

Commercialisation Relating to the Womb for Rent in India: A Case Study of Gujarat

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Abstract - Motherhood and having a child is a boon for every women and parenthood a blessing for people is unfortunately not bestowed on every -one. It can be any mode by natural process, adopting or in the process of surrogacy. The development in the field of medical science, things have changed and the popular methods of artificial reproduction “SURROGACY”. The position of surrogacy at Indian and world level and the study talks about laws relating to surrogacy in India. Concerns were expressed that surrogate mothers were being forced to sell their motherhood, which was being exploited by a small group of medical professionals. The government's change to a prohibition in 2015 was reportedly to stop surrogate moms being exploited. As a result, media reports highlighted a number of surrogate moms who objected to the government's shift in policy, implying a conflict of interest between the government and the surrogates. The government's shift in position on surrogacy was ostensibly intended to end exploitation, but we can't begin to comprehend what exploitation includes unless we first have a good understanding of who is being exploited and where this exploitation originates from. The major goal of this study is to establish knowledge of the surrogate construct and, in turn, to comprehend how interwoven legal, sociological, medical, and economic frameworks define the possibilities of exploitation and their regulation. In nations like India, surrogacy has also turned into a lucrative industry, raising several issues that have sparked political controversy. Legal experts have looked into the contractual and jurisdictional difficulties while feminists have debated the alienability of women's bodies. The surrogacy industry is sizable and expanding. There are many of prospective parents who have the means and the desire to pay a different mother to give birth to their children. In this regard, one of the important components of this paper's attempt to comprehend the surrogate's construct in Gujarat State is the topic of the surrogate's vulnerability to possible exploitation. Before we examine how this applies more particularly to the topic of surrogacy, we must first grasp the relationship between the law, vulnerability, and the

danger of exploitation. Issues including but not limited to legal which have arisen with the concept of surrogacy have also been discussed. This research paper gives bird eye view highlighting the Surrogacy Act 2021 and the recommendations given and insight into the concept of surrogacy which has become a miracle for the ones who are unable to have an offspring. It comes out as one of the most wondrous achievements in the fields of artificial reproduction, which have been in practice since not today but ancient times.

Index Terms - Motherhood, Gestational Surrogacy, Golden Triangle of Fundamental Right, Artificial Reproduction, Act of 2021.

INTRODUCTION

Change is consistent but one thing that remains unchanged is the women's ability to give birth, eras change, time change but in the ancient times as well as today only a woman possesses the ability to procreate. The institution of marriage and family not only in ancient times but today as well are given primary importance and considered significant. Marriage is a union of two people via which a new family comes into existence but a family is deemed complete with the birth of a child only. A child is not only necessary for the completion of a family but also for the continuation of the family line and the continuation of the life cycle on Earth.

To have a child is every couple's desire and is a universal concept that fills one's life with happiness. Not having a child is sometimes a big issue in the families and not being able to procreate sometimes can become the reason for the breakdown of matrimonial ties. Still due to some conditions arising due to biological or psychological constraints, prevents a woman from giving birth to her own child. A huge part of society is not able to reproduce. As per WHO it is

estimated that between 48 million couples and 186 million individuals live with infertility globally .In developing countries, it is found that every four couples one is affected by infertility . It has become a global problem.

CONCEPT OF COMMERCIALISATION OF SURROGACY

The word surrogacy means substitute. Surrogacy is an arrangement wherein a woman often termed as ‘surrogate’ agrees to carry the child for another person/s who is the genetic parent of the child. In simpler terms, the surrogate mother is a substitute for the biological mother. Here it can also be stated as a woman providing womb to another. Surrogacy word has its origin traced to the Latin term surrogatus which means a substitute, a person acting on behalf of another, a woman acting as a substitute for another. Herein a woman agrees to carry a child for an infertile couple/ intended woman.

Surrogacy has become an attractive alternative for couples who cannot have children through artificial reproduction and in vitro fertilization. It has become a globally recognized concept. It allows parents to have all the parental rights over the child even if the child has been carried by another woman.

According to Merriam Webster Dictionary ‘the practice of serving as surrogate mother’

As per Cambridge Dictionary ‘the action of a woman having a baby for another woman who is unable to do so herself’

According to Collins Dictionary ‘is an arrangement by which a woman gives birth to a baby on behalf of someone who is physically unable to have babies themselves, and then gives the baby to that person.

According to Artificial Reproductive Technique guidelines defined surrogacy as ‘an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, intending to carry it to the term and hand over the child to the person or persons for whom she is acting as a surrogate’ .

TYPES OF SURROGACY

There are different kinds of surrogacy even though the medical process can be a difficult one the difference in

surrogacy can range based on who will be genetically related to the baby etc.

Surrogacy can be divided based on:

Genetic Relationship – Traditional v/s Gestational

- Traditional Surrogacy: It is also called straight surrogacy. In traditional surrogacy, surrogate mother is genetically related to the child whereas the intended mother is related to the child legally and socially. In traditional surrogacy, the embryo is created using the surrogate’s egg and the sperm of either the donor or the intending father (commissioning father). The Surrogate’s egg is inseminated either by artificial insemination or a less used natural method or via in vitro fertilization or intrauterine insemination. Surrogacy where the sperm of the intended father is used to fertilize the egg of the surrogate is called partial surrogacy.
- Gestational Surrogacy: In this type of surrogacy, both the egg as well as the semen is obtained by the intending couple or the donor/s (either of sperm or egg or both) and the result also called the embryo is implanted in the surrogate. Here the surrogate is not genetically linked to the child. This type of surrogacy is also called Full/Total Surrogacy. It is also called host surrogacy.

And over the period, gestational surrogacy has become more popular than traditional surrogacy though through-out most history traditional surrogacy was in use.

The glaring difference between both types of surrogacies is the genetic relation of the surrogate mother to the child. In gestational surrogate mother is not genetically relayed to the child whereas, in traditional surrogacy, the surrogate mother is genetically related to the child.

Commercialization – Compensated/Commercial (Profit) v/s Altruistic (Non-Profit)

- Compensated/ Commercial: Herein the surrogate is given the money beyond that of the reasonable pregnancy expenditure; she is paid beyond for carrying the child. She is paid for her services of gestation.
- Altruistic: Financial compensation is not provided it usually takes place between the family members or relatives or friends. Though a reasonable

amount relating to expenditure during pregnancy may be taken care of nothing beyond is given. It is done more out of love than earning profit.

Where it is Completed – Domestic Surrogacy v/s International Surrogacy

Surrogacy also takes place by going to different jurisdictions and international borders

- Domestic Surrogacy: every country has different laws regarding surrogacy, therefore, in case if one's country allows surrogacy either altruistic or commercial, they can have the process done in their own country taking into consideration other factors if any as well. Here the process of surrogacy takes place in one's own country.
- International Surrogacy: when one opts to have the process of surrogacy taking place in another country due to any reason it is called international surrogacy.

Who will help? – Agency v/s Independent Surrogacy

- Agency Surrogacy: Herein an agency or a service is involved along with the intended parents and the surrogate and they look into everything from the beginning till the end including all the compensations, parentage, etc.
- Independent Surrogacy: The intended parents and the surrogate handle everything themselves and just have a surrogacy lawyer and a fertility clinic to complete the process.

REVIEW OF LITERATURE

- Surrogacy seems to be an emerging technology, but it has its thesis in Bible as well. During Biblical times, one Sarai was there who was infertile and not able to conceive her child. Therefore, an agreement was made in the Book of Genesis wherein she asked her maid Hagar to sleep with her husband, Abram. Hagar conceived and gives birth to Ishmael, Abram's child. This is the traditional method of surrogacy wherein the intended mother is not related to the child in any way but claimed it as one with her husband. In the past decade, there have been many instances where infertile couple persuaded their relatives, friends, or strangers to help them in having a baby.

- In 1976, Noel Keane, the father of surrogate parenting, drafted the first legal surrogacy agreement and later on establishes an infertility centre in the US.
- In July 1978, Louise Brown, the world's first in-vitro fertilization baby was born. IVF is also known as the test tube method wherein a woman's eggs are removed from her ovaries and fertilized with male sperm in laboratories. After successful fertilization, an embryo is formed which got transferred into her wife's uterus.
- In the same year on October 3, after 67 days of Louise Brown's birth, India's first IVF baby Kanupriya was born. Kanupriya, also known as Durga, was born with the help of Dr. Subhas Mukherjee and his two colleagues in Kolkata.
- In 1980, the first paid contract was formed between Ms. Elizabeth Kane and an infertile couple wherein through artificial insemination Ms. Kane agreed to carry a baby for the couple for \$10,000. But later on, Ms. Kane regretted her decision and become an advocate against surrogacy. She also mentioned her experiences in a book called Birth Mother.
- In 1983, the first successful pregnancy with the help of egg donation took place. In this, the intended mother can conceive a child with the help of other women's eggs.
- In 1985, the first gestational surrogacy took place in which Shannon Boff decided to carry a child for Sandy and Elliot as Sandy undergone hysterectomy, due to damage in her fallopian tubes by a childhood disease. This method eventually reduces the chances of having a biological connection between the surrogate mother and the child.
- In 1986, the first time the US government faced a legal hurdle in surrogacy. A surrogate mother was appointed by an infertile couple for \$ 10000 in 1984 to give birth to their child. But when the child was born, she refused and retained the child's custody. The matter went to court and for 2 years the custody battle for Baby Melissa goes on. In 1986, the New Jersey Supreme court held that the surrogacy agreement was illegal and granted parental rights to the biological father and also granted visitation rights to the surrogate

mother. After this case, the US comes up with stricter surrogacy laws.

- In 1990, gestational surrogate Anna Johnson refused to hand over the baby to intended parents. The couple sued her for custody and the court granted the custody of a child to them. While, upholding their custody rights also stated that the mother of the child is the one who intends to create and raise such child as per the surrogacy agreement.
- In 1998 Special Program of Assisted Reproduction (SPAR) was formed. It advances surrogacy at another level by allowing HIV-positive intended parents to have their natural offspring without transmitting them any such disease.
- Since then, surrogacy came a long way. As time passes use of traditional surrogacy has been minimized or completely vanished by society. The reason behind that it left a biological connection between the surrogate mother and the child, which provides a kind of insecurity among the intended parents. Also, the child born through such a traditional method was considered illegitimate by society considering it as an immoral act. This leads to an increase in gestational surrogacy wherein the child is genetically related to the husband and wife only and the surrogate mother works as a carrier of the couple's embryo only.
- Over the years, we experienced certain events in surrogacy that marked history in surrogacy. In the year 2001, we saw a grandmother acting as a surrogate mother for her daughter. In 2005, a 58-year-old grandmother gave birth to her twin granddaughters.
- Nowadays it has become a very common practice wherein friends, relatives, parents, siblings helped infertile couples to conceive a baby for them. Today, with rapid advancement in different kinds of surrogacy, it becomes very easy for individuals and intended couples to fulfil their dream of starting a family.

PREREQUISITES RELATING TO CONCEPT OF SURROGACY

Surrogacy comes as a ray of hope in every such person's life who is struggling to start their own family due to one or another reason. Surrogacy is not only limited to infertile couple and now there are many reasons why people including fertile choose a surrogate to expand their family .

Infertility- It is one of the main reasons why couples opt for surrogacy. The complication in Pregnancy happens when the human reproduction process does not work accordingly. Following are the steps of the process :

- 1 A mature egg has to be released by one of the two ovaries.
- 2 The mature egg has to be picked by the fallopian tube.
- 3 The sperm cells should travel through the cervix, with the help of the uterus to reach the fallopian tube.
- 4 The sperm and the mature egg should meet, within six days after sex, for the fertilization of the egg.
- 5 The fertilized egg should move down through the fallopian tube to reach the uterus.
- 6 The fertilized egg should attach to the lining of the uterus which leads to implantation.

But there can be many reasons because of which the process can be disrupted.

Some common factors for female infertility can be:

- Ovulation disorders
- Damaged or blocked fallopian tubes
- Endometriosis
- Uterine or cervical issues

Some common factors for male infertility can be :

- Varicocele
- Retrograde ejaculation
- Immunologic infertility
- Hormonal imbalances
- Certain medications

Age- Age plays a vital role in pregnancy. Every woman is born with limited no. of eggs and by the time she reaches 35 or 40 she is left with fewer eggs that are not able to fertilize with man's sperm easily. Although many of them able to conceive with the use of fertility treatments. But, despite that majority of them tend to use surrogacy as an option.

Single Individual- For single women, due to inability to carry the baby to full term. For a single man despite the fact, he can be fertile or not. Both the intended parents need to use an egg or sperm donor for gestational surrogacy so that the surrogate is not related genetically to the baby.

Same-sex couples- Naturally homosexual couples are unable to conceive a child and often tend to go for surrogacy for completing their family and enjoying their parenthood. LBTQ community has led to a widespread increase in surrogacy.

Medical condition- During pregnancy it's better to avoid any kind of drugs and medical treatments. But that is not possible for everyone. If someone is suffering from such chronic disease, wherein, medication is must or can't hold off the medication for nine months. In that case, such people choose to go for surrogacy.

Past trauma- Many times past pregnancy creates so much emotional as well as physical trauma that they started facing post-traumatic order before the actual pregnancy starts. In such a situation, surrogate mothers are considered the best option.

Surrogacy over adoption- Both options are available with the intended couple and individuals. But, despite that, there are many reasons why the majority of them go for surrogacy and not for adoption. These are:

- Surrogacy provides the intended parents to have a biological connection with the baby which is not possible through adoption.
- In surrogacy, the intended parents can control everything like the surrogate mother, donor, diet, and all. But in the adoption, it depends on the party who gives the child in adoption.
- The adoption process is considered lengthier than surrogacy.

Personal decisions- Sometimes, despite being able to conceive a child they opt for surrogacy because of some personal issues. Many a time, women are much conscious about their career and physique due to which, to avoid pregnancy affecting their career, they went for surrogacy.

PRESENT STATUS IN INDIA

With surrogacy becoming a popular concept among the people around the world it has also dug its claws in the Indian soil among the Indians who are not able or don't want to have their own off-springs. In India, Anand, a town in Gujarat State, Indore, a city in Madhya Pradesh, Pune, Mumbai, a city in Maharashtra State, Delhi, Kolkata, and Thiruvananthapuram are the top locations to look for surrogate moms. In Indore, Pune, Surat, and Anand, private clinics have expanded like weeds. Being a good mother frequently conflicts with being a good worker when one's mother identity is controlled and ended by a contract, making the mother-worker identity a somewhat challenging one to develop. India is one of the places though where there is still no codification of the surrogacy law, although the said subject is a primary topic for discussion and debate not only among the parliament but among the medical bodies like ICMR as well. The then Finance Minister of India wanted India to become a global health center and thus, several steps were taken for the said development. Thus, fertility tourism also shot up. Though gaining popularity it was not before the year 2002, that commercial surrogacy became legalized in India. It was done to promote medical tourism in our country. The practice was also termed as "renting of the womb". This led to a boom in surrogacy in India, where the expense the clinic charges ranges from 10,000 dollars to 28,000 dollars for surrogacy which is quite low as compared to other nations. The draft of National Guidelines of Accreditation, Supervision and Regulation of ART clinic in 2002 was given approval by the government in the year 2005 and were issued which given by ICMR along with other medical bodies as well as the Ministry of Health and Family Welfare and then in 2006 ICMR published the guidelines regarding the surrogacy in India. But these guidelines were not having any sort of back by the legislation; they were not yet a law.

Foreign married heterosexual couples from abroad are the only ones who may commission surrogacy under the 2013 Home Ministry Guidelines (Foreign Division) Foreign Nationals Intending to Visit India for Commissioning Surrogacy & Conditions to be Fulfilled for Grant of VISA. It lays forth specific requirements for the issuance of the proper medical VISA to the foreign intending couple. To secure the legal execution of the surrogacy arrangement, the guideline calls for the intending couple and the

surrogate mother to sign into a properly notarized agreement.

A CASE STUDY OF GUJARAT

The legalization of Surrogacy with the need to codify the concept of surrogacy arose with the cases like Baby Manji Yamada v. Union of India and Jan Balaz v. Anand Municipality .

Gujarat is considered a surrogacy hub for past many years. After 2015, by banning commercial surrogacy, it is still considered as the best place for surrogacy. This is because of the majority of women's interest in being surrogate mothers.

Baby Manji Yamada V. Union of India

- Petition was filed for child's custody under article 32 of the Indian constitution.
- It brought the surrogacy issue for the first time and realized the need to regulate the concept of surrogacy.
- It leads to the formation of Assisted Reproductive Technologies Bill, 2010.
- In this, the court presumed surrogacy as legal and the surrogacy contracts to be valid.
- Various terms and process related to surrogacy was decided first time by the Indian court.

Jan Balaz v. Anand Municipality

- Nationality of a surrogate child is determined for the first time.
- Custody of the child was granted by the inter-country adoption process.
- It was presumed that since there is no law preventing commercial surrogacy, it is legal in India
- It emphasizes the need to bring into force comprehensive legislation concerning surrogacy laws in the Indian subcontinent.
- It conferred the surrogacy capital status on Anand District of Gujarat. Also, through the 228th report of the law commission of India on 5th August 2009, a suggestion for a need for proper legislation for surrogacy was made.

ISSUES AND CHALLENGES RELATING TO CONCEPT OF SURROGACY IN INDIA

Though with surrogacy the problem faced by childless couples can be solved it might lead to some issues with

remain unaddressed and there have been no proper legal provisions and codification for surrogacy in India so far though there are government guidelines including that of ICMR and certain bills which have been amended from time to time, lack of study about the subject has made it difficult to come up with the laws concerning surrogacy.

1. Interest of surrogate mother- Surrogate mothers are an integral part of surrogacy. But in the process, certain aspects are sometimes not taken into consideration in respect of surrogate mothers.

- Attachment of surrogate mother to the child: A woman becomes a mother not when the child is born but when the child is in her womb. The term of nine months is when the mother forms a bond of love with her child. It is a natural feeling to develop when a 'life' is living inside of you. Sometimes the intended parent/s are comfortable choosing a close relative rather than some outsider. This might create several problems. Even if the intended parent/s chooses someone outside of the family- a willing woman for surrogacy, it is not impossible for her to develop a love for the childbearing inside her. She might refuse to hand over the child. The surrogate mother has to give up something she has had growing inside of her for nine months, thus it can get tough for her.

- The exploitation of surrogate mothers: There is a possibility that the surrogate mother might be taken advantage of. It might happen in cases where the surrogate is illiterate or she is unaware of the language the contract is made in. In some cases, she might even not know the clauses of the contract. As per the study of CSR , in 2014, it was stated 88% and 76% of surrogate mothers in Delhi and Mumbai respectively were not aware of the clause of contract they were entering into. Also, the case might be that the surrogacy clinics may get more than what the surrogate mother is receiving. Though the interest of surrogate women may get protected if the surrogacy bill 2020 passes.

2. Procedural/ substantive law in India in terms of surrogacy: In India with the hope for the surrogacy (regulation) bill, 2020 passing our country will have the laws for surrogacy but the main question which arises is that of enforceability. In the bill, though clauses are talking about punishments, what is the procedure that is to be followed for the same is nowhere

mentioned. The bill is substantive in nature and procedural law is missing. It is just like the Indian Penal Code wherein the punishment is defined but the process is not mentioned. There is still no bill like the code of criminal procedure which describes how to enforce the punishments. Just having a substantive bill will not do as people will have no fear regarding its enforceability. Though boards at the state and national level are to be set up, the procedure of how one can complain, etc., is nowhere given.

3. Interest of the child- In any process whatsoever, if a child is involved, he should be the main concern irrespective of any other party involved because somewhere the child is in a more vulnerable position than others. Throughout the process of surrogacy, certain issues pop up concerning the child.
 - Abandoning the child: Intended parent/s may due to any given reason abandon the child which puts the child in the most vulnerable position a newborn infant can be in. In the case of Baby Manji, the intended mother did not keep the child and the intended father could not take the child to Japan as he could not get custody and also, because the child did not have Japanese nationality. Thus, the child would have been left abandoned. Though with time laws and regulations have come up to prevent such miss happenings. But certain things are still unaddressed in our Indian surrogacy bill what if the intended women (divorcee or single) decide to get married and it abandons the child because nothing specific in regards to abandonment is given in the bill. Also, the future partner of the intended woman might, later on, abandon the child. Also, it is unclear what relation will the child share with the male in such instances.
 - Identity/Citizenship of the Baby: The issue of citizenship is another big one as it is quite confusing to place citizenship of the child in case of the child's parent's being of one nationality, surrogate mother's nationality being something else and the birthplace of a child also being different. There arise legal problems as; the child might not be recognized of a certain place because of it being born in another country due to the process of surrogacy, or some other reason. For

example, in the Israeli Gay couple case after the couple's paternity was proven then only the child got their documents including the passport was prepared by the Israeli government. Had the Indian government not banned foreign surrogacy, questions regarding a child's nationality and citizenship would have kept circulating. In some cases, the child might have been left citizenship less. Also, the system in India might have been different from other countries as India didn't provide dual citizenship, thus, leaving the citizenship of the child in question.

- Parent of the child: In the process of surrogacy, there are multiple parties involved. It's not just the parents sometimes the case may be that there are donors other than the surrogate mother. Thus, comes the question of whom does the child belong to? As was have seen in Jaycee B. v. Superior court case. Though five different people were asking for custody, the child was still left motherless. The custody of the child becomes an issue.
- Child's relation and right to the donor/s: In a case where donor/s are involved questions like does the child have right over the donor? Especially in the case where the only single intended parent is there, whether the donor plays the role of the biological parent or is the child one parent short. This problem is still not completely addressed. The laws have talked about the intended parent/s as being biological parents but the rights and role of the donor in a child's upbringing are still not completely clear. Also, the child has the right to know the identity of the anonymous donor when he/she grows up as per article 8 of the UN convention of child's rights.

4. Need for surrogacy contracts

Allowing Altruistic surrogacy is not enough, safeguarding the rights of all the people involved in the surrogacy agreement is also important. There are many reasons for the need for a legally binding tripartite agreement:

First, problems faced by Surrogate Mothers:

- The Indian contract Act, 1872 provides free consent as a necessary ingredient for any contract. But, many times in persuasion of family pressure women decided to act as surrogate mothers.

Therefore, there is a need for psychological screening and legal counselling, wherein the party consenting to be a surrogate mother is able to understand the process and risk involved in it and gives her consent as “informed consent”.

- Sometimes, vague conditions are mentioned in the agreement like they have to do everything that doctors ask them to do, because of which they come up with new things that are not mentioned earlier in the name of “the welfare of child”
- Due to the confidentiality of intended parents’ identities, surrogate mothers are not provided with a copy of such contracts, which leads to the absence of any proof to them about such surrogacy agreement.

Second, problems faced by intended couples/ intended women:

- During the pregnancy period, chances are those surrogate mothers consume such things (drugs, alcohol, weed) that are prohibited and can affect the child’s health. Therefore, having a contract whose breach can lead to legal action against them hindered them from consuming any such thing.
- While the embryo plantation is in process, many times surrogate mother indulges in sexual intercourse as there was a lack of information regarding it. In that case, the child born is considered as the child of her and not of the intended couple. To avoid such a situation, there is a need to mention all that in a legally enforceable contract and the consequences of its breach as well.
- Under special circumstances wherein abortion of the child is necessary but not possible as the consent of the surrogate mother is necessary and at times refusal by her creating problems.

Third, problems faced by the child born out of surrogacy:

- There should be a provision that when any dispute regarding a child’s parentage occurs, it should be dealt with under Custody laws and not under Contract Law. It is because the interest of the child is at stake and it was held by the Supreme Court in one such case that paramount consideration is the welfare of the minor and not the legal rights of this or that person.

- After the child is born, problems arise when the anonymous donor tries to claim right over the child. Absence of provisions regarding it in the agreement lead to face long battle by the child to get his identity.

Surrogacy is a method wherein different peoples are involved and therefore, there is a need for tripartite agreement between the parties involved. A legally enforceable agreement is necessary for the smooth functioning of surrogacy. It also minimizes the role of the state and for any violation; they don’t have to wait for the court to decide. Therefore, there is a need to frame surrogacy contracts in such language that can be understood by all.

5. Applicability of the 2019 Act

The surrogacy Bill doesn’t talk about the applicability which raises many questions. Every religion has its perspective regarding procreation and surrogacy.

- The Christian religion does not forbid surrogacy but raises the question that using a third party for bearing a child means the child will have a third parent which is ethical or not. In Bible, Children are considered as a gift of God, not a right and if you are unable to bear a child it is the choice of God. Using surrogacy against the wish of God is considered a sin but using a surrogate after paying reasonable consideration is viable.
- In the Muslim religion, only a child born naturally is considered a biological child. Many Sunni scholars opposed the practice of surrogacy as they see it as a process wherein the men’s sperm is entered into other women’s uterus who is not his wife. Those who are not able to have their natural child are left with no option as all other methods of having a child are considered as Haram under Muslim law.
- In Jewish law, surrogacy is permitted only if both the intended couple uses their genetics for the formation of embryo otherwise not.

Already there is no uniform civil code for personal laws, now the absence of applicability in the bill also raises problems that can be solved by explicitly stating the applicability of the bill.

6. In consonance with constitution

The object behind the surrogacy Bill is to protect the surrogate mother and surrogate child from being

exploited. The surrogacy bill banned commercial surrogacy and also provided relevant provisions for protecting intended parties but still, many clauses do not agree with the Golden Triangle of Fundamental Right i.e., Articles 14, 19, and 21. As the bill fails to pass the Golden Triangle test that means it encroaches the basic Fundamental Rights.

- Article 21 talks about the Right to life and personal liberty which also includes the Right to Privacy. Therefore, interference by the State on procreation is considered as direct encroachment of Article 21. The Surrogacy Bill asks the intended parents to prove infertility which restricts their reproductive autonomy and also provides State the right to decide whether the couple is eligible to go for surrogacy or not. It is considered under sexual autonomy to make choices relating to the birth of babies and interfering with it is directly violating a person's liberty. Also, considering the privacy of intended parents, surrogate mothers are not provided with a copy of the agreement, but in contrast, there is no confidentiality regarding the details of a surrogate mother.
- Article 14 talks about the Right to equality, wherein everyone should be treated alike but the bill not able to provide equality to all. The bill restricts surrogacy to only intended couples, divorcee and widow, leaving behind others. The Universal Declaration of Human Rights, 1948 provides having a child as a basic human right. Even in other adoption laws also single, divorced, widowed people are allowed to adopt a child with restricted conditions.
- Article 19(1)(g) talks about freedom of trade and profession which guarantees every citizen the right to profess or carry any kind of occupation subject to certain reasonable restrictions. Under 19(6), the restriction can be imposed in the interest of the general public. The bill restricts the surrogate mother to go for surrogacy only once in her life. Even though surrogacy cannot be considered as money-making means but completely restricting it to only once cannot be proper justice to all those poor women who are in a vulnerable stage. Therefore, allowing surrogate mothers to undergone surrogacy more than once will be more beneficial for women from the

economically weak background. As many surrogates consider using their reproductive body as a better alternative than other wage labour available for women in India as it is less harmful, dangerous, and abusive.

JUDICIAL INITIATIVES IN INDIA

- ICMR came up with the ART bill 2008, which was time and again altered first in 2010, then in 2013, and then 2016. Again, it came up in 2020. Till date, the bill has been proposed in the parliament, but it is yet to be passed as a law. ART bill or Artificial Reproductive Technology Bill was introduced to make the various forms of reproductive techniques legitimate in India and regularize them.
- As per a report by CII in 2012, the Indian Surrogacy size was 2 billion dollars a year and an estimated number of 3000 clinics were part of this in India.
- In the year, 2013 a ban on surrogacy by homosexual foreign couples and single parents was imposed in the country which further led to a complete ban on commercial surrogacy for people from abroad in the country in the year 2015. Soon followed by the ban Surrogacy (Regulation) Bill, 2016 was introduced which aimed at prevention of commercial surrogacy and laid emphasis on altruistic surrogacy and allowed only heterosexual couples to go for the surrogacy. The couple needs to be married for a minimum of 5 years and should be infertile. The bill was for Indian couples only. The bill banned commercial surrogacy. It was passed by the Lower House of the parliament but could not take shape of law as the parliament was adjourned. Again, the bill came up in 2019 which was again passed by the Lok Sabha on but the bill was examined by a committee in the Upper House of the Parliament wherein it suggested 15 changes and Surrogacy (Regulation) Bill, 2020 was formulated which was passed by the Union Cabinet. The bill had taken all the recommendations of the Upper House in the bill.

Surrogacy (Regulation) Act, 2021: Regulation of Surrogacy: - The legislation forbids commercial

surrogacy, however altruistic surrogacy is authorised. In altruistic surrogacy, the surrogate mother receives no monetary remuneration other than medical expenses and insurance coverage throughout the pregnancy. Commercial surrogacy refers to surrogacy or similar operations conducted for a monetary benefit or reward (in cash or kind) in excess of minimal medical expenditures and insurance coverage. Surrogacy may be used for a variety of reasons. Surrogacy is permitted when it is:

- a. for intending couples who suffer from proven infertility;
- b. altruistic;
- c. not for commercial purposes;
- d. not for producing children for sale, prostitution or other forms of exploitation; and
- e. for any condition or disease specified through regulations.

Eligibility criteria for Intending Couple: - The intending couple should have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority.

A certificate of essentiality will be issued upon fulfilment of the following conditions:

- a. a certificate of proven infertility of one or both members of the intending couple from a District Medical Board;
- b. an order of parentage and custody of the surrogate child passed by a Magistrate's court; and
- c. insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.

Eligibility criteria for Surrogate Mother: - To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to be:

- a. a close relative of the intending couple;
- b. a married woman having a child of her own;
- c. 25 to 35 years old;
- d. a surrogate only once in her lifetime; and
- e. possess a certificate of medical and psychological fitness for surrogacy.

Further, the surrogate mother cannot provide her own gametes for surrogacy.

Surrogacy (Regulation) Act, 2021: Appropriate Authority; Registration of Clinics and National and State Boards

- Appropriate Authority: Within 90 days of the Bill becoming an Act, the central and state governments must nominate one or more competent authorities. The competent authority's responsibilities include: (i) issuing, suspending, or cancelling surrogacy clinic registration; (ii) enforcing surrogacy clinic standards; (iii) investigating and taking action against violations of the Bill's provisions; and (iv) suggesting rule and regulation changes.
- Registration of surrogacy clinics: Surrogacy clinics must be registered with the relevant government before they may perform surrogacy treatments. Clinics have 60 days from the date of the competent authority's appointment to apply for registration.
- National and State Surrogacy Boards: The National Surrogacy Board (NSB) and State Surrogacy Boards (SSB) will be established by the federal and state governments, respectively. The NSB's responsibilities include (i) advising the central government on surrogacy policy, (ii) establishing a code of conduct for surrogacy clinics, and (iii) overseeing the operation of SSBs.
- Parentage and abortion of Surrogate child: - A child delivered through a surrogacy operation is considered the biological child of the intended couple. The surrogate mother's written consent and the authorised authority's approval are required for the surrogate child's abortion. For this authorization to be legitimate, the Medical Termination of Pregnancy Act of 1971 must be followed. Furthermore, the surrogate mother will have the option to withdraw from surrogacy before the embryo is implanted in her womb.

Offences and Penalties: - The offences under the Bill include:

- a. undertaking or advertising commercial surrogacy;
 - b. exploiting the surrogate mother;
 - c. abandoning, exploiting or renunciation a surrogate child; and
 - d. selling or importing human embryo or gametes for surrogacy.
- The penalty for such offences is imprisonment up to 10 years and a fine up to 10 lakh rupees.

- The Bill specifies a range of offences and penalties for other contraventions of the provisions of the Bill.

RECOMMENDATIONS

- 1 The surrogacy (regulation) bill 2020, talks about letting all the Indian married couples who are proven to be infertile and have the certificate of essentiality and eligibility and single women who are inclusive of only divorcee and widows go for surrogacy. Though the bill protects the interest of such people by ensuring that they do have the joy of parenthood, it is outrightly ignoring the interest of people in live-in-relationship, older couple and people, single men and women (excluding widows and divorces women) and people belonging to the LGBTQ community in our country. It is not mentioning of Indians in abroad as well. The bill is violating article 14 of the Indian constitution. Article 14 talks about equality before the law and equal protection of law within the territory of India. But specifying the sections who can opt for surrogacy and who cannot, is outrightly being violative of the fundamental right. Thus, in the bill, according to the authors everyone should be allowed to opt for surrogacy though with certain conditions as a child's rights might be at much greater risk in these situations. Couples in a live-in relationship, LGBTQ community and older couples should be incorporated in the definition of "couple" as per section 2(g) of the surrogacy (regulation) bill, 2020.
- 2 "Intending women" as per section 2(s) of the surrogacy (regulation) bill, 2020 states the age of divorcee or widow as 35 to 45. The lower limit of the range should be reduced in the authors' opinion because a woman can get divorced before the age of 35 given, she could have gotten married at any age after 18. Also, though however unfortunate a woman might become a widow before the age of 35. One cannot fight nature or God. Therefore, putting an age bracket on when a widow or a divorced woman should go for surrogacy should be avoided. Having the baby might be one of the ways for her to cope.
- 3 Also, as per the article, the Insurance time period has been mentioned as 36 months, in authors' opinion the time period should not be fixed. It is

so because on one hand it is talked that no reward, gain etc., should be provided to the surrogate mother, though 36 months of insurance coverage is equivalent to three years which in itself is a long time for insurance for a surrogate mother and is just like a reward or gain as it is believed 40 days care is necessary for a woman after giving birth so such a long period is quite unnecessary for insurance. Therefore, instead of fixing the time of insurance coverage, it should be left upon the doctors and insurance agency to decide the time period for insurance coverage.

- 4 In the surrogacy bill, only an intended couple or an intended woman has the right to avail the benefits of surrogacy. Here, an intended woman means a divorcee or a widow. The bill is silent about the rights of the intended men. Since, a widower and a divorced man have the right to adopt a child then why not to extend the surrogacy services to them as well. There is no nexus between the object of the bill and the classification and hence invalid to differentiate. Just like the young age widow or the divorcee, a widower or a divorced man who doesn't want to remarry and is issueless, has the right to avail the benefits of surrogacy to have a genetically related child of his own. Therefore, intended men should also be put on the same footing with permitted restrictions as the intended woman is in the surrogacy bill.
- 5 The Bill provides the opportunity to avail the benefits of surrogacy to only those couples or intended women who are facing any medical problem. But nowadays people want to opt surrogacy due to many other reasons. Many a times their profession is such wherein personality/ Physique play a vital role and in order to avoid after pregnancy changes, they want to go for surrogacy. Besides that, it is the choice of the women to reproduce or not and no one has the right to interfere with her private decision. It was held in the Puttaswamy case that it is the fundamental right of the women to make reproductive choices, being a part of dignity under Article 21 of the constitution. Again, in the Suchita Srivastava case court held that reproductive choice of the women includes entitlement to carry full term pregnancy, to give birth and to raise children. As right to privacy,

dignity, and bodily integrity forms a vital part of women's right to life and personal liberty. Therefore, restricting surrogacy for only those who are facing any medical problem is not right.

CONCLUSIVE REMARKS

Surrogacy at first instance seems to be a profitable one for both parties. As the intended couple got a chance to get their genetically related child and on the other hand the surrogate mother is provided with reasonable money to improve their livelihood. But, due to the lack of proper legislation exploitation of parties and heavy profit earned by surrogacy clinics is very common. For the past 13 years, the surrogacy bill is pending which lead to no transparency in the whole surrogacy system. Now, it's high time, there is a need for proper legislation which legally recognized surrogacy contracts and also deals with legal problems beforehand. The proposed bill also needs to be drafted in consonance with the ART bill.

REFERENCE

- [1] World Health Organisation, <https://www.who.int>, (last visited 20 May 2021)
- [2] World Health Organisation, <https://www.who.int> (last visited 20 May 2021)
- [3] Merriam Webster, <https://www.merriam-webster.com>(last visited 20 May 2021)
- [4] Cambridge Dictionary, <https://dictionary.cambridge.org>(last visited 20 May 2021)
- [5] Collins, <https://www.collinsdictionary.com>(last visited 20 May 2021)
- [6] Draft Assisted Artificial Reproductive Technology Bill,2014<https://www.prsindia.org> (last visited 22 May 2021)
- [7] Genesis 16:1-10
- [8] Surrogate Motherhood – The Legal and Human Issues, Martha A. Field
- [9] Lawrence Van Gelder, Noel Keane, 58, Lawyer in Surrogate Mother Cases, Is Dead, <https://www.nytimes.com/>
- [10] SS Das, Priyanka Maut, Commercialization of Surrogacy in India: A Critical Analysis, Research Gate (last visited 27 May 2021), <https://www.researchgate.net/>
- [11] About Surrogacy, SURROGATE.COM (May. 27, 2021, 9:29 PM),
- [12] Johnson, Bonnie (May 4, 1987). "And Baby Makes Four: for the First Time a Surrogate Bears a Child Genetically Not Her Own", PEOPLE (May. 28, 2021, 7:24 PM), <https://people.com/>
- [13] Re Baby M, 109 N.J. 396 (N.J. 1988)
- [14] <https://www.latimes.com/archives/la-xpm-1990-10-11-me-3119-story.html>
- [15] Kristin Marsoli, The History of Surrogacy: How Surrogacy Has Evolved, CIRCLE SURROGACY,<https://www.circlesurrogacy.com>
- [16] Ankur, Why Surrogacy is emerging trend of New India, NYOOOZ, <https://www.nyoooz.com/>
- [17] Female infertility, MAYO CLINIC, <https://www.mayoclinic.org/>
- [18] Male infertility, MAYO CLINIC, <https://www.mayoclinic.org/>
- [19] WIKIPEDIA, en.wikipedia.org, (last visited 23 May 2021)
- [20] WIKIPEDIA, <https://en.wikipedia.org>, (last visited 23 May 2021)
- [21] Surrogate Motherhood-Ethical or Commercial, pg. 24
- [22] Baby Manji Yamada v. Union of India, (2008) 13 SCC 518
- [23] Jan Balaz v. Anand Municipality, AIR 2010 Guj 21
- [24] iPleaders, Ayush Verma, Surrogacy (Regulation) Bill, 2020: The way Forward (23 May 2021,1:55 pm) <https://blog.ipleaders.in>
- [25] iPleaders, Ayush Verma, Surrogacy (Regulation) Bill, 2020: The way Forward (26 May 2021,4:39 pm) <https://blog.ipleaders.in>
- [26] Baby Manji Yamada v. Union of India, (2008) 13 SCC 518
- [27] Tirth Bhatt, Garv Malhotra, Legalization of Commercial Surrogacy and the 'Rent-A-Womb' Culture: Is India's Stand Sound Enough?2 NSLJ (2013) 54, 2013 <https://www-sconline-com.eu1.proxy.openathens.net>
- [28] Jaycee B v. Superior court, 1996 Feb 6
- [29] Surrogate Motherhood – The Legal and Human Issues, Martha A. Field
- [30] Veena Kapoor vs. Varinder Kumar, AIR 1982 SC 792
- [31] Jaycee B. v. Superior Court 1996 Feb 6
- [32] Psalm 127:3
- [33] Quran 23:5-6
- [34] KS Puttaswamy v Union of India, (2017) 10 SCC 1.

- [35] B.K. Parthasarathi v. Government of Andhra Pradesh, (1999) 5 ALT 715.
- [36] Navtej Singh Johar & Ors. v. Union of India the Secretary Ministry of Law and Justice; AIR 2018 SC 4321
- [37] Article 16- Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.
- [38] Hindu Adoptions and Maintenance Act, 1956 [Sections 7 and 8] The Juvenile Justice [Care and Protection of Children] Act, 2015 [Section 57]
- [39] Rozée, V., Unisa, S. & de La Rochebrochard, E. The social paradoxes of commercial surrogacy in developing countries: India before the new law of 2018. BMC Women's Health 20, 234 (2020). <https://doi.org/10.1186/s12905-020-01087-2>
- [40] Jagran Josh, Shikha Goyal, Surrogacy in India: History, Impact on Poor and Facts, (23 May 2021, 2:46 pm) <https://www.jagranjosh.com>
- [41] WIKIPEDIA <https://en.wikipedia.org> (last visited 23 May 2021)
- [42] INDIA CONST. art 14
- [43] Surrogacy (regulation) bill, 2020, S.2 cl. g
- [44] Surrogacy (regulation) bill, 2020, S.2 cl. S
- [45] Justice K S Puttaswamy v Union of India 2012a: para 72, 2012b: para 46, 2012c: para 38
- [46] Suchita Srivastava v Chandigarh Administration (2009)