

## LEGAL GLITCHES FACING SURROGACY AGREEMENT IN INDIA

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### LEGALIZATION OF COMMERCIAL SURROGACY & SURROGACY AGREEMENT - JUDICIAL & STATUTORY DEVELOPMENTS:

The Supreme Court of India formally legalized commercial surrogacy in the landmark case *Baby Manaji Yamanda v. Union of India*.<sup>1</sup> In this case the Court defined “commercial surrogacy as a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb” and the related aspects as surrogacy agreement, the stakeholders or parties who may enter, and directed for enactment of a statutory law on the same. The supreme court admitted not only the void in law but also the irregularities taking place in the absence of law by calling surrogacy as money making racket. In this case of *Baby Manji*, a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. But subsequently in this case there were issues raised on the legality of the surrogacy agreement but the court allowed the same.

In another case *Jan Balaz v. Anand Municipality and Ors.*<sup>2</sup>, it may be significant to note that that surrogacy agreement was entered in the name of intending father and the second respondent, surrogate mother whose name is mentioned as the wife of intending father which led to vexatious legal issues in the issue of birth certificate for the surrogate child. However the common truth in

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<sup>1</sup> (2008) 13 SCC 518.

<sup>2</sup> AIR 2010 Guj 21.

both the cases surrogacy agreement was entered into whose sole purpose of the agreement is to ensure hand over of the surrogate child to the intending couple in return for a fixed payment of money and that the surrogate child would derive all inheritance of a child of biological parents from the intending parent”.

However during the course of adjudication of both these cases the court opined that there was an absence of a regulatory statutory law to address issues and concerns arising out of or related to the conduct of surrogacy in India. The Court directed for the early enactment of a statute for the same considering its large scale commercial practice in India. Following the Court’s direction, the Indian Council of Medical Research (ICMR), under the aegis of Ministry of Health & Family Welfare, Government of India, formulated the Assisted Reproductive Technologies (Regulations), ART Bill, 2008<sup>3</sup> providing for the legal regulation, conduct of surrogacy and control of misuse of this technology in India. This ART Bill has been subject to deliberations and scrutiny and accordingly the Bill has undergone periodic revisions and necessary changes as the ART Bill 2010<sup>4</sup> and lately the ART Bill is also revised in the year 2013<sup>5</sup> submitted for the consideration of cabinet but the detail draft of the same is not made available.

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<sup>3</sup> Indian Council of Medical Research, The Assisted Reproductive Technology (Regulation) Bill – 2008 (Draft) Ministry of Health and Family Welfare, Government of India, *available at*:- [http://icmr.nic.in/art/Draft%20ART%20\(Regulation\)%20Bill%20&%20Rules%20-%202008-1.PDF](http://icmr.nic.in/art/Draft%20ART%20(Regulation)%20Bill%20&%20Rules%20-%202008-1.PDF). (Last visited Feb. 15, 2015) [hereinafter Draft Bill 2008].

<sup>4</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 February 15, 2015) [hereinafter ART Bill, 2010].

<sup>5</sup> Assisted Reproductive Technology (Regulations) Bill 2013, (Tentative Draft) Date Jun. 27, 2013, Legislative Department, Ministry of Law & Justice, Government of India [hereinafter ART Bill 2013].

### **DEFINITION & MEANING OF SURROGACY AGREEMENT:**

Though these case laws mention about it but there is no definition for the same under the judgments. Surrogacy agreement is defined as “a contract between the person(s) availing of assisted reproductive technology and the surrogate mother” under Section 2(cc), ART Bill 2010. In simple terms surrogacy agreement means “a comprehensive document that lays the foundation for governing relation between the commissioning couple and the surrogate including rights, liabilities, responsibilities details about the need for surrogacy, purpose and situation of both parties, the terms under which the surrogate has agreed, compensation, payment schedule, etc”.<sup>6</sup>

### **SIGNIFICANCE & PURPOSE OF SURROGACY AGREEMENT:**

The ART Bill lays down the purpose and significance of this surrogacy agreement. Surrogacy agreement enlists the minimum number of parties to the agreement and makes it legally binding enforceable and sought to be governed by the Indian contract Act. The ART Bill expressly provides for entering into surrogacy agreement between the surrogate mother and the couple who is seeking surrogacy through the use of assisted reproductive technology and that the surrogacy agreement shall be legally enforceable.<sup>7</sup>

The most significant attribute of surrogacy agreement is that in the absence of an effective binding law surrogacy agreement is the only regulatory instrument that regulates the terms and conditions of surrogacy agreement, defines rights and obligations of parties to contract and states the monetary

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<sup>6</sup> Mother & Baby, Womb in your heart, News.advisen, 09/03/2014, available at:- <[http://news.advisen.com/documents/AMX/20140903/08/201409030816CONTIFY\\_NEWS\\_0012073484.xml](http://news.advisen.com/documents/AMX/20140903/08/201409030816CONTIFY_NEWS_0012073484.xml)>. (Last visited Feb. 15, 2015).

<sup>7</sup> *Supra* note at 5, §34 (1).

compensation for agreeing to act as surrogate mother<sup>8</sup>, all expenses, including insurance related to pregnancy and after delivery for the surrogate mother<sup>9</sup> and most importantly handing over of custody of surrogate child by the surrogate mother to the intending parent<sup>10</sup> and other crucial aspects related to arrangement. The nature of this agreement is purely personal arrangement as all the particulars or particular details of the agreement are left to the will of the parties to be determined. In many of the international surrogacy cases namely in *Re The Matter Of TT (A Minor)*<sup>11</sup>, *Re P (Surrogacy: Residence)*<sup>12</sup> the utmost significance of the case is summed up by stating that “the surrogate child is born as a result of the surrogacy agreement” thus implying all the conditions, situations, stakeholders or parties, the promises undertaken by them respectively leading to the birthing of surrogate child.

#### **LIMITATIONS & LOOPHOLES IN SURROGACY AGREEMENT UNDER ART BILL:**

Though the ART Bill defines and lays down provisions providing for entering into surrogacy agreement by the parties or stakeholders to surrogacy along with this, the Bill gives it legal binding effect and enumerates some of the basic requisite contents of the same but the Bill leaves out many gaps which are criticized as limitation and loopholes in the Bill and leads to many irregularities and illegalities in the practice or conduct of surrogacy in India, some of which are identified and briefly discussed as below.

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<sup>8</sup> *Supra* note at 5, §34 (3).

<sup>9</sup> *Supra* note at 5, §34 (2).

<sup>10</sup> *Supra* note at 5, §34 (24).

<sup>11</sup> [2011] EWHC 33 (Fam).

<sup>12</sup> [2008] 1 FLR 177.

## I. NO UNIFORM STANDARD MONETARY COMPENSATION:

Though the ART Bill clearly states that the monetary compensation may be provided to the surrogate mother but neither the ART Bill, Rules lay down the minimum or the maximum quantum of monetary payment for same. The Bill is silent on the nature of legally approved expenses that may be covered under the agreement for reimbursement and otherwise. Therefore the payment to the surrogate mother varies and the amount to be determined remains arbitrary in each case. Rather there has been arbitrary and varying payment among the surrogate mothers.

It has been found that in the absence of a standard, specified payment, the payment to surrogate mother also differs based on their fair skin complexion, caste background, education, fluency in English speaking, economic class of the surrogate mother<sup>13</sup>. Additionally such surrogate mother are paid a bonus sum of money (around 25% ) who bear twins, who show eat well show gainful increase in weight, healthy or positive test reports or such symptoms of health pregnancy.<sup>14</sup> It has also been found that the payment to surrogate mother differs from state to state and there is no uniformity rather there is discrimination and arbitrariness in payment to the surrogate mother.<sup>15</sup>

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<sup>13</sup> Rahi Gaikwad, *They need the baby, she needs the money*, The Hindu, September 28, 2014, Available at:-

<<http://www.thehindu.com/sunday-anchor/they-need-the-baby-she-needs-the-money/article6453307.ece>>. (Last visited Feb. 15, 2015).

<sup>14</sup> *Ibid.*

<sup>15</sup> Dipen Hiranwar, *Study finds surrogate mothers in India face discrimination, health risks* November 2012, available at:-

<<http://www.indusbusinessjournal.com/ME2/dirmod.asp?sid=&nm=&type=Publishing&mod=Publications%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=B8D41AEFE24E428F9A9F9FC135AB979D>>. (Last visited Feb. 15, 2015).

## **II. NON ENFORCEABILITY WITHIN INDIA:**

The legal enforceability of such surrogacy agreement is a questionable issue as evident in the case of *Baby Manji Yamnda v. Union of India* where in it was found that the surrogacy agreement entered between the parties is held null void or without any legal effect. As this agreement did not bear the signature of either the Japanese intending father and 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>16</sup>

## **III. NO PROCEDURAL MECHANISM:**

There is no prescribed procedural mechanism of entering into the surrogacy agreement, there is silence in the ART Bill or Rules on the administrative legal compliance including the attestation, stamp value, requirement of witness, approval and scrutiny as necessary among others. Taking unfair advantage of this the surrogacy agreement are entered as a fake sham documents usually in bond paper of as petty a value of Rs. 50 with mere scribbling of one or two paragraphs with provisions on transfer of custody of surrogate child from surrogate mother to the intending couple in return for money this is as per the research findings contained in the report titled as Surrogacy Ethical or Commercial by Center for Social Research a leading women right advocacy group in Delhi.<sup>17</sup> Besides, 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

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<sup>16</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 Feb. 15, 2015).

<sup>17</sup> Center for social Research Delhi, Surrogate Motherhood - Ethical or Commercial, *available at* <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>. (Last visited Feb. 15, 2015).

surrogate pregnancy or by the end of the first trimester of surrogate pregnancy or around the middle of the second trimester or the 4<sup>th</sup> month of pregnancy by the infertility clinic thus during this time period woman is already pregnant and she has no choice but to be compelled to sign the surrogacy agreement. This is another glaring procedural irregularity brought out by the research study. It may be rightfully mentioned that during this intervening period from the time of inception or conceiving of pregnancy till the confirmation of pregnancy the surrogate mother's reproductive health is exposed to serious health risks without any legal onus on either the couple or the clinic which is gravely unjust.

#### **IV. NON ENFORCEABILITY OF SURROGACY AGREEMENT IN FOREIGN LEGAL JURISDICTION:**

One of the most significant features of the surrogacy agreements as stated in the ART Bill is its enforceability within the geographical territory of India not outside taking after the relevant provision of the ART Bill which imposes territorial limitation on the legal effect of agreement. Therefore a surrogacy agreement providing for pertinent concerns as legal parentage, custody rights of couple over surrogate child entered by the foreign intending couple in India though may receive the legal approval in India but the same agreement may have no legal effect in their respective foreign jurisdiction. This held true in the case of *Baby Manji*<sup>18</sup> where Japan out rightly refused the surrogacy arrangement and the agreement to this effect entered in India between the Japanese couple and the Indian surrogate mother for violation of the legal definition of motherhood

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<sup>18</sup> *Supra* note at 2.

that inheres in the birthing mother as contained in the Japanese civil code 1896.<sup>19</sup> Similarly in case of *Jan Balaz*<sup>20</sup> Germany rejected legal recognition to surrogate motherhood as a means of attaining parenthood, and any such surrogacy agreement to this effect as Germany bans commercial surrogacy under its laws.<sup>21</sup> In *Re TT Case*<sup>22</sup> the UK court held that “Surrogacy agreements are not binding Surrogacy contracts”. In this case the surrogate mother originally promised to relinquish or hand over the custody of the surrogate baby under the relevant provision of surrogacy agreement but subsequent to the birth the surrogate mother changed her mind due to emotional attachment with child during her gestation and thereby she retracted from her performance of contractual promise. However, the Court at the very outset held the surrogacy agreement as non binding, unenforceable contract accordingly the provisions of the same were similarly held non binding, unenforceable. Therefore the court did not hold the refusal by surrogate to be any breach of the agreement on the contrary the court vested the custody of child with the surrogate mother finding her befitting capacity to care and meet the emotional needs of the child. Another UK Case, In *Mr. and Mrs. W case*<sup>23</sup>, the couple, as Mr. and Mrs. W entered into surrogacy agreement with Ms. N surrogate mother to pay her £10,000 for carrying on the

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<sup>19</sup> Japanese Civil Code, (Japanese: 民法 Minpō), Government of Japan, Ministry of Justice, Government of Japan, Act No. 89 of April 27, 1896, available at <<http://www.moj.go.jp/content/000056024.pdf>>. (Last visited Feb. 15, 2015)

<sup>20</sup> *Supra* note at 3.

<sup>21</sup> Germany Federal Embryo Protection Act 1990., 13th December 1990 available at <<http://www.auswaertiges-amt.de/cae/servlet/contentblob/480804/publicationFile/5162/EmbryoProtectionAct.pdf>>. (Last visited Feb. 15, 2015).

<sup>22</sup> [2011] EWHC 33 (Fam).

<sup>23</sup> Louise Eccles, *Couple are ordered to pay surrogate mother £568 a month for the baby they will never see*, DAILY MAIL, 12 April 2011, available at <<http://www.dailymail.co.uk/news/article-1375861/Child-custody-Couple-ordered-pay-surrogate-mother-monthly-baby-wont-meet.html#ixzz3UpcKvvaN>>. (Last visited Feb. 15, 2015).



pregnancy and exchange of custody of child but in this case depending on the facts of the case, the court held Surrogacy agreements not legally binding in court, despite being a formal written contract. This resulted in the couples losing the custody of their surrogate baby to her surrogate mother along with an additional burden of payment of maintenance for the same. In this case, Mr. Justice Baker opined that “there are “Considerable risks” of entering into a surrogacy agreement and that Surrogacy agreements are not legally binding in court, even with a formal written contract”<sup>24</sup>.

However, differing from these cases, the Wisconsin Supreme Court the surrogacy agreement or parentage agreement was “largely enforceable” and not void as against public policy after laying down necessary conditions to be satisfied for holding the same. *In re Paternity of F.T.R25.*, the Wisconsin Supreme Court dealt at length with the issue of enforceability and non enforceability of surrogacy or parentage agreements that came for consideration before the court, wherein the Wisconsin Supreme Court ruled that in the absence of binding statutory law in Wisconsin the parentage agreement in this case as just a contract, more or less like any other contract. The Wisconsin supreme court held that in order to make the surrogacy agreement enforceable such agreement satisfy the other requirements for a valid contract, in the furtherance of same, the court held that like All contracts require consideration.” the consideration is the promise to pay the surrogate’s medical expenses and to relieve her of obligations was enough or the consideration is money given exchange for undergoing pregnancy and relinquishing or handing over the custody of baby to the couple and the surrogacy agreement must comply with the best interests of the child.

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<sup>24</sup> *Ibid.*

<sup>25</sup> (2013) WI 66.

The Wisconsin Supreme Court opined that there are compelling interests in support of enforcement of surrogacy agreement as enforcement of surrogacy agreements promotes stability and permanence in family relationships and reduces contentious litigation. Therefore, the Wisconsin Supreme Court concluded that the surrogacy agreement or parentage agreement was “largely enforceable” and not void as against public policy. Taking after the enforceable effect of surrogacy agreement, the court directed the legislature to enact a statute addressing the enforceability of surrogacy agreements. In addition to these, surrogacy agreement entered online between the couple and the surrogate mother raise complex issues in terms of their legal validity enforceability.

#### **V. NON APPLICABILITY OF CONTRACTUAL LEGAL REMEDIES:**

Fourthly, though the surrogacy agreement is sought to be governed by the contract law of India namely Indian Contract Act, 1872 but there is a major limitation in applicability of contractual remedies for breach of contract to the surrogacy agreement. The Indian contract Act<sup>26</sup> under relevant section enumerates the consequences, remedies for the breach of contract namely compensation for loss or damage caused by breach of contract<sup>27</sup>. In addition to the contract Act, the contractual legal remedies as suit for specific performance are provided under relevant Section Specific Relief Act<sup>28</sup>. But in case of surrogacy agreement neither the remedies provided under the Indian Contract Act nor the remedies provided under the Specific Relief Act may be applicable. Firstly with regard to the contract Act imposing legal liability or damages under the statutes may be difficult in such case where the surrogate refuses to hand over the

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<sup>26</sup> The Indian Contract Act, 1872 (Act no. 9 of 1872) [25th April, 1872.] [hereinafter ICA].

<sup>27</sup> *Ibid.*, § 73 to 75.

<sup>28</sup> Specific Relief Act, 1963 (Act No. 47 OF 1963) [13th December, 1963.] § 10.

custody of child subsequent to birth or she changes her mind. One such case was reported by a leading surrogacy law firm based in Mumbai which the surrogate mother refused to hand over the custody of surrogate child to the couple but the lawyers claimed to have necessarily “sorted” the issue. But it is not disclosed if the same amounted to breach of surrogacy agreement by the surrogate mother and if she was sued against or any other legal proceeding or legal action taken by either the intending couple, law firm against the surrogate mother for the same.<sup>29</sup> Besides, the establishment of deficiency of services or any breach of contractual performance on the part of surrogate mother is not only very difficult but also the ascertainment and quantification of damages if at all any for imposing legal liability on surrogate mother is equally cumbersome. It is even absurd to illustrate a hypothetical cases related to imposing damages on surrogate mother for any defect or deficiency in health of the newly born child, as this would clearly amount to commodify the child or equally making women’s reproductive labor or gestational capacity as any other mechanical service availed on hire for money thus both propositions prima facie unethical and against public policy as they amount to commercializing and sale of human life and at the least commercializing human body and parts and offer for sale in market. This inference is taken after the New Jersey SC decision in *Baby M New Jersey Case*<sup>30</sup>. Along with this considering the economically strained condition or poor plight of surrogate mother payment of damages may not be imposed on the surrogate mother due to her inability to pay. Whereas on the other hand, any attempt to impose imposing Specific performance of contractual promise would

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<sup>29</sup> Mother & Baby, Womb in your heart, news.advisen , 09/03/2014, *available at*:- [http://news.advisen.com/documents/AMX/20140903/08/201409030816CONTIFY\\_NEWS\\_012073484.xml](http://news.advisen.com/documents/AMX/20140903/08/201409030816CONTIFY_NEWS_012073484.xml)>. (Last visited Feb. 15, 2015).

<sup>30</sup> 537 A.2d 1227, 109 N.J. 396 (N.J. 1988).

amount to forced pregnancy on the surrogate other against her will which would per se amount to violation of right to her person dignity, bodily autonomy, bodily integrity which are the core of constituent of right to life, liberty of person thus the violation under article 21 of constitution of India<sup>31</sup>. In *Re P (Surrogacy: Residence)*<sup>32</sup> the court was met with grave difficulty to impose any penal liability on the surrogate mother. Coleridge J., held that the court has nothing to do with penalizing the mother for breaking her agreement or for her prolonged deception. On the contrary, it is observed by the court that she entered the surrogacy agreement in good faith although she has behaved in a deceitful way in a number of respects, which is take into account by the court. Thus this case indicates the non applicability and non imposition of penal liability on the surrogate mother despite proved breach.

#### **VI. LACK OF THE SPECIFIED JUDICIAL FORUM FOR DISPUTE RESOLUTION:**

Another related issue is the lack of the specified forum for dispute resolution arising out of complaints related to disputes and disagreements related to enforceability and non enforceability of surrogacy agreement or performance or non performance of the contractual obligation or breach of contractual provisions. The ART Bill does not mention any specific forum for the same. This assumes greater significance in case of surrogacy agreement entered by foreign couples or surrogacy agreement in foreign legal jurisdiction as the choice or forum of dispute resolution and the effect of judicial pronouncements remain ambiguous and unascertained. These issues defeat the very object and purpose of surrogacy agreement. The issue of common uniform, global forum and consistent

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<sup>31</sup> M.P. Singh, *V.N. Shukla's Constitution of India*, p. 131 (2008), Art 21.

<sup>32</sup> [2008] 1 FLR 177.

binding laws at the inter country level appeared in the cases of *Baby Manji*<sup>33</sup>, *Jan Balaz*<sup>34</sup> as both these nations namely Japan and Germany had under their respective laws prohibited surrogacy where as India permitted surrogacy thus the differences and inconsistencies were apparent among these nations due to such differences, these case faced legal deadlock with absence of any specified applicable law in such cases where countries differ markedly on their laws. Consequently there was the indeterminate issue of a universally binding forum where such disputes may be submitted for adjudication and resolve and another related issue is the legality and enforceability of such judicial decisions at the inter country level among the differing nations with mutually inconsistent laws on the same . considering this legal void at the global level , the Permanent Bureau of the Hague conference on Private International Law's Council on General Affairs and Policy law initiated a project titled as “the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements” during the period of year 2011-2014.<sup>35</sup> The primary mandate of the Permanent Bureau is to construe comprehensive international and multinational agreement providing for uniform rules on the jurisdiction of courts and applicable binding law governing the surrogacy arrangement and to the establishment of legal parentage within such legal regime across different foreign legal jurisdictions.<sup>36</sup> The Bureau is presently

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<sup>33</sup> *Supra* note at 2.

<sup>34</sup> *Supra* note at 3.

<sup>35</sup> Hague Conference on Private international Law, Statute of the Hague Conference on Private International Law, HCCH , 15 July 1955 *available at*:- [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=29](http://www.hcch.net/index_en.php?act=conventions.text&cid=29)>. (Last visited February 10, 2015).

<sup>36</sup> Anne-Marie Hutchinson OBE, The Hague Convention on Surrogacy: Should we agree to disagree? ABA Section of Family Law 2012 Fall CLE Conference, Philadelphia, Dawson Cornwell, London, United Kingdom, October 2012, *available at*:- [http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf) (Last visited February 10, 2015).

during this year working towards a multilateral international instrument and submission of final report in the coming year 2015.

## **VII. INCONSISTENCY & DIFFERENCES WITH OF OTHER STATUTORY LAWS:**

Another major limitation of the surrogacy agreement is the Inconsistency & differences with of other statutory laws which prima facie raises legal issues. While the surrogacy agreement lays down the entire process of conduct of surrogacy arrangement and defines the rights and obligations of parties to the agreement but in the course of this certain provisions in the surrogacy agreement seek to satisfy the vested interest of a particular party or stakeholder of the agreement for attaining the ultimate objective of the agreement which in many cases results at the cost of defiance of existing established laws, policies and in the same also results in unequal treatment of parties and inequitable allocation of rights and liabilities, denial of rights among the stakeholder of the agreement. Some of these are identified and discussed as below.

### **VII.A. INCONSISTENCY WITH RIGHT TO MEDICAL TERMINATION OF PREGNANCY<sup>37</sup>:**

The provisions in the surrogacy agreement take away from the surrogate mother the guaranteed legal rights namely the reproductive right to seek termination of medical pregnancy subject to the terms and conditions under the Medical termination of Pregnancy Act 1971<sup>38</sup>. 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

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<sup>37</sup> Medical Termination of Pregnancy (MTP) Act, 1971. (Act No. 34 of 1971) 10<sup>th</sup> August 1971.

<sup>38</sup> *Ibid.*, §§ 3(2), 3(b).

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. In the same light , many provisions of the surrogacy agreement imposing impose strict servile behavior on the surrogate mother including compulsory stay of surrogate mother at the clinic premises away from home, the restriction on the movement of the surrogate mother and denial of right to visit home, denial of right to enjoy conjugal life, companionship and impose life style restrictions, such provisions may be contested before the court of law for violation of right to privacy , family, dignity and integrity which is constitutive of life, liberty of a surrogate mother.

#### **VII.B INCONSISTENCY WITH HUMAN ORGAN TRANSPLANT ACT<sup>39</sup>:**

Commercial surrogacy is based on the primary premise that involves payment provided to surrogate for her making use for her womb or uterus for conceiving pregnancy, undergoing embryo implantation, carrying the gestation to full term or precisely put for her gestational service accordingly it is popularly called as “womb renting business”. The ART Bill<sup>40</sup> under relevant provision provides for monetary payment to the surrogate mother for the same and accordingly the surrogacy agreement in its first and foremost provisions provide for the monetary payment to the surrogate mother as per the Bill. It must be noted here that the term “womb” is a popularly used term for the uterus which is defined in the medical terminology as a female reproductive muscular body organ responsible for the development of the embryo and fetus during

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<sup>39</sup> Transplantation of Human Organs Act, 1994, (Act No. 42 of 1994), 8th July, 1994, Section 19.

<sup>40</sup> *Supra* Note at 5, § 34 (2), (3).

pregnancy<sup>41</sup>, thus commercial surrogacy essentially amounts to use of human body part for commercial gain which is strictly prohibited under the national law, international convention. The Human Organ Transplant Act as well as the European Convention on Human Rights and Biomedicine or “Oviedo Convention”<sup>42</sup> uses a broad and general terminology of “prohibition on financial dealings or transaction in human body”. This also raises potential issues of commercial use of human organ for sale or hire leading to vexatious issues related to legalizing or permitting kidney sale, legalizing prostitution, there is another incidental issue related to bringing back fears of illegal market in human bodies or organs and threats of human trafficking in women for serving as gestational carriers or for forced pregnancies, procuring or sourcing gametes if commercial surrogacy is legalized on large scale. These are some of the concerns raised by the biomedical ethical groups globally. On these lines, it may be appropriate to mention such case of human trafficking under the garb of commercial surrogacy at both national and international level. It is reported that two of the infertility clinic doctor at Porbander, Gujarat were arrested for charges with human trafficking under the garb of conduct of commercial surrogacy under relevant sections of IPC<sup>43</sup>. Another such case s reported from California, USA. Theresa Erickson an internationally renowned reproductive law attorney based in

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<sup>41</sup>Medicinenet, *Definition of Womb*, available at:- <http://www.medicinenet.com/script/main/art.asp?articlekey=8833>>. (Last visited February 15, 2015).

<sup>42</sup> The Council of Europe, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine Oviedo, 4.IV.1997, Oviedo, Spain\_4 April 1997, Article 3, 4.

<sup>43</sup> TNN Another doctor booked in human trafficking case TNN | Feb 2, 2013 available at:- <http://timesofindia.indiatimes.com/city/ahmedabad/Another-doctor-booked-in-human-trafficking-case/articleshow/18299048.cms>>. (Last visited February 15, 2015). See also DNA, Human trafficking: Gujarat doctor sold two babies, not one, DNA Agency, Ahmadabad. 1<sup>st</sup> February, 2013, available at <http://www.dnaindia.com/india/report-human-trafficking-gujarat-doctor-sold-two-babies-not-one-1794934>>. (Last visited February 15, 2015).



California was running a baby-selling scheme under the garb of commercial surrogacy<sup>44</sup> and she pleaded guilty to charges of human trafficking, conspiracy, fraud and subject to criminal sanctions at the Federal Court in San Diego<sup>45</sup>.

### **VII.C. INCONSISTENCY WITH INDIAN EVIDENCE ACT 1872<sup>46</sup>:**

The ART Bill under relevant provision provides for parentage to be vested in the intending couple who commissions such surrogacy and avails the services of surrogate mother after necessary payment<sup>47</sup> and the Bill also states the names of the couple to be mentioned as the legal parents in the birth certificate issued to the surrogate child to the exclusion of surrogate mother<sup>48</sup>. There is a legal obligation cast on the surrogate mother to hand over the custody, guardianship right of the child immediately after birth on to the couples<sup>49</sup>. In conformity with this the provisions of the surrogacy agreement are so drafted which in most clear terms stipulates that the parentage to be vested with the intending couple to the complete exclusion of any right of the surrogate mother over the child and correspondingly the duty of surrogate mother to handover or relinquish the custody, rights over the child. But this scheme and determination of parentage as conceptualized under the ART Bill runs counter to the established ground rule of parentage as specified under the Indian Evidence Act.

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<sup>44</sup> FBI San Diego Division, U.S. Attorney's Office, Baby-Selling Ring Busted, U.S. Attorney's Office Southern District of California, San Diego Press Releases 2011, August 09, 2011, available at <<http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted>>. (Last visited February 15, 2015).

<sup>45</sup> Jennifer Lahl, Surrogacy Attorneys Caught Exploiting Women, Selling Babies, life news, August 19, 2011, available at <<http://www.lifenews.com/2011/08/19/surrogacy-attorneys-caught-exploiting-women-selling-babies/>>. (Last visited February 15, 2015).

<sup>46</sup> The Indian Evidence Act, 1872 (Act No. 1 of 1872) [15th March, 1872].

<sup>47</sup> *Supra* Note at 5, § 34(1), (10).

<sup>48</sup> *Supra* Note at 5, §34(10).

<sup>49</sup> *Supra* Note at 5, § 34(4).

The Indian Evidence Act under its relevant section establishes the parentage of the child and sets the presumption of legitimacy of birth for all legal purposes under the Indian law. This rule in very simple terms states that “a child born during the continuation of a Marriage, the husband of the woman giving birth is presumed to be father of the child”<sup>50</sup>. Following 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. As per the same, the surrogate mother and her husband may be legally presumed to be the legal mother, father of the surrogate child and accordingly legal parentage may be vested in them. On the same lines, the Birth Registration Act <sup>51</sup> also provides for recognition of birthing mother as “natural mother” or “natural parent”. But contrary to this, the ART Bill under its relevant provision states that the Intending father or the intending couple shall be the parent of the child not the surrogate mother or her husband<sup>52</sup>. Thus these are mutually antithesis. These complex issues related to parentage determination surfaced in the case of German surrogate twins whose biological father was German but given birth by Indian surrogate mother in Anand, Gujarat in *Jan Balaz*<sup>53</sup> where the Gujarat High Court held the surrogate mother as held as one of the parent following the legal presumption established under the Indian Evidence Act and also under the Birth Registration Act that permits the recognition of birthing mother as natural mother or natural parent, hence under the force of existing laws surrogate mother is recognized as the legal mother and accordingly the name of the birth or surrogate mother was mentioned as the legal mother along with the name of German national as biological father in the birth

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<sup>50</sup> *Supra* Note at 47, § 112.

<sup>51</sup> The Registration of Births and Deaths Act, 1969 (Act No. 18 of 1969) (1<sup>st</sup> February 1993).

<sup>52</sup> *Supra* note at 5, § 34(10), 35 (1).

<sup>53</sup> *Supra* note at 3.

certificate of the surrogate child. 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”.<sup>54</sup> This however led to complications in the vesting of legal parentage of surrogate child as it differs from the prescribed tenets of ART Bill. Thus the provisions concerning determination and vesting of legal parentage don’t resolve issues rather add complications to the same.

#### **VIII. ISSUES OF LEGAL VALIDITY & ENFORCEABILITY OF SURROGACY AGREEMENT:**

There are many vexatious legal issues striking at the very foundational legal basis of surrogacy agreement, its legality, validity and enforceability of the agreement. First, commercial surrogacy agreements by their inherent nature permitting monetary payment for availing on hire women’s gestational service, child birthing coupled with exchange of custody, guardianship rights over child faces strong criticism for its non compliance with the tenets of public policy. Secondly, many aspects of surrogacy agreement do not comply or satisfy the statutory essential requirements prescribed under the contract law in India. There are other ancillary related issues as well which raise other concerns. These are identified and briefly discussed as below.

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<sup>54</sup> *Ibid.*, ¶ 10.

## **VIII.A. COMMERCIAL SURROGACY AGREEMENTS & INCONSISTENCY WITH PUBLIC POLICY:**

Though there is no such fixed definition of public policy but Public policy in simple terms means larger public interest or welfare of society at large or greater good of society. In the context of contract law, “a contract is said to be in consonance with public policy when the proposed contract promotes and protects general interest, welfare of society or complies with existing law and on the other side, a contract is said to be against public policy when it defeats or goes against the existing law or causes breach of law or negates the general interest, welfare or causes harm to the society at large”.<sup>55</sup> One such instance of a pertinent subject matter of public interest in this regard may be illustrated here.

The fact of motherhood and childhood has been established as matter of public interest accordingly provided constitutional protection under relevant provisions of Directive Principles of State Policy (DPSP)<sup>56</sup> and international conventions namely International Covenant on Economic, Social and Cultural Rights<sup>57</sup> which state that motherhood and childhood must be provided special protection as there is inherent socio-legal or public interest in the same. With these understanding of public interest , it is said that “there are some things that should not be exchanged for money like human beings, criminal justice, marriage rights, citizenship, and certain other forms of human labor for instance sexual

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<sup>55</sup> Duhaime, *Legal Dictionary*, 2002 (8th edition) of *Williams on Wills*, available at: <<http://www.duhaime.org/LegalDictionary/P/PublicPolicy.aspx>>. (Last visited February 15, 2015).

<sup>56</sup> M.P. Singh, *V.N. Shukla's Constitution of India*, p. 131 (2008), “Arts. 36 - 51”.

<sup>57</sup> International Covenant on Economic, Social and Cultural Rights , United Nations, General Assembly resolution 2200A (XXI) of 16 December 1966, UN Treaty Series, Vol. 993, p. 3 ,(3 January 1976) available at <<http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>>. (Last visited February 15, 2015).

and procreational labor”<sup>58</sup>. Accordingly, certain subject matter cannot be made legally valid subject matter for contract. It is therefore established that there should be no market or financial transaction in exchange and relinquishment of reproductive rights and parental rights, this is the very basic principle which is implicit in all laws prohibiting the sale of human organs, laws prohibiting prostitution, laws prohibiting the sale of children. For the same, it has been held that commercial surrogacy causes negation of social or community harm, unethical precedent - the breach of public policy. The New York State Task Force<sup>59</sup> concluded that governing reproduction by contract and purchase will inflict social harm, fragmentation of culture. Thus commercial surrogacy set a wrong social precedent.

The provision in the ART Bill providing for monetary compensation in return for her agreeing to be surrogate and for availing gestational service of surrogate mother and for handing over custody of child as specified under the provision of ART Bill<sup>60</sup> and accordingly similar provision is drafted under the terms of surrogacy agreement. This effectively amounts to market transaction in commercial hiring and reproductive labour or gestation in the process or means while both are questionable in terms of its legality, permissibility as a subject matter and objective of a valid legal contract under the existing contract law. Similarly, the provision in the ART Bill providing for surrender or hand over of custody of surrogate child immediately after birth to the intending couple in

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<sup>58</sup> Alan Wertheimer, *Two Questions About Surrogacy and Exploitation*, *Philosophy & Public Affairs*, Vol. 21, No. 3 (Summer, 1992), pp. 211-239, Wiley, available at: - <<http://www.jstor.org/stable/2265356>>. (Last visited February 15, 2015).

<sup>59</sup> New York State, Department of Health, Task Force on Life and the Law, 1988 November 2012, available at <[https://www.health.ny.gov/regulations/task\\_force/](https://www.health.ny.gov/regulations/task_force/)>. (Last visited February 15, 2015).

<sup>60</sup> *Supra* note at 5, § 34 (4).

return for monetary payment, as the final objective of the surrogacy agreement also goes against the public policy. It is evident that the end purpose of surrogacy agreement is to give birth to the child for the sole purpose of giving away the child or hand over the custody, guardianship of the surrogate child immediately after birth to another individuals in compliance with the terms of the pre birth agreement in return for a fixed sum of monetary payment to the birthing mother for the same. This effectively amounts to commodification and sale of child and equally sale of parental rights as the fulfillment of surrogacy agreement. These issues also raises issues of lawfulness of considerations and objects under the existing laws namely under relevant sections of Indian Contract Act<sup>61</sup>. Thus the very legality of the subject matter, objective of entering into surrogacy contract remains shaky. Besides such provision of handing over or surrender of child primarily stands inconsistent with the surrogacy laws of many leading foreign legal jurisdictions and also stands as breach of the specific statutory law namely the Hindu Adoptions and Maintenance Act<sup>62</sup>, and the international human right convention the Hague Convention on the Protection of Children and Co-operation in Respect of Inter country Adoption<sup>63</sup>, both these instruments prohibit payment in consideration of the adoption of any person. As per these legal instruments state that any provision in the agreement or any agreement providing for a stipulated sum of money as a pre birth arrangement with a negotiated sum of money as a consideration between two parties in order to gain custody, guardianship parental rights amounts to child selling and breach of public

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<sup>61</sup> Supra Note at 27, § 23 .

<sup>62</sup> The Hindu Adoptions and Maintenance Act, 1956 [Act No.78 of 1956][21st December, 1956], § 17.

<sup>63</sup> Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, ( Article 3, 4 ) 29 May 1993, 33, 1 May 1995, available at <<http://www.refworld.org/docid/3ddcb1794.html>>. ( Last visited February 15, 2015).

policy. This is also established by the ruling of the New Jersey Supreme court in the trailblazer case of *Re Baby M case of New Jersey*<sup>64</sup> the New Jersey supreme court held that the commercial surrogacy contract effectively constitutes as “the sale of a child,” thus held as unenforceable under New Jersey statutory law and that it violated public policy for the same reason that it was banned under state adoption law or it amounts to the sale of a child for adoption or taking unfair advantage of a women needing money who might be coerced into giving up their children for the need for money or economic coercion. As an aftermath of this epoch making judgment of New Jersey court, finding upon similar reason of breach of public policy, a host of US states similarly prohibit commercial surrogacy and render commercial agreements unenforceable. These US states are namely New York<sup>65</sup>, Indiana<sup>66</sup> Arizona<sup>67</sup>, Nebraska<sup>68</sup>, Louisiana<sup>69</sup> Michigan<sup>70</sup>, hold surrogate parenting contracts are contrary to the public policy of this state, void and unenforceable. Thus it is evident that the provisions of the surrogacy agreement seek to breach the existing statutes or law as well as go against the general public interest of society.

#### **VIII.B. COMMERCIAL SURROGACY AGREEMENTS & INCONSISTENCY WITH THE ESSENTIALS OF VALID LEGAL CONTRACT:**

The legal validity of surrogacy contract has come to be questioned in terms of its compliance with essential of legal valid contract stipulated under the Indian Contract Act. Under the ART Bill surrogacy agreement is defined as a

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<sup>64</sup> *Supra* note at 31.

<sup>65</sup> NY Dom. Rel. Law § 122 (McKinney).

<sup>66</sup> IND. CODE § 31-20-1-1 (1988).

<sup>67</sup> ARIZ. REV. STAT. ANN. § 25-218(A) (1989).

<sup>68</sup> NEB. REV. STAT. § 25-21, 200 (1988).

<sup>69</sup> LA Rev. Stat. Ann. § 9:2713.

<sup>70</sup> MICH. COMP. LAWS §§ 722.851–.863 (1988).

contract but the cardinal legal pre requisites for an agreement to be called as contract namely the free consent of the parties as stipulated under the of the Indian Contract Act<sup>71</sup> is not met with the surrogacy agreement. Primarily there is no free, informed voluntary consent on the part of surrogate mother rather there is compulsion, particularly economic coercion and it is only for the monetary compensation woman surrogate agrees to be surrogate mother not otherwise, these women due to their own illiteracy, disadvantaged socio economic background they are not in a position to comprehend the provisions of the agreement which include an array of legal, medical jargons and the implications of the same under the agreement therefore without such the knowledge and understanding of the provisions of the agreement the surrogate mother signs the agreement only in the dire need for monetary sum this states that the very legal foundation of the agreement is flawed for the want of free consent and consent caused by economic coercion or financial inducement hence negating the consent altogether. Due to want of informed consent on the part of surrogate mother, the parties lack *consensus ad idem i.e.* agreement between the parties upon the same thing in the same sense or meeting of the minds of the parties on the understanding and performance of the agreement.<sup>72</sup> This is held as one of the fundamental pre requisite for the legal validity and enforceability of surrogacy agreement.

Secondly, under the surrogacy agreement the parties do not have equal status rather unequal status in terms of rights and obligations imposed on them while the surrogate mother is placed with strict onerous legal obligation of threat of legal action against the surrogate mother for non performance or dereliction of

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<sup>71</sup> *Supra* note at 27, § 10.

<sup>72</sup> *Supra* note at 27, § 2 (h).



duty but there are no such obligations imposed on the couple for non-payment of monetary sum promised to the surrogate mother. The two parties to the surrogacy agreement namely the intending couple and the surrogate mother are not equally positioned in terms of rights and obligations arising under the surrogacy agreement. The parties to the agreement do not have the same equal status or same standing, socio economic educational background, the surrogate mother typically comes from poor marginalized sections of society who illiterate, poor, usually living below poverty line, unemployed or petty wage earners, not in a position to get a gainful employment whereas the intending couples are from the affluent section of society who are educated, with gainful employment and economically well off to afford paying few lakhs for the surrogacy arrangement. In addition to this, the surrogate mother has no legal counseling whereas the intending couple is provided with legal counseling with necessary explanations by legal experts who are made available by the clinics as a part of the surrogacy arrangement programme which is paid for by the couple to the clinic. Thus, the surrogate mother is placed in a disadvantageous position and the intending couple is placed in rather advantageous position respectively. Thus the surrogacy agreements for reasons related to non compliance with the prerequisites of the contract Act stands questionable.

#### **VIII.C. COMMERCIAL SURROGACY AGREEMENTS & INCONSISTENCY WITH THE TENETS OF DISTRIBUTIVE JUSTICE:**

The provisions in the surrogacy agreement provide for the surrogate mother to undergo or bear all risks arising out of such surrogate pregnancy and make her legally liable for all consequences flowing from the same. The surrogate mother bears the sole burden of fatal health risks but there are no such corresponding risks for the intending couples. It may be of relevant to mention

here that There are certain provisions in the surrogacy agreement which expressly provide for subjecting the surrogate mother to the risk to the extent of death for instance the contract under relevant section provides that the surrogate mother may be subject to life support in case of her life threatening condition to save the life of surrogate child, the provision in the surrogacy contract provide that the surrogate mother must agree to undergo abortion at the will of intending couple, or the clinic irrespective of her will, refusal by the surrogate to comply with the same constitutes breach or violation of legal contract at the instance of surrogate mother for which she may be held legally liable or prosecuted or legal action may be brought against the surrogate mother for the same. Thus the preferences, interests of the intending couple are imposed as a binding legal obligation on surrogate and performance is compelled from the surrogate mother under the threat of legal action for non compliance. The surrogate mother under the contract is burdened with undergoing all legal, medical or health risks even at the cost of her risking her own life. Whereas the intending couple is the right bearing party who is subject to none of these health risks, exempt from all legal liabilities rather conferred with right to avail the services of surrogate mother, infertility clinic, for monetary sum under the Bill law and under the agreement. Thus the surrogate is held as solely responsible for bearing all the risks arising there form exempting the intending couple altogether. This is breach of the principle of distributive justice which implies equal and fair the allocation of the benefits and burdens or advantages and disadvantages among the parties to the contract<sup>73</sup> but from the provisions of the surrogacy agreement stated above, it appears that the surrogacy agreement defeats the principle of distributive justice. On the contrary, the provisions in the surrogacy agreement cause flagrant breach

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<sup>73</sup> U.S. LEGAL , *Distributive Justice Law & Legal Definition available at:-* <http://definitions.uslegal.com/d/distributive-justice/>.

distributive justice by allowing the intending couple to unfairly benefit at the cost of exploitation of surrogate mother who is subject to all risks, liabilities. Surrogacy agreements are apposite to the tenets of distributive justice in principle and practice.

#### **IX. LEGALITY & VALIDITY OF TERMS & CONDITIONS OF SURROGACY AGREEMENT:**

There are certain provisions in the surrogacy agreement which merit consideration for their provisions have the effect of taking away or denying basic human rights and freedoms from the surrogate mother. The surrogacy agreement provide for compulsory stay the surrogate mother within the hospital premises or the so called Surrogate hostels as provided for by the clinics for the entire duration of gestation at the same time the surrogate mothers are not allowed to visit their homes. There are restrictions imposed on their day to day movement and these surrogate mothers are kept under regular supervision by hospital attendants, these provisions are defended on the ground of successful surrogate pregnancy, to prevent any miscarriage or any other hardships and delivery of surrogate child. Besides there are restrictions on the private access and exercise of conjugal rights between the surrogate mother and her husband during this period. As a consequence of same the surrogate mothers right to family, conjugal rights are kept in suspension. But the legal validity of these provisions may be questioned as these provisions amount to denying established guarantee of legal and human rights in return for fixed sum of money which may be contested. Such provisions in the agreement would amount depriving the surrogate mother from care, custody of child namely the right to family marital life and could be

possibly be challenged as agreement in restraint of marriage<sup>74</sup>. It may be pertinent to mention that there can be no such legally enforceable contract which would be opposed to the existing statute or law or in contravention or denial of rights guaranteed under the existing law. As stipulated in the relevant section of contract Act that “the object of an agreement is lawful, unless...it is if permitted, it would defeat the provisions of any law”<sup>75</sup> thus such contract may be challenged for its legality and under the existing Indian contract Act.

## **X. INCONSISTENCY WITH INTERNATIONAL STATUTES:**

In keeping with the above mentioned reasoning, several other foreign legal jurisdictions have prohibited commercial surrogacy amounting to child trafficking or baby selling , commercialization of women’s body being unethical, ante public policy namely UK Under the UK Human Fertilization and Embryology (HEFA) Act<sup>76</sup> 2008, New South Wales, Australia Surrogacy Act<sup>77</sup> 2010, Canada Assisted Human Reproduction Act<sup>78</sup>. In many European nations as France under its French Civil Code<sup>79</sup>, Germany Federal Embryo Protection Act<sup>80</sup>,

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<sup>74</sup> *Supra* Note at 27 § 26.

<sup>75</sup> *Supra* Note at 27 § 23.

<sup>76</sup> UK Human Fertilization and Embryology Act 2008, (c 22), Introductory Objective, *available at* <<http://www.legislation.gov.uk/ukpga/2008/22/introduction>>. (Last visited February 15, 2015).

<sup>77</sup> Australia, New South Wales Surrogacy Act 2010, No. 102, Part I, Preliminary, *available at* <<http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2010%20AND%20no%3D102&nohits=y>>. (Last visited February 15, 2015).

<sup>78</sup> Government of Canada , Ministry of Law & justice, Canada, Assisted Human Reproduction Act, S.C. 2004, c. 2 , Assented on 2004-03-29 , *available at* <http://laws-lois.justice.gc.ca/eng/acts/A-13.4/page-1.html>, (Last visited February 15, 2015).

<sup>79</sup> French Civil Code (1804) Decreed 8th of March, 1803. Code Napoleon; or, the French Civil Code. Literally Translated from the Original and Official Edition, Published at Paris, in 1804.

<sup>80</sup> Centre for German Legal Formation, Germany The Embryo Protection Act 1990, Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – ESchG), no. 35/ 1988, 13th December 1990 *available at* <http://www.auswaertiges-amt.de/cae/servlet/contentblob/480804/publicationFile/5162/EmbryoProtectionAct.pdf>>. (Last visited Feb. 15, 2015)

Italy Medically Assisted Procreation Act<sup>81</sup> , Sweden Genetic Integrity Act<sup>82</sup> commercial surrogacy is not only prohibited but also entering into such commercial agreement or facilitating the same is strictly penalized under the statutes. In recent years, even some the south Asian nations namely China under an 'Administrative Rule' issued by Ministry of Public Health in 2001 prohibits commercial surrogacy<sup>83</sup> and Thailand has banned commercial surrogacy for foreigners as a law passed by Thai parliament in the present year 2015<sup>84</sup>.

### **SUGGESTIONS & CONCLUSION:**

In the light of legal issues associated with commercialization and financial contract of surrogacy, the first and the most fundamental suggestion is the rephrasing of the term commercial and replacing it with compensated surrogacy arrangement as feasible with the law and policy makers. The term compensated surrogacy means such surrogacy arrangements providing for reimbursement and reinstatement of health of surrogate mother for undergoing gestation and child birthing and for any sickness related to same and nothing beyond this amount of reasonable cost may be paid to the surrogate mother. Thus, it may be distinguished from commercial surrogacy arrangements. Compensated surrogacy is legal in many foreign legal jurisdictions namely UK<sup>85</sup>

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<sup>81</sup> Italy Medically Assisted Procreation Act 2004, Act No 45, February 24, 2004 *available at* <<http://www.ieb-eib.org/en/pdf/loi-pma-italie-english.pdf>>. (Last visited February 15, 2015).

<sup>82</sup> The Genetic Integrity Act (2006:351), Swedish Code of Statutes no 2006:351, 18 May 2006, *available at* <http://www.smer.se/news/the-genetic-integrity-act-2006351/> ( Last visited February 15, 2015).

<sup>83</sup> Jie Qiao, Huai L. Feng, *Assisted Reproductive Technology in China: Compliance and Non-compliance*, Vol. 3, No. 2 (April 2014) *available at* <<http://www.thetp.org/article/view/3545/4408>>. (Last visited February 15, 2015).

<sup>84</sup> Australian Associated Press Thailand bans commercial surrogacy, *The Guardian*, 20 February 2015 *available at* <<http://www.theguardian.com/world/2015/feb/20/thailand-bans-commercial-surrogacy>>. (Last visited February 15, 2015).

<sup>85</sup> *Supra* note at 77.

, New South Wales Australia<sup>86</sup>, Canada<sup>87</sup> as well as in many other nations. In all these nations only payment of “reasonable expenses” are legally permitted under these statutes. In many UK cases namely *Re the Matter of TT (A Minor)*<sup>88</sup>, *Re P (Surrogacy: Residence)*<sup>89</sup> the courts have permitted and upheld only such reasonable payment as reiterated above. Accordingly compensated surrogacy agreements may be drafted mainly seeking to provide in keeping with the same providing for legally sanctioned expenses or reimbursements.

Though the ART Bill provides for the agreement but there are many lacunas which raise a host of legal complications that needs to be urgently addressed. There are certain suggested safeguards recommended by the Government of India, Law commission Report (No. 228, August 2009) to be included in order to better the provisions providing for surrogacy agreement<sup>90</sup>. The commission recommends for inclusion of the provisions in the agreement on securing consent of surrogate mother, her husband and other family members to bear child, reimbursement of all reasonable expenses including medical procedures, allowing medical contingency as abortion regulated under the Medical termination of pregnancy Act, social security measures as life insurance cover for the surrogate mother and child. These recommendations are tendered by Law Commission may go in long way in restoring the legal rights to surrogate mothers which are taken away under the agreement.

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<sup>86</sup> *Supra* note at 78.

<sup>87</sup> *Supra* note at 79.

<sup>88</sup> *Supra* note at 12.

<sup>89</sup> *Supra* note at 13.

<sup>90</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, August 2009, *available at* <<http://lawcommissionofindia.nic.in/reports/report228.pdf>>. (Last visited Feb. 15, 2015).

Another significant piece of suggestion may be incorporation of Indian Society for Third-Party Assisted Reproduction (INSTAR<sup>91</sup>) Guidelines. These are recommendations are formulated by a group of self conscious and motivated doctors, lawyers, experts whose main purpose is to protect the interest of surrogate mothers. The recommendations for the first time stipulated a fixed sum of compensation around 2.5 lakhs to be all the surrogate mothers at the state and national level throughout India. The Guidelines lays down monetary compensation to be paid to the surrogate mother in case of health eventualities or health risks arising out of surrogate pregnancy. Thus these Guidelines may suitably supplement the relevant provision of ART Bill which provides for monetary payment to surrogate mother but does not specify the amount of compensation<sup>92</sup>and therefore may fill up the gap.

It may also be suggested that while the ART Bill is in the pendency to effectuate as a statutory enactment the Women's, Child commission and the concerned Women & Child Ministry may take the Bill into consideration and suggest measures for the better protection of rights and interest of surrogate mother. It may be observed that the Supreme Court in *Baby Manji* case had mentioned about the involvement of child commission in the issues related to surrogate children. Hence these commissions may lay down necessary recommendations. It may also be suggested that the proposed ART Rules under the ART Bill may set out the procedural rules specifying the appropriate stage of

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<sup>91</sup> President Dr. Bavishi, Vice President Dr. Rita Bakshi, Indian Society for Third-Party Assisted Reproduction INSTAR Key Recommendation, 5<sup>th</sup> October, 2013 Guwahati, *available at* [http://instarorg.blogspot.in/2013\\_10\\_01\\_archive.html](http://instarorg.blogspot.in/2013_10_01_archive.html) (Last visited February 10, 2015); See also, Radha Sharma, Surrogacy stakeholders draw up guidelines, TNN, Oct 22, 2013, *available at* <http://timesofindia.indiatimes.com/city/ahmedabad/Surrogacy-stakeholders-draw-up-guidelines/articleshow/24504259.cms> (last visited Feb. 15, 2015).

<sup>92</sup> *Supra* note at 5, § 34 (1) (3).

entering into surrogacy agreement, along with an illustrative enumeration of such legally approved reimbursements, the legal, administrative procedures including stamp fees, bond paper, notary, witness, signatures among such other particulars as necessary. Another unaddressed issue in the ART Bill is the legal counseling provided for surrogate mother it is suggested that there should be Legal counseling provided for surrogate mother, this helps forming better informed consent, better decision making on the part of surrogate mother. A provision to this effect may be included under the ART Bill. It may be noted that these suggestions are not exhaustive but a few concerns submitted for consideration and incorporation as feasible in the present draft of ART Bill to make the surrogacy agreement better along with the enactment of the ART Bill may bring effective regulation and uniformity in practice.