atmosphere to live till delivery and an adequate compensation for her work which tends to have a noble outcome.

5.1.3 Right against exploitation and Surrogacy

Article 23 of Indian Constitution prohibits traffic in Human beings,*begar* and other similar forms of forced labour.Traffic in human beings means selling and buying men and women like goods and includes immoral traffic in women&children for immoral or other purposes.[59] *Begar* means involuntary work without payment.[60] Element of force in the forced labour can be analysed with the case *People union for democratic rights* v.*Union of India*[61] where Justice Bhagvathi interpreted the word' 'force' in wider ways.To him,force is not only physical but also force arising from the compulsion of economic

58 *See* Warnock report ,Para 8.14 . There is no reason, it is argued, to suppose that carrying mothers will enter into agreements lightly, and they have. A perfect right to enter into such agreements if they so wish,just as they have a right to use their own bodies in other ways,according to their own decision. Where agreements are genuinely voluntary, there can be no question of exploitation,nor does the fact that surrogates will be paid for their pregnancy of itself entail exploitation of either party to the agreement.This is also the justification for the claim that surrogacy arrangements voluntarily entered should not be come under the purview of Art 23 of the Constitution of India.

59 *Raj Bahadur* v..*Legal remembrencer* AIR 1953 Cal 522.

60 It means making a person work against his will and without paying remuneration.*See S Vasudevan* v.*S.D.Mital*,AIR 1962 Bom 53,67.

61 AIR 1982 3SCC 235.

circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or services eventhough the remuneration received for it is less than the minimum wage.Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as "force' and if labour or service is compelled as a result of such 'force',it would be 'forced labour'[62]Concern of the court on the aspects of human trafficking and the need of its suppression can be seen in cases like *Laxmi Kant Pandey* v. *Union of India* [63] in which the court had laid down procedures to check and monitor inter country adoptions so as to avoid elements of trafficking of human beings.Another case is *Vishal Jeet* v. *Union of India*[64] where the Supreme Court ordered for an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of human trafficking and required most rational measures to weed out the vices of illicit trafficking.

In surrogacy arrangement,surrogate women get financial support from intended parents which may be a compelling factor for her to go for surrogacy but forced labour most probably may not be possible as it involves various medical steps and there is also the involvement of mental health of the pregnant lady which need not be compromised by the intended parents.But the situations of forced surrogacy where surrogate women is forcefully detained and

62 *Id.* at 259.

63 (1984) 2 SCC 244.

64 (1990) 3 SCC 318 .

threatened to undergo medical procedures or situations where she is forced to do surrogacy by her family for her relative under the head of altruism or for any infertile couple for money cannot be neglected. The need is to evolve a transparent mechanism for surrogacy as it may reduce harmful practices like human trafficking and forceful surrogacy behind it will come to a level of decreasing rate .

In surrogacy arrangements ,opponents always claim that ,children are characterized as commodities and there are clear parallels between a surrogate arrangement and a market transaction.The intending parents are the buyers because they are willing to pay.Commodities are eggs,parental rights ,child and nine months service.Surrogate mothers are sellers.[65] It is submitted here that Art 23 cannot be blindly posed to surrogacy as it is not a mere commercial market transaction.It is made for human emotions and mere selling and buying of child is not occurred because the intended parents are donating their sperm or ovum(sometimes donors used) and waiting for the medical procedures and nine months time and cherished to have the baby.Surrogacy should be encouraged atleast one of the intended parents can donate sperm or ovum.If there is no such chance,adoption should be preferred.It is the duty of the state to ensure that the practice of surrogacy should not become human trafficking by crossing its permissible limits and to become a market transaction .It is the duty of state to ensure its citizens by an adequate legislation that the instances like *Babe 101*

65 *See* Trevor Allis ,"Surrogate Arrangements:Market of Living Laboratories" accessed at *http://www.vpmthane.org* on 2/9/2012.

traced in countries like Thailand and Vietnam should not be occurred in India as there is no regulatory mechanism to restrict the practice.

5.1.4 Article 19(1)g and Surrogacy

Article 19 (1)g of the Constitution of India guarantees that all citizens shall have the right to practice any profession,or to carry any occupation ,trade or business. *Sodan Singh* v.*New Delhi Municipal Committee*[66] ,it was held that profession means an occupation carried on by a person by virtue of his personal and specialized qualification ,training skill.It was observed that the word 'occupation' has a wide meaning such as any regular work profession ,job, principal activity, employment, business or calling in which an individual is engaged. Court defined trade as in its wider sense includes any bargain or sale, any occupation or business carried on for subsidence or profit, it is an act of buying and selling of goods and services. It may include any business carried on with a view to profit whether manual or mercantile. It observed business as a very wide term may include anything which occupies the time, attention and labour of a man for the purpose of profit. It may include in its form trade, profession ,industrial and commercial operations, purchase and sale of goods and would include anything which is an occupation as distinguished from pleasure. Court elaborated the object of using four analogous and overlapping words in Article 19(1)(g) as to make the guaranteed right as comprehensive as possible to includes all the avenues and modes through which a man may earn his livelihood.

66 (1989)4 SCC 155.

This right is not an unconditional right. Reasonable restrictions can be imposed by the state under the clause 6 of the Art 19 (1).State can impose restriction on that freedom in the interest of general public or in situations where professional or technical qualification is necessary for carrying on any profession,trade or business and also the state can carry any trade or business to the exclusion of private citizens,wholly or partially.This right includes right to close down or relinguish or sell the business.[67]It is also to be noted that expression in the interest of general public is of wide import comprehending public order,public health ,public security,morals,economic welfare of the community and the objects mentioned in part IV of the constitution.[68]

In order to determine the reasonableness of the restriction,regard must be to the nature of the business and the conditions prevailing in that trade.It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down.Thus trades in noxious and dangerous goods or trafficking in women may be prohibited altogether and there is nothing unconstitutional in the law doing so.[69] State can exclude certain trade or activities from the purview of Art 19(1)g on the basis of their adverse and reprehensible moral and social effects.[70]

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67 *See* Art 19(6). *See also Excel Wear* v. *Union Of India* (1978)4SCC 224;*Fertilizer Corporation Kamgar Union* v. *Union of India* AIR1981SC344.

68 *Municipal corporation of City of Ahmedabad* v. *Jan Mohammed Usman Bhai* (1986)3 SCC 20,31

69 *See supra* n.2.

70 *Ibid*.*See also,State of Bombay* v..*R M D Chamarbaugwala* AIR 1957 SC

Surrogacy, thus, should not be claimed as an occupation,trade or business as making it as an occupation will cause negative social effects.Women may be choosing it for their survival.But making it a mere occupation creating a free market system can make further exploitation of surrogate womens health and wellbeing.It must be regarded as an arrangement between parties not an occupation which makes women to do whenever demand comes from the desires.It makes competition among them, compromising prices for order and can make the system more vulnerable.

Advances in reproductive technology forces the judiciary as well as legislature to interpret the words of law with an effective sense for the new era.For the Constitution to be a constitution of principle,a forward looking document,it must be interpreted broadly,one must extract principles,rather than rules.Only when liberties are interpreted in such a manner can the Constitution be powerful and effective document that protects an individual 's rights and liberties in today's technologically advanced society with the same force that it protected the liberties endangered during the ratifies generation.[71]In the case of Assisted reproduction as well as in Surrogacy ,a broad interpretation of the rights of parties involved in it with a powerful aid of legislation alone can serve decisive impacts.

699;*Krishnan Kumar Narula* v..*State of Jammu and Kashmir* AIR 1967SC1368.

71 Samuel A.Gunsmerg, "Frozen Life's Dominion:Extending Reproductive Autonomy Rights to *In Vitro Fertilization*",(1997)65 *Fordham L.Rev* 2207,2239 accessed at *http://ir.lawnet.fordham.edu* accessed on 23/4/2013.

5.2 PAYMENT OF MONEY IN SURROGACY-AN ANALYSIS

The most controversial thing in surrogacy arrangement is the payment of money to the surrogates.[72] That payment can be divided into four types.

a.The payment to procure the child.

b.Payment to to procure the surrogate mothers consent

c Payment for surrogate mothers promise to voluntarily terminate or abandon her parental rights over the child

d Payment for services.[73]

5.2.1 Payment to Procure the Child.

Payment to procure is not permissible in its literal sense as human trafficking is not permitted by any law.Surrogacy arrangement exactly not taking a child as a commodity but starting from the conception by artificial means exact arrangement prevails.It is not like purchasing a chattel from market.Unrestricted baby market should be restricted as it is a clear cut exploitation.Putting price tags for baby born out of the transaction is not occurring because surrogacy arrangement involves clear planning from beginning to end(previous fixing of fee also) as it is highly expensive for the intended couples.

72 Peter Bowel, " Surrogate Procreation:A Motherood Issue in Legal Obscurity " ,(1983-1984)9 *Queens L.J* 5,20.

73 *See ibid.*

5.2.2 Payment to Procure the Surrogate Womens Consent.

Payment can be interpreted as an inducement to hire surrogate womens consent to be a surrogate.She should get ready for the financial gain met out of the transaction of surrogacy.In brief sense, giving consent for surrogacy may be motivated by the payment for it.

5.2.3 Payment for Surrogate Mothers Promise to Voluntarily Terminate or Abandon Her Parental Rights Over the Child

Payment can be interpreted as it is given for surrogate mothers promise to voluntarily terminate or abandon her parental rights over the child.The mother gets emotionally attached during pregnancy.After delievery ,it may be difficult for her abandon the child.At that time,the large sum of money payment can induce her to terminate her rights.

5.2.4 Payment for Services

The payment can be equated to the payment for surrogacy services.It is given for surrogates nine months services,delievery pain, wastage of time ,nonparticipation to other employements during pregnancy etc. In *Johnson* v. *Calvert* [74] the Californian Supreme Court made a number of important points which paved the way towards the notion of surrogacy

(i) A gestational mother cannot renege on the surrogacy agreement ,provided that agreement was fairly & properly reached;

(ii) Economic necessity is a reality for many of the women who become surrogate mothers – but this does not make surrogacy arrangements invalid, it is simply a reflection of the reality of the situation;

(iii) Surrogacy does not turn children into commodities, despite the fact

74 5 Cal. 4th 84,19 Cal. Rptr. 2d 494, 851 P.2d 776 (1993)

that they are effectively the subject of a contract.[75]

5.3 CONCLUSION

Surrogacy has turned into a legal disputed matter and its legalization is highly relevant. Surrogate women provides a noble service that should be respected and honored. She helps in the creation of life, bringing into the world a child who otherwise would not exist ….She does place herself at some risk, but she does so knowingly, willingly, and without reservation. Why this should not be honored is mystifying[76]. Legislature should not be hesitated to respond to the current needs of technological era.Slow strategies should not be employed as it is not a sudden relief to the problems facing by surrogate women and commissioning parents today.There remains a long difference between innovation and regulation of that innovation.[77]"International surrogacy has both beneficial and harmful effects. In the next few years, international surrogacy will continue growing, and regulators and scholars will need to address this brave new world with thoughtful, nuanced responses."[78] Time is not for saying a big "No" to surrogacy but to frame exact rules for its legal use and limits. Sufficient checks and guidelines to avoid malpractice in the arena can make the system more hazardless to the entire parties involved in the surrogacy process.

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75 Family Law week," Surrogacy: National Approaches and International Regulation" Nov 2011 p .22 accessed at *http:// www.familylawweek.co.uk* on 25/5/2015

76 Paul G. Arshagouni ,"Be Fruitful and Multiply, By Other Means,if Necessary: the Time has Come to Recognize and Enforce Gestational Surrogacy Agreements", (2011-2012) 61 *DePaul L. Rev*. 799, 847.

77 *See generally* Seema Mohapatra, "Achieving Reproductive Justice in the International Surrogacy Market",(2012)21 *Annals Health L.* 191 accessed at *http://lawecommons.luc.edu/annals/vol21/iss1* accessed on 22/7/2014

78 *Ibid.*

CHAPTER 6

LEGAL ENFORCEABILITY OF SURROGATE AGREEMENT- AN ANALYSIS

Surrogacy is having huge demand among the infertility treatment but at the same time it is an indicator of unending controversial issues. It is being seen as an extension of advanced medical treatments for infertility. More than a treatment, it is a medical as well as a social arrangement using ART. In some surrogacy arrangements ,surrogate may be inseminated with the sperm of the husband of the infertile couple.And the result is a child genetically similar to the surrogate and infertile couple's husband.In some other arrangements ,egg and sperm of the couple itself is used and this embryo is implanted to the surrogate's womb and the resulting child is genetically similar to the infertile couples.[1]One of the prior legal issue surrounding surrogacy is relating to the surrogate agreement and its legal enforceability.

6.1 COMMERCIAL SURROGATE ARRANGEMENT AND ALTRUISTIC SURROGACY ARRANGEMENT

Surrogacy arrangements are generally divided into Commercial surrogacy arrangements and Altruistic surrogacy arrangements.These arrangements are commercial or altruistic depending on whether the

1. *See* Katherine.B.Leiber,"Selling the Womb:Can the Feminist Critique of Surrogacy Be Answered",(1992-1993)68 *Ind.L.J.* 205,206.

surrogate receives financial reward for her pregnancy or the relinguishment of the child,or not.Most of the critics opines that altruistic surrogacy does not amounts to baby selling as there is no financial reward whereas commercial surrogacy amounts to baby selling.It is the economic compulsion makes the women to go for commercial surrogacy and such agreements can be exploitative.[2] It is also to be noted that in Altruistic surrogacy ,the surrogate is not financially rewarded for her service but often motivated to help the infertile couples to have a child.Eventhough altruistic arrangements are noncommercial in nature but in some cases ,socially forced women by her family members act as surrogate for friends and close relatives.The element of free consent is absent here although they are not expressly denying to act as a surrogate due to fear or dependence to the family.[3]This arrangement is more exploitative and more harmful to her than the commercial arrangements because in commercial arrangements ,at least she is paid for her service.

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2 *But see* Swapnendu Banerjee, "Gestational Surrogacy Contracts: Altruistic or Commercial?A Contract Theoretic Approach"(2009) p.6 accessed at *http://www.cdedse.org* accessed on 5/9/2012. By stereotyping women as a selfless, self sacrificing and 'altruistic' entity, altruistic surrogacy only adds to the exploitation of women. If one wants to take benefit of women's reproductive capabilities then one should pay for it. *See also id.* at pp. 6-7.To Stainsbey,

> "The repercussions of refusing to relinquish a child would be particularly painful in an altruistic surrogacy situation. It is here that a decision to keep or relinquish the child can cut deep into a surrogate woman's most intimate family ties and support systems. (If the child is disabled in any way neither the surrogate nor the commissioning parents may wish to keep it). In a commercial surrogacy situation a surrogate can still have her family supports. In an altruistic surrogacy one's kith and kin can become one's accusers".

3 *See ibid.*

When the parties to a surrogacy contract reach agreement on the terms of the contract, apparently all of them wish the contract to be enforceable; otherwise they would not have entered into it in the first place. The parents wish to have children and they view surrogacy as their only opportunity to do so and the surrogate mother wishes to obtain a sum of money, which she apparently needs for herself or for her own family. After the deal, they all feel better off, since they have acquired what they needed more in exchange for money or services, which they valued less. For example, a surrogate mother can use the money to offer a better education to her children or a better standard of living to her family. At the same time, she can derive utility from her own altruism.[4]It is submitted here that line dividing altruism to commercial surrogacy is so narrow that more undesirable effects can exist in the name of altruism.

6.2 SURROGACY AGREEMENT AND ITS LEGAL ENFORCEABILITY IN INDIA

Surrogacy Agreement means a contract between the person(s) availing of assisted reproductive technology and the surrogate mother.It is the prior requirement for entering for surrogacy.Persons availing of surrogacy involves both commissioning parents and surrogate mother. Through surrogacy agreement, they formulates their terms and conditions of these arrangements.

4 Aristides N. Hatzis, "Just the Oven**:**. A Law & Economics Approach to Gestational Surrogacy Contracts" (2003) *Intersentia* 412,417 accessed at *http:// www.ssrn.com* on 2/8/2013.

Section 60(1) of Assisted Reproductive Technology (Regulation) Bill 2014 mandates entering in to a surrogate agreement which shall be legally enforceable.[5]So it is clear from the provisions of ART Bill that legally enforceable surrogate agreement is needed for having a surrogate arrangement.An agreement enforceable by law is a contract itself.All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void by law.[6]Then , a surrogate agreement enters between the commissioning parents and the surrogate mother providing that surrogate will relinquish all parental rights over the child;with free consent of the parties competent to contract ,there can be no confusion regarding its enforceability. Thereafter, Under Section 9 of Civil Procedure Code 1908 ,it can be the subject of civil suit before a civil Court for adjudication of all disputes relating to the surrogacy agreement and for a declaration/injunction as to the reliefs prayed for.[7]These agreements are not rendered expressly void by any Indian Law and ART Bill mandates entering into such agreements for an enforceable surrogacy arrangement. While considering the aspects of lawful consideration and lawful objects, the provisions of Indian Contract Act should be thoroughly dealt with. As already mentioned, Section 10 of the Indian

5 Section 60(1) of Assisted Reproductive Technology (Regulation) Bill 2014.

6 Section 10 Indian Contract Act 1872.

7 *See* Law commission of India(Report No.228), "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to Surrogacy"(2009) para 3.5 (c).

contract Act requires lawful consideration as an essential for giving enforceability to an agreement.[8]Section 23[9]& Section 24[10] deal with circumstances in which the consideration will be treated as unlawful.To determine whether a surrogacy contract is violative of Section 23 and 24 of Indian Contract Act, an enquiry towards what is court regarding as immoral or against public policy must be dealt with.

6.3 SURROGACY ARRANGEMENTS V. PUBLIC POLICY

An initial difficulty in addressing surrogate motherhood arrangements is that they do not conform to predictable patterns of behaviour, and no legal language exists to describe the human and social relationships that they create.[11] Surrogate agreements should not be considered as commercial contracts. These agreements are not for the sale or repair of goods. It is an agreement for the release of parental obligations as well as rights. It is an agreement dealing with human emotions. Intention of the parties to surrogate arrangement is the crucial point on these

8 *See* Section 25, Indian Contract Act 1872: an agreement made without consideration is void.

9 Section 23 ,Indian Contract Act:The consideration or object of an agreement is lawful, unless -It is forbidden by law; or is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; of involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

10 Section 24 of Indian Contract Act 1872:If any part of a single consideration for one or more objects, or any one or any part of any one of several consideration of a single object, is unlawful, the agreement is void.

11 *See generally* Glenda Emmerson,"Surrogacy:Born for Another",Research Bulletin No 8/96 (1996)accessed at *http://www.parliament.qld.gov.au* on 2/3/2013.

agreements.Other major areas in it are the conditions of child bearing by surrogate, termination of her parental rights after baby birth and payment of money by the genetic parents etc.Commercial surrogacy arrangements are often portrayed as a win-win situation,seen to give a desperate and infertile parents the child they want and poor surrogate women the money they need.Yet surrogacy is a survival tool rather than easy and happy right.[12] These arrangements have been the subject of much academic debates also.

The Warnock Committee had doubted that surrogacy agreements contravened public policy by stating that:

> any surrogacy arrangement would necessarily involve some form of agreement between the parties concerned, however informal. Although it may be assumed that in the majority of cases the agreement would be kept and the matter never brought before a court, it is likely that grave difficulties of enforcement would ensue in the event of a dispute over such an agreement. There is little doubt that the Courts would treat most, if not all, surrogacy agreements as contrary to public policy and therefore unenforceable. Where one party broke the agreement the other party could not expect to invoke the court's assistance. Thus, if the carrying mother changed her mind and decided she wished to keep the child it is most unlikely that a court would order her, because she had previously agreed to do so, to hand over the child against her will. Nor in such a case would a court order the surrogate mother to repay a fee paid to her under the terms of the agreement.[13]

12 Magdalina Gugucheva,"Surrogacy in America "(2010) accessed at *http://www.councilforresponsiblegenetics.org* on 20/8/2012.

13 *See* Report of the Committee of Inquiry into Human Fertilization and Embryology (1984) para 8.5 accessed at *http:// www.publications.parliament.uk* accessed on 24/2/2015.

> The Courts do, however, have jurisdiction over child which is quite separate from and independent of the law of contract. Where a court has to consider the future of a child born following a surrogacy agreement, it must do so in accordance with the child's best interests in all the circumstances of the case, and not according to the terms of any agreement between the various adults. The child's interests being the first and paramount consideration, it seems likely that only in very exceptional circumstances would a court direct a surrogate mother to hand over the child to the commissioning couple. The present state of the law makes any surrogacy agreement a risky undertaking for those involved.[14]

Majority of the committee was concerned about the dangers of commercial exploitation. The committee was convinced that the danger of exploitation of one human being by another appears…far to outweigh the potential benefit …[15]All surrogacy agreements, furthermore,"treat others as a means to their own ends" and are therefore morally objectionable, 'however desirable the consequences.'[16] Majority of the Committee also recommended the criminalization of commercial surrogacy agencies and an express statutory declaration that all surrogacy agreements are illegal contracts.[17]

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14 *See id*.at para 8.6.

15 *Id*.at para 8.17.

16 *Ibid.*

17 *Id.* at para 8.18&8.19.

Critics attacks surrogate arrangement as something having immoral objectives and opposed to public policy.While evaluating this,the criteria for what amounts to public policy should be extracted.Prevailing view taken by Courts is that a contract that has a tendency to injure public interest is against public policy.[18]It is not to limit the notions of public policy by applying precedents on it ,but also to use care and caution on new and extra ordinary cases that may arise and to decide it with current situational analysis.[19]Courts are reluctant to extend the categories of agreements opposed to public policy.Burrough J. observed in *Richardson* v.*Mellish*[20] that "Public Policy is a very unruly horse and once you get astride if you never know where it will carry".Freedom of contract is the dominant principle in law.This has to be reconciled with other public interests.[21]Technological advances,rapid inventions in medical sciences may make extraordinary cases in which the questions of surrogacy agreements and its enforceability on doubt.

It is the primary duty of the Court of Law to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of the society.But in certain cases, Court may relieve them

18 *See generally ,Bhagwant Genuji Girne* v. *Gangabisan Ramgopal* AIR 1940 Bom.369; *See also,Evanturel* v. *Evanturel* (1874)L.R. 6 PC 1.

19 *See generally Egerton* v.*Brownlaw* (1853)4 H.L.C.149.

20 1824(2)Bing 229.

21 G.C.V.Subbarao,*Law of Contracts* (9th ed.,2007)p.151.

of their duty on a rule founded on what is called the public policy.[22]The expression Public policy is however incapable of a precise definition,[23] sometimes Courts consider immoral or opposed to public policy limited to sexual immorality.[24]It also has stated that public policy connotes some matter concerning public good and public interest.[25]Court can evolve new heads under public policy and it should be done in extraordinary circumstances giving rise to incontestable harm to the society.[26] In *Re Minors Case* [27],Court observed that element of surrogacy agreement was repellent to the proper ideas about the procreation ,so as to make any such agreement one which should be rejected by law as being contrary to public policy.[28] It is exactly like a contract for sale and purchase of child and thus was contrary to public policy.[29]Surrogacy arrangement was described as the most extra ordinary and irresponsible,bizarre and unnatural,a sordid commercial bargain.[30]. In *Baby M Case* ,U.S Supreme Court ruled that surrogacy contracts were potentially degrading to women and if it did not involve the payment of fee,it would be acceptable.[31] There are counter

22 Akhileswar Pathak,*Contract Law* (1st ed.,2011)p.250.

23 *State of Rajasthan* v.*Basant Nahata* (2005)12 SCC 77,97-101.

24 *Gherulal Parekh* v.*Mahadeodas Maiya* AIR 1959 SC 781.

25 *Central Inland Water Transport Corporation Ltd* v.*Brojo Nath Ganguli* AIR 1986 SC1571.

26 *See generally supra* n. 20.

27 In *Re Minors*,(1987)2 *FLR* 421,425.

29 *See generally* A v.C(1985)*FLR* 445,449.

30 *Id.* at 455,457 (Per Ormrod LJ).

31 525 A.2d 1128(1987).

views such as payment does not make things commercial or altruistic and if courts make altruistic surrogacy acceptable ,it"smacks all too familiar a notion that while men get paid for their efforts, skills and services [sperm are among the things for which men get paid] women, being women, should do their women-things out of purity of heart and sentiment".[32] In 2007, the Ohio Supreme Court held that a particular gestational surrogacy contract in question did not violate public policy, even when it prohibited the gestational surrogate from asserting parental rights. The Court reasoned that the gestational surrogate had no claim to legal parentage at the time of the agreement, and therefore she had no parental rights to assert.[33] In *Baby Manji's Case*, Indian Court did not render surrogacy prohibited and allowed the baby to be in the custody of genetic father.[34]So it can be well said that there is a disparity among judicial trends internationally on public policy and surrogate agreement .In some cases surrogate agreements are held to be against public policy, and sometimes commercial surrogacy only were considered to be discouraged as it is against the notion of public policy.

32 *See* Stuhmcke, A ,"For Love or Money: The Legal Regulation of Surrogate Motherhood" ,(1996) 3 *Murdoch University Electronic Journal of Law* accessed at *http://www.murdoch.edu.au* on 10/10/2012. Stuhmcke, A, further observes " the fact that the parties enter into a surrogacy agreement which provides for payment to the surrogate mother does not necessarily mean that the motivation behind the agreement is not altruistic. Similarly, the fact that there is no payment does not necessarily imply that the motivation for surrogacy is altruistic."

33 *See J.F.* v. *D.B*., 879 N.E.2d 740 (Ohio 2007).

34 *Baby Manji Yamada* v. *Union Of India* AIR 2008 SC 1656.

In light of varying perceptions of public policy and differing notions, one cannot be sure whether surrogacy agreements violate public policy, adoption laws or any other law. The current legal status of surrogacy agreements can only be described as uncertain.To say that the law is uncertain is to invite legislative clarification.[35]Apart from that there is a lot of confusion on eligibility criteria of both surrogate and commissioning parents ,genetic traces,international surrogacy,parentage and nationality issues,compensation and custody issues etc. "The proper role for the potential gatekeepers to surrogacy arrangements, including attorneys, physicians and surrogacy firms is also unclear. When controversies arise, the lack of comprehensive regulation leaves courts without much guidance on how to handle these issues".[36]

6.4 SURROGACY CONTRACTS - FROM THE PERSPECTIVE OF SURROGATE MOTHER &CHILDREN

Major criticism of surrogacy contracts which affects the surrogate is like that surrogacy contracts restricts the freedom of women and control over their bodies. Surrogacy contracts are restrictive of womens freedom in as much as it allow others (especially Doctor and commissioning parents) to exercise control over what happens to her body.The decision to

35 Leora I Gabry, "Procreating Without Pregnancy:Surrogacy and the Need for a Comprehensive Regulatory Scheme " ,(2012) 45 *Columbia Journal of Law and Social Problems* 415,431-32.

36 Thomas A. Eaton, "Comparative Responses to Surrogate Motherhood",(1986) 65 *Neb. L. Rev* 686,701.

continue pregnancy,abort the pregnancy if genetic abnormalities are traced,all decisions are up to the intervention of others more than the will of the surrogate. It has been argued by Deborah Satz that the restrictions imposed on women under surrogacy contracts are antithetical to sex equality, and that surrogacy contracts should be considered null and void.[37] Defenders argues that the terms of surrogacy contracts could be moderated by careful regulation[38].Another contention is that surrogacy contracts also disrespects the reproductive labour as it wrongly treats procreative freedom as a commodity and exploits women.[39]

Another major concern for surrogacy contracts is the emotional trauma that the surrogate has to go through while giving up the child to the commissioning parents. It has been seen that a mother develops not only physical but also strong emotional ties to the child that she carries and separation from the child can cause a overwhelming sense of loss and emotional stress for the surrogate. But these problems hold for surrogacy agreements as a whole and are not specific to any form of surrogacy whether commercial or altruistic.[40]

37 *See generally*.Satz, D, "Markets in Women's Reproductive Labour ",(1992)21 *Philosophy and Public Affairs* 107, 125.

38 *See generally* Carmel Shalev,*Birth power* (1st ed.,1989)p.11.

39 *See generally* Anderson, E. " Is Women's Labour a Commodity? ", (1990)19 *Philosophy and Public Affairs* pp. 71-92.

40 *See supra* n.2.

As far as the surrogacy Contracts from the perspective of children is concerned,prior question is whether it amounts to baby selling or not. There are clear parallels between a surrogate arrangement and a market transaction.The intending parents are the buyers because they are willing to pay,the commodities are eggs,parental rights, the child ,nine months service:the egg donor and the surrogate mother the sellers,while the doctors and the surrogate agency are the brokers-they hire women,screen them and inseminate the chosen ones and are responsible for facilitating the contract.[41] Rights and interests of the child cannot be here predicted.Surrogate agreements are more inclined to protect the commissioning parents interest, not the best interest of the Child .

6.5 SURROGATE CONTRACTS- REGULATION IS BETTER THAN PROHIBITION

Professor Wood contends that all are all paid for using their bodies, both brain and muscle in their work.[42] The banning of commercial surrogacy could be considered discriminatory against the surrogate mother. On this argument, surrogate mothers are considered service providers to parents in respect of their children, along with doctors, nurses, nannies and teachers. They should not be discriminated against for providing their

41 Trevor Allis ,"Surrogate Arrangements:Market of Living Laboratories" accessed at *http://www.vpmthane.org* on 2/9/2012.

42 C .Wood, quoted in R Giles (ed), *For and Against* (1st ed.,1993), p. 292.

services. [43]A total prohibition would not be worth because it will encourage illegal contracts and make surrogacy a secret affair which would amounts to a much more exploitation of surrogates. Contractual approach to surrogacy arrangement which should be legally binding on both surrogate mother and childless couples must be welcomed.[44]A clear and unambiguous agreement is needed which clearly states the conditions,compensatory measures,childs welfare,custody etc. While entering into an agreement ,intending parents and surrogates should discuss about the procedures used, who can take medical decisions through out the pregnancy.The three main types of medical decisions that can arise are those that primarily affect the health of the surrogate, those that primarily affect the health of the foetus, and those that affect both. To avoid future conflicts ,all these aspects and issues should be discussed in advance and concerned provisions should be introduced in surrogacy contract.[45]It is also should be noted that not all the surrogacy contracts are not challenged in Courts,only when there is a breach of contract or one of the parties changes their mind or conditions already mentioned and the dispute comes before the Court of law.Mutually agreeable terms and conditions in a surrogacy contract can help to avoid future conflicts in a much more constructive way.

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43 *Ibid.*

44 *See generally supra* n.39.

45 *See supra* n.35 at 446.

6.6 INTERNATIONAL SURROGACY ARRANGEMENTS – REAL HAZARDS

An international surrogacy arrangement is one which involves more than one country of habitual residence, nationality or domicile of the commissioning parents, donors and the gestational mothers. There are currently no international laws which make provision for rights of parentage either from the perspective of the commissioning parents, gestational mothers or most importantly the child. Indeed there is no instrument which allows for the recognition of international surrogacy arrangements, in another state, following an administrative or judicial process in a state where such arrangements are lawful.[46]International surrogacy arrangements are now a days a common thing.Recent advancements in it have focused the need to regulate these industries.Surrogacy may not be the actual problem that needs to be regulated but it does expose flaws that are to be addressed in the international private law system.[47]

Major attack on international surrogacy arrangements occurs when an issue comes from the arena of creating stateless children.Greatest concern should be given to situations here the legal parentage,nationality

46 *See* Anne-Marie Hutchinson, " The Hague Convention on Surrogacy: Should We Agree to Disagree?" 1-13 accessed at *http://www.dawsoncornwell.com* on 2/1/2015.

47 Bruce Hale ,Esq, "Regulation of International Surrogacy Arrangements:Do We Regulate the Market or Fix the Real Problems",(2013)36 *Suffolk Transnational I.L.Rev* 501.

and immigration status of the child born through the international surrogacy are unclear due to conflicting national laws governing these matters.Concern should be given to analyse the exploitation of individual involved in the process also.[48]To evaluate solutions for international surrogacy arrangement disputes,right option should be a regulatory framework for it itself.An industry regulation can be taken like a form of convention on surrogacy that establishes rules specifically involving persons from other countries.[49] Highly complex legal problems arise from the International surrogacy arrangements are legal parenthood and nationality disputes.Regulation of International surrogacy arrangements also can reduce human trafficking and exploitation issues.[50]

As long as the present situation is concerned,a flexible framework on which countries maintain an open dialogue regarding disputes around international surrogacy is welcomed.Leaving a greater autonomy to countries to have their own law with these framework or negotiation of bilateral agreement with other countries can have better impacts and a sensible beginning.Recognition of the fact that when conflicts of law arises,greater care should be given and countries should cooperate for better results.[51]

48 *Id.*at 502.

49 *Ibid.*

50 *Id.*at 636.

51 *Id.* at 645.

The Hague conference on Private International Law(2011) focused on the issue of international surrogacy arrangements, in particular the status of such arrangements under Private International Law and the status of children born through international surrogacy arrangements.It considers development of a convention on International Surrogacy.That is welcoming move.An International convention on surrogacy can mitigate atleast some of the issues regarding international surrogacy.The Hague Conference in its comprehensive note entitled "Private International Law Issues Surrounding The Status of Children, Including Issues Arising from International Surrogacy Arrangements 2011"has identified the basic criteria[52] that would need to be covered by any comprehensive international and multinational agreement:

(i) uniform rules on the jurisdiction of courts or other authorities to make decisions as to legal parentage;
(ii) uniform rules on the applicable law governing the surrogacy arrangement;
(iii) corresponding rules providing for the recognition and enforcement of parental decisions relating to the legal parentage;
(iv) uniform rules on the applicable law as to the establishment of legal parentage by way of operation of law or by agreement;

52 *See supra* n. 46 at 13.

(iv) uniform rules on the principles of recognition concerning the establishment of parentage by voluntary acknowledgment (ie birth certificates).

The Permanent Bureau has also recommended that any international instrument would have to be backed up by safeguards to protect children born of surrogacy arrangements. This would include, as a minimum, assessment of commissioning parents and gestational mothers. There would also need to be a system of licensing and control of agencies and authorities providing surrogacy services.

There is a Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 which may look appropriate for surrogacy also at first sight. Hague Conference has noted some problems making the 1993 Convention an inappropriate vehicle for international surrogacy arrangements.For example,Article 4(c)(3) of the said convention states that commercial adoptions are prohibited under the Convention and 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 and thereby requirement of Article 4(c)(4) cannot get fulfilled.There also arise other provisional conflicts in surrogacy those are enumerated below.

Article 4(b) sets out the subsidiarity 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. [53]

It is also acknowledged that direct regulation of international surrogacy arrangements as a proxy for issues concerning international private law sphere will have unintended consequences,To avoid coercion and exploitation in the area,each nation should develop a protective approach towards the parties involved.[54] An international regulatory scheme which may equippe domestic regulatory mechanism of each countries to work smoothly alone can make good outcomes. It is also submitting here that New Daft Assisted Reproductive Technology (Regulation) Bill 2014 which restricts the practice of surrogacy to Indian infertile couples and Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen can make tremendous impacts on unethical international surrogacy arrangements and promote genuine international surrogacy arrangements only.

53 *See supra* n. 46 at 10.

54 *See supra* n. 47 at 526.

6.7 REGISTRATION OF BIRTHS REGARDING CHILDREN BORN OUT OF THE SURROGACY ARRANGEMENTS IN INDIA

There is no legislation as such dealing with Registration of births regarding children born out of the surrogacy arrangements in India. India have Registration of Births and Deaths Act 1969.In those times where it is enacted, the issue of surrogacy was not forseen .There is no amendments regarding surrogacy disputes also. In order to address such issue of registration of births regarding children born out of the surrogacy arrangements in India, ICMR guidelines for accreditation, supervision and regulation of ART clinics in India 2005 and Assisted Reproductive Technology (Regulation) Bill 2014 will be considered.[55]The provisions of ICMR guidelines are not binding due to its non statutory nature and Draft Assisted Reproductive Technology (Regulation) Bill 2014 is not still passed. This reveals the urgency of having the issue of registration of births regarding children born out of the surrogacy arrangements in India be specifically addressed. As per the ICMR guideline[56],surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use or register in the name of

55 Para 3.5.4 of ICMR guidelines & S 60(10) of Assisted Reproductive Technology (Regulation) Bill 2013.

56 *Ibid.*

the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death .The birth certificate shall be in the name of the genetic parents. ICMR guidelines also requires that the clinic must also provide a certificate to the genetic parents giving the name and address of the surrogate mother.As per Assisted Reproductive Technology (Regulation) Bill 2014[57] which states that the birth certificate of the baby born through surrogacy shall bear the name(s) of individual/individuals who commissioned surrogacy, as parents.As it is clear that certificate shall be in the name of the genetic parents,above mentioned certificates can be issued under Sec 12 and 17 of Registration of Births and Deaths Act 1969.[58] In terms of 17(2) of the Act,a birth certificate can be admissible in evidence as far as the factum of birth is concerned.

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57 *See* Section 60(10).

58 Section 12 of Registration of Births and Deaths Act 1969:Extracts of registration entries to be given to informant:The Registrar shall,as soon as the registration of birth or death has been completedgive,free of charge,to the person who gives information under Section 8 or Section 9 an extract of the prescribed particulars under his hand from the register relating to such birth or death.
Section 17 of Registration of Births and Deaths Act 1969: Search of births and death register-1)subject to any rules made in behalf by the State government,including rules relating to payment of fees and postal charges,any person may –
a) Cause a search to be made by the registrar of any entry in a register of births and deaths;
b) Obtain an extract from such register relating to any birth or death:
provided that no extract relating to any death,issued to any person,shall disclose the particulars regarding the cause of death as entered in the register.
2) All extracts given under this section shall be certified by the Registrar or any other officer authorized by the state government to give such extracts as provided in S.76 of the Indian Evidence Act 1872 and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates.

6.8 NATIONALITY OF CHILDREN BORN OUT OF THE SURROGACY ARRANGEMENTS IN INDIA

There is no exclusive enactment for nationality and citizenship issues for children born out of the surrogacy arrangements in India,all such issues will be governed by the provisions of Indian Citizenship Act 1955[59].In *Jane Balaz* Case[60],one of the issue is whether the surrogate women can be treated as one of the parents for the purpose of S.3(1)(c)(ii) of Indian Citizenship Act 1955,which provides that every person born in India,one of whose parents is a citizen of India,shall be a citizen of India by birth.Gujarat High Court admitted surrogate mother satisfies criteria of S.3(1)(c)(ii) of Indian Citizenship Act 1955.[61]On appeal,considering the matter,Apex court held that gestational mother who had blood relationship with the baby is more deserving to name as natural mother than a carrier.[62] In a nutshell, the legal position available to parentage and citizenship of children born out of the surrogacy arrangements in India were not exactly

59 Indian Citizenship Act 1955 Act describes four modes of acquiring citizenship in its Section 3,4,5&6 respectively.Section 3 deals with Citizenship by Birth.Section 4 deals with Citizenship by descent.Section 5 deals with Citizenship by Registration and Sec 6 deals with Citizenship by naturalization.

60 AIR 2010 GUJ 21

61 For the purpose of discussion, Section 3 has got more significance which deals with Citizenship by birth. As per Section 3 of the Act , A person born in India on or after 26th January 1950 but before 1st July, 1987 is citizen of India by birth irrespective of the nationality of his parents(3(a)).A person born in India on or after 1st July,1987 but before 3rd December, 2004 is considered citizen of India by birth if either of his parents is a citizen of India at the time of his birth(3(b)).A person born in India on or after the commencement of the Citizenship (Amendment Act) 2003 is considered citizen of India by birth where i)both of his parents are citizens of India or ii)one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth. (Sec3(c)).

62 Para 16 of *Jane Balaz* Case , *supra* n.60.

dealt with a specific law.Judiciary interpreting the provisions of already available law with new vision and intelligence so as to suit the current need of society.

6.9 CONCLUSION

Surrogacy and surrogate agreements in India are legitimate because no law in India prohibits the same.Given the present state of biomedical technology,surrogate arrangements are the only alternative to infertility,apart from adoption.What is worrying is that such arrangements involve the exchange of big money and thus encourages the growth of Living Laborataries.[63]Equally worrying is whether in the near future surrogate contracts –essentially through market-would become a major,if not sole,means of acquiring children.[64] Applying more stringent standards, such as terms regulating the eligibility of surrogate and intended parents, through a pre-approval process would make the arrangements appear less commercial in nature and prevent intended parents from taking advantage of surrogates. Clear state regulation of surrogacy is necessary to protect surrogates, intended parents and children.[65]A wise approach of regulation with clear guidelines is much better than a complete ban of surrogacy arrangements.

63 *See supra* n. 2.

64 *See ibid.*

65 *See supra* n. 35 at 445.

CHAPTER 7

RIGHTS OF PARTIES TO SURROGACY

Emergence of ART's has introduced new possibilities not only for infertile couples but also for women who are willing to bear children for another and for individuals interested in facilitating the introduction of these two groups for a profit.[1]It enables surrogate mothers to carry an embryo not genetically related to them.[2]Agreement for surrogacy can stipulate conditions of remuneration,parental rights etc.[3] Surrogacy no longer remains a newer concept today. This social reality involves a variety of conflicting interest such as rights of surrogate mother,commissioning parents,donors,children born out of the transaction etc.[4]In order to have a thorough undrstanding of surrogacy ,the parties to surrogacy and their rights should be analysed.

7.1 SURROGATE MOTHERHOOD

Motherhood is a sacred concept which can not be defined perfectly by anyone.Black's Law Dictionary defines "mother" as "a woman who has given birth to or legally adopted a child."[5] Emily Jackson observes that 'the meaning of motherhood...has always been culturally, geographically and temporally

1 *See generally* Angle Godwin McEwen, "So You Are Having Another Woman's Baby:Economics and Exploitation of Gestational Surrogacy" ,(1999) 32 *Vanderbuilt journal of transnational law* 272.

2 Gestational surrogacy.

3 *See supra* Chapter 6.

4 Lita Linzer Schwartz ,"Surrogacy Arrangements in the USA" in R.Cook et al ,*Surrogate Motherhood:International Perspectives* (1st ed., 2003)p.162.

5 *Black's Law Dictionary* (7th ed.,1999) 1031.

specific'.[6] ART and surrogacy were mentioned in ancient times also. Development of alternate reproductive innovative strategies could enable for making any women a parent although she did not conceive but contributed gametes to a third party.Modern technologies in this era had made more explorations and entire concept of parenthood are now in a fluctuating mode.

Baroness hale observes in *Re G*[7] ,three broadways to identify natural parent. First,she observed genetic parenthood[8],secondly,gestational parenthood[9]and thirdly, a kind of parenthood relationships developed upon the child's social and psychological needs . This relationship is developed from the most basic level of feeding, up to educating and guiding.[10]There may not be anything "new" about surrogacy as a social practice, but its relevance within society through its relationship with motherhood is a persistent feminist concern. What is "new" and most interesting about surrogacy is that it openly and obviously challenges gendered constructions of motherhood, maternity and ultimately women.[11]

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6 E Jackson, "Degendering Reproduction?",(2008) *Med Law Rev* 16 (3) 346,347 accessed at *http://medlaw.oxfordjournals.org* on 16/6/2015.

7 (2006)UKHL 43.

8 Para 33 of *Re G Case.*

9 Para 34.

10 Para 35.

11 Chantell Burrows, "Deconstructing Motherhood: A Critique of the Legal Regulation of Surrogacy",(2011) p.108 accessed at *http://etheses.dur.ac.uk* on 23/2/2014.

The concept of surrogate motherhood involves two dimensions

a) Surrogacy aspect: It involves the interference or involvement of third person , surrogate women in the reproductive process.

b) Motherhood aspect : This aspect makes many major crucial questions such as what makes a women, a mother ,ultimately.In gestational surrogacy , the gestation makes surrogate woman -a mother.Genetic contribution makes donor/ commissioning female parent if healthy to donate eggs -a mother .Commissioning female parent who unable to produce eggs using donor eggs for the process can be a mother by her intent to have a baby.[12]

Surrogate mother can be defined as a women who, for varying motives, are willing perhaps even anxious, to gestate a fertilized egg, give birth and then to surrender the baby to the person who arranged for this to happen . They become involved in what one psychologist calls a bizarre situation in which the woman has limited information , and experiences physical and psychological evaluations and stresses beyond those normally associated with the pregnancy and all to carry a baby whom she will surrender to someone else forever.[13]Primarily a women is called as a mother when she has contributed to the creation of the baby.While carrying a baby to term and providing nourishment to him ,the role of surrogate women in the aspect of motherhood is well clear.Through her gestational capacities ,it is identifiable. Nextly,A woman is also defined as a mother when she provides ovum. This creates a genetic

12 *See ibid.*

13 Kanefield L, "The Reparative Motives : Surrogate Mothers", (1999)2 *Adoption Quarterly* 5.

relationship between a woman and fetus. It is equal to the gestational relationship in terms of contribution to the creation of a child.Both the roles are crucial for the baby.[14]"What makes a surrogate mother like a mother yet not the real mother is the fact that she assists the real mother to overcome a particular impairment. While her gestation of the child is the complete substitute for the commissioning mothers role in gestation."[15]As the concept of motherhood is often related to motherly qualities like love ,maternal affection, sacrifice etc,all these mothers(biological,gestational or commissioning) are mothers as they may experience the same in any stages.But in law there can be only one mother not shared mothers. So in a surrogacy arrangement where gestational mother is not a biological mother, or biological mother is not commissioning mother,law should fix mother status to commissioning mother as she is ready to upbring the child in future to avoid foreseeable dilemmas. A holistic approach to surrogacy and motherhood is required and can only be achieved through redefining motherhood and reshaping the law. Recognizing various mother roles broadly apart from the hetero-normative ideal is needed.[16]Only truth to remember is that for the purpose of fixing mother status in the eye of law will be in favour of commissioning mother wholly as per the terms of surrogacy agreement.

14 *See generally supra* n.11.

15 Marilyn Strathern, "Still Giving Nature a Helping Hand? Surrogacy: A Debate about Technology and Society" in R.Cook,*supra* n.4 at 294.

16 *See id.* at 106.

7.2 OBJECTIONS TO SURROGATE MOTHERHOOD

Surrogate motherhood has been criticized by sociologists on the basis of harmful impact on both surrogate mother and child's interests.It is also widely criticized by legal scholars for his legal acceptability and contractual enforceability.Critics firmly opposes these arrangements by stating no party to surrogacy can be free from its negative impact on their interests, mental as well as physical health etc.

7.2.1 Harmful influence to the child's interests

Although child is not a party to the agreement but most affected person in the surrogacy issue, partially, surrogate motherhood, poses no greater physical risk to the child then the risks occurs in an ordinary pregnancy, psychological risks occurs when child learns of his origins, he may suffer a lot for the knowledge that his gestational mother purposefully conceived him for money and handled over to his commissioning parents.[17]

7.2.2 Harm to the parties such as surrogate women and intended parents

Surrogate parenting involve a sizeable psychological and monetary investment[18]. Surrogate mother is ready to relinguish her parental rights and the

17 Thomas A Eaton,*" Comparative Responses to Surrogate Motherhood"*, (1986) 65 *Neb.L.Rev* 686 ;S*ee also, Brazier report* para 4.14 . It states that the effect on a child, especially an older child, of learning that the woman who bore him or her was paid to do so is difficult to predict. Particularly in cases where children have a hostile or distant relationship with the commissioning couple, the knowledge that they had been brought into the world as a result of a commercial arrangement may not only have a damaging effect on family relationships but may also interfere with the child's development of a secure sense of identity and positive self-esteem. Furthermore, children who discover that their surrogate mother has had other children as part of a surrogacy arrangement may find this information particularly difficult to accept.

18 *See id.* at 708.

surrogate mother's pre-birth waiver of her parental rights should be irrevocable because she has waived her rights knowingly and voluntarily.Rowthman criticizes surrogate motherhood as it makes woman a container to grow fetus and it destroys the very special relationship a woman has with the fetus she is gestating[19].Commissioning couples can be misleaded and financially exploited by the agencies or intermediary a thought facilitating adequate financial reward to surrogates[20]. Surrogate motherhood poses both physical as well as mental discomforts to surrogate women. Critics warned surrogate motherhood as a concept which make her an incubator in which others can attain their goal of procreation.

7.3 RIGHTS OF SURROGATE MOTHER

To elaborate the rights of surrogate mother,her contributions to the procreation should be carefully analysed.The process of procreation involves two or three contributions in a gestational surrogacy arrangement. If commissioning mothers egg is used ; it involves two contributions of mothers.

A Women who contributes her eggs (genetic mother)

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19 In her value system, she is placing the woman, her experiences and her relationships, at the very heart of my understanding of all pregnancies.The second value she bring as a feminist to her understandingof surrogacy contracts is the value of women's bodily autonomy,our control over our own bodies. And she see the fetus as part of a woman's body .... Women never bear anybody else's baby.... Every woman bears her own baby.... she cannot ever believe that a woman is pregnant with someone else'sbaby. The idea is repugnant - it reduces the woman to a container .*See,* B. Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* 243-244 (1989) cited in Mimi Yoon, "The Uniform Status of Children of Assisted Conception Act: Does It Protect the Best Interests of the Child in a Surrogate Arrangement", (1990) 16*Am. J.L. & Med*. 525,538.

20 *See* Thomas A Eaton,*supra* n.17 at 710.

B Women who carries the pregnancy (gestational mother)

If donor eggs are used,it involves three mothers

A Women who contribute her eggs- genetic mother

B Women who carries the pregnancy – gestational mother

C Women who takes the child, rears and nurtures the child- social mother

To avoid claim on child, gestational mother should not contribute eggs in gestational surrogacy arrangement. Otherwise she should have greater claim on child.[21]The key dimensions of motherhood have changed a lot through Assisted reproductive technologies.[22]

Surrogate mother should be informed of all medical procedure going to be carried in her body. Informed consent is to be obtained in every stage of surrogacy.[23] The information about her should be kept secret and no ART clinic shall provide information about her to any person. She should get an evidence of certificate by commissioning couple ART clinic that she acted as a surrogate to avoid future conflicts. She should not harm the fetus during the pregnancy by

21 *See* Trevor Allis, "Surrogate Arrangement: Market of Living Laboratories" accessed at *http//www. vpmthane. org* accessed on 1/2/2013.

22 Imrana Qadeer, "Social and Ethical Basis of Regulatory Legislation on Surrogacy: Need for Debate"in *New Reproductive Technologies and Health Care in Neo-liberal India:Essays* ,Centre for Women Development Studies,New delhi(2010) p.40 accessed at *http://www.cwds.ac.in* on 16/5/2013.

23 Critics contended that it is impossible for a woman to grant the necessary informed consent in order to become a surrogate mother for two reasons. First, her consent is never informed because the hormonal changes that accompany pregnancy make it impossible for a surrogate to predict how she will feel when she relinquishes the child at birth. Secondly they states that consent to become a surrogate is never fully voluntary because surrogates only enter into these agreements out of economic necessity. *See generally* Lori B. Andrews, "Motherhood: The Challenge for Feminists" ,(1988)16 6(1-2) *Journal of Law, Medicine and Ethics* pp. 72-80.

any deed and should hand over the child after delivery to the agreed persons. Surrogate should get adequate insurance facilities till the handing over time and she should not exploited physically or mentally by anyone. She should not be bound to look after the child if the born with disability, or intended parents refused to take the childas she should relinquish her parental rights under the surrogacy agreement.[24]

In most of the surrogacy arrangements surrogate is not treated as a person but a high risk pregnancy. The focus is on fetal development and whether adequate nutrition reaches the baby.[25]Surrogate women after delivery is not of concern for anyone.There can be various health problems. Some of them after delivery without getting proper rest and having painful stitches for a long time. Neither the clinic nor the intended parents are concerned about it.Their role is over after getting baby.Constitution of India guarantees right to live with dignity (Art 21), right to privacy (Art 21), right against exploitation (Art 23-24) which should be made available to surrogate women. She should be treated especially like any pregnant lady and should get adequate legal protection.[26]

Concept of compensation to surrogate mothers should be carefully evaluated. It should not be limited to pregnancy but also for handing over the baby, for damages caused to the mother in case of medical complications as well as negligence and even for her death .This should include compensation to the family who had lost her care during the period. For the time and energy she

24 *See generally* , ART (Regulation)Bill 2014, Section 60(4).

25 Alison Bailey, " Reconceiving Surrogacy:Toward a Reproductive Justice Account of Indian Surrogacy", 2011(26)4 *Hypatia* 715, 735.

26 *See generally supra* Chapter 5.

invested in surrogate pregnancy and baby care, she should get effective compensation.[27]

7.4 RIGHTS OF CHILD

Children are the precious gift of god. Most children have single parental set. An adopted child will have two subsets such as one biological and another adoptive. But a child born from surrogate arrangement has the unique possibility of having two to five parents anywhere in the world[28]. Advocates of surrogate parenting suggest that

> Any risks to children are outweighed by the opportunity for life itself-they point out that the children always benefit since they would not have been born without the practice. But this argument assumes the very factor under deliberation the child's conception and birth. The assessment for public policy occurs prior to conception when the surrogate arrangements are made. This issue then is not whether a particular child should be denied life, but whether children should be conceived in circumstances that would place them at risk. The notion that children have an interest in being born prior to their conception and birth is not embraced in other public policies and should not be assumed in the debate on surrogate parenting.[29]

The interest of the children born out of the surrogacy transaction is the highlights of most of the debates over surrogacy. Best interests of the child had got predetermining consideration over the surrogacy issue. In general, the judges chose to ignore the surrogacy arrangements for public policy reasons and have

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27 *See supra* n. 22 at 39.

28 *See* Nancy W Machinton,"Surrogate Motherhood: Boon or Baby Selling the Unresolved Questions",(1987)71 *Marquette Law Review* 115.

29 S*ee* The Newyork State Task Force on Life and the Law, Surrogate Parenting:Analysis and Recommendations for Public Policy (1988) accessed at *http://www.health.ny.gov* on 2/8/2013.

ruled cases in the best interests of child. Ethicists also agree in general that child's best interest trump any other considerations.[30]

There is no dispute in the matter that best interest of the child should be analysed in the surrogacy arrangement. But partially, in no case of surrogacy whether commercial or altruistic , there can be paramount consideration to the child's interest. Only thing to claim is many children got chances of having life otherwise they would not be born.[31] In surrogacy arrangements , infertile couples want a baby , and assumption is always their welfare as commissioning parents spent huge amount of money for them. After birth, they are supposed to ensure that the interests of the child.By clearly establishing the adult parties' rights, a stable environment for the child will be created, and the child's best interests will be protected.[32] Chances of exploitation is often reminded by the critics about the children born out of the surrogacy transaction. Commercial surrogacy and making children a commodity is certified by the Warnock report.[33] However exploitation itself as such is not a crime , it is not clear that commercial surrogate motherhood should be made illegal because of its supposed exploitative nature . Brazier report remarked that

> There exists no systematic information of the long-term psychological consequences for children born as a result of a

30 Dan .R. Reilly, " Surrogate Pregnancy: A Guide for Canadian Prenatal Health Care Providers" (2007) 76 *Can.Med.Ass'N J* 483,484.

31 Hugh .V. Mclachlan and Kim swales, "Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defence of Legally Enforceable Contracts (2009) accessed at *http://www. duce . edu/journals* on 11/2/2014 pp.93-94.

32 *See* Mimi Yoon,*supra* n. 19 at 553.

33 Para 17 of Brazier report.

> surrogacy arrangement. To the extent that the experiences of adopted children are relevant to children conceived by surrogacy, it is important to note that adopted children do tend to show a greater incidence of emotional and behavioural problems in comparison with their non-adopted counterparts. Not all adopted children experience difficulties, however. It seems that psychological problems are most likely to occur in adoptive families where the quality of parenting is poor, and where the parents do not communicate openly about the adoption to the child. It is also of relevance that the younger children are at the time of the adoption, the less they are at risk.[34]

The report also states that there is a growing body of research on the psychological development of children conceived by assisted reproduction suggesting that the quality of parenting in such families is good and that the children themselves are functioning well, whether or not donated gametes had been used in the child's conception.[35]

To Imrana Qader , the vulnerability of the baby can be enhanced if the surrogacy process is not sensitive to the issues of child rights. These basically are: i) the right to bonding,breast feeding for a minimum period of 3-6 months, and early psychological and immunological development while prescribing the time of separation, ii) right to survival like any other baby with disability or born of a multiple pregnancy should not be undermined by the whims of the commissioning parents, iii) right to a safe home as an obligation of a state that permits surrogacy in cases where both sets of parents refuse to accept the baby, iv) right to know her/his identity too needs to be respected as an early acceptance

34 Para 4.9 of Brazier report .

35 Para 4.10 of Brazier report.

of their status helps their socialisation and acquiring a sense of belonging. Discovering parentage late or accidentally is more damaging than knowing the truth in an open and frank environment. Secrecy and misinformation is born out of the notion of priority of biological associations over socio-psychological ones.[36]

There is a responsibility on the state to ensure the welfare of the child because the risk to the welfare of the child is greater than in relation to the natural birth, and that surrogacy involves the active assistance of the state both in the provision of medical services and determining status of the child.[37]Child's physical health at birth is dependent on the health of the three adults on whom his/ her conception and gestation was dependent as well as on the doctors who carried out the IVF and implantation.[38]

The risks of the child born in pursuance of a surrogacy agreement being rejected at birth by intended parents is likely to be greater than that of a child born in the ordinary way because the indented mother does not have the same physical bond with the child as a mother who is carried and given birth to her/him.[39] Identity of birth mother should be kept secret but if a child wants to trace it, he will have to get a chance.Otherwise it is a an offence. For example,in

36 *See supra* n.22 at 38.

37 R.Schuz, "Surrogacy in Israel" in R. Cook et al (ed) "Surrogate Motherhood , *International Perspectives* (1st ed.,2003) at 44.

38 *Ibid.*

39 *Id.* at 45-46.

Israel, Section 19(cc) of Surrogacy law makes publication of anything which would enable the identity of the surrogate women , intented parents and child without the proper permission from the court is a criminal offences with one year imprisonment.[40]

Anderson criticizes surrogacy as contract pregnancy which amounts to the literal sale of parental and custody rights over children[41]. Irrational sticking on altruism commercial is not needed because both are the same process. Element of money involving is same as that of medical and hospital expenses. Financial reward to surrogate only is absent which may cause a couple only to get difficulty in issuing parental order by the court where altruism only permitted. Supporters of surrogacy claims that a particular services of surrogate mother is brought by the intended parents , and the deal should not be considered as anything sold or brought.[42]

Brazier views about surrogacy that if an infertile couple can buy an egg, and rent a womb, why should they not buy the finished products splitting the role of mother between different women such as egg donor , commissioning women and surrogate mother and the role of the father (sperm

40 *Id.* at 48.

41 Elizebeth S Anderson, " Why Commercial Surrogate Motherhood Unethically Commodifies Women & Children : Reply to McLachlan and Swales", (2000) 8 *Health Care Analysis* 1 9,20 ;*But see,* McLachlan & swales, "Babies Child Bearers and Commodification" in (2000) 8 *Health Care Analysis* 97-98.They argue that from a legal point of view, the mother is paid not to transfer her parental and custodial rights over the child to the father , but merely to "relinquish her right to claim legal parenthood of the child on to relinquish her custody . so contract pregnancy does not involve legal sale of parental rights.

42 *See generally ibid.*

donor/commissioning father) violates child's right to know his or her origin and identity as guaranteed in Art 7 & 8 of UN Convention on Right to Child .[43]

Surrogacy is likely to remain very much as a last resort for involuntary children's people rather than an arrangement primarily made for purposes of convenience . society should not discourage the opportunity of parenthood to people funding themselves in this position where another woman has offered to assist them by means of surrogacy arrangement ,so long as this does not result in the commodification of the child.[44]

It is also true that children do not get a chance to choose their biological mothers. They want get a role in the surrogacy preliminary process. But they are the most affected after the process. While evaluating maternity disputes , best interest of child is the prominent focus. When a issue of custodial arrangement is came before the Court , It considers seven factors.

A Parental fitness

B Stability

C Primary care taker

D Harmful parental conduct

E Separation of siblings

F Substantial change in circumstances[45]

43 Margaret Brazier ," Can You Buy Children" *(*1999) 11 *Child and Family Law Quarterly* 345.

44 Eric Blyth*, Claire Potter*, " Paying for it ? Surrogacy , Market Forces & Assisted Conception*"*p.227,239 in Rachel Cook*,supra* n.4.

45 *See Price* v.*Price,* 611 N.W.2d 425, 430 (2000).

Paramount consideration of court is the wellbeing of child's welfare in the process of surrogacy requires that it should be clear who is responsible for her/ him from the moment she/ he born.In surrogacy arrangement,it is presumed that the best interest lie with the childs legal parents as they desired the child and wanted it to raise after birth.In *Johnson* v. *Calvert*[46],custodial rights of the child was conferred to the women who intended to bring about the birth of the child and intended to raise it.

If a market like arrangement is initiated for surrogacy ,there will always will exists a demand for good quality products . One may pay huge amount of money for having a baby through surrogacy and a child born with disability may often get rejected. In *Baby Doe Case*[47],baby suffered from microcephaly[48] rejected by commissioning parents and Michigan department of social services fostered the child.

Art 7 & 8 of UN Convention on Right to Child makes it clear that every child should have their right to life,survival and development.[49] Respect for the views of the child is also incorporated under Article 12 .The best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly

46 (1993)5 4th Cal 84.

47 *Weber* v.*Stony Brook Hospital* (1983) 467 N.Y.S.2d 685.

48 abnormally small head with higher chances of mental retardation.

49 Art 6.

applies to budget, policy and law makers. [50]Both surrogate mother and intended mother should think for the welfare of the child.[51] Advocates of surrogate parenting suggest that any risks to children are outweighed by the opportunity for life itself and they point out that the children always benefit since they would not have been born without the practice. But this argument assumes the very factor under deliberation the child's conception and birth. The assessment for public policy occurs prior to conception when the surrogate arrangements are made. This issue then is not whether a particular child should be denied life, but whether children should be conceived in circumstances that would place them at risk. The notion that children have an interest in being born prior to their conception and birth is not embraced in other public policies and should not be assumed in the debate on surrogate parenting.[52]Priority towards the best interest of the child should not be detrimental to the other parties genuine interests also which is the most crucial and difficult thing to be dealt with.In surrogacy arrangement,most unpredicticable thing remains the interest of the child born out of it.It can be only assumed that the child is getting into the hands of desired ones will be happy with the needy ones.

7.5 RIGHTS OF DONORS

Sometimes donor eggs or sperm can be used in surrogacy . Sperm donation is simpler than ovum donation. Most of the donors do not consider , it will going to be their own child. Once it is out of them , they consider ,it is not

50 Art 3.

51 *See supra* n.11.

52 *See supra* n.29.

related to them[53] some compare donation to donating blood , platelets , or bone marrow that they are not giving life , but are saving life[54].Donors go through psychological counselling before donation. During counselling they compare it to donating blood.[55] "There an attempt to reconceptualise her act of donation and to provide a mere ,finely textured , albeit unclear theory about life."[56] This attempt to approval of biogenetic tie and an attempt to deny that connection.[57] Donors prominent right is to be anonymous and to have right to privacy. No one wants the deed to get published and may make future problems to them. Most of the clinics and donors argues for anonymity as an acceptable strategy. It is also true that due to anonymity model, individuals who are able to have children through donor eggs/ sperm do not feel the same indebtedness to their donors as do those who participate in surrogacy.[58]

Donor should get the right to decide what information should be passed on to whom and the identity of the donor should not be disclosed to the recipient to avoid future conflicts.Donors undergo psychological as well as physical screening including genetic , pelvic , inflatious disease testing , psycho educational consultation is good for donors which covers about psychological

53 *See generally,* Helna Ragone, "Gift of Life :Surrogate Motherhood , Genetic Donation and Construction of Altruism "in Rachel Cook, *supra* .n.4 at 222-224.
54 *Id.* at 223.
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*
58 *Id.* at 224. Ragone further observes that the practice of anonymity contributes to further fragmentation of reproduction and the body, a fragmentation that is inextricably connected to the desire to maintain the commodification model. *Ibid.*

side effects, education them about medical procedures etc.[59]Otherwise their rights should not be protected in the surrogacy transactions.

7.6 RIGHTS OF COMMISSIONING PARENTS

Commissioning parents is the persons who has availed the service of surrogate women.They are bound to accept the custody of child irrespective of any disability the child born may have and the birth certificate of the child may be issued in their name.They should have a duty to pay the surrogate women all the reasonable expenses,and should not deviate from the conditions assured in surrogacy agreement.They should not seek the aid of more than one surrogate simultaneously.The child born through surrogacy is their legitimate child under the eye of law irrespective of the fact that whether donor eggs or sperm is used.

Regarding the rights of commissioning parents,they should not be exploited financially by the intermediaries who benefits out of the transaction who may exploit surrogate women also.Clear provisions regarding monetary compensation to surrogates by commissioning parents and of expenses can make the intermediary exploitation less and both commissioning parents and surrogate mothers rights be protected effectively. Some authors criticize surrogacy which causes harm to a wide range of people. They include: (1) the surrogate mothers; (2) women generally (by spillover effects of surrogacy) (3) the children born of the transaction(4) the siblings who see or later hear of the transfer of the child (5) the hiring parents (6) children available for adoption who

59 *See supra* n. 4 at 170.

might be adopted in the absence of surrogacy arrangement other parties involved or keenly interested in the transaction, such as grandparents and other relatives, brokers, lawyers and counselors and (8) the community's normative system which include all the members of the community.[60]

As there is no exact criteria available for judiciary to determine the rights of commissioning parents, judiciary is trying hard to define their rights whenever a matter come for their consideration to have a beneficial effect to the parties to surrogacy. The decisions of Court granting leave to female commissioning parents for caring the baby obtained from surrogacy are the well illustrations of their deviation from traditional parameters of maternity for the benefit of an innocent baby. In *Kalaiselvi* v. *State of Karnataka*[61],Court extended Rule 3 A of Madras Port Trust (leave) Regulation 1987 to a women who commissioned gestational surrogacy services. Delhi High Court in the case of *Rama Pandey* v. *Union of India & ors*[62] had decided that surrogate mothers and commissioning

60 *See* Michael H. Shapiro**,** "How (Not) to Think About Surrogacy and Other Reproductive Innovations, (1993-1994) 28 *U.S.F. L. Rev.* 647,652-653.Author further observes that a wide range of harm or benefit can befall these subjects .they are (1) Having a life and becoming bonded to one's family (a benefit or burden to the child); (2) gaining a child and becoming bonded to her; (3) losing a child by transferring him to others; (4) regretting entry into an arrangement one should have avoided; (5) being objectified or commodified-going from personhood to thinghood (either the surrogate or the child); (6) falling victim to the risks of pregnancy, from discomfort to death; (7) being affected by change-on the part of others and/or on one's own part-in attitudes, beliefs and values basic to our normative system (a risk or benefit to individuals and communities); (8) being subject to whatever inappropriate behaviors are generated by this shift in values, including behaviors accompanying shifts in social relationships and in our views of each other; (9) being demoralized by seeing one's sibling transferred, whether for value or not; (10) living in an institution or a series of foster homes or on the streets after remaining unadopted; and (11) being prevented from existing because surrogacy is banned or discouraged (though very few people will benefit from this). *See id.* at 653.

61 W.P.No.8188 of 2012.

62 W P(C) No. 844/2014.

mothers who have children through surrogacy are entitled to maternity leave, which includes pre- and post-natal period. In the very same case , Court observed that

> In a surrogacy arrangement, the concern of the commissioning parents, in particular, the commissioning mother is to a large extent, focused on the child carried by the gestational mother. There may be myriad situations in which the interest of the child, while still in the womb of the gestational mother, may require to be safeguarded by the commissioning mother. To cite an example, a situation may arise where a commissioning mother may need to attend to the surrogate/ gestational mother during the term of pregnancy; because the latter may be bereft of the necessary wherewithal. The lack of wherewithal could be of : financial nature (the arrangement in place may not suffice for whatever reasons), physical condition or emotional support or even a combination of one or more factors stated above. In such like circumstances, the commissioning mother can function effectively, as a care-giver, only if, she is in a position to exercise the right to take maternity leave.[63]

Here the honourable Court established the fact that curtailing the commissioning mother's entitlement to leave on the ground that she has not conceived the child, would work, both to her as well as that of the child's detriment.Court also evoked certain principles for grant of leave in Para 24 which is grouped below

i). A female employee, who is the commissioning mother, would be entitled to apply for maternity leave under sub-rule (1) of Rule 43.

63 *Id.* at para 17.1.

(ii). The competent authority based on material placed before it would decide on the timing and the period for which maternity leave ought to be granted to a commissioning mother who adopts the surrogacy route.

(iii). The scrutiny would be keener and detailed, when leave is sought by a female employee, who is the commissioning mother, at the pre-natal stage. In case maternity leave is declined at the pre-natal stage, the competent authority would pass a reasoned order having regard to the material, if any, placed before it, by the female employee, who seeks to avail maternity leave. In a situation where both the commissioning mother and the surrogate mother are employees, who are otherwise eligible for leave (one on the ground that she is a commissioning mother and the other on the ground that she is the pregnant women), a suitable adjustment would be made by the competent authority.

(iv). In so far as grant of leave qua post-natal period is concerned, the competent authority would ordinarily grant such leave except where there are substantial reasons for declining a request made in that behalf. In this case as well, the competent authority will pass a reasoned order.[64]

Court again reiterated the principle that leave of 180 days is necessary for pregnant women by stating that pregnancy brings about restriction in the movement of the female carrying the child as it progresses through the term. In case complications arise, during the term, movement of the pregnant female may get restricted even prior to the pregnancy reaching full term. It is for these

64 *Id.* at para 24.

reasons, that maternity leave of 180 days is accorded to pregnant female employees.[65] Substantial part of the leave is taken after delivery if the women do not face any medical complications during the time.[66]This part is the most challenging part also.[67] Through the case, the role of judiciary in constructiong words of law for the needs of current time was also evoked significantly.It was elaborated by stating that;

> It is not unknown, and there are several such examples that legislatures, usually, in most situations, act ex-post facto. Advancement in science and change in societal attitudes, often raise issues, which require courts to infuse fresh insight into existing law. This legal technique, if you like, is often alluded to as the "updating principle". Simply put, the court by using this principle, updates the construction of a statute bearing in mind, inter alia, the current norms, changes in social attitudes or, even advancement in science and technology. The principle of updating resembles another principle which the courts have referred to as the "dynamic processing of an enactment"…. Updating construction resembles so-called dynamic interpretation, but insists that the updating is structured rather than at large. This structuring is directed to ascertaining the legal meaning of the enactment at the time with respect to which it falls to be applied. The structuring is framed by reference to

65 *Id.* at para 7.1.

66 *See id.* at para 7.2. Court observed, pregnant female employees, who are constitutionally strong and do not face medical complications, more often avails a substantial part of their maternity leave in the period commencing after delivery.

67 *See id.* at para 7.3.Court also explores the reason for taking the substantial part of the leave in post delivery stage by the female employees (depending on their well-being), is that the challenging part of bringing a new life into the world, begins with the post-natal period. There are other factors as well, which play a part in a pregnant women postponing a substantial part of her maternity leave till after delivery, such as, family circumstances (including the fact she is part of a nuclear family) or, the health of the child or, even the fact that she already has had successful deliveries; albeit without sufficient time lag between them.

> specific factors developed by the courts which are related to changes which have occurred (1) in the mischief to which the enactment is directed, (2) in the surrounding law, (3) in social conditions, (4) in technology and medical science, or (5) in the meaning of words..."[68]

In *Geetha* v. *Kerala Live stock Board*[69], it was decided by High Court of Kerala that a women who commissioned gestational surrogacy is entitled to get maternity leave although she has not delivered the baby.Court is of the view that there cannot be any discrimination between a women who got a baby from surrogacy and a women of normal means of delivery. Maternity leave is intended for the care of the baby also.

Similarly,the Bombay High Court has ruled in *Amisha Girish Ramchandani* v. *Divisional Manager (Personnel Branch) Mumbai CST*[70] that a woman who has attained motherhood through a surrogacy procedure is entitled to six months maternity leave like any other woman. Again in *Dr. Mrs. Hema Vijay Menon* v. *State of Maharashtra & Ors*[71],it was held that a woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Thereby she is entitled to get maternity leave.Court observed the concept of maternity leave in this case ;

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68 *See id at* para 9.1.

69 W.P.(C)No.20680 of 2014 H.

70 WP No. 1727 of 2015.

71 WP No.3288 of 2015.

> Maternity means the period during pregnancy and shortly after the child's birth. If Maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy or has adopted a child from the date of his/ her birth. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two.[72]

Again in the next paragraph , the concept of maternity and motherhood was elaborated in a much wonderful manner by stating;

> …being a mother is one of the most rewarding jobs on the earth and also one of the most challenging. To distinguish between a mother who begets a child through surrogacy and anatural mother who gives birth to a child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy, as her own. A commissioning mother like the petitioner would have the same rights and obligations towards the child as the natural mother. Motherhood never ends on the birth of the child and a commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Though the petitioner did not give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born. A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too.

72 *Id.*at para 6.

> Also, the bond of affection has to be developed. A mother…would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child.[73]

There can be more litigation on the issue where Indian Law should ready to be equipped with. Judiciary is interpreting the rights of parties with the insight of beneficial reach to the parties commissioned for surrogacy.Judiciary with the aid of a clear legislation on the issue can interpret the rights of parties more remarkably and without undue burden of interpreting the issues of concern without any specific statutory mention.A positive move from Ministry of labour,Government of India is that it is planning to make a child care policy for surrogacy arrangements which includes the provision of child care leave to women having a child through a surrogacy .The ministry during the year of 2015 sought to amend the Maternity Benefit Act, 1961 by introducing series of progressive provisions including that women having a child through a surrogacy to be eligible for 12 weeks of paid leave which is submitted for cabinet approval.This year may witness a policy by Government on assuring child care leave to women who is a central government employee having a child through a surrogacy.This also extended to a surrogate mother who is a central government employee and also to entitle intending father in central service to claim paternity leave .[74]Giving leave to both surrogate women and intending

73 *Id.*at para 7.

74 *See* generally Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training Proposals on Child Care Leave (CCL) and Maternity Leave –DOPT, Office Memorandum, No. 13018/1/2014-Estt(L) 01.04.2016;*See*

mother is welcoming and can be characterized as a broad, inclusive and genuine attempt from the part of the Government.Giving child care leave to surrogate mother may encourage her to provide special care for the newly born child , breastfeed and to build emotional bonding or attachment between the mother and the child. Plenty of judicial decisions above elaborated granted child care leave to intending or commissioning mothers but not the task of surrogate mother mentioned effectively.The circular also extends the provision of paternity leave to intending father which is a new transforming approach and favourable to male central government employees availing surrogacy services. Central government female employees are permitted to avail travel leave, concession and reimbursement for travel costs, tickets fare for such travel undertaken while availing such child care leave.[75]

As it is the time for Assisted Reproductive Technology Bill to get revised and awaited for enactment, which makes a legal lacunae in the existing scenario of surrogacy in India,Court rulings as well as Government of India policy created a progressive way towards Indian surrogacy which can wipe the tears of genuine infertile couples who seeks the service of surrogacy.

7.7 CONCLUSION

Given the complex interplay of rights and interests, coupled with very real emotional and physical risks, as well as the sensitivity involved in

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also Shalini Nair, "Ministry of Labour to Mandate Creches in Offices", Indian Express, Dec 30, 2015, accessed at *http://indianexpress.com* on 16/4/2016.

75 *Ibid.*

reproduction, surrogacy will continue to be a divisive issue.[76]Surrogacy arrangement is a like a cobweb which creates so many crucial and complicative questions on which debates are going on. As Anderson says, "Surrogacy is not going to go away, and as such it is important that steps are taken to protect the vulnerable parties involved. Gone must be the early legislation characterized by ambivalence, and in its place a well thought out and reasoned attempt at tackling the many problems and risks currently faced alone by those entering into surrogacy arrangements."[77] While analyzing the rights of each parties to surrogacy ,it can be well said that surrogate women is the least protected party in the surrogacy arrangement.A legislation as well as judicial pronouncements which clearly formulates her rights,compensatory measures and liabilities are yet to come which can make things much smoother and vibrant.

76 Phillip Anderson, " Surrogacy Law and its Potential Development in the UK " , (2010)*2King's Student L. Rev.* 37,49.

77 *See id.* at 50.

CHAPTER 8

LEGAL REGULATION OF SURROGACY IN INDIA–A CRITICAL ANALYSIS

Assisted Reproductive Technology is a doubtless product of enormous advances in medical technologies. It had resulted in providing maximum advantages to the infertile couples for having children which is most often overlooked or impossible in earlier times. Assisted reproductive technology techniques requires perfect expertise and vision.Bitter truth is that unethical practices can be made under the shadow of ART.Mushrooming of ART Clinics without any proper criteria all over the country which is a trend of nowadays can adversely affect the society as a whole.Assisted Reproductive Technology (Regulation) Bill 2014 is drafted for providing a proper guideline and regulation to ART Clinics,Services and also to prevent illegal matters connected with it.[1]Preamble of the bill denotes that the bill details procedures for accreditation and supervision of infertility clinics (and related organizations such as semen banks) handling spermatozoa or oocytes outside of the body, or dealing with gamete donors and surrogacy, ensuring that the legitimate rights of all concerned are protected, with maximum benefit to the infertile couples/individuals within a recognized framework of **e**thics and good medical practice.[2]ART (Regulation)

1 The Assisted Reproductive Technology (Regulation)Bill 2014 in its statement of objects and reasons states that it is enacted to provide for a national framework for the accreditations, regulation and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto.

2 *See* Preamble of Assisted Reproductive Technology (Regulation) Bill 2014.

Bill 2014 was kept secret from public domain for confidentiality as matter of cabinet note till September 2015 and then only revealed for public opinion.[3]

8.1 ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL 2014 -TRODDEN PATHS.

Before going to analyse the ART (Regulation) Bill 2013,it is appropriate to trace the major developments of the field which accelerated the framing of the existing Bill.This can be divided in to four

8.1.1 The Indian Council of Medical Research (ICMR) guidelines for accreditation, supervision and regulation of ART clinics 2005

8.1.2 The Case of *Baby Manji Yamada* v. *Union of India*[4]

8.1.3 Assisted Reproductive Technology (Regulation) Bill 2008

8.1.4 Law commission of India(Report No.228) on "Need for legislation to regulate Assisted Reproductive Technology clinics as well as rights and obligations of parties to surrogacy"(2009)

8.1.5 Assisted Reproductive Technology (Regulation) Bill 2010

8.1.1 The Indian Council of Medical Research (ICMR) Guidelines 2005

In 2005, the Indian Council of Medical Research (ICMR) published Guidelines for Accreditation, Supervision and Regulation of ART clinics in

3 *See* Anil Malhothra, "Ending Discrimination in Surrogacy Laws" May 3 2014, Hindu Report accessed at *http://www.hindu.com* on 24/3/2015;*See also* Dr.Shivani Gaur ,Director, Surrogacy Centre India,New Delhi ,Presentation on "ART (Regulation)Bill 2013" accessed at *http://www.slideshare.net* on 14/3/2015.

4 AIR 2008 SC 1656.

India[5]. In its Chapter 3 (Code of Practice, Ethical Considerations and Legal Issues) provisions relating to surrogacy has been incorporated.

ICMR Guidelines requires that the ART clinic must not be a party to any commercial element in donor programmes or in gestational surrogacy.[6]A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use or register in the name of the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death .The birth certificate shall be in the name of the genetic parents. ICMR guidelines also requires that the clinic must also provide a certificate to the genetic parents giving the name and address of the surrogate mother. Guidelines mandates that all the expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother. An oocyte donor can not act as a surrogate mother for the couple to whom the

5 *See* ICMR guidelines for Accreditation, Supervision and Regulation of ART clinics in India(2005) accessed at *http:// www.icmr.nic.in* on 12/2/2012.

6 *Id.* at para 3.5.3.

ooctye is being donated as per the guidelines.[7] It is also required that a third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa[8] and no ART procedure shall be done without the spouse's consent.[9]

ICMR Guidelines is also dealing with the sourcing of oocytes and surrogate mothers.As per the guideline , the law firms and semen banks will be encouraged to obtain (for example, through appropriate advertisement) and maintain information on possible oocyte donors and surrogate mothers. The above organizations may appropriately charge the couple for providing an oocyte or a surrogate mother. The oocyte donor may be compensated suitably (e.g. financially) by the law firm or semen bank when the oocyte is donated. However, negotiations between a couple and the surrogate mother must be conducted independently between them.[10]

General Considerations on surrogacy is also covered by the ICMR Guidelines.[11] It states that ,a child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.[12] Surrogacy by assisted conception should normally be considered

7 *Id.* at para 3.5.4.

8 *Id.* at para 3.5.5.

9 *Id.* at para 3.5.6.

10 *Id.* at para 3.9.2.

11 *Id.* at para 3.10.

12 *Id.* at para 3.10.1.

only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term.[13] Guidelines also mandates that the payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. And the ART centre should not be involved in this monetary aspect.[14] Surrogacy Advertisements should not be made by the ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, should rest with the couple, or a semen bank.[15]A surrogate mother should not be over 45 years of age as per the guideline.Before accepting a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full-term pregnancy.[16]A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.[17]Guidelines also states that no woman may act as a surrogate more than thrice in her lifetime[18].Chapter 4 of the ICMR guidelines provides for Sample Consent Form for Agreement for Surrogacy also.[19]It includes a declaration that the surrogate women understand the methods of treatment which may include

13 *Id.* at para 3.10.2.

14 *Id.* at para 3.10.3.

15 *Id.* at para 3.10.4.

16 *Id.* at para 3.10.5.

17 *Id.* at para 3.10.6.

18 *Id.* at para 3.10.8.

19 *Id.* at para 4.7.

1. Stimulation of the genetic mother for follicular recruitment.
2. The recovery of one or more oocytes from the genetic mother by ultrasound-guided oocyte recovery or by laparoscopy.
3 .The fertilisation of the oocytes from the genetic mother with the sperm of her husband or an anonymous donor.
4. The fertilisation of a donor oocyte by the sperm of the husband.
5. The maintenance and storage by cryopreservation of the embryo resulting from such fertilisation until, in the view of the medical and scientific staff, it is ready for transfer.
6. Implantation of the embryo obtained through any of the above possibilities into her uterus, after the necessary treatment if any.

Consent form also make sure that the surrogate women has got assurance that the genetic mother and the genetic father have been screened for HIV and hepatitis B and C before oocyte recovery and found to be seronegative for all these diseases. Surrogate however, been also informed that there is a small risk of the mother or/and the father becoming seropositive for HIV during the window period. A prospective surrogate mother also must be tested for HIV and shown to be zero negative for this virus just before embryo transfer. Consent form also demands her declaration that surrogate women consent to the medical procedures and to the administration of such drugs that may be necessary to assist in preparing her uterus for embryos transfer, and for support in the luteal phase.She should affirm that she understand and accept there is no certainty that a pregnancy will result from these procedures. She should also understand and

accept that the medical and scientific staff can give no assurance that any pregnancy will result in the delivery of a normal and living child.Besides that, Consent form requires an affirmation that the surrogate have worked out the financial terms and conditions of the surrogacy with the couple in writing and an appropriately authenticated copy of the agreement has been filed with the clinic, which the clinic will keep confidential and she agrees to hand over the child to the couple and in case of their separation during pregnancy to an authorized person or to the survivor in case of the death of one of them during pregnancy. Consent form excludes the surrogate from taking any responsibility of taking the child after birth.Her right to terminate the pregnancy at her will is recognized for which she have to refund the expenses incurred on it by the biological parents. She should also certify that (a) she has not had any drug intravenously administered into her through a shared syringe; (b) she has not undergone blood transfusion; and (c) She and her husband have had no extramarital relationship in the last six months. She should not disclose the identity of the party as per the guidelines.[20]

Although the ICMR guidelines provides for the provisions for avoiding possible misuse of ART such as sale of embryos and stem cells,establishment of national database for infertility in order to track the trends of abnormal genes etc. the guidelines are criticized severly for its lack of clarity . For example,guideline is silent on the criteria's to avoid situations of surrogacy agreements for a women to act as a surrogate who is having prohibited degrees

20 *Id.* at para 3.10.7.

of relationships of marriage with the couple. It should specify like 'relationship with surrogate should not be within prohibited degrees of relationship in relation to each other' .There are arising instances of altruism where mother is acting as a surrogate for daughter which negates the same generation principle set out by the ICMR guidelines. Guideline should be more specific so as to cover these situations and to avoid vagueness in these areas. Law Commission of India criticizes it by stating that they are silent on foreseeable ethical dilemmas of ART and more focus of it is on technical procedures.To the Commission,in the absence of any law to govern surrogacy, the 2005 Guidelines may apply. But, being non-statutory, they are not enforceable or justiciable in a court of law.[21] To the Law commission , though the draft Bill prepared by the ICMR is full of lacunae and incomplete,it is a beacon to move forward in the direction of preparing legislation to regulate not only ART clinics but rights and obligations of all the parties to a surrogacy including rights of the surrogate child.[22]

It is to be noted that significant advantage of the guideline is that it prescribes documentary evidence of payment for surrogacy and excludes ART clinics from interfering in it.It also made surrogacy to be an option for patients who are physically or medically incapable to gestate a baby. Although with

21 *See* Law commission of India(Report No.228), "Need for Legislation to Regulate Assisted ReproductiveTechnology Clinics as well as Rights and Obligations of Parties to Surrogacy''(2009) para 3.5(b).

22 *See id.* at para 4.2.

some flaws, guideline tried to make an effective effort to regulate surrogacy arrangements in India which must be appreciated.

8.1.2 *Baby Manji Yamada* v. *Union of India*

In 2008, *Baby Manji* case revealed the urgent need of reforms in the area of ART's and unending questions of controversies which is to be resolved immediately.[23]This case clearly posed certain questions on surrogacy which remained unanswered yet such as custody of child on divorce or death of commissioning parents,citizenship controversies if baby born out of a foreign surrogacy arrangement in which commissioning parents are foreign nationals and native Indian Surrogate is hired for surrogacy,absence of legal contract between the parties,the future and custody of the baby if none of the commissioning parents ready to take the baby for any reasons such as physical or mental infirmity ,disability of the baby etc. The questions posed in the case

23 The case is concerned to the production/custody of a child Manji Yamada given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement with her entered into by Dr Yuki Yamada and Dr Ikufumi Yamada of Japan. The sperm had come from Dr Ikufumi Yamada, but egg from a donor, not from Dr Yuki Yamada. There were matrimonial discords between the commissioning parents. The genetic father Dr Ikufumi Yamada desired to take custody of the child, but he had to return to Japan due to expiration of his visa. The Municipality at Anand issued a birth certificate indicating the name of the genetic father. The child was born on 25.07 2008 and moved on 03.08.2008 to Arya Hospital in Jaipur following a law and order situation in Gujarat. The baby was provided with much needed care including being breastfed by a woman. The grandmother of the baby Manji, Ms Emiko Yamada flew from Japan to take care of the child and filed a petition in the Supreme Court under article 32 of the Constitution. The Court relegated her to the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act 2005. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother. As a result of this case the debate within India about surrogacy has intensified. In the controversy that followed, several infirmities in the arrangement came to light including the absence of a legal contract between the parties, a fact that many saw as a worrying reminder of the potential for exploitation of native surrogates.*See generally supra* n.21 at para 1.15,1.16.

became an accelerating factor to address the controversial issues involved in a surrogacy arrangement.

In *Jane Balaz* v. *Anand Municipality* [24],Court discussed the nationality of a child born in Indian soil of an Indian mother and foreign father.Although Anand Municipality issued birth certificate in favour of Mrs and Mr.Balaz,german consulate rejected it as in Germany the Surrogacy was held illegal.Wih these difficulties ,Balaz parents sought Indian passports through the Court.Lower Court refused it and Anand Municipality recalled the birth certificates and made it in the name of the Indian surrogate (gestational carrier) and Jane Balaz(father,the sperm donor).Passport applications also identified likewise.Later the Court required Balaz to surrender the passports as the case was pending in Gujarat Court. On appeal Court considered the twins born out of the arrangement of surrogacy as Indian Nationals.The Honourable Court in its judgment remarked, gestational mother who had blood relationship with the baby is more deserving to name as natural mother than a carrier.[25]Apex Court observed,since surrogacy is not illegal in India,through Indian Law, paternity of Jan Balaz can not be denied.Court is primarily concerned of the rights of the two innocent babies than the rights of the parties involved such as surrogate mother, commissioning parents etc.Court granted exit permit to the children so that they can get an option of adoption by the Balaz parents in Germany where the surrogacy is not legally valid. Through this case, Court noted the urgent need of

24 *Jane Balaz* v.*Anand Municipality* AIR 2010 Guj 21.

25 *See id.* at para16.

comprehensive legislation on the subject and recognition of crucial issues such as legal validity of surrogate agreement, citizenship& identity of the child, rights of the parties to surrogacy etc.

These cases had revealed the foreseeable dilemmas of surrogacy such as the complexities of international surrogacy arrangements,conflict of laws of India and a foreign country which can make a child born under surrogacy orphan because of the absence of proper legislative frameworks etc.There can be more litigations and disputes on surrogacy as India is considered as the favourable destination for it.Without a proper legal framework on surrogacy ,regulation on it cannot be possible. Urgent need of reforms in the field of surrogacy in India is adequately substantiated by Indian Judiciary by these cases.

8.1.3 Assisted Reproductive Technology (Regulation) Bill 2008

Indian Council of Medical Research (ICMR) had come out with a draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008. The Bill contains 50 clauses under nine chapters. Chapter I of the Bill contains definitions. Chapter II provides for 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 lays down procedure for registration of ART clinics. Chapter IV prescribes duties of ART clinics. One of the duties is to make couples or individuals, as the case may be, aware of the rights of a child born through the use of ART. The

duties also include the obligation not to offer to provide a couple with a child of a pre-determined sex. Chapter V provides for sourcing, storage, handling and record-keeping for gametes, embryos and surrogates. Chapter VI regulates research on embryos. Chapter VII discusses rights and duties of patients, donors, surrogates and children. Chapter VIII deals with offences and penalties therefore. Chapter IX is titled 'Miscellaneous' and includes power to search and seize records etc. and the power to make rules and regulations. This legislation is intended to be in addition to, and not in derogation of, other relevant laws in force. Draft Bill is not free from criticisms for its lacunae's and ICMR modified the Bill and ART(Regulation) Bill 2010 came out with slight alterations.

8.1.4 Law commission of India(Report No.228), on "Need for legislation to regulate Assisted Reproductive Technology clinics as well as rights and obligations of parties to surrogacy''(2009)

In order to legalize surrogacy , Law commission of India formulated the 228th Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy." Report mentioned practical difficulty of the enforceability of ICMR guideline due to its non statutory nature.[26] ART Bill 2008 is severely criticized by the Law Commission for its lack of clarity. Law Commission states that The Bill neither creates, nor designates or authorizes any court or quasi-judicial forum for adjudication of disputes arising out of surrogacy,ART and surrogacy agreements. Disputes may, *inter alia*, relate to parentage, nationality, issuance of

26 *See generally supra* n.21.

passport, grant of visa.[27] Law commission report clearly states the inadequacies of ICMR guidelines as it concerns more on ART clinics and rights and obligations of parties to surrogacy are to be more seriously dealt with.[28] Report considers the crucial question which may arise for determination as to whether a judicial verdict determining rights of parties in a surrogacy arrangement is essential in respect of a foreign biological parent who wishes to take the surrogate child to his/her country of origin or permanent residence. It can be said that either a declaration from a civil court and/or a guardianship order ought to be a must to conclusively establish the rights of all parties and to prevent any future discrepancies arising in respect of any claims thereto.[29]Report clearly envisages the urgent need to have a legislation which is proper to determine the Rights and Obligations of Parties to a Surrogacy .Report is not satisfied with both ICMR Guidelines and ART Bill 2008 .

Most significant recommendations of Law commission are[30]

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

27 *See id.* at para 3.2.

28 *See supra* n.21.

29 *See id.* at para 3.5(g).

30 *See ibid.*.

[2] A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

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

[4] One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

[5] Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parents without there being any need for adoption or even declaration of guardian.

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

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

[8] Sex-selective surrogacy should be prohibited.

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

In its final remarks,Commission stated ;

> Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.[31]

8.1.5 Assisted Reproductive Technology (Regulation) Bill 2010

The Bill is aiming to avoid some of the pitfalls of the ICMR guidelines 2005 and ART Bill 2008.To Bill surrogacy means "surrogacy", means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate[32].Assisted Reproductive Technology (Regulation) Bill 2010 recognizes the gestational surrogacy only not

31 *Id.* at para 4.1.

32 *See* Section 2(aa) of the ART (Regulation)Bill 2010.

the traditional one[33]. Chapter VII of ART Bill is an exclusive chapter dealing with the rights and duties of Patients,Donors,Surrogates and Children.The entire provisions are intended to cover the rights and duties of the parties to surrogacy,criterias for a surrogate women,custody and legitimacy of the child,requirement of donor as well as patients in ART,Right to information of baby under surrogacy arrangement .ART (Regulation) rules 2010 are also framed to deal with selection criterias of parties and ART procedures ,consent forms regarding it etc. ART (Regulation) rules 2010 provides for the agreement for surrogacy[34] which incorporates the matters mentioned in the sample consent Form for Agreement for Surrogacy of the ICMR guidelines.[35]

Under the Bill.option of surrogacy is given to any adult who desires a child irrespective of his marital status single,gay, married or divorced. This includes unmarried couple living together and having a legalized sexual relationship as per their country.[36]So the bill excludes the couples whose sexual relationship is not validated in India such as homosexuals which includes gay and lesbians.The bill allows foreign gay or lesbian couples to enter in to surrogacy while impliedly disallows such Indian couples.Bill makes it mandatory to select surrogate mother within the age of 21-35 years of age and permit her to act as a surrogate for more than five live births in her life including

33 *See* Section 34(13) the ART (Regulation)Bill 2010.It states ,A surrogate mother shall not act as an oocyte donor for the couple or individual ,as the case may be, seeking surrogacy.

34 Form J of ART (Regulation) rules 2010.

35 *See* ART (Regulation) rules 2010.

36 *See* Section 32(1).

her own children.[37] This should be reduced to three as the ART Bill 2008 had earlier prescribed to protect the health and wellbeing of the mother.And an interval period between deliveries should also be incorporated. To Bill,If the first embryo transfer has failed in a surrogate mother she can decide to accept on mutually agreed financial terms, at most two more successful embryo transfers for the same couple and surrogate mother shall not undergo embryo transfer more than three times for the same couple.[38] Birth certificate of the baby is to be under the name of commissioning parents only.[39]Bill makes Indian citizens to act as a surrogate women and prohibits abroad surrogacy by sending her there.[40]Bill makes the status of the child born out of surrogacy as legitimate child by Section 35(2). Bill also ensures child's right to information relating to the donor or surrogate when he reaches the age of eighteen although excluded personal identification as per Section 36(1). From the overview of the crucial sections of the Bill,it can be well established that the Bill focuses on gestational surrogacy to all persons including single,unmarried or married persons .It allows homosexuals to go for a surrogacy arrangement if they have a legalized sexual relationship in their country. That should not be permitted in India as it never legalized homosexuality.It creates a large set of homosexuals(permitted in their country) to come for surrogacy in India only because their country does not enforce the surrogacy transactions. Bill is silent on the situations where surrogate

37 Section 34(5).

38 *See* Section 34(9).

39 *See* Section 34(10).

40 *See* Section 34(22).

mother dies after delivery due to complications arising out of it.It does not prescribe any responsibility to clinic/compensatory measures by commissioning parents for such sort of risks to surrogate mother while doing surrogacy.Although the Bill exclusively concerned the rights of parties to surrogacy in its Section 32- Section 36 which is dealt in Chapter VII is not free from such a sort of mentioned criticisms which had led to the revision of the Assisted Reproductive Technology (Regulation) Bill 2010 and the rise of New Draft Assisted Reproductive Technology (Regulation) Bill 2014 .

8.2 Assisted Reproductive Technology (Regulation) Bill 2014 on Surrogacy

The Bill has gone through number of revisions over the years and the recent draft seems to be promising while comparing to former drafts .Bill establishes the fact that the option of assisted reproductive technology, except option of surrogacy shall be available to all married infertile couple.[41]It mandates that in case the assisted reproductive technology is used by a couple, there must be written consent from both the parties.For the welfare of the child,commissioning parents have the the right to access information about the surrogate other than the name,identity or address.[42]The parents of a minor child have the right to access information about the donor, other than the name,identity or address of the donor, or the surrogate to the extent necessary for the welfare of

41 Section 58(1) of Assisted Reproductive Technology (Regulation) Bill 2014. As per Section 2(p), "couple" means a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage which is legal in India.

42 *See* Section 58 (2).

the child.[43]Bill requires that the informations about the patients shall be kept confidential and information about Assisted Reproductive Technology procedures done on them shall not be disclosed to anyone other than the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research, except with the consent of the person or persons to whom the information relates, in case of a medical emergency or by an order of a competent court of jurisdiction.[44]

Bill mandates that there should be a surrogacy agreement which shall be binding on the parties,that is , the couple commissioning surrogacy through the use of assisted reproductive technology, and the surrogate.[45]While regarding the rights and duties in relation to surrogacy,the Bill declares that all the expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the commissioning couple, shall be borne by the couple commissioning surrogacy.[46] If there are any complications that have arisen during pregnancy (i.e. Gestational Diabetes, Chronic Hypertension etc.) which are likely to continue for the rest of her life then it shall be covered appropriately under insurance.[47] It also elaborates that the

43 *See* Section 58(3).

44 *See* Section 58(4).

45 *See* Section 60(1).

46 *See* Section 60(2)a.

47 *See* Section 60(2)b.

surrogate may also receive monetary compensation from the commissioning couple, as the case may be, for agreeing to act as surrogate.[48] Under the Rules for payment of compensation to the surrogate mother and appropriate compensation can be transferred to the bank account of the surrogate mother at different stages starting from signing of the agreement till the child or children are handed over to the commissioning parents.[49]

As per the Bill, all the parental rights over the child or children be relinquished by the surrogate mother.[50]Criteria of surrogate mother under the Bill clearly states that an ever married Indian woman with minimum twenty three years of age and maximum thirty five years of age and at least having one live child of her own with minimum age of three years only can become a surrogate mother.[51]And Bill makes it mandatory that no woman shall act as a surrogate for more than one successful live birth in her life and with not less than two years interval between two deliveries.[52]It is also provided that surrogate mother shall be subjected to maximum three cycles of medications while she is acting as surrogate mother.[53]

48 *See* Section 60(3) (a).

49 *See* Section 60(3) (b).

50 *See* Section 60(4).

51 *See* Section 60(5).

52 *See* Section 60(5)(a).

53 *See* Section 60(5)(b).

As per the Bill ,any woman seeking or agreeing to act as a surrogate shall be medically tested for such diseases, sexually transmitted or otherwise, including HIV/AIDS as may be prescribed, and all other communicable diseases and conditions such as cardio-vascular disease, thyroid problem etc. which may endanger the health of the child or children, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.[54]

The commissioning couple may obtain the service of a surrogate through an assisted reproductive technology bank, which may advertise to seek surrogacy.[55]It must not contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy and no assisted reproductive technology clinic shall advertise to seek surrogacy for its clients.[56]A surrogate shall, in respect of all medical treatments or procedures in relation to the concerned child or children, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate and provide the name or names and addresses of the commissioning couple, as the case may be, for whom she is acting as a surrogate, along with a copy of the Surrogacy agreement.[57]As per the Bill, If the first embryo transfer has failed in a surrogate, she may, if she wishes, decide to accept on mutually agreed financial terms, at most two more successful embryo transfers for the same couple that had engaged her services in the first instance and no surrogate shall undergo embryo transfer more than three

54 *See* Section 60(6).

55 *See* Section 60(7).

56 *See id*.

57 *See* Section 60 (8).

times for the same couple.[58]The birth certificate issued in respect of a baby born through surrogacy shall bear the name of couple who commissioned the surrogacy, as parents under the Bill.[59]

Bill prohibits Surrogacy for foreigners in India but made it permissible to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen.[60]It is mandatory that the commissioning couple including Overseas Citizen of India, People of Indian Origin, Non Resident Indians and foreigner married to an Indian citizen who have availed of the services of a surrogate shall be legally bound to accept the custody of the child or children irrespective of any abnormality that the child or children may have.[61]If any abnormalities are detected in the child or children during the gestation period, then the commissioning parent shall ensure that the defected/disabled child/children are appropriately insured and compensation to be used for the development and growth of the child/children by the next in the family, in case of accidental death of the commissioning parents during delivery or in the process of delivery of the surrogate child.[62]Bill made 'Medical Visa for surrogacy (MED-S) mandatory to a foreigner married to an Indian citizen.[63]

58 *See* Section 60(9).

59 *See* Section 60(10).

60 *See* Section 60 (11)a.

61 *See* Section 60 (11)b.

62 *See* Section 60 (11) c

63 *See* Section 60 (12).

An Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen shall produce an undertaking that they would take care of the child/children born through surrogacy[64]and they shall require an 'exit' permission from the FRRO/FRO concerned for the child or children born through surrogacy before leaving India.[65]The information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research except by an order of a court of competent jurisdiction.[66]Bill through the Section 60 (17) (a) which prevents surrogate to act as an oocyte donor for the couple commissioning surrogacy enables gestational surrogacy option only for infertile couples.[67] Commissioning couple shall submit a certificate indicating that the child/children born in India through surrogacy is/are genetically linked to them and they will not involve the child/children in any kind of pornography or paedophilia.[68] Bill also provides that no assisted reproductive technology clinic and assisted reproductive technology bank shall provide information on or about surrogate or potential surrogate to any person.[69]The written consent of surrogate mother's spouse shall be required

64 *See* Section 60 (14).

65 *See* Section 60(15).

66 *See* Section 60(16).

67 *See* Section 60 (17) (a).

68 *See* Section 60 (17) b.

69 *See* Section 60(18).

before she may act as surrogate.[70] The spouse of the surrogate mother shall certify in his written consent that he will take care of the well being of the existing child/children of their own specially during the surrogacy agreement period and till his wife who is acting as a surrogate mother is free from the obligation of agreement.[71] A surrogate shall be given a certificate by the commissioning couple who shall avail of her services, stating unambiguously that she is acting or acted as a surrogate for them.[72] As per Section 60(21) (a), conditions are imposed on an Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen, commissioning surrogacy in India .[73] The party commissioning the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation a letter from either the embassy of the Country in India or from the appropriate Government Authority, stating that the child or children born through surrogacy in India, shall be permitted entry in the Country as a biological child or children of the commissioning couple and that the party shall

70 *See* Section 60 (19) (a).

71 *See* Section 60 (19) b.

72 *See* Section 60(20).

73 Section 60(21) (a: An Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen, commissioning surrogacy in India -
(i) be married and the marriage should have sustained at least for two years;
(ii) submit a certificate conveying that the woman is unable to conceive their own child and the certificate shall be attested by the appropriate government authority of that country.
(iii) appoint a local guardian who shall be legally responsible for taking care of the surrogate during and after the pregnancy, till the child or children are delivered to the commissioning couple or the local guardian;
(iv) insure the child or children born through the surrogacy, at the time of signing the agreement, till the age of twenty-one years or till the time of custody of the child or children is taken through appropriate Insurance Policy like Jeevan Balya, whichever is earlier, for wellbeing and maintenance of the child or children;
(v) use at least one gamete of their own in creation of the embryos

be able to take the child or children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence, as the case may be[74]and if Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian commissioning surrogacy fails to take delivery of the child or children born to the surrogate commissioned by the Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian, the local guardian shall be legally obliged to take delivery of the child or children and be free to hand the child or children over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one month of the birth of the child or children.[75]Bill also provided that during the transition period, the local guardian shall be responsible for the well-being of the child or children and appropriate guidelines shall be developed under Rules describing the duties, responsibilities and other related issues of the local guardian.[76]If Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian who commissioned surrogacy in India fails to take the custody of the child or children born then as per the insurance coverage signed at the time of agreement, the well being and maintenance of the child or children till the age of twenty-one years shall be taken care of by the Insurance Agency.[77]Bill mandates that appropriate penalty provision shall be made for the Overseas Citizen of India, Citizen of

74 *See* Section 60(21)b.

75 *See* Section 60(21) (c) (i).

76 *See* Section 60(21)(c)(i)a and (c)(i)b.

77 *See* Section 60(21) (c)(i)c.

Indian Origin, Non Resident Indians or foreigner married to an Indian and Indian Commissioning Couple who commissioned surrogacy in India and failed to take the custody without any genuine reason.[78]

The treatment should be done only at one of the registered assisted reproductive technology clinic recognized by the National Registry of ART Clinics and Banks of India of Indian Council of Medical Research.[79]The Overseas Citizen of India or People of Indian Origin Cardholder and foreigner married to an Indian citizen shall obtain the requisite prior permission from the Foreigners Regional Registration Officer/Foreigners Registration Officer concerned for commissioning surrogacy.[80]The Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen shall carry a certificate from the assisted reproductive technology clinic concerned regarding the fact that the child/children have been duly taken custody of by the Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen and the liabilities towards the Indian surrogate mother have been fully discharged as per the Agreement.[81]A copy of the Birth Certificate of the surrogate child or children will be retained by the Foreigners Regional Registration Officer/ Foreigners Registration Officer along with photocopies of the passport and Overseas Citizen of India/People of Indian Origin card of the Overseas Citizen of India/People of Indian Origin Cardholder

78 *See* Section 60(21) (c)(i)d.

79 *See* Section 60(21) (c)(i)e.

80 *See* Section 60(21) (c)(i)f.

81 *See* Section 60(21) (c)(i)g.

and foreigner married to an Indian citizen.[82]If the child or children are being given adoption to an adoption agency, the child or children shall be allowed to claim the provisions of the Indian Citizenship Act, 1955 in respect of matters relating to Indian citizenship.[83]Bill requires legal action against the ART Clinics/Banks who fails to follow the above provision and be sealed for the reason.[84]Bill prohibits employing the service of more than one surrogate by the couple.[85]Bill prevents simultaneous transfer of embryos in the woman and in a surrogate[86] and also makes it clear that only Indian citizens shall have a right to act as a surrogate, and no assisted reproductive technology bank or assisted reproductive technology clinic shall receive or send an Indian woman for surrogacy abroad.[87]

Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act, including unprotected sex that may harm the foetus during pregnancy and the child after birth, until the time the child or children is handed over to the designated commissioning couple as per section 60(26)of the Bill.[88]Section 60(27)of the Bill reads that the commissioning couples shall ensure

82 Section 60(21 (c)(i)h.

83 *See* Section 60(21)(c)(i)i.

84 *See* Section 60 (22).

85 *See* Section 60 (23).

86 *See* Section 60(24).

87 *See* Section 60 (25).

88 The acts that may harm the foetus are as follows:

a) Surrogate mother shall not have drug intravenously administered into her through a shared syringe.

b) Surrogate mother shall not undergo blood transfusion without medical supervision and guidance.

the surrogate and the child or children she deliver be appropriately insured until the time the child or children is handed over to the commissioning parents or any other person as per the agreement and till the surrogate is free of all health complications arising out of surrogacy.[89]It is also provided that the assisted reproductive technology bank shall act as a legal representative and mental health counsellor of the surrogate mother and on behalf of her, the assisted reproductive technology bank shall fight any legal case, if arises, during the course of surrogacy agreement free of cost.[90]

In case of death of surrogate mother after the conception is established and till she is declared free from all diseases and disorders resulting because of pregnancy, an appropriate compensation should be given to the family of surrogate in addition to the amount fixed at the time of agreement for her services as surrogate.[91] When the life of the surrogate mother is in danger at the time of delivery then the life of surrogate mother shall be protected over that of the unborn child and surrogate mother shall get the complete payment as agreed under the agreement under such type of condition.[92] Bill makes it clear that the minimum compensation to be paid to a surrogate mother by an Overseas Citizen

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c) Surrogate mother should not accept blood from any source except from certified blood bank.

d)) Surrogate mother and her husband shall not have extramarital relationship during the gestation period.

89 *See* Section 60(27).

90 *See* Section 60(28).

91 *See* Section 60(29).

92 *See* Section 60(30).

of India, People of Indian Origin Cardholder, Non Resident Indians and foreigner married to an Indian citizen shall be different than the amount to be paid by an Indian commissioning couple.[93]Aadhar Card is the identity proof for surrogate women as per the Bill.[94]

Section 60(33) (a) requires that all assisted reproductive technology (ART) clinics shall report to National Registry of ART Clinics and Banks of India of Indian Council of Medical Research to give a detailed periodic report of surrogate mother on whom the procedures have been tried and possible outcome and complications, if any and all relevant records in respect of the Agreement between the Surrogate Mother, the Commissioning parents and the ART Clinics must be sent to the birth registration authority at the time of registering birth of a child.[95]For the death or disability of the surrogate mother, it shall be presumed to have been caused by the negligence of the assisted reproductive technology clinic unless proven otherwise and where negligence in different degree is proven then appropriate provision shall be made under the Rules for a system of graded penalties/compensation depending on the degree of negligence.[96] Bill confers the legitimacy of child born under assisted reproductive technology treatment.[97]The birth certificate of a child or children born through the use of

93 *See* Section 60(31).

94 *See* Section 60(32).

95 *See* Section 60 (33)(a)&(b).

96 *See* Section 60 (34) (a))&(b).

97 Section 61 (1) :A child or children born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having

assisted reproductive technology shall contain the names of the commissioning couple, as the case may be, who sought such use.[98]

If Overseas Citizen of India, People of Indian Origin and a foreigner married to an Indian citizen seeks sperm or egg donation, or surrogacy in India, and a child or children are born as a consequence, the child or children, even though born in India, shall not be an Indian citizen but shall be entitled to Overseas Citizenship of India under Section 7A of the Citizenship Act, 1955 as per Section 61(7) of the Bill.[99] Bill in its Section 62 deals with the Right of the child to information about donors or surrogates.[100]

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been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child or children born through sexual intercourse

98 Section 61(6).

99 *See* Section 61(7). Again in Section 61(8),Bill analyses another condition.
Section 61(7) (8): In case of donation of egg or sperm, it may so happen that the egg/sperm is of an Indian donor, and the corresponding sperm or egg is that of a foreigner, who is married to a person who is, or whose children are entitled to the Overseas Citizenship of India (OCI). In such a case, though the OCI is not the biological parent of the child, but shall be the legal parent of the child. Therefore, if he, or his legal child or children, are entitled to OCI as per the Section 7A of the Citizenship Act, 1955, then that right must not be compromised or abridged in any manner. This would also apply to cases of NRIs who are married to foreigners

100 *See* Section 62: Right of the child to information about donors or surrogates

(1) A child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother.

(2) The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent or parents or surrogate mother when required, and to the extent necessary, for the welfare of the child.

(3) Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother. Provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother.

8.3 PROVISIONS OF ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL 2014 WITH REGARD TO SURROGACY – STRENGTHS AND WEAKNESSES

When previous Assisted Reproductive Technology (Regulation) Bill 2008 and 2010 provides for an extremely inadequate format of surrogacy agreement between surrogate mother and commissioning parents which permits continuation of exploitation of surrogates without addressing any of the concerns raised on issues of health, informed consent, compensation, legal assistance,insurance etc ,the Draft Bill 2014 tried to address some of these issues such as insurance,compensation requirements .Any way, all these Bills had recognized surrogacy as pregnancy achieved in furtherance of ART.It evokes patriarchal strategies and giving priority to genetic parents without rewarding the surrogate women who plays a vital role. While reading former Bills of 2008 and 2010 ,it can be seen that the interests of the clinics and sperm banks are effectively protected and all risks transferred to the surrogate- be it her death, complication during fetal reduction or transfers of infections such as AIDS. Neither these Bills concerns on the situations where surrogate mother dies after delivery due to complications arising from that pregnancy or delivery nor it fix any responsibility to ART Clinic or compensatory measures by commissioning parents such future risks of pregnancy. These Bills makes a free liability protection to commissioning parents which is totally absurd.[101]Fortunately, the Assisted Reproductive Technology (Regulation) Bill

101 *See* Imrana Qadeer, "Social and Ethical Basis of Regulatory Legislation on Surrogacy: Need for Debate"in *New Reproductive Technologies and Health Care in Neo-liberal*

2014 makes it clear that in case of death or disability of the surrogate mother, it shall be presumed to have been caused by the negligence of the assisted reproductive technology clinic unless proven otherwise. Where negligence in different degree is proven then appropriate provision shall be made under the Rules for a system of graded penalties/compensation depending on the degree of negligence.[102] Bill makes that all expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the commissioning couple, shall be borne by the couple commissioning surrogacy.[103] It is also noticed that Bill considers any complications that have arisen during pregnancy (i.e. Gestational Diabetes, Chronic Hypertension etc.) which are likely to continue for the rest of her life and required that it shall be covered appropriately under insurance.[104] It is promising as it can foresee future health complications and the extreme necessity of insurance where former drafts completely neglects these areas.Bill also demands an appropriate formula and mechanism for payment of compensation to the surrogate mother and to transfer the funds to the bank account of the surrogate mother at different stages starting from signing of the agreement till the

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India:Essays ,Centre for Women Development Studies,New delhi(2010) pp33-34 accessed at *http://www.cwds.ac.in* on 16/5/2013.

102 *See* Section 60(34)(a) &(b).

103 *See* Section 60(2)(a).

104 *See* Section 60(2)(b).

child or children are handed over to the commissioning parents[105] which also needs special applause. Bitter truth lies on the fact that the surrogate women is not getting enough money as the clinics,brokers,doctors benefits out of the transaction and a minimum percentage of the profit is passed to her.Fixing monetary compensation through legislation can make things much better and exploitation free. Imrana Qader firmly states on the aspects of monetary compensation;

> The notion of 'cheap wage labour in developing world' rooted in the concept of a variable skill based "productive social labour" (low in the developing world), is different from the universal value of women's procreative labour, which is biological, not fixed for a number of hours a day, and with a product neither saleable nor a commodity but which is a priceless human baby. Hence any woman who agrees to be a commercial surrogate deserves her 'wage' for the energy(physical, emotional and psychological) invested in nine continuous months, plus the period of caring for the baby. Only the professional provider's payment could be lower. The "compensation" can only be for the pain of separation from her unique product - the baby, and events such as physical damage due to negligence or her death.[106]

There is no need of depriving her right to compensation in the name of commodification of reproductive labour criticisms as her demand is more legitimate for the pain and stress during the period of surrogacy services.The Bill should incorporate the provisions for fixing adequate

105 *See* Section 60(3)(b).

106 *See supra* n.101, Imrana Qadeer, " Benefits and Threats of International Trade in Health: A Case of Surrogacy in India" at pp.67-68.

compensation(Minimum amount) to surrogate women which will make system more hazardless.

In case of death of surrogate mother after the conception is established and till she is declared free from all diseases and disorders resulting because of pregnancy, Bill mandates an appropriate compensation be given to the family of surrogate in addition to the amount fixed at the time of agreement for her services as surrogate.[107]In circumstances where the life of the surrogate mother is in danger at the time of delivery,Bill consideres the life of surrogate mother shall be protected over that of the unborn child and surrogate mother shall get the complete payment as agreed under the agreement under such type of condition.[108]These provisions elaborated the concerns towards the welfare of surrogate women which is quite better than the former Drafts.

Bill also provided that no woman shall act as a surrogate for more than one successful live birth in her life and with not less than two years interval between two deliveries.[109]Reducing the number of births to one birth where former Draft permitted five live births also seems to be promising. It is also provided that surrogate mother shall be subjected to maximum three cycles of medications while she is acting as surrogate mother.[110]

107 *See* Section 60(29).

108 *See* Section 60(30).

109 *See* Section 60(5)(a).

110 *See*, Section 60(5)(b).

When previous Bills enabled the process of surrogacy to foreigners, Draft Bill of 2014 restricts the practice to Indian infertile couples and Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen. A foreigner married to an Indian citizen shall have to come on a 'Medical Visa for surrogacy (MED-S) when they come to India for commissioning surrogacy. These sort of strict policies can reduce the flourishing of misuses behind foreign surrogacy.From all these provisions,it is well clear that Government is initiating steps to avoid rash reproductive tourism via surrogacy where anyone can hire Indian wombs.

Critics contended that the fast separation from mother is detrimental to the critical development of the baby and preventing surrogate mother to be the ovum donor is also seems to be tricky.[111]But it is submitting here that making surrogacy option to gestational only is a welcoming move as it makes the surrogate women excluded from genetic similarity to child which otherwise can add more claim of her to the baby.[112]But it is true that the Bill never considered the service of surrogate women as a rewardable thing as it fails to confer adequate compensation fixage through its provisions.

111 *See generally, supra* n.101.

112 Centre for Social Research Report on"Surrogate Motherhood- Ethical or Commercial" concerns the main features of the bill as the provisions stating that donors should relinquish parental rights at the time of donation, and the surrogate mother, shortly after birth. Traditional surrogacy is no longer allowed. The reason for this is that when the surrogate is also the genetic mother the risk of legal complications increases. *See generally,*Centre for Social Research Report on "Surrogate Motherhood- Ethical or Commercial"(2011).

Centre for Social Research Report on 'Surrogate Motherhood' states;

> Surrogacy is increasingly becoming a popular and well-accepted practice in India amongst childless couples; most of such Commissioning Parents hail from the creamy layer of the society who can bear the huge cost of surrogacy. India is emerging as a leader in international surrogacy and a destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are also becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge exorbitant amount for the complete package, including fertilization, the surrogate's fee, and delivery of the baby at a hospital, including the costs of flight tickets, medical procedures and hotels.[113]

Bill is not considering any criteria for a relative acting as a surrogate mother for couples.Bill should specify atleast two conditions if a relative is acting as a surrogate .First condition is that she should not be within the prohibited degree of relationship with the couple.Second condition may impose the rule that she should be of the same generation of the female commissioning parent.Making restrictions on events of altruistic surrogacy by relatives of prohibited degrees who may be acting for their next generations such as for daughter,son etc can reduce genetic abnormalities as well as the instances of forced surrogacy under compulsion rooted out of emotions for beloved ones.

To Bill,gestational surrogate has no such claims as she relinquishes her parental right.Bill makes a provision for handing over the child to adoption agency which was earlier discussed which completely protecting commissioning

113 *See,ibid.*

parents from liability. But an effective analysis on the issue of abortion,breach of conditions by the parties and punishments for that breach is not incorporated in the Bill. Besides that there is no involvement of any adequate mechanism to pre-approve the process can be seen in the provisions of the Bill.The issues like custody and best interests of child,exploitation of surrogates without giving adequate expenses,forceful surrogacy etc should be effectively addressed through the Bill. Aadhar Card is the identity proof for surrogate women as per the Bill which should incorporate other identity proofs such as voter identification card as admissible identity proofs to avoid undue hardships for surrogate mother.

Previous Bill such as 2008 and 2010 openly protects commercial surrogacy and silent on the exploitation of poor surrogates,their compensation and health hazards in surrogacy arrangements. They permits surrogates to undergo maximum three embryo transfer for the same couple on previous failures of transfers and permits three babies in her life time including her own children. This is a time where the state is encouraging the two child norm policy .Previous Bills allows single surrogate pregnancy only if the surrogate women have her own two children.Eventhough the state is implementing two child norm for population stabilization,it can also linked to avoid health problems arising from frequent pregnancies. As far as the situation of surrogacy is concerned,the child born out of it may be a member of other family who does not have offsprings.In that sense ,there is no threat to population stabilization. The New Draft Bill 2014 is quite promising as it reduced surrogate pregnancy to

one live birth and two years interval between two deliveries of surrogate mother is prescribed. It is also provided that surrogate mother shall be subjected to maximum three cycles of medications while she is acting as surrogate mother. For the sake of the health of the surrogate women, limiting total surrogate pregnancies to single (no matter whether live or not) should be satisfactory than making the limit as single live birth.Repeated exploitation of surrogate women for in the case of embryo transfer attempts also can be forseen.Interval period between embryo transfers should be mentioned for avoiding this kind of issues.

As previous bills gave little recognition to the complications arising out of pregnancies which may be multiple aided by ART and treated surrogate women as a commodity to be exploited being liberal to the commissioning Parents and not adequately concerned to poor surrogates,New Draft Bill atleast tried to recognize her rights to some extent although failed to mention her right to legal assistance,interval period between embryo transfers for her health and fixing minimum compensation requirements etc.

Although the Section 62 of the Bill deals with the Right of the child to information about donors or surrogates,it cannot be said that Bill is perfect on enhancing Child rights.Bill should also make concern towards the complications arise while discovering parentage late or accidentally which is more damaging than knowing the truth in an open and frank environment. Secrecy and misinformation is born out of the notion of priority of biological associations

over socio-psychological ones.[114] It is to be noted that if State is restricting surrogacy to infertile couple for atleast one of their gametes are healthy, their attitude towards the baby got from surrogacy which is atleast having genetic similarity with one of them will be promising and beneficial for the developmental needs of the baby as they have waited for a long time and suffered a lot for getting a baby in to their own hands to fulfill their dream of being a parent.

8.4 CONCLUSION

Growth of technology is a reflection of human creativity and it has helped generations to survive and improve the quality of their lives through the control of nature. This control often meant destruction and domination of other species and helped somewhere to save other species. Technology on one hand had been the instrument of the ruling classes to dominate, and on the other hand it have challenged the social organisation of work, or of other spheres of civil society. In doing so it offers human societies a chance to re-examine their own humanity and create a better, more inclusive and egalitarian society.[115]

As far as surrogacy is concerned ,It is both a threat and an opportunity. On one hand,it gives surrogate women ,a means to survive;and commissioning couples ,a baby which is their most waited moment. On other hand,It makes commodification of motherhood as well as exploitation in terms of money

114 *Supra* n. 101, Imrana Qadeer, "The ART of Marketing Babies", at 38.

115 Imrana Qader,"Technology in Society: A Case of ART/Surrogacy in India" *supra* n.101 at 2.

towards poorer sections. There is a need to have proper rules and balances for the surrogacy commissioned in India,Eventhough Government had made some restrictions for foreign surrogacy in India,there remains a huge vacuum. It is extremely true that unavoidable commodification of traditional notion of motherhood (Surrogate women's) is to be accepted in surrogacy. Some sort of exploitation of their reproductive labour is there.Instead of preventing the commodification,wise notion is to regulate as Assisted Reproductive Technology (Regulation)Bill 2014 (although with some flaws) is preparing to do.Need of the hour is to make a balancing approach to avoid undue exploitation of surrogate motherhood without underestimating the significant desire of genuine infertile couples to have a baby.

CHAPTER 9

COMMERCIAL SURROGACY IN INDIA-OTHER REGULATORY LEGAL MEASURES

Assisted Reproductive Technologies had made India to witness huge demand for medical treatments for infertility. This techniques are not only use for Indian couples but a large number of foreign clients flew to India for its relatively lower costs. Commercial surrogacy is recently flourished largely in India. Most of the foreign couples coming to India for availing assisted reproduction are for surrogacy. It is the cheapest option for them comparing to their country.Medical tourism developed enormously in India and largest contribution to it is from the reproductive service sector.

9.1 COMMERCIAL SURROGACY IN INDIA

India is regarded as the surrogacy outsourcing capital of the world and often termed as a "mother destination".[1]Surrogacy is a survival tool for Indian women from poverty. Choice of being a surrogate is not a deliberate choice.It is made in extreme economic necessity.Commercial surrogacy is denoted as a new kind of labour gendered,exploitative and stigmatized labour.The matter should be looked rather than moral basis but in terms of its medical and legal perspective.[2]Only through a broad outlook on the problem,the issue of surrogacy can be effectively handled.

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1 *See* Vrinda Marwal and Sarojini N, "Reinventing Reproduction, Reconceiving Challenges: An Examination of Assisted Reproductive Technologies in India",2011 (XLVI) 43 *EPW* 104, 109.

2 *Ibid.*

Critics of commercial surrogacy industry warned the surrogacy as the well off women using the wombs of lower class counter parts.[3] In India, now Film stars like Aamir khan and Sharukh Khan admitted the hiring of surrogates for their baby genetically related to them and their wives.[4]Trend is going on and will get more acceptable as now working mothers of hectic life's are increasing day to day, models and film stars may make use of surrogacy industry as it may provide their own child without compromising on their work, figure and time.

9.2 INDIA- A FAVOURABLE DESTINATION FOR SURROGACY -AN ANALYSIS

Major reasons which have made India a 'destination' for surrogate mothers can be grouped into four.

9.3.1 Customers get relatively lower cost effective treatment for infertility as well as for surrogacy arrangements.

9.3.2 There is a growing demand for fair skinned, healthy young women of India among foreign couples.

9.3.3 Greater availability of surrogate mothers in India due to variety of reasons such as poverty, unemployment etc.

9.3.4 Lack of legislation for regulating surrogacy in India

3 *See generally* Alice Baily, "Reconceiving Surrogacy:Toward a Reproductive Justice Account of Indian Surrogacy", (2011) 26(4) *Hypatia* 715,734.

4 *See generally http://www.tribune.com* accessed on 12/2/ 2014.

A detailed discussion on the reasons are given below.

9.2.1 Customers get relatively lower cost effective treatment for infertility as well as for surrogacy arrangements.

India offers effective and efficient medical treatment for infetility .Entire branch of medical tourism in India flourished through surrogacy. Strongest reasons for foreigners to travel to India is most likely to be the relatively lower cost involved in the process. The fees for surrogates are reported to range from 2500 Dollars to 7000 Dollars. The total costs can be anything between 10,000 Dollars and 35000 Dollars.[5] Law commission of India reports that fee for surrogate women in developed countries such U.S.A were 1/3rd higher than the fee for surrogates in India.[6]

9.2.2 There is a growing demand for fair skinned, healthy, young women of India among foreign couples.

There is a growing tendency to foreign couples to select young beautiful surrogate women for womb renting. Dr. Amritha Pandey states the truth that makes selective procedure on the basis of caste and looks in her article[7]. There are advertisements for fair surrogates. Colour and caste play an important place

5 Kenan Institute for Ethics ,"Commerical Surrogacy and Fertility Tourism in India" accessed at *http://www.dukeethis. org* on 21/7/2012.

6 *See* Law commission of India(Report No.228), "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to Surrogacy''(2009) para 1.7. "The usual fee is around $25,000 to $30,000 in India which is around 1/3rd of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice".

7 *See generally* Amritha Pandey, "Commerical Surrogacy in India: Manufactering a Perfect Mother Worker",(2010) 35(4) *Journal of Women in Culture and Society* 969-992.

in surrogacy works. Many childless couples are eager to have a fair skinned child and women from northern India (Specifically healthy and whitish colour) are preferred by them. Study of Sama group on thirty three surrogacy related advertisements emphasises that almost 40% couples want beautiful fair looking surrogates.[8] Hence in gestational surrogacy, there is no role for surrogates external appearance as she is not having link genetically to the baby in womb.

9.2.3.Greater availabillity of surrogate mothers in India due to variety of reasons such as poverty, unemployement etc.

Surrogacy remains a choice where intersection of high reproductive technology and low-tech work force occurs. It is a practical option to get a huge sum of money which would otherwise be a dream for them.[9]In India, women who are in financial crisis opts for becoming a surrogate for fee.This crisis is due to variety of reasons such as poverty, unemployement etc.

9.2.4 Lack of legal frame work for regulating surrogacy in India.

Although India having ICMR guidelines and 228th Law commission of India reports on surrogacy, both of them have no statutory recognition. Assisted Reproductive Technology (Regulation) Bill 2014 which deals a Chapter on rights of the parties involved in surrogacy yet in a way to get enacted. Lack of legislation for surrogacy is a welcoming sign for foreign couples to come to

8 Sama–Resource Group for Women and Health, "Birthing A Market :A Study on Commercial Surrogacy"(2012) accessed at *http:/www.samawomenshealth.org* on 12/10/2013.

9 *See* E. Goodman, "Rent-a-womb" accessed at *http://www.post.gasette.com* accessed on 12/6/2013.

India for surrogate arrangement which may be impossible in their country where by law such arrangement renders unenforceable or forbidden. Lack of regulation in the field may make intermediate brokers who benefits out of the transaction.

9.3 INTERMEDIARIES IN SURROGACY ARRANGEMENTS

Intermediaries are flourishing in the sector of surrogacy .As per the report of Centre for social science ,10-20 agencies are exists which act as facilitators for surrogacy arrangements. They keep the mothers in shelter homes during their pregnancy and take care of their food and clothing during the surrogacy period. Doctors and clinics are often dependent on these agencies.[10] Surrogate women also complains about intermediaries(brokers) exploitation by stating they takes Rs 10,000 [$200] from them for getting into the clinic.[11]There are so many motivations and negotiations into surrogacy.Agent tries a lot to persuade surrogate in to this arrangement with severe visits to make them comfortable with the terms of the surrogacy agreement.Often agent charges from surrogate women. The strategy of recruitment revolves around the complex mother – worker combination. "Being a mother is not just a medical requirement for a woman to be recruited as a surrogate but also an insidious mechanism to control her as a worker".[12]Intermediaries reduces her benefits from the surrogate transaction by imposing heavy charges for introducing them to the clinic.

10 Centre for Social Research (CSR), "Report on Surrogate Motherhood- Ethical or Commercial"(2012) accessed at *http://www.womenleadership.in* on 12/1/2013.

11 *See* Pandey,*supra* n.7 at 989.

12 *See supra* n.8 at 57**.**

9.4 THE CONTRACT AND COUNSELING OF SURROGATES

The contract and the counseling compose the first step in the surrogacy process. The study of Pandey reveals that the surrogates in Anand are desirable not just because they are cheap but because they are fully under the control of the doctor and the buyer. "To ensure that the women remain perfect surrogates and that the clients get the best deal, the management has devised ways to have complete control over the surrogates during the nine months of pregnancy".[13]Each clinic have their own styles of counseling.Common thing is to educate them about the process. In surrogacy arrangement, surrogate woman is often reminded during her pregnancy to detach emotionally from the baby in womb. Counseling is given throughout the pregnancy at regular times to make them aware of the situation of detachment so as to enable her to hand over the baby without any distress.[14]Dr.Usha Khanderia ,Director of Hope Infertility Clinic states that she has to educate them as providing their womb to some one's child.She also equates the situation to a guest visits to any one's home.Every one will take care of him more than the care given to a normal member .Surrogates are moulded to the situation on the basis of the training given to her by the Doctor. To Pandey, "Khanderia's "training" of first-time surrogates reiterates the disposability of the women-wombs but adds the contradictory demand that the surrogate be nurturing toward the baby and yet detached from it."[15]Her comments reveal the complexities of mother-worker

13 *See* Pandey,*supra* n. 7 at 976.

14 *See ibid.*

15 *See* Pandey,*supra* n. 7 at 978. "The perfect surrogate is one who is constantly aware of her disposability and the transience of her identity as a worker and yet loves the product of her transient labor (the fetus) as her own."

combination which is demanded from a surrogate to act simultaneously a care taker and loving mother.

Surrogate while signing of the contract should get aware of the actual situations as it may help to heal the mental stress as soon as possible then making her unaware of the circumstances. The contract also should specify payment to the surrogate mother and the stages at which she will be paid. By signing the contract the surrogate signs away parental rights to the baby she carries in her womb. Pandey states

> The contract and the process of 'counseling' are tools designed to serve the interests of the commissioning parents, the hospitals and the surrogacy industry. In current practice, the contract does not embody the interests and conditions of the arrangements and are not set by all 'parties' equally. It is merely an affidavit signed by the surrogate agreeing to hand over the child after birth and to relinquish all rights over the child. Nor are all the 'parties' obligated equally through this contract., resulting in an extremely biased contractual agreement. 'Counseling', too, is practised as an informal interaction between surrogates and doctors/agents. It is aimed at building a particular perspective among surrogates that is designed to 'convince' them initially of the benevolence of becoming surrogates, and thereafter of the need to relinquish the child .[16]

Without highlighting the exact situations to the surrogate women and forcing her to undergo the process should not be justified as it involves a hidden element of human trafficking.

16 *See supra* n.8 at 137.

9.5 REPRODUCTIVE TOURISM VIA SURROGACY

As per the Centre for Social Research (CSR) Report on Surrogate Motherhood- Ethical or Commercial, fertility tourism in India has increased via surrogacy. Report highlights the tourism aspect of commercial surrogacy by firmly stating that

> The reproductive segment of the Indian medical tourism market is valued at more than $450 million a year.These fertility tourists do not all come from Western countries; India is also a popular destination for medical tourists from Sri Lanka, Pakistan, Bangladesh, Thailand and Singapore. In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that.[17]

Report also states that the State of Gujarat is particularly popular, especially among westerners.The practice of renting a womb and getting a child is similar to outsourcing pregnancy.[18] Women from small towns are outsourced for surrogacy to Anand,Bhopal,Indore,Jamnagar etc.[19]

While moving on to the State of Gujarath where exists so many infertility clinics among them 'Akansha clinic' which is owned by Dr. Nayana Patel is

17 *See supra* n. 10.

18 Pushpa, a twenty-seven-year-old surrogate who has already delivered a baby for an Indian couple, is pregnant for the second time in two years, for an NRI couple from the United States asks firmly that If they are just wombs, why are there different rates. She is getting much more than many of the surrogates here. A Gujarati NRI couple came from America during the delivery of her first baby. They said that they don't care how long they have to wait, but they only want her to carry their baby. Commissioning parent,the NRI woman, is also a Brahmin. Pushpa supposes maybe that's why she liked her. But almost everyone who comes here for a surrogate wants her. Doctor Madam says, Please get her ten to fifteen more Pushpas . *See,* Pandey,*supra* n. 7.

19 *See supra* n .10.

regarded as the global hub of the commercial surrogacy industry in India.One can trace the background of *Baby Manji Case* which had revealed the extent of commercial Surrogacy industry in India .In November 2007, Japanese Couple IKufumi Yamada and Yuki Yamada came to Nayana patel's clinic for Surrogacy. Doctor arranged a surrogate, 'Pritiben Mehta[20], a married Indian woman with Children. She made an embryo from 1kufumi yamada's Sperm and donor egg. Then Surrogate women is implanted with the embryo.Before One month from Baby Manji's birth,On June 2008, Yamada's divorced. Father is genetically related to the child there by he wants to keep the Child but Yuki Yamada did not want the child as she is unrelated to the child genetically. Donor's responsibility also ended after providing egg. Gestational surrogate is also not responsible as per the Surrogacy contract.This case has lead to various disputes which Indian law never equipped to deal as there is no similar situation had before[21]. As per the Centre for Social Research (CSR) Report on Surrogate Motherhood- Ethical or Commercial,

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20 She received a house worth 3,25000 and 50,000 Cash in hand. While Pregnant she received 5000 per month for her expenses.

21 *See*, *Baby Manji Yamada* v. *Union of India,* AIR 2008 SC 1656.Under the existing state, Parentage and Nationality of Baby Manji were difficult to determine as per the definitions of family and citizenship laws of India and Japan.Yamada not got certificates from Japanese embassy in India to grant Japanese passport to Manji as Japanese Code do not recognize surrogate children. Code consider woman who give birth to baby as mother, ie Manji's mother is not Japanese and she is not entitled to get passport. As Indian laws do not address commerical surrogacy , genetic parent should adopt baby. But as per Guardians and wards Act 1890 does not allow Single men to adopt girls. For Manji, to get an Indian passport for birth certificates also requires names of father and mother. And it is often confusing to the authorities whether genetic mother, or gestational surrogate or wife of Yamada holds the status.Municipal council of Anand was refused to grant birth certificate and referred the case to National council and it refused to ussue passport as there is no clarity of which mother should be taken. For parties, Indira Jaisingh filed an appeal with the plea that Yamada is father of the baby and at last council grant certificate stating only father's name.When father had to return to Japan, his mother got temporary custody of the

> Women, who undertake these assignments in India, usually come from lower class to lower middle class backgrounds, are married, and are often in need of money. Their need for money is so acute that more than often, childless couples can negotiate a better price as a result of competition. The amount of money given to a surrogate mother in India may appear very miniscule from any reasonable perspective, however, the amount may serve as the economic lifeblood for the families, and will be spent on the needs of the family (a house, education of the children, medical treatment.) These are basic needs and may seem trivial from a notably rich westerners' perspective, but they become mega needs in a country like India, which lack social safety nets, and where the governance structure is attuned only to the needs of the rich and powerful sectors of the society[22]

International couples hiring surrogates realize substantial cost savings. A surrogate childbirth in Canada or the United States costs between 30,000 Dollars and 70,000 Dollars; in Anand the whole process can be accomplished for less than 20,000 Dollars. An added attraction for clients hiring surrogates in Anand is that the clinic runs several hostels, similar to the one above the clinic, where the surrogates can be kept under constant surveillance during their pregnancy.[23]In India,almost every states,the surrogacy clinics are available.Reproductive tourism via commercial surrogacy will flourish more rapidly for the coming

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baby. Oct 2008, Manji got Identity certificate. Japanese embassy issued visa valid for one year on humanitarian grounds to Manji and Manji can become Japanese only when Yamadas adopt her or establishes a parent child relationship. The case had opened eyes of policy makers on legal complexities and also the business of surrogacy came more closer to them. This case is considered crucial in the forum of surrogacy arrangements as it may provoke the thought process of the legal community towards the intricacies of surrogacy transactions which may arise largely in future.

22 *See supra* n. 10.

23 Amrita Pande,"At Least I Am Not Sleeping with Anyone":Resisting the Stigma of Commercial Surrogacy in India*"* ,(2010)36(2) *Feminist Studies* 292,295.

years.Women of necessity are willing to become surrogate. State of Kerala is also not an exception. In an ART Clinic at Ankamali,a small town near Ernakulam,Kerala, Doctor of the clinic claims that 20-30 surrogate mothers are entered in surrogacy arrangements and hundreds of ready surrogate mothers are in waiting list for their turn. In almost every districts of Kerala ,Clinic planning to start(some districts,already started) branches because of the good response from readily available surrogates as well as increased demand for such arrangements.[24]

The case of *Babe 101* in the year 2011 , an illegal surrogacy ring which was operational in Thailand,Combodia.Vietnam,Taiwan shows the harmful practice behind commercial surrogacy and reproductive tourism . Website of the illegal surrogacy ring states the price of a child as 32000 Dollars +other expenses.Fourteen young women between the age of 19-26 were rescued by the police from the ring as they are trapped in a house and passport has been taken by the offenders.They all are offered good job by the dealers and after having several months without a job,they are figured out the reality. The victims allegedly suffered sexual abuse at the hands of *Babe 101*.One girl is consented to do it for the second time as the money she got earlier is taken by her drug addict father. *Baby 101* is also reported as making forceful impregnation to the victims.[25]The time is not far away in India to face such dilemmas as there is no legislation to restrict the practice effectively.

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24 *See* P.P .Prasanth , "Pettunovinu Vilayidumbol" , Madhyamam Weekly, Coverstory 2014 January 20 no 17.

25 *See* European Centre for Law and Justice, "Report on Surrogate Motherhood: A Violation of Human RIghts" accessed at http://www.eclj.org on 2/12/2014.

Commercial surrogacy industry aided medical tourism in India a lot to expand.These companies have made significant profits from commercial surrogacy by using sophisticated Internet-based strategies to market comprehensive services to prospective fertility patients designed to bridge the distance between healthcare consumers in developed countries on the one hand and healthcare providers in developing and transitional-economy countries on the other, these services depend on low prices and lack of regulation in India to keep costs and hassles to a minimum.[26]

In a developing country like India, where surrogacy work is rapidly becoming a survival strategy for many women, it makes little analytical sense to battle about the morality of surrogacy.[27]A sensitive approach to commercial surrogacy work is needed. Surrogacy is a product of poverty, unemployment which compels them to take the decision to become a surrogate.They should not be blamed for it as it is a survival tool for overcoming their hardships.

9.6 COMMODIFICATION OF REPRODUCTIVE LABOUR IN INDIA

The global tendency to come to India for reproductive outsourcing is a harsh reality India now facing.Commercial Surrogacy has attracted a range of criticisms such as making the reproductive capacity a mere monetary beneficial object .Child becomes a mere thing to get transacted to hirers and surrogate women an incubator.She is like a contractual labour who should give the products of labour to desired ones. Reproductive labour is valued here for

26 *Supra* n.5.

27. Pandey ,*supra* n.7 at 972.

monetary aspects not maternal one. Parental love and affection she develops by carrying the baby in womb for nine months is objected through psychological counseling and advises which is not absolutely successful. Emotional trauma cannot be avoided in surrogate pregnancy, it may be suppressed only.Although all the criticisms of surrogacy exists, ultimate truth is that one cannot deny the commercial surrogacy industry because a ban on commercial surrogacy may be neither desirable not effective. In practical,ban will serve only to create expansive black markets and more exploitation.[28] "Surrogacy is something they have to do to survive.When they heard of surrogacy, they don't have any clothes to wear after the rains-just one pair that used to get wet-and the roof of the house had collapsed".[29] Tomorrow,the surrogacy industry can shift to more cheaper destinations than India and without having much concern for women's health and working conditions ,it can flourish throughout the world.[30]

Feminist jurisprudence have denoted surrogacy as the worst form of medicalisation, commodification and technological colonisationof her body .It is a form of prostitution and slavery which is a result of patriarchal nature of exploiation.Radical scholars of feminist jurisprudence detected it as a thing composed to women of colour whose prior function is to gestate the embryos

28 Amritha Pandey cited in *Birthing Markets ,supra* n.8.

29 "It is money that gets you to do everything. One has compulsions at home. Everyone is sitting with a lot of tension at home. No one does it because they enjoy bearing someone else's child. When there are compulsions, this is what god gets you to do. No woman bears a child and gives it away out of interest." *See*,Amritha Pandey cited in *Birthing Markets ,supra* n.8 at 50.

30 *See ibid.*

of white women.[31] To some scholars,criteria for a perfect surrogate is a peculiar combination over motherhood and employement.They states;

> Economic desperation does not make a perfect surrogate; a new subject has to be produced, a surrogate who is a willing worker and, simultaneously, a virtuous mother. The surrogate is expected to be a discipline contract worker who will give the baby away immediately after delivery without creating a fuss. But she is simultaneously expected to be a nurturing mother attached to the baby and a selfless mother who will not treat surrogacy like a business. This mother-worker combination is produced through a disciplinary project that deploys the power of language [in the form of the surrogacy contract and the discourses deployed by medical staff] along with a meticulous control over the body of the surrogate.[32]

A positive change found here is that somehow the reproductive labour valued which otherwise be noticed merely as a biological function of women.It is better to treat surrogate mother, a human being with strong emotions for her child in womb but expecting herself to hand over the baby to contracted parties even if she nurtured the baby selflessly.

9.7 SOCIAL STIGMA OF SURROGATES IN INDIA AND THEIR RESISTING VOICES

Surrogacy, is a conspicuous lack of choice that pushes both women surrogate women and the commissioning mother-who may be blamed for infertility-towards a surrogacy arrangement.It is highly stigmatized that many surrogate women spending their time of pregnancy away from their families in

31 *See,supra* n.23 at 293.

32 Pandey,Cited in *Birthing Markets, supra* n.8 at 50.

surrogate homes.They want to keep the thing secret as it is womb renting.[33] In Pandey's study,Daksha ,one surrogate explains that her husband does not tell anyone what she is doing .He says ,his wife went for work in another city. The society views surrogate women as worse women who sell their body and baby.Society don't understand that surrogates are not doing this for fun. [34]

Surrogacy ,more specifically ,gestational surrogacy exists in almost every countries in the world,There is no need of facing social stigma by surrogates. However,In India, surrogates face a great deal of stigma. As a consequence,almost all the surrogate mothers in the study of Amritha Pandey kept their work a secret from their communities and very often from their parents. Typically they hide in the clinic or take temporary accommodation in the surrogate hostels during the last months of pregnancy. Some told their neighbors that the baby was their own and later claimed to have miscarried.[35]Women working as surrogates resisted the commercial and contractual nature of their relationships by establishing or imagining a relationship with the couple hiring them. Although the surrogates recognized the immense class difference between themselves and the couples hiring them, their narratives sometimes constructed relations that transcended the national and class differences.[36]Other women normalize surrogacy by drawing parallels between the act of giving away the newborn and giving away one's daughter at

33 *See generally,supra* n. 1.

34 *See supra* n .23 at 298.

35 *Ibid.*

36 *Id.* at 307.

marriage.[37]Surrogate women while highlighting the mothering role denies the labour aspects.It is embarrassing that while supports highlights the choice aspect ,women in surrogacy deny choice by highlighting their economic desperation.[38] But it is a bitter truth that ultimate concern is money which makes surrogate women to come forward towards surrogacy. To surrogate women,they need the money and commissioning parents want a baby.The crucial thing to note is that they are not doing anything wrong for the money-not stealing or killing anyone. And they are not even sleeping with anyone.[39]Another one Salma, pregnant for a couple from Washington, firmly revealed that she have to do it for children's future. "This is not a choice; this is *majboori* [a necessity]….Prestige won't fill an empty stomach."[40]Surrogate women tried to justify the act and relation to the baby by drawing on cultural symbols that parallel aspects of the surrogacy arrangement. They narrated tales from Hindu mythology where infant Lord Krishna was taken care of by a foster mother Yashoda, as well as the cultural practice of giving away a daughter at marriage. Surrogates face stigma because of their act is deviant from traditional roles of

37 *See id* at 309.They states like that while handing over the baby,surrogate mother will feel sad .But when one's daughter marries ,the kind of situation occurs.Their daughter is their responsibility for eighteen years, then have to give her up but one still remain responsible for anything that goes wrong. At least with the child born from surrogacy, surrogate mother won't be responsible once she handed over the baby.She will be more happy that the person who takes her will send her to school, college, pamper her much more than she could.

38 *See supra* n.7 at 987.

39 *See supra* n .23 at 299.

40 *Id.* at 301,302.

society often based on patriarchal norms.[41] What Pandey observed is appropriate which states that;

> Stigmatized nature of the work also very concretely disadvantages them and makes the arrangement in the current form socially undesirable. Yet the norms that are transgressed, such as the restriction of reproduction within patriarchal institutions and the assignment of gender roles, specifically those of women, are also not socially desirable. The burden of social disapproval, strained personal relations, and other difficulties arising from engaging in surrogacy means that this is a highly restricted and 'risky' option, chosen only by those who are disadvantaged and marginalized.[42]

Doctors who encourages surrogacy sees that commercial surrogacy which give benefits to everyone. Women who become surrogate is paid more money than she could earn in her entire life time. Couples who are infertile gets a child through it. People who never experience infertility or poverty can easily say commercial surrogacy is exploitation. But it is actually a service which changes peoples lives for the better. Dr.Nayana Patel characterizes surrogacy work as a legitimate choice for some women who is in extreme demand of money. whether society approves it or not, poor women will do it just as they work as housemainds or servants.[43] To her ,it should not be socially stigmatized. Along with the surrogates' narratives of their poverty and helplessness, it is also

41 *See supra* n.10 at 131.

42 *Ibid.*.

43 Dunabar, polly, 'Wombs to Rent' Childless British Couple Pay Indian Women to Carry their Babies". Daily Mail (Dec. 8, 2007) accessed at *http;//dailymail.co.uk* on 2/4/2013.On a telephonic conversation to Nayana patel dated 10.5.2014 ,she states that surrogacy is a matter of women empowerment and enhancement of feminine power.Here one women helps another needy women to get a baby and rewarded for that.There is no need of criticizing her or the act.It is a legitimate choice of her to survive with a noble cause.

important to examine their decision to undertake surrogacy within the larger context of women's work. Indian women are getting ready for surrogacy as a means of their survival.There is a BBC news that a British couple are to become parents of two sets of twin babies carried by two Indian surrogate women they have never met. Experts say siblings - or children born to separate surrogates but created from the same batch of embryos - are not uncommon in India.[44] An article titled "moms on the market"[45] highlights the rates and figures regarding surrogacy arrangements. Article states that from being a centre of cheap reproductive labour,India is now virtually a surrogacy supermarket where deals are available off the shelf and bonuses are thrown in for good measure.Surrogate mother charges Rupees 1,00000 to Rupees 350000 which varies from city to cities.Specific demands can be forwarded for surrogate women by the Couples who intends to commission surrogacy. *IVF* procedure costs normally are around Rupees 66000 which include 3-4 embryo transfer attempts.Egg donors (Indian)of highly qualified,fair ladies can demand 50,000 for donation.Egg donor of foreign country can demand upto Rupees 180000.To handle complications of twin pregnancy, Rupees 1,35000 can be added to the package.Hiring a second surrogate will add Rupees 4 lakhs extra cost.If both surrogates get pregnant and fetal reduction is needed,extra cost will be there in the package.Surrogate women will get additional Rupees 2000-3000 for food.Some gets cloths ,gifts from the commissioned parents for her own children.Other add-ones like spa

44 *http://www.bbc.co.uk* accessed on Oct 31 2013.

45 Hindustan times, 2011,March 13 cited in Anil&Renjith Malhothra,*Surrogacy in India* (1st ed.,2013) p. 50.

packages,Agra tours can also be there .[46]Surrogacy brings the traditionally domestic activity of giving birth to a child into the realm of the market.[47] Whether one deny or not deny,Surrogacy segment in India is developing with new biological possibilities.Imposing stringent restrictions on the practice alone can make the condition of surrogate women better from mere exploitation. They should not be excluded from the society for what they did in surrogacy because it should be broadly viewed as their choice in extreme situations which at least bring a new life to those who were infertiles.

9.8 NEW INDIAN MEDICAL VISA RULES 2012

Foreign nationals intending to visit India for commissioning surrogacy will not be allowed to come on a tourist visa from Nov 1 2012 as per the Home Ministry order on surrogacy.Instances of abuse of surrogacy is being traced by the Ministry. The order states that Tourist visa will not be not the appropriate visa category, appropriate visa category will be a medical visa .Such foreigners who were not fulfilling new medical visa criteria will be liable for action for violation of visa conditions.The Ministry is of the view that visa criteria is necessary in such cases to ensure that the surrogate mother is not cheated and therefore, such a visa may only be granted if certain conditions are fulfilled.[48]

46 *Ibid.*

47 *See supra* n .8 at 55.

48 Notification No :25022/74/2011 dated 9 July 2012 .As per the New Draft Assisted Reproductive Technology (Regulation) Bill 2014,the surrogacy is restricted to Indian infertile couples and Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen.

9.8.1 Conditions for granting Medical visa for foreign nationals for commissioning surrogacy[49]

i The foreign man and woman are duly married and that marriage has sustained atleast for two years

ii. A letter from the embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed with the visa application stating clearly that;

a the country recognises surrogacy ; and

b the child/ children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/ children of the commissioning couple.

iii The couple will have to furnish an undertaking that they would take care of the child/ children born through surrogacy.

iv The treatment should be done only at one of the registered Assisted Reproductive Treatment (ART) clinics recognised by ICMR.

v The couple should produce a duly notarised agreement between the applicant couple and the prospective Indian surrogate mother.If any of the above conditions are not fulfilled, the visa application shall be rejected.

49 *See http://indiatoday.intoday* ,Oct 30 2013.

vi Before the grant of visa, the foreign couple need to be told that before leaving India for their return journey,"exit" permission from the Foreigner Regional Registration Offices is required.[50]Before granting "exit", the FRRO/ FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child/ children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement.

vii A copy of the birth certificate(s) of the surrogate child/children will be retained by the FRRO/ FRO along with photocopies of the passport and visa of the foreign parents.

viii It is also stated that ,for drawing up and executing the agreement cited above at condition (v) , the foreign couple can be permitted to visit India on a reconnaissance trip on tourist visa,but no samples may be given to any clinic during such preliminary visit.

ix If the listed conditions are not fulfilled,visa application shall get rejected.

The order is a part of a broad government effort to regulate India's growing wombs-for-rent industry also require egg donors to seek medical visas while their companions would require medical attendant visas. This sort of efforts can be helpful to avoid negative effects of reproductive tourism.The visa

50 *See http://indiatoday.intoday* ,Oct 30 2013. *See also*, Anil&Renjith Malhothra, *supra* n.45 at pp. 41-42.

regulations will make new compulsory changes in the surrogacy arrangements.The recent move of the Government through New Draft Assisted Reproductive Technology (Regulation) Bill 2014 which is going to restrict to Indian infertile couples and Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen is promising which can make tremendous changes in the commercial surrogacy industry flourishing in India.Through Draft Assisted Reproductive Technology (Regulation) Bill 2014,restrictions as well as conditions be imposed on foreign surrogacy clients.[51] The provisions insisted that Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen, commissioning surrogacy in India shall —

(i) be married and the marriage should have sustained at least for two years;

(ii) submit a certificate conveying that the woman is unable to conceive their own child and the certificate shall be attested by the appropriate government authority of that country.

iii) appoint a local guardian who shall be legally responsible for taking care of the surrogate during and after the pregnancy, till the child or children are delivered to the commissioning couple or the local guardian;

(iv) insure the child or children born through the surrogacy, at the time of signing the agreement, till the age of twenty-one years or till the time of

51 *See*, Section 60(21)a (i)-(v) of Assisted Reproductive Technology (Regulation) Bill 2014.

custody of the child or children is taken through appropriate Insurance Policy like Jeevan Balya, whichever is earlier, for wellbeing and maintenance of the child or children[52]

(v) use at least one gamete of their own in creation of the embryos

These sort of restrictions are promising for the future surrogacy arrangements in India and It is submitted here that adequate restrictions on surrogacy only be possible and practical than total prohibition which may shut door to the hopes and aspirations of genuine couples.

9.9 CONCLUSION

India is the country which took the bold step towards commercial surrogacy and it will not be surprising that the cases of surrogacy will become common among Indian society within a dacade.While evaluating the socio economic background of surrogate women ,it is clear that the option gives some monetary benefit to her which is not possible from daily wages.But root of the problem is much deeper.It imposes the structural injustices which compel marginalized women to go for surrogacy as a survival strategy.Deep concern to be raised regarding the surrogates' place in the arrangement, their ability to negotiate the terms of the arrangement and to control the ways in which they are remunerated as well as the actual control over the earnings.[53]

52 *Ibid.*

53 *See supra* n.8 at 11.

Lack of capacity of Indian law to address the commercial surrogacy as well as the regulatory mode is the crucial factor to dealt with.Indian Government is promoting medical tourism as it is an income generator as tax revenue and contributed much to economic growth.Legal regulation of commercial surrogacy industry in India is an urgent move which is to be taken by the Government itself.Terms of surrogacy agreement should be legally identified.Empowering surrogates to dictate that terms would be beneficial.[54]This approach has the potential to validate surrogates' autonomy and decisional capacity while safeguarding women from discriminatory as well as exploitative practices. Strict regulations alone can protect the rights of surrogates thereby reduce injustices towards her in the name of surrogacy.

54 *See generally supra* n.5.

CHAPTER 10

SURROGACY ARRANGEMENTS:COMPARATIVE ANALYSIS

Surrogacy arrangements are of international concern as infertility is a common problem for all over the world.The demand for these arrangements are enormous and surrogacy industry is flourishing in developing countries like India. There is no dispute in the matter that without regulating the surrogacy industry,increased chances of exploitation and harmful consequences only can be traced in every countries. To analyse the situation of other countries of the world regarding surrogacy,a very brief evaluation of their legislative policies as well as frameworks is being attempted here.

10.1 LEGALIZING SURROGACY: DIFFERENT STANDS

Countries have different legislative policies for surrogacy. For example; Italy banned both commercial and non commercial surrogacy with the legislation on medically assisted reproduction law. Italy is a highly religious (most predominantly catholic country) with a more conservative view.[1]Argentina demands a case by case analysis to be completed by a special committee to determine whether IVF surrogacy needs to be allowed.[2] In United Kingdom, Human Fertilization and Embryology Authority prohibits cash payments to

1 F simonstien ,"Pressures on Women to Reproduce and the Drive towards ARTS",(2006) 25 Me*d&L* 355,359

2 Ruby L.Lee, "New Trends in Global Sourcing of Commercial Surrogacy –A Call for Regulation", (2009)20 *Hasting women's L.J* 275,277

surrogacy but allows reasonable expenses payments to the surrogate.[3]Denmark also legalized non commercial surrogacy like, United Kingdom. In United States,there is no federal policy for surrogacy and regulation is the duty of states. Different regulations of United States can be divided in to four. Prohibition, inaction, status regulation and contractual ordering.[4] In Canada,through Assisted Human reproduction Act 2004 ,commercial form of surrogacy is prohibited. Israel Surrogate motherhood agreement Act 1996 is a most comprehensive piece of legislation which makes the arrangement –legal, remunerated and government supervised.It permits gestational surrogacy and surrogate women should not be a relative to avoid familial pressure and to avoid subsequent complications within the family.The legislation provides for an approval committee which supervises the agreement for surrogacy and pre approve the process. A seven member committee including doctors lawyer psychologists. She has to be single or divorced.The legislation also covers health insurance plans for surrogate mother.

10.1.1 Surrogacy in EU and Non EU Countries-An analysis

There is a report on Surrogacy in EU Countries [5] which clearly states the situation in EU member states.A brief outline of surrogacy in non member states

3 *See* Human Fertilization and Embryology Authority Act 2008

4 Radhika Rao ," Surrogacy Law in United Sates: The Outcome of Ambivalence" in Rachel Cook et al,*Surrogate Motherhood-International Perspectives* (1sted.,2003) p.23

5 Report of Policy Department C: Citizens' Rights and Constitutional Affairs ,A Comparative Study on the Regime of Surrogacy in EU Member States(2013) accessed at *http://www.europarl.europa.eu* accessed on 23/8/2014

also enumerated in the report. Table 5 and 6 of the report briefly states the situation of both EU and non EU Countries which has been enumerated below.

10.1.1.1 Surrogacy in European Union Member States(EU Countries)

Belgium: There is no express provision in Belgian law for surrogacy.But there exists four legislative proposals which have been tabled for discussion at parliamentary assemblies.[6]

Bulgaria: There is a general legal prohibition against surrogacy in Bulgaria. Draft legislation has been considered by parliament.[7]

Greece: Greece has a legislative framework for altruistic gestational surrogacy involving judicial pre-approval of the surrogacy agreement, which is then enforceable while a number of restrictions apply.The aim of the legislation is to provide a comprehensive and facilitative framework for altruistic gestational surrogacy.[8]

Ireland : There is no express provision in Irish law for surrogacy. But formal guidelines relating to citizenship and cross-border surrogacy arrangements have been published by the Minister for Justice, Equality and Defence.[9]

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6 As far as the present situation is concerned,altruistic surrogacy is permitted in Belgium whereas commercial surrogacy is not permitted

7 In Bulgaria,surrogacy is illegally existing and widely used term for surrogate women is "substitute women".Regulation of surrogacy is intended by the legislatures as it took steps to amend the related health laws.

8 *Supra* n.5

9 *Ibid*

Netherlands : There is no express provision in Dutch law for surrogacy. But Since 1998, fertility clinics that provide IVF for surrogacy arrangements have been legally required to abide by the professional regulations of the Dutch Society for Obstetrics and Gynaecology.[10]

United Kingdom : The UK has two pieces of legislation on surrogacy. The Surrogacy Arrangements Act 1985 makes it clear that surrogacy contracts are not enforceable and criminalises certain activities relating to commercial surrogacy. The 'Parental Order' provisions in the Human Fertilisation and Embryology Act 2008 allow for the transfer of legal parenthood from the surrogate mother (and father) to the intended parents. The Home Office had also published guidelines on immigration and cross-border surrogacy.[11]

10.1.1.2 Surrogacy in European Union Non Member States (Non EU Countries)

Australia: Surrogacy is legally regulated at the state rather than federal level in Australia. Most states have recently enacted legislation which places restrictions on the practice of surrogacy and facilitates the post-birth transfer of legal parenthood to the intended parent(s), subject to certain conditions.[12]

Russia: Russia is regarded as having one of the most permissive surrogacy regimes. This is due to the eligibility requirements being fairly relaxed (the main restriction being that the intended mother has to have some sort of medical

10 *Ibid*
11 *Ibid*
12 States like Queensland& Tasmania ,all surrogacy contracts are void whereas in Victoria and NewSouth wales permits altruistic surrogacy only.

condition which prevents her from carrying a pregnancy to term) and the fact that the intended parents can be registered as the child's legal parents from birth. Also, both altruistic and commercial surrogacies are permitted under the Family Code of Russia (articles 51-54). However, there are two other important restrictions in the Russian legal framework: the surrogate mother must not also be the genetic mother of the child (i.e. only gestational surrogacy agreements fall under the legal framework)and she should give consent to the registration of the intended parent(s) as the legal parent(s) of the child.[13]

South Africa: South Africa introduced a court approval procedure for surrogacy agreements. This is similar to the legal framework in Greece.There are various restrictions (e.g. arrangements should be altruistic rather than commercial, domicile requirements, eligibility criteria for the surrogate mother, and sometimes a genetic connection is required between the intended parent(s) and the child but in some circumstances the intended parent(s) can be recognised as the child's legal parent(s) from the moment of birth and single persons and same-sex couples are not excluded. The High Court has also issued guidance on when surrogacy agreements will be validated.[14]

Unites States: Several states in the US expressly regulate surrogacy, to include permitting commercial surrogacy and providing for the intended parent(s) to be

13 *Supra* n.5
14 *Ibid*

the legal parent(s) from the moment of birth.Some other states in US prohibits or penalize the same.[15]

Illinois: The legislation of Illinois sets out the terms of legally valid gestational surrogacy agreements. Under the Illinois legislation, legal parenthood can be framed prior to the child's birth, so that the intended parents are the legal parents upon the child's birth. This makes the Illinois legislation similar to the legal frameworks in Greece and South Africa. But this legislation is different in pre approval criteria of Greece and South Africa as the court of Illinois does not have a pre-approval role. Here lawyers are charged for ensuring that all the criteria be satisfied in the particular surrogacy agreement. Thereby Illinois provides a further comparative dimension to the legislative case studies.[16]

10.2 LEGALITY OF SURROGATE AGREEMENTS IN U.S.A AND U.K

Commercial surrogacy arrangements are not enforceable in England as per the surrogacy arrangements Act 1985.[17]It is illegal to pay more than the expenses

15 *See infra* n.20

16 S*upra* n.5

17 S.2 -(1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is
(a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,
(b) offer or agree to negotiate the making of a surrogacy arrangement, or
(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements ; and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.
(2) A person who contravenes subsection (1) above is guilty of an offence ; but it is not a contravention of that subsection-
(a) for a woman, with a view to becoming a surrogate mother herself, to do any act mentioned in that subsection or to cause such an act to be done, or
(b) for any person, with a view to a surrogate mother carrying a child for him, to do such an act or to cause such an act to be done.
(3) For the purposes of this section, a person does an act on a commercial basis (subject to subsection (4) below) if--
(a) any payment is at any time received by himself or another in respect of it, or

for surrogacy if relationship is recognized under Human Fertilization and Embryology Act 1990,In USA, surrogacy is under state jurisdiction and some states recognizes both altruistic and commercial surrogacy and enforces those contracts[18] while some simply refuses them[19]. There are states that: (1) hold surrogacy agreements valid and enforceable, (2) have unclear statutes but favorable case law, (3) explicitly allow surrogacy agreements but regulate the market, (4) have unclear statutes and no case law, (5) hold surrogacy agreements void and unenforceable, and (6) prohibit and/or penalize individuals entering such agreements, sometimes under threat of heavy fines and jail time. Most states fall in the middle, and most do not have statutes that address the validity or legality of surrogacy contracts.[20]Nonenforceability of Surrogacy Contracts in U.K and U.S.A and legal complexities met out there,India became a favourable destination to the foreigners because of the lack of regulation of surrogacy sector,cheap medical expenses comparatively and readily availability of poor Indian surrogates.

10.3 LEGALIZING SURROGACY –CRUCIAL CONCERNS

In order to balance the surrogacy industry, the legislatures have to factor its legal concerns. These concerns include issues like whether it is appropriate for a woman to take compensation for their reproductive service or free market

(b) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement

18 Example:California,Illinois.

19 Example:North Carolina,Michigan,Newyork

20 *See* Magdalina Gugucheva,"Surrogacy in America"(2010) accessed at *http://www.council forres ponsiblegenetics.org* on 20/8/2012.For example,in Newzeland,there is no specific legislation on surrogacy.Although in 1998,Government introduced Assisted Human reproduction Bill yet to be passed.

availability consequences. Another complication is conflicting laws among foreign countries.Issues with conflicting laws does not end between states in fact the issue has worldwide complications because law vary between countries[21]."With the increasing demand for surrogate mothers in all countries, it is necessary to implement a uniform regulation ….to avoid situation like these where parties attempt to "foreign shop" between states and countries that have the least restrictions and that leave the children and the parties without adequate security in the laws."[22]While regulating it,legislature should ensure effective protection of the rights of the parties involved as well as fixing of their liability for these arrangements.

10.4 CONFLICTING HEALTH CARE POLICIES

Regulation of surrogacy also should incorporate health care plans .Israel model regulation is welcomed. In Israel, all citizen of Israel are entitled to basic package of benefits under the national health insurance law. It covers IVF treatments for married and single women for up to two births.[23] There is no restriction for number of cycles until 2 births are accrued. This may lead to widespread acceptance of ART & surrogacy and Israeli system portals all those involved in the surrogacy process from its potential effects. Israeli law recognize genetic mother as legal mother and there is no need for legal adoption.In India

21 Cara luckey, " Commercial surrogacy : Is Regulation Necessary to Manage the Industry", (2011) 26(2) *Wis. Journal of law, gender and society* 213,220.*See also*, *Jane Balaz* v. *Anand Municipality*,AIR 2010 Guj 21 where parents of the children were germen but they are unable to get passport became Germany does not recognize.

22 *See id.* Surrogacy as a type of parenthood.

23 Ellen Waldman ,"Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel ,(2006)16 *health matrix* 65,82

also,the legislation should cover these sort of health care plans which can protect the parties involved from its potential drawbacks relating to health.

10.5 CONCLUSION

In a nutshell, States are having different legislative insights towards the surrogacy arrangements.But all the policies promoted gestational surrogacy only.Validation of the gestational surrogacy agreements are done with respect to their motive,i.e. whether they are altruistic or commercial.Some permits altruistic surrogacy while some prohibits all forms of surrogacy.Some permits surrogacy with limited circumstances but makes commercial surrogacy a criminal offence.India should incorporate positive features of the international legislations on surrogacy as India is the country which bravely going for legalizing both forms of surrogacy.India now incorporated strict frameworks on surrogacy (Draft Assisted Reproductive Technology (Regulation) Bill 2014 incorporated some crucial changes) especially for foreign surrogacy otherwise, whether genuine or nongenuine people, may come for surrogacy in India for the reason that their country forbids the same.It is to be noted that Indian surrogacy industry is not for nongenuine clients. It should be for genuine infertile couples who had waited for a long time to have a baby and incapable to have it due to physical or medical incapability. Indian surrogate women are not an instrument for delivery and to get abandoned after the process.They should be viewed much broadly as their sacrifice is more in the arrangement to give effect to the hopes of the needy infertile couples which cannot be underestimated or degraded merely in terms of money.Adopting the positive features of

international surrogacy legislations into the features of Indian legislation on Surrogacy with adequate control mechanism formulating stringent rules can make the surrogacy practices in India much better and less exploitative.

CHAPTER 11

CONCLUSION AND SUGGESTIONS

A woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom - develop her personality to the full – as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

Lord Denning[1]

Women are often termed as icons of motherhood. She is always postured as creators of life and a sense of responsibility is vested in her by the entire society as her role in family leads to transformations as it is the primary unit of society. Society links her to the role of mother rather than an individual human being and the concept of motherhood always gives additional respect to a women.[2] Women's role in parenting most often constrains their ability to pursue careers and live an ambitious life in a perfect sense. Feminist jurisprudence scholars contended that if women gain control of their reproductive capacities, she will have made an essential first step in gaining the prominent control over their bodies and their destiny.[3]

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1 Lord Denning,*Due process of Law*(1st ed.,1980)pp.194-195

2 *Supra* p.4.

3 *Supra* p.5.

It is a clear fact that overall development of the world is based upon the notion of gender justice. Creation and maintenance of non discriminatory gender sensitive atmosphere has got more prominence. As it is the biological peculiarity of women to reproduce she should get ultimate procreative choice unwarranted from individual as well as states intervention except under very limited circumstances. The notion of reproductive autonomy is understood as the right of women to get choice in reproduction,that is, whether to get pregnant or not,and also to determine number,spacing and partner.That choice of women in reproduction involves controversial unending questions that needs an exact response. Right to reproduce implies more than a duty not to interfere with existing capacities and actually includes the duty not to force reproduction in the same way as not enforcing nonreproduction.[4] Choice in reproduction is ultimately a personal issue rather a public one.[5]

The concept of female reproductive autonomy should be considered in a much more broad spectrum of rights which enable every women to have her freedom to determine what to be done with her body subjected to limited genuine restrictions on her right to abortion,contraception and also to seek the aid of ART which otherwise will decline her right to privacy.The great challenge lies on the recognition of female reproductive autonomy in a justifiable and balancing sense without underestimating or weakening her right to bodily integrity and freedom of choice.[6]

4 *Supra* pp.2,5&10.

5 *Supra* p.13.

6 *Supra* pp.3&23.

Justification to delay reproduction or involuntary childlessness can be different from women to women. In matrimonial affairs, female partners decision to not to get pregnant can be a ground for matrimonial cruelty to a husband who desires to have offspring. On other hand wife decision to keep baby and partner wants an abortion also leads to cruelty conflicts. Pregnancy indisputably takes in women's body. She suffers all pains and invasions all the discomfort and burdens as well as medical risk to the health. So compelled continuation of the pregnancy or compelled discontinuation of pregnancy, both are a negation of her fundamental right to reproductive autonomy. Some restriction can be imposed on her right under familial grounds(emphasizing partners right to have a child) complete autonomy over reproduction cannot be possible for a women so far increased autonomy can be ensured.[7]

Women are faced with new hopes as well as possibilities through the emergence of ART. ART emphasizes the presupposition that the concept of procreation has got great prominence in every society. Women who are infertile are often socially humiliated as well as criticized although men can be sterile. Married women often charged for infertility if they did not pregnant in initial year's marriage. Infertility is major life crisis and also a haunting experience for those who face it.[8]

Right to reproduce is a concept which need to be viewed broadly as it extends to right to produce with the assistance of technology. Infertility is not a

7 *Supra* pp.13,15.

8 *Supra* p.38.

curse under ART. ART makes a new potential for having several choices for women. Women can cryopreserve their gametes, thereby they can use it in future. ART helps those who are delaying child birth due to various reasons such as education, career opportunities etc can keep their gametes stored for few years and use it later when they desire a baby.Studies have revealed that woman who have sufficient knowledge of ART exercise more reproductive autonomy in their life .ART can protect both her procreative freedom as well as choice.[9]One has to carefully analyse the effects of ARTs on women as it may influence each and every stage of her life assigning new frontiers of rights as well as obligations.

Infertility can be a major life crisis for those who are experiencing it .ART should not have got such popularity if there is such a social pressure to be a mother. ART includes so many medical procedure such as AI, *IVF* most commonly and other distinct techniques in combination such as ICSI ,embryo freezing etc.[10] Surrogacy can be a conjunction of these methods and a third party inference is prominent in surrogacy arrangements as it aided a surrogate women .

Every one wish to have a biological child of one's own gene. If one is incapable to have it normally, they want it with the aid of ART as they feels genetic claim is more safe than going for an adoption . ART should be viewed positively helping women to have more choice in reproductive rather than making herself to be subordinate to the control of society which consider her

9 *Supra* pp.20,24.

10 *Supra* p.40.

through their reproductive capacities.[11] Although ART is severely criticized for its unnaturalness,there is no doubt in its postiveness towards the society. ART had widend option of women in procreation and not at all an antifeminist one.[12]It is not to be criticized as reinforcing women's primary role as to produce but to be viewed more broadly as it prevents women to live in an emotionally haunting experience. If a woman wishes to have a child, but physically incapable to conceive can get the aid of ART. If she is not worried on that infertility aspect of her life, she can avoid ART. It is her personal decision to have child or not to have. ART has a potential to liberate women with strict regulations on its application level.[13]

As for as the issue on health in ART techniques field is concerned, there is a dependency on variety of factors. Women's health is interrelated to so many factors. It should be viewed both in a gender perspective as well as on a non discriminatory base.[14] In ART,a woman may undergo ovarian stimulation and egg retrieval for many of ART treatments.Employement of fertility drugs to women in ART is a common thing but there is also indicated that the use of fertility drugs may lead to an increased risk of hormone-dependent cancers—in particular, breast, ovarian, and uterine (endometrial) cancers. World is witnessing dramatic developments in the technological era and ideology of ART is a bold move. Fundamental questions on their safety and health hazards should

11 *Supra* p.11.

12 *Supra* p.56.

13 *Ibid.*

14 *Supra* p.64.

be effectively analyzed and communicated to the patients involved in ART. Greater attention should be given to that communication that can significantly change the collective social thinking over it.[15] In order to establish her(Women involved in ART) rights as well as obligations, while formulating all the responses and paradigms regarding ART & Women's health ,a feminine approach is to be welcomed.It alone can wipe the tears of women involved in the process effectively.[16]

Surrogacy is a method of reproduction whereby a woman consents to become pregnant for the purpose of gestating and giving birth to a child and hand over that child to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be a carrier of that child in her womb to delivery after having been implanted with an embryo. Every Legislation dealing with surrogacy issue in the world promotes for gestational surrogacy where surrogate egg is not used.She only carries the baby which does not have a genetic link of her. In surrogacy arrangements,the surrogate is expected to be a disciplined contract worker who will give the baby away immediately after delivery without creating disputes.At the same time she must be a a nurturing mother attached to the baby and a selfless mother who will not treat surrogacy like a business.This is a complicated mother-worker combination which exists in surrogacy transactions.[17] It provides a noble service that should be respected and honoured. She helps in the creation of life, bringing into the

15 *Supra* pp.69-71.

16 *Supra* p.77.

17 *Supra* pp.230,231.

world a child who otherwise would not exist in the world.She also helps the infertile couples to feel better with that baby. Legislature should not be hesitated to respond to the technological needs as it is necessary for the time being. Sufficient checks and guidelines to avoid malpractice in the arena can make the system more hazardless to the entire parties involved in the surrogacy process.[18]

While evaluating the validity aspect of surrogacy agreement,prior legal issue surrounding the arrangements is its legal enforceability. As far the provisions of Indian Contract Act is concerned, nothing prohibits the same .An agreement enforceable by law is a contract.[19] It states that all agreements are contracts if they are made by free consent of the parties competent to contract, for a lawful consideration and with a lawful object and not expressly declared to be void by law. In that sense , surrogacy arrangement are not prohibited by Indian law, it is made with free consent of competing parties with a lawful object (noble use of reproductive capacity of one women for an infertile women) and thus legally enforceable under law. Attack on surrogacy arrangements by the public policy issue is also should not stand. It does not have immoral objectives.[20] Criteria for what amounts to public policy is also varying from time to time. Committees like Warnock, commended that it is risky under taking and doubted as it violates public policy. There is no strong basis to attack it as the grounds of public policy.[21] Judicial pronouncement regarding it is also

18 *Supra* p.248.

19 *Supra* pp.137,138.

20 *Supra* p.139.

21 *Supra* pp.142,143.

fluctuating. In *Baby Manji case* as well as *Jane Balaz Case*, Honourable Court did not rendered such arrangements as illegal one.[22]

Surrogacy arrangements always poses legal and constitutional questions. State cannot deny any person to aid treatments of ART as it is a matter of reproductive autonomy and also comes with in the right to procreate which is a fact of right to privacy under Art 21.[23] As far as the issue of Art 23 is concerned ,surrogacy should not be equated to mere selling and buying of children. It should be considered nongenuine as the child is the most desired one it the transaction and intended parents are donating their sperm or ovum (some times donors) and waiting for the arrival of the baby with prayers. Baby is made of at least one of their gametes most probably and it is not like a commercial transaction or market mechanism.[24]But it should not be viewed like any occupation, trade or business. It is just an arrangement between parties and should not be like on occupation which makes whenever need come ,do it like a job.[25]Chances of forceful surrogacy and trafficking should be eliminated with a strict regulation.

In India there is no legal impediment to surrogacy as there is no existing law in India prohibits the same. March of the technology cannot be stopped, a legislation which respond sufficiently to the technological needs is necessary for

22 *Supra* p.144.

23 *Supra* p.117.

24 *Supra* p.128.

25 *Supra* p.131.

the time being.[26] Although India have Law commission of India(Report No.228) on "Need for legislation to regulate Assisted Reproductive Technology clinics as well as rights and obligations of parties to surrogacy"(2009),The Indian Council of Medical Research (ICMR) guidelines for accreditation, supervision and regulation of ART clinics 2005 and Draft Assisted Reproductive Technology (Regulation) Bill 2014 , a strict surrogacy monitoring law is in urgent need. Draft Assisted Reproductive Technology (Regulation) Bill 2014 restricts Surrogacy for foreigners in India. But Bill allows surrogacy permissible to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen.This is a welcoming move to retard the flow of unnecessary and non genuine cases. The process of surrogacy becomes more transparent when it legalized with strict legislation. Otherwise poor will get exploited for rich without getting adequate financial support. Parties involving the surrogacy can get their rights redressal of grievances only when the process gets legalized.[27]

The global tendency to come to India for reproductive outsourcing is a harsh reality which India now facing.[28] Major reasons which have made India a 'destination' for surrogate mothers can be grouped into four.1) Customers get relatively lower cost effective treatment for infertility as well as for surrogacy arrangements. 2) There is a growing demand for fair skinned, healthy young

26 *Supra* p.157.

27 *Supra* p.206.

28 *Supra* p.219.

women of India among foreign couples.3)Greater availability of surrogate mothers in India due to variety of reasons such as poverty, unemployment etc. 4) Lack of legislation for regulating surrogacy in India.For these reasons,there is a wide entry of foreigners and India became now a ' surrogacy hub'.[29]

A sensitive approach to commercial surrogacy work is needed. Surrogacy is a product of poverty, unemployment which compels them to take the decision to become a surrogate.They should not be blamed for it as it is a survival tool for overcoming their hardships. Empowering surrogates to analyse and suggest the comfortable terms to the agreement for surrogacy should be encouraged.This has the potential to validate surrogates autonomy and decisional capacity while safeguarding women from discriminatory as well as exploitative practices. Strict regulations alone can protect the rights of surrogates.[30]

The Indian ministry started imposing restriction on foreign surrogacy clients by making condition of medical visa in 2012 which has limited surrogacy to only married couples can avoid gay couples to come for India. This order made needy infertile couple to get a baby through surrogacy arrangements which can avoid rash sense of reproductive tourism via surrogacy in India.Through Draft Assisted Reproductive Technology (Regulation) Bill 2014 ,Surrogacy in India is permitted to Indian infertile couples, Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen.New changes can be made appropriately

29 *Supra* p.227.

30 *Supra* p.248.

in surrogacy arrangement.Strict restrictions alone can be practical than total prohibition. Indian surrogacy laws should be capable to contribute towards justice. An ample legislation with crystal clear provisions alone can make system better.[31]Surrogacy arrangement involves lots of conflicting of interest. Surrogate mother ,commissioning parents, baby born out of it ,donors who donate their gametes etc. Balancing of competing interests of one another is a critical task. During the complex interplay of rights ,issue of surrogacy will go on. It is like a cobweb which leads to complicated issues which is to be dealt effectively. As far as the right of parties are concerned, surrogate women is less protected and more exploited party among others. Clearly formulating of her right by fixing of adequate compensatory measures and liabilities are yet to come which can create things less disputing. [32]

A complicated factor which is to be addressed effectively about the commercial surrogacy industry is the lack of capacity in current Indian law to address emerging issues.[33] Surrogacy is not going to go away, and as such it is important that steps are taken to protect the vulnerable parties involved.In the present state of biomedical technology,surrogate arrangements are the only alternative to infertility, other than adoption.[34] It is not disputing that the process of surrogacy involves conflicts of interest a plethora of complicated questions but mere disregarding of the process by totally prohibiting it may make process

31 *Supra* p.224.

32 *Supra* p.184.

33 *Supra* p.248.

34 *Supra* p.184.

even more complicated.[35] There can be extreme cases where surrogacy remains a last option. For example, if a mother lost her son through road accident ,later she wants a child which can bring light to their life but physically incapable to gestate due to hysterectomy or other similar issues but having healthy gametes can commission surrogacy for which no one can blame her. A couple who already had a child opts for surrogacy due to lack of interest to get pregnant and deliver or recognizing it is an easier method than delivery, that practice can be discouraged.[36] If any body incapable to have a baby by natural means can seek the assistance of ART . ART often criticised for its cost factor as well as failure rate but every treatment will have expenses. Major object is to create a new life and that concern should be viewed broadly as it is treatment to cure biological incapability to have a child should be criticized vice versa only.[37] Commercial surrogacy industry is a moving towards developing countries as there is acute need of money for the people to survive. International surrogacy is rapidly flourishing as the cost in foreign countries more than countries in India.[38]India now became a reproductive tourism industry which estimated Indian rupee 25000 cores and in every sphere there are flourishing of ART clinics. Changing faces of law is now going to use a new rent a womb-law as India is getting ready to legalize surrogacy. The incidents like *Babe 101* reveals the exploitation

35 *Supra* pp.147,148.

36 *Supra* p.226.

37 *Supra* p.243.

38 *Supra* p.232

aspect of commercial surrogacy in other developing countries like Thailand, Colombia, and Vietnam .In India, surrogacy is a survival strategy of many women. They cannot be stigmatized as it is a survival tool for their hardship.[39] Mere banning of commercial surrogacy is not a wise option as it makes black markets to flourish and leads to more exploitation of poor surrogates. A positive thing to be noticed is that reproductive labor here valued which otherwise noticed as biological function only.[40] Imposing strict restriction on the practice alone can make the system less exploitative. Surrogate women should be rewarded for their deed as they bring a new life to those who were infertiles.[41]

Chances of exploitation is often reminded by the critics about the children born out of the surrogacy transaction. Commercial surrogacy and making children a commodity is doubted by the Warnock report[42] as well as Brazier reports.[43] However exploitation itself as such is not a crime , it is not clear that commercial surrogate motherhood should be made illegal because of its supposed exploitative nature.[44]Reports like Brazier report commended that there is a need of growing body of research on the psychological development of children conceived by assisted reproduction suggesting that the quality of parenting in such families is good and that the children themselves are

39 *Supra* p.235.

40 *Supra* p.238.

41 *Supra* p.247.

42 *Supra* p.140,167.

43 *Supra* p.168.

44 *Ibid.*

functioning well, whether or not donated gametes had been used in the child's conception.[45]

If a market mechanism occurs for getting a child,it clearly fosters and generates a demand for product quality. The commissioning parents pay huge amount of money may reject the baby if it is having some physical or mental disability.But that sort of rejection should not be permitted as they are completely responsible for the child as per the surrogacy agreement.Complete liability to look after the child should be conferred on them by legislation to avoid future conflicts.[46]

In its final remarks, Report of Law Commission of India (2009) stated ;

> Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.[47]This is entirely true and necessity of a legislation which clearly formulates the rights and liabilities of parties are in urgent need.

45 *Supra* p.168.

46 *Supra* p.172.

47 Para 4.1 of 228th Report of Law commission of India, *supra* p.199.

Assisted Reproductive Technology (Regulation) Bill 2014 like previous Bills recognizes the gestational surrogacy only not the traditional one.[48] Bill deals with the rights and duties of Patients, Donors, Surrogates and Children. The entire provisions are intended to cover the rights and duties of the parties to surrogacy, criterias for a surrogate women, custody and legitimacy of the child, requirement of donor as well as patients in ART, Right to information of baby under surrogacy arrangement etc. Although Bill has some flaws, it seems to be a positive legislation for the entire ART sector.[49]

A far as the international scenario of surrogacy is concerned, Commercial surrogacy arrangements are not enforceable in England as per the surrogacy arrangements Act 1985.[50] It is illegal to pay more than the expenses for surrogacy if relationship is recognized under Human Fertilization and Embryology Act 1990 in U K.[51] In USA ,surrogacy is under state jurisdiction and some states recognizes both altruistic and commercial surrogacy and some prohibits.[52] There are states which prohibits surrogacy and penalize the parties who initiates it. There are also other states which holds a silent view on surrogacy arrangements.[53] In Germany and Italy, all forms of surrogacy got prohibited. States of Australia like Queensland and Tasmania prohibits all forms

48 *Supra* p.215.

49 *Supra* p.218.

50 *Supra* pp.254,255.

51 *Ibid.*

52 *Supra* p.255.

53 *Ibid.*

of surrogacy while Victoria and South Australia permits altruistic surrogacy with limited situations.[54]

Women who involves in the creation of child and upbringing of a child is considered as mother in every society. In law there can be only one mother not, shared mothers. But now advances in reproductive technology seeks a much more broader spectrum for mothers such as gestational mother, genetic mother, etc.[55]In surrogacy arrangement, both roles are significant as one gestates, other upbrings throughout the life(whether genetically similar or not). In *Geetha* v. *Kerala Live stock Board*[56] ,Petitioner who commissioned gestational surrogacy granted maternity leave although she not delivered the baby by stating that there can not be any discrimination but women who got a baby from surrogacy and women of normal means of delivery.[57] It is the essential for the child care also.[58]In *Kalaiselvi* v. *State of Karnataka*[59],Court extended Rule 3 A of Madras Port Trust (leave) Regulation 1987 to a women who commissioned gestational surrogacy services .She does it for financial needs her right to equality right to health, right to live with dignity all should be preserved she makes a life to come on earth and give new life to the hopes and aspirations of infertile couple which itself is a remarkable and noble cause.[60] Delhi High Court in the case of *Rama*

54 *Supra* p.256.

55 *Supra* p.160.

56 W.P.(C)No.20680 of 2014 H.

57 *Supra* p.180

58 *Ibid.*

59 W.P.No.8188 of 2012.

60 *Supra* p.176.

Pandey v. *Union of India & ors*[61] had decided that surrogate mothers and commissioning mothers who have children through surrogacy are entitled to maternity leave, which includes pre- and post-natal period.The Bombay High Court has ruled in *Amisha Girish Ramchandani* v. *Divisional Manager (Personnel Branch) Mumbai CST*[62]that a woman who has attained motherhood through a surrogacy procedure is entitled to six months maternity leave like any other woman. Again in *Dr. Mrs. Hema Vijay Menon* v. *State of Maharashtra & Ors*[63],it was held that a woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Thereby she is entitled to get maternity leave. There can be more litigation on the issue where Indian Law should ready to be equipped with. Advances in reproductive technology forces the judiciary as well as legislature to interpret the words of law with an effective sense for the current needs.[64] Constitution must be interpreted to respond to the actual needs of current time where technology is randomly developing and the concept of motherhood has incorporated new perspectives.[65] It is appropriate to quote Para 2 of the case *Geetha* v. *Kerala Livestock Development Board*

> For Robert Brown all love begins and ends with motherhood, by which a woman plays the God. Glorious it is as the gift of nature, being both sacrosanct and sacrificial, though; now again, science has forced us to alter our perspective of

61 W P(C) No. 844/2014.

62WP No. 1727 of 2015.

63 WP No.3288 of 2015.

64 *Supra* p.182.

65 *Ibid.*

> motherhood. It is no longer one indivisible instinct of mother to bear and bring up a child. With advancement of reproductive science, now, on occasions, the bearer of the seed is a mere vessel, a nursery to sprout, and the sapling is soon transported to some other soil to grow on. Now, it is Law's turn to appreciate the dichotomy of divine duty, the split motherhood.

State should evolve new strategies to regulate technology than suppressing its effects.It should legislate on the subjects like surrogacy rather than remaining silent on it.[66]Unavoidable commodification of reproductive labour occurs in the case of surrogacy but should be viewed in a spirit that it is used to overcome the incapability of a patient to have a baby. The technological innovations in ART cannot be neglected, only thing to demand is strict governmental regulation of reproductive market by making the legislation more adequate and to protect the interest of poor surrogate women, her health and interests.[67]There is a need of right-based legal framework for the surrogate mothers and crystal clear provisions regarding the limits of surrogacy.[68]

Urgent need is to enact a law on ART ,more specifically an exclusive legislation on surrogacy which otherwise can make unregulated flourishing of reproductive tourism via surrogacy in India.[69] Fertility tourism in India has increased via surrogacy.[70] The reproductive segment of the Indian medical

66 *Supra* p.134.

67 *Supra* p.157.

68 *Supra* p.134.

69 *Supra* p.232.

70 *Ibid.*

tourism market is valued at more than $450 million a year.[71] It is better to enact a gestational surrogacy legislation than sticking into ART Bill because a comprehensive statement of rights can be done by a legislation exclusively meant to be for surrogacy .Today, In India ,there is an urgent need to enact a law on surrogacy and extent and parameters of it can be effectively dealt with a comprehensive legislation on it besides Assisted Reproductive Technology (Regulation) Bill.

An adequate legislation with clarity in provision can make the system better and Conflicts of interests of parties involved in surrogacy transaction less disputing.

SUGGESTIONS

Exploitation for surrogacy and the wide range of conflicting interests of parties in the field may pose many difficult questions which should be adequately addressed and suggestive measures to be framed.The entire analysis on the issue of surrogacy has incorporated certain suggestions which can make the system much better.

1 **Strict Surrogacy Monitoring Law**- A strict surrogacy monitoring law having a special authority to pre- approve the process is to be formulated. An exclusive law dealing with surrogacy arrangement along with pre approving authority will be the ultimate remedy. Assisted Reproductive Technology (Regulation) Bill

71 *Supra* p.232.

2014 is a welcoming move but more specific law is needed for surrogacy permitting gestational surrogacy with restrictions as it involves lots of conflicts of interests and third party interference as well as conjunction of techniques of ART which is more than any other methods of assisted reproduction .

Major inadequacies of the Assisted Reproductive Technology (Regulation) Bill 2014.

A Time should be fixed under the Bill:A fixage of time for seeking surrogacy option for all the commissioning parties is required so that after that period only one should seek the service of surrogacy. Assisted Reproductive Technology (Regulation) Bill 2014 mandates that an Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen, commissioning surrogacy in India shall be married and the marriage should have sustained at least for two years.[72]Medical Visa Rules of 2012 also speaks for it.[73]But that fixing of period is not satisfactory as it is a too hurry period. Some may think of being pregnant after one or two years only. Fixing the period as five year to all the commissioning parties would be a justifiable time limit as after one or two years couple may wait for normal pregnancy, then can detect the causes of infertility, trial outcomes,aiding the other services of ART and formulating a conclusion on adequate technique to be employed.It can avoid unnecessary hurry towards surrogacy and may enhance the recourse to other forms of ART if possible.Idea behind the suggestion is that to project

72 *Supra* p.219.

73 *Supra* p.243.

surrogacy as a last thing to resort not an earlier remedy as other ART can be helpful for infertile couples and things can be less exploitative and more proper.

B Issues of Health,Informed Consent,Compensation and Legal assistance. Bill should address the issues of health,informed consent,compensation(fixing minimum) and providing legal assistance to surrogate women while entering in to a surrogacy agreement. Otherwise with an extremely inadequate format for private contract between surrogate women and intended parents which does not communicate the possible health hazards ,appropriate compensation and also without any adequate legal support which can enable her to understand the language and terms of contract ,mere exploitation of surrogate women only will occur.

C Adequate mechanism to deal with Surrogacy agreement. There is no involvement of an adequate mechanism to deal with surrogacy agreement and eligibility scrutiny can be seen in the provisions of the Bill.A provision for surrogacy Boards at state and district level which can have exclusive supervisory and pre-approving power on surrogacy disputes should be included. A designated forum including legal as well as medical experts is to be made mandatory.

D Frequency of Embryo Transfer.Bill permits surrogate women to undergo a maximum of three embryo transfer for the same couple on previous failures of transfers. While making a maximum of three embryo transfer,Bill protects the desires of commissioning parents only.Bill should also incorporate an interval

period between embryo transfers to surrogate women for ensuring her right to health.

2 Expert Team .It is now peek time to frame a dedicated team of experts by the Ministries such as Ministry of Home Affairs and Ministry of family and Health Affair with other legal experts to look after the effects of Commercial surrogacy in India and make a clear cut answer to it.Medical professionals,legal experts as well as sociologists can contribute more to the mission.A progressive and adequate law on surrogacy will enable the process more smoother and less complicated.

3 Convention on Surrogacy.To evaluate solutions for international surrogacy arrangement disputes,right option should be a regulatory framework for it itself.An industry regulation can be taken like a form of convention on surrogacy which also leaves autonomy to individual countries to frame law in accordance with the convention can be effective. The Hague conference on Private International Law(although India is not a signatory) is a welcoming move which desires to focus on the issue of international surrogacy arrangements, in particular the status of such arrangements under Private International Law and the status of children born through international surrogacy arrangements.

4 Exclusive Law on Surrogacy. An exclusive law on surrogacy in India should incorporate these essentials

a) It should limit surrogacy in India to Indian infertile couples, Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner

married to an Indian citizen, who shall be married for atleast five years and having confirmed medically that female partner is incapable to get pregnant and gestate a baby.

b) It should permit surrogacy as a last resort where every other chances of ART treatment fails and a documentary evidence to prove the same should be insisted.

c) If neither of the commissioning parent is having healthy gametes, option of adoption should be instructed by the law not surrogacy .

d) A pre -approval process by a competent surrogacy board should be implemented through the legislation.In Greece, there is a legislative framework for altruistic gestational surrogacy involving judicial pre-approval of the surrogacy agreement, which is then enforceable while a number of restrictions apply.The aim of the legislation is to provide a comprehensive and facilitative framework for altruistic gestational surrogacy.In South Africa also, there is a requirement of a court approval procedure for surrogacy agreements. It is to be made mandatory that for entering into a surrogacy agreement in India ,pre-approval from the designated authority (Surrogacy Board) should be obtained.

e) It is to be ensured by the legislation that the surrogate women should be well informed of her rights before getting into surrogacy agreement.A lawyer should assist her and supports her in defining her right.Surrogate should know both her and intended parents rights because sometimes

surrogates privacy rights can be interfered with the others rights in case of medical examinations,scanning etc.Only after giving her exact picture of transaction and monetary compensation she will get after the transaction,the agreement should be done.

f) Surrogacy agreement should be made available to surrogate women in her language also other than English. A translation of the English version should also be produced before the Designated authority while applying for preapproval of the process.

g) Compensation for surrogate women should be fixed with a minimum of 5 lakhs.This should include compensation to the family which is denied her care while contributing to mother and baby care during the period .Payment by cheque only be done.This can reduce the exploitation of intermediaries.

h) Surrogacy agreement should specify that if for the health of the surrogate women an abortion is needed, that should be permitted.Agreement for surrogacy should specify that if for the health of the surrogate women,an abortion is done which is necessary for her well being , she will be entitled to half of the fixed amount agreed for surrogacy.

i) Commissioning parents should be made financially liable for any health risks relating to surrogate pregnancy to surrogate women within one year of delivery .

j) Commissioning parents who fail to claim the child after delivery should face penal consequences with a minimum imprisonment of two years and 50000 Rupees fine.

k) The surrogacy legislation should permit gestational surrogacy only which should cover health insurance plans for surrogate women from the physical risks to her while doing surrogacy. The surrogate and the child or children she deliver are appropriately insured until the child is handed over to the parties and till the time where surrogate is free of all health complications arising out of surrogacy.

5 Regulation of Surrogacy,Not Prohibition. Surrogacy arrangements should not be prohibited but restricted through clear terms regulating the eligibility of surrogate and intended parents, through a pre-approval process by a proper designated forum which would make the arrangements less exploitative. A wise approach of clear regulation which is legal,remunerated and state controlled is much better than a complete ban of surrogacy arrangements.A model legislation for Surrogacy in India(The Gestational Surrogacy(Regulation)Act 2016) is framed herein for the purpose of clear regulation by law.

6 A Model Legislation on Gestational Surrogacy.Through the research,a Model Legislation which exclusively dealt with the gestational surrogacy arrangements in India is suggested and framed herein for the effective handling of the issues surrounding these arrangements.[74]

74 *See infra* p.287

CONCLUSION

It is not disputing here that the world is witnessing an era of technological development which has changed the human lives significantly.[75]Alternate possibilities of voluntary childlessness and adoption never find a place in the market driven ideology of Assisted Reproduction.As a result women keep trying to have a child through ART.[76] For most of human history...'being a father was a matter of conjecture, and being a mother was a matter of fact.' Now nothing can be known for sure."[77] Surrogacy poses significant legal ,ethical as well as social issues and have been attracted critical scrutiny.[78] The fact that surrogacy and rapid advances in scientific knowledge give rise to difficult ethical and moral dilemmas has not meant that the community, have sought to deny infertile couples access it.[79] "The apparent rush to embrace the latest assisted reproductive technologies, and the countervailing

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75 Contemporary technological innovations and social developments have led to enormous changes in human fate and freedom.They possess cultural and commercial capital and are among the most visible and influential fields of the globalized world.*See,* Vijaya kumar Yadavendu,Deepak Kumar , "Bioethics and Society :A Provocative Trilogy" (2011)46 *EPW* 13

76 Sama Team, "Assisted Reproductive Technologies in India-Implications for Women",(2007)42 *EPW* 2184,2189

77 Liza Mundy, *Everything Conceivable*:How Assisted Reproduction is Changing Our World (1st ed.,2007)p. 101.

78 *See generally* Lars Noah, "Assisted Reproduction Technologies and the Pitfalls of Unregulated Biomedical Innovation", *(2003)*55 *Fla. L. Rev*. 603

79 Lindy Willmott, **"**Surrogacy: ART's forgotten child **"(**2006)29 *U.N.S.W.L.J.* 227

preoccupation with the collateral challenges that they present, has left some fundamental questions about their safety underappreciated".[80] Evolving stringent rules and regulating mechanism on surrogacy and encouraging risk minimizing strategies for its impact on women's health is the most practical way ahead. Policy makers, legal scholars, and women's rights advocates should give greater attention to reproductive services and expand the collective social and political thinking about surrogacy as well as other means of assisted reproductive technology. That significantly high percentages of children born through these technologies will come to life with disabilities, suffer from low birth weight, and otherwise possess special needs should inspire greater governmental involvement and oversight.[81] It is rightly to remember the speech of Solitude of Self[82] here which states;

> The talk of sheltering woman from the fierce storms of life is the sheerest mockery, for they beat on her from every point of the compass, just as they do on man, and with more fatal results, for he has been trained to protect himself, to resist, and to conquer. Such are the facts in human experience, the responsibilities of individual sovereignty.Rich and poor, intelligent and ignorant, wise and foolish, virtuous and vicious, man and woman; it is ever the same, each soul must depend wholly on itself.

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80 *See supra* n. 78 at 608

81 *See* Michele Goodwin, "Assisted Reproductive Technology and the Double Bind:The Illusory Choice of Motherhood", (2005-2006) 9 *J. Gender ,Race & Just.* 1,54

82 *See* Elizabeth Cady Stanton, "Solitude of Self," Address before the U. S. Senate Committee on Woman Suffrage, February 20, 1892 accessed at *http:// www.sscnet.ucla.edu* on 12/4/2012

> Whatever the theories may be of woman's dependence on man, in the supreme moments of her life, he cannot bear her burdens. Alone she goes to the gates of death to give life to every man that is born into the world. No one can share her fears, no one can mitigate her pangs; and if her sorrow is greater than she can bear, alone she passes beyond the gates into the vast unknown.

Above all,the attitude towards these surrogate mothers should change and the transparency in the entire surrogacy arrangements be enhanced.Assisted reproductive technologies including surrogacy remarkably changed human reproductive lives and the significant role of surrogate mothers should be appreciated as well as rewarded.It is appropriate to conclude with the philosophy which is to be adapted by the entire community through the famous quotation of RavindraNath Tagore ;

In to the mouths of these

Dumb, Pale and meek

We have to infuse the language of the soul.

In to the hearts of these

Weary and worn, dry and forlorn

We have to minstrel the language of humanity.[83]

83 RavindraNath Tagore,Kadi O Kamal quoted in Lakshmidhar Misra, "Laws for the Labour" in Praveen Kumar Gandhi(ed), *Social Action Through Law: Partnership for Social Justice* (1985) p.106 accessed at *https://books.google.co.in* on 23/5/2015

MODEL LEGISLATION

THE GESTATIONAL SURROGACY (REGULATION)ACT 2016

Preamble

Infertility is one of the most haunting medical problem among the couples all over the world. Infertile people are socially stigmatized especially in a country like India where having children has got most significance in marital affairs.Today with the advancement of medical technologies, infertility can be treated with surgeries, medicines and also with assisted reproductive technologies such as artificial inseminations and *in vitro* fertilization techniques. Surrogacy is recognized as a method of assisted reproduction where introduction of surrogate mother for carrying a baby for another women gets encouraged which could be beneficial in situations where female partner is physically or medically in capable to gestate a baby .

In India ,as there is no law governing surrogacy ,mushrooming of unwanted instances without any criteria or regulation is being traced. Anyone can do surrogacy as well as hire the service of surrogate mother whether fertile or infertile in India as of today.Thereby,in view of public interest, it has become important to regulate the surrogacy arrangements commissioned in India and to ensure that the rights of the parties involved in it are sufficiently protected.

The bill details the procedure for commissioning surrogacy in India and formulating eligibility criteria for the parties to surrogacy.It also provides for an establishment of Surrogacy Boards for pre-approving the process to protect the

legitimate rights of all parties within a recognized regulatory frame work of law and ethics.

Statement of Object and Reasons

An act to provide for the regulation of gestational surrogacy commissioned in India and for matters connected therewith and incidental thereto.

Be it enacted by the parliament in 66th year of the republic of India as follows:-

1 Short title,extent and commencement:-(1)This Act may be called the Gestational surrogacy (Regulation)Act 2016

(2) It extends to whole of India

(3) It shall come in to force on such date as the Central Government may ,by notification in the Official gazette;appoint,and different dates may be appointed for different states and any reference in this Act to the commencement of this Act shall,in relation to a state ,be construed as a reference to the coming into force of this Act in that state.

2 Definitions

a ART Bank means an organization that is to set up to supply sperm/semen,oocytes/oocyte donors and surrogate mothers to assisted reproductive technology clinics or their patients.

b Assisted reproductive technology means all techniques that attempt to obtain pregnancy by handling or manipulating the sperm or the oocyte

outside the human body, and transferring the gamete or the embryo in to the reproductive tract

c Assisted reproductive technology clinic means any premises used for procedures related to assisted reproductive technology

d Child means any baby born through ART

e Commissioning parents means parents who aided the ART bank service for surrogacy i.e the persons who were commissioned surrogacy

f Couple means two persons male and female married legally

g Egg means female ovum

h Embryo means fertilized ovum having development up to eight weeks

i Foreigners Regional Registration Officer/ Foreigners Registration Officer" means an officer having jurisdiction over the area for implementation of the Acts/Rules pertaining to foreigners where the assisted reproductive technology clinic is located

j Gamete means sperm and oocyte

k Infertility means the inability to conceive after one years of unprotected coitus or any anatomical or physiological condition that would prevent an individual from having a child.

l Insurance" means an arrangement in which a company undertakes to provide guarantee of compensation to the family/ nominee/ beneficiary of surrogate mother/ oocytes donor in case of death and the compensation of medical expenses incurred in case of medical emergency to the surrogate and oocytes donor themselves and in case of any complications that have

arisen during pregnancy which are likely to continue for the rest of life of surrogate and oocytes donor.

m 'Medical Visa' means an official authorization/endorsement in a passport or similar documents issued by Indian High Commission or Indian Embassy permitting entry into and travel within India for treatment of infertility at an Assisted Reproductive Technology (ART) Clinic registered under National Registry of ART Clinics and Banks in India of the Indian Council of Medical Research

n Overseas Citizen of India (OCI)" means a person registered as Overseas Citizen of India (OCI) under section 7A of the Citizenship Act, 1955.

o People of Indian Origin (PIO)" means a person who or whose any of ancestors was an Indian national and who is presently holding another country's citizenship/ nationality i.e. he/she is holding foreign passport.

p Surrogacy means an arrangement where a women in which women consents to carry a pregnancy achieved through ART in which neither of the gametes belong to her or her husband ,with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.

q Surrogacy agreement means a contract between the persons availing of ART and surrogate mother.

3 Establishment of State Surrogacy Board

(1) There shall be a State Surrogacy Board constituted to exercise the jurisdiction and powers and discharge the functions and duties conferred or imposed on the board by or under the Act.

(2) The State Surrogacy Board shall consist of five members.

a) a retired judge of High court as chairman.

b) senior scientist having through knowledge in the field of Assisted Reproductive Technology from Indian Council of Medical Research(ICMR).

c) Three women members among them

(i) one should be doctor specialized in ART and gynecology.

(ii) one should be a psychologist.

(iii) One should be a legal expert who have extensive knowledge and experience in the matters of surrogacy practice.

4 Functions of State Surrogacy Board

i) To pre-approve the surrogacy agreement by the parties after evaluating the requirements of such agreement..

ii) To enquire matter of disputes arising out of surrogacy arrangements upon public interest on the recommendation by concerned Courts and give reports. It can took the aid of national and state advice board of ART for any clarification regarding ART clinics.

5 Establishment of District Surrogacy Board.

1) There shall be a District surrogacy Board constituted to exercise the jurisdiction and powers and discharge the functions and duties conferred or imposed on the board by or under the Act.There is no mandatory requirement is prescribed by the Act for establishing the District Board in every districts. But it is mandatory that atleast one District surrogacy Board per three districts be constituted.
2) District surrogacy Board shall have five members.
    a) a retired judicial officer not below the rank of District Judge as chairman.
    b) A scientist having through knowledge in the field of ART from Indian Council of Medical Research(ICMR).
    c) Three women members among them
        (i) one should be doctor specialized in ART and gynecology.
        (ii) one should be a psychologist.
        (iii) One should be a legal expert who have extensive knowledge and experience in the matters of surrogacy practice.

6 Functions of District Surrogacy Board

i) To scrutinize the surrogacy agreement of the parties and eligibility and refer the matter to State surrogacy Board for pre-approval.

ii) To enquire matter of disputes arising out of surrogacy arrangements in concerned districts and give reports to State Surrogacy Board. It can took the

aid of national and state advice board of ART for any clarification regarding ART clinics.

7 Terms of Office

Every member of both State surrogacy board and District Surrogacy board shall hold office for such period,not exceeding five years ,but shall be eligible for reappointment.Appeal from the decisions of both State surrogacy board and District Surrogacy board shall be entertained by concerned High Court.

8 Registration

Every ART clinic who avails the surrogacy treatment should be a registered clinic with Indian Council of Medical Research(ICMR).

9 Criteria for Commissioning Surrogacy

Surrogacy is permitted only to the Indian infertile couples and Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen married atleast for five years and who produces documentary evidence to prove that female partner is incapable to gestate medically or physically.

10 Gestational Surrogacy Only Permitted

Gestational surrogacy only permitted where ovum of the surrogate is not used.

11 Surrogacy- A Last Resort

There should be a conclusive proof that Surrogacy is a last resort to the commissioned couples as all other means of ART failed in their case.

12 Requirement of Surrogacy Agreement

Couple seeking surrogacy through ART shall enter into a surrogacy agreement which shall be legally enforceable.

13 Criteria for Surrogate Mother

No women shall act as a surrogate mother unless

i) she is within the age limit of 25-35

ii) already married and having atleast one kid

iii) Medically tested that she is physically fit to carry baby to a term.

14 Legal Assistance

Surrogate mother should get legal assistance while signing on the surrogacy agreement.A translation of the agreement to her language also should be availed.

15 Relinquishment of Parental Right

Surrogate mother shall relinquish all parental right over the child.

16 Single Time Surrogacy

No surrogate women shall not be a surrogate for more than once in her lifetime and a two year interval between two deliveries (Surrogate pregnancy and normal pregnancy)needed.

17 Medical Tests for Surrogate Women

Surrogate women agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted as otherwise as may be prescribed , and all other communicable diseases which may cause danger to the health of the child and must abide by writing that she has not received a blood transfusion or a blood product in the last ten months.

18 Prohibition of Surrogacy Advertisements by ART Clinic

No ART clinic shall advertise for surrogate mother. It is the responsibility of the commission parents to seek surrogates.

19 Registration in Hospital

Surrogates mother should register her original name and details with the hospital where she is under treatment and she should also specify the name,detailes of the persons for whom she is acting as a surrogate with a copy of the certificate mentioned in the act.

20 Conditions for Embryo Transfer after the Failure of the First Transfer

On the failure of the first embryo transfer it is allowed that with the consent of the surrogate mother on mutually agreed financial terms one more successful embryo transfer for the same couple can be done. No surrogate mother shall undergo more than twice embryo transfer for the same couple. Between the embryo transfers ,an interval period of six months should be there.

21 Requirement of Spousal Consent

Surrogate mother shall not agree for surrogacy unless her spousal consent for surrogacy and undertaking clearly stating he should take care of her children in family till she is free from the surrogacy obligation is ensured.It should be written and with signature.No oral admissions are permitted.

22 Identity Proof Requirements

Surrogate mother should produce one proof of identity document bearing her name, photo & signature such as Voter Id,AAdhar Card,Bank Pass book etc.

23 Certificate for Surrogacy Service

Surrogate mother shall avail a certificate for her service , which unambiguously states that she has acted as a surrogate for them.

24 Restrictions on Relative acting as Surrogate Women

If a relative acting as a surrogate there is two restrictions.

(i) She should not be within the prohibited degree of relationship with the couple.

(ii) she should be of the same generation of the female commissioning parent.

25 Appointment of Local Guardian

Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy till the child / children are handed over to the them .

26 Conditions for Commissioning Parents

Surrogacy is open to Indian infertile Couples,Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen only under these conditions.

(i) be married and the marriage should have sustained at least for five years;

(ii) submit a certificate conveying that the woman is unable to conceive their own child and the certificate shall be attested by the appropriate government authority of that country.

(iii) appoint a local guardian who shall be legally responsible for taking care of the surrogate during and after the pregnancy, till the child or children are delivered to the commissioning couple or the local guardian;

(iv) insure the child or children born through the surrogacy, at the time of signing the agreement, till the age of twenty-one years or till the time of custody of the child or children is taken through appropriate Insurance Policy like Jeevan Balya, whichever is earlier, for wellbeing and maintenance of the child or children;

(v) use at least one gamete of their own in creation of the embryos

27 Prior Permission Requirements for the Party Commissioning the Surrogacy

The Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen shall obtain the requisite prior permission from the Foreigners Regional Registration Officer/ Foreigners Registration Officer concerned for commissioning surrogacy.

(i) The party commissioning the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the appropriate Government Authority, stating that the child or children born through surrogacy in India, shall be permitted entry in the Country as a biological child or children of the commissioning couple and that the party shall be able to take the child or children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence, as the case may be

(ii) Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian commissioning surrogacy fails to take delivery of the child or children born to the surrogate commissioned by the Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian, the local guardian shall be legally obliged to take delivery of the child or children and be free to hand the child or children over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one month of the birth of the child or children.

(iii) If Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian commissioning surrogacy fails to take delivery of the child or children born to the surrogate commissioned by the Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian, the local guardian shall be legally obliged to take delivery of the child or children and be free to hand the child or children over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one month of the birth of the child or children.

(iv) The Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen shall carry a certificate from the assisted reproductive technology clinic concerned regarding the fact that the child/children have been duly taken custody of by the Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen and the liabilities towards the Indian surrogate mother have been fully discharged as per the Agreement.

(v) A copy of the Birth Certificate(s) of the surrogate child/children will be retained by the Foreigners Regional Registration Officer/ Foreigners Registration Officer along with photocopies of the passport and Overseas Citizen of India/People of Indian Origin card of the Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen.

(vi) If the child or children are being given adoption to an adoption agency, the child or children shall be allowed to claim the provisions of the Indian Citizenship Act, 1955 in respect of matters relating to Indian citizenship.

28 Insurance Provisions

Any couple who commissioned surrogacy should pay premium for insurance coverage to the surrogate mother she deliver until baby handed over and the surrogate mother be free from health complications arising out of the pregnancy and delivery.(postnatal period of 6 months also included)

29 Minimum Compensation

Compensation to surrogate mother other than medical and expenses are fixed to a minimum of five lakhs. Payment by Cheque only be permissible.

30 Death of Surrogate Women

If death of the surrogate is established after conception till delivery or after delievery till she is declared free from all disorders resulting because of pregnancy,her family is entitled to get compensation in addition to the payment as agreed under the surrogacy agreement.

31 Requirement of Giving Report to National Registry of ART Clinics and Banks of India of Indian Council of Medical Research

All assisted reproductive technology (ART) clinics shall report to National Registry of ART Clinics and Banks of India of Indian Council of Medical Research to give a detailed periodic report of surrogate mother on whom

the procedures have been tried and possible outcome and complications, if any.Provided that all relevant records in respect of the Agreement between the Surrogate Mother, the Commissioning parents and the ART Clinics shall be sent to the birth registration authority at the time of registering birth of a child.

32 Life Threatening Emergency Situations of Surrogacy

If a life threatening situation occurs during pregnancy or delivery,the life of surrogate mother shall be protected over that of unborn child.and she is entitled to get full payment agreed for surrogacy.

(i) If a situation of extreme danger to life of surrogate occurs which demands an abortion,she shall get complete payment as agreed under the surrogacy agreement.

(ii) If a miscarriage occurred to the pregnancy of the surrogate women ,she is entitled for half the rate of the amount fixed excluding medical expenses unless it is proved that her willful negligence caused the same.

33 Liability of ART Clinic in Cases of Death and Health Complexities or Disabilities

In cases of death and health complexities or disabilities of the surrogate women,it shall be presumed to have been caused by the negligence of Assisted Reproductive technology clinic and hence it is liable unless proven otherwise.

33 (i) If death and health complexities or disabilities of the surrogate women has been proved outside the purview of negligence of Assisted Reproductive technology clinic and completely proved,then also commissioning parents are

financially liable for the death and health complexities of the surrogate women during the period of pregnancy and delivery or the complication arising from the up to one year.

34 Handing over the Baby

Surrogate women is free to hand over the child to the commissioning parents after delivery. If commissioning parents failed to claim the child within one week (if they are Indian couple) within one month(For Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen) shall be punishable with an imprisonment for a term of five years with or without a fine of Rs 50,000.

35 Prohibition on Pre-natal Determination of Sex of the Child under Surrogacy

No ART clinic shall issue or cause to be issued any advertisement for surrogacy or conduct pre- natal determination of sex of the child under surrogacy.

36 Presumption of Innocence of Surrogate Women

Notwithstanding anything in the Indian Evidence Act 1872, court shall presume unless the contrary is proved that the pregnant woman has been compelled by her husband or the relative to undergo pre natal diagnostic techniques.

37 Pre- approval Requirements

No surrogacy agreement is valid without the pre- approval of the surrogacy Board established under this Act.

38 Punishment for Breach

Any person who contravenes the provision of sections 34,35,36&37 shall be punishable with or imprisonment of five years with or without fine as may be specifies.

39 Addition to any Law for the Time

Provisions of this act shall be in addition to any law for the time being in force.

40 Rule Making by Central Government

Central government may by notifications in the official Gazette may make rules for carrying out the purpose of the Act.

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APPENDICES

1 & 2

Appendix -1

THE INDIAN COUNCIL OF MEDICAL RESEARCH GUIDELINES 2005

(ICMR)

CHAPTER-3

3.1 Clinics which should be Registered

Clinics involved in any one of the following activities should be regulated, registered and supervised by the State Accreditation Authority/State Appropriate Authorities (Section 3.15).

1. Any treatment involving the use of gametes which have been donated or collected or processed *in vitro, except for* AIII, and for IUI by level 1A clinics who will not process the gametes themselves.
2. Any infertility treatment that involves the use and creation of embryos outside the body.
3. The processing or /and storage of gametes or embryos.
4. Research on human embryos.

The term ART clinic used in this document refers to a clinic involved in any one of the first three of the above activities.

3.2 Code of Practice

This Code of Practice deals with all aspects of the treatment provided and the research done at registered clinics. Those areas which most affect the doctors, scientists and patients and are a part of this code are summarized below.

3.2.1 Staff: A 'person responsible' shall take full responsibility for ensuring that the staff of the registered unit is sufficiently qualified, that proper equipment is used, that genetic material is kept and disposed off properly, and that the center complies with the conditions of its registeration. ***Guidelines for minimum standards*** and qualifications of clinical, scientific and counselling staffs are laid down in Chapter 1. Failure of the 'person responsible' to comply with the ***mandatory code of practice*** can lead to his/her removal or prosecution, or to the suspension of the clinic's registration.

3.2.2 Facilities: These must cover the standards expected in respect of provision of clinical, laboratory and counselling care mentioned in Chapters 1 and 2. Proper systems for monitoring and assessing practices and procedures are required to be in place (for example in the form of Standard Operating Procedures) in order to optimize the outcome of ART.

3.2.3 Confidentiality: Any information about clients and donors must be kept confidential. No information about the treatment of couples provided under a treatment agreement may be disclosed to anyone other than the accreditation authority or persons covered by the registration, except with the consent of the person(s) to whom the information relates, or in a medical emergency concerning the patient, or a court order. It is the above person's right to decide what information will be passed on and to whom, except in the case of a court order.

3.2.4 Information to patient: All relevant information must be given to the patient before a treatment is given. Thus, before starting treatment, information should be given to the patient on the limitations and results of the proposed treatment, possible side-effects, the techniques involved, comparison with other available treatments, the availability of counselling, the cost of the treatment, the rights of the child born through ART, and the need for the clinic to keep a register of the outcome of a treatment.

3.2.5 Consent: No treatment should be given without the written consent of the couple to all the possible stages of that treatment, including the possible freezing of supernumerary embryos. A standard consent form recommended by the accreditation authority should be used by all ART clinics. Specific consent must be obtained from couples who have their gametes or embryos frozen, in regard to what should be done with them if he/she dies, or becomes incapable of varying or revoking his or her consent.

3.2.6 Counselling: People seeking registered treatment must be given a suitable opportunity to receive proper counselling about the various implications of the treatment. No one is obliged to accept counselling but it is generally recognized as being beneficial, and couples should be encouraged to go

through it. The provision of facilities for counselling in an ART clinic (of Levels 1B, 2 or 3) is, therefore, mandatory. Couples should be referred for support or therapeutic counselling as appropriate.

3.2.7 Use of gametes and embryos: No more than three oocytes or embryos may be placed in a woman in any one cycle, regardless of the procedure/s used, excepting under exceptional circumstances (such as elderly women, poor implantation, adenomiosis, or poor embryo quality) which should be recorded. No woman should be treated with gametes or with embryos derived from the gametes of more than one man or woman during any one-treatment cycle.

3.2.8 Storage and handling of gametes and embryos: The 'highest possible standards' in the storage and handling of gametes and embryos in respect of their security, and in regard to their recording and identification, should be followed.

3.2.9 Research: The accreditation authority must approve all research that involves embryos created *in vitro*. A separate registration should be issued for each research project involving human embryos. The accreditation authority must not give a registation certificate unless it is satisfied that the use of human embryos is essential for the purposes of the proposed research and the research is in public interest.

Additionally:

(i) No human embryo may be placed in a non-human animal

(ii) All research projects must be approved by the Institutional Ethics Committee before submission to the accreditation authority.

3.2.10 Complaints: All registered ART clinics are required to have procedures for acknowledging and investigating complaints, and to have a nominated person to deal properly with such complaints. The accreditation authority must be informed of the number of complaints made in any year and those that are outstanding.

3.3 Responsibilities of the Clinic

3.3.1 To give adequate information to the patients (detailed in Section 3.4).

3.3.2 To explain to the patient the rationale of choosing a particular treatment (see Chapter 2) and indicate the choices the patient has (including the cheapest possible course of treatment), with advantages and disadvantages of each choice.

3.3.3 To help the patient exercise a choice, which may be best for him/her, taking into account the individual's circumstances.

3.3.4 To maintain records in an appropriate proforma (to be prescribed by the authority) to enable collation by a national body.

3.3.5 When commercial DNA fingerprinting becomes available, to keep on its record, if the ART clinic desires and couple agrees, DNA fingerprints of the donor, the child, the couple and the surrogate mother should be done.

3.3.6 To keep all information about donors, recipients and couples confidential and secure. The information about the donor (including a copy of the donor's DNA fingerprint if available, but excluding information on the name and address – that is, the individual's personal identity) should be released by the ART clinic after appropriate identification, only to the offspring and only if asked by him/her after he/she reaches the age of 18 years, or as and when specified and required for legal purposes, and never to the parents (excepting when directed by a court of law).

3.3.7 To maintain appropriate, detailed record of all donor oocytes, sperm or embryos used, the manner of their use (e.g. the technique in which they are used, and the individual/couple/surrogate mother on whom they are used). These records must be maintained for at least ten years after which the records must be transferred to a central depository to be maintained by the ICMR. If the ART clinic/centre is wound up during this period, the records must be transferred to the central repository in the ICMR.

3.3.8 To have the schedule of all its charges suitably displayed in the clinic and made known to the patient at the beginning of the treatment. There must be no extra charges beyond what was intimated to the patient at the beginning of the treatment.

3.3.9 To ensure that no technique is used on a patient for which demonstrated expertise does not exist with the staff of the clinic.

3.3.10 To be totally transparent in all its operations. The ART clinics must, therefore, let the patient know what the success rates of the clinic are in regard to the procedures intended to be used on the patient.

3.3.11 To have all consent forms available in English and local language(s).

3.4 Information and Counselling to be given to Patients

Information must be given to couples seeking treatment, on the following points:

3.4.1. The basis, limitations and possible outcome of the treatment proposed, variations in its effectiveness over time, including the success rates with the recommended treatments obtained in the clinic as well as around the world (this data should be available as a document with references, and updated every 6 – 12 months).

3.4.2. The possible side-effects (e.g. of the drug used) and the risks of treatment to the women and the resulting child, including (where relevant) the risks associated with multiple pregnancy.

3.4.3 The need to reduce the number of viable foetuses, in order to ensure the survival of at least two foetuses.

3.4.4. Possible disruption of the patient's domestic life which the treatment may cause.

3.4.5 The techniques involved, including (where relevant) the possible deterioration of gametes or embryos associated with storage, and possible pain and discomfort.

3.4.6 The cost (with suitable break-up) to the patient of the treatment proposed and of an alternative treatment, if any (there must be no other "hidden costs").

3.4.7 The importance of informing the clinic of the result of the pregnancy in a pre-paid envelope.

3.4.8 To make the couple aware, if relevant, that a child born through ART has a right to seek information (including a copy of the DNA fingerprint, if available) about his genetic parent/surrogate mother on reaching 18 years, excepting information on the name and address – that is, the individual's personal identity – of the gamete donor or the surrogate mother. The couple is not obliged to provide the information to which the child has a right, on their own to the child when he/ she reaches the age of 18, but no attempt must be made by the couple to hide this information from the child should an occasion arise when this issue becomes important for the child.

3.4.9 The advantages and disadvantages of continuing treatment after a certain number of attempts.

Pamphlets (one-page on each technique in all local languages and English) which give clear, precise and honest information about the procedure recommended to be used will help the couple make an informed choice.

3.5 Desirable Practices/Prohibited Scenarios

3.5.1 A third party donor of sperm or oocytes must be informed that the offspring will not know his/her identity. He/She must also be informed of the provisions in Section 3.4.8.

3.5.2 There would be no bar to the use of ART by a single women who wishes to have a child, and no ART clinic may refuse to offer its services to the above, provided other criteria mentioned in this document are satisfied. The child thus born will have all the legal rights on the woman or the man.

3.5.3 The ART clinic must not be a party to any commercial element in donor programmes or in gestational surrogacy.

3.5.4 A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use/register in the name of the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death (in whose names will the hospital certify this death?). The birth certificate shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother. All the expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother. An oocyte donor can not act as a surrogate mother for the couple to whom the ooctye is being donated.

3.5.5 A third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa.

3.5.6 No ART procedure shall be done without the spouse's consent.

3.5.7 The provision or otherwise of AIH or ART to an HIV-positive woman would be governed by the implications of the decision of the Supreme Court in the case of X – vs – Hospital 2 (1998) 8 Sec. 269 or any other relevant judgement of the Supreme Court, or law of the country, whichever is the latest.

3.5.8 Gametes produced by a person under the age of 21 shall not be used. The accepted age for a sperm donor shall be between 21 and 45 years and for the donor woman between 18 and 35 years.

3.5.9 Sex selection at any stage after fertilization, or abortion of foetus of any particular sex should not be permitted, except to avoid the risk of transmission of a genetic abnormality assessed through genetic testing of biological parents or through preimplantation genetic diagnosis (PGD).

3.5.10 No ART clinic shall offer to provide a couple with a child of the desired sex.

3.5.11 Collection of gametes from a dying person will only be permitted if the widow wishes to have a child.

3.5.12 No more than three eggs or embryos should be placed in a woman during any one treatment cycle, regardless of the procedure used, excepting under exceptional circumstances {such as elderly women (above 37 years), poor implantation (more than three previous failures), advanced endometriosis, or poor embryo quality} which should be recorded.

3.5.13 Use of sperm donated by a relative or a known friend of either the wife or the husband shall not be permitted. It will be the responsibility of the ART clinic to obtain sperm from appropriate banks; neither the clinic nor the couple shall have the right to know the donor identity and address, but both the clinic and the couple, however, shall have the right to have the fullest possible information from the semen bank on the donor such as height, weight, skin colour, educational qualification, profession, family background, freedom from any known diseases or carrier status (such as hepatitis B or AIDS), ethnic origin, and the DNA fingerprint (if possible), before accepting the donor semen. It will be the responsibility of the semen bank and the clinic to ensure that the couple does not come to know the identity of the donor. The ART clinic will be authorized to appropriately charge the couple for the semen provided and the tests done on the donor semen.

3.5.14 What has been said above under 3.5.13 also would be true of oocyte donation.

3.5.15 When DNA fingerprinting technology becomes commercially available, the ART clinic may offer to the couple, a DNA fingerprint of the donor

without revealing his/her identity, against appropriate payment towards the cost of the DNA fingerprint. An ART clinic will then have DNA fingerprinting done of the couple and keep the DNA fingerprints on its records.

3.5.16 Trans-species fertilization involving gametes of two species is prohibited.

3.5.17 Ova derived from foetuses cannot be used for IVF but may be used for research.

3.5.18 Semen from two individuals must never be mixed before use, under any circumstance.

3.5.19 Transfer of human embryo into a human male or into any animal belonging to any other species, must never be done and is prohibited.

3.5.20 The data of every accredited ART clinic must be accessible to an appropriate authority of the ICMR for collation at the national level.

3.5.21 Any publication or report resulting out of analysis of such data by the ICMR will have the concerned members of the staff of the ART clinic as co-authors.

3.5.22 The consent on the consent form must be a true informed consent witnessed by a person who is in no way associated with the clinic.

3.6 Requirements for a Sperm Donor

3.6.1 The individual must be free of HIV and hepatitis B and C infections, hypertension, diabetes, sexually transmitted diseases, and identifiable and common genetic disorders such as thalassemia.

3.6.2 The age of the donor must not be below 21 or above 45 years.

3.6.3 An analysis must be carried out on the semen of the individual, preferably using a semen analyzer, and the semen must be found to be normal according to WHO method manual for semen analysis, if intended to be used for ART.

3.6.4 The blood group and the Rh status of the individual must be determined and placed on record.

3.6.5 Other relevant information in respect of the donor, such as height, weight, age, educational qualifications, profession, colour of the skin and the eyes, record of major diseases including any psychiatric disorder, and the family background in respect of history of any familial disorder, must be recorded in an appropriate proforma.

3.7 Requirements for an Oocyte Donor

3.7.1 The individual must be free of HIV and hepatitis B and C infections, hypertension, diabetes, sexually transmitted diseases, and identifiable and common genetic disorders such as thalassemia.

3.7.2 The blood group and the Rh status of the individual must be determined and placed on record.

3.7.3 Other relevant information in respect of the donor, such as height, weight, age, educational qualifications, profession, colour of the skin and the eyes, and the family background in respect of history of any familial disorder, must be recorded in an appropriate proforma.

3.7.4 The age of the donor must not be less than 21 or more than 35 years.

3.8 Requirements for a Surrogate Mother

See Section 3.10.

3.9 How may Sperm and Oocyte Donors and Surrogate Mothers be Sourced?

3.9.1 Semen banks

3.9.1.1 Either an ART clinic or a law firm or any other suitable independent organization may set up a semen bank. If set up by an ART clinic it must operate as a separate identity.

3.9.1.2 The bank will ensure that all criteria mentioned in Section 3.6 (Requirements for a sperm donor) are met and a suitable record of all donors is kept for 10 years after which, or if the bank is wound up during this period, the records shall be transferred to an ICMR repository.

3.9.1.3 A bank may advertise suitably for semen donors who may be appropriately compensated financially.

3.9.1.4 On request for semen by an ART clinic, the bank will provide the clinic with a list of donors (without the name or the address but with a code number) giving all relevant details such as those mentioned in Section 3.6. The semen bank shall not supply semen of one donor for more than ten successful pregnancies. It will be the responsibility of the ART clinic or the patient, as appropriate, to inform the bank about a successful pregnancy. The bank shall keep a record of all semen received, stored and supplied, and details of the use of the semen of each donor. This record will be liable to be reviewed by the accreditation authority.

3.9.1.5 The bank must be run professionally and must have facilities for cryopreservation of semen, following internationally accepted protocols. Each bank will prepare its own SOP (Standard Operating Procedures) for cryopreservation.

3.9.1.6 Semen samples must be cryopreserved for at least six months before first use, at which time the semen donor must be tested for HIV and hepatitis B and C.

3.9.1.7 The bank must ensure confidentiality in regard to the identity of the semen donor.

3.9.1.8 A semen bank may store a semen preparation for exclusive use on the donor's wife or on any other woman designated by the donor. An appropriate charge may be levied by the bank for the storage. In the case of non-payment of the charges when the donor is alive, the bank would have the right to destroy the semen sample or give it to a bonafide organisation to be used only for research purposes. In the case of the death of the donor, the semen would become the property of the legal

heir or the nominee of the donor at the time the donor gives the sample for storage to the bank. All other conditions that apply to the donor would now apply to the legal heir, excepting that he cannot use it for having a woman of his choice inseminated by it. If after the death of the donor, there are no claimants, the bank would have the right to destroy the semen or give it to a bonafide research organisation to be used only for research purposes.

3.9.1.9 All semen banks will require accreditation.

3.9.2. Sourcing of oocytes and surrogate mothers

Law firms and semen banks will be encouraged to obtain (for example, through appropriate advertisement) and maintain information on possible oocyte donors and surrogate mothers as per details mentioned elsewhere in this document. The above organizations may appropriately charge the couple for providing an oocyte or a surrogate mother. The oocyte donor may be compensated suitably (e.g. financially) by the law firm or semen bank when the oocyte is donated. However, negotiations between a couple and the surrogate mother must be conducted independently between them.

3.9.3. Oocyte sharing

The system of oocyte sharing in which an indigent infertile couple that needs to raise resources for ART agrees to donate oocytes to an affluent infertile couple wherein the wife can carry a pregnancy through but cannot produce her own oocyte, for in-vitro fertilization with the sperm of the male partner of the affluent couple, for a monitory compensation that would take care of the expenses of an ART procedure on the indigent couple, must be encouraged.

3.10 Surrogacy: General Considerations

3.10.1 A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.

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

3.10.3 Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect.

3.10.4 Advertisements regarding surrogacy should not be made by the ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, should rest with the couple, or a semen bank (see 3.9.1.1; 3.9.2).

3.10.5 A surrogate mother should not be over 45 years of age. Before accepting a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full-term pregnancy.

3.10.6 A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.

3.10.7 A prospective surrogate mother must be tested for HIV and shown to be seronegative for this virus just before embryo transfer. She must also provide a written certificate that (a) she has not had a drug intravenously administered into her through a shared syringe, (b) she has not undergone blood transfusion; and (c) she and her husband (to the best of her/his knowledge) has had no extramarital relationship in the last six months. (This is to ensure that the person would not come up with symptoms of HIV infection during the period of surrogacy.) The prospective surrogate mother must also declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank.

3.10.8 No woman may act as a surrogate more then thrice in her lifetime.

3.11 Preservation, Utilization & Destruction of Embryos

3.11.1 Couples must give specific consent to storage and use of their embryos. The Human Fertilization & Embryology Act, UK (1990), allows a 5-year storage period which India would also follow.

3.11.2 Consent shall need to be taken from the couple for the use of their stored embryos by other couples or for research, in the event of their embryos not being used by themselves. This consent will not be required if the couple defaults in payment of maintenance charges after two reminders sent by registered post.

3.11.3 Research on embryos shall be restricted to the first fourteen days only and will be conducted only with the permission of the owner of the embryos.

3.11.4 No commercial transaction will be allowed for the use of embryos for research.

3.12 Rights of a Child Born through various ART Technologies

3.12.1 A child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple through sexual intercourse.

3.12.2 Children born through the use of donor gametes, and their "adopted" parents shall have a right to available medical or genetic information about the genetic parents that may be relevant to the child's health.

3.12.3 Children born through the use of donor gametes shall not have any right whatsoever to know the identity (such as name, address, parentage, etc.) of their genetic parent(s). A child thus born will, however, be provided all other information (including that mentioned in Section 3.4.8)

about the donor as and when desired by the child, when the child becomes an adult. While the couple will not be obliged to provide the above "other" information to the child on their own, no deliberate attempt will be made by the couple or others concerned to hide this information from the child as and when asked for by the child.

3.12.4 In the case of a divorce during the gestation period, if the offspring is of a donor programme – be it sperm or ova – the law of the land as pertaining to a normal conception would apply.

3.13 Responsibilities of the Drug Industry

3.13.1 Drug companies must not make exaggerated claims for infertility drugs and market them only to qualified specialists. All available information on the drug must be provided to the specialist.

3.13.2 Infertility drugs must be sold only on prescription by a qualified doctor/ ART specialist.

3.13.3 There has been a spurt of new media introduced for *in vitro* culture of gametes and embryos. Companies dealing with culture media do not give full details of the composition because they wish to retain this as a trade secret. This poses problems for those dealing with human embryos. The future life of the products created in the laboratory is dependant, to a certain extent, on the culture media used. ART centers should not encourage companies that do not give details of the full composition of the culture media. This will also make it possible to take legal action against a company supplying something different from what it is stated to be.

3.14 General Considerations

3.14.1 Minimum age for ART:

For a woman between 20 and 30 years, two years of cohabitation/ marriage without the use of a contraceptive, excepting in cases where the man is infertile or the woman cannot physiologically conceive. For a

woman over 30 years, one year of cohabitation/marriage without use of contraceptives. Normally, no ART procedure shall be used on a woman below 20 years.

3.14.2 Advertisements of an infertility centre:

False claims via hoardings and paper advertisements are a cheap way of attracting a clientele that is vulnerable and, therefore, easily swayed. Such advertisements shall be banned. An honest display at appropriate places or publicity of statistics, fee structure, quality of service and of service provided, will be encouraged, provided the guidelines laid down by the Medical Council of India in this regard, are not violated.

3.14.3 As already mentioned, sperm banks where a complete assessment of the donor has been done, medical and other vital information stored, quality of preservation ensured, confidentiality assured, and strict control exercised by a regulatory body, must be set up. Donor sperm would be made available only through such specialized banks/centers.

3.14.4 In the light of a recent technological breakthrough where a fertilized ovum containing ooplasm (including mitochondria) from a donor ovum has been successfully cultured, the embryo or the future child may now have three genetic parents. In such cases, the ooplasm donor must sign a waiver relinquishing all rights on the child, and must be screened for and declared free of known mitochondrial genetic abnormalities.

3.14.5 No new ART clinic may start operating unless it has obtained a temporary registration to do so. This registration would be confirmed only if the clinic obtains accreditation (permanent registration) from the Center or State's appropriate accreditation authority within two years of obtaining the temporary registration. The registration must be renewed every seven years.

3.14.6 Existing ART clinics must obtain a temporary registration within six months of the notification of the accreditation authority, and appropriate accreditation (permanent registration) within two years of the notification.

3.14.7 The Center/State Government would close down any unregistered clinic not satisfying the above criteria.

3.14.8 If the ART clinic that has applied for a temporary registration to the appropriate accreditation authority, does not receive the registration (or a reply) within two months of the receipt of the application from the concerned office of the authority, the ART clinic would be deemed to have received the registration. The same would apply for the permanent registration after the above-prescribed period.

3.14.9 As pointed out in section 1.6.12.2, the technique of ICSI has never undergone critical testing in animal models, but was introduced into the human situation directly. Defects in spermatogenesis and sperm production can be often traced to genetic defects. Such individuals are normally prevented from transmitting these defects to their offspring because of their natural infertility. ICSI by–passes this barrier and may help in transmitting such defects to the offspring, which sometimes may be exaggerated in the offspring. In view of this, the ART clinic must point out to the prospective parents that their child born through ICSI may have a slightly higher risk over and above the normal risk, of suffering from a genetic disorder.

3.14.10 Human cloning for delivering replicas must be banned.

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

3.14.12 All the equipments/machines should be calibrated regularly.

3.15 Responsibilities of the Accreditation Authority

A State Accreditation Authority will be set up by the State Governments through its Department of Health and/or Family Welfare to oversee all policy matters relating to Accreditation, Supervision and Regulation of ART Clinics in the States in accordance with the National Guidelines. The State Government may also set up appropriate authorities for implementation of the Guidelines for the whole or a part of State having regard to the number of the ART Clinics. The

appropriate authority would have right to visit individually or collectively, any ART Clinic/Centre(s) accredited or not accredited, once a year with or without prior information to the clinic/center, to determine if the ethical guidelines and operative procedures mentioned here are being followed. If not, the appropriate authority will point out the lapses to the clinic/center in writing. If these lapses continued for a maximum period of six months (during which period the clinic shall not engage in any activity related to the lapses), the appropriate authority would recommend to the State Accreditation Authority that the clinic/center may be ordered to be closed. The State Accreditation Authority will have the powers to order the closing of such a clinic or a center. The appropriate authority may be delegated powers to impose a fine or a penalty on the center/clinic. The above-mentioned appropriate authority would consist of appropriately qualified scientists, technologists and sociologists. The appropriate authority will also be authorized to visit and regulate semen banks in the manner mentioned above. In addition to the above, the Ministry of Health and Family Welfare, Govt. of India, will set up a National Advisory Committee. The National Advisory Committee may be headed by the Secretary, Health and Family Welfare as chairman and the Director General of ICMR as co-chairman. The National Advisory Committee will advise the Central Government on policy matters relating to regulation of ART Clinics. Composition of the Committee is given in Chapter 9.

The State Accreditation Authority will have the rights and the responsibility of fixing the upper limit of charges for gamete donation and surrogacy and of revising these charges from time to time.

3.16 Legal Issues

3.16.1 Legitimacy of the child born through ART

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

3.16.2 Adultery in the case of ART

ART used for married woman with the consent of the husband does not amount to adultery on part of the wife or the donor. AID without the husband's consent can, however, be a ground for divorce or judicial separation.

3.16.3 Consummation of marriage in case of AIH

Conception of the wife through AIH does not necessarily amount to consummation of marriage and a decree of nullity may still be granted in favor of the wife on the ground of impotency of the husband or his willful refusal to consummate the marriage. However, such a decree could be excluded on the grounds of approbation.

3.16.4 Rights of an unmarried woman to AID

There is no legal bar on an unmarried woman going for AID. A child born to a single woman through AID would be deemed to be legitimate. However, AID should normally be performed only on a married woman and that, too, with the written consent of her husband, as a two-parent family would be always better for the child than a single parent one, and the child's interests must outweigh all other interests.

3.16.5 Posthumous AIH through a sperm bank

Though the Indian Evidence Act, 1872, says that a child born within 280 days after dissolution of marriage (by death or divorce) is a legitimate child since that is considered to be the gestation period, it is pertinent to note that this Act was enacted as far back as 1872 when one could not even visualize ART. The law needs to take note of the scientific advancements since that time. Thus a child born to a woman artificially inseminated with the stored sperms of her deceased husband must be considered to be a legitimate child notwithstanding the existing law of presumptions under our Evidence Act. The law needs to move alongwith medical advancements and suitably amended so that it does not give rise to dilemma or unwarranted harsh situations.

3.17 Institutional Ethics Committees

Each ART clinic of Levels 1B, 2 and Level 3 must have its own ethics committee constituted according to ICMR Guidelines, comprising reputed ART practitioners, scientists who are knowledgeable in developmental biology or in clinical embryology, a social scientist, a member of the judiciary and a person who is well-versed in comparative theology. Should the local ART clinic have difficulty in establishing such a body, the state accreditation authority should constitute such a body, co-opting a representative of the ART clinic.

Appendix -2

THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL 2014

Government of India
Ministry of Health and Family Welfare
(Department of Health Research)

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	THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2014	
	to establish the National Advisory Board, the State Advisory Boards and the National Registry for the accreditation, regulation and supervision of assisted reproductive technology clinics and the assisted reproductive technology banks, for prevention of misuse of assisted reproductive technology including surrogacy, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto.	
	BE it enacted by the Parliament in the Sixty-Eighth year of the Republic of India as follows:-	
	CHAPTER I PRELIMINARY	
	1. (1) This Act may be called the Assisted Reproductive Technology (Regulation) Act, 2014.	Short title, extent and commencement.
	(2) It extends to the whole of India.	
	(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.	
	2. In this Act, unless the context otherwise requires, –	Definitions.
	(a) "appointed day" means the date with effect from which the National Board is established under sub-section (1) of section 3;	
	(b) "artificial insemination" means the procedure of artificially transferring semen into the reproductive	

	system of a woman and includes insemination with the husband's semen or with the donor's semen;	
	(c) "assisted reproductive technology", with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive tract of a woman;	
	(d) "assisted reproductive technology bank" means an organisation that is set up to supply sperm or semen, oocytes or oocyte donors and surrogate mothers to the assisted reproductive technology clinics or their patients;	
	(e) "assisted reproductive technology clinic" means any premises, other than the clinics of AYUSH System of Medicine, equipped with the requisite facilities for carrying out the procedures related to the assisted reproductive technology;	
	(f) "biological parent" means the genetic parent;	
	(g) "child" means any individual born through the use of the assisted reproductive technology;	
	(h) "commissioning couple" means an infertile married couple, who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining service's that the assisted reproductive technology clinic or the assisted reproductive technology bank is authorised to provide;	
	(p) "couple" means a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage which is legal in India;	
	(j) "cryo-preservation" means the freezing and storing of gametes, zygotes and embryos;	
	(k) "donor" means the donor of a gamete or gametes but does not include the husband who provides the sperm or the wife who provides the oocyte to be used in the process of assisted reproduction for their own use;	
	(l) "egg", means the female gamete namely the oocyte;	

	(m) "embryo", means the fertilised ovum that has begun cellular division and continued development up to eight weeks; (n) "fertilisation", means the penetration of the ovum by the spermatozoon and fusion of genetic materials resulting in the development of a zygote;	
	(o) "foetal reduction", means reduction in the number of foetuses in the case of multiple pregnancies;	
	(p) "foetus", means the product of conception, starting from completion of embryonic development until birth or abortion;	
	(q) "Foreigners Regional Registration Officer/ Foreigners Registration Officer" means an officer having jurisdiction over the area for implementation of the Acts/Rules pertaining to foreigners where the assisted reproductive technology clinic is located;	
	(r) "Fund" means the assisted reproductive technology fund constituted under section75;	
	(s) "gamete", means sperm and oocyte namely the egg;	
	(t) "gamete donor", means a person who provides sperm or oocyte with the objective of enabling an infertile couple to have a child;	
	(u) "implantation", means the attachment and subsequent penetration by the zona-free blastocyst, which starts five to seven days following fertilisation; (v) "infertility", means the inability to conceive after at least one year of unprotected coitus or an anatomical or physiological condition that would prevent a couple from having a child;	
	(w) "Insurance" means an arrangement in which a company undertakes to provide guarantee of compensation to the family/ nominee/ beneficiary of surrogate mother/ oocytes donor in case of death and the compensation of medical expenses incurred in case of medical emergency to the surrogate and oocytes donor themselves and in case of any complications that have arisen during pregnancy which are likely to continue for the rest of life of surrogate and oocytes donor;	

	(x) "Legitimate" means in accordance or in compliance with the existing/ established law or accepted patterns and standards;	
	(y) "Medical Visa" means an official authorization/endorsement in a passport or similar documents issued by Indian High Commission or Indian Embassy permitting entry into and travel within India for treatment of infertility at an Assisted Reproductive Technology (ART) Clinic registered under National Registry of ART Clinics and Banks in India of the Indian Council of Medical Research;	
	(z) "Member" means a Member of a National Board or State Board, as the case may be, and includes its Chairperson;	
	(za) "National Board" means the National Advisory Board for assisted reproductive technology established under sub-section (1) of section 3;	
	(zb) "National Registry" of Assisted Reproductive Technology Clinics and Banks in India , means an Institution which shall be established under section 18 at Indian Council of Medical Research, New Delhi and shall act as central data base of all the Assisted Reproductive Technology Clinics and Banks in India and helping the State Boards and National Board in accreditation, supervision and regulation of the Assisted Reproductive Technology Clinics and Banks in country and help in policy making respectively;	
	(zc) "Non Resident Indian (NRI)" means an Indian citizen who is ordinarily residing outside India and holds an Indian Passport;	
	(zd) "notification" means a notification published in the Official Gazette and the expression "notify" shall be construed accordingly;	
	(ze) "Overseas Citizen of India (OCI)" means a person registered as Overseas Citizen of India (OCI) under section 7A of the Citizenship Act, 1955;	
	(zf) "oocyte" and "ovum", means, the female gamete present in the ovary, and an ovulated oocyte in which the first polar body has been released;	

	(zg) "patients" means an infertile married couple who comes to any registered assisted reproductive technology clinic and is under treatment for infertility;	
	(zh) "People of Indian Origin (PIO)" means a person who or whose any of ancestors was an Indian national and who is presently holding another country's citizenship/ nationality i.e. he/she is holding foreign passport;	
	(zi) "People of Indian Origin (PIO) Card IIolder" means a person registered as PIO Card Holder under MHA's scheme vide Notification No.26011/4/98-F.I dated 19.08.2002;	
	(zj) "Pre-implantation Genetic Diagnosis" includes the technique in which an embryo formed through in-vitro fertilisation is tested for specific disorders prior to the transfer;	
	(zk) "prescribed" means prescribed by rules made under this Act;	
	(zl) "Record" means documents pertaining to infertile couple, gamete donor and surrogate mother's medical history, diagnosis/screening, types and steps of treatments/ procedures and their complications, if any and final outcome, written consent's, agreement's, No Objection Certificate's (NOCs), other related documents etc.	
	(zm) "Registration Authority" means the Registration Authority constituted under sub-section (1) of section 35;	
	(zn) "Regulations" means the regulations made under this Act;	
	(zo) "sperm" means the male gametes produced in the testicles and contained in semen;	
	(zp) "State Board" means the State Advisory Board for assisted reproductive technology established under sub-section (1) of section 22;	
	(zq) "surrogacy" means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the commissioning couple for whom she is acting as a surrogate;	

	(zr) "surrogate mother" means a woman who is a citizen of India and is resident of India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the commissioning couple that had asked for surrogacy;	
	(zs) "surrogacy agreement" means an agreement between the commissioning couple availing of assisted reproductive technology and the surrogate mother; (zt) "zygote" means the fertilized oocyte prior to the first cell division.	
	CHAPTER II AUTHORITIES TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY	
	3. (1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a National Board to be called the National Board for Assisted Reproductive Technology.	Establishment of National Board.
	(2) The National Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable **with prior approval of the Central Government**, and to contract, and shall, by the said name, sue or be sued.	
	(3) The head office of the National Board shall be at Department of Health Research, Ministry of Health and Family Welfare, New Delhi or at such other place as the Central Government may, by notification, specify.	
	(4) The National Board may, by notification, establish its offices or branches in any other State in India or, with the previous sanction of the Central Government, outside India.	
	4. (1)The National Board shall consist of a Chairperson and such Members not exceeding twenty-three who shall be appointed by the Central Government on the recommendations of the Selection Committee constituted under section 5.	Composition of National Board.

	(2) The National Board shall consist of the following Members, namely:—	
	(a) a Chairperson to be appointed by the Central Government who shall be a person of eminence and standing in the field of assisted reproductive technology or Bio-medical sciences and who shall be equivalent to the rank of Secretary to the Government of India;	
	(b) representatives, not below the rank of Joint Secretary, one from the Department of Health Research, Ministry of Health and Family Welfare and another from Ministry of Overseas Indian Affairs - Member, ex officio;	
	(c) a nominee of an Indian professional society concerned primarily with assisted reproduction – Member;	
	(d) a nominee of an National Commission for Woman – Member;	
	(e) a nominee of National Commission for Protection of Child Rights – Member;	
	(f) a nominee of Medical Council of India – Member;	
	(g) other expert members, not exceeding fifteen, having special knowledge and experience in the field of assisted reproduction, gynaecology, embryology, andrology, bioethics, mammalian reproduction, medical genetics, social science, law or human rights, public health, biomedical sciences, representative from civil society working on women's health and child right issues to be nominated by the Central Government – Members:	
	Provided that out of fifteen Members, —	
	(i) one each shall be a nominee of the Department of Health and Family Welfare and National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research; and	
	(ii) at least six of whom shall be women;	

	(g) The chairman and members of the National Board shall be deemed to be public servants as per the Section 21 of the Indian Penal Code.	
	(h) Director of the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research Member Secretary. 5. (1) The Central Government shall constitute a Selection Committee consisting of,	Selection Committee.
	(a) a person of eminence having qualification and experience of at least twenty-five years in Bio-medical profession and assisted reproductive technology as Chairperson;	
	(b) Five other experts of eminence from the discipline of Bio-medical and allied health science having qualification and experience of at least twenty years in the discipline, as members, to be appointed in such manner as may be prescribed.	
	(2) The Joint Secretary to the Government of India in the Department of Health Research, Union Ministry of Health and Family Welfare shall be the Convenor.	
	(3) The Selection Committee shall make its recommendations for appointment against each vacancies referred to it.	
	(4) Before recommending any person for appointment as a Chairperson or Member the Selection Committee shall satisfy itself that such person does not have any financial or other conflict of interest, which is likely to affect prejudicially his functions as Chairperson or Member, as the case may be.	
	(5) No appointment of the Chairperson or Member of the National Board shall be invalid merely by reason of any vacancy in the Selection Committee.	
Qualification for appointment of Chairperson and Members of National Board.	6. (1) The Chairperson shall be a person of eminence, integrity, administrative capability and outstanding ability with a post graduate degree in the discipline of bio-medical science and research from a university, and having not less than fifteen years experience in the profession, out of which at least ten years shall be in a leadership role, in the area of assisted reproductive technology.	

	(2) The Member except Member *ex-officio* shall be a person of eminence, integrity, administrative capability and outstanding ability with a post graduate degree in the discipline of bio-medical science and allied health science having not less than twelve years experience in the profession, out of which at least eight years shall be in a leadership role, in the area of assisted reproductive technology. (3) If the chairperson and the member(s) appointed while serving in the Government, they shall be deemed to have retired from Government service upon taking their respective appointments in Regulatory Authority.
Terms of office and other conditions of service of Chairperson and other Members.	7. (1) A person appointed as the Chairperson or a Member shall hold office as such for a term of three years from the date on which he enters upon his office and be eligible for re-appointment: Provided that a person shall not hold office as a Chairperson or Member after he has attained the age of seventy years.
	(2) Notwithstanding anything contained in sub-section (1), the Chairperson and the Members shall hold office during the pleasure of the Central Government.
	(3) The salary and allowances payable to, and other terms and conditions of service of the Chairperson and the Members shall be such as may be prescribed:
	Provided that no salary, allowances and other terms and conditions of service of the Chairperson or other Members shall be varied to their disadvantage after their appointment.
Removal and suspension of Chairperson and other Members.	8. (1) The Central Government may by an order, remove from office the Chairperson or a Member who-
	(a) is, or at any time has been, adjudged as insolvent; or (b) is of unsound mind and stands so declared by a competent court; (c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

	(d) has acquired such financial or other interest as likely to affect prejudicially his functions; or (e) has so abused his position as to render his continuance in office detrimental to the public interest; or (f) has been removed or dismissed from the service of the Government or of a local authority or of a corporation with which he has been in employment; or (g) has been absent for more than three consecutive meetings without leave of the National Board.	
	(2) No Chairperson or any other Member shall be removed under clause (d) or clause (e) of sub-section (1) unless he has been given an opportunity of being heard in the matter.	
Declaration of interest.	9. The Chairperson and other Members, shall immediately after entering office and every year thereafter, make a declaration to the extent of their interest, whether direct or indirect and whether financial or otherwise, in any health or research centre relating to the assisted reproductive technology.	
Restriction of re-employment.	10. (1) The Chairperson and other Members, on ceasing to hold office shall not, for a period of two years, accept any employment (including as consultant or otherwise) in any health or research centre relating to the assisted reproductive technology whose matter has been dealt with by such Chairperson or Member, as the case may be, or has been before the National Board when he held office as such Chairperson or Member.	
	(2) Nothing in sub-section (1) shall prevent the Chairperson or a Member, as the case may be, to accept any employment in any health or research centre relating to the assisted reproductive technology controlled or maintained by the Central Government or the State Government.	
General superintendence, direction and management of affairs of National Board.	11. Subject to the other provisions of this Act, the general superintendence, direction and control of the administration shall vest in the Chairperson of the National Board.	

Member to act as Chairperson or to discharge his functions, in certain circumstances.	12. (1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of death, removal, suspension or resignation, the senior-most member shall act as the Chairperson till such time the Chairperson is appointed.	
	(2) When the Chairperson is unable to discharge his functions owing to absence on account of leave or otherwise, the senior-most member shall discharge the functions of the Chairperson till the Chairperson is able to discharge his functions.	
Resignation.	13. The Chairperson or a Member may, by notice given in writing under his hand of not less than a period of thirty days, addressed to the Central Government, resign from his office:	
	Provided that the Chairperson or the Member shall, unless permitted by the Central Government to relinquish office sooner, continue to hold office until the expiry of a period of thirty days from the date of receipt of such notice or until a person duly appointed as his successor enters upon office or until the expiry of his term of office, whichever is earlier.	
Meetings of National Board.	14. (1) The Board shall meet at least three times in a year and shall observe such rules of procedure in regard to the transaction of business at its meetings (including quorum at such meetings) as may be specified by regulations.	
	(2) Where the Chairperson is unable to attend a meeting of the Board for any reason, the senior-most member shall preside at the meeting.	
	(3) All questions which come up before any meeting of the Board shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding, shall have a second or casting vote.	
Vacancies, etc., not to invalidate proceedings of National Board.	15. No act or proceeding of the National Board shall be invalid merely by reason of—	

	(a) any vacancy in, or any defect in the constitution of, the National Board; or	
	(b) any defect in the appointment of a person as a Member of the National Board ; or (c) any irregularity in the procedure of the National Board not affecting the merits of the case.	
Procedure of National Board.	**16.** (1) The National Board shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—	5 of 1908.
	(a) summoning and enforcing the attendance of any person and examining him on oath;	
	(b) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document, from any office and production of such documents;	1 of 1872.
	(c) receiving evidence on affidavits;	
	(d) issuing commissions for the examination of witnesses or documents; (e) any other matter which may be prescribed;	
	(2) Every proceeding before the Board shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code and the Board shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.	2 of 1974.
Functions of National Board.	17. (1) The National Board shall, subject to provisions of this Act, rules and regulations made there under, take measures to develop new policies in the area of Assisted Reproductive Technology and to assist the State Boards in accreditation and regulation of services of Assisted Reproductive Technology Clinics and Banks in the country.	
	(2) Without prejudice to the generality of the foregoing provisions, the measures referred to in sub-section (1) may provide for all or any of the following matters, namely: —	

	(a) the regulation in respect of the minimum requirements related to staff and physical infrastructure for the various categories of assisted reproductive technology clinics and assisted reproductive technology banks;	
	(b) the regulations in respect of permissible assisted reproductive technology procedures;	
	(c) the regulations in respect of selection of patients for assisted reproductive technology procedures;	
	(d) the regulation in respect of the encouragement and promotion of training and research in the field of assisted reproduction;	
	(e) (i) the regulation in respect of counselling and providing patients with all necessary information and advice on various aspects of assisted reproductive technology procedures; (ii) the regulation describing duties and responsibilities of the counsellor with special reference to potential surrogate mother and oocyte donor to explore the range of outcomes and possible long term effects and to evaluate her psychological risks and vulnerabilities as well as the possible effects of surrogacy and oocyte donation on their existing relationship and on any existing child/children.	
	(f) the regulation in respect of the ways and means of disseminating information related to infertility and assisted reproductive technologies to various sections of the society;	
	(g) the regulations in respect of research on human embryos;	
	(h) the regulation in respect of the proforma for obtaining information from donors of gametes and surrogate mothers, consent forms for various procedures, and contracts or agreements between the various parties involved, in all of the languages listed in the Eighth Schedule of the Constitution;	
	(i) settle the disputes between the State Boards;	
	(j) such other functions as may be prescribed.	

Establishment of National Registry.	18. With effect from such date as the Central Government may, by notification, establish for the purposes of this Act, a National Registry to be called the National Registry of Assisted Reproductive Technology Clinics and Banks in India at Indian Council of Medical Research, New Delhi	
Composition of National Registry.	19. The National Registry referred to in section 18 shall consist of a Director, Scientists at various levels, not less than eighteen, technical, administrative and supporting staff, not less than twenty, who shall be appointed by the Indian Council of Medical Research on the recommendations of the Selection Committee which shall consist of such number of members as may be determined by the Central Government.	
Terms of Office and other conditions of service of officers and employees of National Registry.	20. The terms of office and other conditions of services of Director, Scientists, Officers and employees of National Registry shall be such as may be prescribed by the Central Government.	
Functions of National Registry.	21. (1) The National Registry shall act as a Central data- base in the country and through which details of all the Assisted Reproductive Technology Clinics and Assisted Reproductive Technology Banks of the country including nature and types of services provided by them, outcome of the services and other relevant information shall be obtained on regular basis.	
	(2) The National Registry shall assist all the State Boards in the country in accreditation, supervision and regulation of the Assisted Reproductive Technology Clinics and Assisted Reproductive Technology Banks in their respective States.	
	(3) The National Registry shall assist the National Board in its functioning by providing the data generated from the Central database of the Registry.	
	(4) The National Registry shall develop an appropriate curriculum for training programmes in the area of clinical embryology, andrology, counselling and other related fields and shall run regular training programmes in these areas and other related fields.	
	(5) The data generated from the National Registry shall be utilised for making policies, guidelines and shall help in identifying new research areas and conducting research in the area of assisted reproduction and other related fields in the country.	

	(6) The National Registry shall have power to inspect any premises using Assisted Reproductive Technology without prior intimation.	
Establishment of State Board.	22. (1) Every State Government shall, within a period of one hundred and eighty days of the issue of the notification under sub-section (1) of section 3, by notification, establish a State Board for assisted reproductive technology to exercise the jurisdiction and powers and discharge the functions and duties conferred or imposed on the State Boards by or under this Act.	
	(2) The State Board shall consist of a Chairperson and such Members not exceeding sixteen who shall be appointed by the State Government on the recommendation of a selection committee constituted under sub-section (1) of section 23.	
	(3) The State Board shall consist of the following members, namely :—	
	(a) a Chairperson to be appointed by the State Government who shall be a person of eminence and standing in the field of assisted reproductive technology or Bio-medical Sciences and who shall be equivalent to the rank of Secretary to the State Government; Chairperson, *ex officio;*	
	(b) one nominee shall be from the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research; and	
	(c) a nominee of an Indian professional society concerned primarily with assisted reproduction – Member;	
	(d) a nominee of an National Commission for Woman – Member;	
	(e) a nominee of National Commission for Protection of Child Rights – Member;	
	(f) other expert members not exceeding ten who shall be experts in the fields of assisted reproduction, gynaecology, embryology, andrology, bioethics, mammalian reproduction, medical genetics, social science, law or human rights, public health to be nominated by the State Government – Members:	

	Provided that out of ten Members, —	
	(i) one shall be a nominee of the Ministry of Health and Family Welfare of the State Government ; and	
	(ii) at least four of whom shall be women;	
	(g) The chairman and members of the State Boards shall be deemed to be public servants as per the Section 21 of the Indian Penal Code.	
	(h) an officer not below the rank of a Joint Secretary to the State Government and having knowledge and expertise in assisted reproductive technology shall be the Member-Secretary of the Board.	
	23. (1) The State Government shall constitute a Selection Committee consisting of, —	Selection Committee.
	(a) a person of eminence having qualification and experience of at least twenty years in bio-medical sciences and in assisted reproductive technology profession as Chairperson;	
	(b) five other experts of eminence from the discipline of bio-medical sciences and assisted reproductive technology and allied health sciences having qualification and experience of at least fifteen years in the discipline, as members, to be appointed in such manner as may be prescribed.	
	(2) An officer not below the rank of the Joint Secretary to the State Government of the Ministry of Health and Family Welfare shall be the Convenor.	
	(3) The Selection Committee shall make its recommendations for appointment against each vacancies referred to it.	
	(4) Before recommending any person for appointment as a Chairperson or Member, the Selection Committee shall satisfy itself that such person does not have any financial or other conflict of interest, which is likely to affect prejudicially his functions as Chairperson or Member, as the case may be.	
	(5) No appointment of the Chairperson or Member of the State Board shall be invalid merely by reason of any vacancy in the Selection Committee.	

	(6) Subject to the provisions of sub-sections (1) to (5), the Selection Committee may regulate its own procedure.	
Qualification for appointment of Chairperson and Members of the State Board.	24. (1) The Chairperson shall be a person of eminence, integrity, administrative capability and outstanding ability with a post graduate degree in the discipline of Bio-medical sciences and research from a university, and having not less than fifteen years experience in the profession, out of which at least ten years in the area of assisted reproductive technology;	
	(2) The Member shall be a person of eminence, integrity, administrative capability and outstanding ability with a post graduate degree in the discipline of Bio-medical sciences and allied health sciences research from a university, and having not less than twelve years experience in the profession, out of which at least eight years in the area of assisted reproductive technology.	
Terms of office and other conditions of service of Chairperson and other Members of State Board.	25. (1) A person appointed, or nominated, as the case maybe, as the Chairperson or a Member shall hold office as such for a term of three years from the date on which he enters upon his office and be eligible for re-appointment:	
	Provided that a person shall not hold office as a Chairperson or Member after he has attained the age of seventy years:	
	(2) Notwithstanding anything contained in sub-section (1), the Chairperson and the Members shall hold office during the pleasure of the State Government.	
	(3) The salary and allowances payable to, and other terms and conditions of service of, the Chairperson and the Members shall be such as may be prescribed by the State Government:	
	Provided that no salary, allowances and other terms and conditions of service of the Chairperson or other Members shall be varied to their disadvantage after their appointment.	

Removal and suspension of Chairperson and other Members.	26. (1) The State Government may by order, remove from office the Chairperson or a Member who —	
	(a) is, or at any time has been, adjudged as insolvent; or (b) is of unsound mind and stands so declared by a competent court; (c) has been convicted of an offence which, in the opinion of the State Government, involves moral turpitude; or (d) has acquired such financial or other interest as likely to affect prejudicially his functions; or (e) has so abused his position as to render his continuance in office detrimental to the public interest; or (f) has been removed or dismissed from the service of the Government or of a local authority or of a corporation with which he has been in employment; or (g) has been absent for more than three consecutive meetings without leave of the State Board.	
	(2) No Chairperson or any other Member shall be removed under clause (d) or clause (e) of sub-section (1) unless he has been given an opportunity of being heard in the matter.	
Declaration of interest.	27. The Chairperson and other Members, shall immediately after entering office and every year thereafter, make a declaration to the extent of their interest, whether direct or indirect and whether financial or otherwise, in any health or research centre relating to the assisted reproductive technology.	
Restriction of reemployment.	28. (1) The Chairperson and other Members, on ceasing to hold office shall not, for a period of two years, accept any employment (including as consultant or otherwise) in any health or research centre relating to the assisted reproductive technology whose matter has been dealt with by such Chairperson or Member, as the case may be, or has been before the State Board when he held office as such Chairperson or Member.	

	(2) Nothing in sub-section (1) shall prevent the Chairperson or a Member, as the case may be, to accept any employment in any health or research centre relating to the assisted reproductive technology controlled or maintained by the Central Government or the State Government.	
General superintendence, direction and management of affairs of State Board.	29. Subject to the other provisions of this Act, the general superintendence, direction and control of the administration shall vest in the Chairperson of the State Board.	
Member to act as Chairperson or to discharge his functions, in certain circumstances.	30. (1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of death, removal, suspension or resignation, the Vice-Chairperson shall act as the Chairperson till such time the Chairperson is appointed.	
	(2) Where the Chairperson is unable to attend a meeting of the Board for any reason, the senior-most member shall preside at the meeting.	
Resignation.	31. The Chairperson or a Member may, by notice given in writing under his hand of not less than a period of thirty days, addressed to the State Government, resign from his office:	
	Provided that the Chairperson or the Member shall, unless permitted by the State Government to relinquish office sooner, continue to hold office until the expiry of a period of thirty days from the date of receipt of such notice or until a person duly appointed as his successor enters upon office or until the expiry of his term of office, whichever is earlier.	
Meetings of State Board.	32. (1) The Board shall meet at least three times in a year at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings (including quorum at such meetings) as may be specified by regulations made by the State Board.	
	(2) Where the Chairperson of the State Board is unable to attend any meeting of the State Board for any reason, the senior-most member shall preside at the meeting.	

	(3) All questions which come up before any meeting of the Board shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding, shall have a second or casting vote.	
Powers and functions of State Board.	33. (1) Subject to the provisions of this Act and the rules and regulations made there under, the State Board shall have the responsibility for laying down the policies and plans for assisted reproduction in the State.	
	(2) Without prejudice to the generality of the provisions contained in sub-section (1), the State Board, taking into account the recommendations, policies and regulations of the National Board, shall –	
	(a) advise the State Government to constitute a Registration Authority or Authorities as required, at least of six experts in assisted reproductive technology or a related field, for the use of assisted reproductive technology in the State;	
	(b) monitor the functioning of the Registration Authority subject to the guidelines laid down by the National Board;	
	(c) co-ordinate the enforcement and implementation of the policies and guidelines for assisted reproduction;	
	(d) constitute advisory committees consisting of experts in the field of assisted reproduction and related fields at the State or District level, to make recommendations on different aspects of assisted reproduction;	
	(e) perform such other functions as may be prescribed under this Act;	
	(3) Notwithstanding anything contained in section 34 of this Act, the State Board may, *suo moto*, whether on the basis of a complaint or otherwise, examines and review any decision of the Registration Authority.	
	(4) In the exercise of its functions under this Act, the State Board shall give such directions or pass such orders as are necessary, with reasons to be recorded in writing.	
Procedure of State Board.	34. (1) The State Board shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of	

	Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—	5 of 1908.
	(a) summoning and enforcing the attendance of any person and examining him on oath;	
	(b) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document, from any office and production of such documents;	1 of 1872.
	(c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents;	
	(e) any other matter which may be prescribed.	
	(2) Every proceeding before the State Board shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code and the Board shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.	2 of 1974.
Constitution of Registration Authority.	35. (1) Every State Government shall, in consultation with the State Board, by notification constitute a Registration Authority with in a period of three months from the date of consent given by the State Board.	
	(2) The Registration Authority shall consist of a full-time Chairperson not below the rank of a Joint Secretary to the State Government and six members who shall be recognised experts in assisted reproductive technology.	
	(3) The Chairperson and Members of the Registration Authority shall be appointed in such manner as may be prescribed by the State Government.	
	(4) The salary and allowances payable to and other terms and conditions of service of the Chairperson and the Members of the Registration Authority shall be such as may be prescribed by the State Government.	
	(5) Before appointing any person as Chairperson or Member, of the Registration Authority, the State Government shall satisfy itself that his integrity is such	

	that his professional interest shall not affect prejudicially his functions as a member.	
	(6) The Registration Authority shall be provided by the State Government with adequate supporting staff and secretarial assistance and suitable space and accommodation for the officials and staff of the Registration Authority.	
	CHAPTER III PROCEDURES FOR REGISTRATIONS AND COMPLAINTS	
Registration and accreditation of clinics **and Banks.**	36. No assisted reproductive technology clinic and assisted reproductive technology bank shall practice any aspect of assisted reproductive technology, or use any premises for such purposes, without registering as the assisted reproductive technology clinic or assisted reproductive technology bank with the Registration Authority constituted under sub-section (1) of section 35 and National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research:	
	Provided that any assisted reproductive technology clinic or assisted reproductive technology bank which is carrying out the work of assisted reproductive technology on or before the date of commencement of this Act, may continue to do so until the certificate of registration is granted or declined to it by the Registration Authority and a unique registration number to be given or declined by the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research under this Act:	
	Provided further that such assisted reproductive technology clinic and assisted reproductive technology bank shall, within a period of ninety days from the date of constitution of the Registration Authority under this Act, make an application under sub-section (1) of section 37 for registration as an assisted reproductive technology clinic or assisted reproductive technology bank under this Act:	
	Provided also that the Registration Authority shall, within a period of ninety days from the date of such application, either issue the certificate of registration or reject the application under section 38.	

	Explanation.—For the purposes of this section, the expression assisted reproductive technology clinic means any premises equipped with the requisite facilities for carrying out the procedures related to the assisted reproductive technology namely:– (a) infertility treatment, including Intra-Uterine Insemination (IUI), artificial Insemination with Husband's semen (AIH), and artificial Insemination using Donor Semen (AID), involving the use of donated or collected gametes; or	
	(b) infertility treatment involving the use and creation of embryos outside the human body; or	
	(c) Processing or storage of human embryos; or	
	(d) research in the area of the Assisted Reproductive Technology.	
Application for registration.	37. (1) All assisted reproductive technology clinics and the assisted reproductive technology banks shall make an application to the State Registration Authority for the registration of the assisted reproductive clinic or assisted reproductive bank within such period and in such form accompanied by such fee as may be prescribed.	
	(2) Every application under sub-section (1) shall be accompanied by the following, namely:— (a) registration certificate from the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research; (b) bio-data of all the faculty members of the clinic or bank including Director or in-charge of the clinic or bank ; (c) copies of the degrees and certificates of all the faculty members of the clinic or bank including Director or in-charge of the clinic or bank ; (d) such other information and documents as may be prescribed.	
	(3) Any assisted reproductive technology clinic or assisted reproductive technology bank by whatsoever name called, may apply to the Registration Authority for registration to operate the Assisted Reproductive	

	Technology clinic or assisted reproductive technology bank in accordance with the procedure and criteria laid down in this Act.	
	(4) Every application for registration by an assisted reproductive technology clinic or assisted reproductive technology bank under sub-section (1) shall contain the particulars of the applicant including all details of techniques and procedures of assisted reproductive technology practiced before enactment of this Act and to be practised after coming into force of this Act at such clinics or banks.	
	(5) Notwithstanding anything contained in this Act or any of the rules made there under, no assisted reproductive technology clinic and assisted reproductive technology bank performing any of the functions under sub-section (3) or any other advanced diagnostic, therapeutic shall practice any aspect of such diagnosis, therapy without a certificate of accreditation issued by the State Board and National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical research.	
Grant of registration.	38. (1) On receipt of the application under sub-section (2) of section 37, the Registration Authority shall within a period of ninety days ; (a) grant registration subject to the provisions of this Act and the rules and the regulations made there under; (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act:	
	Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard.	
	(2) The Registration Authority shall, within a period of one month of a registration being granted under this section, report such registration to the State Board.	
	(3) The State Board shall maintain a record of all registrations applied for and granted under this section.	
	(4) No registration shall be granted unless the Registration Authority, or such authorised person or persons acting	

	on its behalf, have inspected the premises and certified that the premises of the applicant is equipped with the requisite facilities for carrying out the procedures related to the assisted reproductive technology and is fit for the same.	
	(5) The registration granted under this section shall be valid for a period of three years from the date of registration granted by the Registration Authority.	
Extension of registration.	39. The registration granted under section 38 may be extended by the Registration Authority on an application made by the applicant, under such conditions as may be prescribed, in such form and on payment of such fee as may be specified by the regulations made by the Authority.	
Revocation of registration.	40. (1) The Registration Authority may, on receipt of a complaint in this behalf or on the recommendation of the State Board, revoke the registration granted under section 38, after being satisfied that –	
	(a) the applicant makes wilful default in doing anything required of him by or under this Act or the rules or the regulations made there under;	
	(b) the applicant violates any of the terms or conditions of the approval given by the Authority:	
	(c) the applicant is involved in any kind of unfair practice or irregularities.	
	Explanation. For the purposes of this clause, the term "unfair practice means" a practice which, for the purpose of promoting the assisted reproductive technology, if adopts any unfair method or deceptive practice including any of the following practices, namely:-	
	(A) the practice of making any statement, whether orally or writing or by visible representation which,— (i) falsely represents that the services are of a particular standard or grade;	
	(ii) represents that the holder of registration has approval or affiliation which such applicant does not have;	
	(iii) makes a false or misleading representation concerning the services;	

	(B) the holder of registration permits the publication of any advertisement relating to infertility or surrogacy whether in any newspaper or otherwise of services that are not intended to be offered.
	(2) The registration granted to the applicant under section 38 shall not be revoked unless the Registration Authority has given to the applicant not less than thirty days notice in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the holder of registration within the period of that notice against the proposed revocation.
	(3) The Registration Authority may, instead of revoking the registration under sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of patients, and any such terms and conditions so imposed shall be binding upon the holder of registration.
	(4) Upon the revocation of the registration, the Authority,-
	(a) shall debar the holder of registration from operating the assisted reproductive technology clinic or assisted reproductive technology bank and displaying his name in the list of defaulters on its website and also inform the other State Boards in other States, Union Territories and National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research about such cancellation;
	(b) to protect the interest of patients or in the public interests, issue such directions as it may deem necessary.
	(5) Notwithstanding anything contained in sub-sections (1), (2), (3) and sub-section (4), if the Registration Authority is of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any assisted reproductive technology clinic without issuing any such notice referred to in sub-section (2).
Information to State Board.	41. (a) The Registration Authority shall be deemed to have granted renewal for three years to the applicant if the

	applicant does not receive a definitive communication from the Registration Authority regarding the renewal application within a period of sixty days of the receipt of the renewal application in the office of the Registration Authority. (b) Assisted Reproductive Technology Clinic and Bank shall submit the renewal application six months before the expiry of the registration and registration authority shall issue the renewal/rejection letter after evaluation/verification of all the documents submitted and after conducting site visit by the competent experts/officials at the respective clinic and bank.	
	42. The Registration Authority and National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research shall have the power to inspect, with or without prior notice on a working day during working hours, any premises relating to assisted reproductive technology or call for any document or material in the discharge of its powers and functions.	Registration Authority **and National Registry** to inspect premises.
	43. The provisions of sections 39, 40, 41 and 42, as relevant, shall apply also to assisted reproductive technology banks.	Applicability to assisted reproductive technology banks.
	44. (1) Any person aggrieved by the decision of the Registration Authority made under this Act may, within such period and in such manner and form as may be prescribed by the State Government, prefer an appeal to the State Board.	Appeal to State Board.
	(2) On receipt of an appeal under sub-section (1), the State Board may, after giving the appellant opportunity to be heard, and after making such further inquiry as it thinks fit, confirm, modify or set aside the decision of the Registration Authority, within three months of the receipt of the appeal.	
	45. (1) Any person aggrieved by the decision of the State Board made under this Act may, within such period and in such manner and form as may be prescribed, prefer an appeal to the National Board.	Appeal to National Board.

	(2) On receipt of an appeal under sub-section (1), the National Board may, after giving the appellant opportunity to be heard, and after making such further inquiry as it thinks fit, confirm, modify or set aside the decision of the state Board, within three months of the receipt of the appeal.	
	CHAPTER IV DUTIES OF AN ASSISTED REPRODUCTIVE TECHNOLOGY CLINIC AND ASSISTED REPRODUCTIVE TECHNOLOGY BANK	
	46. (1) The assisted reproductive technology clinics and assisted reproductive technology banks shall ensure that patients, donors of gametes and surrogates are eligible to avail of assisted reproductive technology procedures under the criteria specified by the rules under this Act and that they have been medically tested for such diseases, sexually transmitted or otherwise, including HIV/AIDS as may be specified and all other communicable diseases which may endanger the health of the commissioning couple, or any one of them, surrogate or child.	General duties of assisted reproductive technology clinics and banks.
	(2) It shall be the responsibility of an assisted reproductive technology clinic to obtain, from assisted reproductive technology bank, all relevant information, other than the name, personal identity and address, of possible gamete donors, and assist the commissioning couple desirous of the donation, to choose the donor.	
	(3) When an assisted reproductive technology bank receives a request from an assisted reproductive technology clinic for a donor oocyte, a responsible member of the staff of the assisted reproductive technology bank shall accompany the particular donor to the assisted reproductive technology clinic, and obtain a written agreement from the authority designated for this purpose by the clinic, that the clinic shall under no circumstances reveal the identity of the donor to the recipient couple or to anyone else and ensure that all its staff is made aware of the fact that any step leading to disclosure of the identity of the oocyte donor (i.e., the name and address) to the recipient couple or to anyone else, shall amount to an offence punishable under this Act, except in case of a medical emergency or in pursuance of an order issued by a competent court.	

	(4) Either of the parties seeking assisted reproductive technology treatment or procedures shall be entitled to specific information in respect of donor of gametes including height, weight, ethnicity, skin colour, educational qualifications, medical history of the donor, including HIV/AIDS:	
	Provided that the parties shall not be entitled to specific information in respect of the individual identity, name and address of the donor.	
	(5) The assisted reproductive technology clinics shall obtain donor gametes from assisted reproductive technology banks that have ensured that the donor has been medically tested for such diseases, sexually transmitted or otherwise, including HIV/AIDS as may be prescribed and all other communicable diseases which may endanger the health of the commissioning couple, or any one of them, surrogate or child.	
	(6) The assisted reproductive technology clinics shall provide professional counselling to commissioning couple about all the implications and chances of success of assisted reproductive technology procedures in the clinic in India and internationally, and shall also inform commissioning couple of the advantages, disadvantages and cost of the procedures, their medical side effects, risks including the risk of multiple pregnancy, the possibility of adoption, and any such other matter as may help the commissioning couple arrive at a informed decision that would be most likely to be the best for the commissioning couple.	
	(7) The assisted reproductive technology clinics shall make commissioning couple, as the case may be, aware of the rights of a child born through the use of assisted reproductive technology. (8) The assisted reproductive technology clinics shall explain to commissioning couple, as the case may be, the choice or choices of treatment available to them and the reason or reasons for recommending a particular treatment, and shall clearly explain the advantages, disadvantages, limitations and cost of any recommended or explained treatment or procedure. (9) The assisted reproductive technology clinics and Assisted Reproductive Technology Banks shall	

	ensure that information about clients, donors and surrogate is kept confidential and that information about assisted reproductive technology treatment shall not be disclosed to anyone other than a central database to be maintained by the National Registry for Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research except in a medical emergency at the request of the person or persons or the closest available relative of such person or persons to whom the information relates, or by an order of a court of competent jurisdiction.	
	(10) No assisted reproductive technology clinic shall consider conception by surrogacy for patients for whom it shall normally be possible to carry a baby to term:	
	Provided that where it is determined that such conception may be unsafe or may lead to undesirable medical implications, the use of surrogacy may be permitted.	
	(11) The assisted reproductive technology clinics shall provide to commissioning couple, as the case may be, a pre-stamped self-addressed envelope to inform the clinic of the results of the assisted reproductive technology procedure performed for the commissioning couple.	
	(12) No assisted reproductive technology clinic shall obtain or use sperm or oocyte donated by a relative or known friend of either of the parties seeking assisted reproductive technology treatment or procedures.	
	(13) (a) Every assisted reproductive technology clinic and Assisted Reproductive Technology Banks shall establish a mechanism to look into complaints in such manner as may be prescribed under Rules. (b) An appropriate provision shall be made for the complaints relating to ART treatment or procedures against the ART Clinic and Bank under the Rules. Simultaneously a provision shall also be made, to review and for speedy disposal of these complaints pending against such clinics and banks, under the Rules.	

	(c) National Board and State Board shall periodically review the complainants pending in such clinics and banks and issue directions for speedy disposal.	
	(14) (a) No assisted reproductive technology procedure shall be performed on a woman below the age of twenty three years and above the age of fifty years and the concern Gynaecologist shall furnish certificate indicating that the woman is medically fit to opt for the ART services. (b) No assisted reproductive technology procedure shall be performed on a man below the age of twenty three years and above the age of fifty five years.	
	(15) All assisted reproductive technology clinics shall issue to the infertile commissioning couple a discharge certificate stating details of the assisted reproductive technology procedure performed on the commissioning couple and its outcome.	
	(16) Only the assisted reproductive technology banks registered under this Act shall be authorised to advertise for, procuring or providing semen, oocyte donor or surrogate.	
	(17) The possible side effects and complications arising out of assisted reproductive technology procedures in infertile couple, gamete donor and surrogate mother shall be described under the Rules.	
	(18) Except the Assisted Reproductive Technology Clinic and Assisted Reproductive Technology Bank registered under the Assisted Reproductive Technology Bill, or any person authorized to deal with Assisted Reproductive Technology under the Assisted Reproductive Technology Bill, or with prior permission of Central Government, no person (the term "person" as defined under Income Tax Act), whether resident or foreigner provides any service or advice direct or indirect relating to Assisted Reproductive Technology and Surrogacy for commercial purpose or for any profit or gain.	
	47. (1) No assisted reproductive technology clinic shall perform any treatment or procedure of assisted reproductive technology without the consent in writing of all the parties seeking assisted reproductive	Duties of assisted reproductive technology clinics and banks to

	technology to all possible stages of such treatment or procedures including the freezing of human embryos.	obtain written consent.
	(2) No assisted reproductive technology clinics and assisted reproductive technology banks shall freeze any human embryos and/or gametes without specific instructions and consent in writing from all the parties seeking assisted reproductive technology in respect of what should be done with the gametes or embryos in case of death or incapacity of any of the parties.	
	(3) No assisted reproductive technology clinic shall use any human reproductive material to create a human embryo or use an *in vitro* human embryo for any purpose without the specific consent in writing of all the parties to whom the assisted reproductive technology relates.	
	(4) The consent of any of the parties obtained under this section may be withdrawn at any time before the human embryos or the gametes are transferred to the concerned woman's uterus.	
	(5) All consent forms and agreements signed by all the parties seeking ART services including surrogacy shall be in local language also so that all the parties including surrogate mother and the gamete donor can understand the contents of the consent forms and agreements.	
	48. (1) All assisted reproductive technology clinics and assisted reproductive technology banks shall maintain detailed records, in such manner as may be prescribed, of all donor oocytes, sperm or embryos used, the manner and technique of their use, and the commissioning couple or surrogate, in respect of whom it was used.	Duties of assisted reproductive technology clinics and banks to keep accurate records.
	(2) All assisted reproductive technology clinics shall, as and when the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research is established, put on line all information available to them in regard to progress of the patient, such as biochemical and clinical pregnancy, within a period of seven days of the information becoming available, withholding the identity of the patient.	
	(3) The records maintained under sub-section (1) shall be maintained for at least a period of ten years, upon the expiry of which the assisted reproductive technology	

	clinic and assisted reproductive technology bank shall transfer the records to a central database of the National Registry of Assisted Reproductive Technology Clinics and Banks in India to be set up under the Indian Council of Medical Research, New Delhi.	
	(4) In the event of the closure of any assisted reproductive technology clinic and assisted reproductive technology bank before the expiry of the period of ten years under sub-section (2), the assisted reproductive technology clinic and assisted reproductive technology bank shall immediately transfer the records to a central database of the National Registry of Assisted Reproductive Technology Clinics and Banks in India to be set up under Indian Council of Medical Research, New Delhi.	
	49. (1) The assisted reproductive technology clinics shall harvest oocytes in accordance with such regulations of the National Board or the concerned State Board or, as the case may be.	Duties of assisted reproductive technology clinics using **human** gametes and embryos.
	(2) The number of oocytes or embryos that may be placed in a woman during any one treatment cycle shall be such as may be specified by the regulations made by the National Board or the concerned State Board, as the case may be.	
	(3) No woman should be treated with gametes or embryos derived from the gametes of more than one man or woman during any one treatment cycle.	
	(4) An assisted reproductive technology clinic shall never mix semen from two individuals before use.	
	(5) Where a multiple pregnancy occurs as a result of assisted reproductive technology, the concerned assisted reproductive technology clinic shall inform the patient immediately of the multiple pregnancy and its medical implications and may carry out foetal reduction after appropriate counselling.	
	(6) The collection of gametes from a person whose death is imminent shall only be permissible if such person's spouse intends to avail assisted reproductive technology to have a child.	

	(7) No assisted reproductive technology clinic shall use ova that are derived from a foetus, in any process of in vitro fertilisation.	
	(8) No assisted reproductive technology clinic shall utilise any semen, whether from an assisted reproductive technology bank or otherwise, for any aspect of assisted reproductive technology unless such semen is medically analysed in such manner as may be prescribed.	
	50. (1) The Pre-implantation Genetic Diagnosis shall be used only to screen the human embryo for known, pre-existing, heritable or genetic diseases or for such other purposes as may be determined by the Registration Authority.	Pre-implantation Genetic Diagnosis
	(2) The destruction or donation, with the approval of the patient, to an approved research laboratory for research purposes, of an embryo after Pre-implantation Genetic Diagnosis, shall be done only when the embryo suffers from pre-existing, heritable, life-threatening or genetic diseases. (3) The National Board and the State Boards may lay down such other conditions as it deems fit in the interests of the Pre-implantation Genetic Diagnosis.	
	51. (1) No assisted reproductive technology clinic shall offer to provide a couple with a child of a pre-determined sex.	Sex selection
	(2) It is prohibited for anyone to do any act, at any stage, to determine the sex of the child to be born through the process of assisted reproductive technology.	
	(3) No person shall knowingly provide, prescribe or administer anything that would ensure or increase the probability that an embryo shall be of a particular sex, or that would identify the sex of an in vitro embryo, except to diagnose, prevent or treat a sex-linked disorder or disease.	
	(4) No assisted reproductive technology clinic shall carry out any assisted reproductive technology procedure to separate, or yield fractions enriched in sperm of X or Y variations.	
	(5) The collection of blood samples from pregnant woman and subjecting the blood sample for sex selection in	

	any form both within the country and outside the country shall be prohibited.	
	CHAPTER V SOURCING, STORAGE, HANDLING AND RECORD KEEPING FOR GAMETES, EMBRYOS, AND SURROGATES	
	52. (1) The screening of gamete donors and surrogates; the collection, screening and storage of semen; and provision of oocyte donor and surrogates, shall be done by an assisted reproductive technology bank registered as an independent entity under the provisions of this Act.	Sourcing of gametes
	(2) An assisted reproductive technology bank shall operate independently of any assisted reproductive technology clinic.	
	(3) The assisted reproductive technology banks shall obtain semen from males between twenty one years of age and forty five years of age, both inclusive, and arrange to obtain oocytes from females between twenty three years of age and thirty five years of age, both inclusive, and examine the donors for such diseases, sexually transmitted or otherwise, including HIV/AIDS as may be prescribed, and all other communicable diseases and conditions such as cardio-vascular disease, thyroid problem etc. which may endanger the health of the commissioning couple, or any one of them, surrogate or child.	
	(4) (a) All assisted reproductive technology banks shall have standard, scientifically established facilities and defined standard operating procedures for all its scientific and technical activities as per the provision described under the Rules for assisted reproductive technology banks. (b) Detailed guidelines shall be developed under the Rules describing different categories of assisted reproductive technology banks, minimum infrastructure facilities, trained manpower, procedures undertaken at assisted reproductive technology banks etc.	
	(5) All assisted reproductive technology banks shall cryo-preserve semen sample for a quarantine period of at least six months before being used and, till the expiry of such period, the assisted reproductive technology	

	bank shall not supply the sperm to any assisted reproductive technology clinic unless the sperm donor is tested for such diseases, sexually transmitted or otherwise, including HIV/AIDS as may be prescribed.	
	(6) An assisted reproductive technology bank may advertise for gamete donors and surrogates, who may be compensated financially by the bank.	
	(7) An assisted reproductive technology bank shall not supply the sperm of a single donor for use more than twenty five times.	
	(8) (a) Oocyte donor shall be an ever married woman having at least one live child of her own with minimum age of three years and shall be allowed to donate oocytes only once in her life and not more than seven oocytes shall be retrieved from the oocyte donor. (b) The written consent of oocyte donor's spouse shall be required before she may act as oocyte donor.	
	(9) The eggs from one donor can be shared between two recipients only, provided that at least seven oocytes are available for each recipient.	
	(10) All unused oocytes shall be preserved by the assisted reproductive technology clinic for use on the same recipient, or given for research to an organisations registered under this Act.	
	(11) One sample of semen supplied by an assisted reproductive technology bank shall be used by the assisted reproductive technology clinic only once on only one recipient.	
	(12) An assisted reproductive technology bank shall obtain all necessary information in respect of a sperm or oocyte donor or a surrogate, including the name, identity and address of such donor or surrogate, in such manner as may be prescribed, and shall undertake in writing from the donor to keep such information confidential.	
	(13) An assisted reproductive technology bank may, for such appropriate fee as may be prescribed, store any semen obtained from a donor for the exclusive use of his wife.	

	(14) In the event that the man intending to act as sperm donor is married, the consent of his spouse shall be required before he may act as sperm donor.	
	(15) Aadhar Card shall be used as a proof of identity of gamete donor (semen donor and oocyte donor).	
	(16) (a) In case of death or disability of the oocyte donor, it shall be presumed to have been caused by the negligence of the assisted reproductive technology clinic unless proven otherwise. (b) In case where negligence in different degree is proven then appropriate provision shall be made under the Rules for a system of graded penalties/compensation depending on the degree of negligence.	
	53. (1) The highest possible standards should be followed in the storage and handling of gametes and human embryos in respect of their security, and with regard to their recording and identification.	Storage and handling **of human** gametes and embryos.
	(2) No donor gamete shall be stored for a period of more than five years.	
	(3) A human embryo may, for such appropriate fee as may be prescribed, be stored for a maximum period of five years and at the end of such period such embryo shall be allowed to perish or donated to an research organisation registered under this Act for research purposes with the consent of the patients and if during the period of five years, one of the commissioning partners dies; the surviving partner can use the embryo for herself or for her partner, provided an appropriate consent was taken earlier:	
	Provided that where the persons to whom such embryo relates fails to pay the fee, or both the commissioning couple die, the assisted reproductive technology clinic or assisted reproductive technology bank may, subject to such regulations as may be specified, destroy the embryo or transfer the embryo to any research organisation registered under this Act.	
	54. (1) All records, charts, forms, reports, consent letters and all other documents required to be maintained under this Act and the rules made under shall be preserved for a period of ten years and after which the records shall be transferred to the National Registry of	Records to be maintained by assisted reproductive technology bank.

	Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research:	
	Provided that, if any criminal or other proceedings are instituted against any Assisted Reproductive Technology Clinics or Assisted Reproductive Technology Banks, the records and all other documents of such Assisted Reproductive Technology Clinics and Assisted Reproductive Technology Banks shall be preserved till the final disposal of such proceedings.	
	(2) Where an assisted reproductive technology bank closes before the expiry of the period of ten years, the records shall be immediately transferred to the National Registry of Assisted Reproductive Technology Clinic and Banks in India of the Indian Council of Medical Research.	
	(3) All such records shall, at all reasonable times, be made available for inspection to the concerned State Board or National Board or National Registry to any other person authorised by the concerned State Board or National Board in this behalf.	
	55. (1) The sale, transfer or use of gametes, zygotes and embryos, or any part thereof or information related thereto, directly or indirectly to any party outside India is prohibited except in the case of transfer of own gametes and embryos for personal use with the permission of the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research.	Restriction on sale of **human** gametes, zygotes and embryos.
	(2) The sale of gametes, except for use by an assisted reproductive technology clinic for treating infertility, and the sale of zygotes and embryos, or of any information related to gametes, zygotes or embryos, within India is prohibited.	
	CHAPTER VI REGULATION OF RESEARCH ON HUMAN EMBRYOS	
	56. (1) The sale of any human gametes and embryos or their transfer to any country outside India, for research is absolutely prohibited.	Permission of Department of Health Research for research.

	(2) The import or export of frozen human gametes and embryos shall be considered as transfer of biological material for therapeutic use and shall be permitted as per the rules made in this behalf for exchange of human biological material and with the permission of the National Registry of the Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research.	
	(3) The research shall be conducted on such gametes and embryos that have been donated for such purpose in India only.	
	(4) No research shall be conducted using embryos except with the permission of the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research.	
	(5) Any person or organisation, by whatsoever name called, may apply to the Department of Health Research for registration as a research institution permitted to conduct research on embryos.	
	(6) While granting permission on an application for registration made under sub-section (5), the Department of Health Research may prescribe, and the applicant shall be bound by such terms and conditions as it thinks fit.	
	(7) The Department of Health Research may, if it has reasonable grounds to believe that any of the terms and conditions under sub-section (6) have not been fulfilled, the Department may, –	
	(a) call for the production of such documents or the furnishing of such evidence as may be required;	
	(b) inspect, or order any officer authorised in this behalf to inspect, any premises related to the grant of registration;	
	(c) suspend the registration of the research institution, after giving all concerned parties adequate opportunity to be heard;	
	(d) make such guidelines as it think fit to provide for research on human embryos.	
	57. Subject to the provision of section 56, the Department of Health Research shall, on advice from National Board and	Regulation of research.

	National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research ensure that –	
	(a) no research shall be conducted on any human embryo created *in vitro* unless such research is necessary in public interest to acquire further scientific knowledge;	
	(b) no research is conducted on any human embryo, other than embryos given for storage to an assisted reproductive technology bank under sub-section (3) of section 53, unless full and informed consent in writing is obtained from the persons from whom such embryo was created;	
	(c) no advertisement is issued, and no purchase, sale or transfer is made, of any human embryo created *in vitro* or any part thereof, except in accordance with the provisions of this Act;	
	(d) no human embryo *created in vitro* is maintained for a period exceeding fourteen days or such other period as recommended by the National Board;	
	(e) no work is done leading to human reproductive cloning;	
	(f) such other terms and conditions that may be provided by the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research.	
	CHAPTER VII RIGHTS AND DUTIES OF PATIENTS, DONORS, SURROGATES AND CHILDREN	
	58. (1) Subject to the provisions of this Act and the rules and regulations made there under, the option of assisted reproductive technology, except option of surrogacy shall be available to all married infertile couple.	Rights and duties of patients.
	(2) In case the assisted reproductive technology is used by a couple, there must be written consent from both the parties.	
	(3) The parents of a minor child have the right to access information about the donor, other than the name,	

	identity or address of the donor, or the surrogate to the extent necessary for the welfare of the child.	
	(4) All information about the patients shall be kept confidential and information about Assisted Reproductive Technology procedures done on them shall not be disclosed to anyone other than the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research, except with the consent of the person or persons to whom the information relates, in case of a medical emergency or by an order of a competent court of jurisdiction.	
	59. (1) Subject to the provisions of this Act, all information about the donors shall be kept confidential and information about gamete donation shall not be disclosed to anyone other than the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research except with the consent of the person or persons to whom the information relates, in case of a medical emergency or by an order of a court of competent jurisdiction. (2) Subject to the provisions of this Act, the donor shall have the right to decide what information may be passed on and to whom, except in the case of an order of a court of competent jurisdiction.	Rights and duties of donors.
	(3) A donor shall relinquish all parental rights over the child or children which may be conceived from his or her gamete.	
	(4) No assisted reproductive technology procedure shall be conducted on or in relation to any gamete of a donor under this Act unless such donor has obtained the consent in writing of his or her spouse, if there, to such procedure. (5) The identity of the recipient shall not be made known to the donor. (6) Appropriate formula and mechanism needs to be developed under Rules for payment of compensation to the gamete donor and to transfer the funds to the bank account of the gamete donor.	

	60. (1) The couple commissioning surrogacy through the use of assisted reproductive technology, and the surrogate, shall enter into a surrogacy agreement which shall be binding on the parties.	Rights and duties in relation to surrogacy.
	(2) (a) All expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the commissioning couple, shall be borne by the couple commissioning surrogacy. (b) If there are any complications that have arisen during pregnancy (i.e. Gestational Diabetes, Chronic Hypertension etc.) which are likely to continue for the rest of her life then it shall be covered appropriately under insurance.	
	(3) (a) Notwithstanding anything contained in sub-section (2) and subject to the surrogacy agreement, the surrogate may also receive monetary compensation from the commissioning couple, as the case may be, for agreeing to act as surrogate. (b) Appropriate formula and mechanism shall be developed under Rules for payment of compensation to the surrogate mother and to transfer the funds to the bank account of the surrogate mother at different stages starting from signing of the agreement till the child/children is/are handed over to the commissioning parents.	
	(4) A surrogate shall relinquish all parental rights over the child or children.	
	(5) Surrogate mother shall be an ever married Indian woman with minimum twenty three years of age and maximum thirty five years of age and shall have at least one live child of her own with minimum age of three years:	
	(a) provided that no woman shall act as a surrogate for more than one successful live birth in her life and with not less than two years interval between two deliveries.	

	(b) provided that surrogate mother shall be subjected to maximum three cycles of medications while she is acting as surrogate mother. (6) Any woman seeking or agreeing to act as a surrogate shall be medically tested for such diseases, sexually transmitted or otherwise, including HIV/AIDS as may be prescribed, and all other communicable diseases and conditions such as cardio-vascular disease, thyroid problem etc. which may endanger the health of the child or children, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.	
	(7) The commissioning couple may obtain the service of a surrogate through an assisted reproductive technology bank, which may advertise to seek surrogacy. Provided that no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy and no assisted reproductive technology clinic shall advertise to seek surrogacy for its clients.	
	(8) A surrogate shall, in respect of all medical treatments or procedures in relation to the concerned child or children, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate and provide the name or names and addresses of the commissioning couple, as the case may be, for whom she is acting as a surrogate, along with a copy of the agreement referred to in sub-section (1) and the copy of the certificate referred to in sub-section (20). (9) If the first embryo transfer has failed in a surrogate, she may, if she wishes, decide to accept on mutually agreed financial terms, at most two more successful embryo transfers for the same couple that had engaged her services in the first instance and no surrogate shall undergo embryo transfer more than three times for the same couple.	
	(10) The birth certificate issued in respect of a baby born through surrogacy shall bear the name of couple who commissioned the surrogacy, as parents.	
	(11) (a) Surrogacy for foreigners in India shall not be allowed but surrogacy shall be permissible to Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen.	

	(b) The commissioning couple including Overseas Citizen of India, People of Indian Origin, Non Resident Indians and foreigner married to an Indian citizen who have availed of the services of a surrogate shall be legally bound to accept the custody of the child or children irrespective of any abnormality that the child or children may have. (c) If abnormalities are detected in the child/children during the gestation period, then the commissioning parent shall ensure that the defected/disabled child/children are appropriately insured and compensation to be used for the development and growth of the child/children by the next in the family, in case of accidental death of the commissioning parents during delivery or in the process of delivery of the surrogate child. (12) A foreigner married to an Indian citizen shall have to come on a 'Medical Visa for surrogacy (MED-S) when they come to India for commissioning surrogacy;	
	(13) An Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen shall produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother;	
	(14) An Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen shall produce an undertaking that they would take care of the child/children born through surrogacy;	
	(15) An Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen shall require an 'exit' permission from the FRRO/FRO concerned for the child or children born through surrogacy before leaving India;	
	(16) Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research except by an order of a court of competent jurisdiction.	

	(17) (a) A surrogate shall not act as an oocyte donor for the couple, as the case may be, commissioning surrogacy. (b) Commissioning couple shall submit a certificate indicating that the child/children born in India through surrogacy is/are genetically linked to them and they will not involve the child/children in any kind of pornography or paedophilia.	
	(18) No assisted reproductive technology clinic and assisted reproductive technology bank shall provide information on or about surrogate or potential surrogate to any person.	
	(19) (a) The written consent of surrogate mother's spouse shall be required before she may act as surrogate. (b) The spouse of the surrogate mother shall certify in his written consent that he will take care of the well being of the existing child/children of their own specially during the surrogacy agreement period and till his wife who is acting as a surrogate mother is free from the obligation of agreement.	
	(20) A surrogate shall be given a certificate by the commissioning couple who shall avail of her services, stating unambiguously that she is/has acting/acted as a surrogate for them.	
	(21) (a) An Overseas Citizen of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen, commissioning surrogacy in India shall — (i) be married and the marriage should have sustained at least for two years; (ii) submit a certificate conveying that the woman is unable to conceive their own child and the certificate shall be attested by the appropriate government authority of that country. (iii) appoint a local guardian who shall be legally responsible for taking care of the surrogate during and after the pregnancy, till the child or children are delivered to the commissioning couple or the local guardian; (iv) insure the child or children born through the surrogacy, at the time of signing the	

	agreement, till the age of twenty-one years or till the time of custody of the child or children is taken through appropriate Insurance Policy like Jeevan Balya, whichever is earlier, for wellbeing and maintenance of the child or children; (v) use at least one gamete of their own in creation of the embryos;
	(b) The party commissioning the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the appropriate Government Authority, stating that the child or children born through surrogacy in India, shall be permitted entry in the Country as a biological child or children of the commissioning couple and that the party shall be able to take the child or children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence, as the case may be;
	(c) (i) If Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian commissioning surrogacy fails to take delivery of the child or children born to the surrogate commissioned by the Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian, the local guardian shall be legally obliged to take delivery of the child or children and be free to hand the child or children over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one month of the birth of the child or children:
	(a) Provided that during the transition period, the local guardian shall be responsible for the well-being of the child or children;
	(b) Appropriate guidelines shall be developed under Rules describing the duties, responsibilities and other related issues of the local guardian.

	(c) If Overseas Citizen of India or Citizen of Indian Origin or foreigner married to an Indian who commissioned surrogacy in India fails to take the custody of the child or children born then as per the insurance coverage signed at the time of agreement, the well being and maintenance of the child or children till the age of twenty-one years shall be taken care of by the Insurance Agency.	
	(d) Appropriate penalty provision shall be made for the Overseas Citizen of India, Citizen of Indian Origin, Non Resident Indians or foreigner married to an Indian and Indian Commissioning Couple who commissioned surrogacy in India and failed to take the custody without any genuine reason.	
	(e) The treatment should be done only at one of the registered assisted reproductive technology clinic recognized by the National Registry of ART Clinics and Banks of India of Indian Council of Medical Research.	
	(f) The Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen shall obtain the requisite prior permission from the Foreigners Regional Registration Officer/ Foreigners Registration Officer concerned for commissioning surrogacy.	
	(g) The Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen shall carry a certificate from the assisted reproductive technology clinic concerned regarding the fact that the child/children have been duly taken custody of by the Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen and the liabilities towards the Indian surrogate mother have been fully discharged as per the Agreement.	
	(h) A copy of the Birth Certificate(s) of the surrogate child/children will be retained	

	by the Foreigners Regional Registration Officer/ Foreigners Registration Officer along with photocopies of the passport and Overseas Citizen of India/People of Indian Origin card of the Overseas Citizen of India/People of Indian Origin Cardholder and foreigner married to an Indian citizen.	
	(ii) If the child or children are being given adoption to an adoption agency, the child or children shall be allowed to claim the provisions of the Indian Citizenship Act, 1955 in respect of matters relating to Indian citizenship.	
	(22) The ART Clinics/Banks who fails to follow the above provision shall be sealed immediately and appropriate legal action shall be taken as per the provision of the Bill.	
	(23) A commissioning couple shall not have the service of more than one surrogate at any given time.	
	(24) A couple shall not have simultaneous transfer of embryos in the woman and in a surrogate.	
	(25) Only Indian citizens shall have a right to act as a surrogate, and no assisted reproductive technology bank or assisted reproductive technology clinic shall receive or send an Indian woman for surrogacy abroad.	
	(26) Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act, including unprotected sex that may harm the foetus during pregnancy and the child after birth, until the time the child or children is handed over to the designated commissioning couple. The acts that may harm the foetus are as follows: a) Surrogate mother shall not have drug intravenously administered into her through a shared syringe. b) Surrogate mother shall not undergo blood transfusion without medical supervision and guidance. c) Surrogate mother should not accept blood from any source except from certified blood bank.	

	d) Surrogate mother and her husband shall not have extramarital relationship during the gestation period.	
	(27) The commissioning couples shall ensure that the surrogate and the child or children she deliver are appropriately insured until the time the child or children is handed over to the commissioning parent(s) or any other person as per the agreement and till the surrogate is free of all health complications arising out of surrogacy.	
	(28) The assisted reproductive technology bank shall act as a legal representative and mental health counsellor of the surrogate mother and on behalf of her, the assisted reproductive technology bank shall fight any legal case, if arises, during the course of surrogacy agreement free of cost.	
	(29) In case of death of surrogate mother after the conception is established and till she is declared free from all diseases and disorders resulting because of pregnancy, an appropriate compensation should be given to the family of surrogate in addition to the amount fixed at the time of agreement for her services as surrogate.	
	(30) Under the circumstances when the life of the surrogate mother is in danger at the time of delivery then the life of surrogate mother shall be protected over that of the unborn child and surrogate mother shall get the complete payment as agreed under the agreement under such type of condition.	
	(31) The minimum compensation to be paid to a surrogate mother by an Overseas Citizen of India, People of Indian Origin Cardholder, Non Resident Indians and foreigner married to an Indian citizen shall be different than the amount to be paid by an Indian commissioning couple.	
	(32) Aadhar Card shall be used as a proof of identity of a surrogate mother.	
	(33) (a) All assisted reproductive technology (ART) clinics shall report to National Registry of ART Clinics and Banks of India of Indian Council of Medical Research to give a detailed periodic report of surrogate mother on whom the procedures have been tried and possible outcome and complications, if any.	

	(b) All relevant records in respect of the Agreement between the Surrogate Mother, the Commissioning parents and the ART Clinics shall be sent to the birth registration authority at the time of registering birth of a child.	
	(34) (a) In case of death or disability of the surrogate mother, it shall be presumed to have been caused by the negligence of the assisted reproductive technology clinic unless proven otherwise. (b) In case where negligence in different degree is proven then appropriate provision shall be made under the Rules for a system of graded penalties/compensation depending on the degree of negligence.	
	61. (1) A child or children born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child or children born through sexual intercourse.	Determination of status of child.
	(2) A child or children born to an ever married woman through the use of assisted reproductive technology shall be the legitimate child or children of the woman.	
	(3) In case of married couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child or children are born, the child or children shall be the legitimate child or children of the couple.	
	(4) A child or children born to an ever married woman artificially inseminated with the stored sperm of her dead husband shall be considered as the legitimate child or children of the couple.	
	(5) If a donated ovum contains ooplasm from another donor ovum, both the donors shall be medically tested for such diseases, sexually transmitted or otherwise, including HIV/AIDS as may be prescribed, and all other communicable diseases which may endanger the health of the child or children, and the donor of both the ooplasm and the ovum shall relinquish all parental rights in relation to such child or children.	

	(6) The birth certificate of a child or children born through the use of assisted reproductive technology shall contain the names of the commissioning couple, as the case may be, who sought such use.	
	(7) If Overseas Citizen of India, People of Indian Origin and a foreigner married to an Indian citizen seeks sperm or egg donation, or surrogacy in India, and a child or children are born as a consequence, the child or children, even though born in India, shall not be an Indian citizen but shall be entitled to Overseas Citizenship of India under Section 7A of the Citizenship Act, 1955.	
	(8) In case of donation of egg or sperm, it may so happen that the egg/sperm is of an Indian donor, and the corresponding sperm or egg is that of a foreigner, who is married to a person who is, or whose children are entitled to the Overseas Citizenship of India (OCI). In such a case, though the OCI is not the biological parent of the child, but shall be the legal parent of the child. Therefore, if he, or his legal child or children, are entitled to OCI as per the Section 7A of the Citizenship Act, 1955, then that right must not be compromised or abridged in any manner. This would also apply to cases of NRIs who are married to foreigners.	
	62. (1) A child or children may, upon reaching the age of eighteen, ask for any information, excluding personal identification, relating to the donor or surrogate.	Right of child **or children** to information about donors or surrogates.
	(2) The legal guardian of a minor child or children may apply for any information, excluding personal identification, about his or her genetic parents or surrogate when required, and to the extent necessary, for the welfare of the child.	
	(3) The personal identification of the donor or surrogate may be released only in cases of life threatening medical conditions which require physical testing or samples of the donor or parents or surrogate: Provided that such personal identification shall not be released without the prior informed consent of the donor or parents or surrogate.	
	CHAPTER VIII OFFENCES AND PENALTIES	

	63. (1) No assisted reproductive technology clinic, or assisted reproductive technology bank or agent thereof, shall issue, publish, distribute, communicate or caused to be issued, published, or distributed or communicated any advertisement in any manner including internet, regarding facilities of pre-natal determination of sex.	Prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention.
	(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to rupees ten lakhs or with both.	
	Explanation.—For the purposes of this section, "advertisement" includes any notice, circular, label wrapper or any other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall-painting, signal, light, sound, smoke or gas.'.	
	64. (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns or operates any assisted reproductive technology clinic or assisted reproductive technology bank is employed in such a assisted reproductive technology clinic or assisted reproductive technology bank and renders his professional or technical services to or at such assisted reproductive technology clinic or assisted reproductive technology bank, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made there under shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to rupees ten lakhs or with both and on any subsequent contravention, with imprisonment for a term which may extend to seven years or with fine which may extend to rupees fifteen lakhs or with both.	Offences and penalties.
	(2) The name of the registered medical practitioner shall be reported by the State Board to the State Medical Council concerned or Medical Council of India for taking necessary action including suspension of the registration and closure of the clinic.	
	(3) If the practitioner has been convicted by the court, his name shall be removed from the Register of the concerned Medical Council by the State Board for a	

	period of five years for the first offence and permanently for the subsequent offence.	
	(4) In case of closure of the assisted reproductive technology clinic, the patients undergoing treatment at the clinic shall be referred by the State Board to the another nearest assisted reproductive clinic registered under this Act on similar terms and conditions.	
	65. Any person who seeks the aid of any assisted reproductive technology or of a medical geneticist, gynaecologist or registered medical practitioner for conducting pre-natal diagnostic techniques on any pregnant woman for purposes other than those specified in sub-section (2) of section 4 of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, he shall, be punishable with imprisonment for a term which may extend to five years or with fine which may extend to rupees ten lakhs or with both and on any subsequent offence with imprisonment for a term which may extend to seven years or with fine which may extend to rupees fifteen lakhs or with both.	Punishment for conducting pre-natal diagnostic techniques. 57 of 1994.
Punishment for transfer of human embryo.	66. The transfer of a human embryo into a male person or into an animal that is not of the human species shall be an offence under this Act and shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to rupees ten lakhs or with both.	
Punishment for sale of **human** embryo.	67. The sale of any human embryo for research is absolutely prohibited and shall be an offence under this Act punishable with imprisonment for a term which may extend to five years or with fine which may extend to rupees ten lakhs or with both.	
Punishment for use of brokers or paid inter-mediators	68. The use of individual brokers or paid intermediaries to obtain gamete donors or surrogates shall be an offence under this Act, punishable with imprisonment for a term which may extend to three years or fine which may extend to rupees five lakh or with both.	
	69. Whoever contravenes any of the provisions of this Act or any rules made there under, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to rupees ten lakhs or with both and in the case of continuing contravention with an additional fine which may extend to rupees fifty thousand	Punishment for contravention of provisions of Act or rules for which no specific

	every day during which such contravention continues after conviction for the first such contravention.	punishment is provided.
	70. (1) Where an offence under this Act has been committed by a company, supplying equipments, drugs and reagents used in the process, every person who at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:	Offences by companies.
	Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.	
	(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. *Explanation*.–For the purposes of this section,-	
	(a) "company" means anybody corporate and includes a firm or other association of individuals; and	
	(b) "director", in relation to a firm, means a partner in the firm.	
	71. (1) No court shall take cognizance of any offence punishable under this Act, save on a complaint made by the National Board or the State Board or by an officer authorised by it; (2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.	Cognizance of offences.
	72. All the offences under this Act shall be cognizable offence.	

	CHAPTER IX FINANCE, ACCOUNTS, AUDITS AND REPORTS	
	73. The Central Government may, after due appropriation made by Parliament in this behalf, make to the National Board grants and loans of such sums of money as that Government may consider necessary.	Grants and loans by Central Government.
	74. The State Government may, after due appropriation made by State Legislature by law in this behalf, make to the State Board, grants of such sums of money as the State Government may think fit for being utilized for the purposes of this Act.	Grants by State Government.
	75. (1) The Government shall constitute a fund to be called the 'assisted reproductive technology Fund' and there shall be credited thereto all the Government grants received by the National Board and National Registry or the State Board.	Constitution of Fund.
	(2) The Fund shall be applied for meeting- (a) the salaries and allowances payable to the Chairperson and other Members and the administrative expenses including the salaries, allowances payable to the officers and other employees of the National Board and National Registry or the State Board and the Registration Authority; (b) the other expenses of the Authorities in connection with the discharge of its functions and for the purposes of this Act.	
	(3) The Fund shall be administered by a committee of such Members of the National Board and the State Board as may be determined by the Chairperson.	
	(4) The committee appointed under sub-section (3) shall spend money out of the Fund for carrying out the objects for which the Fund has been constituted.	
	76. All sums realized by way of registration fee and penalties under this Act shall be credited to the Consolidated Fund of India or the Consolidated Fund of the State as the case may be.	Crediting sums realized by way of penalties to Consolidated Fund of India.

	77. (1) The National Board, National Registry and the State Board shall prepare a budget, maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Government in consultation with the Comptroller and Auditor General of India.	Budget, Accounts and Audit.
	(2) The accounts of the National Board and State Board shall be audited by the Comptroller and Auditor General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Authority to the Comptroller and Auditor General of India.	
	(3) The Comptroller and Auditor General and any person appointed by him in connection with the audit of the accounts of the Authority under this Act shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor General generally has in connection with the audit of Government accounts and, in particular shall have the right to demand production of books, accounts, connected vouchers and other documents and papers, and to inspect any of the offices of the Authority.	
	(4) The accounts of the Authority, as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded annually to the Government by the National Board and the State Board and the Government shall cause the audit report to be laid, as soon as may be after it is received, before each House of Parliament or, as the case may be, before the State Legislature, where it consists of two Houses, or where such legislature consists of one House, before that House.	
	78. (1) The National Board, National Registry and the State Board shall prepare annual report once in every year, in such form and at such time as may be prescribed by the Government,— (a) description of all the activities of the National Board and the State Board for the previous year; (b) the annual accounts for the previous year; and (c) the programmes of work for the coming year.	**Annual report and future proposed plan**

	(2) A copy of the report received under sub-section (1) shall be laid, as soon as may be after it is received, before each House of Parliament or, as the case may be, before the State Legislature or the Union Territory Legislature, where it consists of two Houses, or where such legislature consists of one House, before that House.	
	CHAPTER X MISCELLANEOUS	
Power of Central Government to issue directions to National Board **and National Registry**.	79. (1) Without prejudice to the foregoing provisions of this Act, the National Board and National Registry shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time:	
	Provided that the National Board and National Registry shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.	
	(2) If any dispute arises between the Central Government and the National Board or National Registry as to whether a question is or is not a question of policy, the decision of the Central Government shall be final.	
Power of State Government to issue directions to State Board.	80. (1) Without prejudice to the foregoing provisions of this Act, the State Board shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy as the State Government may give in writing to it from time to time:	
	Provided that the State Board shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.	
	(2) If any dispute arises between the State Government and the State Board as to whether a question is or is not a question of policy, the decision of the State Government shall be final. 81. (1) If the State Board has reason to believe that an offence under this Act has been or is being committed at any facility using assisted reproductive technology, such Board or any officer authorised in this behalf may, subject to such rules as may be prescribed, enter and	Power to search and seize records etc.

	search at all reasonable times with such assistance, if any, as such Board or officer considers necessary, such facility using assisted reproductive technology and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize the same if the State Board or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.	
	(2) The provisions of the Code of Criminal Procedure, 1973, relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act.	2 of 1974.
	82. No suit, prosecution or other legal proceeding shall lie against the Central Government or the State Government or the National Board or State Board or Registration Authority or National Registry or any other officer authorised by the Central Government or the State Government or the National Board or State Board or Registration Authority or National Registry for anything which is in good faith done or intended to be done in pursuance of the provisions of this Act .	Protection of action taken in good faith.
Power of Central Government to supersede **National** Board.	83. (1) If, at any time the Central Government is of the opinion that—	
	(a) on account of circumstances beyond the control of the National Board, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or	
	(b) the National Board has persistently defaulted in complying with any direction given by the Central Government under this Act; or	
	(c) the National Board has failed in the discharge of any of the functions or performance of the duties imposed on it by or under the provisions of this Act; or	
	(d) circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification, for reasons to be recorded, supersede the National Board or dissolve the Board for such	

	period, not exceeding six months, as may be specified, in such notification:	
	Provided that before issuing any such notification, the Central Government shall give a reasonable opportunity to the National Board to make representations against the proposed supersession and shall consider representations, if, any, of the National Board.	
	(2) Upon the publication of a notification under sub-section (1) dissolving the National Board,–	
	(a) the Chairperson, the Members shall, from the date of supersession, vacate their offices as such;	
	(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the National Board shall, until the Board is reconstituted under sub-section (3), be exercised and discharged by the Central Government or such agency or persons as the Central Government may specify in this behalf;	
	(c) all properties owned or controlled by the National Board shall, until the Board is reconstituted under sub-section (3), vest in the Central Government. (3) On or before the expiry of the period of supersession specified in the notification issued under sub-section (1), the Central Government shall reconstitute the Board by a fresh appointment or nominations, as the case may be, of the Chairperson, and Members in such case any person who had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment. (4) The Central Government shall cause a notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament.	
	84. (1) If, at any time, the State Government is of the opinion,—	Power of State Government to supersede State Board.
	(a) that, on account of circumstances beyond the control of the State Board, it is unable to	

	discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or	
	(b) that the State Board, has persistently defaulted in complying with any direction given by the State Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the State Board, or the administration of the State Board, has suffered; or	
	(c) that circumstances exist which render it necessary in the public interest so to do, the State Government may, by notification, supersede the State Board, for such period, not exceeding six months, as may be specified in the notification and appoint a person or persons as the Chairperson to exercise powers and discharge functions under this Act: Provided that before issuing any such notification, the State Government shall give a reasonable opportunity to the State Board, to make representations against the proposed supersession and shall consider the representations, if any, of the State Board.	
	(2) Upon the publication of a notification under sub-section (1) superseding the State Board,—	
	(a) the Chairperson and other members shall, as from the date of supersession, vacate their offices as such; (b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the State Board shall, until the State Board is reconstituted under sub-section (3), be exercised and discharged by the person or persons referred to in sub-section (1); and	
	(c) all properties owned or controlled by the State Board shall, until the State Board is	

	reconstituted under sub-section (3), vest in the State Government.	
	(3) On or before the expiry of the period of supersession specified in the notification issued under sub-section (1), the State Government shall reconstitute the State Board, by a fresh appointment of its Chairperson and other members and in such case any person who had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for reappointment.	
	(4) The State Government shall cause a copy of the notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before State Legislature at the earliest.	
	85. (1) The Central Government may make rules for carrying out the provisions of this Act.	Power of Central Government to make rules.
	(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for –	
	(a) the manner of appointing the Members of National Board under sub-section (1) of section 4;	
	(b) the manner of appointment of the Selection Committee under sub-section (1) of section 5.	
	(c) the salary and allowances payable to and other terms and conditions of service of Chairperson and Members of the National Board in sub-section (3) of section 7.	
	(d) any other matter in respect of which the National Board may exercise the powers of a civil court under clause (e) of sub-section (1) of section 16;	
	(e) the other functions which the National Board may perform under clause (j) of sub-section (2) of section 17;	
	(f) the terms of office and other conditions of service of Director, Scientists, officers and other	

	employees of National Registry under section 20; (g) the period and the form in which an application shall be made for registration and fee payable thereof under sub-section (2) of section 37;	
	(h) the other information to be specified and documents to be annexed to the application under clause (d) of sub-section (2) of section 37;	
	(i) the application made for extension of the registration of assisted reproductive clinic and assisted reproductive bank under sections 39 and 43.	
	(j) the period, the form and manner in which an appeal may be preferred to the National Board under sub-section (1) of section 45. (k) the medical examination of the diseases with respect to which the donor shall be tested under sub-section (5) of section 46;	
	(l) the manner of looking into the complaints for the mechanism adopted by the assisted reproductive technology clinic under sub-section (13) of section 46;	
	(m) the manner of maintaining the records by the assisted reproductive technology clinics and Banks under sub-section (1) of section 48.	
	(n) the manner of medical analysis of semen in sub-section (8) of section 49.	
	(o) the medical examination of diseases with respect to which the donor shall be tested under sub-section (3) and sub-section (5) of section 52.	
	(p) the manner of obtaining the information in respect of sperm or oocyte donor or a surrogate by the assisted reproductive technology bank under sub-section (12) of section 52.	

(q) the fee to be paid to the assisted reproductive technology bank for the purpose of storing any semen obtained from a donor for exclusive use for his wife under sub-section (13) of section 52.	
(r) the fee to be paid for storing of embryo under sub-section (3) of section 53.	
(s) the medical examination of the diseases with respect to which any woman seeking to act as surrogate mother under sub-section (6) of section 60.	
(t) the medical examination of the diseases with respect to which the donor's shall be tested under sub-section (5) of section 61.	
(u) the form for maintaining proper accounts and other relevant records and the annual statement of the accounts of the National Board under sub-section (1) of section 77.	
(v) the form in which and the time in which the annual report of the National Board shall be prepared under sub-section (1) of section 78.	
(w) the salary and allowances payable to and other terms and conditions of service of the officers and of the employees of the National Board under sub-section (3) of section 91.	
86. (1) The State Government may make rules for carrying out the provisions of this Act.	Power of State Government to make rules
(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for	
(a) the salary and allowances payable to and other terms and conditions of service of the Chairperson and Members of the State Board under sub-section (3) of section 25;	
(b) the other functions which the State Board may perform under clause (c) of sub-section (2) of section 33;	

	(c) any other matter in respect of which the State Board may exercise the powers of a civil court under clause (e) of sub-section (1) of section 34;	
	(d) the manner of appointing the Chairperson and Members of the Registration Authority under sub-section (3) of section 35;	
	(e) the allowances payable to and other terms and conditions of service of the Chairperson and the Members of the Registration Authority under sub-section (4) of section 35;	
	(f) the period, the form and manner in which an appeal may be preferred to the State Board under sub-section (1) of section 44;	
	(g) the form for maintaining proper accounts and other relevant records and the annual statement of the accounts of the State Board under sub-section (1) of section 77;	
	(h) the form in which and the time in which the State Board shall prepare the annual report under sub-section (1) of section 78;	
	(i) the manner of entry and search by the State Board or any officer authorized by it under sub-section (1) of section 81;	
	(j) the salary and allowances payable to and other terms and conditions of service of the officers and of the employees of the State Board under sub-section (3) of section 91.	
	87. (1) The National Board may, with the previous sanction of the Central Government, by notification make regulations consistent with this Act and the rules made there under to carry out the provisions of the Act;	Power to make regulations by National Board.
	(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for –	
	(a) time, place and the procedure in regard transaction of business at meetings of the	

	National Board under sub-section (1) of section 14;	
	(b) the permissible assisted reproductive technology procedures under clause (b) of sub-section (2) of section 17;	
	(c) the selection of patients for assisted reproductive technology procedures under clause (c) of sub-section (2) of section 17;	
	(d) the research on human embryos under clause (g) of sub-section (2) of section 17;	
	(e) the minimum physical infrastructure requirements for an assisted reproductive clinic and assisted reproductive technology bank under clause (a) of sub-section (2) of section 17;	
	(f) the minimum requirements regarding staff in assisted reproductive technology clinic and assisted reproductive technology bank under clause (a) of sub-section (2) of section 17;	
	(g) the manner of harvesting oocytes under sub-section (1) of section 49;	
	(h) the number of oocytes or embryos under sub-section (2) of section 49;	
	(i) any other matter which is required to be, specified by regulations or in respect of which provision is to be made by regulations.	
	88. (1) The State Board may, with the previous sanction of the State Government, by notification in the Official Gazette, make regulations consistent with this Act and the rules made there under to carry out the provisions of the Act;	Power to make regulations by State Board.
	(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for –	
	(a) time, place and the procedure in regard transaction of business at meetings of the State Board under sub-section (1) of section 32;	
	(b) the form and fee for extension of registration under section 39;	

	(c) the manner of harvesting oocytes under sub-section (1) of section 49;	
	(d) number of oocytes or embryos under sub-section (2) of section 49;	
	(e) any other matter which is required to be, specified by regulations or in respect of which provision is to be made by regulations.	
	89. Every rule or regulation made and notification issued under this Act shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses of Parliament agree in making any modification in the rules or regulations or notifications, as the case may be, both Houses agree that the rules or regulations or notifications, as the case may be, should not be made or issued, the rule or regulation or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification, as the case may be.	Laying of Rules and Regulations.
	90. (1) The National Board may, by general or special order, delegate to any officer of the Board, subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions exercisable by it under this Act (except the power to make regulations under section 87) as it may deem necessary.	Delegation.
	(2) The State Board may, by general or special order, delegate to any officer of the Board, subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions exercisable by it under this Act (except the power to make regulations under section 88) as it may deem necessary.	

	91. (1) The Central Government may appoint, in consultation with the National Board such officers and employees as it considers necessary for the efficient discharge of their functions under this Act who would discharge their functions under the general superintendence of the Chairperson.	Officers and employees of Board.
	(2) The State Government may appoint, in consultation with the State Board such officers and employees as it considers necessary for the efficient discharge of their functions under this Act who would discharge their functions under the general superintendence of the Chairperson.	
	(3) The salary and allowances payable to and the other terms and conditions of service of the officers and of the employees of the National Board appointed under sub-section (1) shall be such as may be prescribed by the Central Government.	
	(4) The salary and allowances payable to and the other terms and conditions of service of the officers and of the employees of the State Board appointed under sub-section (2) shall be such as may be prescribed by the State Government.	
	92. The Chairperson and other Members and the officers and other employees of the National Board, State Board and the Registration Authority shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.	Members and staff of National Board to be public servants.
	93. The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.	Act to have overriding effect .
57 of 1994.	94. The provisions of this Act shall be in addition to, and not in derogation of the provisions Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and the Clinical Establishment (Registration and Regulation) Act, 2010 or of any other law for the time being in force.	Application of other laws not barred.
	95. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary or expedient for removing the difficulty:	Power to remove difficulties.

	Provided that no such order shall be made after the expiry of a period of three years from the date of commencement of this Act.	
	(2) Every order made under this section shall, as soon as may be made, be laid before each House of Parliament.	

LIST OF RESEARCH ARTICLES PUBLISHED

1 **"REPRODUCTIVE CHOICE OF WOMEN IN ABORTION-AN ANALYSIS"(2012)(V)KERALA UNIVERSITY JOURNAL OF LEGAL STUDIES 217-225 ISSN 2278-2702**

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REPRODUCTIVE CHOICE OF WOMEN IN ABORTION-AN ANALYSIS

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Concept of reproduction has got great significance in human life.Major concerns on reproduction are revolving around the area of reproductive choices. Most focal point to the theoretical disputes surrounding the issue of reproductive choice of women is the notion of reproductive autonomy.[1] The contemporary accounts of autonomy[2] denote it as a form of independence. In the context of women and development, the concept of autonomy was first mentioned in Bangkok, in 1979, during a workshop on feminist ideology and structures for women.[3]Autonomy was defined as the power to control our lives. The term power is used not in the sense of domination over others but as: a) a sense of internal strength and confidence to face life ;b)the right to determine our choices in life; c)the ability to influence the social processes that affect our lives; and d)influence on the direction of social change .[4]

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the

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[1] *See generally*,L Purdy , Women's reproductive autonomy: Medicalisation and beyond, 32 *J MED ETHICS* 287,288-289(2006)

[2] There are so many definitions on autonomy. *See*, GERALD DWORKIN ,THE THEORY AND PRACTICE OF AUTONOMY(1st ed.,1988) p.20 .Dworkin defines the term autonomy as a second order capacity of persons to reflect critically upon the first order preferences,desires,wishes and so forth and the capacity to accept an or attempt to change these in light of higher order preferences and values. He considers capacity as a constituent element of his definition of autonomy. To him Autonomy has been seen as Liberty (positive or negative)...dignity, integrity, individuality, independence, responsibility and self knowledge...self-assertion... critical reflection... freedom from obligation...absence of external causation...and knowledge of one's own interests...The only features that are held constant from one author to another are that autonomy is a feature of persons and that is a desirable quality to have . *See also* ,R. S.Downie and K C Calman ,HEALTHY RESPECT :ETHICS IN HEALTH CARE (2nd ed.,1994) p.52.They considers,to be an autonomous person is to have the ability to be able to choose for oneself or more extensively to be able to formulate and carry out one's own plans or policies .

[3] It was held by the Asian and Pacific Centre for Women and Development based in Kuala Lumpur.

[4] *See,* JYOTSNA AGNIHORTI GUPTA, NEW REPRODUCTIVE TECHNOLOGIES, WOMEN'S HEALTH AND AUTONOMY :INDO-DUTCH STUDIES ON DEVELOPMENT ALTERNATIVES SERIES (1st ed.,2000) p.23

person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences.[5]What is always at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.[6] The mothering role of women is reproduced in society irrespective of whether women become mothers or not and the ideology of motherhood is dependent on the way a society constructs it. Motherhood has always been, and continues to be, a colonized concept-an event physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology"[7].Motherhood is seen to be positively significant in many traditional societies, since women's reproductive capacity is something which women consider their source of power, and as defining their identity and status. It is also considered a resource for women who are denied the experience. This is true of childless women who centre their whole life on the fact that they cannot become mothers or bear children and have to pay a social cost for it.[8].The way the patriarchal family is structured is one of the major causes of inequality between men and women and of the understanding that motherhood is one of the major roles of a woman in society[9]. Some feminists believe that motherhood should be placed within the context of women's lives as one of the greatest pleasures, worries and burden of female's[10].The experience of motherhood is powerfully shaped by culture. But it is so profoundly affected by race, social class and sexuality even though mothers have never had much power and prestige in many societies, women alone have had the power to gestate and birth babies.[11] But it is remarkable that in

[5] *See* , ICPD Programme of Action(1994)(Para 96)

[6] *See* ,Reva B. Siegel, Dignity and the Politics of Protection:Abortion Restrictions Under *Casey/Carhart*, 117 YALE L.J. 1694 , 1752 (2007-2008)

[7] Martha L. Fineman, "Images of Mothers in Poverty Discourses", *(*1991) 2 DUKE L.J.274, 289-90.

[8] *See*, Anjali Widge , Sociocultural attitudes towards infertility and assisted reproduction in India ,in CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION,REPORT OF A MEETING ON"MEDICAL, ETHICAL AND SOCIAL ASPECTS OF ASSISTED REPRODUCTION"62(Effy Vayena,Patrick J. Rowe,P. David Griffin eds 2001 .The ideology of motherhood in Indian society explains why fertility is so important. Feminine identity is defined by the ideology of motherhood, being fertile is important and infertility is a huge problem. Though the control of fertility might be a problem for the state, yet infertility is very important in the cultural context as kinship and family ties depend on the progeny.

[9] *Id*

[10] To some cultural feminists, the distinction between women and men is based on women's reproductive capacities. This capacity and women's ability to mother is seen as something to celebrate. *See generally,* GILLIGAN C , IN A DIFFERENT VOICE:PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT(1st ed.,1982)

[11] *See generally*,S. FIRESTONE, THE DIALECTIC OF SEX (1st ed.,1979)

many feminist theories the reproductive capacity of women is either implicitly or explicitly associated with powerlessness, without a clear explanation for the same[12]. Female capacity for motherhood as a natural, biological phenomenon prevents women from being capable of living a fully autonomous life. Feminists have long been interested in the matter, how male and female reproductive roles have influenced their relative status in both family and society. Feminist economists and sociologists have also shown how women's role in parenting restricts their capability or capacity to pursue careers of their choice.Most legal scholarship addressing gender issues and law treats "women" as a homogeneous category, assuming that the material conditions of, dominant attitudes towards, and concerns and values of all women are the same[13]

In *Parkinson* v. *St James and Sea croft University Hospital NHS Trust,*[14] the sheer hard work involved in pregnancy, childbirth and in being a mother elucidates :

> From the moment a woman conceives, profound physical changes take place in her body and continue to take place not only for the duration of the pregnancy but for some time thereafter. Those physical changes bring with them a risk to life and health greater than in her non-pregnant state…along with those physical changes go psychological changes…some may amount to a recognised psychiatric disorder, while others may be regarded as beneficial, and many are somewhere in between….Along with these physical and psychological consequences goes a severe curtailment of personal autonomy. Literally, one's life is no longer just one's own but also someone else's…continuing the pregnancy brings a host of lesser infringements of autonomy related to the physical changes in the body or responsibility towards the growing child.

[12] *See Supra* note 4 at 37 . *See also,* Robin West, *Jurisprudence and Gender* 55 *U. CHI. L. REV.* 1, 30(1988). Here Pregnancy is considered as a dangerous, psychically consuming,existentially intrusive, and physically invasive assault upon the body which in turn leads to a dangerous, consuming,intrusive, invasive assault on the mother's self-identity—that best captures women's own sense of the injury and danger of pregnancy.

[13] *See generally* , Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581(1990)

[14] (2001)3 W.L.R. 376.

Procreation is the instinct of living beings and man is not different from other living beings in this respect. However man is not merely an animal, But a *homo faber*. At the present level of intellectual development,he not merely seeks the aid of science and technology for procreation,but also preventing procreation[15]. As it is the biological peculiarity of women to procreate,[16]the reproductive choice in abortion also vests in them.

Reproductive choice of women in Abortion

Right to have Reproductive choices is a part of our right to privacy. Neither our Indian constitution nor American Constitution explicitly recognizes the right to procreative choices .It can come under right to privacy or personal liberty which is protected by the due process clause in America[17] as well as the counter part of due process clause,Art.21 of Indian Constitution[18]. The most relevant and impactful reproductive choices eclipse the abortion choice[19]. The determination of whether to have a child or children is "a major life decision. The crucial question which arises here is that whether there is a right to terminate

[15] Paras Diwan,'Technological *niyoga* and *nirodh* and social engineering through law'. 22 *JILI* 448(1980)

[16] Procreation has anthropological and sociological significance supporting its designation as a fundamental right. No other creative function ranks with the process of procreation in its importance to individuals and to society. The impetus to procreate is fostered both biologically through hormonal impulses and psychologically through enculturation.*See generally* , E. POHLMAN**,** THE PSYCHOLOGY OF BIRTH PLANNING 35-81 (1st ed.,1969)

[17] *See, Griswold* v.*Connecticut* ,381 U.S. 479 (1965),In this case,connecticut law was challenged on the basis that it violated right to marital privacy.The Court in a 7-2 decision held that although right to privacy is not expressly protected by U.S.Constitution,such a right can be read into the Due process clause clause of the fourteenth Amendment.Court invalidated 1879 connecticut law that made the sale of birth control devices a misdemeanor.

[18] Art.21 uses the term personal liberty instead of liberty.It reads "No person shall be deprived of his life or personal liberty ,except according to the procedure established by law".*See, Kharak singh* v. *State of U.P.* ;AIR 1963 SC 1295. It was held that personal liberty was not only limited to bodily restraint or confinement to prisons only ,but was used as a compendious term including within itself all the variety of rights which go to make up the personal liberty of man other than those dealt within the Article 19. *But See* , *Maneka Gandhi* v *Union of India*; AIR 1978 SC 597 The supreme court was interpreted the term Personal liberty in a broader manner to include freedoms even the specific freedoms that have been granted under Art.19 of the Constitution.The decision in this case was based on Subba Rao J.'S dissenting opinion in Kharak Singh case.

[19] *See,* Mariama A. Jefferson, "Reproductive choice: the reproductive choice debate must include more than abortion", 4 CHARLESTON LAW REVIEW 774,791(2010)

pregnancy or freedom of choice in determining it or not.It is true that Every human being of adult years and sound mind has a right to determine what shall be done with his own body. In U.S. , abortion was permitted with the consent of the pregnant women ,at all stages prior to "quickening".[20]There has been long debates on abortion rights and *Roe* v.*Wade*[21] , an American case law opened a way to expand the competing and compelling facets of the right. In this Supreme Court decision,Court overturned a Texas interpretation of abortion law[22] and made abortion legal in the United States. In the *Roe* v. *Wade* decision ,it was held that a woman, with her doctor, could choose abortion in earlier months of pregnancy without legal restriction, and with restrictions in later months, based on the right to privacy. The case founding a fundamental right to abortion, "has . . . been the subject of prolonged and heated debate."[23] It "has become a defining and polarizing issue in national politics" and threatens the state of women's procreative rights.[24] In this celebrated case, Blackburn J. observed "The right of personal privacy includes the abortion decision,but that this right is not unqualified and must be considered against important state interests in regulation.[25]. Like contraception, Abortion also coming under the purview of personal privacy. Laurence Tribe has argued:The liberty that is most plainly vindicated by the right to end one's pregnancy is the woman's liberty not to be made unwillingly into a mother, the freedom to say no to the unique sacrifice inherent in the processes of pregnancy and childbirth.[26] In *Planned Parenthood* v. *Casey*, [27] the Court

[20] It is the earliest perception of foetal movement by a mother in the second trimester of pregnancy.The judicial recognition of abortion right was got in 1973 in Roe.*See Infra* n.21

[21] *Roe* v.*Wade* 410 U.S. 113 (1973). In *Roe*, Court adopted a three stage analysis a)During the first trimester of pregnancy ,the right of privacy of a women and her physician precluded most state regulation of abortions performed by the licenced physicians.b)From the end of the first trimester until viability,state could regulate to protect maternal health.c)After viability,states had a compelling interest in the life of the unborn child,so that abortions could be prohibited except when necessary to preserve the life or health of the mother.

[22] Texas criminal abortion law prohibited all abortions which are not necessary to save the life of the mother .In Roe,it was declared violative of the due process clause of the fourteenth amendment.

[23] PAUL FINKELMAN, ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 1321 (3rd ed.,2006)

[24] *Id*

[25] *See , Supra* n.21 at 153. There is also *Doe* v. *Bolton* ,the companion case to *Roe* and was decided at the same time. 410 U.S. 179 (1973). In *Bolton,* a married woman challenged the constitutionality of Georgia's laws criminalizing abortion. Under Georgia law, abortions were prohibited unless a doctor determined that the pregnancy would endanger tile woman's life or health, the fetus likely would be born with a birth defect, or if the pregnancy resulted from rape. *See, Id.* at 183. Doe argued that she was forced to either relinquish her right to decide whether to bear a child or seek an illegal abortion. The Supreme Court struck down the Georgia law as
unconstitutional.

[26] LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 98-99(1st ed.,1992)

emphasized that the abortion right "stands at [the] intersection of two lines of decisions[28].One's attitudes towards life , family,values affects the same.[29]

Pregnancy itself may be viewed as a profound invasion of the body that imposes heavy physical burdens and subjects women to serious medical risks to their health. According to Justice Blackmun,Compelled continuation of a pregnancy infringes upon a woman's right to bodily Integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those the Court has held to violate the constitutional principle of bodily integrity in other contexts.[30] So Women have the right to obtain an abortion, without any substantial hindrance or undue burden, is allowed before the fetus reaches the point of viability[31] outside the womb with neonatal care.[32]The facts that

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[27] 505 U.S. 833 (1992)

[28] *See, Id* at p.857

[29] As Justice Blackmun wrote in *Roe,*

"We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that

the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."See, Roe at 116.

[30] *See Supra,* n.27 at 833, 927 (1992) .The joint opinion in *Casey* can be divided into several sections.First, it reviews *Roe* v. *Wade* and its constitutional foundations at great length. It examines the "liberty" interest as found in the Constitution, reiterating that the right to abortion is a protected interest. Second, the joint opinion does an extensive review of stare decisis. Third, the joint opinion affirms what it labels the essential holding" in *Roe* and then provides a new test with which to review the constitutionality of state laws regulating abortion.*See* , Kevin Yamnamoto, & Shelby A.D. Moore, A Trust Analysis of a gestational carrier's right to abortion , 70 *Fordham L. Rev*. 93 ,139 (2001-2002)

[31] Viability is important not simply because it correlates with sentience, but because it marks the moment of independence,of an autonomous existence. At viability, it is reasonable to regard the fetus as a separate entity rather than an appendage that is part of the woman's body because it no longer needs her in order to survive. At this point, it may be treated as an autonomous entity, a distinct being with interests in its own right. Accordingly, viability connects the legal status of the fetus with its dependence upon the woman's body, confirming the importance of bodily integrity and sex equality to the abortion right. *See*, Radhika Rao, Equal Liberty: Assisted Reproductive Technology and Reproductive Equality, 76 *The George Washington Law Review* 1457,1470(2008)

[32] Viability is that point where the fetus is potentially able to live outside the mother's womb, albeit with artificial aid. *See ,Roe,* at 160. In 1973, viability for a fetus outside the womb was approximately twenty-eight weeks gestation. By 1992,viability was possible at twenty-three to twenty-four weeks. *See*,*Casey,* at 860

viability is a scientific concept, that time of viability changes with technology,and whether the fetus viable depends on whether one determines viability before or after the abortion were all reasons not to make matters of constitutional significance depends upon viability.[33]The maternal health and potential fetal life are inextricably relates and may sometimes be at war with each other suggests the folly of making them independent variables in the abortion regulation process. In India,The Bombay High Court refused permission to abort a 26-week fetus with a serious heart defect after rejecting the couple's plea to terminate the pregnancy in a case torn between trauma and ethical issues. Dismissing an application by Niketa Mehta[34], the court observed that medical experts did not express any "categorical opinion that if the child is born it would suffer from serious handicaps. Petitioners also sought an amendment to the Medical Termination of Pregnancy Act 1971[35] so that pregnancy can be terminated even after 20 weeks if doctors believe that the child, if born, will have serious abnormalities, so as to render it handicapped.[36] Another concern is that what will be the response of our court if the spousal consent is not

; *See also, Stenberg* v. *Carhart*, 530 U.S. 914 (2000); *Gonzalez* v. *Carhart*, 550 U.S. 124 (2007).In *Gonzalez* v. *Carhart,* the Court upheld a state statute prohibiting partial birth abortion.Some commentators feel that the Supreme Court did not give enough importance to the State's interest in protecting the life of the fetus:No reason is given why viability should be the measure of the significance of the state's interest. This metaphysical assessment of worth is scarcely inferable from the Constitution or from the record in the case. Moreover, it would appear to rely on the unacknowledged and plainly incorrect premise that only self-sufficient living entities may serve as objects of a state's compelling interests.*See generally,* John T. Noonan, Jr., The Root and Branch of *Roe* v. *Wade*, 63 *Neb. L. Rev*. 668 (1984).

[33] From the perspective of those who claim a right to reproductive autonomy—a right to choose whether or not to reproduce—the location of the embryo or fetus is irrelevant. But if reproductive autonomy receives constitutional shelter only when there is also a threat to bodily integrity or sex equality, however, location is critical. *See,* Radhika Rao, *Supra* n. 31 at 1471

[34] *See*, *Dr. Nikhil Dattar & Ors*. v. *Union of India* (2008) 110 Bom. L .R. 3293.

[35] In India Abortion is a criminal offence as per S.312 Of IPC.In 1971 Medical Termination of Pregnancy Act 1971 was enacted which is an exception to IPC S.312.It permits abortion where continuance of pregnancy cause grave injury to mental and physical health of the mother.

[36] As per the 41-year-old abortion control laws, (MTP Act 1971)a pregnancy can be terminated after 20 weeks only if there was a fatal risk to the mother and not the foetus. Niketa, who is in the 26th week of pregnancy, had moved the court last week, seeking permission to abort her first child, as her doctor found out in the 24th week that the foetus has a congenital heart block. The court then constituted a committee of doctors. But the doctors consulted by Mehtas too were not sure if a cardiac surgery would be required after the birth, or there was any "substantive" risk that the child will be seriously handicapped all its life. They also sought amendment to the MTP Act, which does not allow abortion on the ground of feared abnormality in the child after 20th week of pregnancy. But the court pointed out that even if Mehtas were to seek permission for abortion before 20 weeks, medical opinions did not support the need for abortion in their case.

involved in the abortion choice by women.Indian courts often recognizes the abortion without spousal consent amounts to matrimonial cruelty and thereby a valid ground for divorce.[37]So generally the right to make independent reproductive choice in abortion is not considered absolute in India.[38]In United States ,the issue of absolute reproductive autonomy has been made so much controversies and spousal or parental consent clauses in abortion statutes were invalidated in several cases.[39]But later U.S Courts also began to abandon liberal approach by upholding the requirement of consent in the abortion choice.[40]

Here it is rightly to remember the speech of solitude of self[41] while it is high time to conclude,

> The talk of sheltering woman from the fierce storms of life is the sheerest mockery, for they beat on her from every point of the compass, just as they do on man, and with more fatal results, for he has been trained to protect himself, to resist, and to conquer. Such are the facts in human experience, the responsibilities of individual sovereignty.Rich and poor, intelligent and ignorant, wise and foolish, virtuous and vicious, man and woman; it is ever the same, each soul must depend wholly on itself.
>
> Whatever the theories may be of woman's dependence on man, in the supreme moments of her life, he cannot bear her burdens. Alone she goes to the gates of death to give life to every man that

[37] *See* ,*Satya* v.*Siri Ram* A.I.R.1983 P&H 252,253,Court held,the termination of pregnancy without the hubands consent where he had legitimate craving to have child amounts to cruelty.*See also, S Kumar Verma* v.*Usha* A.I.R 1987 Del.86.

[38] *See generally,* Priyaranjan Kumar Shukla, Woman's Right to Abortion at Legal Crossroads , 19 *IND.BAR.REVIEW* 89,95(1992)

[39] *See* ,*Planned Parenthood Central Missouri* v.*Danforth* 428 U.S.52 (1976), *Bellotti* v.*Baird* 428 U.S. 132(1976)

[40] *See, Planned Parenthood* v.*Ashcroft* 462 U S 476 (1983).

[41] On the occasion of her retirement at age seventy-six as president of the National American Woman Suffrage Association, Elizabeth Cady Stanton gave a widely reported speech entitled *The Solitude of Self* which she then repeated in an address before the U.S. House Committee on the Judiciary and the U.S. Senate Committee on Woman Suffrage in 1892. *See*, ELIZABETH CADY STANTON, THE SOLITUDE OF SELF WOMEN (1892) accessed at *www.sscnet.ucla.ed* on 12/2/2012

> is born into the world. No one can share her fears, no one can mitigate her pangs; and if her sorrow is greater than she can bear, alone she passes beyond the gates into the vast unknown

Renewing or creating life is a form of work, a kind of production, which is fundamental for the very existence of the society.[42] In a regime of reproductive rights, there is room for both state and private actors to express their own moral views about reproductive choice or to take steps to minimize perceived harm.[43]There is a need for both legislative and judicial intervention to clarify the many stressing issues on reproductive choice in abortion. The choices in Reproduction are ultimately a personal issue and giving undue interference on that power of decision making except in very limited circumstances where there is an unreasonable risk to maternal health, fetal viability, or both is a clear negation of our constitutional rights. The greatest challenge here lies upon the realization of reproductive autonomy of women in a justifiable and balancing manner without totally disregarding her freedom of reproductive choice.

[42] *See generally* ,Laslett, Barbara and Johanna Brenner, Gender and social reproduction: historical perspectives, 15 *ANNUAL REVIEW OF SOCIOLOGY* 381,383(1989).
[43] *See* ,John A. Robertson, Assisted Reproductive Technology and the Family 47 *HASTINGS LAW JOURNAL* 915(1996)

Legalizing Surrogacy in India- A study with special reference to the rights of surrogate women in surrogacy arrangements.

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Abstract

Surrogacy is a method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. Surrogacy can be an option for infertile parents who wish to have a child that is biologically related to them. Legalizing surrogacy in India without proper guidelines can cause huge amount of human right violations of the parties involved. This paper mainly highlights the rights of surrogate women in these arrangements and also the sphere of violation of these rights.Paper will have 4 major parts which includes these highlights

a.Surrogacy- a conceptual probe

b.Rights of surrogate women

c Assisted reproductive technology (regulation) bill on Surrogacy

d Remedial measures to avoid reproductive tourism in India via surrogacy

Legalizing Surrogacy in India- A study with special reference to the rights of surrogate women in surrogacy arrangements

I Introduction

Surrogacy no longer remains a new concept.It became popular among infertile couples.Surrogate mother is needed for the practice.The word 'surrogate' has its origin from a Latin word '*surrogatus*', meaning a substitute,that is, a person appointed to act in the place of another.Hence Surrogate mother is a mother who carries a child on behalf of another woman.Surrogacy can be defined as a method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child. But she will not raise that child, only hand over to a contracted party.It is often recognized as a method of Assisted

Reproduction. The use of artificial insemination and the recent development of *in vitro* fertilisation have eliminated the necessity for sexual intercourse in order to establish a surrogate pregnancy. American Law reports gives a standard definition to Surrogacy as a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth.[1]

II. Types of Surrogacy

There are Two Major classifications of Surrogacy Arrangements

1.Traditional and Gestational Surrogacy

2.Altruistic and Commercial Surrogacy

1. . Traditional and Gestational Surrogacy

Surrogacy can be traditional as well as gestational.In traditional surrogacy,surrogate mothers egg is used. Resulting child is genetically related to her and the male partner.In gestational surrogacy,surrogate women carries the pregnancy created by the egg and the sperm of the genetic couple or donors.Surrogate woman is just a carrier,there is no genetic similarity between surrogate and the child.Gestational surrogacy is known as total surrogacy whereas Traditional surrogacy is known as partial surrogacy.[2]

2. Altruistic and Commercial Surrogacy

Another division of surrogacy arrangements was made on the basis of financial concerns.Altruistic Surrogacy and Commercial Surrogacy.Altruistic surrogacy is a situation where surrogate receives no financial reward for her pregnency or the relinquishment of the baby although usual expenses are related to the pregnancy and birth are paid by the intended parents such as medical expenses,clothing etc.Commercial surrogacy is an arrangement in which the gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents violated.

III Surrogacy and women's health

Right to health is a constitutionally guaranteed right.It is the most valuable asset of human life. Health is considered as the most basic and essential asset of human life.The World Health Organization (WHO) in its preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[3] It further states the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race,religion, political belief, economic or social conditionThe Universal Declaration of Human Rights, adopted in 1948, acknowledges the right to health as a component of "a standard of living adequate for the health and well-being of [a person and that person's] family, including … medical careand necessary social services, and the right to security in the event of sickness."[4] Not only in Art.21 of the Constitution but also in Art.47 of the Constitution ,this right has been enumerated Art.21 casts an obligation on the state to preserve the life and health of the citizen. The expression "life" does not connote mere animal existence.It has a much wider meaning which includes right to livelihood,better standards of life etc.[5]While considering the health of women,Convention on elimination of all forms of discrimination against women (CEDAW) enumerates the right to health of women in Art.12[6].Besides that there are so many international conventions which envisages right to health.[7]

The Assisted Reproductive Technologies (Regulation) Bill – 2010 which has incorporated a part for surrogacy is silent on the health risks and compensatory measures for that risks.Apart from this , in its S.34 (9) Bill states ,If first embryo transfer has failed in a surrogate mother two more embryo transfer can be done for the same couple.No surrogate mother shall undergo embryo transfer more than three times for the same couple.More than three embryo transfer is prohibited for the same couple.Surrogate can again be exploited for another couple. Bill in its S.34(5) states ,Surrogate can have five live births including her children.This should be limited to three as it otherwise can make continuous exploitation of surrogate's services. Bill is more liberal to the rights of commissioning parents.Right of surrogates are not fully represented.

Most of the Health risks of women in surrogacy are relating to ovarian hyperstimulation and egg retrieval for her own use or for donating eggs or be compensated for providing them to another woman or couple for their use.There arise a three week hormone therapy and its prominent side effect occurs while stimulating the ovary is Ovarian Hyper stimulation Syndrom(OHSS).These mentioned health risk risks may occur in traditional surrogacy option.In gestational surrogacy arrangements,first step is matching cycles of genetic mother and surrogate by adjusting menstruation dates by oral pills.Then the surrogate women is put on to eastrogen tablets to prime the uterus.Gentic mother is also exposed to Gonodotropin injections.On the day of that injection ,surrogate is started on to progestron tablets .After 36 hours,egg retrieval of genetic mother is done and later fertilized embryo is transferred to surrogates womb.Surrogate is then put on to luteal support using progesterone tablets /injection.After 15 days ,pregnancy is confirmed.In these arrangements health risks are due to the overexposure to hormonal drugs.[8] Use of fertility drugs may lead to an enhanced risk of hormone dependent cancers- in particular breast ,ovarian and endometrial cancers.[9] Scientific Studies [10] have revealed that

- There is some potential links between the egg retrieval process and the risks of breast, ovarian and endometrial cancers, as well as the risk of future infertility:
- It is known that the three cancers are affected by hormones, but it is not known whether the interaction causes higher rates of cancer, or even perhaps lower rates.
- Data suggests that infertility, not ovulation induction drugs, increases a woman's risk of all three cancers.
- There is no current evidence that fertility drugs increase a woman's risk of breast or ovarian cancer.
- There is some evidence that the hormones increase the risk of endometrial cancers.
- Additionally, there is no compelling data proving an increased risk of infertility due to ovulation induction and egg retrieval.Nor does the evidence show an increased risk for early menopause, the depletion of the follicle pool, or significant instances of infection
- There is some risk of anti ovarian antibodies being produced because of the trauma to the ovary from being pierced by a needle.It is unclear whether these antigens play any role in future IVF procedures or infertility.

IV Other specific Rights of surrogate mother

To elaborate the rights of surrogate mother,her contributions to the procreation should be carefully analysed.The process of procreation involves two or three contributions in a gestational surrogacy arrangement. If commissioning mothers egg is used ; it involves two contributions of mothers.

a) Women who contributes her eggs (genetic mother)
b) Women who carries the pregnancy (gestational mother / social mother)

If donor eggs are used,it involves three mothers

a) Women who contribute her eggs- genetic mother
b) Women who carries the pregnancy – gestational mother
c) Women who takes the child, rears and nurtures the child- social mother

Surrogate mother should be informed of all medical procedure going to be carried in her body. Informed consent is to be obtained in every stage of surrogacy[11].The information about her should be kept secret and no ART clinic shall provide information about her to any person. She should get an evidence of certificate by commissioning couple ART clinic that she acted as a surrogate to avoid future conflicts. She should not harm the fetus during the pregnancy by any deed and handed over the child after delivery to the agreed persons. Surrogate should get adequate insurance facilities till the handing over time and she should not exploited physically or mentally by anyone. she should not be bound to look after the child if the born with disability, or intended parents refused to take.[12]

In most of the surrogacy arrangements surrogate is not treated as a person but a high risk pregnancy. The focus is on fetal development and whether adequate nutrition reaches the baby .Constitution of India guarantees right to live with dignity (Art. 21), right to privacy (Art – 21), right against exploitation (Art 23-24) which should be made available to surrogate women. She should be treated especially like any pregnant lady and should get adequate legal protection.

While legalizing surrogacy,Concept of compensation to surrogate mothers should be carefully evaluated. Normal pregnancy is neither a disease nor a disability, hence the issue of 'compensation' for pregnancy does not arise. The compensation can only be for the handing over

of (separation from) the baby, for damages caused to the mother in case of complications and medical negligence, and in the event of the mother's death. This should include compensation to the family which is denied her care while contributing to mother and baby care during the period of surrogacy.for nurturing the baby, the surrogate should earn 'wages' for the time and energy invested in pregnancy and baby care.

It is also suggesting here that the surrogate women should be well informed of her rights before getting into surrogacy agreement.A lawyer should assist her and supports her in defining her right.Surrogate should know both her and intended parents rights because sometimes surrogates privacy rights can be interfered with the others rights in case of medical examinations,scanning etc..only after giving her exact picture of transaction and monetary compensation she will get.

V Concluding Observations

It is true that apart from the thirst for scientific understanding for its own sake, reproductive technological development was initially driven by the desire to assist those who were biologically unable to reproduce.[13] It is not in dispute that the development of reproductive technologies has enabled the humans to access their very genesis and it caused a wave which still impacts on our understanding of ourselves.[14] The apparent rush to embrace the latest assisted reproductive technologies, and the countervailing preoccupation with the collateral challenges that they present, has left some fundamental questions about their safety underappreciated.[15] If a balanced and just approach to the use of these technologies is evolved properly progressives must enter the fray as soon as possible.[16]

In this present stage of biomedical technology and development,surrogacy is the only option to infertility (if female partner is incapable to gestate a child) apart from adoption.It is somehow given an opportunity to the infertile couples to have a genetically similar child if possible rather than go for an adoption in which no such claim can be fulfilled. Legislation should cover provisions avoiding rash sense of reproductive tourism via surrogacy compromising the rights of the parties involved.The march of technology cannot be stopped but only thing to remember is concern should be given to surrogate mother also.Without compromising much on her health and welfare, surrogacy option should be tried.

1. American Law Reports, *Validity and Construction of Surrogate Parenting Agreement*, (1989)77 *A.L.R.* 470.

2. *See,* Law commission of India(Report No.228), "Need for legislation to regulate Assisted Reproductive Technology clinics as well as rights and obligations of parties to surrogacy''(2009)Para 1.5.It states that .'Gestational surrogacy' is total in the sense that an embryo created by the process of IVF is implanted into the surrogate mother. 'Traditional surrogacy' may be called partial or genetically contracted motherhood because the surrogate mother is impregnated with the sperm of the intended father making her both the genetic and the gestational mother; the child shares make-up of the commissioning father and the surrogate mother.

3 *See* ,The World Health Report, 2006

4 Universal Declaration of Human Rights (1948),Article 25.

5 *See, Paramananda Katara* V.*Union of India* AIR 1989 SC 2039;*Paschim Bang Khet Mazdoor Smit*i v.*State of West Bengal* (1996)4SCC 37;*Consumer Education and Research centre* v.*Union of India* (1995)3SCC42;*Kirloskar Brothers Ltd*.v.*ESI Corporation*(1996)2 SCC 42;*State of Punjab* v.*MohinderSingh Chawla* AIR 1980 SC 470;*State of Punjab* v.*Ram Lubhaya Bagga*.AIR 1998 SC 1703;*Commoncause* V.*Union of India* AIR 1996 SC 929;*Upendrabaxi* v.*State of U.P* (1986)4 SCC 106.

6 *See,* CEDAW Art.12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

7 The Universal Declaration of Human Rights 1948,The International Convention on the Elimination of all forms of racial discrimination 1965,The International Covenant on Civil and Political Rights (ICCPR) 1966,The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966,The Declaration on the Rights of Mentally Retarded Persons 1971,The Declaration on the Rights of Disabled Persons 1975,The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) 1979,Mental Health Care and Human Rights ,The Convention against torture and other cruel, inhuman or degrading treatment or punishment 1984,The Declaration on the Right to Development 1986,The Convention on the Rights of the Child 1989,International Conventions on the Protection of the Rights of all Migrant Workers and members of their families 1990 etc..

8 Charles.P.Kindergan Jr &Maureen Mcbrein,*ART:A lawyers guide to emerging law and science* (Ist ed.,2006)p.75.

9 *See*, National Academy of Sciences workshop report on "Assessing the Medical risks of Human oocyte Donation for Stem cell Research accessed at *http://www.nap.edu* 67-68.

10 *See ,Id*

11 Critics contended that it is impossible for a woman to grant the necessary informed consent in order to become a surrogate mother for two reasons. First, her consent is never informed because the hormonal changes that accompany pregnancy make it impossible for a surrogate to predict how she will feel when she relinquishes the child at birth. Secondly they states that consent to become a surrogate is never fully voluntary because surrogates only enter into these agreements out of economic necessity. *See* , Lori B. Andrews," *Surrogate Motherhood: The Challenge for Feminists" in* Surrogate motherhood: polics and privacy 169 172-173.

12 *See,* ART Bill 2010 s.34.

13 *See* ,Marjorie Maguire Shultz, "Reproductive technology and intent-based parenthood:an opportunity for gender neutrality" (1990)*WIS. L. Rev*. 297,.311

14 Robert Winston,*The IVF Revolution:The definitive Guide to Assisted Reproductive Techniques* (1999)p.137

15 *See Generally,* Lars Noah, Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation (2003)55 FLA. L. REV 1

16 *See,* Jessica Arons,Future choice:Assisted reproductive Technologies and the law,Centre for American Progress (2007) accessed at http://. www.americanprogress .org