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**COMMERCIAL SURROGACY: LEGAL, SOCIAL AND ETHICAL CONCERNS.**

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**I. ABSTRACT:**

The increasing cases of infertility and the inherent human desire to procreate have led to an unprecedented growth in the usage of assisted reproductive technologies around the globe. With the advent of assisted reproductive technologies surrogate parenting has risen sharply in recent years. Cross-border commercial surrogacy arrangements are on the rise due to globalization of travel and communications. International commercial surrogacy has earned a fair share of critics and supporters. On the one hand critics have raised concern about the ethical, social, medical and legal implication of the same on women who sell their wombs to earn livelihood in commercial surrogacy arrangements. On the other hand, it has been applauded by supporters of procreative rights and contractual individualism. In this backdrop, the paper proposes to study and discuss various issues relating to the basic rights of parties who are involved in commercial surrogacy. The paper intends to discuss whether commercial surrogacy enables exercise of procreative right or undermines reproductive justice. Secondly, the rights of surrogate children, issues of identity and parentage will be discussed. Thirdly, the rights the surrogate mothers in the context of potential health risks imposed by assisted reproductive techniques will be analysed. Lastly, the paper intends to highlight the need for a concrete legal framework in reference to the recent developments to protect the rights of parties involved in the commercial surrogacy.

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With the advent of assisted reproductive technology, surrogate parenting has risen sharply in recent years. Surrogacy, one type of Assisted Reproductive Technique (ART), is the "process of carrying and delivering a child for another person".<sup>1</sup>Due to advancement in technology allowing for gestational surrogacy, the demand for surrogate services has increased as a result of an expanding global market for commercial surrogacy.<sup>2</sup>Regulations and costs for surrogacy vary worldwide and with globalization of travel and communications, cross-border arrangements have been on the rise.<sup>3</sup>At global level commercial surrogacy is a booming business despite of the fact that many countries prohibit surrogacy arrangements. The market for international surrogacy is estimated to be six billion dollars annually worldwide.<sup>4</sup> In India ART service providers, hospitals and clinics seem to be actively vying to become the most favoured destination for commercial surrogacy. India has come to be seen as one of the most popular international surrogacy hub, providing quality fertility services for low cost<sup>5</sup> and most legal protections for intended parents. <sup>6</sup> In 2002, India became the first country to explicitly allow commercial surrogacy.<sup>7</sup>Moreover, the Indian government provides tax breaks to hospitals treating international patients.<sup>8</sup>Additionally, Indian women are considered more trustworthy because they are less likely to smoke, drink alcohol, or

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<sup>1</sup>Definition of Surrogacy, Black's Law Dictionary (9<sup>th</sup>edn. 2009). The word "surrogate," is rooted in Latin "Subrogare" (to substitute), which means "appointed to act in the place of". See Amy M. Larkey, "Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements", 51*Drake L. Rev.* 608 (2003). Also see Lars Noah, "Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation", 55 *Florida L. Rev.* 609 (2003). Also see Ruby L. Lee, "New Trends in Global Sourcing of Commercial Surrogacy: A Call for Regulation" 20 *Hastings Women's L.J.* 275 (2009).

<sup>2</sup>Usha Regachary Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India" 39 *Cumb. L. Rev.* 15 (2009).

<sup>3</sup>Joseph Chamie and Barry Mirkin, "Surrogacy: Human Right or Reproductive Exploitation?". Available at: <http://yaleglobal.yale.edu/content/surrogacy-human-right-or-reproductive-exploitation>. (Last visited on March 15, 2017)

<sup>4</sup>*Ibid.*

<sup>5</sup>Scott Carney "Inside India's Rent a Womb Business". Available at: <http://www.motherjones.com/politics/2010/04/surrogacy-tourism-india-nayna-patel/> (last visited on March 15, 2017).

<sup>6</sup>*Supra* note 3 at 17.

<sup>7</sup>G. Pascal Zachary, "Most Likely Industry Finds It Can't Resist Globalization's Call-Exporting-Human Sperm is a Fast-Growth Business, Banks in Denmark, U.S.", 1 *Wall St. J.* 234 (2000).

<sup>8</sup>Françoise Baylis & C Mcleods (eds.), *Transnational Commercial Contract Pregnancy in India*, 266 (Oxford, Oxford University Press, London, 2014).

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engage in drug use due to cultural and religious norms.<sup>9</sup> Some fertility clinics are even located in dry cities like Anand in Gujarat. Although there are no accurate figures for the number of individuals who travel to India for ARTs, including surrogacy, it is estimated that the surrogacy business alone is worth \$445 million.<sup>10</sup>

**III. PROCREATIVE RIGHT VERSUS REPRODUCTIVE JUSTICE:  
HUMAN RIGHT OR EXPLOITATION:**

The question, whether international commercial surrogacy should be viewed as a basic human right enabling procreation or as a potential tool of exploitation, has no clear answer.<sup>11</sup> Supporters of international commercial surrogacy consider it to be a fundamental human right, consistent with the freedom of contract, individualism and procreative right. Surrogacy empowers women to choose to participate and gain financial compensation for their valued service. It also permits otherwise childless men and women to have children. On the other hand, critics argue that surrogacy, also known as “baby outsourcing,” constitutes exploitation of women, especially poor, encouraged to provide wombs-for-rent. Furthermore, when the only motivation is money, surrogacy is apprehended to have negative health related and social consequences for women.<sup>12</sup>

Supporters of ART and cross border surrogacy argue that an individual has the right to procreate and ART helps in the advancement of this right. The proponents of the procreative rights of individuals use the principle of bodily integrity and autonomy to validate their stance, however critics counter the claim by pointing out that the right to procreate does not guarantee infertile persons the right to conceive with the assistance of reproductive technologies and reproductive

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<sup>9</sup>Lindsey Coffey, “A Rights-Based Claim to Surrogacy: Article 23 of the Convention on the Rights of Persons with Disabilities”, 20 *Mich. St. U. Coll. L. Int'l L. Rev.* 260 (2011-2012).

<sup>10</sup>Law commission of India, “288th Report on Need to Regulate Assisted Reproductive Technology Clinics and Protection of Rights and Obligations of Parties to surrogacy” (2009).

<sup>11</sup>*Ibid.*

<sup>12</sup>*Supra* note 4.

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collaborators.<sup>13</sup> Similarly, the argument of contractual autonomy and individualism<sup>14</sup> has been raised in support of commercial surrogacy, which states that the individuals have the right to enter into a contract and freely trade with the female body capability for reproductive labour to provide services as the surrogate mother does, on the other hand stands the communitarian perspective<sup>15</sup> of human rights, which states that a person possesses certain unalienable rights and the status granted to them by virtue of their birth as human being cannot be traded away by virtue of individual contract, as it affects the status of other individuals as well.<sup>16</sup>

International Commercial surrogacy and an open market for ART raises pertinent questions related to human rights, specifically a concern for reproductive justice<sup>17</sup> in the global market for fertility services. Cross border surrogacy has raised numerous issues relating to the economic status of women involved in surrogacy arrangements, issues of poverty motherhood and how women from different ethnic, socioeconomic, class, and national backgrounds interact in the global surrogacy market.<sup>18</sup>

The reproductive justice framework incorporates the concepts of reproductive rights, social justice and human rights. Reproductive justice proponents try to "achieve the complete physical, mental, spiritual, political, social, and economic wellbeing of women and girls, based on the full achievement and protection of women's human rights."<sup>19</sup>In the context of international commercial

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<sup>13</sup>Lars Noah, "Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation", 55*Florida L. Rev* 643 (2003).

<sup>14</sup> CB Macpherson, *The Political Theory of Possessive Individualism: From Hobbes to Locke* 216 (Oxford University Press, New York, 2011).

<sup>15</sup>Yasmine Ergas "Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy" 27 *Emory Int'l L. Rev.* 117 (2013)

<sup>16</sup>*Ibid.*

<sup>17</sup>Alison Bailey "Responsibility and Identity in Global Justice" *Hypatia* 26(4) 716 (2011). See Loretta J. Ross et al., "The "Sistersong Collective": Women of Color, Reproductive Health and Human Rights", 17*Am. J. Health Stud.* 79(2001).

<sup>18</sup>Seema Mohapatra, "Achieving Reproductive Justice in the International Surrogacy Market", 21(1) *Annals of Health Law* 193 (2012).

<sup>19</sup>*Id.* at 194.

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surrogacy, reproductive justice moves away from the language of choice and autonomy because "the right to choose means very little when women are powerless."<sup>20</sup>

Using a framework reproductive justice allows one to acknowledge that there are differences even among surrogates being hired for their services in developed countries and the ones being hired in developing countries like India.<sup>21</sup> The ideals of autonomy may not be as relevant to such a woman as it may be for a white, middle class woman that liberal feminism often speaks for.<sup>22</sup> Amrita Pande in her research contends that being a surrogate in India or similarly situated countries should be considered a form of labour or work, rather than an autonomous "choice".<sup>23</sup> The international surrogacy market is compensating women surrogates in a manner that allows them to make more income as a surrogate than most other jobs they would be qualified for.<sup>24</sup> This leads to concerns about whether the principle of justice is violated as the economically disadvantaged have a comparatively larger financial incentive to participate in an activity they might otherwise not.<sup>25</sup>

The payments that surrogates receive for carrying a baby often equals four or five times their annual household income. Although the payment is less than in other countries, such as the United States, the sum is significant in the lives of these surrogates. Surrogates state that the income allows them to provide education for their children or to purchase a home.<sup>26</sup> Therefore, Some scholars contend that unregulated use of ART could create and exacerbate inequality amongst surrogates themselves depending upon their right to make an informed choice and their financial condition.<sup>27</sup>

<sup>20</sup> France Winddance Twine, *Outsourcing the Womb: Race Class and Gestational Surrogacy in the Global Market* 112 (Routledge, New York, 2<sup>nd</sup> edn., 2015). He analyzes surrogacy as a form of stratified reproduction. This refers to the concept that certain physical and social reproductive tasks vary based on class, race, ethnic, and global hierarchies.

<sup>21</sup> Amrita Pande, "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker", *35J. of Women in Culture and Society* 974 (2010).

<sup>22</sup> Cyra Akila Choudhury, "Exporting Subjects: Globalizing Family Law Progress through International Human Rights", *32 Mich. J. Int'LL.* 259 (2011).

<sup>23</sup> *Ibid.*

<sup>24</sup> Rev. Phillip C. Cato, "The Hidden Costs of Fertility", *1 St. John's Journal of Legal Commentary* 48 (2005).

<sup>25</sup> Emily Stehr, "International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation" *35 Hastings Int'l & Comp. L. Rev.* 277 (2012).

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

<sup>27</sup> Radhika Rao, "Equal Liberty: Assisted Reproductive Technology and Reproductive Equality" *76 Geo Wash. L. Rev.* 1457 (2007-2008).

**LEX RESEARCH HUB JOURNAL [VOLUME I ISSUE I]****IV. RIGHT OF SURROGATE CHILDREN: ISSUES OF CITIZENSHIP PARENTAGE AND IDENTITY:**

Cross border commercial surrogacy poses a dilemma for governments, religious organizations, surrogates and intended parents, and even the commissioned children themselves.<sup>28</sup> Many legal issues arise with regard to parentage and citizenship and identity of surrogate children in the case of cross border commercial surrogacy. In several cases intended parents in their local jurisdiction have met with an official refusal to recognize the parent-child relationship or to bestow citizenship upon the children born out of cross border surrogacy arrangements.<sup>29</sup> Many instances show that countries intent on curtailing cross-border surrogacy have refused to issue a passport or visa to the child, or bestow citizenship upon the child, and recognize the intended parents as the legal parents of the child.<sup>30</sup>

For instance, the case of Yamadas, a Japanese couple who traveled to India to hire a Indian gestational surrogate, highlights the problems related to cross border commercial surrogacy. After the surrogate gave birth to Manji, a baby girl created with Mr. Yamada's sperm and the egg of a third party, the Yamadas divorced.<sup>31</sup> India refused to allow Mr. Yamada, single father, to obtain a passport for Manji or to legally establish his fatherhood by adopting her. Japan, which does not explicitly ban surrogacy but where the law provides that the gestational mother is the legal mother of a child, were denying to grant citizenship to the child. It was only after an Indian court ordered the government to act expeditiously on Mr. Yamada's request for permission to take Manji to

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<sup>28</sup>*Ibid.*

<sup>29</sup>Kari points, The Kenan Institute for Ethics at Duke University Report on "Commercial surrogacy and Fertility Tourism in India: The Case of Baby Manji" 8 (2009), Available at: <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf> (Last visited on March 20,2017).

<sup>30</sup> Richard Storrow, "The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy", 20 *Am. U. J. Gender Soc. Pol'y & L* 594 (2011-2012).

<sup>31</sup>Jenni Millbank, "The New Surrogacy Parentage Laws in Australia: Cautious Regulation or Brick Walls?" 35 *Melb.U.L. Rev.*161 (2011).



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Japan, that the Indian government issued a transit document,<sup>32</sup> and Japan issued a one-year visa to Manji on humanitarian grounds.<sup>33</sup>

Another case of the Balaz twins<sup>34</sup>, commissioned by German citizens Jan Balaz and his wife Susan Lohle in India by way of surrogacy, reveals the consequences international commercial surrogacy. This case is emblematic of the filiation and citizenship issues that the international market in commercial surrogacy raises.<sup>35</sup> In this case on the birth certificate of the twins the names of father Jan Balaz and the gestational mother instead of Susan Lohle appeared. Indian court held that because they were born on Indian soil to an Indian mother they were Indian citizens.<sup>36</sup> The court decided that the gestational mother was the natural and only the mother.<sup>37</sup> Adoption was thought to be a possible solution to establish parentage. However, in India it amounted to a problem as adoption is reserved for children who are "orphans abandoned or surrendered".<sup>38</sup> Moreover, as India is a party to the Hague Convention on Inter-Country Adoption (the "Adoption Convention"), all cross-border adoptions must comply with Convention rules, including a mandatory requirement that includes that the adoption agency must certify that no adequate national placement of the child is possible—and a ban on pre-adoption contact between the birth mother and the intended adoptive parents.<sup>39</sup> This made it impossible for Jan Balaz to adopt as he was the natural father, and similarly Susan was disqualified from adoption. Stuck between two diverse legal systems the twins were claimed to be Indian citizens against the arrangement of surrogacy. However, after an extended legal battle and compromises between the two countries the twins were granted exit documents from India and entered Germany.

Similarly, in the case of a gay couple Yonathan and Omer, who came to Mumbai and had a surrogate child baby Evyatar. The gay couple took son Evyatar to Israel. Israeli government had required

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<sup>32</sup>*Supra* note 16.

<sup>33</sup>*Supra* note 18.

<sup>34</sup>*Supra* note 21 at 120.

<sup>35</sup>*Id.* at 118.

<sup>36</sup>*Balaz v. Anand Municipality*, AIR 2010 Guj 21.

<sup>37</sup>*Id.* at 17.

<sup>38</sup>Central Adoption Resource Agency Guidelines Governing the Adoption of Children, 2011. Available at <http://adoptionindia.nic.in/guideline-family/Part I.pdf> (Last visited on March 17, 2017).

<sup>39</sup>Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption, May 29, 1993 (Entered into force on May 1, 1995).

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them to do a DNA test to prove their paternity before the baby's passport and other documents were prepared.<sup>40</sup>

In this context, Richard Stowrow contends that there a powerful flavour of the new illegitimacy created by the use of ART in cross border commercial surrogacy.<sup>41</sup>The Hague conference report suggested that one of the many serious problems occurring internationally as a result of the increasing use of international surrogacy arrangements is the uncertain legal parentage and nationality of the children born. Surrogate children are “marooned, stateless and parentless”.<sup>42</sup>Apart from the issue of citizenship and parenthood, the children born out of anonymous donation of sperms and eggs are also deprived of exposure to those with whom they have biological ties, this can detrimentally affect the right of the child to know his biological roots.<sup>43</sup>

Moreover, India being a signatory to the Convention on Rights of Child of the is placed under the obligation under Article 7 of the Convention to ensure protection of rights of the child to identity on birth, which is being denied to surrogate children in the absence of a national law to govern surrogacy arrangements. Furthermore, recent cases, such as the of Baby Gammy reported in Thailand which gained international attention ,where an Australian couple left behind a disabled twin born to a Thai surrogate mother that prompted a ban on commercial surrogacy in Thailand<sup>44</sup> raises an apprehension related to the future of these children being put in jeopardy. A similar case was reported in India where an Australian couple rejected their biological child based on the baby's gender born to an Indian surrogate mother, but took home its twin.<sup>45</sup> Such incidents raise a concern about the future of the children commissioned by international surrogacy. These incidents also

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<sup>40</sup>Madhavi Rajadhanyaksaha,” Israeli Gay Couple get a Son in India” *Times of India*, Nov.18, 2008. Available at: <http://timesofindia.indiatimes.com/india/Israeli-gay-couple-gets-a-son-in-India/articleshow/3724754.cms> (Last visited on March 20, 2017,).

<sup>41</sup>*Supra* note 21.

<sup>42</sup>See Case of foreign surrogacy, In *Re X &Y*, EWHC [Fam. 3030 (10) Eng] [2008].

<sup>43</sup>Emma Batha “International surrogacy traps babies in stateless limbo” *Health News*, Sept. 18, 2014. Available at: <http://www.reuters.com/article/us-foundation-statelessness-surrogacy-idUSKBN0HD19T20140918> (last visited on March 23, 2017).

<sup>44</sup>Associated Press, “Australian couple reject surrogate baby in India on gender, take home its twin Sibling” *The Indian Express*, Oct. 9, 2014. <http://indianexpress.com/article/world/world-others/australian-couple-reject-surrogate-baby-in-india-on-gender-take-home-its-twin-sibling/?SocialMedia> (Last visited on March 20, 2017).

<sup>45</sup>*Ibid.*

suggest that there is a possibility of ART and international commercial surrogacy being used for purposes other than creating a family. It can be used as a potential tool to create a child of a specific gender or for a specific medical purpose. Supporters of ART and International commercial surrogacy emphasize on the rights of intended parents. They often cite rights to reproductive autonomy, the right to found a family, and the right to respect for family life, but its interaction with other human rights, particularly the rights of the child, is often ignored.<sup>46</sup>The propagators of such arguments fail to look at the Child's right of protection against exploitation under Article 2 of the Optional<sup>47</sup>As Professor Tobin writes, arguments which claim commercial surrogacy should *not* be considered child-selling are ultimately unconvincing. It incorrectly assumes that the payment merely relates to gestation, rather than the transfer of the child. But the reality is that surrogacy contracts are mixed-purpose contracts, including both payment for service (the gestation) *and* the transfer of the child. The second stands in direct conflict with the protocol as stated above.<sup>48</sup>Thus an unregulated market of ART and cross border commercial surrogacy jeopardizes the basic human right of the child to citizenship, parenthood and identity.

## **V. SURROGATE MOTHER'S RIGHT TO HEALTH:**

ART allocates most of the health risks to women. Highest risks arise from egg retrieval and surrogacy.<sup>49</sup> Fertility treatments increase the odds of a multifocal pregnancy, which poses a significant risks to maternal and foetal health and other safety issues have been identified, such as birth defects associated with particular ARTs.<sup>50</sup> Drugs that induce ovulation by first stimulating the follicles and then releasing the mature ova provide the cornerstone for all forms of ART.<sup>51</sup>Such

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<sup>46</sup>Philip Marquet, "International Commercial Surrogacy in the Post-Gammy World" Right Now Human Rights in Australia. Available at: <http://rightnow.org.au/topics/children-and-youth/international-commercial-surrogacy-in-the-post-gammy-world/> (Last visited on March 20, 2017)

<sup>47</sup>Article 2 of Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> (Last visited on 19 March 20, 2017)

<sup>48</sup>*Ibid*

<sup>49</sup>Lisa C. Ikemotot, "Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services", 27 *Law & Ineq.* 277 (2009).

<sup>50</sup>*Supra* note 18 at 608.

<sup>51</sup>John A. Collins & Edward G. Hughes, "Pharmacological Interventions for the Induction of Ovulation", 50 *Drugs* 481 (1995); Symposium, "Frontiers in Ovulation Induction", 172 *Am. J. Obstet. & Gynecol.* 725 (1995). See *supra* note 18 at 609.

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drugs are used to increase the odds of artificial insemination<sup>52</sup> and also administered in preparation of IVF.<sup>53</sup> In the US, surrogates are given no more than two embryos for their safety, however, in India; surrogates are implanted with more than five embryos in order to increase the chances of pregnancy. Implanting large number of embryos increases health risks for babies and the mother. There are increased chances of post-partum depression of surrogates are the child that grew in mother's womb.<sup>54</sup> There have been incidents where surrogate mothers have lost their lives by developing sudden complications during the period of gestation.<sup>55</sup> Similarly, in some cases young egg donors have died right after egg donations.<sup>56</sup> Low educational levels, Poverty, marginalization in job markets, patriarchal social and family structures and the financial gain through surrogacy become a key push factor.<sup>57</sup> These women can be exploited by the agents working for commissioning parents. Thus surrogacy ranges from being a financial opportunity to potential tool exploitation. Many argue that the payment for bodily services dehumanizes the surrogate mother and exploits her reproductive organs.<sup>58</sup>

Moreover, Surrogate mothers are kept in isolation from families and allowed to meet families in weekends, which are against the human rights.<sup>59</sup> Another major concern in this context includes the standard of measures undertaken in order to protect the health of the surrogate mothers and egg donors involved in such an arrangement in the back drop of a legal vacuum.<sup>60</sup> Due to a

<sup>52</sup>*Id.* at 611. Also see Aydin Arici et al., "Evaluation of Clomiphene Citrate and Human Chorionic Treatment: A Prospective, Randomized, Crossover Study During Intrauterine Insemination Cycles", 61 *Fertility & Sterility* 316(1994).

<sup>53</sup>*Supra* note 18 at 612. See Salim Daya et al., "Follicle-Stimulating Hormone Versus Human Menopausal Gonadotropin for in Vitro Fertilization Cycles: A Meta-Analysis", 64 *Fertility & Sterility* 347(1995).

<sup>54</sup>Anu, Pawan Kumar, Deep Inder, and Nandini Sharma "Surrogacy and Women's Right to Health in India: Issues and Perspective". Available at: [http://www.ijph.in/temp/IndianJPublicHealth57265-942131\\_001542.pdf](http://www.ijph.in/temp/IndianJPublicHealth57265-942131_001542.pdf). (Last visited on March 20, 2017).

<sup>55</sup>Editorial, "Surrogate mother dies of complications", *Times of India*, May 17, 2012. Available at: [http://timesofindia.indiatimes.com/city/ahmedabad/Surrogate\\_mother\\_dies\\_of\\_complications/articleshow/13181592.cms?referral=P](http://timesofindia.indiatimes.com/city/ahmedabad/Surrogate_mother_dies_of_complications/articleshow/13181592.cms?referral=P) (Last visited on March 19, 2017). Also see "Surrogate mother died after birth", Also see News in English From Norway, Apr. 2, 2013. Available at: <http://www.newsinenglish.no/2013/04/02/surrogate-mother-died-after-birth/> (Last visited on March 17, 2017).

<sup>56</sup>Pritha Chatterjee and MayuraJanwalkar, "The great Indian egg bazaar" *The Indian Express*, February 9, 2014.

<sup>57</sup>*Ibid.*

<sup>58</sup>*Ibid.*

<sup>59</sup>*Ibid.*

<sup>60</sup>Frederik Joelving "Surrogate mothers in India Unaware of risks" *Health News*, Mar.2,2015. Available at: <http://www.reuters.com/article/us-surrogate-mothers-india-idUSKBNOLY1J720150302> (Last visited on March 20, 2017).

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complete absence law regulating surrogacy, there is no concrete payment structure for surrogate mothers. They don't even get a copy of the written contract which is signed between surrogate mother the commissioning parents and fertility physicians<sup>61</sup>, they are unaware of the terms of the contract.<sup>62</sup> Thus in order to protect surrogate mothers from being exploited and to safeguard their right to health, there is an immediate need to regulate ART and cross border commercial surrogacy in India.

### **VI. NEED FOR A CONCRETE LEGAL FRAMEWORK TO REGULATE ART AND COMMERCIAL SURROGACY:**

In India there is no of legal framework to regulate this expanding business of fertility services.<sup>63</sup> Only piecemeal regulations and guidelines exist currently which have created more confusion than providing clarity. Thus it has become imperative to have a well-structured legal regime to regulate the use of such services and ensure that the parties to such arrangement are well protected by law and the health of the surrogate mothers is not jeopardized at the altar of global fertility market. The unregulated market for ART and commercial surrogacy may give rise to in numerous legal conflicts given the rising practice of gamete donation and commercial surrogacy in India. The surrogates and the intended parents, both face the fear of the contract being entered into by them, having no legal enforceability and being completely at the mercy of the judicial interpretation. In the light of the above stated legal vacuum, the Supreme Court of India asked the government to bring commercial surrogacy within ambit of law.<sup>64</sup> Consequently, The Surrogacy (Regulation)

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<sup>61</sup>PTI, "Lack of legal framework harming surrogate mother and child", *The Indian Express*, 17 July 2013. Available at: <http://indianexpress.com/article/india/india-others/lack-of-legal-framework-harming-surrogate-mother-and-child/> (Last visited on March 17, 2017).

<sup>62</sup>Douglas Pet, "Make a Baby as Fast as You Can". Available at: [http://www.slate.com/articles/double\\_x/doublex/2012/01/reproductive\\_tourism\\_how\\_surrogacy\\_provider\\_planethos\\_pital\\_speeds\\_up\\_pregnancies\\_and\\_lowers\\_costs\\_.2.html](http://www.slate.com/articles/double_x/doublex/2012/01/reproductive_tourism_how_surrogacy_provider_planethos_pital_speeds_up_pregnancies_and_lowers_costs_.2.html) (last visited on March 20, 2017).

<sup>63</sup>National Guidelines for Accreditation, Supervision and Regulations in ART clinics in India 2005. Available at: [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm) (last visited on March 21, 2017).

<sup>64</sup>Section 32 of The Surrogacy(Regulation) Bill, 2014.

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Bill, 2016 was drafted. The bill allows “altruistic surrogacy “only to needy infertile married Indian couples. Hence, delegitimizing the existing market of commercial surrogacy in India that allowed surrogate services and ART procedure to be used by all, irrespective of proof of marriage, infertility or citizenship. According to the Bill, cases of surrogacy will be examined by a National Surrogacy Board and State Surrogacy Board and other “appropriate authority”<sup>65</sup>As per the draft, commissioning couple must be Indian citizens and married for at least five years with at least one of them being infertile. The surrogate mother has to be a close relative who has been married and has had a child of her own. It further prohibits payment other than medical expenses and makes taking of surrogacy fee and advertisement of surrogacy illegal and punishable with hefty fine up to 10 lakhs, punishable with imprisonment up to 10years.<sup>66</sup> The bill is yet to be deliberated upon by the houses and if it is passed it will regulate surrogacy and ART procedures in India.

### **VII. CONCLUSION:**

Usage of ART and cross border commercial surrogacy ranges from being a tool to enjoy the right to procreate to being a medium of human exploitation. In the light of the above mentioned issues it imperative to ensure protection of basic human rights of the parties involved in such commercial arrangements by providing a well-structured legal regime to regulate the use of such services and ensure that the parties involved are not exploited. This would protect the basic rights of the commissioned children and surrogate mothers from being violated in the global fertility market.

### **SUGGESTIONS**

In the light of the above, the author in intends to suggest the following measures to regulate this sector:

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<sup>65</sup>Express News Service, “No commercial surrogacy, only for needy Indian couples, Govt tells SC” The Indian Express, Mar. 6, 2017. Available at: <http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/> (last visited on March 20,2017).

<sup>66</sup>*Ibid.*

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- Firstly, a concrete legal mechanism should be developed to provide clarity on the enforcement of surrogacy contracts.
- Secondly, the proposed bill should be balanced in its approach. As complete ban on commercial surrogacy may lead creation of an underground market in India which can detrimentally affect the health and rights of surrogate mothers.
- Thirdly, the bill should legalize altruistic surrogacy and make commercial surrogacy conditional, subject to approval of appropriate authorities based reasonable parameters to be determined by government/panel.
- Fourthly, a mode of compensation for surrogates should be put in place to eliminate the middlemen (the ART clinics, ART banks and surrogacy agents) amongst whom the money exchanges take place often leading to the exploitation of the gamete supplier or the service provider(surrogate).
- Fifthly, an optimal framework should be created keeping in mind individual procreative liberty and reproductive equality. It would minimize the prevalence of black markets in this sector. Moreover, a legalized and regulated surrogacy industry would also provide adequate protections for all parties, sets standards of practice, guarantee oversight and control of the industry, and most importantly provide a forum for redressal of abuses and exploitation in such national and international arrangements. Also, the parties can contract to provide additional benefits, such as health insurance coverage and pre and post-natal care.
- Lastly, enacting a clear legal framework that recognizes surrogacy contract legally enforceable would also address some of the concerns in the context of rights of the child under Article 7<sup>67</sup> of the Convention on the Rights of the Child 1990, which states that "immediately after birth" a child shall have the right to acquire a nationality and to be known and cared for by her/his parents. The Convention on Child rights extends also protection of the child's right to be free from arbitrary or unlawful interference with her privacy, family, or her right not to be separated from her parents. This is particularly

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<sup>67</sup>Convention on the Rights of Child, 1990.

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relevant in cross border commercial surrogacy arrangements where conflicts of laws or lack of law jeopardizes the right of the child. Thus an effective legislation which is balanced in its approach is immediately needed to ensure protection of rights of all parties involved in such cross border transactions.