

CHAPTER - III

RIGHT TO PROCREATION AND RIGHT TO ASSISTED REPRODUCTIVE TECHNOLOGY-LEGAL PROVISIONS, POLICIES AND LEGISLATION CONNECTED TO SURROGACY

Children are the most valuable reward of God and considered as a blessed treasure to a family. In Bible, it is stated that little children are a heritage from Lord and the fruit of the womb is his reward.¹ Children are the assets of the nation. They make the marriage life of a couple more meaningful and successful. By giving birth to a child by a woman establishes and maintains her real status in society. By the nature only women are empowered to experience such a miracle and it is a great opportunity given by God to become procreator to carry out his divine plans. Procreation of a child is the primary biological function of a marriage and it is the family ensures the continuity of human race. Procreation is an inbuilt element of marriage and this concept is accepted universally all over the world and endorsed by all religions.² In Hindu religious philosophy, it explicitly states about the importance and want of a child for the parents, family and society. According to *Manu*, a man creates himself through his own children. Christian religion has also given paramount weight to children and considers them as an emblem of God. It also recognizes the aspiration for an inherent heir as a natural and cognitive desire of individual. And Islamic religion also considered that children are a gift

¹ The Bible, Psalm 127:3

² Dr. G.K. Goswami, *Assisted Reproduction and Conflict in Rights* 68 (Satyam Law International, New Delhi, 2017)

and blessing from Allah. Begetting children is said to be of utmost importance and fundamental to the existence of community in Islam. It is also mentionable that need of a child is not only demanded by religious beliefs but also due to various other interconnected and mutually dependent factors; such as personal, social, and economic aspects of human life. The developed concept of human rights has also recognized Right to have children as a fundamental human right and incorporated it as right to procreation and protected under various International Bills of Rights. Nevertheless, the fertility is an instinctive biological happening and infertility is considered as annoyance resulting into multiple socio-economic and religious hardships to persons and family.

To deals with unwanted problem of infertility, the medical science and reproductive technology has come forward to provide or assist such childless couple through various methods of assisted reproductive technology (ART). And surrogacy is one of the most opted methods among ARTs to have a genetically linked child. Though, the modern human rights documents recognizes the significance of children and emphasize on the protection of the right to procreation as a basic human rights, there is an urgent need to discuss and justify, whether the right to procreation includes the right use ART, more specifically surrogacy. Amongst all methods of ART, surrogacy is the most controversial one, in relation to surrogate mother, surrogate children and commissioning parents. Regardless the debate emerging out of it, surrogacy has been heading recognition everywhere in the world and brought an incredible change in the life of individuals. Additionally, nobody can deny the significance of a child for a family unit and for the

community. It is also important to mention here that services offered by the nations as well as legal frameworks of surrogacy are not identical all over the world. In some countries legal regulations are very strict and surrogacy is banned, in some countries only altruistic surrogacy is allowed and in other surrogacy is ever banned. Although, there are some rules and regulations, but it is not enough to protect the interests of parties concerned to surrogacy in national and as well as in international level.

This chapter seeks to elucidates the recognition of need for a child as a basic human right and its incorporation as right to procreation including right to use ART at international as well as national level. And also to discusses the existing legal frameworks for regulating surrogacy in international as well as national level.

3.1. Right to Procreation: Meaning and Concept

Procreation means a natural biological process by which women gives birth to a child. It is essential to the subsistence of any species. It is the most basic and important functions of the family. Without this every family would survive for only one generation, hence, procreation is vital for social improvement. Though, the term ‘procreation’ and ‘reproduction’ used interchangeably; procreation is the process by which an organism produces others of its biological kind while reproduction is the act of reproducing new individuals biologically. Procreation focuses on the conceiving and bearing offspring.

Etymologically the term ‘Procreation’ derived from the French term ‘Procreacion’ and from the Latin term ‘Procreatio’ which means ‘to bring forth offspring.’ It is the sexual activity of conceiving and bearing biological offspring. The Webster’s dictionary defines the term ‘procreate’ as ‘to produce young, beget offspring.’ The Modern Medical Science has coined it as a reproductive process by which a person creates offspring who may or may not have genetic or biological ties to the intended parents or parents.³ It is a comprehensive definition covers a full variety of reproductive activity from normal biological sexual reproduction to the sale of gametes to in-vitro fertilization to surrogacy.

According to *Black’s Law Dictionary*, ‘procreation’ means the generation of children, and ‘pregnancy’ means the condition resulting from the fertilized ovum, that is, the existence of condition beginning at the moment of conception and terminating with delivery of the child.⁴ As per section 3 (65) of the General Clauses Act, 1897, ‘reproducing’ means ‘producing again’.

Procreative rights are the rights relating to reproduction and reproductive health and include access to sexual and reproductive health care and autonomy in sexual and reproductive decision making.

Reproductive health is a component of Reproductive rights. Reproductive health is a complete physical, mental and social wellbeing, not merely the absence

³ J. Edwards, Sarah Franklin, et.al., *Technologies of Procreation: Kinship in the age of Assisted Conception* (Routledge ,2nd ed., 1999) available at <http://www.routledge.com/books/details/9780415170567/> (accessed on November 10, 2018)

⁴ The Black’s Law Dictionary, Sixth Edition (Centennial Edition, 1891-1991), p. 1179, 1207

of disease or infirmity, in all matters relating to reproductive system and to its functions and processes. Reproductive wellbeing infers that individuals can have a wonderful, safe and protective sexual coexistence and that they have the ability conceive and the opportunity to choose when and how regularly do as such. Implicit in this last condition are: the rights of men and women to be informed, have access to safe, effective, affordable and acceptable methods of family planning including methods for regulation of fertility, which are not against the law; and the right of access to appropriate health care services to enable women to have a safe pregnancy and childbirth and provide couples with the best chance of having a healthy infant.⁵ Reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. Reproductive health care includes care for sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases.⁶

The International convention on the protection and promotion of the Rights and Dignity of persons with Disabilities, 2006 involves the privilege to reproductive wellbeing, education and training.⁷ Art-14 of Convention of the American Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003 explicitly mentions about women's reproductive rights as basic human rights. It incorporates as its nucleus components; the right to established a

⁵ Id.

⁶ Ibid.

⁷ Article 23 (1) (b)

family, the right to choose, wholeheartedly and accountable the number and gap of one's children; the option to admittance to family arranging information and instruction and the privilege to admittance to family arranging strategies and services.

3.2. International Framework on the Right to Procreation and Assisted Reproductive Technology

Human Rights are imperative to individual's existence. They are the fundamental and inalienable rights, precondition to life as human beings. The inclusion of human rights law as part of international law is a relatively recent development. Number of human rights provided in international law in various human right documents suggests the existence of rights to procreation and reproductive health.

The Preamble to the Constitution of the WHO states that, it is one of the fundamental rights of every human being to enjoy the highest attainable standard of health. The term 'health' encompasses within its ambit women's right to reproductive health. The right to health carries significant importance with reference to women, more particularly, keeping in view their biological structure and child bearing capacity.

The United Nation Charter, the Universal Declaration of Human Rights and other International agreements provide the framework for analyzing reproductive freedom as international human rights. The agreement authenticities the trust in basic human rights, in the self-respect and value of the individual, in the identical

human rights for both men and women and of countries large and small, and to promote social progress and better standards of life in larger freedom and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to employ international machinery for the promotion of the economic and social advancement of all people.

3.2.1. The Universal Declaration of Human Rights, 1948⁸

The United Nations General Assembly has adopted a code of human rights comprising of both civil and political right and social, economic and cultural Rights in 1948. It declares that the acknowledgment of intrinsic dignity and of the equivalent and undeniable rights of all individuals of the community is the base of autonomy, impartiality and harmony in the world.

Article 16(1) of UDHR provides, “*Men and women of full age, with no constraint because of race, ethnicity or religion, reserve the right to wed and to establish a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution*”. Thus, it can be inferred that the right to procreate, in persistence of, the right to establish a family is a basic human right, having universal application.

Article 12 of UDHR guarantees that right to protection and non-obstruction by others to each individual can be extended to incorporate the individual’s right to decide the number and spacing of children. Additionally, the right to information,

⁸ Herein after referred as UDHR, It was proclaimed by the UN General Assembly in Paris on 10 December, 1948

wellbeing and education can also be extended to give safeguard to the rights to family planning information and services. The right to benefit from scientific achievement can be considered as the repository for the use of modern scientific technologies for the enjoyment of reproductive rights.

Further, Article 25 expresses that everybody has the privilege to a standard of living sufficient for the wellbeing and prosperity of himself and his family. Though, the UDHR said to have no legal force behind it, it has moral force behind it which inspires states and the people to enforce and observe human.

3.2.2. The European Convention on Human Rights, 1950⁹

The ECHR is formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Article 12 of the ECHR provides for two basic rights: right to marry and right to found a family. It expressed that Men and Women of eligible age reserve the right to marry and to establish a family, as per the national laws administering the activity this right.

3.2.3. The International Covenant on Civil and Political Rights, 1966¹⁰

The ICCPR, 1966 is the initial obligatory global human right document. The preface of ICCPR referenced that the state parties to the pledge have accepted that the ideal of free individuals enjoying civil and political autonomy and autonomy from terror and desire must be accomplished in conditions are formed

⁹ Herein after referred as ECHR, It was drafted in 1950 by the Council of Europe and came into force on 3 September 1953

¹⁰ Herein after referred as ICCPR, It was adopted by the UN General Assembly on 16th December, 1966 and came into force from 23th March, 1976

whereby everybody may benefit from the civil and political rights just as economic, social and cultural rights.

The Charter of United Nations in support of the current treaty, the state parties have consented to advance collective respect for human rights and basic liberties with no sort of qualification, any kind of distinction, e.g., colour, sex, language, religion, political or other belief, public or social derivation, property, birth or different status.¹¹

Further Article 23 of ICCPR provides protection for the right to found a family. The covenant also provides that no person shall be subjected to illegal or arbitrary interference into their right to privacy.¹² The treaty additionally accommodates for right to marry and to establish a family.¹³ The interpretation to Article 23 provided by the Human Right Committee¹⁴ confirms a positive right to non-discriminatory access to reproductive technologies.

3.2.4. The International Covenant on Economic, Social and Cultural Rights, 1966¹⁵

The state parties to the ICESCR, 1966 attempt to take steps, exclusively or through worldwide financial and technological support and teamwork, to the limit of its existing assets for obtaining gradually the full recognition of the rights

¹¹ Article 2(1) of the ICCPR

¹² Article 17 of the ICCPR

¹³ Article 23 of the ICCPR

¹⁴ It is the Adjudicative Body for the enforcement of ICCPR

¹⁵ Herein after referred as ICESCR, it was adopted by the UN General Assembly on 16th December, 1966 and come into force on 3rd January, 1976

perceived in this covenant. The state parties are needed to ensure that the rights perceived in this covenant will be practiced with no any unfairness of any manner as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or different conditions of states of the individual in question. Under Article 12 (1) of the covenant, Member States have consented to perceive the right of utmost achievable norm of physical and emotional wellbeing of everybody to the satisfaction. Article 12(2) refers the ways to accomplish this right, specifically in relation to, the right to reproductive wellbeing and will incorporate those mentioned in, Article 12 (2) (a). It is the prerequisite for minimizing the rate of the still-birth and infant mortality and for the sound development of the child. Further, Article 12 (2) (d) accommodates the formation of conditions, which will guarantee to all clinical assistance and clinical consideration in the case of illness. This covenant additionally confers a right to obtain benefit from scientific advancement and its application to everybody.¹⁶

3.2.5. The Convention of Elimination of All Forms of Discrimination against Women, 1979¹⁷

This convention gives stress on particular issues of discrimination, whereby distressing women as well as social, political, religious and different practices that lead to discriminations against women.

¹⁶ Article 15 of the ICESCR

¹⁷ Herein after referred as CEDAW, it was adopted in 1979 by the UN General Assembly

Article 11, 12 and 14 of the CEDAW, in affirmative terms hold that States will take all reasonable measures to eliminate oppression against women in the area of medical care, in order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning. Further, State shall ensure to women suitable services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy.

3.2.6. The International Conference on Population and Development, 1994¹⁸

The 1994 Cairo Programme of Action¹⁹, regarding the right to reproduce, definitely stated that reproductive rights hold certain human rights that have already been acknowledged in national laws, international human rights documents and different accord documents. These rights exist on the acknowledgment of the fundamental right of all, including couples and individuals, to determine liberally and maturely the number, spacing and timing of their children. It also extended to the right to have the information and intends to do as such, and the right to achieve the utmost standard of sexual and reproductive wellbeing. Likewise, it incorporates people's right to make decisions concerning reproduction free of discrimination, intimidation and cruelty, as articulated in human rights documents.

¹⁸ Herein after referred as ICPD, Program of Action, UN Doc. A/CONF.171/13 1994, chap. 7.A

¹⁹ It is the Action plan of International Conference on Population and Development (ICPD)

This Conference marked the acceptance of new paradigm in addressing human reproduction and health. The programme establishes a clear definition of what reproductive health is, and recognized the right to reproductive choice and to have access to sexual and reproductive health.

3.2.7. United Nations Fourth World Conference on Women, 1995²⁰

In this Conference, governments from around the world agreed on a comprehensive plan to achieve global legal equality, a Declaration and an Action Plan i.e. Beijing Platform were adopted and the international commitment to protect women's rights was strengthened. Article 17 of the Beijing Conference explicitly states that all women have the right to control all aspects of their health, particularly 'fertility', as it is an aspect which is very basic element for their empowerment.

This Conference on Women adopted a definition that specifies exclusive rights for the couples and extended protection to women from coercive aspects and also expanded the definition of the Cairo Conference which includes all aspects relating to sexual health and provides,

“Reproductive Rights also referred to as sexual rights include the right to be free from sexual violence and coercion and the right to the highest standard of sexual health. Sexual health implies a positive approach to human sexuality and includes the freedom from sexual abuse, coercion or harassment, protection from

²⁰ Herein after referred as UNFWCW, it was convened by the United Nations during 4-15 September 1995 in Beijing, China

*sexually transmitted diseases, and success in achieving or in preventing pregnancy.”*²¹

3.2.8. The International Planned Parenthood Federation,²² 1996²³

The IPPF, 1996 has summed up the results of all top level International framework and introduced the IPPF Charter on Sexual and Reproductive Rights.

The Charter has evolved twelve rights as sexual and reproductive rights. They are right to life, right to freedom and security of individual, right to equality and to be free from all forms of discriminations, right to privacy, right to freedom of thoughts, right to information and education, right to choose whether or not to marry and found a family, right to decide whether or when to have children, right to health care, right to benefit of scientific progress, right to freedom of assembly and political participation and right to be free from torture and inhumane or degrading treatment.²⁴

3.2.9. The Maternity Protection Convention, 2000²⁵

The Maternity Protection Convention, 2000 is an International Labour Organization Convention. Article 3 of the Maternity Protection Convention, 2000 states that, Member States of the Convention are to adopt appropriate measures to

²¹ Chapter IV, paragraph 96

²² It is a global non-governmental organisation with the broad aims of promoting sexual and reproductive health, and advocating the rights of individuals to make their own choices in family planning, formed on 24 November 1952 at Bombay (presently Mumbai), India

²³ Herein after referred as IPPF, the Charter was published in 1996

²⁴ The IPPF Charter on Sexual and Reproductive Rights, IPPF Annual Report 1995-96 at 6

²⁵ Herein after referred as MPC, it was adopted on 15 June, 2000 and come into force on 7 February, 2002

ensure that pregnant or breast-feeding women are not made to perform tasks which shall have detrimental effect qua their health or the health of the child. Again Article 4 states that, on production of relevant documents, such as medical certificate and other supporting documents, as determined by the national law of the particular State, the women to whom the Convention applies will be entitled to maternity leave of not less than 14 weeks.

3.2.10. The Convention on the Rights of Persons with Disabilities, 2006²⁶

The CRPD, 2006 is the initial international human rights instrument that distinctively recognized the right to reproductive and sexual wellbeing as a fundamental human right under Article 23. It proclaims that State parties shall take efficient and suitable measures to reduce oppression against persons with disabilities in all issues connecting to marriage, family, parenthood and relationships, or an equal basis with others. Hence, to ensure that the rights of persons with disabilities to decide liberally and responsibly regarding the number and spacing of their children and to obtain age-appropriate information, reproductive and family arranging education are acknowledged, and the means essential to enable them to exercise these rights are provided. Furthermore, persons with disabilities, including children, are also eligible to retain their family or an equal basis with others.

²⁶ Herein after referred as CRPD, it is an international human rights treaty of the United Nations intended to protect the rights and dignity of people with disabilities. It was adopted on 13 December 2006 and came into force on 3 May 2008

3.2.11. Hague Conference on Private International Law²⁷

The HCPIIL is the oldest international organization based in the, Hague. It has shaped how people can become the legal parents of children born in countries other than their own and served respond to global needs in the various areas such as Family and property relations, international legal co-operation, international commercial and finance law including international protection of children. since, 1955, it has drawn up about 38 International Treaties or Conventions to overcome legal obstacles faced by individuals and companies in cross- border relations and transactions.²⁸

3.2.12. Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption, 1993²⁹

It is popularly known as Hague Adoption Convention. It is an international convention dealing with international adoption, child laundering, and child trafficking. It provides for an attempt to safeguard those implicated in corruption, abuses, and exploitation which occasionally accompanies international adoption.³⁰

The convention have been regarded as central on the grounds that it come up with a proper international and intergovernmental recognition of Inter Country

²⁷ Herein after referred as HCPIIL

²⁸ Available at <http://www.hcch.net> (accessed on November 3, 2017)

²⁹ Herein after referred as HAC, it was concluded on 29th May 1993 and entered into force on 1st May 1995

³⁰ https://en.m.wikipedia.org/wiki/Hague_Adoption_Convention (accessed on November 3, 2017)

adoption to guarantee that adoptions under the convention will be by and large perceived and given impact in other party countries.

The aims of the Convention are³¹ –

- To ascertain safeguards to guarantee that intercountry adoptions occur to the welfare and best interests of the child in connection to his or her fundamental rights documented in international law,
- To ascertain an arrangement of co-operation amongst Contracting States to guarantee that those safeguards are regarded whereby able to prevent the abduction, the sale of, or traffic in children,
- To protect the recognition in Contracting States of adoptions made as per the provisions of the Convention.

Firstly, the Hague Adoption Convention was with a few adaptations would appear to be a model instrument to regulate International Surrogacy Arrangements. But later on, it has noted some differences with International Surrogacy Arrangements, such as-

- a) While Article 4(c)(3) ensured the non inducement of payment or compensation of any kind, the International Surrogacy Arrangements mostly deals with payments;
- b) While Article 4(c)(4) states that, where required, the consent of the mother must be given only after birth of the child; but in case of surrogacy, the

³¹ Article 1 of the HAC

consent of the surrogate mother will often have given even before been conceived;

- c) While Article 4(b) speaks about possibilities for placement of child within the State of Origin for the best interest of child; it will not be applicable particularly in case of International Surrogacy Arrangements.
- d) While Article 29 states that there should be no contact between the prospective adoptive parents and the child's parents; but in surrogacy arrangements, contact will have to take place when it is entered into.

3.2.13. The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and measures for the Protection of Children, 1996³²

The Convention is also known as Hague Convention 1996. It is a Convention of the Hague Conference on Private International Law. It covers civil measures of protection concerning children, ranging from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property. The convention applies to children from the moment of their birth until they reach the age of 18 years.³³ Though, the Convention is being considered as a potentially appropriate means for regulating parental responsibility at international level; but Article 4(a) of the Convention states that it does not apply to the establishment or contesting of a parent-child relationship. Whereby it excludes its applicability over

³² It was signed on 10 October 1996 and came into force on 1 January 2002

³³ Article 2 of the Hague Convention 1996

matter relates to contesting parent-child relationship, which is very familiar in case of surrogacy.

3.2.14. A Written Declaration on Surrogate Motherhood by Council of Europe³⁴

The Parliamentary Assembly of Council of Europe signed a Written Declaration on Surrogate Motherhood by which asserts that Surrogate Motherhood is contrary to the self-esteem of the women and children concerned and is a infringement of their Fundamental Rights considering various other Conventions.

The law of adoption is full of protections to preserve the human dignity of both the mother and child. Therefore, it is contrary to established law to permit a mother to consent to the adoption of her child before she has given birth.³⁵ While the timeline for adoption ensures that the mother is fully informed and has sufficient time after the birth of her child to make a thoughtful decision regarding the future of the child; the timeline for surrogacy requires the prospective surrogate to make a binding decision to give up a child for adoption that has not yet been conceived. And surrogate mothers are not able to withdraw consent once it has been given. Furthermore, the Council of Europe Convention on adoption states that, no one shall derive any improper financial or other gain from an activity relating to adoption of a child.³⁶ And commercial surrogacy is inherently contrary to this provision. After all, adoption is a decision made by the birth mother

³⁴ Written Declaration No. 522/ Doc. 12934/ 04 July 2012.

³⁵ Article 4 of the HAC.

³⁶ Article 17 of the European Convention on Adoption of Children

considering the best interest of the child; while the decision to obtain a child through surrogacy is a decision made by the potential parents whose primary motivating factor is their own desires. And to fulfill their desire to become parents through surrogacy, the prospective parent create a situation where as many as five people could claim parental rights to a child.

3.2.15. The Brussels IIA Regulation, 2003³⁷

The Brussels II Revised Regulation, 2003 is a European Union Regulation on conflict of law issues in family law between member states; in particular those related to divorce, child custody and international child abduction. The regulation applies to all EU member states except Denmark. The regulation concerns the jurisdiction and recognition, responsible for parental responsibility, including the access to the child of the other parent. Jurisdiction is generally conferred to the courts connected to the child's habitual residence. The regulation also specifies the procedures regarding international child abduction, but does not take precedence over the Hague Child Abduction Convention. It is mentionable that between 15th April and 18th July 2014 the EU Commission had a "Consultation on the functioning of the Brussels IIA Regulation". The Regulation is not concerned with issues of parenthood or to other questions linked to the status of persons. Though harmonization within the European Union could be a good step towards a global system of regulation; but it is doubtful whether this can be achieved through the

³⁷ Brussels IIA Regulation (EC) No. 2201/2003 of 27 November 2003 and came into force on 1 August 2004.

Brussels II Revised Regulation,³⁸ as it will not assist in resolving the wider disputes about parentage which can be arise in surrogacy cases.

3.2.16. Hague Conference on Private International Law on International Surrogacy Arrangements

The Hague Conference on Private International Law begun to focus on the issues of International Surrogate Arrangements in 2010, more particularly in relation to the status of such arrangements under private international law and the status of children born through international surrogacy arrangements.

In order to defend all parties concerned and to even out the regulatory difference across the globe, one idea is to set up a separate convention under the Hague Conference on Private International Law modeled on the existing Hague Adoption Convention of 1993.

The draft convention would guarantee that the contracting nations follow international recognized standards, with legal safeguards in the best interests of the surrogate, the intending parent(s), and the surrogate child.³⁹ The draft convention would categorize countries based on their laws and their stands on surrogacy so that couples, under protection of international law can choose from these groups bases on their own nationality and state laws.⁴⁰

³⁸ Official Journal of the European Union, Dec 23, 2003, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF> (accessed on November 8, 2017)

³⁹ Rutuja Pol, “Proposing an International Instrument to address issues arising out of International Surrogacy Arrangements” 48 *GJIL* 1329 (2017)

⁴⁰ Ibid.

The Permanent Bureau Hague Conference produced an often-cited Preliminary Document, on March 2011 and Interim Report on ISAs in 2012.⁴¹ The Preliminary Report on the Issues Arising from International Surrogacy Arrangements expresses about the imperative ‘need’ in a multilateral instrument which would put in place structures and procedures to enable State to ensure that these obligations are being met in the context of this transnational phenomenon. The main important feature of this approach is the fundamental recognition that ISAs exist and that nations need to oblige when conflicts of law surrounding these arrangements arise. The main legal issues that occur in ISAs are, conflict-of-law and problems of association of nations that can arise in non-surrogacy contexts. Therefore, these are required to talk more effectively within a broader context than that of surrogacy. Hence, the draft convention should be developed with an eye to navigating the conflict of laws and comity problems in ISAs, with emphases on the establishment of a framework for international cooperation, on the need for substantive safeguards, and on procedures for courts and administrative authorities.⁴² This includes seeking to eliminate “limping” legal parentage ensuring children can acquire a nationality ensuring their right to know their identity is secured, and putting in place procedures to protect them from harm.⁴³ Though, a few multilateral conventions like the Adoption Convention exist, what could deal with the issue of ISA, but these are ineffective to deals with ISAs. As parenting and reproducing are not same, they are two different processes. Adoption gives the

⁴¹ HCCH Preliminary Document No.10 (March 2012)

⁴² Supra note 39

⁴³ Ibid.

legal right to the adoptive parents over someone else's child over whom they would otherwise not possess any legal authority. While in comparison to adoption, surrogacy is as intimate one through which intending parents(s) get offspring with own genetic contribution.

Bilateral treaties instead of, in addition to, draft convention to regulate international surrogacy arrangements will not be very effective because: i) confusion will be created due to a plethora of disparate treaties governing ISAs from numerous countries, making it difficult for laymen (like intending parents) to understand and interpret the laws; ii) framing these bilateral treaties will take time because negotiations are inherently time consuming; iii) dismantling these numerous bilateral treaties would be difficult and could lead to further confusion if and when a comprehensive multilateral solution is reached; and iv) these treaties may cause further cost, delay, and heartache to intending parents who choose to surrogacy.⁴⁴

The results were evaluated and summarized in “A Study of Legal Parentage and the Issues arise from International Surrogacy Arrangements” in 2014.⁴⁵ In 2015, an updating note was published giving an overview over the recent key developments.⁴⁶

⁴⁴ Id.

⁴⁵ Hague Conference on Private International Law, “A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements”, Preliminary Document No. 3C (March 2014)

⁴⁶ Hague Conference on Private International Law, “The Parentage/Surrogacy Project: An Updating Note”, Preliminary Document No. 3A (February 2015).

3.2.17. The Parentage / Surrogacy Project, 2015⁴⁷

Considering the difficulties associated with recognition of legal parentage in international surrogacy arrangements and pursuant to a directive from its members, the Permanent Bureau of The Hague Conference on Private International Law is currently studying the private international law issues. Accordingly, in 2015, the Council of General Affairs and Policy of the Hague Conference decided to convene an Experts' Group to investigate the probability of advancing work in this field. The Council decided that the Experts' Group should be geographically representative and be composed in consultation with members. Meetings of the Experts' Group have, thus far, taken place in February 2016, January/ February 2017, September 2018, January/ February 2019 and October/November 2019.

In March 2020, the Council endorsed the continuation of the work in line with the latest report of the Experts' Group and recommended that future work focus on developing –a) a general private international law instrument on the recognition of foreign judicial decisions on legal parentage and b) a separate protocol on the recognition of foreign judicial decisions on legal parentage arising from international surrogacy arrangements.

3.3. Legal Framework of Surrogacy in Other Countries

United Kingdom

In UK, commercial surrogacy is unlawful and such arrangements are denied by the Surrogacy Arrangements Act, 1985 and agreement for commercial

⁴⁷ Id.

surrogacy is considered as a criminal offence, and provides imprisonment up to three months and/or with fine. Despite the fact that, the surrogate mother is not permitted to incurred more than reasonable practical clinical expenses yet the relationship is accepted under Section 30 of the Human Fertilization and Embryology Act, 1990. Here surrogacy is legal but it cannot be advertised or commercialized. In UK, the surrogate mother who has brought forth the child is the legitimate mother until an adoption has been concluded. Here it is seen that though the surrogate mother is not genetically identified with the child, nonetheless she has legitimate rights over the child and if she is married, her spouse will be the child's parent at birth. Legal parenthood can be transferred by parental order or adoption after the child is born.

United States

The law regarding surrogacy is not identical in all states of US. Surrogacy and issues related is different under different state jurisdiction. A few states have composed enactment; some others have created common law principles to settle issues of surrogacy. Again, a few states encourage surrogacy and surrogacy contract, some others merely reject to put in force and a few intends to forbid commercial surrogacy arrangements. Generally surrogacy friendly states seek to enforce both altruistic and commercial surrogacy contract. California, Illinois, Arkansas, Maryland, Washington DC, Oregon and New Hampshire are the states among others commonly considered as surrogacy cordial. Very recently, New Jersey and Washington State commercial surrogacy laws become effective from 1st

January 2019. However, there are some states that only permit surrogacy arrangement for married heterosexual couples.

During the 1980s, the famous *Baby M* case in New Jersey, created national attention towards surrogacy. The judicial pronouncement of *Baby M*'s case encouraged state legislatures around the United States to embrace laws concerning surrogacy. Here, the gestational surrogate mother entered into a surrogacy arrangement and consented to carry and deliver the surrogate child. The commissioning parents sued for their recognition as legitimate parents. The court has given the care of the child to the commissioning parents considering the wellbeing of the child and has given visitation rights to the surrogate mother to meet the surrogate child.

Australia

Australian states are having own state regulation for surrogacy. Under Australian Law, altruistic surrogacy is allowed, but commercial surrogacy is banned in New South Wales, Queensland, Tasmania and the Australian Capital Territory. As a consequence, many infertile couple of Australia seeks the services of surrogate mothers from the US, India and other countries. Surrogacy laws in all states follow the same basic principles in Australia, are-

- The intended parents must not be able to either conceive or carry a baby themselves, or if they can, to do so would be risky'
- Whilst surrogacy is altruistic, the intended parents must cover the surrogate's expenses in relation to surrogacy.

- When the baby is born, the birth is registered in the state where the baby is born, with the surrogate her partner listed as the baby's parents on the birth certificate. After the birth, the intended parents can apply to the court for a parentage order in the state where they live.

Canada

Surrogacy is legal in Canada but restricted. The law permits altruistic surrogacy only. The Assisted Human Reproduction Act prohibits the provision or acceptance of consideration to a woman for acting as surrogate. However, it is legal to reimburse a surrogate mother for her reasonable expenses incurred as a result of the surrogacy. Through this Act, the Parliament of Canada recognizes the benefits of Assisted Human Reproductive Technologies and related research.

The Act expressly provides the following constraints on surrogacy in Canada-

- That no individual is allowed to pay monetary compensation to a woman consented to be a surrogate mother, propose to pay such monetary compensation or advertise that it will be paid.
- That no individual will shall acknowledge monetary compensation for planning for the services of a surrogate mother, propose to make such a plan for monetary compensation or advertise the planning of such services.
- That no individual is allowed give consideration to another person to plan for surrogacy services, propose to give such consideration or advertise the payment of it.

In summer 2019, the Canadian government announced changes to the Assisted Human Reproduction Act. The changes include a more careful and accurate enforcement of the existing restrictions on surrogate expenses and thereby it become impossible to pay surrogates for any expense for which she does not have a physical receipt. Earlier, though Canada is limited to altruistic arrangements only, surrogate mothers have been paid based on anticipated aggregated costs and not necessarily actual out-of-pocket expenses.

China

In China, surrogacy is neither forbidden nor expressly permitted by law. The Ministry of health has established departmental rules which prohibit medical professionals from performing surrogacy procedures. In practice, surrogacy arrangements are common in china with a black market.

Japan

Japan has not yet regulated assisted reproductive technology by law. Here, surrogacy is not yet considered as offence. But, taking into consideration of safety, care and suffering caused during the process of surrogacy and after, surrogacy is currently forbidden by the Society of Obstetrics and Gynaecology.

Germany, Norway and Italy

In Germany, Norway and Italy, both commercial as well as altruistic surrogacy arrangements are illegal.

Thailand

For arranging surrogacy Thailand was a favorite for international surrogacy as the country known for quality of its health care facilities and personnel.⁴⁸ Previously, Thailand has no law referring to surrogacy. The authorities applied a provision of the Thailand Penal Code, which states that anyone who enslaves another person or causes a person or causes a person to be in a position similar to that of a slave; transports them into or out of the country; or buys, sells, disposes, accepts, or restrains a person may be subject to imprisonment for up to seven years and fined up to 14,000 Bhat (about US \$430).

On February 10, 2015, the National Legislative Assembly of Thailand enacted the Protection of Children Born through Assisted Reproductive Technologies Act (ART Act). It bans all foreign and same-sex couples from seeking surrogacy services in the country. Only married heterosexual couples are allowed to use surrogacy. The Act significantly protects children born through Assisted Reproductive Technologies and set the legal procedures for the spouses must follow in order to have such children. The ART Act seeks -

- To specify the parents' legal status;
- To control and specify the rights and duties of related parties during and after surrogacy;
- To control and set boundaries on the proper use of enhanced technology, especially for achieving pregnancy in procedures; and

⁴⁸ Soraj Hongladarom, *Surrogacy Law in Thailand* 1 (2018)

- To prohibit surrogacy involving a business or profit-making enterprise.

According to the ART Act, if anyone involved in surrogacy for profit, he/she will be sentenced upon conviction to imprisonment for up to ten years or a fine up to 200,000 Bhat (about US\$6,140).⁴⁹ And if anyone acts as an agent by requesting or accepting money, property, or other benefits in return for managing or giving advice about surrogacy, he/she will be sentenced upon conviction to imprisonment for up to five years or a fine up to 100,000 Bhat.⁵⁰

Netherlands

Netherlands allow altruistic surrogacy and consider commercial surrogacy as unlawful. In Netherlands, surrogacy is permitted only if the intended parents can make a private arrangement with someone they know and are allowed to reimburse her for the cost of bearing child. Promoting commercial surrogacy is illegal and prohibited in Netherlands under Criminal Code (in Dutch). The law does not allow websites to advertise surrogacy, on behalf of people who are looking for or want to become a surrogate mother; individuals to publicly announce, for instance on social media, that they are looking for a surrogate mother or that they want to become a surrogate mother.⁵¹

Russia

In Russia, gestational commercial surrogacy is lawful. Surrogacy has been available in Russia to heterosexual couples since 1995 and the official law

⁴⁹ Section 24 & 33 of the ART Act

⁵⁰ Section 27 & 49 of the ART Act

⁵¹ Article 151 b & 151 c of Criminal Code

concerning commercial surrogacy and financial compensation for pregnancy was adopted in November 2011.⁵² Surrogacy is legal in Russia in accordance with the provisions of the Federal Law on Basics of Health Protection of Citizens of the Russian Federation, published in January 2012. Under this Act, foreign citizens, unmarried couples are eligible for gestational surrogacy arrangements in the country. Under this law, it is required that the intended mother must have a medical cause that prevent her from getting pregnant.

Ukraine

In Ukraine, surrogacy and surrogacy in combination with egg/sperm donation has been legal since 2002. Ukrainian surrogacy laws are very favourable and supportive towards individual's reproductive rights. Surrogacy is officially regulated by Clause 123 of the Family Code of Ukraine and the Instruction on Procedures for Assisted Reproductive Technologies adopted by the order of the Ministry of health of Ukraine.

South Africa

In South Africa, the surrogacy agreement is governed by the South Africa Children's Act of 2005. To make a valid agreement, under this Act, it is required to be confirmed by the High Court before fertilization. It permits the commissioning parents to compensate a surrogate mother for the expenses that directly relates to the artificial fertilization and pregnancy of the surrogate mother, the birth of the

⁵² Surrogacy in Russia – Families through Surrogacy, available at <http://www.growingfamilies.org/surrogacy-in-russia/> (accessed on October 23, 2017)

child and the confirmation of the surrogate motherhood; loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.⁵³

3.4. Right to Procreation and Indian Constitution

India is a state party to four major UN conventions, i.e., the CEDAW, the ICCPR, the ICESCR, and the CRC. Under Article 51(c) of the Constitution of India, directs the state to foster respect for international law and treaty obligations. And Article 253 of the Constitution of India empowered the Parliament of India to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Further, it is also a settled by the judiciary that international conventions and norms are great importance in the formulation of guidelines of national laws.⁵⁴

The Constitution of India provides for certain fundamental rights which seek to ensure that dignity of life should be upheld for every citizen as provided under Article 14, 15 and 21. The preamble of the Constitution speaks of status, and opportunity. The principle of equality is considered as an important right, which declares that ‘the State shall not deny to any person equality before law or equal protection of laws within the territory of India.’ Article 15 specifically bars

⁵³ Section 301 of the Children’s Act 2005, available at <http://www.saflii.org/za/legis/num-act/ca2005104.pdf> (accessed on November 10, 2017)

⁵⁴ *Vishaka v State of Rajasthan*, AIR 1997 SC 3014

differentiation against any citizen of India on the grounds of religion, race, caste, sex or place of birth.⁵⁵ Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional doctrinaire limits. It is anti-thesis of arbitrariness. In relation to procreation, the concept of equality, right to marriage and autonomy for procreation has been upheld by the Supreme Court in *C.B. Muthamma v Union of India and others*.⁵⁶ In this case, the Supreme Court repealed the provisions of Indian Foreign Service (Conduct and Discipline) Rules, 1961 requiring a female employee to obtain permission from the Government prior to marriage and was suppose to resign if the Government decides that her marital commitments hamper her work and was held to be discriminatory. On the same reason, question arose regarding the validity of Air India Regulation under which an air hostess could be retired at the age of 35 years or if they got married within 4 years of their service or on first pregnancy and was challenged in famous case of *Air India v. Nargesh Mirza*.⁵⁷ The Supreme Court held that the provision relating to pregnancy bar and retirement at the option of Managing Director, were unconstitutional as being unreasonable, arbitrary and violative of Article 14.

⁵⁵ Article 15 states: “1) the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. 2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to-(a) access to shops, public restaurants, hotels and place of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. 3) Nothing in this article shall prevent the state from making any special provision for women and children. 4) NothingSchedule tribes”.

⁵⁶ (1979) 4 SCC 260

⁵⁷ (1981) 4 SCC 335

Article 21 of the Constitution of India assures every person right to life and personal liberty. The procedure prescribed by law has to be fair, just and reasonable; not fanciful, oppressive or arbitrary.⁵⁸ The Supreme Court has also held that the right to life as enshrined in Article 21 means something more than survival or animal existence and would include the right to live with human dignity. More significantly, the judiciary has brought a new dimension to Article 21 and thereby expanded the ambit of right to personal liberty and includes a plethora of rights within its fold, such as, right to health and right to privacy. Reproductive framework in India is yet to be fully recognized as a fundamental aspect under the Constitution.

For the first time, in *Kharak Singh's*⁵⁹ case, the majority of the judges participating in the decision said of the right to privacy that “Our constitution does not in terms confer any like Constitutional guarantee.”

The right to privacy came to be recognized in *Govinda v. State of Madhya Pradesh*⁶⁰, Mathew. J., after borrowing liberally from U.S. jurisprudence on the point, conceptualized the right to privacy as part of the “penumbral Zones” of fundamental Rights that fundamental right must be subject to restriction on the basis of compelling public interest.

⁵⁸ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

⁵⁹ *Kharak Singh v. state of Uttar Pradesh*, AIR 1963 SC 1295

⁶⁰ AIR 1975 SC 1378

In *R. Rajagopal v. State of Tamilnadu*⁶¹, the Supreme Court enumerated the limited exceptions to the right to privacy and the SC held that the constitution does not permit the publication of matters involving the privacy of an individual's home, marriage, procreation, child bearing, education and other matters, except under certain limited conditions.

Apart from above mentioned aspects of the right to privacy, the right to procreate is also another aspect of the right to privacy. It is familiar as “the right of reproductive autonomy”. In *B.K. Parthasarathi v. Govt. Of Andhra Pradesh*⁶², the Andhra Pradesh High Court has observed that the right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the state into such a decision making process of the individual is scrutinized by the constitutional courts of this country with great care. When the concept of privacy extended to matters of procreation, states intervention or limitations on reproduction amount to a direct infringement on one's privacy.

Further, in the recent case of *Javed v. state of Haryana*,⁶³ the court did not expressly reject the contention that Article 21 includes the right to reproductive choices. Instead, the court held that regardless of how expansive an interpretation is to be accorded to the provisions, reasonable restrictions may be imposed on the exercise of such rights.

⁶¹ AIR 1995 SC 264: (1994) 6SCC 632

⁶² AIR 2000 AP 156

⁶³ (2003) 8 SCC 369

In the light of judicial interpretation, It can be submitted that, the right to privacy has now become established in India, but as a part of Article 21 and not as an independent right in itself but it may be concluded that there is a scope for extending the realm of reproductive choices. The final determination would depend on the facts of the specific case.

3.5. State Policy towards Reproductive Rights in India

The journey of women in India has been really very vibrant from women participating in nationalist movements, to being hard-pressed into the domestic household space, to their reappearance as super-women today in all aspects of the society. However, it is very untoward that the acknowledgment of sexual and reproductive rights of women in the country still lingers and in negligible position. In India, reproductive rights are implicit only in the context of some selective issues, such as, child marriage, female foeticide, sex-selection, menstrual health and hygiene issues.

The two mentionable policies adopted by the Govt. of India towards reproductive rights are:

3.5.1. Abortion

In India abortion is a criminal offence, except done in good faith and for therapeutic purposes. Section 312 of the IPC deals with offence causing of miscarriage. While the pregnant woman herself or any other person voluntarily causing miscarriage and if such miscarriage should not have been caused in good faith

for saving the life of the pregnant woman, the person whoever causes such act shall be punished with imprisonment for a term extend to three(3) years and shall also liable to be fine.

Under Section 313, miscarriage is caused without obtaining the consent of the pregnant woman and the person whoever causes such act shall be punished with imprisonment for a term extend to ten(10) years and shall also liable to be fine.

Furthermore, from section 314 to 316 of IPC, also describes about various offences and punishments in relation to miscarriages.

In 1971, the parliament passed the Medical termination of pregnancy Act (MTP Act), which is an exception to section 312 of IPC and permits abortion where the continuance of the pregnancy will cause “grave injury to mental or physical health.” The Act does not leave the decision to abort with the woman .The satisfaction of the medical practitioner(s) that the grounds mentioned in the Act are satisfied is a pre-requisite under the statute.

The Act was not envisaged as a tool for women to control their reproductive choices. Instead, it grants a power to a third person, the medical practitioner. Abortion law in India reflects that adopted policy for deduction; consider it as a tool for controlling population growth, rather than women’s right to control her body. Here it is also worth mentioning that, the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, prohibits the pre-natal sex-determination tests of the foetus and seeks to provide legislative measures through which unborn female child could be protected.

3.5.2. Forced Sterilizations

Many state Govt. enacted laws to give legal backing to compulsory sterilization. The Punjab Govt., passed a law whereby making it an offence to have more than two children. This was violation of the reproductive autonomy. This attitude of the Indian state towards reproductive autonomy has recognized same in the post emergency era as well. In many states, has a policy of offering a monetary reward for person who has undergone sterilization for achieving “family planning targets.”

Reproductive autonomy is curtailed by many of India’s population policies whereby states would be expected to achieve sterilization targets. Such policy entirely disregards the right to reproductive choices.

Besides these, new reproductive technologies combined with patriarchal attitudes create a problem against the reproductive autonomy and dignity of women.⁶⁴

3.6. Right to Procreation and assisted Reproductive Technology

Right to Procreation is recognized universally as a fundamental human Right. This right is guaranteed by various international human rights instrument and by the constitution of India. Right to procreation is recognized and accepted all over the world as a basic human right, now it is a matter of discussion whether this right includes the right to use ART.

⁶⁴ Dipsikha Konwar, *Reproductive Decision Making: Needs and Concerns for Women Empowerment*, VIII AJANTA 137 (2019)

In fact, procreation is a natural biological process and generally takes place without any technology. But for the infertile couples, the process of procreation to beget a child would not be possible without the intervention of medical science and technology. through it is submitted that for such category of people it is reasonable that the advancement in medical science and technology are to be used for their benefit and therefore they must be allowed to use ART .

Thus, right to procreation includes a right to use ART. In relation to this it is important to discuss that the state has the duty to provide ART and related services. As we know that, Hohfeldian analysis of right and duty relationship that there is no right without a co-relative duty. If there is a Right to Procreation there is also a corresponding duty on part of the state to facilitate its enjoyment. This duty means that the state must not interfere in the reasonable exercise of right to procreation. Right to Procreations is a right whereby obligating others to support a person's attempts to become a parent. In this context the doctors have a major role to play in supporting such attempts to become a parent. When a woman is trying to conceive a child, but unsuccessful to conceive; then the physician who is treating the woman / patient has a duty to provide the best possible treatment for her.

The right to use ART is also justified on the ground of reproductive autonomy of an individual. Therefore, the state should assist couples who need treatment to have children. Hence, the right to use ART is a part of reproductive

autonomy which is important for the exercise of the right to Procreation. Right to use ART only mean right to access facilities so that one can try to have a child. It is also mentionable here that such rights are not absolute and therefore reasonable restriction can be imposed for the welfare of the child and in the interest of the society.

In *Skinner Vs state of Oklahoma*⁶⁵ the US Supreme Court has distinguished the right to reproduce as “one of the basic civil rights of man” and held it would be protected as fundamental human right. Incorporating the pronouncement of *Skinner*, in India, the Andhra Pradesh High Court, in the case of *B.K. Parthasarathi v State of Andhra Pradesh*⁶⁶, established right to reproductive autonomy under Article 21 of the constitution of India.

Very recently, in *Suchita Srivastava Vs Chandigarh Administration*⁶⁷ the Hon’ble Supreme Court of India has held that, the word personal liberty under Article 21 of the constitution of India also includes within its ambit a woman’s right to take reproductive decisions from the judicial interpretations and has observed that the right of women to make reproductive choices is also a aspect of personal liberty as implicit under Article 21. It is essential to perceive that reproductive decision can be practiced to reproduce as well as refrain from reproducing. A woman’s right to privacy, dignity and bodily integrity is fundamental concern and it should be respected. This implies that there should be

⁶⁵ (1941)316 US 535

⁶⁶ AIR 2000 AP 156

⁶⁷ (2009) 9 SCC 1

no limit on the exercise of reproductive decision, e.g., women's right to reject participation in sexual activity or right to use of contraceptive methods. Besides, women are allowed to use conception prevention strategies for birth control. In conclusion, the SC has stated that reproductive rights of women includes right to carry a pregnancy to its full term, to give birth and afterward raise children. And for protecting the life of the prospective child, the termination of a pregnancy is allowed only when the conditions specified in the MTP Act, 1971 are fulfilled.

Through, these entire judicial pronouncements, we have observed the inclination towards the protection of reproductive autonomy and use of ART.

Surrogacy is a remarkable technique of ART, whereby a woman consents to get pregnant for the reasons of gestating and giving birth to a child for intended parents. It is a ray of hope to a childless couple to get a genetically linked child. Surrogacy is a best alternative available for infertile heterosexual couples, homosexual couples, unmarried couples, and single persons. And no one can disagree with the worth of a child for a family and for the society. Various countries have also adopted their legislation to regulate the use and access of ART.⁶⁸

3.7. Legal Provisions, Policies and Legislation Connected to Surrogacy

3.7.1. Surrogacy under Indian Legal Framework

Facilities offered by the countries in relation to surrogacy services are not uniform everywhere. Likewise, legal regulations relating to surrogacy are not

⁶⁸ Such as Canada, UK, Western Australia, South Australia etc.

identical throughout the world. In several nations regulations are very stringent and in other surrogacy practices are ever banned. Hence, the couples and individuals who wish to have a genetically identical child through surrogacy constantly searching for nations which provide surrogacy at a reasonable expense and with least legal complications.

India has been become the favorite destination for infertile couples from across the globe because of the lower cost, less restrictive laws, lack of regulations of ART clinics and availability of surrogate mothers. Besides these, some of the key reasons are that India offers the advantages of well qualified and experienced doctors, world class private health care providers, English speaking environment and easy access to surrogate women.

In the absence of codified law in India, in 2005, the ICMR has come up with moral guidelines for controlling assisted human reproductive technologies in all-purpose and endorses rules for surrogacy practices. Later in 2009 the Law Commission of India has submitted its 228th report to regulate ART clinics as well as rights and obligations of parties to a surrogacy. Besides, in 2008, 2010 and 2013, 2014 respectively, the Union MH&FW and ICMR had formulated ART Bills. But these Bills were not passed by the parliament of India. Successively, the Surrogacy (Reg.) Bill, 2016 was passed by the Union Cabinet but it was lapsed. Again, the Bill of 2016 was reintroduced and passed by Lok Sabha as the Surrogacy (Reg.) Bill, 2019. However, Rajya Sabha has forwarded the Bill of 2019 to the Select Committee of Rajya Sabha. Very recently, the Union Cabinet has

approved the Surrogacy (Reg.) Bill, 2020 after incorporating all the suggestions forwarded on the Surrogacy (Reg.) Bill, 2019 by the Select Committee of Rajya Sabha.

3.7.2. Indian Council of Medical Research Guidelines, 2005

In 2005, the ICMR drafted Guidelines for regulation of surrogacy in India. The Chapter 3 of these guidelines provided for the “Code of Practice, Ethical Considerations and Legal Issues”. These Guidelines establish a procedure for state governmental bodies to oversee all matters relating to the accreditation, supervision and regulation of ART Clinics in India. The code of practice of these Guidelines deals with all aspects of treatments provided and the research done at registered clinics. The guidelines contain specific rules on the selection, screening and status of surrogate mothers. It also attempts to clarify the relationship between the surrogate mother and the intended parents.

Para. 3.10 of the ICMR’s guidelines provide some provisions regarding general considerations for surrogacy. These are ---

- A child born through surrogacy must be adopted by the biological parents if not they can establish through DNA test that the child is theirs.
- Surrogacy ought to be a possibility for patients for whom it would be genuinely or medically not viable to carry a baby to term.
- The task of finding a surrogate mother should rest with the couple, or a semen bank, not the clinic.

- A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple.
- A surrogate mother ought not to be more than 45 years of age. The ART clinic should guarantee potential surrogate woman, who will fulfil all the necessary criteria to go through a successful full-term pregnancy.
- The monetary compensation received by the surrogate mothers ought to be accepted and cover up all legitimate costs related with the pregnancy.
- The prospective surrogate mother must declare that she would not use drug intravenously and not gone through blood transfusion excepting of blood obtained through a certificated blood bank.
- No woman may act as a surrogate mother more than three times in her lifetime.
- There must be informed consent by the surrogate and it must be seen by one who is not connected with the clinic.

In addition to these, the guidelines also consider the matter of welfare of the surrogate mothers as well as the surrogate children. It prohibits sex selection at any stage after fertilization or abortion of foetus. The guidelines also stating that there would be no bar to use of ART by single women. These particular guidelines were prevalent till 2013. Now under the new medical visa regulation 2012, foreign single parents, gay couple and unmarried persons can't come to India for surrogacy arrangement. The new Indian Medical Visa Regulations, 2012 enforced by the Govt. of India, inter-alia, now permit only foreign couples i.e. a duly married man & woman whom marriage should have sustained for at least two (2)

years to visit India on medical visas and not tourist visas for commissioning surrogacy in India.

However, the guidelines have been suffering from various loopholes. Most importantly, these guidelines are non-statutory, having no legal sanction and legally non-binding. These guidelines are voluntary in nature, which reduces their prospective to provide control and reduce conflict. Even though, the Guidelines are exist, there is no central and state body to make certain that these regulations are followed stringently when it comes to surrogacy.

As there is no comprehensive law on surrogacy, these guidelines and Ministry of Home Affairs (MHA) provide strength to the judiciary in resolving many issues

3.7.3. Law Commission's Report on Surrogacy

The law commission of India in Report No.228 of August 2009 has given its views on surrogacy achieved through ART. After examining all the issues and various viewpoints besides discussing actual cases of foreign nationals who have utilized ART for commissioning surrogacy in India, various recommendations have been made by the Law Commission of India in its Report for legislation to regulate Assisted Reproductive Technology (ART) clinics as well as Rights and obligations of parties to a surrogacy. In this Report the Law Commission of India recommends that a practical approach should be adopted by legalizing altruistic surrogacy arrangements.

The Report of the Law Commission of India stated that the legal issues associated to surrogacy are extremely multifaceted and should be addressed by a all-inclusive legislation. It involves inconsistency of various interests and has enigmatic impact on the society through family. A dynamic legislative interference is vital to assist right uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. It is the need of the time to adopt a realistic move toward legalizing altruistic surrogacy arrangements and forbid commercial surrogacy.

There are nine recommendations forwarded by the Law Commission, these are --

- Surrogacy arrangement is required to be administered by contract amongst parties and the contract will contain all the terms and conditions requiring assent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of AI, compensation of all realistic expenses for carrying child to full term, readiness to give the child born to the commissioning parent(s). And such contract ought not to be for commercial purposes.
- A surrogacy arrangement must ensure the monetary support for surrogate child in case of death of commissioning couple or individual prior to delivery of the child, or divorce between the intended parents and successive willingness of none to take delivery of the child.

- A surrogacy contract must contain provision for life insurance for surrogate mother. At least one of the intended parents must be the donor to create biological relationship, which may lead to reduce the chances of various kinds of child Abuse. And if 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 parents and adoptive parents are different.
- A surrogate child is required to be recognized legally as the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
- A surrogate child is required to be recognized legally as the legitimate child of the commissioning parent(s) without there being any need for guardian.
- The birth certificate of the surrogate child must contain the name(s) of intended parents.
- Right to privacy of donor as well as surrogate mother ought to be ensured.
- Sex-selective surrogacy ought to be forbidden.
- Matters of miscarriage should be governed by the Medical termination of pregnancy Act 1971 only.

3.7.4. The Assisted Reproductive Technology (Reg.) Bill, 2008

In India there is no specific legislation on surrogacy. The growing demand for surrogacy in India has raised various issues, including thane of the Child

Rights. This leads the Government drafting a bill which is called “Assisted Reproductive Technology (Regulation) Bill and Rules 2008”. However this bill was formulated but was never passed as a law.

The ART (Reg.) Bill 2008 was drafted by the medical experts from ICMR and the Ministry of Health. It provided for the control and administration of ART throughout India. The Bill encompasses 50 clauses under nine (9) chapters. Surrogacy arrangements are legally accepted under the Bill of 2008. It also ensure that surrogacy agreements are treated as like other contracts under the principles of Indian Contract Act, 1872.

Under this Bill single person, a foreigner or foreign couple or NRI individual or couples, all are eligible for commissioning surrogacy in India. It also proclaims that the child born to a married couple or individual through ART shall be accepted to be the legitimate child of the couple or the individual.

It is additionally provided that notwithstanding any abnormality clubbed with the child, the commissioning parents or parent shall be legally bound to receive the child and the denial to do so shall amount to an offence. A surrogate mother shall have to give up all her parental rights over the child after the delivery of the child to the commissioning parents. The birth certificate of the child should contain the name(s) of genetic parents/parent.

It also affirms that if the commissioning couple gets divorced after commissioning surrogacy but before the child is born, then also the child shall be considered to be the legitimate child of the couple.

The Bill further provides that a couple or an individual shall not have the service of more than one surrogate at any given time. A couple shall also not have simultaneous transfer of embryos in the woman and in a surrogate.

This Bill was patient-centric; it mainly dealt with registration and practice of ART Clinics in India. It also provides for ART clinics and semen banks to perform research on the donated eggs. The Bill has treating surrogacy as business and serving the interest of the private ART clinics, rather than a need of the concerned infertile couple. It neither formed, nor designated or authorized any judicial or quasi-judicial authority for settlement of disputes arising out of ART and surrogacy arrangements.

3.7.5. The Assisted Reproductive Technology Bill, 2010

The ART (Reg.) Bill, 2010 was drafted by a committee comprising of both legal and medical professionals. This Bill legalizes commercial surrogacy stating that the surrogate mother may receive monetary compensation and will surrender all her parental rights over the child. The Bill provided extensive modification to the infertile couple, considering their innate desire to have a genetically linked child but at the same time, it had failed to regard and protect the right of the surrogate mother.

Under this Bill, Single parents can also have children through surrogacy. It had liberal approach whereby allowing individuals, married couples and homosexuals the right to use ART for having children. However, under the medical

visa regulation 2012, foreign single parents, gay couples and unmarried partners can't come to India for surrogacy arrangements.

Under this bill the surrogate mother shall enter into a legally enforceable surrogacy agreement. It provides that foreigners or NRI whoever comes to India for commissioning surrogacy shall have to submit documentation to make sure that their country of residence recognizes surrogacy as legal and the child will get the citizenship though born through the surrogacy agreement from an Indian mother.

Some important provisions of this Bill are as follows-

- a. If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India shall appoint a local guardian to take responsibility for taking care of the child, until the child is delivered to the intended parent/parents. And if the foreign party commissioning surrogacy fails to take delivery of the child born to, the local guardian shall be legally bound to take delivery of the child
- b. A woman in the age group of 21-35 is considered to be eligible to become surrogate mother under this Act. And she is also allowed five live births in her life, including her own children.
- c. If the first embryo transfer is unsuccessful, the surrogate mother may decide to accept on mutually agreed financial terms, two more successful embryo transfers for the same couple. The surrogate mother will not be allowed to undergo embryo transfer for more than three times for the same couple.

- d. The birth certificate of the surrogate should contain the name(s) of commissioning parent or parents..
- e. It also lay down provision for constitution of Authorities to control ART and establishment of National Advisory Board.
- f. It also lay down the whole procedure for registration of clinics and complaints, duties of ART clinics.
- g. It states rights and duties of patients, donors, surrogates and children.
- h. It also mentions about offences and punishment for violation of the provisions of this Bill.

It is mentionable here that though the Bill of 2010 was to control the ever-increasing ART industry, but was failed to utilize legal means of protecting such woman. So, it became very essential to have a deliberate discussion on socio-economic consequences along with the emotional issues of surrogacy arrangements in India.

3.7.6. The Assisted Reproductive Technology (Reg.) Bill, 2014

On September 30th, 2015, a Draft bill titled “The Assisted Reproductive Technology (Reg.) Bill, 2014, was drafted by the Govt. of India. It contemplates that surrogacy shall be available to all married infertile couples thereby, debarring single persons from surrogacy. The salient features of this Bill are:

- a. This bill legalizes commercial surrogacy and the surrogate mother may receive monetary compensation for carrying the child in addition to health care and treatment expenses during pregnancy.

- b. It restricts foreign nationals from commissioning surrogacy in India. Though, it allowed services of surrogacy for OCIs, PIOs, NRIs and to foreigners married to an Indian citizen. However, a foreigner married to an Indian citizen shall subject to produce 'Medical Visa for surrogacy'.
- c. Surrogacy is allowed only for Indian couples. By defining a couple as a married man and woman, the proposed Bill shuts the door on homosexuals and people in live-in relationships. The draft Bill, however, states such couples will have to comply with certain conditions for commissioning surrogacy. For instance, such couples will have to be married and the marriage should have sustained for a considerable period of time. They also have to produce a certificate saying 'the woman is unable to conceive her own child.'
- d. The Bill makes it obligatory for all couples commissioning surrogacy to take the care of the child or children irrespective of any abnormality clubbed with the child or children from birth.
- e. 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.
- f. Married women and divorced women or widowed are allowed acting as surrogates. A woman in the age group of 21-35 and having at least one live child of her own with minimum age of three years was allowed to act as surrogate mother. A woman allowed acting as a surrogate for

more than two years interval between two deliveries. Provided that surrogate mother shall be subjected to maximum three cycles of medications while she is acting as surrogate mother.

- g. A child born to a foreigner married to an Indian citizen by ART in India, will not be an Indian citizen, even though being born in India, will be entitled to Overseas Citizenship of India under Section 7A of the Citizenship Act, 1955.
- h. The draft bill also included various provisions to regulate the reproductive technology clinics in India.
- i. ART clinics were not allowed to grant a intended couple with a child of a pre-determined sex.
- j. ART clinics and ART banks were not allowed to provide information on or about surrogate or potential surrogate to any person. The commissioning couple may acquire the information about a surrogate through ART clinics.
- k. The surrogate mother shall have to enter into a surrogacy agreement with the intended parent(s) commissioning surrogacy through ART, and shall be legally enforceable and binding on the parties.
 - (i) All expenses, including insurance, from the period of pregnancy to post-natal to delivery of the child to the commissioning couple shall be bear by the commissioning parents.

- (ii) If there are any complications that have arisen during pregnancy (i.e. Gestational Diabetes, Chronic Hypertension etc.) and have possibility to persist for the rest of her life, in that case it should be appropriately covered under insurance.
- (iii) 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 starting from signing of the agreement till the child/children is/are handed over to the commissioning parents.
- l. A surrogate shall relinquish all parental rights over the child or children.
- m. A woman assenting to act as a surrogate shall have to undergo tests of diseases, including HIV/AIDS, sexually transmitted, heart diseases, thyroid problem etc., and all other contagious diseases, which may cause danger to the health of the child. She also required declaring in writing that she has not undergone any blood transfusion in the last six months.
- n. For all medical treatments of a surrogate child, the surrogate mother shall register her own name at the hospital by clearly declaring herself to be a surrogate and provide the name(s) and addresses of the commissioning parent(s), along with a copy of the agreement and the copy of the certificate.
- o. The birth certificate issued in respect of a baby born through surrogacy shall contain the name of the commissioning parents.

- p. All information regarding the surrogate mother required to be kept secret and not to be disclosed to anyone else other than the National Registry of ART clinics and Banks in India of the ICMR except by an order of a competent court.
- q. A surrogate is not allowed to donate egg for the couple commissioning surrogacy and prior to act as surrogate, the written consent of surrogate mother's spouse is required. It is to be certified by the husband of the surrogate mother that he will take proper care of the well being of the existing child/children of their own throughout the period of surrogacy and till his wife became free from the responsibility of agreement.

3.7.7. The Surrogacy (Regulation) Bill, 2014⁶⁹

The ever increasing rate of child birth with the help of surrogacy and lower cost of surrogacy in comparison to other countries is a considered as matter to be observed. Because, it is true that large number of people including foreigners also, taking option of ART, but along with it a number of legal issues have arisen which needs urgent attention. Hence, considering it and to protect poor surrogate mothers, it was anticipated to control operation of surrogacy clinics to ascertain the protection of the rights of the concerned parties from all aspects. This Bill seeks to regulate the practices of surrogacy and for matters connected or accompanying to surrogacy. It provides provisions for establishment of National Board for Regulation of Surrogacy and functions of National Board.

⁶⁹ Bill No. 61 of 2014

It also provides provision for registration of ART clinics, procedure regarding persons seeking use of ART, provisions of surrogacy arrangement and medical tests of women seeking to act as a surrogate mother, eligibility conditions for women to be surrogate mother, right of surrogate child to know about genetic parents or surrogate mother.

And it also provides procedure for foreign couples seeking surrogacy and empowers the Central Government to make rules.

3.7.8. The Surrogacy (Reg.) Bill, 2016 and the Surrogacy (Reg.) Bill, 2019

The Surrogacy (Reg.) Bill, 2016, was introduced and passed by the Lok Sabha. However, the 2016 Bill was lapsed owing to the adjournment sine die of the parliament session.

After that, the Surrogacy (Reg.) Bill, 2016 was reintroduced and passed by the Lok Sabha in 2019 as the Surrogacy (Reg.) Bill, 2019. Without passing the Bill of 2019, the Rajya Sabha has sent it to the Select Committee of Rajya. The main proposition of the bill is to completely abolish commercial surrogacy. Under this Bill, Commercial surrogacy refers to surrogacy or its related dealings consented for a financial benefit exceeding the necessary medical costs and insurance coverage. It is aimed at cracking down on the inside business of surrogacy. The bill only allows altruistic surrogacy, where the surrogate mother is a close relative of the commissioning parents. The couples also have to prove their infertility.

Under the Bill, all surrogacy clinics will have to be registered, the surrogate mother can't be paid directly and there will be national and state surrogacy boards which will be regulating authorities for the practice. This Bill provides that violations to some specific provisions it will be liable for punishment. In addition, to these, all registered clinics required to retain records of surrogacy for 25 years.

The most ruthless provision in the Bill is prohibition of single parents, homosexual's live-in-couple from becoming commissioning parents. The Bill will allow surrogacy only for Indians married hetero-sexual infertile couples and not for foreigners.

Though, this bill was approved by the Lok Sabha, the Rajya Sabha has referred the Bill to the Selection Committee for further consideration on 21 November, 2019. Accordingly, on 5 February 2020, the Selection Committee has presented its Report before the Rajya Sabha on the Surrogacy (Reg.) Bill, 2019 with many suggestions.

3.7.9. The Surrogacy (Reg.) Bill, 2020

On 26 February 2020, the Union Cabinet again has approved the Surrogacy (Regulation) Bill, 2020, incorporating the 15 major recommendations suggested by the 23 member Select Committee of the Rajya Sabha made on the Surrogacy (Reg.) Bill, 2019.⁷⁰

⁷⁰ The Hindu, 27 February, 2020

The Surrogacy (Reg.) Bill, 2020 is an ethical, moral and social legislation as it seeks to protect the reproductive rights of a surrogate mother as well as protects the rights of the child born through surrogacy. This Bill is the reformed version of the earlier draft legislation i.e. the Surrogacy (Reg.) Bill, 2019.

This Bill allows any willfully consenting woman to act as surrogate mother. Under the Bill, fair surrogacy is permitted on completion of certain conditions to Indian married couples, Indian-origin married couples. And the service of surrogacy is more significantly extending to Indian widows and divorced women between the age group of 35- 45 years. It deleted the definition of ‘infertility’ as inability to conceive after five years of unprotected coitus relationship on the ground that it was too long for a couple to wait for a child.

The Bill provides provision for establishment of a National Surrogacy Board and State Surrogacy Boards and authorities in the States as well as in Union Territories to regulate the practice of surrogacy in India. Along with, commercial surrogacy, it also restricts sale and purchase of human embryo and gametes.

The Bill also guarantees and increases insurance cover for a surrogate mother from 16 months to 36 months.

3.7.10. The Assisted Reproductive Technology (Reg.) Bill, 2020

The Union Cabinet has approved the Assisted Reproductive Technology (Reg.) Bill, 2020 to monitor medical procedures used to assist people to achieve pregnancy.

The Bill will regulate the ART services in the country. As a result, infertile couples will be more ensured of the ethical practices in ARTs.

It makes provisions for safe ART practices in India. The Bill also affirms secrecy of intending couples and defends the rights of the surrogate child born through ART.

It also provides provisions for establishment of National Board and Regulatory Boards at State level and a national registry for accreditations, regulation and supervision of all ART Clinics and ART banks.

3.7.11. Law for entry of foreigner in India

The entry, stay and exit of foreigners into India are governed by the passport (Entry into India) Act, 1920, the passport (Entry into India) Rules, 1950, Foreigners Act, 1946 and Regulation of Foreigners Rules 1992⁷¹. The minister of Home Affairs can make provisions for prohibiting regulating or restricting, the entry, departure and presence of foreigners into India by enacting justifiable and legitimate visa Rules and Regulations with a classification for different purposes.

3.7.12. Existing legal provisions on Surrogacy

In the absence of specific legislation in all aspects of surrogacy some other legal provisions are still in application .These are-----

⁷¹ Anil Malhotra & Ranjit Malhotra , *Surrogacy in India : A law in the making - Revisited* 159-160 (LexisNexis, Haryana, 2nd Edition, 2016)

- Surrogacy in India is legitimate for married couples/unmarried couples/single persons because no legislation prohibits surrogacy explicitly. The question of legitimacy of surrogacy agreements is an important matter to be decided and for deciding the same, the Indian contract Act, 1872 is still in operation. As per the section 10 of the ICA, 1972, all agreements are contracts, in the event that they are made by free assent of parties for a lawful consideration in relation to a legitimate object, which are not explicitly affirmed as void.

For the present context, any surrogacy arrangement or agreement, which is arrived at by the free consent of the parties who are competent to contract and who have entered into the arrangement or agreement for a lawful consideration as also with a lawful object which is not expressly declared to be void, would be a contract. It may be added that since under the prevalent law in India, commercial surrogacy is not illegal in India, subject to the fulfilment of other conditions of section 10 of the Contract Act a surrogacy arrangement or agreement would be a contract.

Therefore, if any surrogacy agreement of a married/unmarried couple/single parent satisfies these, it is an enforceable contract.

Thereafter, to resolve the problem of enforceability of a particular surrogacy arrangement, section 9⁷² of the CPC, 1908 is still in operation. As the civil courts may try all civil/suits unless debarred. Hence, the

⁷² Section 9 – “Court to try all civil suits unless barred.- The Courts shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred”.

enforceability of surrogacy arrangements is a subject of a civil suit before a civil court and appropriate to institute all/any issues relating to surrogacy agreement before it for a declaration/injunction.

- A child born through surrogacy must be adopted by the Genetic (Biological) parents⁷³. But, it is not being possible in case of Non-Hindu foreign parents who can't adopt in India but can be appointed as guardians under the Guardians and Wards Act, 1890.⁷⁴ Alternatively, the biological parents can move an application under the GWA for seeking an order of appointment and for a declaration to be declared as the Guardian of the surrogate child.⁷⁵

To determine the issues relating to guardianship of a surrogate child, the Guardian and Wards Act (GWA), 1890 would apply. Section 4 of this an Act specifies the persons entitled to apply for a guardianship. Section 9 prescribes the court as having jurisdiction to entertain the guardianship application. Section 10 lays down the form of the application and section 11 prescribes the procedure on admission of the application. Section 13 lays down the requirement of hearing of evidence before making of an order under the Act and section 26 permits the removal of a ward from the jurisdiction of the court. This is the second possible option which can be availed of by the biological father for enforcement of his rights arising from the surrogacy arrangement or agreement.

⁷³ ICMR Guidelines, R-3.10.1

⁷⁴ It is an Act to consolidate and amend the law relating to guardians and wards prevalent in India.

⁷⁵ Supra note 71, p.161

Under the GWA to enforce biological parentage rights for establishing exclusive custody of the surrogate children on the basis of genetic evidence and other rights spelt out in the surrogacy agreement.

- To determine the issues relating to nationality and citizenship of child born out of surrogacy arrangement in India , the Indian citizenship Act , 1955, would apply .this enactment provides four modes of acquisition of citizenship which are contained in Section 3,4, 5and 6 by birth, descent, registration and naturalization respectively.
- Understanding in relation to the registration of births of the surrogate children in India :-

In India, at this moment, do not have any legislation on legal parentage. On the other hand, the registration of the Births and Deaths Act, 1969, also does not contain any provision regarding parentage of a surrogate child born out of surrogacy arrangement.

For registration of births of children born out of surrogacy arrangement are concerned, reference is drawn to the relevant provisions of the ICMR Guidelines, 2005. Para 3.5.4 of the ICMR guidelines clearly states that the surrogate mother shall not be the legal mother and the birth certificate shall be in the name of the genetic parents. However, as per the guidelines the clinic will have to provide a certificate to the genetic parents by mentioning the name and address of the surrogate mother. It also provides that the commissioning couple shall be responsible for all the

expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy. Furthermore, this guideline also provides that the surrogate mother would be entitled to a monetary compensation from the commissioning couple and the amount of compensation should be decided by them mutually. It also restricts oocyte donor from acting as a surrogate mother.

Though the ART bill, 2014 provides that the birth certificate of a child born through Surrogacy should contain the name of the commissioning parents.⁷⁶ However the present proposed Bill is silent in such issue.

These are all about the various legislative actions those are still in operation in India. Now it is the need of the hour to bring a comprehensive legislation, which could able to dispose all the issues arising out of surrogacy arrangements.

⁷⁶ Section 60(10)