



THE WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES

**Analysing the status of the surrogate mother under The Assisted Reproductive
Technologies (Regulation) Bill, 2010**

Jwala D Thapa *

NUJS Working Paper Series

NUJS/WP/2012/01

The NUJS Working papers are research in progress carried out in NUJS and are aimed at disseminating the preliminary findings and arguments on an ongoing research for the purpose of exchanging idea, getting feedback and catalyzing debates. The views, analysis, and conclusions in the 'NUJS Working papers' are of the author(s) only and not of NUJS. Readers are requested to quote or cite working papers only with the permission of the author(s) and with due acknowledgment to the author(s) and NUJS. Comments and feedbacks can be sent directly to the author at the email id given below in the author's affiliation. This paper can be downloaded from <http://www.nujs.edu/nujs-working-papers-research-series.html>

The West Bengal National University of Juridical Science

Dr. Ambedkar Bhavan,
12 LB Block, Sector III, Salt Lake City
Kolkata – 700098
T:(+91)33-2335 0534/ 7379/ 0765/ 0510
Fax:(+91)33-2335 7422/ 0511
Web Site: <http://www.nujs.edu>

* Research Assistant, WB NUJS, Kolkata

ANALYSING THE STATUS OF THE SURROGATE MOTHER UNDER THE ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL, 2010

ABSTRACT

The Assisted Reproductive Technologies (Regulation) Bill, 2010 is a new legislation that aims to regulate the surrogacy industry for which India has become a preferred destination by foreign citizens looking for “wombs for rent”. This paper aims to descriptively analyse the place of a surrogate in the general scheme of the Bill which focuses on the assisted reproductive technology industry as such and of which surrogates are a part. The author through this paper concludes that the Bill neglects most of the issues pertinent to the interest of a surrogate making her a small player in the billion dollar industry but to which she is a major contributor. In explaining this position, the author has analysed other aspects of the Bill also in detail while concluding generally that the Bill mainly thrusts the power of regulating commercial surrogacy in private players of the ART industry instead of giving her an independent berth. In fact, the Bill has been framed according to the processes in which the industry runs at present and to which the surrogates thrust themselves for money keeping their bargaining power questionable. Other ancillary shortcomings of the Bill, necessary to understanding the role of a surrogate has also been dealt with in the paper by the author.

Keywords: Surrogacy, Assisted Reproductive Technology (ART), gestational, altruistic, surrogate mother

I. Introduction

The Assisted Reproductive Technologies [ART] industry is a thriving industry in India and has become a preferred destination for ‘persons’, foreign as well as domestic, opting for ART treatment as well as “the destination”¹ on the lookout for surrogates. Some of the factors contributing to this have been identified as low costs for high end medical facilities,

* Research Assistant, WB NUJS, Kolkata

1 N B Sarojini, *Unravelling the fertility industry: ARTs in the Indian Context, International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies, January 22-24, 2010, New Delhi, A Report*, Sama-Resource Group for Women and Health, New Delhi, page 46.

lax governmental regulations; in fact a total absence of law,² and a large number of women willing to engage in surrogacy for money etc.³

Legal regulation of surrogacy involves an amalgamation of the fields of law and science and is an issue which is delicate and complex at the same time. This is due to the immense value human beings place to motherhood and to the subjective and traditional roles that has been assigned to individuals in the creation of a family by society as well as legal institutions, more so to a mother. The commercial angle to most surrogacy arrangements makes the role of a surrogate an extremely crucial yet an immensely vulnerable one at the same time because the burgeoning surrogacy industry actually hinges and depends on her or rather her 'womb'.

The Assisted Reproductive Technologies (Regulation) Bill, 2010 [henceforth to be known as the 'Bill'] aims to fill the void that exists in the legal regulation of surrogacy in India. The Bill defines surrogacy as "...an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate."⁴ Ideally, it would have been expected that the Bill would give tantamount importance to the protection of the rights of a surrogate, as citizens of India, as

2 The Hindu, "Law silent on protecting rights of a surrogate", 24 March 2012, <http://www.thehindu.com/news/cities/Hyderabad/article3213040.ece>, [last visited 24 March 2012]

Also see The Hindu, "Once a taboo, surrogacy gaining acceptance", 24 March 2012, <http://www.thehindu.com/news/cities/Hyderabad/article3211525.ece> [last visited 24 March 2012]

3 *Supra* note 1, pages 46-48.

"An important subset of this medical tourism includes fertility tourism, which has become a \$ 500 Million industry in India.... .the lack of legal regulation...[creates a] free market ...[which] favors foreigners, who are often able to afford the relatively lower costs of surrogacy in India. Although the demand for surrogates can be fairly described as good, there is a significant supply of Indian women willing to serve as commercial surrogates. This maintains low prices of surrogacy, particularly when compared to those in the United States. The typical surrogacy fee in India has been around \$ 25,000 to \$30,000, which is approximately a third of that in developed countries such as the United States. The surrogate is paid only between \$ 6,000 and \$ 100, 000 of the total cost, with the fertility clinics or other middlemen receiving the balance." See Margaret Ryznar, *International commercial surrogacy and its parties*, 43 J. Marshall L. Rev. 1009, (2010) at 1016-20.

Due to the extreme disadvantage for reasons of the developing-developed country divide, some writers have proposed that international surrogacy be banned due to its exploitative tendencies. See Usha Rangachary Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India", 39 Cumberland Law Review 15.

Also See The Hindu, "'Qualifications' of a surrogate mother", 24 March 2012, <http://www.thehindu.com/news/cities/Hyderabad/article3212624.ece> [last visited 24.03.2012]; The Hindu, "I will get Rs. 2 Lakh to bear the child". 24 March 2012, <http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/article3208286.ece> , [last visited 24 March 2012]

4 See Section 2(aa)

desperate and poor women resorting to any means to survive economic hardships and as the foundations on which the surrogacy industry and the whole argument of them being players in the medical tourism business rests.

In the course of the paper however, it becomes clear that the Bill relegates surrogates to an ideal that is perpetuated by their desperation to become one in the first place; poor women who come and go in and out of the industry for money, without any voice and place in the larger scheme of things of the ART industry by not subjecting the peripheral players of the surrogacy and ART industry to stringent regulations in their responsibility towards the surrogate. A huge onus has been placed on surrogates to be perfect and responsible partners in the surrogacy business on one hand while propagating an idea to these poor women that the industry is also doing them a favour by emancipating them financially, thus nullifying the equal participation rhetoric.

It is clear that the Bill merely aims at regulating the thriving ART industry by bringing it under the aegis of the government through the establishment of regulatory bodies both at the state and central levels and participation of scientific, reproduction, bio-ethical and human rights etc. experts at both levels. By intending to legalize surrogacy, more specifically, commercial surrogacy, it basically sidelines the globally controvertible moral and ethical debates on surrogacy to nought in the Indian context. The Bill also rejects the recommendation of the Law Commission in its Report No. 228, titled “*Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy*” which had highlighted the need for a legislation in this area and had suggested a ban on commercial surrogacy while accepting altruistic surrogacy in India⁵ as “..the need of the hour..” and thus “..... a pragmatic approach...”⁶ “...to harmonise reality”.⁷

5 Law Commission of India Report No. 228, Para. 4.1; available at <http://lawcommissionofindia.nic.in/reports/report228.pdf>, [last visited 19 November 2011]

6 *Ibid.*

7 Dr. Justice A.R. Lakshmanan, *Surrogacy*, Lawyers' Update, January 2011, <http://www.lawyersupdate.co.in/LU/4/1154.asp>, (last visited 01 December 2011)

The retired Judge, who was the Chairman of the Law Commission of India at the time of submission of the Report No. 228, titled “*Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy*”(See footnote 8) in justification of this stand of the Bill wrote:

However, the incorporation of the state of reality in the Bill as it is, could also be the direct effect of the only decision of the Apex Court relating to surrogacy, *Baby Manji Yamada vs. Union of India and Another*⁸ rather than the recommendations of the Law Commission. The issue relating to the absence of a regulation was highlighted in the case but the Court accepted the existing phenomenon of surrogacy and surrogacy contracts in India to the effect of accepting it as legal in the following words:⁹

“We need not go into.....whether bona fides are involved or not.”

“Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party.”

At the time of this decision, surrogacy was carried out exclusively by infertility clinics and was performed under the guidelines established by the Indian Council of Bio-medical Research in the year 2006 whereby surrogacy contracts were held to be valid. There, however, was no framework for the monitoring of the practices of neither these clinics nor a mechanism to regulate or reprimand any violation of the guidelines.¹⁰

Baby Manji can also be credited to be the precursor to the 228th Report of the Law Commission and the Bill as the commercial surrogacy industry received huge media coverage highlighting the absence of a regulatory mechanism to a major extent. One more case relating to surrogacy is being deliberated upon and is pending final disposal before the Apex Court.¹¹ Very often, the issue of surrogacy crops up throwing questions on the legality of surrogacy contracts, legal recognition and rights of a child born out of a surrogacy, rights of the persons who opts to

“...Thus, the report of the Law Commission tried to harmonise reality since Surrogacy arrangements were already going on in large numbers and it was expressed that checks, balances and safeguards be provided through legislation to curb malpractices and exploitation of commercial Surrogacy.”

8 *Baby Manji Yamada vs. Union of India and Another*, AIR 2009 SC 84; (2008)13SCC518.

9 *Ibid*, Para 5

The Court in Para 4 also stated that in case surrogacy was responsible for violation of any rights of children born out of surrogacy agreements, which was one of the issues involved, then such complaints should be made to the National or State Commissions established under the Commissions for the Protection of Child Rights Act, 2005.

10 *Statement of Specific Principles for Assisted Reproductive Technologies*, Ethical Guidelines For Bio-medical Research and Human Participants, Indian Council of Medical Research, New Delhi, 2006; pages 101-2, Available in [http:// www.icmr.nic.in/ethical_guidelines.pdf](http://www.icmr.nic.in/ethical_guidelines.pdf), (last visited 19 November 2011)

11 *Union of India and Another v. Jan Balaz and Ors.*, SLP (Civil) No. 31639/2009, [From *Jan Balaz v. Union of India* L.P.A. No. 2151 of 2009, High Court of Gujarat]

have a child out of surrogacy in India as well as the thriving surrogacy Indian industry. The morality of surrogacy as a practice always crops up in these discussions, especially when it involves money. In the conundrum of all these debates, the justification for the use of Indian women as surrogates is single and uniform; their financial and economic emancipation through a ‘noble and ‘womanly’’ act- *pregnancy*.

This paper aims to descriptively analyze the role of the Surrogate mother under the Bill and the extent and modalities to which her rights and duties have been underlined and defined. This is mainly to critically evaluate as to whether the Bill in its scheme, does in fact accept the role of a surrogate as an equal partner in the ART industry. The paper however, intends to maintain a neutral stand with respect to surrogacy as such; its only aim is to look mainly into the status of a surrogate mother under the Bill without taking any stand on the morality or otherwise of the practice of surrogacy.

II. Necessity of a mother for an invention: ART and surrogacy as methods of reproduction

The traditional picture of a family would not be complete without children. Many couples face a breakdown of their marriage in their inability to procreate. The inability of a woman to become a mother could also, many a times, be responsible for bigamous marriages, spousal abandonment, and cruelty in the marital family and other forms of domestic violence.¹²

¹² Mary Warnock’s report wrote of the prevailing societal attitudes in the England of early 1980s towards infertility, adoption and single parentage and is reflective of the contemporary attitude in India which is but slowly changing. The Report was by the Warnock Committee, established four years after the birth of the world’s first test tube Baby, Louise Brown to morally justify the creation of a legal regulatory framework for new developments in the field of human fertilisation and embryology, at the time a fledgling industry.

She wrote of the affects of infertility and childlessness on couples as well as the ignorance about the causes and the scepticism towards new forms of remedies to infertility. The report is seen as having a negative view on surrogacy

The Warnock Report and the subsequent controversy that ensued in the case of *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846, HC, which was one of the first cases to reach an English Court resulted in the

In the Indian social context specially, children are also a kind of old age insurance.¹³ If marriage is a personal choice monitored by social practices and obligations in India, so is motherhood; to not become a mother is rarely a matter of personal choice and in the least, encouraged. In this conundrum of familial pressure, concerns over genetic progeny and continuation of property rights of a group of persons who are genetically related to each other, not having a 'next generation' has made persons look to alternative remedies for continuation of the bloodline.

Apart from the desire for a genetic progeny, medical issues resulting in infertility in couples could also be a factor contributing to the need for a child and the relevance of alternate methods of reproduction. Incapacitations of reproduction like low sperm count, impotency or other medical problems or terminal diseases could make it impossible for the male to contribute to pregnancy. Recurring miscarriages, ectopic pregnancies, absence of a womb or other health problems on the other hand might make pregnancy critical for a woman. It can so happen that a genetic progeny might inherit defective genes from either parent and create complications for the child conceived as well as the mother. These are some factors that push people towards ART, not to mention convenience and appalling but often disguised reasons like "hedonistic womb-leasing".¹⁴ In order to prevent hedonistic womb-leasing, the Bill categorically states 'infertility' as the single reason for which persons, single as well as couples, can opt for surrogacy in India.

Human Fertilisation and Embryology Act, 1990 that criminalizes commercial surrogacy arrangements in England and amending the Surrogacy Arrangements Act, 1985 and reinforcing the illegality of commercial surrogacy arrangements as well as the unenforceability of surrogacy arrangements. However, both the Acts allow altruistic surrogacy arrangements. The Margaret Brazier Review, 1997 recommended that surrogate mothers be allowed to receive payment of legitimate and proven expenses without legalizing commercial surrogacy agreements in England but the recommendations have not been implemented till date. See Warnock Committee, (paras 2.1 and 2.2), *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314, 1984, London: HMSO (the Warnock Report). See generally Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 370-71 (2001).

¹³ Preamble, The Assisted Reproductive Technologies (Regulation) Bill, 2010.

¹⁴ Mason and Laurie also mention "hedonistic womb-leasing" where a woman would want a surrogate ".....for purely selfish reasons- for example, a desire to have a child without interference with a career...comparable to nineteenth-century wet-nursing.." See J.K. Mason and G.T. Laurie, *Mason and McCall Smith's Law and Medical Ethics*, (Eight Edition, 2011, Oxford University Press), 292.

Mary Warnock had also mentioned that women would use surrogacy for 'convenience' where a medically fit woman might opt for it in order for a pregnancy "not to interrupt her career, or not to affect her appearance." See generally Douglas, G, *Law, Fertility and Reproduction*, 1991, London: Sweet & Maxwell, pp141-44 as cited in Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, (Second Edition, 2001, Cavendish Publishing), 413-14.

However, the parameter for determination of 'infertility' is the prerogative of the ART clinics and its doctors; the qualifications to being allowed to opt for surrogacy have been dealt with in Part III.

ART, of which surrogacy is a small 'service' sector, has to a large extent helped in solving these problems. As treatment of infertility has become more high profile, medical technology has developed new techniques to assist conception over the past thirty years.¹⁵ India herself has received ART, beginning with a lot of scepticism for almost the same number of years with its first test tube baby being born on the 3rd of October, 1978.¹⁶

Assisted Reproductive technology (ART) has been defined under the Bill to mean "all techniques that attempt to obtain a pregnancy by handling or manipulating the gametes, the sperm or the oocyte outside the human body, and transferring the fertilized embryo into the reproductive tract of the woman".¹⁷

This 'manipulation' could be through artificial insemination (AI) or implantation of fertilized gametes in a womb under clinical conditions. There are varied methods of artificial insemination, one where the semen of the husband or partner is used and is generally known by the term "Assisted Insemination by Partner (AIP)" and the other where the sperm comes from a donor the latter as "Artificial Insemination by donor (AID)".¹⁸

¹⁵ Jean McHale and Marie Fox, *Health Care Law: Text and Materials*, (Second Edition, 2007, Thomson Sweet and Maxwell), 752.

¹⁶ The baby was named Durga (officially named Kanupriya Agarwal by her parents) and her birth resulted in a lot of medical controversy and tragedy. She was born three months after the world's first test tube baby; Louise Brown, was born in the UK. However, his claims were repudiated by a committee of experts set up by the Government of West Bengal.

"..In the conservative Calcutta of the 70s, the idea of a test tube baby was science fiction. It just couldn't have happened. Discredited by the medical fraternity, humiliated, and the purpose of his life taken away, Mukherjee killed himself in 1981..".

Although Kanupriya always knew of the method of her conception, the controversy that ensued and the conservative Marwari background of her parents meant that her parents never came out in the open supporting Dr. Subhas Mukherjee although they kept close relations with his widow and a colleague who worked with him closely in the case. See Mandira Nayar, *Kanupriya Agarwal: My Five Parents and I*, The week , 3 April 2011, 38.

¹⁷ See Section 2(c), The Assisted Reproductive Technologies (Regulation) Bill, 2011.

¹⁸ Section 13(3): ".....the techniques and procedures of assisted reproductive technology practiced at such clinic, such as –

There are various instances when AIP or AID/DI¹⁹ is preferred, one over the other. It could be because of the low sperm count or low motility of the partner's sperm and which could be rectified by increasing the density in the laboratory. It could also be where the partner stores the sperm in a sperm bank²⁰ either because he is presently incapacitated by illness or apprehends such a situation in the future and thus wants his sperm preserved for future artificial reproduction by his spouse or partner. It could also be in a situation where the husband is under intensive care or there is an apprehension of his death and his wife/partner wants his sperm to be preserved.²¹ However, AI need not be a strictly technical process that has to be conducted under lab conditions as impregnation "can be accomplished with nothing more sophisticated than a syringe, turkey-baster or a drinking straw".²²

The marriage of surrogacy and ART is a very recent phenomenon as compared to the older practice of surrogacy as is understood in its traditional sense.²³ 'Traditional' and 'gestational' surrogacy are American terminologies and are known as 'partial' and 'full/complete' surrogacy, respectively, in the British context. Mason and Laurie have used the term "womb-leasing" to

(a) infertility treatment, including Intra-Uterine Insemination (IUI), Artificial Insemination with Husband's semen (AIH), and Artificial Insemination using Donor Semen (AID), involving the use of donated or collected gametes; "

¹⁹ AID is also alternatively known as just "Donor Insemination" (DI). See Mason and Laurie at page 254.

²⁰ The process is known as 'Cryopreservation.'

²¹ *R v. HFEA, Ex p. Blood* [1997] 2 W.L.R. 807; [1997] 2 All E. R. 687. Here, the husband was dying from meningitis and unconscious. His sperm was taken via electro-ejaculation and was preserved in a sperm bank at the insistence of his wife who later had two sons as a result of conception from the sperm through ART, after his death.

²² Jean McHale and Marie Fox, *Health Care Law: Text and Materials*, 759 (2007)

²³ The concept of surrogacy through copulation could be said to be ancient as is found in the Biblical lore and ancient texts like the Mahabharata and if at all existing in modern society, possibly through private arrangement between the parties.

"The concept of surrogacy dates back to the biblical days of Abraham and Sarah. Due to Sarah's infertility, Hagar, her Egyptian handmaiden, conceived and gave birth to Ishmael, a baby fathered by Abraham." See Jamie Levitt, "Biology, Technology And Genealogy: A Proposed Uniform Surrogacy Legislation", 25 Columbia Journal of Law & Social Problems 451, 454.

"Similarly, Rachel, the barren wife of Jacob, commissions her maid Bilhah to have a child by convincing Jacob to sleep with her.....

.....Hindu mythology also offers instances of surrogacy and reflects the secrecy that still surrounds surrogacy practice. In the Bhagvata Purana, Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devaki's womb transferred to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kansa the child was born dead." See Usha Rangachary Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India", 39 Cumberland Law Review 15, 16.

describe a complete surrogacy.²⁴ Also, the couple who have sought the surrogacy arrangement and pays for it, with the intention of being the social parents, is called the ‘commissioning couple’ under British law but as ‘intended parents’ or ‘contracting parents’ in American law.²⁵ The Bill uses the English terminologies to denote types of surrogacy as well as persons interested to the use ART or a surrogate. Pasayat, J in *Baby Manji* has used the term ‘straight method’ to signify traditional surrogacy and ‘host method’ for gestational surrogacy. He has also mentioned a third type known as ‘altruistic surrogacy’²⁶ where money for surrogate services is not a factor and a fourth type, ‘commercial surrogacy’ which, as the term denotes, implies the one where there is exchange of material benefits, most of the times, money.²⁷

Traditional surrogacy is the type where the surrogate carrying the baby is also the genetic mother. The development of ART has pushed the concept of traditional surrogacy to a newer level where the method of impregnation of the genetic mother has changed from ‘through copulation’ to ‘artificial insemination’²⁸ to the use of advanced ART techniques like impregnation through the implantation of fertilized embryo in the womb. Thus, ‘surrogacy’ in today’s context, especially in the background of ART breakthroughs, includes all types, except

²⁴ See Mason and Laurie at page 283. Also see, Shaun D. Pattinson, *Medical Law and Ethics*, 271 (2006). Traditional Surrogacy has also been alternatively called “Artificial Insemination Surrogacy” while gestational as “In-vitro-fertilization surrogacy” or “Host uterus”. See Christine L. Kerian, *Surrogacy: A last resort alternative for infertile women or commodification of women’s bodies and children?*, 12 Wis. Women’s L.J. 113, 114 (1997).

She uses the term “donor surrogacy” to indicate gestational surrogacy with the fertilisation and implantation of an embryo which is neither genetically related to the commissioning parent nor the surrogate mother. Also, the term “genetic surrogacy” has been used to denote traditional surrogacy by other writers. See Abby Brandel, *Legislating surrogacy: A partial answer to feminist criticism*, 54 Md. L. Rev. 488, 491 (1995).

²⁵ Peter De Cruz, *Family Law, Sex and Society*, 82 (2010).

The Assisted Reproductive Technologies (Regulation) Bill, 2010 uses the term “commissioning Parents” and hence the author shall use this term throughout the paper. The word parent shall be written as ‘parent(s)’ to signify a single person as well as a couple as the commissioning parent.

²⁶The third type can be said to be an extension of both the traditional and gestational forms of surrogacy but devoid of any material benefits for the surrogate mother and may have been done out of love and familial bonds with the commissioning parent(s). Paras 5-8, *Baby Manji Yamada v. The Union of India and Anr.*, [(2008) 13 SCC 518].

²⁷ Although commercial surrogacy as defined by him could be present in the definitions of surrogacy in the first two instances given by him, the term which he states as being “.....sometimes referred to by the emotionally charged and potentially offensive terms “wombs for rent”, “outsourced pregnancies” or “baby farms”, could exclusively be read in the background of the case where the surrogate mother was sought only for her womb for which she was paid. See para. 9 of the judgment. .

²⁸ Section 2(b): “artificial insemination”, means the procedure of artificially transferring semen into the reproductive system of a woman and includes insemination with the husband’s semen or with donor semen.”

traditional surrogacy in its strictest term, which are primarily determined by the mode of impregnation, fertilization and implantation of a fertilized egg in the placenta.

The term “modern-traditional surrogacy” may be used to denote artificial insemination by the sperm of the genetic father in the womb of the surrogate who is also the genetic mother. It is modern due to the use of AI as opposed to the requirement of copulation in the strictly traditional version and traditional due to the use of the genetic mother’s egg as well as the womb. A “modern-traditional surrogacy” can also be altruistic as well as strictly commercial, depending upon the surrogate mother and her relationship with the genetic father and his wife.²⁹

Another method where ART comes into use is in the case of gestational surrogacy where the surrogate mother is implanted with a fertilized embryo, resultant of the fertilization of the ova and sperm of the commissioning couple under artificial reproductive conditions.. Here, the commissioning mother is able to produce a healthy ovum which is surgically removed from her ovaries and artificially inseminated outside her body. The zygote is then implanted into the womb of the surrogate completing a process known as in-vitro fertilization (IVF). The baby could be genetically related to the commissioning parents or only one of them.

Gestational surrogacy can also happen by the in-vitro fertilization of the surrogate with a zygote which is not genetically linked to either of the commissioning parent(s). Here, the egg and sperm are obtained from donors who are generally anonymous and the fertilized gamete is implanted in the womb of the surrogate.³⁰

²⁹ In *In re Baby M*, [537 A2d 1227 (NJ 1988)], the case involved the method of “modern-traditional surrogacy” with the parties entering into a surrogacy contract. The surrogate mother was paid a certain amount of money for being a surrogate.

³⁰ Egg donation is the other form of gamete donation where the egg is used for female ‘patients’. For donation of the egg, the donor does however get monetary compensation most of the times and the egg is useful for couples who are unable to rear due to the problems faced by the wife/partner to produce eggs or are incapacitated due to trauma, accidents or drug treatments of severe diseases that renders them infertile. Extra-ovarian fertilization or storage of eggs could be as a result of the inability of the patient to get the eggs fertilized through the normal/natural reproductive processes and or also in cases of women diagnosed with cancer who opt for preservation of eggs for childbearing post treatment. The patient is administered superovulatory drugs to increase production of the eggs by the ovaries. The drugs are administered from days 3 to 7 of her menstrual cycle. The drugs stimulate the ovaries to develop one or more follicles containing eggs. The eggs are ‘extracted’ from the ovaries via laparoscopy and now through the use of ultra sound where the egg is extracted through the vagina(considered less evasive).After the oocytes are removed from the ovaries, they are cultured and incubated to develop into mature eggs. See generally Jean McHale and Marie Fox, *Health Care Law: Text and Materials*, 261-62 (2007).

Again, gestational surrogacy can be altruistic as well as commercial, depending upon the terms and conditions under which the surrogate agrees to get impregnated and carry the baby to full term.

The Bill clearly intends to regulate Commercial gestational surrogacy but as explained in Part IV, is ambiguously open to the idea of the possible inclusion of altruistic gestational surrogacy also.

Hence, the development of ART means that all categories of infertile couples can opt for infertility treatments and the Bill has a salutary intention in providing relief to infertile couples who intend to go for ART treatments and services. The Bill, as already mentioned, is pro-ART industry giving them a wide berth to help infertile couples in the best way possible. But if the infertility is an extreme case, to the extent of failure of a commissioning mother to carry a baby to full term or get impregnated in spite of the use of ART, the need for a surrogate becomes crucial. A surrogate might not be the whole ART industry but just as important in the whole scheme of its existence in India.

In this backdrop, the Bill has failed to provide an independent berth to the thousands of women who are said to become surrogates out of financial necessity. Her place in the ART industry, her rights and duties and other considerations important for her has been dealt with in Part IV. This can be better understood by looking into Part II which made the function of a surrogate as well as ART clear, while also looking into those persons who can opt for a surrogacy under the Bill. The latter has been dealt with in the next portion, Part III.

III. Persons who can opt for surrogacy under the Bill

The Preamble of the Bill shows an assumption that ‘infertility’³¹ is the main reason for commissioning couples seeking the help of ART and a surrogacy arrangement and also treats the commissioning couple as ‘patient(s)’.³² This is further confirmed by the reading of section 20(10)³³ of the Bill which bars couples/persons who can have the capability of procreating normally from seeking the help of ART and surrogacy under the Bill; the onus of this decision

³¹ Section 2(u): “infertility”, means the inability to conceive after at least one year of unprotected coitus; or an anatomical / physiological condition that would prevent an individual from having a child.

³² See Section 2(x).

³³ See Section 20(10).

banks majorly on the incapability of the commissioning mother to carry the baby to term. Hence, infertility of both the couple as well as medical problems of the female partner leading to miscarriages, bad physical and possibly, psychological and mental condition of the commissioning mother etc. are grounds for rendering a couple as ‘patient(s)’ and thus eligible for holding them capable for entering into a surrogacy agreement.

The requirements for selecting an individual or a couple as ‘patient(s)’ are laid down in the Rule 7 which has to be read with Part 5 of the Schedule I of the draft Assisted Reproductive Technologies (Regulation) Rules, 2010³⁴ (henceforth to be known as the Rules). The Bill read with the provisions of the Rules lays down the various instances of how and the manner in which each of the steps leading to the couples seeking ART treatment to surrogacy and delivery of the child is regulated.

The Bill has dealt with in detail with the instances of who can and cannot be a commissioning couple. In practice, surrogacy is not just sought after by childless heterosexual couples but can be of immense help to the building of a family for homosexual (gay and lesbian) couples. However, the Bill specifically bars homosexual couples seeking surrogacy agreements in India in light of the definition of ‘couple’ in section 2(h) which states that a “‘Couple’ means two persons living together and having a sexual relationship that is legal in India.”³⁵

This provision can be interpreted to bar homosexuals from approaching for a surrogate. The ineligibility of homosexuals can also be read in the backdrop of the criminalization of homosexuality in India³⁶ but which again is subject to the decision of the Supreme Court in the appeal³⁷ from the judgment of the High Court of Delhi in the *Naz Foundation Case*³⁸. However,

³⁴ Part 5 of the Draft Rules deal with Patient Selection which are based on the physical examination of husband, wife, defect in partner(s) etc.

³⁵ The term ‘couple’ as defined in Section 2(h) has to be read in light of the definition of ‘commissioning couple’ as defined in section 2(g) where it is the term used to denote the couple seeking the surrogacy agreement.

³⁶ Section 377, Indian Penal Code.

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

³⁷ SLP (C) No. 15436/2009, *Suresh Kumar Kaushal v. Naz Foundation*.

the Supreme Court in *Baby Manzi* observed that surrogacy is also a method used by a single male or a homosexual partner to start a family.³⁹ In light of the present status of the law this statement of the Court could be relegated to the status of *Obiter Dicta*.⁴⁰

The term ‘couple’ as defined in Section 2(h) has to be read in light of the definition of ‘commissioning couple’ in section 2(g) to denote all persons seeking the surrogacy agreement.⁴¹ While specifically identifying the characteristic of the commissioning parent(s) on grounds of sexuality and thus barring homosexual commissioning parent(s) under Section 2(h), the Bill is more liberal when it comes to their marital status.

While section 2(v)⁴² defines “married couples”, section 2(dd)⁴³ identifies and defines an “unmarried couple”. The legality of these relationships is not specific to the Indian legal context, compared to the provision of 2(g), but “in the country/countries of which they are citizens.” Thus, these provisions makes it open for homosexual couples to opt for surrogacy in India if they

³⁸ *Naz Foundation v. Government of NCT of Delhi and Others* dated 02.07.2010 of the High Court of Delhi in the writ Petition(C) No. 7455/2001.

³⁹ AIR 2009 SC 84; (2008)13SCC518, Para 11- “Alternatively, the intended parent may be a single male or a homosexual couple.”

⁴⁰ In practice, foreign couples are already opting for surrogacy in India. *See generally*:

1. “Israeli gay case to hit surrogacy biz in India”, Available in The Times of India, 11 May.2010; articles.timesofindia.indiatimes.com/2010-05-11/india/28289465_1_1surrogacy-fertility-clinics-surrogate-mother;

2. “Spanish gay couple’s child dream comes true in India”, Available in sifynews, 16 February.2011; www.sify.com/news/spanish-gay.....lcqt4jbigi.html; last visited 19 November2011.

3. See the NDTV video “Ahmedabad: Twin hope for gay couple” dated 21 November 2011, where a Spanish gay couple, incidentally the first in Gujarat, to became parents to twins through surrogacy from Ahmedabad. Available on www.ndtv.com/video/player/news/ahmedabad-win-hope-for-gay-couple/201125; last visited 21 November 2011.

See Marla J. Hollandsworth, *Gay men creating families through surro-gay arrangements: a paradigm for reproductive freedom*, 3 Am. U. J. Gender & L. 183 where she argues that gay couples in the USA do not get the same support as lesbians to become “gay fathers” and writes for a need of legal regulation and recognition of “surro-gay agreements” bringing gays at par with single women, lesbians and heterosexual couples in exercising their right to procreation and raising a family.

3. Also see Law Commission of India Report No.228, 2009, page 14-15.

⁴¹ Section 2(g): “Commissioning parents/couples/individuals”, means parents, couples or individuals, respectively, who approach an ART clinics or ART bank for providing a service that the ART Clinic or the ART bank is authorized to provide”.

⁴² Section 2(v): “married couple”, means two persons whose marriage is legal in the country / countries of which they are citizens.

⁴³ Section 2(dd): “Unmarried couple” means two persons, both of marriageable age, living together with mutual consent but without getting married, in a relationship that is legal in the country/countries of which they are citizens.”

are recognized as married in their country of origin⁴⁴ or in those instances where their relationship, even if it cannot be considered a marriage in India, is recognized legally. However, unmarried couples, who are Indian citizens, can be recognized as being a 'couple' in the backdrop of recent Supreme Court decisions where live-in-relationships have been legally recognized as "relationships in the nature of marriage".⁴⁵

Thus, the persons opting for surrogacy could be a couple, heterosexual individual or a closet homosexual with a closet partner.⁴⁶ However, in light of the above stated legal provisions, in India, only one of the partners in the homosexual relationship will have a legal right to the child born out of the surrogacy agreement. This is opposed to the position of the 'unmarried couples', (where heterosexuality is an unstated criterion) where both are considered to have a legal right over the child and consent by both to the ART process and surrogacy has to be provided.⁴⁷

Nonetheless, whether the couple is married or unmarried, section 32(2) of the Bill requires that there has to be informed consent of both the parties to the ART.⁴⁸

The Bill has also kept these questions open on account of the chances of such couples, from foreign countries, opting for surrogacy agreements in India, thus strengthening the assumption that one of the primary intentions for enactment of the Bill is to regulate the existing commercial surrogacy industry, relegating the modalities to future contingencies and litigations.

Thus, under the Bill, in order to be able to enter into valid surrogacy agreements, the following is essential:

1. Either of the commissioning couple *must be infertile* and also, or, the commissioning mother must be *incapable of carrying a baby to full term*;

⁴⁴ Like civil marriages, civil partnerships, consortium, cohabitation etc. in some Common Law countries. See Frances Burton, *Family Law*, 35-41(2003)

⁴⁵ See *D. Velusamy v. D. Patchaiammal* (AIR 2011 SC 479); *Chanumuniya v. Chanumuniya Virendra Kuma Singh Kushwaha and Anr.* (2011)1 SCC 141.

⁴⁶ Section 35(3): In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man.

⁴⁷ Section 35(2): A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties.

⁴⁸ Section 32(2): In case assisted reproductive technology is used by a married or unmarried couple, there must be informed consent from both the parties.

2. The commissioning couple should either be married heterosexual couples or in an unmarried heterosexual relationship. Individuals can also apply for surrogacy. However, homosexual couples living together and who are Indian citizens, are not recognized as commissioning couples when both apply together.
3. 'Single' commissioning persons (male or female) *must prove infertility or prove inability to carry a baby to full term* (in case of single female) by the commissioning mother in case of a single woman or a couple.
4. The status of homosexual commissioning couples who are not citizens of India depends on their legal right to marry under the law of their country. The question whether they, as a couple, will be allowed to go for a surrogacy agreement in India is a matter of future legislative deliberations.
5. A couple or an individual shall not have the service of more than one surrogate at any given time.
6. A couple shall not have simultaneous transfer of embryos in the woman and in a surrogate.

The Draft Rules provide that the commissioning couples are to enter into a surrogacy agreement with the surrogate mother and Form J which is provided in Schedule I serve as an outline of a surrogacy agreement.⁴⁹ Under Section 34(1) of the Bill, the agreement is legally enforceable.⁵⁰

IV. The surrogate mother and her role under the Bill

Section 2(a) shows that a surrogate mother is an extension of the 'ART bank'⁵¹ and the surrogacy contract must involve ART according to the language of Section 2(cc).⁵² The ART Clinics have to maintain a central database which shall be a confidential record of donors, clients and surrogate mothers

⁴⁹ See the draft Assisted Reproductive Technologies (Regulation) Rules, 2010.

⁵⁰ Section 34(1): Both the couple or individual seeking surrogacy through the use of assisted reproductive technology and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable.

⁵¹ Section 2(a)- "ART bank", means an organisation that is set up to supply sperm /semen, oocytes / oocyte donors and surrogate mothers to assisted reproductive technology clinics or their patients.

⁵² Section 2(cc). "surrogacy agreement", means a contract between the person(s) availing of assisted reproductive technology and the surrogate mother.

As observed earlier, the Bill aims to regulate an already existing and thriving surrogacy industry of India. The above mentioned provisions only support this contention.

and which they are liable to disclose only to the Department of Health Research but with the permission of those to whom the information relates to or in cases of medical emergencies.⁵³

Although the wordings of Sections 2 (aa) and (bb) shows that the Bill aims to regulate only gestational surrogacy; specifically, commercial gestational surrogacy,⁵⁴ section 34(18) of the Bill shows that it is also open to the inclusion of altruistic surrogacy.

The woman identified as the prospective surrogate mother can only carry a child who is not genetically related to “her or her husband”⁵⁵ and the strength of this provision is reiterated by barring her from acting as an oocyte or ovum donor for the couple or individual seeking surrogacy under Section 34(13).⁵⁶ The consent of the husband of the surrogate in the surrogacy is very essential⁵⁷ and this consent has to be recorded in the Form J.

Also, the “*only-surrogate and not- donor*” clause, categorically mandated in section 34(13) also, is not only a reinforcement of the push towards commercial surrogacy but also to prevent a situation where the surrogate might develop attachment to a child who is genetically related to her partially. This “*Baby Melissa*”⁵⁸ like situation is something commissioning parents as well as ART clinics, the doctors as well as surrogate mothers would want to avoid. Most of the times, the intending parents would also want a child with certain specifications relating to race and other genetic traits in their child which are considered by going through records of the gamete donors without knowing their personal identities.

Thus, the term “another woman”⁵⁹ could include a female relative of the commissioning parents for whom she is carrying the child purely out of altruism. Section 2(aa) require that the surrogacy agreement

⁵³ See Section 20(9).

⁵⁴ Section 2(aa). “surrogacy”, means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.

Section 2(bb). “surrogate mother”, means a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple / individual that had asked for surrogacy.

⁵⁵ See Section 2(aa).

⁵⁶ See Section 34(13).

⁵⁷ See Section 34(16).

⁵⁸ *In the Matter of Baby M, 217 N.J. Super 313, (1987)*

In one of the first cases relating to surrogacy to have come within the empire of law, a case of breach of contract was filed by the parents of the child who was born through a surrogate. The surrogate refused to give up the child born through AI of her egg by the child’s father. What followed her refusal was a prolonged legal battle and conflicts between her and the commissioning /intended parents. The Court ruled that there was a breach of contract and allowed her visitation rights only. In the meantime, her own marriage to her spouse as well as the security, peace and happiness of her older children were compromised.

⁵⁹ See Section 2(bb).

must involve a woman carrying a child born out of the artificial fertilization of gametes which do not belong to either her or her husband. There is however an exception to this ‘non-genetically related’ clause when a relative of the commissioning parents is involved as a surrogate mother.

Section 34(18)⁶⁰ provides that a surrogate mother can be a “known person”, an “unknown person” or a person who is a “relative” of the commissioning parents provided that she is of the same generation as that of the commissioning mother. This means that the child and the surrogate mother, who is a relative, could be genetically related if either the gametes or one of the gametes is of the commissioning parent(s), although there could be variable amounts of dilution in the degree of the genetic relation on either side of the commissioning parents. Hence, Section 34(13) will not be applicable in such a case but only to those when both the gametes are from donors not genetically related to the surrogate mother, even if she be a relative of either of the commissioning parents.

The problem with the language of the Bill is that it makes space for the commercial gestational surrogate and the terms and conditions under which she is to operate while leaving these aspects open in case of altruistic gestational surrogate under the whims and fancies of the commissioning parents. The Form J also asks for specifications as to whether the surrogate is related or not to the commissioning parents(s). However, it is not clear from the interpretations of Section 34(18) if the involvement of a relative as a surrogate is subject to the same regulation as that of a commercial surrogate except that Form J shows that she has to sign it in the same terms as a non-relative surrogate.

The Bill lays down certain duties of the surrogate, her rights and the terms and conditions of the surrogacy which has to be observed by her as a surrogate and vis-à-vis the infertility clinic, ART banks and the commissioning parent(s).

1. **Limitations on the function of the surrogate mother under the Bill:** The surrogate mother has to enter into the surrogacy agreement with the clear intention to carry the baby to full term and “hand over” or “deliver” the child to the “person or persons”/ “couple/individual” for whom she is “acting as a surrogate” or “has asked for the surrogacy”.⁶¹

The meaning of “full term” signifies that the surrogate mother cannot abort the foetus nor do harm to it until it reaches full term and is delivered and handed over.⁶² However, the Form J in the draft Rules provide an option to the surrogate mother to terminate the pregnancy at her “...will, under the provisions of the MTP Act...” and this has the effect of automatically rescinding the contract. It

⁶⁰ See Section 34(18).

⁶¹ See Sections 2(aa) and (bb); Sections 34(2) and (4).

⁶² See Section 34(23).

can also be aborted on expert medical advice where she will be considered as not having breached the contract and thus entitled to continuation in the payment of compensation as opposed to when she aborts on her free will or under the provisions of the MRTTP Act. These clauses do not apply to her in case of foetal reduction which is a selective abortion and the choice to do so is only given to the commissioning parents and not to the surrogate mother who is the one carrying multiple foetuses.⁶³

A surrogate can only enter into a contract with the full knowledge that she as well as her spouse has to relinquish all parental rights over the baby.⁶⁴ Thus, in case of non-relinquishment, the commissioning parents can initiate an action for breach of the surrogacy contract against her.⁶⁵ On the other hand, the commissioning parent(s) has to take the custody of the child no matter what and refusal to do shall constitute an offence under the Act.⁶⁶

After a surrogate is identified, the commissioning parent(s) has to issue a certificate to prove her appointment as such.⁶⁷ At all levels of medical checkups, pregnancy and delivery of the child, where records have to be maintained, she shall declare herself as a surrogate and furnish the certificate issued by the commissioning parent(s) to give their details and thus prove her status of a surrogate.⁶⁸ When the child is born out of a surrogacy, the birth certificate issued shall state the commissioning parent(s) as the parents.⁶⁹

2. **Territoriality of surrogacy under the Bill:** The Bill also underlines the territoriality of its protection of the rights of the surrogate mother by specifying that she “is a citizen of India and is a resident of India”.⁷⁰ This is further exemplified by Section 34(22) which provides that the surrogates under this Bill should be Indian citizens and one *cannot go out of the country* to become a surrogate. This section is quite ambiguous when it comes to the words ‘shall receive’. It is not clear if ‘receive’ means receiving of non-Indian citizens by Indian ART bank/ clinics or whether it is supposed to

⁶³ Section 2(o): “Foetal reduction”, means reduction in the number of foetuses in the case of multiple pregnancies.

See Section 23(5) which puts an obligation on ART clinics to inform ‘patients’ in case of multiple pregnancies. It also allows foetal reduction in such cases.

⁶⁴ See Section 34(4).

⁶⁵ See Section 34(1).

⁶⁶ See Section 34(11)

⁶⁷ See Section 34(17)

⁶⁸ See Section 34(8)

⁶⁹ See Section 34(10).

⁷⁰ See Section 2(bb)

signify that foreign ART banks/ clinics are not supposed to receive Indian nationals/ citizens as surrogates.⁷¹

Also, the interpretation of the Bill makes it clear that in cases of altruistic surrogacy, the “known person”, “unknown person” or a person who is a “relative” of foreign commissioning couples also has to be an Indian citizen.⁷² This further reinforces the push towards commercialization of surrogacy as a commercial gestational agreement is clearly enforceable under the Bill but is ambiguous about altruistic gestational surrogacy as pointed out above.

3. **Confidentiality of the surrogacy:** The surrogate is promised utmost privacy and confidentiality when it comes to her identity as the surrogate. The surrogacy agreement is a confidential document, to be entered between the surrogate mother and the parties, under their own terms and conditions as well as those stipulated under the Bill and the sample Form J. A copy has to be kept by each party to the surrogacy as well as the ART clinic when approached for the infertility treatment.

The ART Banks who ‘manages’ the surrogates cannot give out any information about surrogates in their records when they advertise for their surrogacy facilities.⁷³ The ART clinic too is under a similar kind of obligation.⁷⁴ The confidentiality can only be broken under an order of the Court or for the future when the child would want to know about her.⁷⁵

Form J also puts an obligation on the surrogate mother not to divulge the name of the parties seeking the surrogacy.

⁷¹ Section 34(22): Only Indian citizens shall have the right to act as a surrogate, and no ART bank/ ART clinics shall receive or send an Indian for surrogacy abroad.

⁷² *Supra* note 62.

⁷³ Section 34(12): Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction. This Section is read with Section 34(7) Individuals or couples may obtain the service of a surrogate through an ART bank, which may advertise to seek surrogacy provided that no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy. No assisted reproductive technology clinic shall advertise to seek surrogacy for its clients.

⁷⁴ Section 34 (14): No assisted reproductive technology clinic shall provide information on or about surrogate mothers or potential surrogate mothers to any person.

Section 34 (15): Any assisted reproductive technology clinic acting in contravention of sub- section 14 of this section shall be deemed to have committed an offence under this Act.

⁷⁵ *See* Sections 34(7), 34(8), 34(12) and 32(3).

This happened in the case of *Jan Balaz v. Union of India* [From L.P.A. No. 2151 of 2009, High Court of Gujarat] where the Court disclosed the name of the surrogate.

4. **Health and medical benefits for the surrogate**: The surrogate mother, being central to the surrogacy arrangement, her health and well being is of primary importance to ensure that the whole arrangement becomes a success.

- a. In order to ensure that the surrogate is physically fit to carry the baby to term, the Bill ensures that only women of a certain age are allowed to be surrogates; she has to be between the ages of twenty one and thirty five years. If she is already a mother to her own biological offspring, then she should not have borne more than five successful live births, inclusive of the number of surrogacies.⁷⁶
- b. A surrogate mother is expected to have a clean slate of health and tests are conducted to ensure that she is not a carrier of any forms of sexually transmittable or other diseases. For the same, she has to make an undertaking that she has not received a blood transfusion or any blood products for the “last six months”.

The date from which the six months is to be calculated is not mentioned in the Bill⁷⁷ but Form J also mentions this time line. So a presumption can be drawn that this is calculated from the date of signing of the surrogacy agreement or alternatively, from the period of her clinical preparation as a surrogate.

- c. The Rules require that a surrogate fill a Form ‘M2’ read with Rule 15.1 where the details of the surrogate mother including the detail of her medical history and other information relating to her health, like detail of the use of contraceptives, substance abuse etc. are required to be given. The various tests to be conducted upon the mother are mentioned along with the time and stages of the fertilization at which these tests are to be conducted.

Thus, any non-disclosure and subsequent finding of health related disorders or other medical requirements can be a ground for breach of the surrogacy agreement. However, such a breach, when a surrogate is already impregnated or in an advanced stage of pregnancy, can make her position as well as that of the unborn child’s insecure and problematic.

⁷⁶ See Section 34(5)

⁷⁷ See Section 34(6).

- d. A surrogate also cannot be subjected to more than three embryo transfers for the same couple and after each failed attempt, the process has to start anew with regards to the terms and conditions relating to payment.⁷⁸

The most crucial angle to a surrogate's medical and health coverage is that she is extended such benefits only till the baby is born, neglecting her requirements after childbirth. The compensation she receives thus is to take care of her in case she develops pregnancy related physical complications, trauma or psychological disorders like postpartum depression etc.⁷⁹

5. **Compensation for the surrogate**: The surrogate mother's role as a 'womb for rent' is apparent as the Bill allows "monetary compensation" to be paid to the surrogate mother,⁸⁰ apart from expenses relating to insurance and medical bills, by the commissioning parents.⁸¹

The decision relating to the amount of compensation to be paid for the surrogacy is left between the commissioning parent(s) and the surrogate mother. Thus, the amount of compensation to be received by her depends on the bargaining power of the surrogate as well as the support which she can garner from the ART Bank to which she belongs. But since the Bank only acts as a "surrogacy facilitator" or a "surrogacy database" for the commissioning parents, the extent to which they might rally behind the surrogate both at the time of signing of the agreement or post-birth is questionable.

While the term used with respect to Section 34(2) is "shall" and thus making it mandatory for her to be protected during surrogacy, the term used in Section 34(3) with respect to monetary compensation is "may be" and puts the onus on the surrogate mother to claim it.⁸² This has not just the danger of creating complications in case of enforcement of money compensation but also raises a question on the benefit of having a legislation that puts a surrogate veering in the middle area of altruism and commercial, without clearly making a stand.

The infertility clinics, however, have been allowed a "hands-off" approach to the details of the surrogacy agreement. Also, the Bill renders them with an exclusive position vis-a-vis the ART Banks;

⁷⁸See Section 34(9).

⁷⁹ See Section 34(2)

⁸⁰ Section 34(3)-Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.

⁸¹ Section 34(2) - All expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.

⁸²*Supra* notes 83 and 84

this ensures that they are not at all responsible towards any outcome of the agreement as well as the financial terms of the surrogacy or any complications thereafter. Their role is limited to preparing the surrogate for the pregnancy, in-vitro fertilization of the gametes selected by the commissioning parents from the ART banks, impregnation of the surrogate with the fertilized zygote, monitoring the pregnancy and childbirth.

V. Conclusion

That the Bill has been passed with the main intention to regulate an already existing surrogacy industry is apparent from the language of the Bill. However, there are also many areas where there are ambiguities and could act as loopholes in the future apart from those mentioned in the previous parts of this paper.

As has already been pointed out in Section III of this paper, the parties that can approach for surrogacy under the Bill are not clearly defined. There are many other criticisms to the Bill, like that relating to the rights of the child as well including its right to be nurtured by the one who gave birth to it through breastfeeding.⁸³ In fact, the Bill does not even mention the period for which a newly born is to be kept with the surrogate mother if such a situation arise due to complications in the health of the baby.

It is also true that a child born out of surrogacy, with the involvement of numerous individuals is placed at a vulnerable position when born but if not taken by the commissioning couple, especially if they are foreigners. Section 34(19) requires that foreign couples appoint a local guardian for the surrogate mother to look after her welfare during the pregnancy and at the time of delivery. It also requires that the commissioning parents make an undertaking that surrogacy is legal in the country of their origin and that the child born through the surrogacy will be allowed to enter their country. However, this Clause also works on the supposition that the child might not be claimed after it is born and thus be subjected to neglect which is a non-committal acceptance of possible abuses of surrogacy.

Even though it is an offence under the Bill as per Section 34(11), the initiation of proceedings takes time to start as there is a waiting period of one month during which the local guardian takes care of the child. It is then a responsibility of the local guardian to ensure that the child is put up for adoption which he/she might do just to lessen a burden? Could surrogacy be encouraged if such pitiful situations could ensue? What mechanism can be placed to ensure that such abandonments does not happen in the first place? These situations could have been much easily avoided if provisions relating to the exact

⁸³ See generally Imrana Qadeer, Mary E John, *The Business and Ethics of Surrogacy*, 44 (04), Economic and Political Weekly, 10 (2008).

punishment of the offence and the provisions relating to initiation of proceedings could have been specified and thus act as a deterrent.

A surrogate mother cannot do anything to harm the foetus and this duty has to be incorporated into the terms of the agreement⁸⁴ Section 23(5) gives an option for the commissioning parents to foetal reduction in case of multiple pregnancies which might also happen on the advice of a medical expert. This means that the choice to undergo foetal reduction is that of the commissioning parent(s) and not of the surrogate mother, the one who actually has to carry multiple foetuses to full term.

The Bill has also identified and regulated a potential problem that might crop, especially involving Indian commissioning parents, by banning sex selective surrogacy.⁸⁵ But considering the fact that many cases of ART results in multiple pregnancies, the dilemma of having to choose the sex of the foetus at the point of foetal reduction is something which needs to be determined within the boundaries set by section 23(5) banning sex selection. Thus, the process of foetal reduction might need a separate set of guidelines so as not to lead to the abuse of Section 25.

Another problem area is of the absence of legal protection of non-commercial surrogacy agreements which have been carried on with the help of ART. Many a times, a family member would volunteer to be a surrogate mother. Although it is implied that the surrogate mother has altruistic intentions for becoming a surrogate and that the couple would treat her well, the non-specification of whether a surrogacy agreement is required in such cases leaves her open to neglect and abuse in the process of surrogacy, the time of birth in case of complications and post-natal care.

As is apparent from Section 36, a surrogate mother has to be given full medical attention right through the gestation period. Thus in altruistic gestational surrogacy, even if payment of compensation is absent, the arrangement without a surrogacy contract leaves the parties at the mercy of each other's whims. Also, if the use of the process of ART means approaching an infertility clinic/ ART Bank, then the clinic might refuse to go ahead with the artificial insemination process without a surrogacy agreement or the involvement of one of their surrogates. This can encourage commercial surrogacy to the extent of totally prohibiting altruistic gestational surrogacy.

It is a well known fact that most of the surrogates who agree to be one are from poor backgrounds and money is their main concern in choosing to be one.⁸⁶ Thus, it could also be that they have been pushed

⁸⁴ See Section 36(23)

⁸⁵ See Section 25

⁸⁶“In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that. The usual fee is around \$25,000 to

into this by their husbands whose consent is an important element of the surrogacy agreement. However, their lack of education and consideration of the fact that they come from economically disadvantaged backgrounds, their bargaining power can also tilt towards the unfavourable. Since the onus of deciding on the amount of compensation is completely on the surrogate mother, there could be a lot of discrepancy in such payments. Also, the fact that another woman would easily agree to be a replacement, since they are all enrolled with the ART Bank, would create a competitive environment and lead to the desperate candidate agreeing to be a surrogate on a lower amount.⁸⁷

Thus, the question of the bargaining power of that human focus of the Bill, the surrogate mother, which had in fact been the reason for the rolling of the wheels of the legislative process towards its much needed protection is gravely overlooked or rather undermined. The bargaining power is further weakened by giving the ART Banks the power to maintain and allocate “surrogate duties”, placing them under their direct control. The better alternative rather could have been to put them under the control of the government or an autonomous government agency. A prospective surrogate’s replaceability in the “surrogate roll” and the justifiable desperation with which these women agree to be a surrogate leaves them at a weaker position to make a really financially sound choice in an industry, which otherwise might not be able to thrive in their absence.

\$30,000 in India which is around 1/3rd of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice. ART industry is now a 25,000 crore rupee pot of gold. Anand, a small town in Gujarat, has acquired a distinct reputation as a place for outsourcing commercial surrogacy. It seems that wombs in India are on rent which translates into babies for foreigners and dollars for Indian surrogate mothers.”

⁸⁷ Her obligation to agree to the surrogacy is laid down in the Form J in a clause which states:

“I have worked out the financial terms and conditions of the surrogacy with the couple in writing and an appropriately authenticated copy of the agreement has been filed with the clinic, which the clinic will keep confidential.” See **India – a reproductive tourism destination**, Para 1.7, Law Commission of India Report No. 228, page 11