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Surrogacy: History and Contemporary laws with focus on Commercial Surrogacy

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Surrogacy or as it is more commonly known “womb for rent” is a method of Assisted Reproductive Technique that has fulfilled the hopes and dreams of millions of couples to become parents. It has a long history, dating back to biblical times. It is accompanied by lots of socio-legal complications. Even after being legalized in 2002, the practice of commercial surrogacy in India remained extremely unregulated due and caused a lot of exploitation of Indian women, especially by foreigners due to inequality in the bargaining power. India became a hub of transnational surrogacy owing to its cheap costs. The article deals with the history of surrogacy along with its development over the years. Special emphasis has been laid on commercial surrogacy and related legal regulations from time to time with an in-depth analysis of The Surrogacy (Regulation) Bill, 2019.

Keywords: *surrogacy, exploitation, health, child, welfare.*

INTRODUCTION

Surrogacy is a form of an assisted reproductive method with a long history. Gestational surrogacy refers to an arrangement where a female (carrier) is engaged to bear a child of another couple referred to as intended parents. In surrogacy, the process of in vitro

fertilization¹ (IVF) is undertaken. In this, the eggs of the intended parents are fertilized in a laboratory and a limited number of the resultant embryo(s) are transferred into the uterus of the carrier.² The word ‘surrogate’ is derived from the Latin word ‘subrogare’ which means “appointed to act in place of”. The intended parent(s) is the couple who intends to rear the child after its birth. Surrogacy is undertaken by women who are either infertile, do not have a uterus, or have a health condition that could avert safe pregnancy or have a history of recurrent miscarriages. This method of producing a child is also prevalent in same-sex couples worldwide.³

Surrogacy, as we know it today, is a fairly new concept that has existed for nearly 40 years. However, the idea of surrogacy dates back to biblical times. The first mention of surrogacy can be found in ‘**The Book of Genesis**’. It is the story of Sarah and Abraham who were married but could not conceive their own child. Sarah resorts to Hagar (her servant) to be the mother of Abraham’s child. This is a case of traditional surrogacy where a surrogate uses her own reproductive eggs to produce a child for the intended parents. Sarah claimed the baby as her own even though she was not genetically related to him.⁴

Another example can be that of Rachel and Jacob from Bible. Rachel asked her maid Bilhah to conceive a child with her husband Jacob. These were the examples of traditional surrogacy (straight method) where the surrogate is pregnant with her own biological child but has to be handed over to the intended parents. The child is usually conceived through home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra-cervical insemination) which is performed at a fertility clinic.⁵

¹ ‘In-vitro’ means outside the living body and in an artificial environment (as opposed to ‘in-vovo’ which means taking place in a living organism)

² ‘Gestational Carrier (Surrogate)’ (*Reproductive Facts*) <<https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/gestational-carrier-surrogate/>> accessed 07 September 2021

³ *Ibid*

⁴ ‘History of Surrogacy’ (*Surrogate.com*) <<https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>> accessed 16 September 2021

⁵ *Ibid*

The practice of surrogacy has developed over time. The first legal surrogacy agreement was negotiated and drafted in 1976 by a lawyer named “Noel Keane”. It was a traditional surrogacy and the surrogate was not monetarily compensated for her service.⁶ 1978 saw the birth of the first baby born through IVF (in vitro fertilization). Louise Joy Brown, the world's first in vitro fertilization (IVF) baby was born on July 25, 1978, at Oldham and District General Hospital in Manchester, England, to parents Lesley and Peter Brown.⁷ Consultant gynecologist Patrick Steptoe and Cambridge research physiologist Robert Edwards had pioneered the technique.

On October 3, 1978; the world's second and India's first test-tube baby, Kanupriya, alias Durga was born in Kolkata.⁸ The modern form of surrogacy is called gestational surrogacy (host method). Here, the surrogate mother becomes pregnant via embryo transfer. She will not be biologically related to the child.⁹ After the birth of the child, she will have to return the child to biological parents or to a parent(s) who are themselves unrelated to the child in case the child was conceived using egg donation or germ donation or is a result of a donated embryo. It is of mainly 2 types. Commercial and altruistic.

In commercial surrogacy, a gestational carrier is paid to bear the child in her womb and is often approached by wealthy infertile couples who can afford or save or borrow to pay the costs involved. Commercial surrogacy is often referred to by offensive terms as baby farms or outsourced pregnancies. Altruistic surrogacy is when the surrogate does not receive any financial reward or compensation for her services, although all the medical expenses related to pregnancy such as check-ups, maternity clothing, or other related expenses. In altruistic surrogacy arrangements, intended parents usually work with women they already know.

⁶ ‘The History of Surrogacy: A Legal Timeline’ <<https://www.worldwidesurrogacy.org/blog/the-history-of-surrogacy-a-legal-timeline>> accessed 11 September 2021

⁷ ‘World's first "test tube" baby born’ <<https://www.history.com/this-day-in-history/worlds-first-test-tube-baby-born>> accessed 11 September 2021

⁸ Law Commission of India, “228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy” (August 2009)

⁹ *Ibid*

These surrogates are usually close relatives of intended parents.¹⁰ Many countries do not permit surrogacy. Infertile couples who intend to have a child through commercial surrogacy but live in jurisdictions that do not permit the same, usually travel to some other country that permits the practice. This takes us to the discussion about commercial surrogacy in the Indian context.¹¹ The Indian judiciary confers an equal status to the child born out of a surrogacy arrangement to that of a naturally born and adopted child. This view is affirmed in a judgment of Bombay High court in 2015¹² and a recent judgment of Himachal Pradesh High Court in 2021¹³ where they have stated that a mother who has commissioned a child through surrogacy is equally entitled to maternity leave as the woman who gave birth to the child herself.

COMMERCIAL SURROGACY IN INDIA

In India, commercial surrogacy was legalized in 2002 as a country's initiative to endorse medical tourism. India was a desired destination for childless couples around the globe to fulfill their dream of becoming parents owing to the cheap cost of technology, surrogates, and fertility clinics. There was no set of defined regulations to regulate the practice. Owing to this unregulated situation, the low cost of fertility clinics, and a great supply of poor women willing to provide the service for money, India became a hub for transnational surrogacy. This also led to the emergence of many firms which claim to be specialized in surrogacy laws, who assisted foreign couples who come in search of Indian women who could provide their wombs on rent to bear their child. Rural women in need of money and having no alternate source of livelihood participate in the practice. This arrangement is quite exploitative as it promotes child selling and as radical feminists put it, surrogacy is commodification and technological colonization of a woman's body.¹⁴ It reduced women to their reproductive capabilities.

PROBLEMS IN COMMERCIAL SURROGACY ARRANGEMENT

¹⁰ 'What is Altruistic Surrogacy?' <<https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-altruistic-surrogacy/>> accessed 12 September 2021

¹¹ *Ibid*

¹² *Dr Mrs Hema Vijay Menon v State of Maharashtra* AIR 2015 Bom 231

¹³ *Sushma Devi v State of Himachal Pradesh & Ors* 2021 SCC OnLine HP 416

¹⁴ A Pande, 'Commercial surrogacy in India: Manufacturing a perfect mother-worker' (2010) 35(4) *Journal of women in culture and society* 969-992

Many problems emerged with the rampant influence of commercial surrogacy. Breach of contract from either party is one of the problems. Breach by surrogate could result due to voluntary abortion by surrogate without the consent of intended parents or by not complying with behavioral requirements by indulging in alcohol consumption or drug abuse during gestation period or a surrogate mother might decline to hand over the child to the commissioning parents. In all these cases, child welfare is severely harmed.

On the other hand, a breach of contract by the intended parents might result from their failure to pay the promised amount. Sometimes, if the child suffers from a mental or physical disability, the parents may refuse to accept the child. A similar situation may arise in case the twins are conceived or over the preference of a male child in case a girl child is born. On a different front, there are multiple health risks associated with surrogacy. In India, a surrogate woman's womb is implanted with up to 5 embryos to enhance the probabilities of pregnancy. The use of such a large number of embryos can pose a risk for both mother and child. A surrogate mother is more vulnerable to infections as another woman's eggs are transplanted into her. Miscarriage is very common in surrogate pregnancies.¹⁵

Surrogacy contracts are usually not adequately drafted. They often miss out on important issues. Issues like premature delivery, genetic malformation, and infections that lead to increased hospitalization of the newborn must be considered in surrogacy contracts. Breastfeeding is another problem that persists. In the first few days of birth, babies are breastfed by surrogates and the intended mother finds it difficult to begin lactation.¹⁶ Commercial surrogacy or "womb for rent" has taken a form of business in India. Women undertake repeated surrogacies to earn. Here, it is not easy to deduce if these women are exercising their own rights or they are forced into the surrogacy business by their families to fulfill their material and financial needs.¹⁷

¹⁵ *Ibid*

¹⁶ P Kumar and others, 'Surrogacy and women's right to health in India: Issues and perspective' (2013) 57(2) Indian journal of public health 65

¹⁷ *Ibid*

Indian Council of Medical Research (ICMR) , a branch of the Indian government's Department of Health Research issued guidelines titled "National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India" in 2005¹⁸ to respond to the problem of the emergence of a large number of unaccredited fertility clinics. It was observed that clinics were providing highly technical services without any proper training or standard infrastructure.

Surrogacy as defined by the guidelines: - Defines surrogacy as an arrangement where a woman agrees to carry a pregnancy to term and hand over the child to genetic parents for whom she acted as a surrogate. Here, it can be inferred that it intends that both the parents are using their own reproductive cells to make the embryo. It excludes non-heterosexual couples from its ambit.

It separately defines 'Surrogacy with Oocyte donation' as the surrogacy in which a woman allows insemination by the sperm of the male partner of the intending couple to carry the pregnancy to the term and hand over the child to the intending couple after birth. ICMR classifies the patients (intending couple) into 3 categories namely, 'Single defect in one of the partners', 'Multiple defects in one or both partners' and 'No detectable defect in either partner (unexplained or idiopathic infertility)' and provides a flowchart as a guide to clinics for dealing with an infertile couple.¹⁹ The guidelines **failed to address the inequality in bargaining power** as it suggested that dialogs between the couple and surrogate should be conducted autonomously by them.

The practice of surrogacy in India is a highly debated grey area. Debates around this topic began with the Baby Manji Yamada case²⁰ where the intended parents divorced during pregnancy and the intended mother refused to accept the child. The surrogate mother abandoned the baby too. In the absence of clear laws on surrogacy, the citizenship status of baby Manji remained undecided. However, her custody was granted to her grandmother after a legal battle.

¹⁸ National Guidelines for Accreditation, Supervision and Regulation of Art Clinics in India 2005

¹⁹ *Ibid* at 42

²⁰ *Baby Manji Yamada v Union of India & Anr* AIR 2009 SC 84

The Law Commission of India under the chairmanship of Hon'ble Dr. Justice AR. Lakshmanan in its 228th report recommended **allowing only altruistic surrogacy and banning commercial one.**²¹

In 2012, India faced an extremely heart-breaking incident of abandonment of a baby boy by an Australian couple. The couple's surrogate from India bore twin babies, a male, and a female. At the time, it was prohibited in Australia to get into transnational surrogacy arrangements. The biological parents denied to take to male twin with hem saying that they already have a son at home and wanted to complete their family with a girl child.²² 2 years later, a news outlet, through Australia's freedom of Information Act discovered that the Indian government allowed the couple to return without the baby boy. As India did not recognize children of surrogate mothers as children, it warned the Australian couple that the boy would be left stateless. Despite that, the Australian couple declined to apply for citizenship of the male twin and misled the Australian consulate to believe that they would give the baby boy to their acquaintances in India.²³

In 2015, Advocate Jayashree Wad filed a Public Interest Litigation (PIL) in the Hon'ble Supreme Court of India challenging the practice of commercial surrogacy. It objected to India's continuation of commercial surrogacy while many other countries have banned it. The PIL challenges it on the grounds of having adverse physical and psychological impacts on the health of women who serve as surrogate mothers.²⁴ A bench of Justices Ranjan Gogoi and N V Ramana recommended the central government ban commercial surrogacy.

²¹ Law Commission (n 8)

²² J Reddy, 'Indian Surrogacy: Ending Cheap Labor - Santa Clara University' <<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1236&context=scujil>> accessed 03 October 2021

²³ *Ibid*

²⁴ ET Bureau, 'Supreme Court asks government to explain stance on commercial surrogacy' (*Economic Times*, 26 February 2015) <<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-asks-government-to-explain-stance-on-commercial-surrogacy/articleshow/46378518.cms>> accessed 11 September 2021

Recently released Kriti Sanon starrer Bollywood movie 'Mimi' showcased one of these problems.²⁵ The biological parents refused to accept the kid while the surrogate (protagonist) was pregnant due to a false positive medical report that the child has down syndrome. It turns out that upon birth, the child is completely normal. The whole storyline is wrongly showcased as in **November 2015; the government of India had banned commercial surrogacy for foreign couples.**²⁶ Import of human embryos was prohibited except for research purposes.²⁷

This decision of the government has caused a decline in medical tourism and the blooming of a black market. According to an Economic Times report published that year, a Toronto-based Lawyer became a father for the second time to a baby boy who was born to a surrogate in Akanksha Infertility Clinic in Anand, Gujarat says "Maybe the government thinks surrogacy diminishes India's image in the world.²⁸ It would be a shame if India sold itself short." Dr. Nayna Patel, medical director of Akanksha believes this ban on foreigners seeking commercial surrogacy as discriminatory. She says, "It (the ban) should be for any embryo put in the surrogate's uterus. Why just for foreigners' embryos?"²⁹

THE SURROGACY (REGULATION) BILL, 2019

The major development in Surrogacy Laws in India has been the Surrogacy (Regulation) Bill, 2019 which was presented in Lok Sabha by then Union Minister for Health and Family Welfare, Dr. Harsh Vardhan on 15 July 2019 and was approved by the lower house on 5th August 2019. It aims to constitute a National Surrogacy Board along with State Surrogacy Boards to regulate the practice of surrogacy in India.³⁰ It provides to prohibits all forms of commercial surrogacy. It allows only those married couples to opt for 'altruistic' surrogacy

²⁵ *Ibid*

²⁶ 'Notice' (dhr.gov.in, 2020)

<<https://dhr.gov.in/sites/default/files/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>> accessed 27 September 2021

²⁷ 'Notification No 25/2015-2020' (*Indian Council of Medical Research*, 2020)

<https://main.icmr.nic.in/sites/default/files/Circulars_front/19_1_0.pdf> accessed 01 October 2021

²⁸ *Ibid*

²⁹ G Seetharaman, 'Ban on surrogacy for foreigners: How govt's recent decision will push a booming industry into black market' *Economic Times* (Gujarat, 8 November 2015)

³⁰ *Ibid*

when either one or both of the members of the intended couple are infertile.³¹ The intending couple would have to attain an eligibility certificate from the appropriate authority.³² The conditions are, they should not have any surviving child either biologically or through adoption or surrogacy and should be married for at least 5 years. But it makes an **exception** in case the surviving child of the intended couple is mentally or physically challenged or suffers from an incurable life-threatening disorder.

Section 6 of the Bill mandates that a surrogate mother must be made aware of ‘all the known side effects and after-effects of the process and must give her consent in writing to undertake the procedure of surrogacy in the language she understands. It also provides her an opportunity to take her consent back before the implantation of an embryo in her womb.³³ Only a married woman between the age of 25-35 having a child of her own can be a surrogate mother of help in surrogacy by donating her eggs.³⁴ Only a close relative of the intended couple can act as a surrogate mother for them.³⁵ No woman can become a surrogate mother more than once in her life. **Section 7** deals with the abandonment issues. It is unlawful for the intending couple to abandon the child due to any reason. The bill provides for mandatory registration of surrogacy clinics. The surrogacy clinics will not be provided registration unless “the appropriate authority is satisfied that such clinic is in a position to provide such facilities and maintain such equipment and standards including specialised manpower, physical infrastructure, and diagnostic facilities as may be prescribed.”

Section 14(1) of the bill provides for the formation of a National Surrogacy Board with the minister of Health and Family Welfare as ex-officio Chairperson³⁶ and Secretary of the Government of India in charge of the Department handling the surrogacy matters as the ex-officio Vice-Chairperson. **Section 14(2)(c)** of the bill provides that 3 women members of parliament, two from Lok Sabha and one from Rajya Sabha shall be elected as ex-officio

³¹ Surrogacy (Regulation) Bill 2019, Ch III, s 4(ii)

³² Surrogacy (Regulation) Bill 2019, Ch III, s 4(iii)c

³³ Surrogacy (Regulation) Bill 2019, Ch III, s 6(ii)

³⁴ Surrogacy (Regulation) Bill 2019, Ch III, s 4(iii)(b)(I)

³⁵ Surrogacy (Regulation) Bill 2019, Ch III, s 4(iii)(b)(II)

³⁶ Surrogacy (Regulation) Bill 2019, Ch V, s 14(2)(a)

members of the board for the term of 3 years. Among other members, it includes eminent embryologists, gynecologists, and obstetricians, eminent social scientists, members from women's welfare organizations, and members from civil society working for women's health.

ANALYSIS OF 2019 BILL

Article 21 includes within its ambit, the right to reproduce and have a family. The Surrogacy (Regulation) Bill 2019 lays down very stringent provisions and allows very limited categories of couples to resort to altruistic surrogacy. Hence, it adopts a need-based instead of a rights-based approach. Even though commercial surrogacy resulted in the exploitation of women, it was a means to stay afloat for many families.

It requires a married couple to wait for a period of 5 long years. Considering the status quo of medical technology in India, any fertility defect in any of the partners can be detected soon after marriage. In such a case, the waiting period is redundant and must be removed. This contention of the author is supported by the report of the Rajya Sabha Select Committee that was presented in the house on 5th February 2020. The report supports the removal of this waiting period particularly in cases of the absent or anomalous uterus, unalterable impairment or destruction of the uterus due to tuberculosis, removal of the uterus due to cancer, fibroids, etc. or patients with a chronic medical condition where normal pregnancy is ruled out and it is medically established beyond any uncertainty that surrogacy is the only option.³⁷

The bill provides that only a close relative of the intended couple, must be within the age group of 25-35 and married with a child of her own can act as a surrogate which means that she will be genetically related to one of the partners. This opens the floor for debate on various aspects. Firstly, the bill does not define 'close relative'.³⁸ Secondly, it limits the number of potential surrogates for the intending couple as the women who can match the given criteria would be either the woman's sister, her brother's wife, or the man's sister, or his brother's wife. Thirdly, in a country like ours where the issue of infertility and Assisted Reproductive Techniques is still taboo, the intended infertile couples would like to keep the process private

³⁷ Report of the Select Committee on the Surrogacy (Regulation) Bill 2019, 25

³⁸ *Ibid*

from their family. The mandate of the surrogate being a close relative breach the constitutional right of privacy.³⁹ Lastly, it expects women to go through the physical toll of pregnancy just out of love and compassion. This approach is patriarchal.

The bill omits from its ambit the non-heterosexual couples and widowed and divorced women. After the legalization of homosexuality, the notion of a family must be modified to include homosexual couples and must include their right to have children through surrogacy. The Rajya Sabha Standing committee seeks to add Clause 2(ra) to define 'intending woman' as "an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail surrogacy" and subsequently amending section 2(zf). In the author's opinion, the government must consider the committee's recommendations to make the law more inclusive and socially just. It is high time we consider the choice to avail surrogacy as a right instead of a need-based last resort.

³⁹ Surrogacy (Regulation) Bill 2019, Ch III, s 4(iii)(b)(II)