

**REVIEW OF ART BILL 2014 –CONTESTED ISSUES AND CASES**

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**Abstract**

The Assisted Reproductive Technology (Regulation) Bill, 2014 (hereinafter ART Bill 2014)<sup>1</sup> has been introduced following the revision of the previous draft ART Bill 2010<sup>2</sup> by the Ministry of Health and family welfare for deliberation and subsequently enactment as a statute. This Bill is significant as it has ushered changes with the ban on foreign nationals, same sex and single individuals to commission surrogacy in India. The Bill suffers from grave limitations, some of the significant issues including enforceability of surrogacy agreement, breast feeding for surrogate child, right to reproductive decision making as abortion for surrogate mother determination, vesting of legal parentage in the intending mother in the are not adequately addressed. Thus taking into account these issues, the Bill merits reconsideration towards addressing these pertinent legal issues for early enactment of law to ensure safe , regulated practice of same with right to better health , family formation for all.

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**I Discriminatory exclusionary against foreigners, same sex partners (LGBT) single individuals**

THE ART Bill 2014, expressly states that the surrogacy for foreigners in India shall not be allowed, however permits a restrictive narrow group including Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married

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<sup>1</sup> Government of India, Ministry of Health and Family Welfare, (Department of Health Research) ART Bill 2014, Sep. 30, 2015, *available at:* [http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202014.pdf](http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf)(last visited on Mar. 1, 2016).

<sup>2</sup> The Assisted Reproductive Technologies (Regulation) Bill - 2010 (Draft), Ministry of Health & Family Welfare Government of India, New Delhi & Indian Council of Medical Research New Delhi, *available at:* <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> (last visited on Mar. 11, 2016).

to an Indian citizen to commission surrogacy, thus the Bill causes classification or distinction among commission couples as nationals or foreigners, sexual orientation, marital status accordingly permitting, prohibiting them from commissioning surrogacy.

Following the perusal of the definition, statement of objective in the bill surrogacy is form of ART treatment, a medically assisted procreation seeking to address the infirmity or failure associated with the reproductive sexual health of couple and thereby providing a medically technological recourse towards assisting procreation for infertile couples, to attain better reproductive or sexual health, procreation or family formation, represents decision making with respect to private life, thus surrogacy is being viewed around the world as an alternative means of family formation or child bearing. Thus taking after the same purpose, The essential nature of this ART Bill 2014 is primarily a welfare legislation seeking to better the reproductive sexual health for reproductively challenged through the use of ART including surrogacy in the backdrop of rising incidence of infertility or medical problems India and worldwide, the World Health Organisation (WHO) estimating that 13- 19 million couples are infertile in India,<sup>3</sup> thus access, availing surrogacy falls under the ambit of right to health, right to privacy or family formation which are facet of right to life of an individual guaranteed legal rights under Constitution, international human right convention. Therefore any such arbitrary distinction, among commissioning couples based on nationality, sexual orientation, marital status doesn't comply with basic human rights.

It may be submitted that right to health is constitutionally protected right, accordingly interpreted, upheld through judicial precedents in innumerable cases, *Parmanand Katra v. Union of India*,<sup>4</sup> *CESC Ltd. v. Subash Chandra Bose*,<sup>5</sup> *Paschim Banga Khetmazdoor Samity v. State of West Bengal*.<sup>6</sup> The Supreme Court after referring to international human rights conventions held that right to health and medical care is a fundamental right covered by article 21 read with articles 39(e), 41 and 43 of Indian Constitution and that the state has an obligation under article 21 to safeguard the right to life of every person, the government's responsibility to provide medical aid. Further it may be added that the right to life and liberty,

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<sup>3</sup>Neetu Chandra Sharma, "Most IVF clinics in Delhi are operating without any registration", *India Today*, New Delhi, Apr. 26, 2015, available at <http://indiatoday.intoday.in/story/in-vitro-fertilisation-clinics-registration-delhi/1/432185.html> (last visited on Mar. 11, 2016). See also, Guidelines for ART Clinics in India, Ch. 1 Introduction, Brief History of ART and Requirements of ART Clinics, ICMR/NAMS, available at: [http://icmr.nic.in/art/chapter%20\\_1.pdf](http://icmr.nic.in/art/chapter%20_1.pdf) (last visited on Mar. 11, 2016).

<sup>4</sup> AIR 1989 SC 2039.

<sup>5</sup> AIR 1992 SC 573: 1991 (2) SCALE 996.

<sup>6</sup>(1996) 4 SCC 37.

enshrined under article 21 of the Constitution, is available to all including foreign nationals as held in *Hans Muller of Nuremburg v. Superintendent*,<sup>7</sup>*Louis Deraedt v. Union of India*,<sup>8</sup> *People's Union for Civil Liberties v. Union of India*.<sup>9</sup> Another component of right to life of an individual includes “right to privacy”, “right to family formation” which is a facet of right to life as held by the Supreme Court of India in the classic case of *Kharak Singh v. state of Bihar*<sup>10</sup> which held the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by article 21. In this case the court held that “It is a right of a citizen to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters” and right to be free from unnecessary, arbitrary state interference in the same”. In *B. K. Parthasarathi v. Government of Andhra Pradesh*<sup>11</sup> upheld “the right of reproductive autonomy or procreative choice or decision making” of an individual as a facet of his “right to privacy” as well as in *Govind v. State of MP*<sup>12</sup> and similar other cases on this point and as much violation of the international convention namely the International Conference on Population and Development (ICPD) Cairo 1994.<sup>13</sup> Among other international human right conventions as Universal Declaration of Human Rights 1948 (UDHR),<sup>14</sup> International Covenant on Economic, Social and Cultural Rights 1966, (ICCPR),<sup>15</sup> International Covenant on Economic, Social and Cultural Rights, 1996 (ICESCR)<sup>16</sup> which also under their respective articles provide the similar human right entitlement.

It may be noted that the right to health, family formation, privacy are an international human right established under series of international human right convention, some of the relevant conventions may be reiterated here, right to form a family is the one of the basic human right, under international human right conventions, the foremost UDHR, ICCPR, ICESCR, right to

<sup>7</sup> 1955 AIR 367; 1955 SCR (1)1284.

<sup>8</sup> (1991) 3 SCC 554.

<sup>9</sup> 1995 SCC Supl. (2) 572; JT 1995 (3) 365; 1995 SCALE (2) 542.

<sup>10</sup> AIR 1963 SC 1295.

<sup>11</sup> AIR 2000 AP 156; *Javed v. State of Haryana* (2003) 8 SCC 369.

<sup>12</sup> (1975) 2 SCC 148; 1975 SCC (Cri) 468. *R. Rajagopal v. State of TN* (1994) 6 SCC 632.

<sup>13</sup> International Conference on Population and Development, Cairo, 5-13 September 1994, United Nations Distr. General A/CONF.171/13, Oct. 18, 1994, available at: <http://www.un.org/popin/icpd/conference/offeng/poa.html> (last visited on Mar. 11, 2016).

<sup>14</sup> UN General Assembly, Universal Declaration of Human Rights, Dec. 10 1948, 217 A (III), available at <http://www.refworld.org/docid/3ae6b3712c.html> (last visited on Mar. 11, 2016).

<sup>15</sup> UN General Assembly, International Covenant on Civil and Political Rights, Dec. 16, 1966, United Nations, Treaty Series, vol. 999 at 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (last visited on Mar.11, 2016).

<sup>16</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993 at 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> (last visited Mar.11, 2016).

the enjoyment of the highest attainable standard of health including sexual health which is also a component of health, wellbeing. UN Convention on the Elimination of All Forms of Discrimination (UNCEDAW) 1979,<sup>17</sup> (articles 12 and 16) provides for access to health care services, including reproductive health care services including family formation choices. The reproductive freedom is guaranteed by the International Conference on Population and Development (ICPD) Cairo, 1994.<sup>18</sup> This for the first time ever at international level established reproductive or sexual health as human rights, as a core component of right to health, wellbeing and right to life of an individual human being. It may be noted that certain cardinal rights as right to life including within its ambit right to health, family are international human rights established universally under human right conventions and for the same reason there is an obligation arising under international human right convention to ensure compliance with the same. Some of the leading international human rights cases have also upheld the right to access medical technology as facet of right to privacy, procreative choice. *Dickson v. The United Kingdom* [GC]<sup>19</sup> the ECHR court concluded that “the Right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8 under Article 8 of ECHR, as such a choice is an expression of private and family life”. Similarly, *S.H v. Austria, ECHR*,<sup>20</sup> right to use medically assisted reproductive procreation is expression of private and family life under Austrian Artificial Procreation Act, 2011.

Thus this provision of Bill imposing ban appears prima facie arbitrary, discriminatory exclusionary for two reasons, *firstly* this provision seeks to deny, deprive take the most fundamental, basic international human rights namely right to family formation, right to privacy which are core constituents of right to life of an individual without justified or reasonable grounds or rationale for the same thus arbitrary and *secondly* for causing distinction, differential treatment among human being in the access, exercise of cardinal human rights on grounds of sexual orientation, marital status, nationality thereby causes discrimination among human beings who share the same status as commissioning or

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<sup>17</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249 at 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> (last visited on Mar.11, 2016).

<sup>18</sup> *Id.* at 13.

<sup>19</sup> (2008) 46 EHRR 41; [2007] ECHR 1050.

<sup>20</sup> [2011] ECHR 1879. See also, Alexandra Timmer, *S.H. v Austria: margin of appreciation and IVF*, strasbourgobservers Nov. 9, 2011, available at: <http://strasbourgobservers.com/category/cases/s-h-and-others-v-austria/> (last visited on Mar.11, 2016).

intending couples seeking to commission surrogacy facing the same health ailment of infertility, sharing the same biological necessity of having a child genetically related to either of the couple thus fall under the same group or class of stakeholders identified with the same name as intending or commissioning couples, this differential treatment or discrimination causes denial of equality or equal treatment, equal protection before law and discrimination on the ground of nationality which in itself is a violation of human rights as right to equality and right to non-discrimination or right to be free from discrimination are primary human rights under international human rights conventions.

This provision is *per se* exclusionary and discriminatory to singles, same sex couples as well, as this provision in the bill outrightly takes away their right to reproductive or procreative freedom, choice and decision making and causes unnecessary interference with the right to privacy, right to family of such individuals, which are rights inhering in all human beings, accordingly granted to all human beings equally without any discrimination both under Indian constitution as well as international human rights conventions as well. This is clearly discrimination on the ground of sexual orientation, marital status of a person.

In this regard, it may be noted that the male, female singles of Indian nationality, as well as foreign nationals are permitted to adopt a child under the adoption law namely Central Adoption Resource Authority (CARA) guidelines<sup>21</sup> issued under the Juvenile Justice Act, 2000 but contrastingly / quite contrary to this singles are prohibited from commissioning surrogacy, this manifests grossly inconsistent and arbitrary policy making.

It is significant to note that the ban proposed in the recent ART Bill 2014 stands contradictory or opposed to/ comes in sharp contrast with the previous ART Bill 2010<sup>22</sup> which permitted surrogacy for all<sup>23</sup> and in pursuance of the same, the provisions of the Bill provide for obtaining prior documentation including letter of permit from the embassy of the concerned foreign country stating “the country permits surrogacy and that the child born through surrogacy in India, will be permitted entry as a biological child of the commissioning

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<sup>21</sup>Ministry of women and child development, CARA Guidelines – 2015 under the Juvenile Justice (Care and Protection of Children) Act, 2000, S.O. 1945 (E). July 17, 2015 available at [http://cara.nic.in/InnerContent.aspx?Id=163#Guidelines - 2015](http://cara.nic.in/InnerContent.aspx?Id=163#Guidelines-2015)( last visited on Mar.11, 2016).

<sup>22</sup> The Assisted Reproductive Technologies (Regulation) Bill - 2010 (Draft), Ministry of Health & Family Welfare Govt. Of India, New Delhi & Indian Council of Medical Research New Delhi, available at <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> (last visited on Mar.11, 2016).

<sup>23</sup>*Supra* note 1, s. 32(1).

couple/individual, the country.”<sup>24</sup> This particular provision of ART bill [section 34 (19)] has been identified and specifically mentioned by the permanent bureau, Hague Conference in their preliminary report on the issues arising from international surrogacy arrangements, as a key mechanism of private international law for regulating surrogacy at international law and permitting cross border surrogacy for foreign nationals at the international level, this provision provides for “inter state cooperation” by necessitating “prior legal permit, documentation” through respective embassy of the concerned foreign country, thus laws of both nations are respected, and complied and this address issues concerning parentage and other legal issues<sup>25</sup>. The Permanent Bureau, Hague Conference has upheld it as a possible approach to formulation of a new international regulatory instrument on surrogacy.<sup>26</sup>

Contrastingly, there are liberal egalitarian surrogacy laws providing for surrogacy for all without any discrimination, these nations are namely California Surrogacy law 2013,<sup>27</sup> United Kingdom (UK), The Human Fertilization and Embryology Act, 1990( HEFA) <sup>28</sup> Canada Assisted Human Reproduction Act, 2004<sup>29</sup> permits surrogacy for all and expressly states under its binding principles that “persons seeking to undergo assisted reproduction procedures must not be discriminated on the basis of their sexual orientation or marital status”.<sup>30</sup> These legislations permit homosexuals to commission surrogacy in the same footing as heterosexuals treating them as equals.

Throughout the world, legal developments are taking place, towards granting legal recognition to same sex surrogacy as well. A prime illustration of same is UK. Under the UK HEFA<sup>31</sup> has undergone recent revision of definitions of parenthood in April 2010,<sup>32</sup> which permits homosexuals to commission surrogacy in the same footing as heterosexuals treating

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<sup>24</sup>*Supra* note 1, s. 34 (19).

<sup>25</sup>Permanent Bureau, Hague Conference on Private International law, Preliminary report on the issues arising from international surrogacy arrangements, some initial thoughts on possible approaches to any new instrument on international surrogacy, Prel. Doc. No 10, mars / Mar. 2012 at 25, *available at*: <http://www.hcch.net/upload/wop/gap2012pd10en.pdf>( last visited on Mar.11, 2016).

<sup>26</sup> *Ibid*.

<sup>27</sup>California legislative information, Assembly Bill No. 1217, Ch. 466AB-1217 Surrogacy agreements (2011-2012), *available at*: [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201120120AB1217](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB1217) (last visited on Mar.11, 2016).

<sup>28</sup>United Kingdom, Human Fertilization and Embryology Act 2008, See Ch. 22, *available at*: <http://www.legislation.gov.uk/ukpga/2008/22/contents> (last visited on Mar.11, 2016).

<sup>29</sup> Canada Assisted Human Reproduction Act, SC 2004, c. 2, 2004-03-29 *available at*: <http://laws-lois.justice.gc.ca/eng/acts/a-13.4/page-1.html>( last visited on Mar.11, 2016).

<sup>30</sup>*Id.*,s. 2(e) *available at*: <http://laws-lois.justice.gc.ca/eng/acts/a-13.4/page-1.html>(last visited on Mar.11, 2016).

<sup>31</sup>*Id.* at 28.

<sup>32</sup>*Ibid*, Phase one on Apr. 6, 2009 part 2 of the Act, the revised definitions of parenthood, Apr. 6, 2009 *available at*: <http://www.hfea.gov.uk/134.html> (last visited on Mar.11, 2016.)

them as equals. Similar change is also evident in the Israeli surrogacy law towards legalizing same sex surrogacy in Israel. Under the earlier Israeli law, only a married heterosexual couple can contract an Israeli woman to serve as a surrogate mother. This was challenged in the court as discriminatory against same-sex couples,<sup>33</sup> the health ministry proposed an amendment to this law towards ending this discrimination,<sup>34</sup> coupled with constitution of a high court of justice committee seeking to extend the law for all including single, same sex couples.<sup>35</sup> In line of this arguments, there are several cases under the foreign legal jurisdictions which have granted legal recognition homosexuals to commission surrogacy and vested them with legal parentage. In *Elisa B. v. Superior Court*<sup>36</sup> California court recognizes a lesbian co-parent as legal parent of the surrogate child as they bring about its birth and carry out the plan to co-parent a child courts are willing to recognize a lesbian co-parent as a legal parent. Similarly, *In the Matter of Jacob*,<sup>37</sup> *T.V. v. NY Dep't of Health*,<sup>38</sup> *Matter of Doe*,<sup>39</sup> the New York court held that the right of same sex unmarried intending couple to legal parentage over surrogate child.

Thus, there is need for reconsideration of ART Bill based on the progressive human rights jurisprudence so as to enable access to ART including surrogacy for all in compliance with human right to reproductive health, family formation, privacy and thereby right to life, liberty.

## II Enforceability of surrogacy agreement

The Bill defines surrogacy agreement as an agreement which is binding on the parties but it is silent on the enforceability of surrogacy agreement as a contract<sup>40</sup> The ART Bill provides for entering into surrogacy agreement between the surrogate mother and the couple who is seeking surrogacy, this agreement lays down rights, duties of both the parties, compensation, terms and conditions of surrogate pregnancy, transfer of custody of child among other things

<sup>33</sup>Aviel Magnezi, Health Ministry: Recognize, Israel, same-sex couples as parents, 03.20.13, Israel News, available at <http://www.ynetnews.com/articles/0,7340,L-4358677,00.html> (Last visited March 11, 2016).

<sup>34</sup> Dan Even, Health Minister Proposes Allowing Surrogacy for Gay Couples and Singles, haaretz, Jun. 19, 2013, available at: <http://www.haaretz.com/israel-news/.premium-1.530673>, See also, Ilan Lior, Israel's High Court Rebukes State for Ignoring Petition on Same-sex Surrogacy, haaretz Mar. 2, 2016, available at: <http://www.haaretz.com/israel-news/.premium-1.706413> (last visited on Mar. 11, 2016).

<sup>35</sup>Irit Rosenblum, "Surrogacy in Israel", New Family, available at: <http://www.newfamily.org.il/en/surrogacy-in-israel/> (last visited on Mar. 11, 2016).

<sup>36</sup>(2005) 37 C.4th 108, 33 C.R.3d 46, 117 P.3d 660.

<sup>37</sup> 86 NY2d 651 (1995).

<sup>38</sup> 88 AD3d 290 (2d Dep't 2011).

<sup>39</sup>7 Misc 3d 352 (NY Cty. Surrogate's Ct., Feb. 1, 2005).

<sup>40</sup> *Supra* note 1, s. 60 (1).

as crucial to the conduct of surrogacy, thus this agreement is significant for laying the foundation for commissioning surrogacy.

There are other procedural gaps in the bill on surrogacy agreement for want of laying down the requisite legal procedural compliances to be followed in case of entering into surrogacy agreement thereby questioning the legality of such an agreement. There is silence in the ART Bill on prescribed procedural mechanism, the administrative legal compliance of entering into the surrogacy agreement, including the attestation, notarisation bond paper, stamp value, requirement of witness, approval and scrutiny of surrogacy agreement. It is rightful to enumerate the law, the US California law on surrogacy,<sup>41</sup> under the family code prescribes for notarised surrogacy agreement, witness, execution, signature, attestation under penalty of perjury as to the parties' compliance with the agreement, a copy of the agreement is also submitted in the court for approval.

The Bill does not specify if the surrogacy agreement is mandatorily required to be in oral, writing or online, or through other communication media or otherwise, in this regard, it is imperative to look at the surrogacy laws of foreign nations namely New South Wales Australia Surrogacy Act, 2010<sup>42</sup> which expressly prescribes that "surrogacy arrangement must be in writing signed by the birth or surrogate mother, her husband and the applicants or intending couples." In Israel 'Embryo Carrying Agreements Law' 1996<sup>43</sup> strictly permits written agreement between the intended parents and the gestational surrogate.

These limitations in the surrogacy agreement has been evident in the case of *Baby Yamnda Manji v. Union of India*, in that case the enforceability of surrogacy agreement was challenged in and the agreement is held null void or without any legal effect. As this agreement did not bear the signature of either the Japanese intending father, mother and there was long delay of six months in entering the surrogacy agreement following the date of embryo implantation in the surrogate mother.<sup>44</sup>

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<sup>41</sup> *Id.* at 27.

<sup>42</sup> New South Wales Australia Surrogacy Act 2010, Act 102 of 2010, 7 June 2011 available at: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/sa2010139/s34.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/sa2010139/s34.html) (last visited on Mar.11, 2016).

<sup>43</sup> Rabbi Prof. David Golinkin, "What does jewish law have to say about surrogacy?", 7(3) Schechter on Judaism (Dec. 2012), available at: <http://www.schechter.edu/responsa.aspx?ID=71/> (last visited on Mar.11, 2016).

<sup>43</sup> Israel Carriage of Fetuses (Approval of Agreement And Status of the New Born) Law, 5756-1996, Mar. 17, 1996.

<sup>44</sup> Swati Vashishtha, Baby Manji faces another legal hurdle, CNN-IBN, Aug. 15, 2008, available at: <http://ibnlive.in.com/news/baby-manji-faces-another-legal-hurdle/71068-3.html> (last visited Mar.11, 2016).

Taking unfair advantage of these gap, there are sham surrogacy agreements entered in bond paper of as meager value as Rupees 50 providing for gestation and delivery of child by surrogate mother and surrender or transfer of custody of surrogate child from surrogate mother to the intending couple, this is as per the research report by a leading women right advocacy group in Delhi.<sup>45</sup> Another lacuna is there is no defined time period or stage of entering into surrogacy agreement, it has been observed that surrogacy agreement are signed after the confirmation of surrogate pregnancy or by the end of the first trimester of surrogate pregnancy or around the middle of the second trimester or the fourth month of pregnancy by the infertility during this intervening period until the confirmation of pregnancy the surrogate mother's reproductive health is exposed to serious health risks following the hormonal treatment to prepare the body of surrogate mother for conceiving, successful pregnancy. California surrogacy law specifies the appropriate juncture of executing surrogacy agreement which is before the commencement of embryo transfer procedure, initiation of hormonal medication in preparation for an embryo transfer for assisted reproduction purposes in surrogate mother.<sup>46</sup>

There is another lurking ambiguity implicit in the bill on surrogacy agreement, there is inconsistent use of the provision "notarized surrogacy agreement" under relevant provisions of ART Bill, the provision of the bill directed to OCI, PIO, foreigner married to Indian citizen specifically provides for entering into "notarized surrogacy agreement" but this particular requirement of "notarized surrogacy agreement" is not mandated in other provisions which provides for couples other than the mentioned categories for commissioning surrogacy.<sup>47</sup> It is suggested that this requirement of notarised surrogacy agreement may be uniformly made applicable in all cases of commissioning couple irrespective of nationality, residence for legal reasons of validity or constitutionality.

The unenforceability of surrogacy agreement leaves all the stakeholders including the surrogate mother, surrogate child, commissioning or intending couple vulnerable without any legal recourse or remedy and the entire surrogacy arrangement uncertain, therefore it is suggested to provide for the legal procedural compliances to be followed in order to ensure legality, enforceability of surrogacy agreement.

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<sup>45</sup> Center for social Research Delhi, Surrogate Motherhood- Ethical or Commercial, *available at*: <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>(last visited on Mar.11, 2016).

<sup>46</sup> *Id.* at 27, California Family code s. 7962 (a) (d).

<sup>47</sup> *Supra* note 1, s. 60 (13).

In India, considering the poor plight of surrogate mother the status class difference in parties to surrogacy agreement, there must be approval of surrogacy agreement so as to ensure there is no unjust benefit undue advantages of one party at the cost of others or rather equitable treatment of parties, the legality of the provisions of surrogacy agreement in consonance with the existing laws may also be satisfied.

Many progressive legal jurisdictions of the world provide for progressive measures as scheme of court approved surrogacy agreement, Under the Israel, The Embryo Carrying Agreement (Agreement Authorisation & Status of the Newborn Child) 1996,<sup>48</sup> the surrogacy agreement is approved, supervised by the government appointed committee to ensure the legality, validity of the provisions contained in the agreement, the equitable treatment, status or plight of all the stakeholders under the same.<sup>49</sup> The government appointed surrogacy committee role is to approve the contract after ensuring that it meets the conditions set down by the law and is convinced that both parties signed of their own free will voluntary, after following informed consent and after establishing that no risks are posed to the mother's health or to the child's welfare. Similar form of court approved surrogacy agreement is provided in California as well.<sup>50</sup> These practices may be incorporated in India in for towards better enforceability of surrogacy agreement.

### **III Right to abortion of surrogate mother**

The ART Bill does not mention any provision on the medical termination of pregnancy or abortion as provided under the Medical Termination of Pregnancy Act, 1971.<sup>51</sup> It has been stated that the provisions in the surrogacy agreement are so termed to signify that pursuant to the signing of the agreement the surrogate mother relinquishes her right to seek medical termination of pregnancy in consideration of monetary payment and any effort to seek or abortion on her side would amount to breach of contractual obligation for which may invite legal action against the surrogate mother including suit before the court of law thus it denies her the most fundamental reproductive right.

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<sup>48</sup>*Id.* at 43.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Id.* at 39. see also, Richard Vaughn, California Surrogacy Law To Take Effect Jan. 1, International fertility Law Group, Nov. 26, 2012, *available at*: <http://www.iflg.net/california-surrogacy-law-to-take-effect-jan-1/> (last visited on Mar 11, 2016).

<sup>51</sup> Medical Termination of Pregnancy (MTP) Act, 1971. (No. 34 of 1971).

Pursuant to the research study report titled as “Surrogate Motherhood- Ethical or Commercial” conducted by Centre for Social Research (CSR) Delhi<sup>52</sup> and made observation of surrogate mothers by Anand, Gujarat it has been found that legal actions or suits were filed against the surrogate mother on the ground the surrogate refused to abort or termination of pregnancy against the instance of intending couple thus the surrogate mother is responsible for breaching surrogacy agreement.

The Supreme Court in series of landmark cases namely *Suchita Srivastava v. Chandigarh Administration*,<sup>53</sup> *Bhupinder Kumar v. AngrejSingh*,<sup>54</sup> *B.K. Parthasarathis v. Government Of AP*<sup>55</sup> *R. Rajagopal v. State Of TN*<sup>56</sup> has upheld the right of women to seek abortion as reproductive choices which is a dimension of 'privacy , 'personal liberty' under Article 21 of the Constitution of India”. The same has been established under American precedents namely *Roe v. Wade*,<sup>57</sup> *In Planned Parenthood of Central Missouri v. John C. Danforth*, Attorney General of the State of Missouri,<sup>58</sup> *In Maher v. Roe*<sup>59</sup> the American Supreme Court held that a woman has an right to choose to carry her foetus to term as to choose to abort it.

It may be noted that the Government of India, Law Commission report number 228<sup>60</sup> on surrogacy recommends for right of surrogate mother to seek abortion in compliance with the existing law, yet this has not been made effective.

It may be imperative to state that Israel Carriage of Fetuses (Approval of Agreement and Status of the New Born) Law, 1996 provides for right of surrogate mother to choose to termination or interruption of surrogate pregnancy subject to certain circumstances by approval committee, another such provision is contained in Russian Federation Citizens’ Health Protection Law 1993,<sup>61</sup> Family Code of Russia, 1918. Clause 4 of article 51,<sup>62</sup> Ministry

<sup>52</sup>Centre for Social Research (CSR), Surrogate Motherhood- Ethical or Commercial, *available at*: [http://www.womenleadership.in/Csr/Surrogacy report.pdf](http://www.womenleadership.in/Csr/Surrogacy%20report.pdf) (last visited on Mar. 11, 2016).

<sup>53</sup>(2009) 9 SCC 1.

<sup>54</sup>(2009) 8 SCC 766.

<sup>55</sup>2000 (1) ALD 199:1999 (5) ALT 715.

<sup>56</sup>1995 AIR 264.

<sup>57</sup>410 U.S. 113 (1973).

<sup>58</sup>428 U.S. 52 (1976).

<sup>59</sup>53 L. Ed. 2d 484, 1977 U.S.

<sup>60</sup>Union Minister of Law and Justice, Ministry of Law and Justice, Government of India, Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, Report No. 228, Aug. 2009, *available at*: <http://lawcommissionofindia.nic.in/reports/report228.pdf> (last visited on Mar. 11, 2016).

<sup>61</sup> Russian Federation, Principles of legislation on health protection of the citizens. No. 5487-I1993-07-22, *available at*: [http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=34802](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=34802)(last visited on Mar.11, 2016).

<sup>62</sup>The Family Code of the Russian Federation No. 223-FZ of Dec. 29, 1995, *available at*: <http://www.jafbase.fr/docEstEurope/RussianFamilyCode1995.pdf> (last visited on Mar.11, 2016).

for Health provides for right to medicare, reproductive decision making during pregnancy including abortion.

#### IV Screening of intending couples

The ART Bill is silent on screening of the intending couple in order to assess their fitness to be parent, there are only two minimum statutory guidelines laid down in the ART Bill for the intending couples to be satisfied for commissioning surrogacy, firstly the age stipulation which provides that the intending woman to below the age of 23 years and above the age of 50 years and for an intending father to below the age of 23 years and above the age of 55 years.<sup>63</sup> secondly the medical necessity or infertility or such similar condition where the couple is not biologically fit to conceive and give birth to child after repeated failures<sup>64</sup> accordingly permits such couples to commission surrogacy by entering into a surrogacy agreement in return for offering monetary payment to surrogate mother under a surrogacy agreement to this effect,<sup>65</sup> taking from such provision it may be noted that the financial capacity of couple to pay the surrogate mother is also an essential prerequisite for the couple seeking to commission surrogacy.

It has been found that in many cases the intending couple's divorce or separate after commissioning surrogacy and in some case it has been found that subsequent to commissioning surrogacy the intending couples have been found to be of criminal background yet they not only successfully commissioned surrogacy but also obtained the legal custody of surrogate child. There has been a reported case of an Israeli pedophile who commissioned surrogacy in India thereafter left the country with the girl surrogate child subsequently it was discovered by the Israeli authorities that the intending father was a pedophile criminally charged for sexual abuse of children as per his past criminal records,<sup>66</sup> this case was extensively criticized by the national child commission, concerned ministries in India but neither any action nor any recommendation was issued by them.<sup>67</sup>

Apart from these, there have been cases where the couple after commissioning surrogacy divorced during the term of surrogate pregnancy and after the birth of the child either of the

<sup>63</sup> *Supra* note 1, s. 46 (14).

<sup>64</sup> *Id.*, s. 46 (10) (11).

<sup>65</sup> *Id.*, s.60 (1) (3) (a).

<sup>66</sup> Jason Overdorf, "Israeli sex offender exploited Indian surrogacy trade", *GlobalPost.com, Alaska Dispatch News*, June 11, 2013, available at: <http://www.adn.com/article/20130611/israeli-sex-offender-exploited-indian-surrogacy-trade> (last visited on Mar. 11, 2016).

<sup>67</sup> Michael Cook, "Convicted Paedophile gets child from surrogate mother in India", *Bio Edge*, June, 15, 2013, available at: [http://www.bioedge.org/index.php/bioethics/bioethics\\_article/10560](http://www.bioedge.org/index.php/bioethics/bioethics_article/10560) (last visited on Mar.11, 2016).

couple refused or rejected to take the custody of child reiterating the case of *Maulik Modi*<sup>68</sup> and in the case of *Baby Manaji v. Union of India*<sup>69</sup> the intending mother filed divorce against her husband, the intending father, and the intending mother even declined to be named as one of the legal parent in the birth certificate of the surrogate child.

The issue of lack of screening of intending or commissioning couples is also emphasized in a public interest litigation filed before the apex court seeking enactment of law on the same to protect the interest of surrogate child. The PIL contended that “there is neither scrutiny or assessment or screening of commissioning parents, the sole criterion to attain parenthood is based on the financial capacity of couple to pay monetary cost to the clinic, the cost of hiring the surrogate mother this raises possibility for such exploitation, abuse or trafficking or sale of surrogate child.<sup>70</sup> It may be pertinent to mention few international case laws, statutes on this point, in *R.R. v. M.H.*<sup>71</sup> the Supreme Judicial Court of Massachusetts held that there ought to be screening or assessment of couples seeking surrogacy to check their suitability of intellectual property to attain parenthood in order to be vested with the custody of surrogate child the intended parents.

In Australia, Victoria Assisted Reproductive Treatment Act, 2008<sup>72</sup> provides for “criminal records check” of all parties to surrogacy agreement, such checks are to be conducted by the police in order to finding any record of convictions, criminal charges outstanding against the concerned person.

The Hague Conference on Private International Law, 2008 undertaking a project on the “private international law issues surrounding the status of children, including issues of suitability of intending or commissioning couple to commission surrogacy and the conference

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<sup>68</sup> Express News Service, “A Dilemma, a Decision, Two Children”, *News India Express*, Feb. 23, 2014, available at: <http://www.newindianexpress.com/nation/A-Dilemma-a-Decision-Two-Children/2014/02/23/article2072590.ece> (last visited on Mar.11, 2016).

<sup>69</sup> (2008) 13 SCC 518.

<sup>70</sup> High court directs petitioner to approach government for law on surrogacy available at: <http://news.webindia123.com/news/articles/india/20070405/627322> (last visited Mar.11, 2016).

<sup>71</sup> (SJC-07551), 426 Mass. 501, Oct. 7, 1997 – Jan. 22, 1998, Worcester County, the Supreme Judicial Court of Massachusetts, available at: <http://masslawyersweekly.com/fulltext-opinions/1990/01/01/rr-v-mh-et-al/> (last visited Mar.11, 2016).

<sup>72</sup> Victoria Australia Assisted Reproductive Treatment Act 2008 (Act No. 76 of 2008), s. 3, available at: [http://www.austlii.edu.au/au/legis/vic/num\\_act/arta200876o2008406/s3.html#child\\_protection\\_order\\_check](http://www.austlii.edu.au/au/legis/vic/num_act/arta200876o2008406/s3.html#child_protection_order_check) (last on visited Mar.11, 2016).

refers to measures for psycho-social screening, medical checks, criminal record checks of the commission couples.”<sup>73</sup>

In the aftermath of these, it may be suggested that there is need for adequate screening of the couple, their background check including their social economic position, their civil criminal past records, their health, age, existing family and other relevant information in order to assess their suitability to be parent before they are permitted or allowed to commission surrogacy. It may be suggested that taking after or drawing from the existing adoption law namely CARA which provides for effective screening or assessment of the couple by qualified social worker, following the same preparation of a home study report for better assessment of couple.<sup>74</sup> A similar provision to this effect may be introduced in the ART Bill.

### **V Legal inconsistency issues in vesting of legal parentage**

The ART Bill provides for parentage to be vested in the intending couple<sup>75</sup> and the Bill also states the names of the couple to mention as the legal parents in the birth certificate issued to the surrogate child to the exclusion of surrogate mother.<sup>76</sup> There is a legal obligation cast on the surrogate mother to hand over the custody, guardianship right of the child after birth on to the couples.<sup>77</sup> But this scheme of parentage as conceptualised under the ART Bill runs inconsistent to the established ground rule of description of motherhood as specified under the Indian Evidence Act, 1872 and Birth Registration Act, 1969. Though there is no statutory definition of motherhood under Indian statutory law but there is irrebuttable, incontrovertible presumption of motherhood in favor of the birthing mother accordingly the legal motherhood is vested in the birthing mother. Carrying forward the same ratio, the Indian Evidence Act,<sup>78</sup> under relevant section establishes the parentage of the child following the presumption of legitimacy of birth in favour of birth mother for all legal purposes under the Indian law. Pursuant to this law, the women giving birth during the continuation of valid wed lock is held as the mother in the eyes of law and her then husband is held to vest in a person who is the husband of the mother. Thereby the surrogate mother and her husband may be legally

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<sup>73</sup> *Supra* note 25.

<sup>74</sup> Central Adoption Resource Authority Guidelines Governing Adoption of Children, 2015, Ministry Of Women And Child Development, Notification - S.O. 1945 (E), New Delhi, the July 17, 2015, S. 2 (15) Juvenile Justice (Care and Protection of Children) Act, 2000 (Act No. 56 of 2000), available at <http://cara.nic.in/InnerContent.aspx?Id=163#Guidelines - 2015> (last visited on Mar. 11, 2016).

<sup>75</sup> *Supra* note 1, s. 60 (1).

<sup>76</sup> *Id.* at, s.60 (10).

<sup>77</sup> *Id.* at s. 60(4)

<sup>78</sup> The Indian Evidence Act, 1872 (Act No. 1 of 1872).

presumed to be the legal mother, father of the surrogate child and accordingly legal parentage may be vested in them. Similarly the Birth Registration Act<sup>79</sup> also provides for recognition of birthing mother as “natural mother” or “natural parent”. The legal presumption of motherhood in favour of gestating or birthing accordingly and vesting motherhood in the birthing mother is based on two cardinal roman law principle captured in roman maxim '*mater semper certaest*'<sup>80</sup> meaning the mother is always certain is an irrebuttable presumption and '*mater est quam gestation demonstrat*'<sup>81</sup>motherhood is demonstrated by gestation and birthing. Taking after inferring from these roman maxims, the legal conceptualization of motherhood rests underlies the notion of 'women at parturition'<sup>82</sup> that is women at labour, birth, *partus* or parturition is held as mother, for the purpose of law, thus defining elements of motherhood are “labour, birth, *partus* or parturition” respectively.

This legal principle of is widely followed in all legal jurisdictions of the world through host of judicial decisions, the rule of '*mater semper certaest*'<sup>83</sup>is upheld in the case of Japanese surrogate child, *Baby Manji Yamanda*<sup>84</sup>this case gave rise to the inter country statutory differences in the laws of two nations namely Indian & japan on the determination of motherhood, while Japan prohibited commercial surrogacy and defined legal motherhood with the birthing mother in compliance with the roman legal maxim “*mater semper certaest*” “the mother is always certain”<sup>85</sup> enshrined in the Japanese Civil Code, 1896<sup>86</sup> Where as India despite the existence of statutory laws providing for birthing mother to be recognised as legal mother and in the absence of any legislation on surrogacy, yet the Indian regulations on surrogacy under the ICMR Guidelines, 2005<sup>87</sup>permitted the legal motherhood to be vested with the intending mother or the wife of the intending father to the exclusion of

<sup>79</sup> Registration of Births and Deaths Act, 1969 (Act No. 18 of 1969).

<sup>80</sup>D'alton-Harrison R, “Mater semper incertusest: who's your mummy?” 22(3) *Med Law Rev.* 357-83 (2014), available at: <http://www.ncbi.nlm.nih.gov/pubmed/24457376> (last visited on Mar.11, 2016).

<sup>81</sup> Rita D'Alton-Harrison ‘Inter-Country Surrogacy, Border Controls and the Disconnected Family: The Legal Experiences of UK Commissioning Couples Involved in Inter Country Surrogacy, *blogs.sps.edu.uk.*, Sep. 2013, available at: <http://blogs.sps.ed.ac.uk/sls/files/2013/06/Rita-D-Alton-Harrison.pdf>(last visited on Mar.11, 2016).

<sup>82</sup>Thérèse Callus, Brigitte Feuillet *et.al.*, *The Female Body: A journey through Law, Culture and Medicine*, (Primento Digital Publishing, 2013), available at: <http://www.hive.co.uk/Product/The-Female-Body--A-journey-through-Law-Culture-and-Medicine/18473149> (last visited on Mar.11, 2016).

<sup>83</sup>*Id.* at 81.

<sup>84</sup> *Id.* at 69.

<sup>85</sup>Wikipedia, Mater semper certaest, Wikipedia, the free encyclopedia, available at: [http://en.wikipedia.org/wiki/Mater\\_semper\\_certa\\_est](http://en.wikipedia.org/wiki/Mater_semper_certa_est) (last visited on Mar.11, 2016).

<sup>86</sup>Japanese Civil Code, (Japanese: 民法Minpō), Government of Japan, translated by Ministry of Justice, Government of Japan, Act No. 89 of Apr. 27, 1896, available at: <http://www.moj.go.jp/content/000056024.pdf>(last visited on Mar.11, 2016).

<sup>87</sup> ICMR National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, available at: [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm) (last visited on Mar.11, 2016).

birthing or surrogate mother. This is despite the inconsistency with the existing Indian statutory law.

These complex issues related to motherhood determination surfaced in *Jan Balaz v. Anand Municipality*,<sup>88</sup> in Anand, Gujarat where the German surrogate twins whose biological father was German but given birth by Indian surrogate mother in India, this case also considered the legal issue of motherhood, as the German Civil Code provides for irrebuttable presumption of motherhood following the same rule of “*mater semper certaest*” in favour of the birthing mother that is the surrogate mother, accordingly the legal motherhood is vested in the surrogate mother<sup>89</sup> for the same reason, surrogacy is prohibited in Germany for inconsistency with civil law. The Gujarat High Court held the surrogate mother as one of the parent following the legal presumption established under the Indian Evidence Act, 1872 and also under the Birth Registration Act that permits the recognition of birthing mother as natural mother or natural parent. The Gujarat High Court held that “in the absence of any legislation to the contrary, we are more inclined to recognize the gestational surrogate who has carried the embryo for full 10 months in her womb, nurtured the babies through the umbilical cord and has given birth to the child as the natural mother, as legal mother.” This however led to complications in the vesting of legal parentage of surrogate child, this case is subject to appeal as a special leave petition before the apex court for adjudication on the same question of motherhood,<sup>90</sup> the issue concerning vesting and transfer of legal motherhood in the intending mother is subject matter of legal wrangle. The ART Bill is also being deliberated and revised to incorporate necessary provisions for vesting of motherhood in the intending mother in the same. The issues related to establishment of motherhood/parentage continues to be mired in legal wrangles, in the wake of these issues, the Bill does not adequately address the same. Thus this is evident that there is manifest legal inconsistency on definition of motherhood under statutes and judicial pronouncements.

Another epoch making case surrounding disputes on determination of motherhood in surrogacy arrangements is an Irish case *M.R v. AntArdChlaraitheoir*,<sup>91</sup> where in the Irish Supreme Court upheld the “invariable and irrefutable rule” of *mater semper certaest* as

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<sup>88</sup> AIR 2010 Guj 21.

<sup>89</sup> German Civil Code (Federal Law Gazette [Bundesgesetzblatt] Jan. 2, 2002 at 42, 2909; 2003.

<sup>90</sup> SLP (Civil) 31639 Of 2009, Civil Appeal 8714 of 2010.

<sup>91</sup> [2013] IEHC 91.

criterion to vest the legal motherhood in favour of the birthing surrogate mother<sup>92</sup> despite the intending mother sharing genetic connection with the surrogate child.<sup>93</sup>

Another such recent case of *Kenya, J L N v. Director of Children Services*<sup>94</sup> the High Court at Nairobi dwelt on the similar issue of determination of legal motherhood between the Intending mother who is genetically related to the child and the surrogate or the birthing mother who gave birth to the child.<sup>95</sup> As per the Kenya the Births and Deaths Act, 2011 the surrogate mother is entitled to legal motherhood.

Majority of nations under their respective civil law recognise legal motherhood based on the birthing capacity which inheres in the gestating or the surrogate mother and does not recognize surrogate motherhood this brings the intending mothers' right to motherhood in conflict with the surrogate mother and also causes impediments in determination of parentage over the child. In UK, as per the Human Embryology Fertilization Act, 2009 the surrogate mother being the birth mother is recognized as the legal mother.<sup>96</sup> Likewise New South Wales (NSW) Australia under the NSW Surrogacy Act 2010<sup>97</sup> confers the legal motherhood in the birth mother who is the surrogate mother. These nations provides for parentage order to secure transfer of parentage of a child from the birth or surrogate mother to the intending mother under the respective Acts.

These case shows legal void which is sought to be address by enactment of statute providing a legal recourse for the same, the existing laws on motherhood have been left redundant, obsolete with the growth of reproductive technology as ART surrogacy which involving third party in the wedlock as gamete donors , gestation carriers or surrogate mothers and the act of motherhood is fragmented among there competing women as egg donors who contribute the

<sup>92</sup> Antony Blackburn-Starza, Irish Supreme Court denies genetic mother birth certificate right, *BioNews* 779,10 November 2014 available at : [http://www.bionews.org.uk/page\\_468439.asp](http://www.bionews.org.uk/page_468439.asp) (last visited on Mar.11, 2016).

See also, Ronan Duffy and Sinéad O'Carroll, "Supreme Court says only the birth mother – not genetic mother – can appear on birth cert", *The Journal.ie*, Nov. 7, 2014 available at: <http://www.thejournal.ie/supreme-court-surrogacy-case-1767063-Nov2014/> (last visited on Mar.11, 2016).

<sup>93</sup> Antony Blackburn-Starza, Irish "Supreme Court denies genetic mother birth certificate right", *BioNews* 779,10 Nov. 2014, available at: [http://www.bionews.org.uk/page\\_468439.asp](http://www.bionews.org.uk/page_468439.asp) (last visited on Mar.11, 2016).

<sup>94</sup> Petition No. 78[2014], available at: <http://kenyalaw.org/caselaw/cases/view/99217/> (last visited on Mar.11, 2016).

<sup>95</sup> John Chigiti, "judge makes groundbreaking ruling on surrogacy", *The Star*, July 9, 2014, available at: <http://www.the-star.co.ke/news/article-175386/judge-makesgroundbreaking-ruling-surrogacy> (last visited on Mar.11, 2016).

<sup>96</sup> UK Human Fertilization and Embryology Act 2008, (2008 c. 22), s. 27(1), available at: <http://www.legislation.gov.uk/ukpga/2008/22/introduction> (last visited on Mar.11, 2016).

<sup>97</sup> Parliamentary Counsel's Office New South Wales , NSW Surrogacy Act 2010, No. 102 of 2010 (June 7, 2011), available at <http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2010%20AND%20no%3D102&nohits=y> (last visited on Mar.11, 2016).

genetics or biological make up of the child, gestational carrier or surrogate mothers who gestates and gives birth to the child, and the intending mother who raises the child, thus motherhood is no longer single indivisible inhering in one woman, therefore there is need for a law to address this modern scientific development, the existing laws are archaic in their origin and at the time of the enactment of these laws, the law makers did not bear in mind or envision the development of medical technologies which would render motherhood plural.

Keeping a breast with these changes, the Irish case *M.R v. AntArdChlaraitheoir*,<sup>98</sup> the judge of opinion that maternity no longer continues as irrebuttable legal presumption or a fact rather under surrogate motherhood, motherhood presents a case of rebuttable legal presumption subject to proof through genetics or genetic connection same as paternity for determine, vesting motherhood in surrogacy.<sup>99</sup>

A noteworthy precedent is laid down in the case of *Johnson v. Calvert*<sup>100</sup> by California Supreme Court where in a novel concept of “intent based parenthood” or “*but for the intent test*” is laid down for specifically vesting motherhood in the intending or commissioning mother. The intent based parenthood is based solely on the intent of couples to attain parenthood the entire surrogacy arrangement including the surrogate mother would not have come into existence but for the intent of the couples to attain parenthood/ motherhood through surrogacy. This case namely *the Calvert*, after laying down the intent based parenthood also ruled that the maxim ‘*mater est quam gestation demonstrat*’ did not preclude other forms of motherhood thus provided for legal recognition of intending mother as legal mother.

However the issue of non-recognition of intending mother as legal mother in face of existing statutes, legal presumptions vesting direct, inherent legal right to motherhood in the birthing or surrogate mother is a primary fundamental issue, coupled with the universally established rule of gestation, birthing as the criterion of determining legal motherhood irrelevance of genetic connection and in the determination of motherhood is yet another issue which needs resolve.

## VI Trafficking of surrogate child as disguised commercial surrogacy

Commercial surrogacy has always been equated with amounting to baby selling under series of judicial pronouncements. It is observed that commercial surrogacy raises the possibility of

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<sup>98</sup>*Id.* at 92.

<sup>99</sup> Duffy, *supra* note 92.

<sup>100</sup>5.Cal 4th 84, 851 p.2d 776.

child selling or trafficking under the garb of surrogacy. As it involves exchange of monetary payment between the two couples for exchange of custody right of child. Finding upon similar reasons, in the landmark case of *Re Baby M* New Jersey,<sup>101</sup> the New Jersey Supreme Court held that commercial surrogacy contract involving monetary payment constitute disguised form of baby selling.

There have been several such cases of baby selling both at national and international level. The issue of trafficking or baby selling under the guise of surrogacy is raised in *Baby Yamanda Manji*<sup>102</sup> the Japanese surrogate child case in India, in this Japanese surrogate child case, a PIL has been filed before the Rajasthan high court by a NGO contending there was an allegation of baby trafficking leveled against the intending Japanese father, and running a child trafficking racket for foreigners by the concerned doctor under the guise of surrogacy. This PIL sought court intervention and requested for the issue of writ *Habeas Corpus* seeking production of surrogate child. A doctor named Bharat Ajit running infertility clinic in Gujarat had sold two children for eight lakhs posing as surrogate children belonging to two different intending couples respectively in Porabander, Gujarat in the year 2009.<sup>103</sup> The doctor was charged with criminal charges of human trafficking or illegally selling of babies, fraud, forgery and conspiracy under relevant section of the Indian Penal Code, 1860 (IPC).<sup>104</sup> Pertaining to these issues of trafficking of surrogate child, there has been a PIL public interest petition filed before Delhi High Court seeking direction from the court to enact a legislation for regulating commercial surrogacy so as to control or check or curb trafficking or illicit use of surrogate child for unlawful or illegal, immoral purposes or prostitution or unethical genetic engineering.<sup>105</sup>

At international level, there is an infamous case of the internationally renowned reproductive law attorneys namely Hilary Neiman and Theresa Erickson, who pleaded guilty to the charges of conducting baby selling and running a human trafficking surrogacy ring, conspiracy to sell babies and these attorneys are subject to five years in prison along with the

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<sup>101</sup> 109 N.J. 396 (1988).

<sup>102</sup> *Id.* at 69.

<sup>103</sup> Press Trust of India, "Ahmedabad doctor accused of selling babies" *NDTV*, Jan. 31, 2013, available at: <http://www.ndtv.com/article/cities/ahmedabad-doctor-accused-of-selling-babies-324934> (last visited on Mar.11, 2016).

<sup>104</sup> Express News Service, "City doctors wanted for selling babies questioned, held", Ahmedabad Feb. 20, 2013, available at: <http://archive.indianexpress.com/news/city-doc-wanted-for-selling-babies-questioned-held/1076799/0> (last visited on Mar.11, 2016).

<sup>105</sup> Liz Bishop and BebeLoff, "The rights of the gestational mother and child in surrogacy: A Bill to regulate surrogacy in India", 7(3) *Australian Journal of Adoption* (2013), available at: <http://www.nla.gov.au/ojs/index.php/aja/article/viewArticle/3191/3759> (last visited on Mar.11, 2016).

fine by the federal court in San Diego.<sup>106</sup> The attorneys advertised and auctioned off to the surrogate child based on the preferences of the skin, eye color, race of the baby to highest bidder, up to \$180,000 per baby and secured court orders falsely through forged documents. They were held criminally liable for creating human life for sale.

Such practice are gross violation of right of child under the provisions of UNCRC<sup>107</sup> namely right to life,<sup>108</sup> parentage,<sup>109</sup> family,<sup>110</sup> and also the same are safeguarded under India's constitutional<sup>111</sup> and statutory enactments.<sup>112</sup> These are only the illustrative cases but there could be other similar cases as well, more importantly there is nothing in law which prevent the recurrence of same in future.

### **VII Trafficking, abduction of women to be surrogate mothers**

Commercial surrogacy causes trafficking of women for removal and sale of reproductive gametes to serve as egg donors or gestational carrier as surrogate mother for commercial vested interests. The women involved in egg donation, gestational surrogates are turned into human commodities subject to reproductive health exploitation.<sup>113</sup>

Some of the research studies conducted by NGOs have reported that commercial surrogacy is becoming a source of gender migration.<sup>114</sup> The Telangana State Commission for Women

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<sup>106</sup> Julie Watson, "Theresa Erickson To Be Sentenced For Baby Trafficking Ring", *Associated Press*, Feb, 24 2014, available at: [http://www.huffingtonpost.com/2012/02/24/theresa-erickson-sentenced\\_n\\_1299434.html](http://www.huffingtonpost.com/2012/02/24/theresa-erickson-sentenced_n_1299434.html) (last visited on Mar.11, 2016).

<sup>107</sup> UN Convention on the Rights of the Child 1989, General Assembly resolution no. 44/25 of 20, Sep. 2, 1990, available at: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last visited Mar.11, 2016). Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force on Sep. 2, 1990, in accordance with art. 49.

<sup>108</sup> *Id.*, art. 6.

<sup>109</sup> *Id.*, art. 7.

<sup>110</sup> *Id.*, art. 2(2) (8).

<sup>111</sup> M.P. Singh (ed) *V.N. Shukla's Constitution of India*, (Lucknow: Eastern Book Co. 11th ed.,2008),art. 39(f), art. 43.

<sup>112</sup> Ministry of Law and Justice (Legislative Department), The Commissions for Protection Of Child Rights (CPCR) ACT, No. 4 of 2006, Jan. 20, 2006, available at <http://wcd.nic.in/The%20Gazette%20of%20India.pdf> (last visited on Mar. 11, 2016).

<sup>113</sup> Pat Buckley, "Surrogacy and eggsploitation" June 24, 2014, available at: <http://europeanlifenetowork.blogspot.in/2014/06/surrogacy-and-eggsploitation.html> (last visited on Mar.11, 2016).

<sup>114</sup> Nicole Constable, "The Commodification of Intimacy: Marriage, Sex, and Reproductive Labor Annual Review of Anthropology", 38 *Annual Reviews* 49-64 (2009).

Chairperson Tripurana Venkataratnam recently pointed out that there is a growing trafficking of women under the guise of surrogacy ‘racketeering’.<sup>115</sup>

At international level there have been reports of abduction, trafficking of surrogate mothers from the south Asian nations namely Nepal, China to foreign nations for the same. Some of the illicit cases of confinement, abduction of women to serve as gestational carriers are mentioned here. It has been found that in Nepal, there has been a unprecedented rise in cases of women trafficking, abduction, inter country movement transportation of poor, uneducated Nepali women to be commercial surrogate mother into India from bordering areas (with India) namely Nepalgunj, Biratnagar and Jhapa which have become hinterlands or attractive destinations for commercial surrogacy.<sup>116</sup> Some of the NGOs in their research study have mentioned cases of such abduction or inter country or interstate movement of surrogate mothers. Women from bordering nations are abducted into India<sup>117</sup> and women from rural areas as Bihar, Uttar Pradesh are moved to hubs of surrogacy as Gujarat in India for surrogate motherhood.<sup>118</sup> It is reported that there is wide spread inter-country movement or transportation of Chinese women to be surrogate mothers for monetary returns into other foreign nations.<sup>119</sup> Though surrogacy is illegal in China.<sup>120</sup>

Another international case involves a Taiwan based surrogacy company named as Babe-101 Eugenic Surrogate firm, recruited surrogate mothers by offering the promise of well-paying jobs, seized, confiscated passports and forced women to breed for cash. The Thai police raided a Bangkok home and found 15 Vietnamese women locked up in hoses, the police

<sup>115</sup> Surrogacy assumed status of racketeering: Tripurana, *The Hans India*, Mar. 18, 2016, available at <http://www.thehansindia.com/posts/index/Telangana/2016-03-18/Surrogacy-assumed-status-of-racketeering-Tripurana-214553> (last visited on Mar. 11, 2016).

<sup>116</sup> Family Matters, Nepal's booming trade in commercial surrogacy, July 17, 2013, available at: <http://thefamilylawfirm.blogspot.in/2013/07/nepals-booming-trade-in-commercial.html> (last visited on Mar. 11, 2016). See also, Women's Rehabilitation Centre (WOREC), Workshop on Reproductive Tourism: Issues and Challenges, October 7th and 8th in Kathmandu Nepal, available at: <http://www.worecnepal.org/sites/default/files/Report%20on%20Reproductive%20Tourism%20Workshop.pdf> (last visited Mar. 11, 2016).

<sup>117</sup> Our Bodies Ourselves (OBOS), Women's Rehabilitation Centre (WOREC) Workshop on Reproductive Tourism: Issues and Challenges, October 7th and 8th 2012, Kathmandu Nepal, available at: <http://www.worecnepal.org/sites/default/files/Report%20on%20Reproductive%20Tourism%20Workshop.pdf> (last visited March 11, 2016).

<sup>118</sup> Aarti Dhar, “disturbing trends in surrogacy study” *The Hindu*, New Delhi, July 19, 2013, available at: <http://www.thehindu.com/todays-paper/tp-national/disturbing-trends-in-surrogacy-study/article4930024.ece> (last visited on Mar. 11, 2016).

<sup>119</sup> Nicola Davison in Shanghai, *The Guardian*, Feb. 8, 2012, available at: <http://www.theguardian.com/world/2012/feb/08/china-surrogate-mothers-year-drago> (last visited on March 11, 2016).

<sup>120</sup> Ian Johnson, Cao Liaug, “China Experiences a Booming Underground Market in Surrogate Motherhood 2” *Nytimes*, 2014, available at: [http://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html?\\_r=0](http://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html?_r=0) (Last visited March 11, 2016).

arrested the owner of the company, imposed criminal sanctions including 10 years in prison, fine for violation of Thailand Anti-Human Trafficking Act, 2008<sup>121</sup>

In Poland, a Dutchman, named Melle Kuipers, was running an illegal racket of surrogate mothers by recruiting these Polish women as surrogate mothers by luring them to Holland, Belgium and Germany through advertisements in Polish newspapers promising ‘good fees’ These Polish women were housed in an isolated caravan in the village of Uddel the Dutch police seized the place of stay and rescued these women. The Dutch police arrested Kuipers for violation of the Netherlands law on surrogacy which bans commercial surrogacy.<sup>122</sup>

There are several court cases at national and international level on commercial surrogacy where in the facts of these cases specifically mention the alleged form of human trafficking, exploitation of poor young women as surrogate mothers under the guise of commercial surrogacy.

In UK case *X and Y (Foreign Surrogacy)*<sup>123</sup> Hedley J opined that “there is the potential for a black market in an unregulated character of procreative tourism or surrogacy for profit or commercial nature of surrogacy arrangements that renders them akin to child trafficking or trafficking in women, abduction, There is the potential for black market preying on poor young women’s emotional economic needs and their exploitation through trafficking”.<sup>124</sup>

In consideration of these cases, It is suggested that the ART Bill under its list of offences may identify trafficking of surrogate mother child, gamete donors under the guise of surrogacy as a punishable offense, the ART Bill mentions a list of offences under a separate provision in the Bill but does not mention the offense of child trafficking in the same. The Indian constitution as well as IPC under relevant provision mentions the offense of human trafficking or baby selling respectively but such description of offense of trafficking is confined to prostitution or flesh trade generally, in the modern day medical technology

<sup>121</sup>Richard S. “Ehrlich Taiwan company accused of trafficking Vietnamese women to breed”, *The Washington Times*, Mar. 6, 2011, available at: <http://www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffic-vietnam-women-breed/?page=all> (last visited Mar. 11, 2016).

<sup>122</sup>Abi Daruvalla, “Poles hired as surrogate mums in illegal trade, Holland/ health fears for ‘adopted’ children”, *Independent*, June 4, 1995, available at: <http://www.independent.co.uk/news/world/soles-hired-as-surrogate-mums-in-illegal-trade-1584960.html> (last visited on Mar.11, 2016).

<sup>123</sup>2008 EWCH 3030 (29).

<sup>124</sup>Katarina Trimmings, Paul Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level* (Bloomsbury Publishing, 2013), available at : [https://books.google.co.in/books?id=3IvbBAAAQBAJ&dq=abduction+trafficking+surrogate+mothers&source=gbs\\_navlinks\\_s](https://books.google.co.in/books?id=3IvbBAAAQBAJ&dq=abduction+trafficking+surrogate+mothers&source=gbs_navlinks_s) (last visited on Mar.11, 2016).

including surrogacy, the offense of trafficking may take another form of sale of child by entering a commercial surrogacy agreement to the effect involving exchange of money for gaining the custody of child, using of woman for hiring their body for gestation, extracting gametes which the existing drafted way back in the year 1860 might not have envisaged or provide for under the description of trafficking. Therefore, this offense needs to be specifically included by formulating a proviso to this effect. This will ensure sufficient safeguard for the protection and promotion of right to life and survival of surrogate child.

### **VIII Conclusion**

Inferring from the above mentioned, it is evident that the ART Bill has many shortcomings as it fails to address significant concerns related to surrogacy. The Bill is replete with a series of omissions, there ought to be better identification of ambiguous provisions in the Bill. The ART Bill ought to provide for incorporation of better protection of the stakeholders involved in surrogacy namely the surrogate mother, intending couple, surrogate child for ensuring their legal rights and check, curb the denial or deprivation of their legal rights guaranteed under Indian laws as well as international conventions. The provisions in the Bill ought to be formulated to be in compliance with international human rights, existing laws at the national level. The bill ought to address the reproductive health safeguards for surrogate mother which is the most fundamental health protection of surrogate child. It may be noted that denial of such legal safeguards causes exploitation of the concerned stakeholders in surrogacy. Despite the revision of the bill, the resolve of legal inconsistencies among the ART Bill and the existing other statutes in terms of parentage, motherhood is evident which needs necessary legislative changes to establish legal motherhood in the intending mother or woman commissioning surrogacy. Hence, it is suggested that the Bill in the present form may be reconsidered in the light of the failure to address significant concerns related to surrogacy and accordingly make the necessary changes for better protection of the stakeholders in surrogacy as well as to make the law comprehensive.