

SURROGACY IN INDIA

Hope, Ethics, and Motherhood in a Changing World

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Dedicated to...



Dada-Dadi

Nana-Nani

.....My Grand-Parents.



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न्यायमूर्ति रणजित मोरे
JUSTICE RANJIT MORE
अध्यक्ष
Chairman

Foreword

The subject of Assisted Reproductive Technology and more specifically Surrogacy is considered a taboo in conservative and religiously driven societies like India. One of the oldest civilizations in the world is yet to come to terms with this form of having a child.

Morality and traditions come in the way of such new techniques of family- building as it challenges their foundations and pre-conceived notions. However, moral values of society change constantly. The hypocrisy of the Indian society can be judged from the fact that though surrogacy has a very ancient history here, it is still considered immoral and unethical. It is the same society that criminalises polygamy but ignores extra-marital affairs.

Laws are a mirror of the society they are made for. This is precisely the reason why despite so many Bills tabled in the

Indian Parliament, a law to regulate surrogacy in India is yet to see the light of the day.

The 228th Law Commission of India Report, 2009 emphasised on the need for a legislation to regulate ART clinics in India and listed out the rights and obligations of parties to a surrogacy arrangement.

The author has made a brave attempt to highlight the need for a law to regulate surrogacy in a country that has a considerable population living below the poverty line. Women coming from such background are exploited by rich childless couples desiring to have a child through surrogacy and a law shall protect the interests of such women. The author has also emphasized on the need to regulate commercial surrogacy which is a booming industry in India.

Drawing a comparison between the religious diversity in India and the fundamental right to profess a religion of one's choice, the author has beautifully described how a legislation to regulate surrogacy in India does not violate the freedom of religion and does not hurt the religious sentiments of anybody.

The author has further emphasized on the importance of and the need to legally regulate transnational surrogacy in India.

I applaud his sincere efforts in penning such a noteworthy book and I firmly believe that the readers shall find it praiseworthy too.

Ran-jit

(Justice Ranjit More)



Preface

India was emerging as a leader in international surrogacy until the ban imposed by the Government in 2015. This ban has brought a lot of criticism. However, the Surrogacy Bills of 2016 and 2019 were surely a step forward towards recognising the process as a legitimate human right. But these proposed laws have their own loopholes and have been criticised by the supporters of the IVF technology around the world.

In October 1978, the successful birth of the first IVF baby Kanupriya in Kolkata sowed the seeds of surrogacy as an alternative reproductive technology in India. In 2002, India legalised commercial surrogacy and by 2012 we were already known as the ‘Surrogacy Capital of the World’ until it all came to a halt after the ban imposed by the government in 2015.

The Law Commission in 2009 through its 228th Report emphasized on the need for a legislation to regulate ART clinics and listed out the rights and obligations of parties to a surrogacy agreement.

The Surrogacy Bill, 2016 and the Surrogacy Bill, 2019 were definitely a step in the right direction. Though the 2016 Bill lapsed due to dissolution of the Lok Sabha, a new Bill was tabled in the Lower House in August 2019. The Bills apart from allowing surrogacy also penalised unethical practices involved in carrying out surrogacy. Penalties imposed included imprisonment up to ten years and fine up to Rs. Ten Lakhs.

Another attempt by the government was made by introducing the Surrogacy (Regulation) Bill, 2020 and the Assisted Reproductive Technology (Regulation) Bill, 2021. Both these Bills seek to curb unethical practices related to issues like sex selection and exploitation of the surrogate. The Bills also aim at curbing exploitation of women. They allow a woman to become a surrogate only once and also allow any willing woman to act as a surrogate, extending the rights to widows and divorcees too. Thus, they now disallow single men and women in India to become parents through surrogacy. This was indeed a big criticism of these new intended legislations. The penalty under these laws was however increased to a maximum of Rs. Twenty Lakhs.

Surrogacy is a booming industry in India and India is considered a hub for commercial surrogacy. Legislations in 2002 made surrogacy a half-a-billion dollar annual industry in India. However, the increased surveillance and new rules are definitely

creating a hindrance.

India is a land of many religions and the Indian Constitution guarantees protection to such religious communities to live a dignified life. The Indian Constitution vide Article 25 guarantees to its citizens the freedom to profess a religion of one's choice freely without any interference from the State. However, the same is subject to certain limitations and exceptions. The right to profess a religion of one's choice is not an absolute right in India. Thus, wherein Article 25 guarantees to its citizens 'freedom of religion', it *inter alia* also guarantees a 'freedom from religion'. Any such practice which is prohibited by religious customs and rituals but by and large is beneficial for an individual is protected by the Constitution. Surrogacy, a practice which is frowned upon by most religions, can very well fit in this description.

The right of succession and inheritance of a legal heir is determined by the various personal laws in the country. Every religion has its own norms and rules to decide the same. However, to claim this right a person must come within the definition of a 'legal heir'. Since, religions in general oppose surrogacy the question of recognising the inheritance rights of a surrogate child by such religions doesn't arise. In such a case wherein a surrogate child is denied his or her right to succession, it is the duty of the State to step in and enact laws that protect such rights of a surrogate child.

Transnational Surrogacy involves the transfer of the surrogate child from one country to the other. As a result of widely divergent religious, political and legal perspectives throughout the world, and the impact of those perspectives on access to reproductive technologies from one nation to the other, a growing number of would-be parents are seeking treatment outside their home country. Thus, cross-border reproductive care (CBRC) is an exponentially growing phenomenon. It is important for India to legally recognize and regulate it.

The most common argument against surrogacy is based on the concerns of exploitation of the surrogate mother. Commodification is another criticism of the surrogacy process. To commodify is to treat something or somebody as a commodity, which can be traded. This, at times, is considered a very harsh criticism by the proponents of surrogacy who feel that this is equivalent to demeaning a woman's stature and her position in the society. Moreover, this also means taking away her autonomy over her own body. According to the 'Harm Principle' of John Stuart Mill, neither the State nor any other individual has the moral right to intervene in an individual's actions, as long as it doesn't compose any harm to somebody else. As per Mill, an individual should freely make his choices as he is his own sovereign over his mind and body. The only exception in such a case is of children and people who are not in a state of mind to judge the

consequences of their actions such as lunatics, etc. Another exception to Mill's theory is that if someone does an act harmful to others, the State has a right to punish such person. This emancipates from the duty of a State to protect its citizens. Surrogacy, thus, can be said to derive its validation from the Harm Principle. To say that commercial surrogacy is an exploitation of the surrogate mother when clearly she enters into such agreement willingly is wrong.

This book is an attempt to simplify the concept of surrogacy which is often criticised *en masse*. By no means have I tried to impose my views on any individual or community but I firmly believe that it is important for us as a country to understand the significance of surrogacy in present times. For any State or religious community to deny this basic right to a person and snatching away their happiness of having a child is indeed unjust.

Syed M. Aatif



Acknowledgment

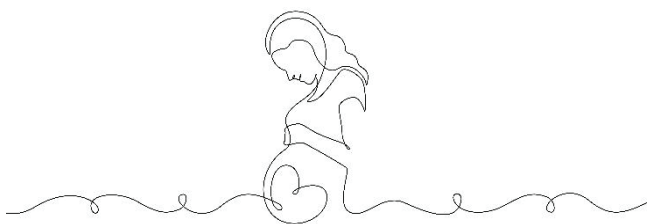
Without the support of Almighty God I wouldn't have been able to accomplish anything in life and thus I thank him for all he has given me.

No work is complete without the blessings of people around you. Their contribution is paramount in our success. It would be wrong on my part if I fail to acknowledge them.

First and foremost, I would like to thank ***Hon'ble Justice Ranjit More*** for penning the Foreword to my book. I am truly indebted to Sir for sparing his precious time and for his valuable suggestions.

I would also like to express my sincere gratitude to every individual who has supported me in my endeavours and helped me pass through every phase of this life.

I would like to thank my parents, *Mr. S M Arif* and *Mrs. Sameena Kausar*, my wife *Ayesha*, my sister *Arifa* and my friends for standing by my side through the thick and thin.



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Chapter

1



SURROGACY

The notions of family and kinship have held important places in history and have set the context for societal perceptions of surrogacy. The natural desire of a human being to have a family and lineage has attracted people towards such forms of artificial reproductive mechanism.

The word “surrogate” is rooted in the Latin “Subrogate” (to substitute), which means “appointed to act in the place of”.

Definition

Surrogacy is the act of a woman carrying a baby in her body for another person, whom she then relinquishes to the intended parents at the time of birth. Surrogacy arrangements can occur in two

ways: a.) where a woman who does not use any biological means to conceive a child but simply functions as a gestational carrier to host a baby in one's body; and b.) where a woman uses her egg as well as her womb to help carry a baby for another person.¹

The Merriam-Webster Dictionary defines surrogacy as "the practice of serving as a surrogate mother."²

The Black's Law Dictionary³ defines surrogacy as,

The act of performing some function in the place of someone else.

The process of carrying and delivering a child for another person.⁴

History

The reinforcement of the social constructions of family and kinship as important societal norms can be traced back through Bible. During that period, having children was vital for the future of family and community. The status and strength of the

¹ Iona Sky, Motherhoods, Bodies and Inequalities: An Exploration of Surrogacy and Its Implications for Social Work, Open Access Dissertations and Thesis, McMaster University, 32 (2011)

² Merriam-Webster, Merriam-Webster.com Dictionary, (Apr. 29, 2020, 4:28 PM), <https://www.merriamwebster.com/dictionary/surrogacy>.

³ Bryan A. Garner (Editor-in-Chief), Black's Law Dictionary 1582 (9th ed. 2009).

⁴ Id.

community was judged from the number of children and family members. Being able to bear a male child was seen as a symbol of pride since males were the providers and women were merely dependants. This set the stage for women to be seen as inferior to men and their role was solely to propagate the male identity.⁵

When the Prophet Abraham who was married to Sarah (r.a.) and even after decades of marriage couldn't have a child then Sarah (r.a.) offered her slave Hajar (r.a.) to the Prophet Abraham (pbuh) to marry her and have a family with her. The child born out of the wedlock (Prophet Ismail AS (pbuh)) was in fact the child of Abraham and Hajar and this as such could not by any stretch of imagination be related to how surrogacy is practiced today but this can act as an origin for the custom as the basis of the marriage between Abraham and Hajar was to have a child.

Although surrogate pregnancies were earlier conceived naturally that also led to the taboo around the whole technique, the first successful artificial insemination reportedly occurred in 1884, paving way for future traditional surrogacy. In the year 1975, the first ethical In vitro fertilisation (IVF)⁶ embryo transfer was successfully completed.

⁵ *Supra* Note 1.

⁶ IVF occurs when an egg joins with a sperm outside the body i.e. not through the natural process.

The first legal surrogacy agreement ever was brokered by a lawyer named Noel Keane in the year 1976. The surrogate mother had not received compensation for the surrogacy. Keane later established the Infertility Centre, which facilitated hundreds of surrogate pregnancies every year and was involved in several key cases in the history of surrogacy in the United States.

The first compensated traditional surrogacy agreement was made in 1980, where traditional surrogate by the name of Elizabeth Kane received 10,000 Dollars. Despite having a complete family, she was unprepared for the emotions one feels after the birth of a child and thus registered to become a surrogate. She detailed her experiences later in a book by the name of “Birth Mother”⁷.

Six years later, the most contested case in the history of surrogacy came up, the “Baby M” case. Bill and Betsy Stern decided to pursue traditional surrogacy to become parents in the year 1984. Mary Beth Whitehead was their chosen surrogate as her eggs were used in artificial insemination, making her the biological mother of the baby. The agreement was settled at a price of 10,000 US Dollars that was to be paid to Mary by the Sterns. However, when time came for Whitehead to terminate her parental rights after the birth of the baby, she refused and took

⁷ Elizabeth Kane, *Birth Mother: The story of America's First Legal Surrogate Mother* (1990).

custody of the child, named Melissa Stern (“Baby M”). A long custody battle ensued between the Sterns and Mary. Eventually, the Supreme Court of New Jersey ruled that the surrogacy contract between the parties was illegal. It restored Whitehead’s paternal rights but granted custody to Bill Stern, allowing visitation rights to Mary Whitehead. The opinion of the Court was delivered by Chief Justice Wilentz.

It was held that the surrogacy contract is unenforceable as it conflicts with laws prohibiting use of money in connection with adoptions; laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and laws that make surrender of custody and consent to adoption revocable in private placement adoptions. The New Jersey law provided for such surrender of a child (as was sought in this case) only when the same is done to an approved agency or the Division of Youth and Family Services (DYFS) accompanied by a formal document acknowledging the termination of paternal rights, or in case of parental abandonment or unfitness. Herein, termination was obtained by claiming benefit of contractual provisions. Since the termination was invalid, the adoption could not properly be granted. The provision stating Mrs. Whitehead agreeing to surrender custody and terminate all her parental rights was intended to be an irrevocable consent, as there was no clause giving

her the right to rescind. The legislature only provided for irrevocable consent by statute i.e. to surrender custody and placement with an approved agency or with DYFS. The contract was designed to circumvent state statutes.

Public policy has always been that children must remain with their natural parents. The contract violated state policy that the rights of natural parents are equal concerning their child. There wasn't any counselling of the natural mother, no evaluation and no warning. Also the contract totally disregarded the best interest of the child. There was no inquiry to determine the fitness of Sterns as adoptive parents, their superiority to Mrs. Whitehead or the effect on the child. It was held that this is a sale of the child, the only mitigating factor being that the purchaser is the father.

To assert that Mr. Stern's right of procreation gave him the right to custody of the child would be to assert that the constitutional right of procreation includes a constitutionally protected contractual right to destroy someone else's right of procreation. Mrs. Whitehead claimed the right to companionship of her child, which is a constitutionally protected fundamental interest. Since, the contract is held to be invalid nothing remains of Mrs. Whitehead's constitutional claims.

Because the contract stood disposed off, the next dispute in question was the custody of the child. It

was held that under the Parentage Act the claims of the natural father and natural mother are entitled to equal weight. The claim of Mrs. Whitehead was that even if it is in the best interest of the child to award custody to Sterns, the court shouldn't do so as it would encourage surrogacy contracts. The Whiteheads also contended that the award of custody to the Sterns *pendente lite* was erroneous and thus should not be allowed to affect the final custody. The court disagreed with the premise that in determining custody the court should decide what would be in the best interest of the child if some hypothetical facts existed. Eleven experts testified that the trial court's decision awarding custody to the Stern couple should be affirmed. This was based on testimony contrasting the family life of the two parties and individual characters. The stability of the Whitehead's was doubtful, with their finances in serious trouble. Mrs. Whitehead's contempt for professional help coincided with her feelings of omnipotence in a way that could be devastating to a child who had likely need help. The Sterns had no other child, but all indications were that their financial and societal status promised a much more likely foundation for the child to grow and thrive. The household was stable, the finances were more than adequate, and they had a strong relationship with the child. Thus it was concluded that Melissa's best interests call for custody in the Sterns.

As for visitation rights, several experts and the

guardian *ad litem* argued that visitation should be suspended until the child attained majority. This was not a divorce case where visitation is granted invariably.

Nonetheless, Mrs. Whitehead being the natural mother of the child is entitled to visitation at some point.⁸

The case prompted New Jersey legislators to create new, restrictive laws on surrogacy.

The law around surrogacy kept developing after the famous Baby M case. In *Jaycee B v. Superior Court*⁹, a married couple sought to have a child by gestational surrogacy wherein the husband's sperm is artificially united with the egg of his wife and the resultant embryo is implanted in another woman's uterus who then carries the child to term. Herein, pursuant to a written contract between four people viz., a husband, his wife, another woman and her husband, a sperm and an egg from anonymous donors were artificially united and implanted in the uterus of the other woman, with the intention that the offspring would be legally the child of the married couple. The case didn't involve the so-called surrogate mother reneging on an agreement seeking to establish her own parental rights over the child. Rather, a month before its birth, the married couple separated and dissolution proceedings soon followed.

⁸ In the matter of Baby M, 109 N.J. 396 (1988).

⁹ 42 Cal. App. 4th 720 (1996).

The child was born and hospital released it to the wife/intended mother. Several months later the wife brought an order to show cause proceeding seeking *pendente lite* child support from the husband who was the intended father under the contract. The husband was willing to stipulate that he had signed the contract, but vigorously disputed the jurisdiction of the family law court to award even temporary support because it wasn't established that the child was indeed a "child of the marriage". The trial judge agreed with the husband and ruled that the court had no jurisdiction to make a temporary child support order. Essentially, he reasoned that the wife's remedy was to first get an order from the probate court decreeing that the child had been adopted. The trial judge also recognised that the case was one of first impression, and that the child might have rights independent of those of the married couple. It was held that the petition must be granted. The question of legitimacy of the child was left undecided and it was held that until then the family law court had jurisdiction to make an order forcing the husband to pay temporary child support till the issue of parenthood is finally decided.

In another matter of *Johnson v. Calvert*¹⁰, the Calverts (Plaintiff) turned to surrogacy because they couldn't have children after the wife's uterus was removed. Since her ovaries could still produce eggs,

¹⁰ 5 Cal. 4th 84 (1993).

they signed a contract with Johnson (Defendant) which provided that an embryo created by Mark's (Plaintiff) sperm and Crispina's (Plaintiff) egg would be implanted in the defendant. Defendant relinquished all parental rights to the child, agreeing to accept payment for her services in a series of instalments. Defendant later demanded balance of payment due in order for her to release the child. The Plaintiff husband and wife filed a suit seeking declaration that they were the legal parents of the unborn child. After the child's birth, defendant was granted temporary visitation rights. It was ruled that the plaintiff husband and wife were the genetic, biological and natural parents of the child and the defendant's right of visitation was terminated. The defendant went in appeal. It was held that when a fertilised egg is formed from the reproductive cells of a couple and is then implanted into the uterus of another woman, resulting in a child unrelated to her genetically, the natural parents are the husband and wife. The presentation of blood test report as evidence and proof of having given birth are ways of establishing maternity. However, when the two ways do not coincide in one woman, under state law, the natural mother is the one who intended to bring about the birth of the child whom she intended to raise as her own. From the beginning the plaintiff intended to be the child's mother. It is safe to say that the defendant would not have been given the opportunity to become pregnant or deliver the child

if she had made obvious her own intent to be the child's mother prior to the implantation of the fertilised egg. Justice Kennard in his dissent opined that the majority's resort to intent to break the tie between the genetic and gestational mothers is unsupported by statutes and is ill advised. The best interest of the child is the standard that should be applied, and which is more protective of child welfare. Application of majority's rule of intent will not serve the child's best interests in every case.

In the Beasley case (2001), Helen Beasley, a twenty-six year old British woman was hired to carry to term a child intended for a California couple for nearly 20,000 Dollars. Beasley discovered after 8 weeks into her pregnancy that she was carrying twins. Upon learning about this, the couple arranged for Beasley to "reduce" the number of fetuses by one as per the contract. Beasley refused to do so, on the ground that it was too late for her as the fetuses were too mature to undergo such a procedure. Beasley acknowledged that she had no legal rights to the children, but now didn't want the intended couple to have them. Another couple took over the surrogacy contract.

In re Marriage of Buzzanca¹¹, a couple named Luanne and John Buzzanca had an embryo genetically unrelated to either of them implanted in a surrogate. A child by the name of Jaycee was born.

¹¹ 61 Cal. App. 4th 1410 (1998).

After the pregnancy, Luanne and John split up, and the question thus arose as to who were Jaycee's lawful parents. Luanne claimed that she and her erstwhile husband were the lawful parents, but John disclaimed any responsibility. The woman who gave birth made no claim to the child. The trial court determined that Jaycee had no lawful parents. It was held that the trial court erred because it assumed that legal motherhood under California statute could only be established either by giving birth or by contributing an egg. Jaycee wouldn't have been born had Luanne and John not agreed mutually to have a fertilised egg implanted in a surrogate. The trial court failed to consider that there are times when fatherhood can be established by conduct apart from giving birth or being genetically related to child, including artificial insemination. Just as a husband is deemed to be the lawful father of such an unrelated child, similarly the husband and wife must be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In both cases a child is procreated because a medical procedure was initiated and a couple consented to be intended parents. Therefore the appellate court reversed the trial court's judgement, and declared Luanne and John as the lawful parents.¹²

¹² Id.

Traditional Surrogacy

One can have a child through surrogacy by various methods. One form which has been prevalent since inception is traditional surrogacy. In case of traditional surrogacy, the surrogate woman uses her own egg which is artificially inseminated using sperm of the intended father or donor. The surrogate carries and delivers the baby, and being the biological mother of the child, she first has to relinquish her parental rights so the intended parents can raise the child and claim its guardianship. Because the surrogate woman is the child's biological mother, many traditional surrogates are either close friends or relatives of either or both of the intended parents.

This form of surrogacy is not so common nowadays primarily because of the legal and other complexities around the process. However, it still remains a valid option for some intended parents.

The process basically involves first to find a woman willing to complete the traditional surrogacy. Once that is done, a legal contract must be drafted and signed by all the parties. This process is much more legally complex as the surrogate is the biological mother of the child and hence, all legal compliances must be completed before hand and parties must agree to it to avoid any further legal complications with regard to the parentage and guardianship of the child. Traditional surrogacy includes additional legal

complications and processes in comparison to gestational surrogacy and hence it is important to consult an experienced attorney at every stage of the surrogacy process.

The cost of traditional surrogacy will depend on various factors and include surrogate's medical expenses, attorney's fees, counselling cost, monthly allowances, compensations, etc. All these are just variables and not an all-in exhaustive list. This kind of surrogacy is banned in many states because of the legal complications involved.

Gestational Surrogacy

Gestational surrogacy is when the sperm of the father and the egg of the mother are combined in a lab setting and then implanted in the surrogate mother's womb using *in vitro fertilisation* (IVF) technique. This process is quickly becoming the acceptable norm for those intending to have a child through surrogacy. Advancement in technology allows any genetic material supplied for IVF procedures to be screened for possible genetic anomalies or diseases. This is called Pre-implantation Genetic Diagnosis (PGD).

Gamete Donation

Gamete donation is used when genetic material from either the intended mother or father or both is unavailable. In such a case, donor material is used. Egg and sperm donations are gaining popularity and

have similar success rates as in case of other forms of surrogacy. The need for donated genetic material, however, may increase the cost of surrogacy process. Also, the legal complexities remain as they are.

Psychological aspect with regard to surrogacy

The American Society for Reproductive Medicine recommends that gestational carriers must receive a psychological evaluation and counselling. These evaluations help in determining if the surrogate mother meets the general requirements to carry the child. Discussing the surrogacy process with a professional gives her a better understanding of the entire journey.

Being a surrogate is both a physically and psychologically demanding role. The commitment extends to not just the individual but even to her partner and family. Hence, their concerns need to be addressed as well.

A responsible agency carrying out the whole process of surrogacy is expected to provide access to full informed consent, psychological and emotional support, independent counsel and fair compensation to help guide the surrogate mother.

Religious hindrances

When it comes to religious differences, the world is always at loggerheads. However, one thing which is uniform among all religions is their stubbornness to

develop beyond the walls of their religious rules and customs. They are uniformly oppressive and backward. They are united in their dislike and hate towards modern day technological advancements.

If we were to talk of the major religions in the world today i.e. Christianity, Islam and Judaism, they uniformly oppose any such mode of having children except the biological natural way. Forget surrogacy, they even oppose something as simple as adoption.

Christianity: The Bible defines marriage as a union between two people and children can only be a result of that union.¹³ Also it says that children are a gift to couples and not everyone is blessed with them.¹⁴

The Catholic Church expresses its official position in this regard too. They are of the view that surrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood.¹⁵

The Russian Orthodox Church is not as strict as the Catholic one. IVF is allowed here as this procedure “does not appear to be any different from the natural conceiving and occur within family and marital relationships”. Regarding surrogacy, it is

¹³ The Holy Bible, Genesis 1:28, 2:24.

¹⁴ The Holy Bible, Psalm 127:3.

¹⁵ Sukhanova Anna, Surrogacy and Christianity, Surrogacy and Religion (Jul. 03, 2021, 5:36 PM), <https://surrogacybypons.com/surrogacy-and-religion/>.

strictly forbidden by the Russian Orthodox Church even if it is done on the altruistic basis. On the other side, if the genetic parents are ready to confess their sins, the Russian Orthodox Church is ready to baptize a baby born in such way. “The fact of a “surrogate birth” is not in itself an obstacle to the baptism of a person, because he is not responsible for the behaviour of his parents¹⁶”.

The Greek Orthodox Church suggests infertile couple to have a well- defined spiritual orientation and be productive in various fields of social and spiritual life, making their faith in God stronger and their soul more mature¹⁷.

Islam: In Islam, law and religion coincide with each other and hence any law (*sharia*, as it is religiously known) cannot go beyond the boundaries of religion. A law for Muslims must be in conformity with the principles of religion. Thus, in an Islamic nation, any law that violates the principles of Islam cannot sustain and must be eradicated.

Islam has a very strict connotation with regard to marriage and children and it believes that the basis of marriage is the procreation of children and thus it adheres only to the natural process of having children between spouses.

This thus makes it clear that Islam doesn't accept

¹⁶ Id.

¹⁷ Id.

any such concept like adoption or surrogacy wherein the natural process of begetting children is not involved.

However, Islam certainly does promote the upbringing of a child in the hands of someone who is not the father or mother of the child in case of unforeseen circumstances like death or separation from natural born mother like it happened in the case of the Prophet Moses (pbuh) and Prophet Muhammad SAW (pbuh).

Judaism: Rabbis universally accept the use of medical technology, as “just as tree does not grow if it is not fertilized, ploughed and weeded – and even if it already grew, but then is not watered it dies. So, the body is like a tree: the medicine is the fertilizer and the doctor is the farmer¹⁸”.

Nevertheless there are still some ethical controversies regarding the process of surrogacy. For instance, there is always this issue as to who is the mother of the child, the biological mother or the gestational one? It is not clear when motherhood starts, is in the moment of conceiving or in the moment of birth? That’s why Jews prefer that both mothers, gestational and genetic, are Jewish so to avoid any problems in the future regarding the question of the religion of the baby.¹⁹

¹⁸ Id.

¹⁹ Id.

We need surrogacy in today's time?

A child is the need of every individual. Barring a few, every person desires to have someone who can give them the joy of being a parent and can help their family grow further.

Logically speaking, adoption and surrogacy thus remain the only option left with such individuals or couples who due to some reason or the other cannot have a biological child.

Chapter

2



GLOBAL VIEWS ON SURROGACY

Surrogacy has gained recognition and acceptance over the years by countries across the globe. Many countries have their own laws to regulate surrogacy, thereby making it a viable option for parents who are not naturally blessed with a child, to have one.

European Union

The European Union (EU) is an international organisation of European countries, which was formed in the year 1993. It came into force after the signing of the Maastricht Treaty¹ by twenty-eight

¹ The Maastricht Treaty, 92/C 191/01 (1992).

countries. As of December 2020, the United Kingdom is the only former member state to have withdrawn from the European Union. Let's understand how surrogacy is regulated in various countries of the EU.

Austria: Surrogacy in Austria is prohibited by the Federal law on reproductive medicine. The government makes advances to the infertile couple and pays for the first six IVF attempts. Childless couples often choose another country to solve the problem of infertility, the most common being Ukraine.

Belgium: Surrogacy is not legally regulated in Belgium. It is neither prohibited nor allowed. The Civil Code declares that the natural mother is the legal mother. The city of administration manages the process on a case-to-case basis, without federal harmonisation. It is recommended to check with the Belgian counsel knowledgeable in the surrogacy process.

Bulgaria: Bulgaria is faced with a severe and constantly deepening demographic crisis with a low birth rate, high rate of emigration of members of the active population, ageing population and the enormous statistic of approximately three hundred thousand couples trying to cope with infertility. Being unable to conceive in a natural way, many couples resort to new reproductive technologies.

There is a complete ban on surrogacy in Bulgaria. The lack of a legal framework has facilitated to the growth and spread of transnational surrogacy.

Surrogacy as a procedure is not referred to at all in the Health Act in effect in Bulgaria². Ordinance Number 28 of 20.06.2007 on activities and procedures involved in assisted reproduction, issued by the Ministry of Health, defines surrogacy as: ‘a method in which a woman carries the pregnancy for another woman, and after the birth of the child, she grants the parental rights to the biological parents’. In the ‘Assisted Reproduction’ Medical Standard to the said Ordinance, it is stated that: ‘When performing assisted reproduction, surrogate pregnancies are not allowed’.³

Croatia: Surrogacy is illegal in Croatia. It is officially banned and thus regulated in the most transparent and conclusive way. Thus anybody involved in the surrogacy process in Croatia is criminalized by the law.

Cyprus: Cyprus allows embryo transfer to a surrogate without any legal complications or hurdles. However due to lack of legislative enactments, any agreement with your surrogate in Cyprus is not enforceable.

Hence, it is essential to ensure that while a couple is

² Protection Against Discrimination Act, SG No. 70/10.08.2004 Chapter IV s.III (2004).

³ Ordinance No. 28 of 20 June 2007 on Assisted Reproduction Activities in Bulgaria (2007).

dealing with a Cyprus surrogacy agency, all parties are happy with the terms of the surrogacy as per the law, the treatment options and the costs associated.

In a case where the surrogate is single, the child is considered to be child of the intended father and the surrogate mother, born out of wedlock. In such a case paternity may either be established by voluntary acknowledgement or through a Court order. A voluntary acknowledgment cannot be revoked. In such a scenario, the intended father needs consent of the surrogate mother as she is deemed to be the natural mother.

Local heterosexual couples in Cyprus can make a court application during the Cyprus surrogacy arrangement. Under the Cyprus's Law to provide for the adoption⁴ an adoption order can be effected provided that the surrogate gives her consent at least three months after birth.

The Czech Republic (Czechia): For the first time surrogacy in the Czech Republic received its legitimization in 2014, after adoption of a new Civil Code of the Czech Republic. However, a clear regulatory framework to govern the process of surrogacy has not yet been developed.

Certain features with regard to surrogacy in the country are:

⁴ Adoption Law of 1995, No. 19(1)(1995).

Both a married as well as a single woman can give birth to a child for an infertile couple.

Married girls need to obtain written notarised consent of their spouse.

The candidate must meet the requirements for the IVF in accordance with the law.

Surrogacy is allowed only on a free basis and violation of the same is considered a criminal offense.⁵

The girl has a right to be paid for IVF, medical examination, pregnancy and child birth.

There are many shortcomings in the law. The legislation does not protect the parental rights of the biological parents, since, as per law, the mother of the child is the surrogate mother. Thus, even an agreement between the biological mother and a married couple will have no legal effect in the court. To obtain the parental rights, the biological mother must adopt the child. A surrogate mother can consent to adoption six weeks after giving birth and after making a personal statement in this regard to the court. The transfer of child to biological parents occurs after a court decision. Under the law, fulfillment of her parental duties is suspended on expiration of three months after obtaining the consent of the surrogate mother for adoption.

⁵ The Criminal Code of the Czech Republic, No. 40/2009 s.169 (2009).

Denmark: Denmark is a leading country in terms of IVF protocols and restrictions. In 1997, a law prohibiting IVF as well as the use of donor sperm for single girls and lesbian couples was passed in the country. In 2007, a new law on artificial insemination was adopted which allowed funding of IVF programs for all, regardless of orientation and marital status. IVF programs are funded by the State. Also, the state control citizens' access to the IVF procedure. It is known that IVF for infertility treatment can be used by couples who can become suitable parents for the child. At the same time, for women above forty, IVF is no longer paid by the state, and those above forty-five, are not allowed to use the technology even in private. Despite liberalization of laws, commercial surrogacy is completely prohibited in Denmark. Surrogate motherhood is allowed only if the surrogate mother is ready to give her own child to a childless couple without any remuneration.

Estonia: Surrogacy is prohibited as per the Estonian law. Artificial insemination is allowed only by using the biological mother and her partner's ovum and sperm, respectively or a donor's ovum and sperm from a gamete donor bank.

Finland: Surrogacy is illegal in Finland. The Assisted Fertility Treatments Act⁶ allows all other alternative

⁶ The Act on Assisted Fertility Treatments, No. 1237/2006 (2007).

fertility treatment options to be implemented but completely excludes surrogacy. It imposes the prohibition on the surrogacy process and surrogate motherhood in an implicit way. Surrogacy has not been defined under the Act but it has prohibitive content concerning fertility treatment cycles designed by fertility clinics following with the adoption of the newborn. Thus, surrogacy does not have an inclusive legal framework in Finland.

France: In France, surrogacy arrangements are illegal. The law is based on the government's assertion that surrogacy would commercialize women bodies. However recently, despite France's stance on the legality of surrogacy, the legislators voted that French children born with the help of surrogates in other countries should be recognized as the intended parents' children when they return to France as a family unit.

Germany: Surrogacy is prohibited in Germany. The Embryo Protection Act⁷ passed in 1991, prohibits any medical procedures in the territory of Germany, which entail illegal actions with the nascent human life⁸. The law allows a woman to give birth only to her own child. IVF technology is allowed in Germany but only with your own eggs. Almost thirty percent of German women get pregnant

⁷ The Embryo Protection Act, Federal Law Gazette, Part I No. 69 (1990).

⁸ Id.

through the help of IVF technique. Due to the prohibition, Germans travel to neighboring countries like Ukraine, Great Britain and the Netherlands where surrogacy and egg donation is allowed by law.

Greece: Greece only allows the altruistic (non-commercial) arrangement of surrogacy. It is legal for intended parents in a heterosexual relationship or for single females. The latter are required to medically prove their inability to have a pregnancy and shouldn't be older than fifty at the time of the contract. Surrogates must be tested for medical as well as mental fitness.⁹ The requirement of permanent residence has now been repealed.¹⁰

Hungary: The Constitution is the paramount statute in the country.¹⁰ No legislation can be adopted that contradicts its contents. The Fundamental Law is the foundation of the Hungarian legal system. The Fundamental Law and legislative regulations are binding on each individual. All branches of law including marital and child laws emancipate from the Fundamental Law. Article L states that:

Hungary will protect the institution of marriage as a union of a man and woman established by voluntary decision, and the family as the basis of the survival of the Nation. Family ties shall be based on marriage and/or the relationship between parents and

⁹ The Enforcement of Medically Assisted Reproduction, No. 3305/2005 (2005).

¹⁰ No. 4272/2014 (2014).

children.

Hungary will encourage the commitment to have children.

The protection of families is regulated by the Cardinal Act CCXI of 2011.

Articles XV and XVI contain essential guiding provisions on equality of men and women, and that the state shall protect families, children, women, the elderly and persons living with disabilities.

Hungary does not recognise surrogacy agreements nor is it enforceable under the Hungarian law¹¹.

Ireland: There is no Irish legislation to deal with the issue of surrogacy. Due to this current legal vacuum, the legal status and rights of all involved are governed by other legislations in the country. In the Report of the Commission on Assisted Human Reproduction¹², the commission made a recommendation that a child born through the process of surrogacy should be presumed to be that of the commissioning couple. It was also recommended to establish a regulatory body for assisted human reproduction, including surrogacy.

If the surrogate mother is married, then the husband is generally presumed by law to be the father of the

11 The Fundamental Law of Hungary (2011).

12 Report of the Commission on Assisted Human Reproduction (2005).(Jul. 29, 2021, 4:15 PM)
<http://hdl.handle.net/10147/46684>.

child, unless the contrary is proved.¹³

Italy: Italy does not recognise surrogacy. It is illegal and banned in the country. The ban is rooted in the claim that surrogacy involves exploitation of women as it treats the surrogate mother as a means to an end, relegating her from a person worthy of respect to a mere object. Thus, the principle contained in Article 2 of the Italian Constitution¹⁴, which enshrines respect for human dignity and honor in the light of social awareness, lies at the root of considering such an agreement as unlawful.

Latvia: Surrogacy is not recognized or legally regulated in Latvia. There is no legislation for the same and hence there is no way to transfer parentage to the commissioning parent. Article 146 of the Civil Law¹⁵ lay down that the mother of the child is the one who has given birth to the child. However, there are other options for potential parents who are infertile or do not wish to give birth to a child. A person may become a parent either by undergoing medical impregnation or through adoption. The Sexual and Reproductive Health Law¹⁶ regulates all such legal affairs including diagnosis and treatment of infertility, medical impregnation, protection of unborn child, and the sexual and reproductive health of every person. Medical impregnation shall be

13 The Status of Children Act, No.26 s.46 (1987).

14 Constitution of the Italian Republic (1947).

15 The Civil Law of Latvia (1992).

16 The Sexual and Reproductive Health Law (2002).

carried out only in medical treatment institutions that comply with legal requirements and use medical technologies certified in Latvia.¹⁷

Lithuania: Surrogacy is illegal in Lithuania. Article 11 of the IVF Law¹⁸ in the country declares all surrogacy agreements as null and void. However, the law has legalized donation of reproductive cells when one of the spouses or parents have damaged or insufficient reproductive cells which cannot be used for assisted fertilization, as well as in cases where there is high risk of transmitting diseases likely to cause significant disability.¹⁹

Luxembourg: Surrogacy is not regulated in Luxembourg. A surrogacy agreement is interpreted as being against public order in accordance with Article 16 of the Law of November 15, 1982 on substances of the human body, which forbids selling human substances.

Malta: Malta has very strict laws on assisted reproduction. A Bill was tabled in the parliament in 2018 to liberalize the law of surrogacy in the country. By permitting gamete donation for the first time, the proposal offered hope to many prospective parents. However, the Embryo Protection Act still restricts access to fertility treatment to heterosexual

¹⁷ Id.

¹⁸ The Law on Assisted Reproduction (2016).

¹⁹ Id.

couples by outlawing surrogacy.²⁰ In 2021, the Labour MP Rosianne Cutazar proposed the legislation of surrogacy, arguing that rights of women born without a uterus need to be taken into consideration.²¹ The proposal is yet to see the light of the day.

Netherlands: Surrogacy is legal in Netherlands under the following conditions:

The intended parents make a private arrangement with someone they know, such as a relative or acquaintance. They are not, however, allowed to publically announce that they are looking for a surrogate mother. This includes social media posts.

The surrogate mother may be reimbursed for her expenses.

Promoting commercial surrogacy is illegal as per articles 151b and 151c of the Criminal Code²². The law does not allow websites to advertise surrogacy nor does it allow individuals to publically announce that they are seeking a child through surrogacy or that they want to become a surrogate mother.

Poland: In Poland, surrogacy is not explicitly

20 The Embryo Protection Act (2012).

21 Tim Diacono, Rosianne Cutazar Calls for Surrogacy: ‘We must consider women born without a uterus’ (Jul. 29, 2021, 6:07 PM) <https://lovinmalta.com/news/news-politics/rosianne-cutazar-calls-for-surrogacy-we-must-consider-women-born-without-a-uterus/>.

22 The Criminal Code (1881).

regulated under any law. The mother of a child is the woman who gives birth to the child. Also, as per majority of the legal doctrines, surrogacy contracts are null and void under Polish law.

Portugal: Portugal is one the few countries in the EU that favors surrogacy. Since August 2016, surrogacy has been legalised²³ in certain specific situations, defined in quite restrictive terms viz., women born without a uterus, or having a serious lesion or disease of the uterus that prevents the gestation of a child, or in other justifiable clinical conditions.²⁴

Romania: Surrogacy in Romania is neither legalized nor expressly forbidden. However, the Civil Code states that, “Human medically assisted reproduction with a third party donor doesn’t determine a filiation link between the child and the donor”²⁵ and “Maternal filiation results from the act of giving birth; it can also be established through recognition of court order.”²⁶ Subsequently, the surrogate mother automatically becomes the legal mother and the genetic parents lose *ab initio* the parental rights.

Slovak Republic: In the Slovak Republic there are

23 Regulates access to replacement pregnancy, proceeding to the third amendment to Law no. 32/2006 of July 26, 2006, Law No. 25/2016 (2016).

24 *Id.*, Article 8/2.

25 The Civil Code of Romania, Law No. 287/2009 art. 441 (2009).

26 The Civil Code of Romania, Law No. 287/2009 art. 408 (2009).

almost no legal bounds on surrogacy set. Surrogacy on altruistic basis is not prohibited but there are no rules neither for the surrogate mother nor the intended couples. The special reproductive medical treatment is provided without any legal or social support for both parties.

Slovenia: In Slovenia, parental rights cannot be acquired through surrogacy. The provisions prohibiting surrogate motherhood are contained in the Infertility Treatment and Procedures of Biomedically-Assisted Procreation Act. Article 7 states that a woman who intends to give a baby to a third person after birth is not entitled to assisted reproductive services. Violation of the law is punishable.

Spain: Surrogacy is illegal as per Spanish law. Article 10 of the law on Human Assisted Reproduction²⁷ states that the contract by which the pregnancy is agreed to, with or without any remuneration in return, in exchange of a woman renouncing her maternal affiliations in favor of another person is null and void.

Sweden: Sweden does not allow assisted conception if the purpose is a surrogacy arrangement. However, Swedish couples are allowed to turn to countries where it is allowed. This is often criticized for the fact that there is no regulatory mechanism of such

27 The Law on Human Assisted Reproduction, Law No. 14/2006 art. 10 (2006).

transnational surrogacy arrangements which complicates the process of legal parenting. Lawyers and activists in the country have time and again advocated for a state law on surrogacy but nothing materialized.

Ukraine: Ukraine is a major international destination for surrogacy, considering its liberal laws and affordable prices of medical treatment. Since 2002, surrogacy and having child in combination with egg and sperm donation is absolutely legal in the country. Ukrainian surrogacy laws are very favorable and support the individual's reproductive rights. Article 123²⁸ of the Family Code of Ukraine²⁹ governs the law on surrogacy in the country. As per the law, a donor or surrogate mother has no parental rights over the child born and the child is by law the child of the prospective parents.³⁰

28 Article 123: Establishing Maternal and Paternal Affiliation in Case of Medically Assisted Procreation and Ovum Implantation:

1. If the wife is fertilized by artificial procreation techniques upon written consent of her husband, the latter is registered as the father of the child born by his wife.
2. If an ovum conceived by the spouses is implanted to another woman, the spouses shall be the parents of the child.
3. Whenever an ovum conceived by the husband with another woman is implanted to his wife, the child is considered to be affiliated to the spouses.

29 Family Code of Ukraine, No. 2947-III (2002).

30 Supra Note 29.

United Kingdom

Surrogacy is legal in the United Kingdom. However, there are various rules and regulations. Surrogacy contracts are not legally enforceable which means that everybody relies on each other to honor the agreement, both in respect of handing over the child as well as expenses and other issues. It is also against the law for a third party to negotiate a surrogacy contract for payment. This includes a solicitor.

Now obviously, this is a very vague rule since due to the agreement not being legally enforceable, the rights of the surrogate mother as well as of the child are always under threat. However, if there is a dispute about who should care for the child after birth, an application can be made to the family court for a child arrangements order. Each case is dealt with individually, keeping the child's best interest in mind.

It is a criminal offence in the UK to advertise that you are:

Looking for a surrogate Willing to act as a surrogate. The surrogate is the legal mother. If she is married, her husband becomes the legal father. In case he doesn't consent to the surrogacy, a form LC can be used to negate his parenthood.

Fertility clinics need to get appropriate consent to treatment from the intended parents, the surrogate and her husband or partner.

Ireland

Surrogacy is currently not legally regulated in Ireland. The Commission on Assisted Human Reproduction³¹ recommended regulating surrogacy and that a child born through it should be presumed to be that of the commissioning parents, but their recommendations have not been implemented.³² Although there has not been any definitive statement on the legality or otherwise of surrogacy agreements *per se*, a number of cases have come before the judiciary in Ireland involving many issues that may arise as a result of such surrogacy agreements.

Domestic surrogacy may give rise to issues regarding parentage and guardianship.³³ These issues may also arise in international surrogacy agreements, regarding citizenship and travel documents. Guidelines regarding the same were published by the Ministry for Justice, Equality and Defence in February, 2012 in relation to children born as a result of surrogacy agreements entered into outside the State.³⁴

31 *Supra* Note 12.

32 *Id.*

33 A child born in Ireland to an Irish parent is entitled to Irish citizenship.

34 The Minister for Justice, Equality and Defence announces the publication of guidance for Irish couples on surrogacy arrangements made abroad (Jul. 30, 2021, 3:43 PM), <http://www.justice.ie/en/JELR/Pages/PR12000035>.

Nigeria and South Africa

Nigeria is yet to provide a specific comprehensive legislation to regulate surrogacy. There are no judicial precedents either. The implication thereby is that the rights of children in surrogacy agreements are not protected and parties have a right to make any decision concerning them, whether harmful or not. There are however, certain provisions under the Code of Medical Ethics³⁵ that regulate assisted conception and related practices. Rule 23 of the Code recognizes gestational surrogacy and permits donation of gametes. The Code also states that gamete and embryo donation should not be commercialized.

However, in 2016, a Bill was introduced in the Nigerian National Assembly to amend the National Health Act and include the regulation of Assisted Reproductive Technology (ART).³⁶ As per the provisions of the Bill, the Federal Ministry of Health was entrusted with the duty to regulate the practice of ART Clinics and Banks that shall have the function of creating and maintaining a central database of ART data in Nigeria. Medical tests and screening are required for surrogates and donors to ensure that no harm is caused to children in any way. Before the process of surrogacy is approved, a medical report must confirm the inability of the

35 The Code of Medical Ethics (2004).

36 The National Health Act (Amendment) Bill (2016).

commissioning mother to carry a child to term.³⁷ Written consent must be obtained of all parties to the agreement.³⁸ They are allowed to withdraw the consent at any time before the surrogate is implanted with the required gametes.³⁹ There is absolute prohibition on sex pre-determination⁴⁰ and freezing of embryos⁴¹ without consent of all parties. It is mandatory for the clinics to inform the commissioning couple the rights of children born through ART.⁴² The Bill also allows the use of ARTs, except surrogacy, for married infertile couples.⁴³

In South Africa, the rights of children are regulated by the Children's Act⁴⁴ and the Constitution of the Republic of South Africa.⁴⁵ Sections 28(1) and 28(2) of the Constitution provide that the best interests of the child are of paramount importance in all matters concerning the child. The first known case of surrogacy took place

37 The National Health Act (Amendment) Bill, clause 68(10) (2016).

38 The National Health Act (Amendment) Bill, clause 69 (2016).

39 The National Health Act (Amendment) Bill, clause 69(4) (2016).

40 The National Health Act (Amendment) Bill, clause 72(1) and 72(2) (2016).

41 The National Health Act (Amendment) Bill, clause 69(2) (2016).

42 The National Health Act (Amendment) Bill, clause 68(7) (2016).

43 The National Health Act (Amendment) Bill, clause 75(1) (2016).

44 The Children's Act, No. 38 (2005).

45 The Constitution of the Republic of South Africa (1996).

in 1987, when a forty eight year old mother agreed to carry her daughter's baby and gave birth to triplets. This compelled the South African Law Commission (SALC) to advocate for a legislation that would specify the rights and duties of all parties to a surrogacy agreement.

Surrogacy agreements are regulated as per the provisions of Chapter 19 of the Children's Act. Prior to the enactment of the Act, surrogacy agreements were regulated by the law of contract as well as by rules pertaining to artificial insemination, such as the Human Tissue Act.⁴⁶

Section 292 of the Children's Act mandates that surrogacy agreements must be in writing, signed by all parties and entered into in South Africa. The law also requires that one of the commissioning parents, as well as the surrogate mother and her husband or partner, must be domiciled in South Africa at the time of agreement.

Malaysia

In Malaysia, modern medical reproductive technologies are readily available to assist couples with the issue of infertility and related problems. The cost of treatment is low in comparison to neighboring countries. However, there is a lack of proper legislation and the reproductive industry is grossly unregulated.

46 The Human Tissue Act, No. 65 (1983).

In 2006, the Malaysian Medical Association⁴⁷ laid down guidelines for assisted reproduction and on the issue of surrogacy the guidelines are as follows:

“12. SURROGACY

In a surrogate arrangement a woman agrees to become pregnant and bear a child for another person/persons and to surrender it at birth. The above practice is not acceptable to most of the major religions in this country. Such a surrogate pregnancy can also potentially lead to many legal dilemmas for the persons involved.”⁴⁸

The guidelines also state that use of assisted reproductive technology (ART) is a prohibited practice and ethically unacceptable for unmarried couples. In the year 2009, the Health Ministry initiated the proposed Assisted Reproductive Technology Technique Services Act to address issues such as surrogacy, sperm and egg banking, and sperm donation in consultation with religious groups, non-governmental organizations, doctors and ministries.

In Malaysia, any proposed ART statute would also need to consider the complexity of the dual legal system for Muslims and non-Muslims since Muslims are governed by the Sharia law, whereas non-

47 Assisted Reproduction: Guidelines of The Malaysian Medical Council, MMC GUIDELINE 003/2006 (2006).

48 Id.

Muslims are governed by the civil law.⁴⁹

Singapore

Surrogacy is currently illegal in Singapore. The Ministry of Health released a directive prohibiting Assisted Reproduction (AR) centres from carrying out surrogacy services, and any violator shall have its license suspended or revoked. The couples however, will not face any criminal penalty but it will be difficult for them to establish any legal or formal relation with the child due to the absence of a surrogacy law.

Thus, people and couples in Singapore turn to countries like the United States, Malaysia and Laos to seek surrogacy arrangements. However, seeking surrogacy overseas comes with a risk. It is unlikely that the Singapore courts will enforce the surrogacy agreements due to absence of any law in the country.

Moreover, in case the surrogate mother plans to back out of the agreement with the intention to keep the child, there is little that can be done to enforce the agreement back home in Singapore. This shall lead to further complications pertaining to the child's citizenship and parental rights.

However, Singapore does allow gestational surrogacy but only in case where one of the partners is not able to produce the sperm or egg.

49 The Law Reform (Marriage and Divorce) Act, No. 164 (1976).

Scotland

Currently the country allows surrogacy in the altruistic form. Thus, surrogacy is legal as long as the surrogate receives no payment or any other benefit from the intended parents. However, in practice, surrogate mothers are permitted to claim 'reasonable pregnancy related expenses'.

The surrogate mother is considered the legal mother until court orders otherwise. The intended parents are not the legal guardians until a Parental or Adoption Order is made. Even in case the surrogate mother is willing to give the child to the intended parents, they will still have to apply to the courts and go through the legal process for obtaining such an order.

A Parental Order can only be applied for if at least one of the intended parents is genetically related to the child. Otherwise, an Adoption Order has to be applied for. Surrogacy agreements can be put in place however, they are not enforceable in Scottish courts.

United States of America

The laws regulating surrogacy in the United States are often distinguished between surrogacy that is compensated and one that is not. In other words, there are states that allow a woman to be a surrogate so long as she is not paid. The idea is that someone paying a surrogate to carry or give up a child is

offensive and often construed as selling the child.

Alabama: Alabama does not expressly make surrogacy agreements enforceable. Under the Alabama Adoption Code, it is a Class C felony for any person or agency to receive any money for placing or arranging a minor placement for adoption.⁵⁰ Surrogate motherhood is expressly excluded from coverage under the provision criminalizing child placement.⁵¹

Alaska: There is no legal authority in Alaska governing surrogacy agreements and their enforceability. The law is completely silent on the subject.

Arizona: Surrogacy is expressly prohibited in Arizona.⁵² The law provides that the surrogate mother is the legal mother of a child born as a result of surrogacy contract. Her husband becomes the child's father.⁵³

Arkansas: Surrogacy agreements are enforceable.⁵⁴ The biological father and intended mother are the parents of any child born as a result of a surrogacy agreement.⁵⁵

50 The Alabama Code, Section 26-10A-34(b) (2009).

51 The Alabama Code, Section 26-10A-34(c) (2009).

52 Arizona Revised Statutes, AZ Rev. Stat. Ann. s. 25-218(A) (1989).

53 *Id.*, s. 25-218(B) and (C).

54 Arkansas Code, Ark. Code Ann. s. 9-10-201(b), s. 9-10-201(c) (2010).

55 *Id.*

California: The California Family Code states that paid and unpaid surrogacy agreements are valid and enforceable, subject to the various statutory requirements.⁵⁶

Colorado: There is no explicit legislation in Colorado dealing with the issue of surrogacy.

Connecticut: There is no express law as such. However, the Connecticut General Statutes provide that if a birth was subject to a surrogacy agreement, the Connecticut Department of Public Health is permitted to create a replacement birth certificate for the child with the names of the intended parents.

Delaware: Surrogacy is legal in Delaware and surrogacy agreements are enforceable.⁵⁷

District of Columbia: Surrogacy is expressly prohibited in Columbia subject to a civil penalty of maximum 10,000 US Dollars or imprisonment for a term not more than one year.⁵⁸

Florida: Surrogacy agreements are expressly legal and enforceable under Florida law.⁵⁹

Georgia: The statutes in Georgia are silent on the subject of surrogacy and there is no legal enforceability of surrogacy agreements.

56 California Family Code, Cal. Fam. Code s. 7960-7962 (2011).

57 The Delaware Code, Del. Code Ann. tit. 13 s. 8-807 (2013).

58 Code of the District of Columbia, D.C. Code ss. 16-402(a) and 16-402(b) (2001).

59 The 2020 Florida Statutes, Fla. Stat. s. 742.15 (2020).

Hawaii: The law is silent on the subject of surrogacy and enforceability of surrogacy agreements.

Idaho: Surrogacy agreements are not specifically addressed by the statutes in Idaho or any published case laws.

Illinois: Surrogacy agreements are expressly legal and enforceable.⁶⁰ The laws set forth a rigid set of requirements for both the surrogate and intended parents for purpose of protecting the interests of all parties involved.⁶¹

Indiana: Surrogacy agreements are void, unenforceable and against public policy of the state.⁶²

Iowa: The Iowa Code does not directly and explicitly speak of enforcing surrogacy agreements. However, surrogacy is excluded from laws forbidding purchase or sale of individuals.⁶³

Kansas: There is no law explicitly prohibiting surrogacy. However, the State has always taken a stand against the practice.

Kentucky: Kentucky is another place devoid of any specific law on surrogacy. However, a 1986 opinion from the Kentucky Supreme Court suggested that

60 The Gestational Surrogacy Act, 750 Ill. Comp. Stat. 47/25 (2005).

61 *Id.*

62 The Indiana Code, s. 31-20-1-1 (2) (1997).

63 The Iowa Code, s. 710.11 (2008).

uncompensated surrogacy agreements are not void as against public policy.⁶⁴

Louisiana: A surrogacy contract in exchange of some valuable consideration is absolutely null and void and unenforceable as contrary to public policy⁶⁵.

Maine: The law is silent on the subject of surrogacy and enforceability of surrogacy agreements. There are no instructive published Maine opinions either.

Maryland: The statutory laws in Maryland do not specifically deal with the issue of surrogacy and the enforceability of surrogacy agreements. However, it was clearly held by the Court of Appeals of Maryland in 2007 that compensated surrogacy agreements are illegal.⁶⁶ The enforceability of uncompensated surrogacy agreements is however, unclear.

Massachusetts: There is no statutory law specifically dealing with the concept of surrogacy. However, judicial pronouncements indicate that surrogacy agreements are enforceable in Massachusetts. In 2001, the natural parents sought a pre-birth order in a surrogacy agreement directing the hospital to enter name of intended parents as the parents of the unborn twins.⁶⁷ In 2004, the Massachusetts

64 Inc. v. Commonwealth, 704 S.W.2d 209 (Ky. 1986).

65 Louisiana Laws Revised Statutes, La. Rev. Stat. Ann. s. 9-2713 (A) (2009).

66 In re Roberto, d.B., 923 A.2d 115 (Md. 2007).

67 Culliton v. Beth Israel Deaconess Med. Cent., 756, N.E.2d

Supreme Judicial Court upheld the authority of a Probate and Family Court to issue a pre-birth judgment of parentage in an equity action brought by the intended parents of a surrogacy agreement.⁶⁸

Michigan: Surrogacy agreement is void and unenforceable as contrary to public policy.⁶⁹

Minnesota: There is no specific law to deal with surrogacy. However, in re Baby Boy A, the court upheld a choice-of-law provision in a surrogacy agreement and enforced the agreement under the law of Illinois, indicating that such an agreement is not against the public policy of Minnesota.⁷⁰

Mississippi: There is no legal authority governing enforceability of surrogacy agreements. The statutes are completely silent.

Missouri: There is no statutory law or judicial pronouncements controlling the enforceability of surrogacy agreements.

Montana: There is no legal authority governing enforceability of surrogacy agreements. The statutes are completely silent.

Nebraska: The law makes surrogacy contract void and

1133 (Mass. 2001).

68 Hodas v. Morin, 814 N.E.2d 320 (Mass. 2004).

69 The Surrogate Parenting Act, Michigan Compiled Laws, Mich. Comp. Laws s.722.851 (1988).

70 Minn. Stat. S. 480A.08, subd. 3 (2006).

unenforceable.⁷¹

Nevada: Paid and unpaid surrogacy agreements are explicitly permitted and are enforceable in Nevada courts.⁷²

New Hampshire: Paid and unpaid surrogacy agreements are explicitly permitted and are enforceable.⁷³

New Jersey: The law on this subject is unclear. Paid surrogacy is completely illegal and unenforceable though.

New Mexico: The law does not deal with surrogacy explicitly but the New Mexico Children's Code does through its provisions imply that paid and unpaid surrogacy agreements are enforceable.

New York: Surrogacy contracts are void and unenforceable.⁷⁴ A first offence results in a civil penalty, and a second offense results in a felony.⁷⁵

North Carolina: The law is silent on the enforceability of surrogacy agreements.

North Dakota: The law explicitly distinguishes traditional surrogacy from gestational surrogacy.⁷⁶

71 Neb. Rev. Stat. s. 25-21, 200(1) (1988).

72 Nev. Rev. Stat. s. 126.710 (2013).

73 N.H. Rev. Stat. Ann. s. 168-B:11 (2014).

74 New York Domestic Relations Law, N.Y. Dom. Rel. Law s. 122 (1992).

75 *Id.*, s. 123(2).

76 North Dakota Century Code, N.D. Cent. Code Ann. s. 14-18-05 (2005).

Traditional surrogacy agreements, where the surrogate is biologically related to the child she carries, are unenforceable.

Ohio: There is no specific law dealing with the issue of surrogacy and enforceability of surrogacy agreements.

Oklahoma: Oklahoma statutes and case law do not specifically address the enforceability of surrogacy agreements.

Oregon: Surrogacy agreements are not considered violative of public policy. However, buying or selling a person less than the age of eighteen is a Class B felony.⁷⁷

Pennsylvania: The law is unclear. The statutory law does not address the enforceability of surrogacy agreements.

Rhode Island: There is no law legalizing or allowing surrogacy agreements in Rhode Island.

South Carolina: There is no law legalizing or allowing surrogacy agreements in South Carolina.

South Dakota: There is no law legalizing or allowing surrogacy agreements in South Dakota.

Tennessee: Surrogacy agreements are legally enforceable as per the Tennessee Code.⁷⁸

77 Oregon Revised Statutes, Or. Rev. Stat. s. 163.537(3) (1997).

78 The Tennessee Code, Tenn. Code Ann. s. 36-1-1(102)(48)

(i)-(ii) (2010).

Texas: Gestational surrogacy agreements are expressly enforceable.⁷⁹

Utah: Compensated and uncompensated surrogacy agreements are enforceable if they confirm to strict requirements.⁸⁰

Vermont: There is no legal authority governing enforceability of surrogacy agreements.

Virginia: An express contract between the surrogate and the intended parents shall be entered into whereby the surrogate shall relinquish all her rights and duties in favor of the intended parents.⁸¹

Washington: The Revised Code of Washington expressly prohibits commercial surrogacy agreements.⁸²

West Virginia: The law regarding surrogacy is unclear. The Code of West Virginia does not speak about enforceability of surrogacy agreements. It does, however, exclude surrogacy from laws that prohibit the purchase or sale of a child.⁸³

Wisconsin: There is no law specifically dealing with surrogacy. However, in 2013, the Supreme Court of Wisconsin held that surrogacy agreements are

79 The Texas Family Code, Tex. Fam. Code Ann. s. 160.754(a).

80 Utah Code, Utah Code Ann. s. 78B-15-801(4).

81 Virginia Code, Va. Code Ann. s. 20-159(A).

82 The Revised Code of Washington, Wash. Rev. Code Ann. s. 26.26.230.

83 West Virginia Code, W. VA. Code s. 61-2-14h(a), (e)(3) (2012).

enforceable.⁸⁴

Wyoming: There is no law that addresses enforceability of surrogacy agreements. The statutes are silent on the subject and there are no instructive published opinions either.

South America

South America is not a homogeneous region. Significant differences exist among the various countries in terms of size, per capita income, demography, and natural resources. High economic disparities in the region and the influence of the Catholic Church significantly impact the reproductive issues.

Over the last few decades, South American societies and their political as well as economic structures have weathered significant changes and uncertainties, like destabilization of political institutions, market inflation, and social, economic, and health inequalities.

Women are better educated and part of workforce now. Combined with the socio-economic conditions in the region, they have delayed their decision to enter into motherhood, which has contributed to a general decline in fertility rates.⁸⁵

84 *In re F.T.R.*, 833 N.W. 2d 634, 650-51 (Wis. 2013).

85 Alicia Adsera et al, Fertility changes in Latin America in periods of economic uncertainty (Aug. 02, 2021, 10:59 AM), <https://doi.org/10.1080/00324728.2010.530291>.

Unlike North America, South American countries have a common legal system. All countries follow a codified civil law system, a definite set of rules which can be brought before a court of law for defense in any legal proceeding.

Apart from that, politics and law in these countries are still considerably influenced by the Catholic Church. Thus, most laws prohibit use of ART. This includes surrogacy as well and for surrogacy to be regulated it must be included in a country's legislative code. Since these codes are enacted by the State's Congress, a definite law on ART is yet to see the light of the day due to its socially controversial nature.⁸⁶

Argentina: In 2010, Argentina regulated ART for the first time, recognizing a person's right to procreate as a fundamental right.⁸⁷ In 2013, ART access was extended to any adult person regardless of his or her age, marital status and infertility situation, allowing

86 Griffin David et. al., Current Practices and Controversies in Assisted Reproduction, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction" (2001) (Aug. 02, 2021, 11:17 AM) <http://apps.who.int/iris/bitstream/handle/10665/42576/9241590300.pdf;jsessionid=2864C65BBF83447AE1211DD8D0637D79?sequence=1>.

87 Florencia Luna, *Infertilidad en Latinoamerica*. En busca de un Nuevo modelo (2014) (Aug. 02, 2021, 17:51 PM) https://www.academia.edu/35947000/Infertilidad_en_Latinoam%C3%A9rica_En_busca_de_un_nuevo_modelo.

national access to ART.⁸⁸

Bolivia: With the highest fertility in the region, Bolivia certainly stands out. On average, a woman in Bolivia has three children in her lifetime. Bolivia does not have any legislation pertaining directly to commercial surrogacy. Lack of laws and regulations lead to cross-border commercial surrogacy agreements in the country that were found to be around 70 per cent of the total surrogacy agreements in 2014.⁸⁹

Brazil: As per the United Nation Fertility Report, 2015,⁹⁰ Brazil has lowest fertility rate. Between 2010 and 2015, women from Brazil had an average of 1.8 children.⁹¹ Commercial surrogacy is forbidden in Brazil. Also, the Congress has not enacted any

88 El Senado y Cámara de Diputados de la Nación Argentina reunidos en Congreso, etc. sancionan con fuerza de Ley (2013)(Aug. 02, 2021, 18:13 PM) https://www.argentina.gob.ar/sites/default/files/anteproyecto_reforma_ley_proteccion_de_los_datos_personales_nueva_version.pdf.

89 Shirley Jesus et. al., El Vacío Legal dentro de la Legislación Boliviana; con relación a la Maternidad Subrogada (2014) (Aug. 02, 2021, 18:24 PM) http://usfx.bo/nueva/Dicyt/Handbooks/Ciencias%20Sociales%20y%20Humanidades_1/Ciencias%20Sociales%20y%20Humanidades_Handbook_Vol%20I/PAPERS_31/Social%20Art%2012.pdf.

90 United Nations World Fertility Pattern 2015, (2015) (Aug. 02, 2021, 18:24 PM) <https://www.un.org/en/development/desa/population/publications/pdf/fertility/world-fertility-patterns-2015.pdf>.

91 Id.

regulation regarding surrogate motherhood.

Chile: As per the 2015 report,⁹² infertility affects 10.4 per cent of women in Chile. Chile has the most egalitarian health system. It covers low- complexity fertility treatments as well as complex treatments such as IVF.⁹³ Despite access to such advanced medical facilities, Chilean society is traditional and values the concept of family which are difficult to negotiate. Legislating laws in this regard thus becomes difficult.

Colombia: In contrast to the regional policy, Columbia was a pioneer in ART. The first in-vitro baby in Latin America was born in Columbia in 1985.⁹⁴ In 2009, the Constitutional Court of Columbia urged Congress to enact a legal framework for surrogacy motherhood. This decision remains the only legal precedent on the subject in Colombia.⁹⁵

Ecuador: In this part of the world, infertility affects around 15 per cent of the population. Assisted

92 Id.

93 Programa de fertilización asistida de baja y alta complejidad en la red pública o red preferente (MAI) de Fonasa (2021) (Aug. 02, 2021, 18:24 PM) <https://www.chileatiende.gob.cl/fichas/23778-programa-de-fertilizacion-asistida-de-baja-y-alta-complejidad-en-la-red-publica-o-red-preferente-mai-de-fonasa>.

94 34 years of the first test tube baby in Latin America (Aug. 02, 2021, 19:09 PM) <https://www.cecolfes.com/34-anos-de-la-primera-bebe-probeta-de-latinoamerica/>.

95 (Aug. 02, 2021, 19:14 PM) <https://www.corteconstitucional.gov.co/relatoria/2009/T-968-09.htm>.

reproductive mechanism is not regulated and thus not included in the health care system. Hence fertility treatment must be paid out of pocket.

Paraguay: Official infertility statistics are not published in Paraguay. IVF is not in widespread use in this part of the world. Similarly, surrogacy arrangements are not legislated nor have they been addressed by judicial pronouncements.

Peru: Since official infertility statistics are not published in Peru, it is difficult to accurately report. The Peruvian public health care system covers only low-complexity fertility treatment. There is no specific surrogacy legislation either.

Uruguay: Uruguay is a small country in South America. The infertility rate among the population is estimated to be between 15 and 18 per cent.⁹⁶ In 2013, Uruguay parliament approved legislation addressing ART. It includes ART coverage under the Uruguayan public health care system. Gestational surrogacy is illegal except in cases when the intended mother has an illness impeding her ability to carry the gestation to term. In such cases, intended parents have their embryos implanted into a surrogate mother who must be a second-degree relative of either of them and the surrogacy should be altruistic in nature.

96 (Aug. 02, 2021, 19:23 PM) <https://www.elpais.com.uy/que-pasa/costos-trabas-gestar-ayuda.html>.

Venezuela: The infertility rate in Venezuela is between 10 and 15 per cent.⁹⁷ The National Public Health System of Venezuela (SPNS) does not cover fertility treatments however gratis care and universal availability are fundamental principles of the public health care system. Neither surrogacy nor ARTs have any specific applicable legislation.

Thailand

ART has witnessed rapid growth in Thailand since the first baby was born through IVF back in 1987.⁹⁸ This is due to availability of ART at major public as well as private hospitals and the many licensed ART clinics in the country.⁹⁹

Intended parents are at an inherent disadvantage as the traditional Thai law recognizes the surrogate as the legal mother, regardless of the mode of surrogacy.¹⁰⁰ The timely and expensive legal transfer of parental rights has long been criticized.

Overriding the cultural and religious norms in Asian society regarding the stigma of infertility and value of children likely influence the liberal access to ART

97 (Aug. 02, 2021, 19:23 PM)

<http://www.correodelorinoco.gob.ve/entre-10-y-1-venezolanas-tienen-problemas-fertilidad>.

98 Andrea Whittaker, Patriarchal Bargains and Assisted Reproductive Treatment in Thailand, GENDER, TECH & DEV. 9 (2014).

99 Id.

100 Margaret Ryznar, International Commercial Surrogacy and Its Parties, 43 J.MARSHALL L. REV. 1009 (2010).

and gestational surrogacy in Thailand.¹⁰¹

One of the main reasons for Thailand becoming a growing hub for cross-border surrogacy is the relatively cheap and affordable cost of ART in the country as compared to commercial gestational surrogacy in other locations.

Despite the Thai cabinet approving the ART Bill in 2010, the National Assembly subsequently failed to ratify it, leaving the industry unregulated until 2015.¹⁰²

Recently commercial surrogacy in the country experienced growth in response to heightened regulation of commercial surrogacy in India, a former hub of international surrogacy. This led to Thailand transforming into the “womb of Asia”.

But everything won't be served on a platter. The new ART Bill contains numerous limitations on access to surrogacy in Thailand to prevent abuse of the once-lax surrogacy industry. Section 23 of the Bill prohibits commercial surrogacy in any capacity. Sections 25 and 26 prohibit existence and usage of agencies or brokers in surrogacy agreements. Section 21 establishes specific criteria for intended parents and surrogate mothers such as, intended parents

101 Andrea Whittaker, Patriarchal Bargains and Assisted Reproductive Treatment in Thailand, 18 GENDER, TECH & DEV. 9, 26 (2014).

102 Protection for Children born through Assisted Reproductive Technologies Act, B.E. 2558 (2015).

must be lawfully married unable to beget a child otherwise, must be mentally and physically prepared to be parents of the resulting child.

Also surrogate mother can neither be biological mother or daughter of either of the intended parents.¹⁰³ Surrogate mothers must have already given birth to children in the past and in case she is married, her husband's consent is important to effectuate the surrogacy agreement.¹⁰⁵ The "prior child" condition is to prevent the surrogate from claiming any rights over the child born out of surrogacy.¹⁰⁴

Lastly, Section 27 establishes the legitimacy of intended parents as legal parents upon the child's birth, to prevent any legal loophole in the future.¹⁰⁵

Conclusion

The world is still coming to terms with this new form of begetting children. Though traditional surrogacy has been in use for quite a while now, however, the fact that countries in developed continents like Europe, North America and South America, among others, still fail to recognize surrogacy or criminalize it proves that no matter how developed and liberal the State or the government claims to be, we still want to regulate

103 Id.

104 Id.

105 Id.

individual lives through centuries-old traditions and laws. Religion is still not outdated for these secular democracies and the State though claims to be secular is still driven by age old religious, cultural and traditional norms that unanimously disapprove, condemn and penalize such methods of reproduction.

Chapter

3



SURROGACY IN INDIA: ISSUES AND CHALLENGE

India was emerging as a leader in international surrogacy until the ban imposed by the Government in 2015. This ban has brought a lot of criticism. However, the Surrogacy Bills of 2016 and 2019 were surely a positive step towards recognizing the process as a legitimate human right. But these proposed laws have their own loopholes and have been criticized by the supporters of the IVF technology around the world. Moreover, India being a religiously rich and diverse country faces many hurdles in implementing a concept that is frowned upon by all religions unanimously. Let us

understand how India looks at surrogacy and the challenges that this concept faces in the country regarding its applicability and acceptance en masse.

History

As per Hindu mythology, surrogacy can be traced back to Mahabharata where Rohini bore the child for Devaki and Vasudev. The child as per Hindu mythology is called Krishna¹. If mythology is to be believed, this technique of surrogacy explains the one hundred children of Dhritarashtra and Gandhari in Mahabharata.

In October 1978, the successful birth of the first IVF baby Kanupriya alias Durga in the city of Kolkata sowed the seeds of surrogacy as an alternative reproductive technology in India. In 2002, commercial surrogacy was legalized in India and by 2012, India was already known as the ‘Surrogacy Capital of the World’ having an investment of approximately \$500 million per annum². Even the 228th Law Commission of India Report³ described India as “*Pot of Gold*”.

1 A. Nigam, Surrogacy: An Indian Perspective (Aug. 7, 2021, 4:21 PM) <http://www.tcog.in/articles/1/1/surrogacy-an-indian-perspective.html>.

2 (Aug. 07, 2021, 4:11 PM) <https://legaldesire.com/analysis-surrogacy-procedures-in-india-and-the-laws/>.

3 Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy. Law Commission of India, Report No. 228 (2009).

Couples from across the globe seeking surrogates at a cheaper rate started flying to India. However, this came with a plethora of legal complications. Being a badly unregulated sector in a country where a large section of the population is always in need for money as they don't have a steady income, unsafe and unethical practices sprouted to meet foreign demand.

The various laws regulating surrogacy in India

ICMR guidelines, 2006: The “Ethical guidelines for biomedical research on human participants” prepared by the Indian Council of Medical Research in 2006 came as a welcome step in the regulatory process of research on human subjects. These guidelines have been accepted as the standard operating manual by the Institutional Ethics Committee (IEC) in India. However, over a period of time, it has become clear that these guidelines lack clarity and are required to be revised. For instance, the guideline number 35 proposed trials on non-approved drugs suggesting that the trial should be carried out only after approval of the Drugs Controller General of India (DCGI), as is necessary under the Schedule Y of the Drugs and Cosmetics Act, 1940⁴. The investigator should also get approval of the Ethical Committee of the Institution before submitting the proposal to DCGI. This sequence is

4 The Drugs and Cosmetics Act, No. 23 of 1940 (1940).

wrong and irrational as it expects the IEC to give approval, even if conditional, for the trial of a drug which is yet to be approved by the DCGI for that indication. Also, as per guideline number 36, once the clinical trial is over, if indeed the drug is found effective it should be made mandatory that the sponsoring agency should provide the drug to the patient till it is marketed in the country. The guidelines themselves appear uncertain as they have made the clause conditional by stating that this should be done “whenever possible”. Strong legislation is required for this purpose and it is not possible for any IEC to ensure that this happens.

228th Law Commission of India Report: During the Congress-led UPA government headed by the former Prime Minister Dr. Manmohan Singh, the Law Commission of India in its 228th Report⁵ emphasized on the need for a legislation to regulate ART clinics and listed out the rights and obligations of parties to a surrogacy arrangement.

The report proposed the Draft for the Assisted Reproductive Technology (Regulation) Bill and Rules, 2008. The Bill comprised of 50 clauses segregated into nine chapters. It acknowledged surrogacy agreements and their legal enforceability, treating them at par with other contracts and principles of various laws such as the Indian Contract Act, 1872. The Bill gave single persons also

⁵ *Supra* Note 3.

the right to enter into surrogacy agreements.

According to the provisions of the Bill, a foreigner or a foreign couple not residing in India or a non-resident Indian couple or individual, seeking surrogacy in the country, had a right to appoint a local guardian who will be legally bound to accept the custody of the child irrespective of any abnormality that the child may possess, and the refusal to do so was punishable. The surrogate mother could relinquish all parental rights over the child. It also proposed that the birth certificate in respect of a baby born through surrogacy shall bear the names of the genetic parents of the baby.

The Bill also stated that a child born to a married couple or a single person through ART shall be presumed to be the legitimate child of the couple or the single person, as the case may be. Separation or divorce between the commissioning couple before the child is born bore no effect on the parentage or the child's legitimacy. A couple or an individual entering into any surrogacy arrangement could not avail the services of any one surrogate at any given time. A couple also couldn't have simultaneous transfer of embryos in the woman and in a surrogate.

The Bill provided for constitution of a National Advisory Board and State Boards for ART to lay down policies, regulations and guidelines, and Registering Authorities for registration of ART

clinics.⁶ While Chapter III lays down registration procedure, Chapter IV prescribed the duties of ART clinics. Elucidating the various rights of the child to the commissioning as well as the surrogate couples or individuals was one of the duties.⁷ The duties also included the obligation not to offer to provide a couple with a child of a pre-determined sex.⁸ Chapter V dealt with sourcing, storage, handling and record-keeping for gametes, embryos and surrogates. Chapter VI regulated research on embryos. Chapter VII discussed rights and duties of patients, donors, surrogates and children. Chapter VIII dealt with offences and penalties. Chapter IX titled 'Miscellaneous' included powers of search and seizure and to make rules and regulations. The legislation was intended to be in addition to and not in derogation of other relevant laws in force.

There were certain criticisms of the Bill as well. Firstly, the Bill neither created, nor designated or authorised any court or quasi-judicial forum for adjudication of disputes arising out of surrogacy, ART and surrogacy agreements. Disputes, *inter alia*, included parentage, nationality, issuance of passport, grant of visa, among others. Such disputes were required to be resolved before a child is moved from

6 The Assisted Reproductive Technology (Regulation) Bill and Rules, Ch. II (2008).

7 The Assisted Reproductive Technology (Regulation) Bill and Rules, Ch. IV (2008).

8 Id.

India to a foreign country. A suggestion for creation of “Surrogacy Court” if adopted could have dealt with all such disputes.

Surrogacy in India is legitimate because no Indian law prohibits it. However, absence of a specific law did create problems. Under Section 10 of the Contract Act⁹, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void. Hence, a surrogacy agreement satisfying these conditions is valid and legally enforceable as per the provisions of the Contract Act.

Under Section 9 of the Code of Civil Procedure (CPC)¹⁰ a surrogacy agreement can be the subject of a civil suit before a civil court for adjudication of all disputes relating to the surrogacy agreements and for a declaration or injunction as to the relief prayed for. A single or gay/lesbian parent can be considered to be the custodial parent by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement. However, the exclusive custodial rights can be adjudicated only in a petition for guardianship under the Guardians and Wards Act¹¹ or in a suit for declaration in a civil court, by a court of competent jurisdiction upon appreciation of

9 The Indian Contract Act, s.10 (1872).

10 The Code of Civil Procedure, s.9 (1908).

11 The Guardians and Wards Act (1890).

evidence and considering all claims made in this regard.

There would be no bar to either of the divorced parents claiming custody of a surrogate child if the other parent does not claim the same. However, if the custody is contested, it may require adjudication by a court of competent jurisdiction. It is important to mention that in such a scenario, the biological parents shall be considered the legal parents of the child by virtue of the surrogacy agreement.

A child born to a married couple, an unmarried couple, a single parent or a single man or woman, shall be the legitimate child of the couple. However, the moot question is as to whether a judicial verdict determining rights of parties in a surrogacy arrangement is essential in respect of a foreign biological parent who wishes to take the surrogate child to his or her country of origin or permanent residence¹². A declaration from a civil court or a guardianship order must be conclusive to establish the rights of all parties and to prevent any future discrepancies arising in respect of any claims thereto.

This Draft Bill, though full of lacunas, must be considered a beacon to move forward in the legislative direction to regulate surrogacy arrangements, rights and duties of parties thereof including the rights of the child, and the functioning of ART clinics in the country.

12 *Supra* Note 3.

A seminar on “Surrogacy – Bane or Boon” held at the India International Centre, New Delhi on 13.02.2009 discussed some important postulates that must be kept in mind while drafting a law to regulate surrogacy in India. These *inter alia* include,

- Surrogacy agreements will continue to be governed by contract among parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying the child to full term and the willingness to hand over the child to the commissioning parents. But, such an arrangement must not be for any commercial purpose.
- Surrogacy arrangements must provide for financial support for the surrogate child in the event of death of commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- The surrogacy contract must necessarily take care of life insurance cover for the surrogate mother.
- One of the intended parents should be a donor as well, because the bond of love and

affection with a child primarily emanates from biological parents. Also, this shall reduce chances of various kinds of child abuse.

- The legislation must be equipped enough to recognize a surrogate child to be the legitimate child of the commissioning parents without any need for adoption or declaration of guardianship.
- The birth certificate of the child should contain names of the commissioning parents only.
- Right to privacy of donor as well as surrogate mother should be protected.

Sex-selective surrogacy should be prohibited.

Surrogacy Bill, 2016: The Surrogacy (Regulation) Bill, 2016 legalized surrogacy in India with certain regulations. The couple intending to have a child through surrogacy must have been Indian citizens and married for at least five years with at least one of them being infertile. The surrogate mother had to be a close relative, must have been married and must have had a child of her own.

No payment other than reasonable medical expenses was allowed to be made to the surrogate mother. The surrogate child was deemed to be the biological child of the intending couple.

The central and state governments had power to appoint appropriate authorities to grant eligibility certificates to the couple intending to have the child and the surrogate mother. The authorities also possessed the power to regulate surrogacy clinics.

The Bill penalized certain acts like commercial surrogacy, advertising it or exploiting the surrogate mother punishable with imprisonment for a period of ten years and a fine up to Rupees Ten Lakhs.

The Bill permitted surrogacy when it was: (i) for intending couples who suffered from proven infertility; (ii) altruistic surrogacy without any monetary compensation; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any other condition or disease specified through regulations.

Eligibility criteria for the intending couple: (i) the intending couple must have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority. The surrogate mother too needed a 'certificate of eligibility'; (ii) the intending couple must be Indian citizens married for at least five years; (ii) between twenty-three to fifty years old (wife) and twenty-six to fifty-five years old (husband); (iii) they must not have had any surviving child (biological, adopted or surrogate), except if the child was mentally or physically challenged or suffered from a life threatening

disorder; and (iv) such other conditions that were specified through regulations.

A certificate of proven infertility of either or both of them, an order of parentage and custody of the surrogate child passed by a Magistrate's court and insurance coverage for the surrogate mother were the necessary prerequisites.

To obtain a certificate of eligibility from the appropriate authority, the surrogate mother had to be a close relative of the intending couple between the ages of twenty-five to thirty-five years, must not have been a surrogate mother earlier, and must have had a certificate of medical and psychological fitness.

Parentage and abortion: A child born out of surrogacy was deemed to be biological child of the intending couple. An abortion of the surrogate child required written consent of the surrogate mother and authorization of the appropriate authority.

Appropriate authority: The central and state governments had the power to appoint appropriate authorities. The authorities that comprised of the Joint Director of the State Health Department, an officer of the State Law Department, a medical practitioner and an eminent woman, had the power to grant, suspend or cancel registration of surrogacy clinics; enforcing requisite standards for surrogacy clinics; and investigating and taking action against complaints of breach of the Act.

Surrogacy clinics did not have the power to undertake surrogacy or its related procedures unless they were granted registration by the appropriate authority. Application for registration was required to be submitted by the clinics within a period of sixty days from date of appointment of the appropriate authority. Acceptance or rejection of the same was required to be done within ninety days from the date of submission of application. No human embryo or gamete could have been stored by a surrogacy clinic for the purpose of surrogacy.

The Bill also created certain offences that included undertaking or advertising commercial surrogacy, exploiting the surrogate mother, and selling or importing human embryo or gametes for surrogacy. A punishment of imprisonment of up to ten years and a fine of up to ten lakh rupees were also prescribed under the law.

Surrogacy Bill, 2019: The Surrogacy (Regulation) Bill, 2016 lapsed due to dissolution of the Lok Sabha and The Surrogacy (Regulation) Bill, 2019 was introduced and passed by the Lok Sabha in August 2019. The Bill prohibited commercial surrogacy but allowed altruistic surrogacy that involved no monetary compensation to the surrogate mother other than the medical expenses and insurance cover during pregnancy. The Union and state governments had the power to appoint one or more appropriate authorities within ninety days of the Bill becoming the Act. The functions of the

authorities were same as in the Bill of 2016. Surrogacy clinics could not undertake surrogacy related procedures unless registered. A child born out of surrogacy will be deemed to be the biological child of the intending couple. An abortion of the child required the written consent of the surrogate mother and the authorization of the appropriate authority. This authorization must have been in compliance with the Medical Termination of Pregnancy Act, 1971. Further, the surrogate mother had an option to withdraw from surrogacy before the embryo is implanted in her womb. Offences included undertaking or advertising commercial surrogacy; exploiting the surrogate mother; abandoning, exploiting or disowning a surrogate child; and selling or importing human embryo or gametes for surrogacy. The penalty for such offences was imprisonment up to ten years and a fine up to ten lakh rupees.

Surrogacy Bill, 2020 and the Assisted Reproductive Technology (Regulation) Bill, 2021: With every passing year the Indian legislature has failed to enact a definite and effective law to deal with surrogacy. The Surrogacy (Regulation) Bill, 2020 and the Assisted Reproductive Technology (Regulation) Bill, 2021 were yet another step to regulate this process of having a child. Both the Bills aimed to curb unethical practices related to issues of sex selection and exploitation of the surrogate. It focused at regulating the practice wherein couples would come

to India, buy wombs and take children back. The Bills also aimed at curbing exploitation of women. Under the ART, ovaries are stimulated for eggs to be extracted. This is a highly technical procedure that needs to be regulated. The Bills also aimed to curb sex selection which is an unethical and highly common practice followed by surgeons in unregulated IVF centres. In a country obsessed with a male child, this provision in law was praiseworthy.

The Bill allowed a woman to become a surrogate only once and it allowed any willing woman to act as a surrogate, and also let widows and divorcees to opt for surrogacy to have children. Thus, this Bill disallowed single men and women in India to become parents through surrogacy. As per the Bill, the intending couple were required to have a 'certificate of essentiality' and 'certificate of eligibility' issued by the appropriate authority. This *inter alia* included a certificate of proven infertility of one or both members from a District Medical Board, required the couple to be Indian citizens married for at least five years and must have been infertile between the age group of 23-50 (women) and 26-55 (men). In case of surrogacy, the government made it mandatory to provide insurance for thirty-six months, so that any post-birth complications or physical and mental health issues could be taken care of. Penalties were also prescribed. For unethical practices, a penalty of Rupees 5-10 lakhs was levied on a first-time offender. A fine of Rupees 10-20

lakhs or imprisonment for a period of eight years was prescribed for a repeat offender.

The Surrogacy Regulation Act, 2021: Chapter 1 of the Act identifies the parties involved in gestational altruistic surrogacy. Chapter 3 establishes the requirements for them to be eligible to undergo the process in India. An “intending couple” is an infertile married couple for the purpose of the Act. The couple must not have any living children at the time of receiving the certificate for eligibility for surrogacy. The only exception to this rule is if the child has a disability, either mental or physical, or such disease that poses a serious risk of death.

“Surrogate mother” as per the Act is any willing, ever-married woman between the age of 25 and 35 who has her own child. Such woman is allowed to sign up for surrogacy only once in her lifetime. She must be physically and mentally fit, attested by a medical practitioner through certification. Under the Act of 2021, such surrogate mother is prohibited from providing her own gametes for surrogacy. She is not allowed to receive any compensation for carrying the child in her womb apart from necessary insurance and medical costs. She also has a choice to revoke her participation even right up until the embryo is placed in her womb and even the right to terminate the pregnancy if need be, as per the provisions of the Medical Termination of Pregnancy Act, 2019.

As per the Act, only the cases fulfilling the following conditions would qualify for the use of surrogacy procedures when there is a medical indication. The District Medical Board must issue the indication certificate in favor of the commissioning party when: (a) the intending parents are of Indian origin; (b) the intended mother is a divorcee or widow; (c) the surrogacy is for charitable purposes and; (d) it is not being done for financial gain.

Ethical, Legal and Socio-Economic Issues

The theory of surrogacy is surrounded by many questions regarding its legality, social needs and ethics. Surrogacy is certainly an option for people in search to fulfill their desired needs. On one hand the poor surrogate mother gets the needed money and on the other hand an infertile couple gets their desired biological baby. Now, this concept has gained more acceptance *en masse* than adoption as in case of surrogacy you can truly call the child your own. Transnational surrogacy also helps in boosting the country's economy. However, reality is different and ugly. Due to lack of a proper legislative framework in India, both the intended parents and the surrogate mother are exploited. The profit is going in pockets of middlemen and some commercial agencies who are taking benefit of these legal loopholes.

Poor illiterate women from rural areas are exploited for such deals either by their spouse or middlemen.

This in turn is an attack on their right over their own body which is very much a part of the Right to Life¹³ as enshrined under the Indian Constitution.

Unlike the USA, there is no provision of psychological screening or legal counseling in India. A number of moral and ethical issues regarding surrogacy have now made it incumbent upon the legislature in this country to enact separate surrogacy laws to protect the rights of surrogate mother and protect them from exploitations.

Some of the moral and ethical issues relating to surrogacy are:

- Harm to the surrogate mother: The main reason for most Indian women to act as surrogate mothers is poverty. However, surrogacy technology may involve some complications and cause harm to the health and life of the surrogate mother. A codified law can help in fixing the liability and consequently indemnify the loss suffered by the surrogate mother.
- Interest of the child: Surrogacy involves payment of money to the surrogate mother for delivering and handing over the child to the commissioning parents. Thus, it is criticised as equivalent to buying and selling a child. This would in turn lead to selection of

¹³ The Indian Constitution, art. 21 (1950).

sex of the child. Thus, surrogacy would result in treating a child as a product. Also the process of surrogacy involving in vitro fertilisation usually results in birth of triplets or quadruplets. This may harm the interest of the child, as the commissioning parents may not be in a position to look after such number of children born against their wish. Further, it is argued that surrogate children may be born with defects.

- Surrogacy degrades the dignity of women: Right to dignity is one of the inherent and cherished rights of every human being. Surrogacy involves the use of a woman's body for producing a baby which is handed over to the commissioning parents. During the pregnancy, the surrogate mother has to abide by the conditions laid down in the contract and has no right to take any decision affecting her body. This is indeed one of the strongest criticisms of surrogacy propounded by human right activists.
- Surrogacy has been equated with prostitution: Many critics argue that surrogacy is like prostitution, since it involves selling of the reproductive capacity of a woman and the use of her body in return for payment of money. Further it is argued that similar to the prostitute who has no choice

and control before a customer who has solicited her favor and paid money, the surrogate also has no choice and must abide by all the terms and conditions put forth by the commissioning parents.¹⁴

- Exploitation of the poor: Women with limited economic means in India have readily accepted surrogacy as a means of earning quick money and fulfilling the needs of the family. Presence of cheap medical facilities and easy availability of surrogate mothers have placed India at the forefront as the outsourcing destination for surrogacy. Childless couples from across the globe flew to India to have their children through surrogacy at a much lower cost.
- Playing the role of God: A child is a gift of God and thus the act of procreation is also considered a sacred obligation to be undertaken by the couple to have a child. Prior to the advancement of medical technology the only option available was adoption. However, the developments in science and medical technology have created a revolution by enabling the childless couple to beget a child which is genetically related to at least one of the parent. Though critics

14 Aneesh Pillai, Surrogate Mother and its Challenges to the Indian Legal System, 89 The Legal Analyst (2011).

argue that by interfering with the natural reproductive process, man is playing the role of God.

- Attachment with the gestational mother: Since the gestational mother will not likely be the child's primary caretaker, there could be legal questions that arise in terms of what involvement she will have with the child once born.¹⁵

Commercial surrogacy

To imagine child as a means of commerce is difficult. However, poor parents across time and place have viewed their children as potential economic assets, weighing their economic contribution in the agricultural field or their factory or manor, against the cost of carrying them through childhood. Likewise, surrogacy has become a commercial business in countries like India, which has given rise to many questions leading to a political debate. Feminists have argued over the alienability of woman's body; legal scholars have probed the contractual and jurisdictional issues. The market for surrogacy is large and is growing. There are thousands of potential parents across the world with both the desire and the wherewithal to hire another

15 (Jun. 06, 2022, 11:35 PM)

<http://www.modernfamilysurrogacy.com/the-ethical-issues-of-surrogacy/>.

woman to bear their children.¹⁶

Commercial surrogacy is a growing business in India. Surrogacy has turned a normal biological function of a woman's body into a commercial contract. Surrogate services are advertised, surrogates are recruited and operating agencies make large profits. Such commercialization raises fear of a black market and baby-selling, breeding farms, turning impoverished women into baby producers and the possibility of selective breeding at a price.

Surrogacy is becoming a booming industry in India due to the fact that surrogate mothers are easily available and entire cost of the method is very less in comparison to other countries. A high demand of surrogates has been witnessed in India due to the ease with which foreigners can find surrogate mothers. Legislations in 2002 had made surrogacy a half- a-billion dollar annual industry in India, with almost three hundred and fifty clinics offering surrogacy services. Indian clinics have become more competitive in terms of pricing as well as hiring and retention of Indian females as surrogates. A surrogacy package at an Indian clinic could cost between ten thousand to twenty-eight thousand dollars including fertilization, the surrogate's fees

16 S.S. Das & Priyanka Maut, Commercialization of Surrogacy in India: A Critical Analysis, 5 (2014) (Apr. 08, 2022, 12:06 PM)

https://www.researchgate.net/publication/281710247_Commercialization_of_Surrogacy_in_India_A_Critical_Analysis.

and delivery of the baby. All this including the costs of flight tickets, medical procedures and accommodation, came to a third of the price compared to a surrogacy procedure in the UK. Thus, India surely became a surrogacy hub for foreign couples. India has witnessed a rise of more than One Hundred and Fifty percent of the surrogacy cases in the past few years. Indian cities like Indore, Pune, Mumbai, Delhi and Kolkata top the list. Private clinics in Indore, Pune, Surat, Anand (Gujarat) have witnessed mushrooming growth. Childless couples across the globe are turning to India in search of surrogate mothers due to availability of poor Indian surrogate mothers at a much lower cost. Generally surrogacy arrangements are drawn up randomly and can be exploitative since most Indian surrogates are from socio-economic weaker sections.¹⁷ Commercial surrogacy in India is a perfect example of exploiting the surrogate mother. They have no legal representation and no rights under the contract. They do not have a grace period following birth within which they can change their mind, and they can claim no compensation whatsoever for the pregnancy period in case they fail to produce a child. The surrogacy market in India is estimated to be around a ten and a fifty billion, considerably lower than what it would cost in a country like the United States. This is one of the principle reasons for

17 Rekha P. Pahuja, Problem of Surrogacy-A Critical Study, Naya Deep Journal 112 (2011).

foreign couples turning to India for surrogacy. The status-conscious lower middle class is resorting for fulfilling its material and financial needs.¹⁸

Religious diversity of India and surrogacy

As per a report of the Pew Research Center more than eight-in-ten people in the world identify with a religious group¹⁹. As per the survey, there are almost six billion religiously affiliated adults and children around the globe. As per the same survey almost one-in-six people around the globe have no religious affiliation. This also makes them the third-largest religious group worldwide, after Christians and Muslims.

Geographic distribution of religious groups also varies considerably. For instance, several religious groups like Hindus, Buddhists and adherents of folk or traditional religions are heavily concentrated in the Asia-Pacific region. Their global presence is almost negligible. This region is also home to three-quarters of the religiously unaffiliated. Also, it hosts most of the World's Muslims. Christians are the most evenly distributed group with population in Europe, Latin America and the Caribbean, and the

18 Radha Sharma, Anand: A womb to let, The Times of India, May 15, 2010.(May. 24, 2022, 7:10 PM), <https://timesofindia.indiatimes.com/india/Anand-A-womb-to-let/articleshow/5934831.cms>.

19 (Jun. 28, 2022, 12:00 AM) <https://www.pewresearch.org/religion/2012/12/18/global-religious-landscape-exec/>.

sub-Saharan Africa. Another religious group is that of Jews who are evenly distributed in parts of North America, North Africa and Middle East with majority of them in Israel.

It is also important to note that majority of the world's population lives in countries where their religious group makes up a majority. Only a quarter of the people live as religious minorities. Majority of the world's Hindus i.e. almost more than ninety per cent live in India. Same goes for Muslims, Jews and Christians. Muslims are a majority in 49 countries, making them a prominent religious group. Israel is the only place where Jews are in majority.

India is host to the largest Muslim population in the world outside the Islamic nations. In fact, it has been the fastest growing religion in India in the last three decades. It is the second-largest religious group in India after Hindus forming almost fifteen per cent of the country's population. Indian Muslims constitute almost ten per cent of the world's Muslim population which surely makes them a large and strong religious group in any country. The country has the third largest Muslim population in the World, next to only Indonesia and Pakistan. As of 2021, there were over two hundred and nine million Muslims in India. Every year, Muslims experience a steady growth in India with a population rise of around three to five million. However, despite such a steady growth, their population remains far behind the country's majority religious group i.e. Hindus

who constitute almost eighty per cent of the population.²⁰

India is a secular country. The Preamble to the India Constitution and its various provisions has ordained the State to abide by its secular principles. No government, organization, institution or person can discriminate against another person on the basis of his or her religion.

The Indian Constitution also grants protection to people who do not identify themselves with any religious group or faith. Thus, it also becomes imperative that any such practice which though condemned by all religions but is for the welfare of the public at large must be promoted and legitimized.

Thus, at this juncture, it is also pertinent to point out the distinction between ‘freedom of religion’ and ‘freedom from religion’. Under international human rights law, freedom of religion has two components. The first is the right to freedom of thought, conscience and religion, which means the right to hold or to change one’s religion or belief and which cannot be restricted under any circumstance. The second is the right to manifest one’s religion or belief which can be restricted only by law.²¹ The

20 (Jun. 30, 2022, 15:12 PM)

<https://www.indiaonlinepages.com/population/muslim-population-in-india.html>.

21 European Convention on Human Rights, art. 9(2) (1950).

International Covenant on Civil and Political Rights, art. 18(3)

European Convention on Human Rights (ECHR) drafted in 1950, is an international convention to protect human rights and political freedoms in Europe. Member states of the ECHR enjoy a margin of appreciation in deciding how to give effect to its responsibilities as the neutral and impartial organizer of religious life whilst ensuring the absolute enjoyment of religious freedom that is consistent with the respect for rights and freedoms of others.

The Indian Constitution vide Article 25 guarantees to its citizens the freedom to profess a religion of one's choice freely without any interference from the State.²² However, the same is subject to certain

(1966).

22 Freedom of conscience and free profession, practice and propagation of religion.- (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

- (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;''
 - (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference

limitations and exceptions. The right to profess a religion of one's choice is not an absolute right in India. Thus, wherein Article 25 guarantees to its citizens 'freedom of religion', it *inter alia* also guarantees a 'freedom from religion'. Any such practice which is prohibited by religious customs and rituals but by and large is beneficial for an individual is protected as per the Constitution. Surrogacy can definitely be counted as one such practice.

Both of the world's major religious groups, Christianity and Islam explicitly prohibit and derecognize surrogacy as a mode of begetting children. As per the Old Testament, marriage is a union between two people and children can be a result only of that union.²³ Moreover, children are a gift and not everyone is blessed with them.²⁴

The Catholic Church, however, expressed its official position in another way. In the document called *Donum Vitae* it is stated, "Surrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood; it offends the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of

to Hindu religious institutions shall be construed accordingly.

23 The Holy Bible, Genesis 1:28, 2:24.

24 The Holy Bible, Psalm 127:3.

families, a division between the physical, psychological and moral elements which constitute those families.”²⁵ Unfortunately, it doesn’t specify how exactly it damages the social institution of motherhood and the dignity of the child who is carried in another womb. Contraception and IVF are neither recognized nor allowed by the Catholic Church. The Church believes that such fertilization is itself illicit and in opposition to the dignity of procreation and of the conjugal union. The Catholic Church is one of the strongest Churches in the World and has a great influence on people’s mind. This is precisely the reason why surrogacy is banned in countries where Catholicism prevails.²⁶

The Russian Orthodox Church is not as strict as the Catholic one. For instance, IVF without donation is allowed herein. Surrogacy, however, is strictly forbidden by the Russian Orthodox Church even if done on altruistic basis. But if the genetic parents are ready to confess their sins, the Russian Orthodox Church is ready to baptize the child. Nevertheless, Russian and Ukraine are presently the biggest surrogacy destinations in the world.

The Greek Orthodox Church suggests the infertile couples to have a well- defined spiritual orientation and be productive in various fields of social and

25 (Jul. 23, 2022, 15:41 PM)

<https://surrogacybypons.com/surrogacy-and-religion/>.

26 Id.

spiritual life, making their faith in God stronger and their soul more mature. The Church also clarified that it is difficult for them to bless the practice of ART and childbearing that disturbs the normal family order as it is against the spirit of the Church. At the same time the Greek Church accepts homologous intrauterine insemination without egg-donation or IVF with the total amount of embryos created if all of them will be transferred into the Genetic mother's uterus.

As per Islam, law and religion are intertwined. One is not independent of the other. The Islamic law, also known as the *Shariah* is based on the *Holy Quran*; the words and practices of the Prophet Muhammad (pbuh) also known as *Hadiths*; consensus or agreement of the Islamic community on a point (*Ijma*) and the process of deductive analogy wherein the teachings of the Prophet Muhammad (pbuh) and compared and contrasted with those of the Holy Quran in order to apply a known injunction to a new circumstance or create a new injunction altogether (*Qiyas*).

By and large Islam absolutely prohibits surrogacy as a mode of begetting a child since marriage is the only recognised mode of having a child. However a very miniscule sect among the Shia Muslims does permit surrogacy as a treatment of infertility but only for married couples. Sperm donation is absolutely prohibited in Islam. In genetic gestational surrogacy without donation, breakdown of lineage

is impossible, as the biological parents are known. There is no adultery in the embryo-transfer procedure performed at an IVF clinic. However, the dispute arises over the question of motherhood.

The Holy Quran is very specific in this regard. A mother is the one who gives birth to the child and nobody else.²⁷ Thus, the Holy Quran denies unconditionally any rights to genetic mothers in a surrogacy arrangement.

Hinduism is a religion having the third largest following in the world, after Christianity and Islam. Almost ninety-nine per cent of the Hindus live in India. Only one per cent of them are situated in other countries. Thus, though it is a large religious group, its global presence is negligible.

Hinduism is the only religion in the world that is most flexible since it neither has coded rules and regulations nor one Holy book unlike other major religions in the world like Christianity, Islam and Judaism. Hinduism is mostly driven by customs and traditions which again are not the same for every Hindu. The Hindus of South India are completely

27 *“Those among you who make their wives unlawful to them by Zihar they cannot be their mothers. None can be their mothers except those who gave them birth. And verily, they utter an ill word and a lie. And verily, Allah is Oft-Pardoning, Oft-Forgiving.”* (Surah Al-Mujadilah 58:2, Dr. Muhammad Muhsin Khan, *Translation of the meanings of The Noble Qur'an in the English Language* (King Fahd Complex, Madinah, KSA)).

different in practice and rituals from the Hindus of North India. Thus, to say that Hinduism is a complete religion would be wrong since this is the only religion in the world that is changing constantly with time. Also, unlike Islam, Christianity and Judaism, this religion lacks solidarity since it doesn't have a common set of rules and regulations. For instance, as per certain Hindu customs bigamy is a sin, while for others it is perfectly fine. While some believe in vegetarianism, most don't. However, this is also the only religion in the world that vociferously practices and promotes idol worship. Thus, in this regard Hinduism is an absolute anti-thesis of the major religious groups and ideologies in the world i.e. Christianity and Islam that absolutely prohibit idol worship.

As per the Hindu mythology, there existed in ancient India a practice known as *Niyog Pratha*. This practice was followed by young childless widows who sought motherhood, infertile women and women having impotent husbands. A revered person, who may or may not be related to the woman, was chosen for the surrogate fatherhood. Mostly it was her brother-in-law. There were certain conditions that needed to be abided by. The chosen man had no claim over the child; only three attempts were allowed to beget a child; while performing the act the two must not be driven by lust or passion; and that the man and the woman would neither see each other's face nor involve in foreplay during the sexual

act. There is mention of this practice in detail in the *Manusmirti* as well as the *Mahabharata*. As per *Mahabharata*, the widows of *Vichitravirya*, *Ambika* begets *Dhritarashtra* and *Ambalika* begets *Pandu* through *Niyog Pratha*. Over the years the practice was discontinued due to reluctance of the women involved. The story of *Rishi Galava* and *Madhavi* describe events where the woman becomes a surrogate mother on four different occasions. Also, *Gandhari's* motherhood is an example of in-vitro fertilisation. *Gandhari* had a prolonged pregnancy and instead of a baby, she delivered a mass fetus. *Rishi Ved Vyas* examined it and found one hundred and one normal cells in it. He separated them and put each in a nutrient medium in earthen pots. Each pot was incubated and grown in vitro till full term. The incubation turned out to be successful. After the full term, the first of the one hundred and one children to be born was *Duryodhan*, followed by ninety-nine more sons and a daughter, namely *Dushala*. Though the *Mahabharata* doesn't describe in detail the in-vitro process, the successful conception and birth outside the womb certainly gives us an insight. Though most people argue that this is all mythical and there is no proof of this except the Hindu scriptures, Hindus in general believe *Mahabharata* to be history and not mythology. So, if Hindu scriptures were to be believed, they vociferously promote surrogacy as a mode of begetting children. Thus it raises even more

questions as to why the Indian legislature post 2015 has been against surrogacy despite Hindu scriptures validating it.

An estimated fifty eight million people, close to one per cent of the global population belong to other religious groups viz., the Baha'i faith, Jainism, Judaism, Sikhism, Shintoism, Taoism, Tenrikyo, Wicca and Zoroastrianism.²⁸ Judaism to some extent accepts surrogacy though the same is not specifically mentioned in their religious scriptures nor advised. But Jews largely believe that being so less in number they are endangered from the other major religious groups concentrated in the Middle-East, the place where most Jews reside, and thus, it is necessary for them to multiply at a much faster rate and they willingly accept any such mode of reproduction that can help them fulfil this goal. However, though Jews in general accept surrogacy as a mode of reproduction, they still are hesitant in accepting some aspects of assisted reproduction. For instance, semen collection for any form of assisted reproduction is still a matter of debate among Jews. Orthodox Rabbis insist that spilling of the seed is forbidden and consequently, the husband may not ejaculate to provide a specimen. Special devices have been invented to prevent spillage of the seeds (non-medicated condoms) and are accepted by some Rabbis as a permissible method for obtaining the

28 *Supra* Note 19.

sperm. More liberal Rabbis permit ejaculation on the basis that the intention is to enhance procreation. Obtaining spermatozoa from men with azoospermia has also been a debatable point. Artificial insemination using the husband's sperm is also allowed by all Jewish sects as long as the sperm is not wasted and again, special devices are recommended for sperm collection (non-- medicated condoms), but donor insemination is not allowed by most Rabbis. If donor insemination is allowed and since Jewishness is conferred through the mother's line, most conservative Rabbis prefer a non-Jewish sperm donor to prevent adultery between a Jewish man and a Jewish woman and to prevent future genetic incest among the offspring of anonymous donors. Similarly, most Rabbis do not allow oocyte or embryo donation. They do not consider it adultery but strongly discourage the practice. In addition, if the genetic mother is not Jewish, the child cannot be Jewish. Embryo freezing for replacement in the future is also permissible (*halacha*). Spare embryos left afterwards can be passively destroyed (e.g. by thawing) but active destruction is not allowed. Similarly, using the embryos for research and then destroying them is not permissible. Sex (gender) selection is also allowed for couples who have at least four children of the same sex, and also for some religious indications. Most Rabbis don't accept surrogacy nor allow it. But for those who do, single Jewish women

are preferred as surrogates, both to avoid implications of adultery and to maintain purity of race. These controversies mean that Jewish couples may sometime have to search for the right Rabbi for advice.

Sikhism is a monotheistic religion that originated in the late fifteen century in the Punjab region of present-day Pakistan, based on the revelation of Guru Nanak ji, the founder of Sikhism. The term 'sikh' has its origin in the word 'sisya' meaning disciple or student. Sikhism promotes methodical control of life and sexual mores through rational reflection and self-discipline thereby encouraging family welfare measures. A Sikh girl should marry only when she reaches adulthood and the religion forbids marriage at a tender age. Sikhism also tends to save girls from unwanted early and frequent pregnancies. Sikhism also promotes birth control measures and doesn't believe in unnecessary increasing population and burdening the society. Sikhs in general have no set rules for surrogacy. However, the progressive attitude of this religion and its compassionate approach towards women would definitely make a ground for promoting surrogacy but not at the expense of exploitation of women.

Buddhism in general discourages surrogacy and IVF procedures as it leads to commercial exploitation of women as surrogate mothers. Buddhists monks believe disposal of unused embryos is immoral and

unethical. It is believed that life begins at the time an egg is fertilized by a sperm and destroying an embryo tantamount to killing a human life which is against Buddhist teachings. As surrogacy has become a business with vast interests at stake, it is important to examine the intentions of those involved when it comes to ethical issues.

Jainism or *Jain Dharma* is an ancient Indian religion. Jains trace their history through a succession of twenty-four victorious saviours and teachers known as *tirthankaras*, with the first being *Rishabhanatha* and the last two being *Parshvanatha* and *Mahavira*. The main principles of this religion are non-violence, non-attachment and asceticism. The life in Jain philosophy is characterized by *jiva* (soul) which is non-corporeal and eternal and thus cannot be destroyed. Life in Jainism is a combination of soul and working body. The soul undergoes transformation in its state due to interactions between its component features present in the impure worldly existence but it never dies. The concept of death is therefore related to the state of the body. Jainism believes that life begins at the time of conception by the mother. Life is considered a gift and thus killing someone is considered a great sin to such an extent that abortion in Jainism is equated to killing of the fetus or embryo. Traditional surrogacy is not adultery. The process involved is physical operation like any other medical treatment that is given to treat the

body deficiency. Hence, this is not objectionable in Jain view. However, there are two main objections to gestational surrogacy. Firstly, the embryo is formed from the egg and sperm of the donor parents in a laboratory that usually involves production of multiple embryos at a time, as mentioned in case of infertility, and loss of potential lives in the form of unused embryos. Secondly, gestational surrogacy involving third party tantamount to adultery, which is forbidden in Jainism. Moreover, the criticism for surrogacy stems from the argument that it may also promote unwanted practice in society such as couples avoiding having children through the natural process and go through the long and discomforting process of pregnancy that restricts personal freedom for a considerable period of time.

India is a pluralistic society and a multi-religious country. It is inhabited by people of various religions. The framers of the Indian Constitution thus desired to introduce the concept of secularism, meaning state neutrality in matters of religion as religion has been an extremely volatile subject in India both prior to and after independence. Religious tolerance and equal treatment of all religious groups thus becomes an essential part of secularism. Secularism in India doesn't mean irreligion. It means respect for all religions and that the state doesn't identify itself with any particular religion. India being a secular state, there is no state or preferred religion as such and all religious groups

enjoy the same constitutional protection without any favor or discrimination. The freedom of religion guaranteed under the Indian Constitution is not absolute and thus the State cannot guarantee protection to every religious practice at the expense of the constitutional principles and ethos. Most religions condemn the practice of surrogacy however a secular State cannot be driven by religious thoughts and beliefs. A secular country like India must promote such techniques of reproduction and family building. Irrespective of how much any religion condemns surrogacy, the only aspect which must be looked at while legalizing surrogacy is the general good of the couple intending to have a child through this process.

Complexities regarding Succession and Inheritance

Problems regarding surrogacy in India won't end with just legalizing it. Numerous legal complexities can arise from a surrogacy arrangement. One such is the right of succession and inheritance of the surrogate child. Basically, whose legal heir is the surrogate child? The general principle of inheritance is closely linked with legitimacy of heirs.

Under all personal laws, legitimacy of a child is entirely based on lawfulness of the marriage between the child's parents. However, the child and mother are always entitled to inherit their property mutually, as the question of legitimacy between the

child and its mother is not relevant for the purpose of inheritance. Since under all laws across the world, surrogate mother and her husband are the natural and legal parents of the surrogate child, thus, the child is therefore, their legal heir, provided that the surrogate's husband has consented for such an agreement. A complication may arise when the surrogate mother after delivery, as a natural guardian of the surrogate child, claims the property of the intended father or mother dying intestate during her pregnancy by which time the child could not have been given in adoption. Her claim would fail even when intended parents have any genetic linkage with the child, as the intended parents do not adopt the child. This position may prejudicially affect the interest of the child. The surrogacy agreement should protect not only the rights of the parties but also the rights of the products i.e., the surrogate child. Therefore, it is desirable that the surrogate child is deemed to be the child of the intended parents from the moment the child is begotten for the purpose of testamentary and intestate succession.

Section 13²⁹ and 14³⁰ of the Transfer of Property Act³¹ allows transfer of property rights through vested interest of an unborn. According to the provisions, no direct transfer can occur, but a child in the mother's womb is a competent transferee. However two conditions must be fulfilled. Firstly, transfer for an unborn must be preceded by a life interest in favor of a person in existence at the date of the transfer. Moreover, only absolute interest can be transferred in favor of the unborn. Also, an unborn child must get whole of the residue or the remainder of the property. If a series of vehicles/carriers are created and unborn is born before the death of last vehicle, he cannot stop him to enjoy the property which is vested on him as life interest by the main owner. If the unborn is not born, or not conceived before the death of the last carrier, the vested interest in the favor of the unborn will revert back to the main owner, which means the

29 13. Transfer for benefit of unborn person- Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transfer or in the property.

30 14. Rule against perpetuity- No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

31 The Transfer of Property Act (1882).

vested interest will only be contingent once the unborn is born and that too before the death of the last vehicle created by the owner. The provision also implies that if such interest is built beyond the age of minority of the concerned unborn, it will deemed to be void and will be liable to get back to the main owner, from where the ultimate interest came. This provision is also similar to Section 113³² of the Indian Succession Act³³.

In India the surrogate mother is not considered the legal mother. Thus, the intended parents shall be the legal parents of the child for all purposes. Thus this child naturally must have rights in their property. However, this is not as simple as it looks. Succession and inheritance in family property is governed by the personal laws in India. Thus, all religious rules shall apply to inheritance and succession as well. Since, surrogacy is something which is not recognized by most religions in India, similarly a surrogate child shall also not be considered the legal child of the commissioning parents. Thus, such a child gets nothing in terms of family property because of the two-edged swords of these laws. This problem cannot be resolved unless and until India

32 113. Bequest to person not in existence at testator's death subject to prior bequest.—Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

33 The Indian Succession Act (1925).

recognizes and legitimizes surrogacy agreements.

Case Studies

The Honorable Supreme Court of India in the landmark case of *Baby Manji Yamada v. Union of India*³⁴ formally legalized commercial surrogacy. The court defined commercial surrogacy as a form of surrogacy wherein a gestational carrier is paid to carry a child to maturity in her womb. In this matter a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other. But subsequently issues were raised on the legality of the surrogacy agreement. The court while allowing the surrogacy admitted not only the void in the law but also the irregularities taking place in the absence of law by calling surrogacy a money making racket.

In another case of *Jan Balaz v. Anand Municipality and Others*³⁵, the surrogacy agreement was entered in the name of the intending father and the second respondent, the surrogate mother whose name was mentioned as the wife of the intending father which led to multiple legal issues. However, the sole purpose of the agreement was to ensure handing over of the surrogate child to the intending couple in return for a fixed payment of money and that the child would derive all inheritance from the intending parents as a biological child would have.

34 (2008) 13 S.C.C. 518.

35 A.I.R. 2010 Guj 21.

During the course of arguments in both these cases the court opined that there was an absence of a statutory law to address issues and concerns arising out of or related to the conduct of surrogacy in India. The Court directed for the early enactment of a statute for the same considering its large scale commercial practice in India. This led to the formulation of the Assisted Reproductive Technologies (Regulations) Bill, 2008.

In the case of *B.K. Parthasarathi v. Government of Andhra Pradesh*³⁶, the High Court of Andhra Pradesh held that the State's interference on procreation amounts to a direct encroachment on one's "right to privacy".

A nine-judge Bench of the Honorable Supreme Court of India in the matter of *Justice K.S. Puttaswamy (Retd.) v. Union of India*³⁷ unanimously held that the right to privacy is a fundamental right which not only emerges from the guarantee of life and personal liberty under Article 21 of the Constitution, but also arises in varying contexts from the other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III of the Constitution. The Bench overruled the decision in *M.P. Sharma v. Satish Chandra*, District Magistrate, Delhi³⁸ and in *Kharak Singh v.*

36 2000 (1) A.L.D. 199.

37 (2017) 10 S.C.C. 1.

38 A.I.R. 1954 S.C. 300.

State of Uttar Pradesh³⁹ which contained information that the Indian Constitution does not specifically protect the right to privacy.

Keeping the Parthasarathi and Puttaswamy verdicts in view, it is evident that not legitimizing surrogacy is a direct attack on a person's right to privacy which is now recognized as a fundamental right.

The Honorable Supreme Court in *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and others*⁴⁰ held that the right to life as enshrined under Article 21 of the Constitution cannot be restricted to mere animal existence. Every limb or faculty through which life is enjoyed is protected by Article 21 and this includes faculties of thinking and feeling.

In *R. Rajagopal v. State of Tamil Nadu*⁴¹ the court held, "The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy

39 A.I.R. 1963 S.C. 1295.

40 A.I.R. 1981 S.C. 746.

41 A.I.R. 1995 S.C. 264.

of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.”⁴²

The Apex Court in *Javed and others v. State of Haryana and others*⁴³, though upholding that having two children can debar a person from contesting elections yet reaffirmed its position on right to procreation as a fundamental right.⁴⁴

In *Suchita Srivastava and another v. Chandigarh Administration*⁴⁵, the Court held that a woman’s right to reproductive choices is a part of her right to life and personal liberty under Article 21. Also, her right to ‘bodily integrity’ and ‘personal liberty’ must be respected.⁴⁶

Of lately, Indian celebrities have chosen surrogacy as a means to have a family. From Priyanka Chopra to Shah Rukh Khan, the list is long. Not so long ago, Priyanka Chopra and Nick Jonas announced the birth of their baby via surrogacy. In 2020, Shilpa Shetty announced the birth of her second child through surrogacy. Preity Zinta and husband Gene Goodenough have also welcomed their children through surrogacy. Television celebrities aren’t far

42 Id.

43 A.I.R. 2003 S.C. 3057.

44 Id.

45 (2009) 9 S.C.C. 1.

46 Id.

behind. The producer of Balaji Telefilms, Ekta Kapoor welcomed her son through surrogacy in January 2019. In March 2017, director-producer Karan Johar announced that he became a father of twins through surrogacy. Mr. Shah Rukh Khan, a known and famous movie star announced the birth of his third child through surrogacy in 2013. Mr. Aamir Khan also welcomed his surrogate son in 2011.

Surrogacy is, thus, an acceptable form of reproduction which is globally recognized. Hence, it is imperative for the Indian legislature to recognize and legitimize it.

Conclusion

The Indian Constitution guarantees equal protection of law to all and permits special legislation only as long as it is founded on “real and substantial distinction” that has a rational nexus with the objective sought to be achieved.⁴⁷ In absence of such a distinction, the discrimination may be deemed “arbitrary” and in violation of Article 14.

The Honorable Supreme Court of India in the case of *E.P. Royappa v. State of Tamil Nadu and another*⁴⁸ held, “Equality is a dynamic concept with many aspects and dimensions and it cannot be “cribbed cabined and confined” within traditional

47 *Union of India v. N.S. Rathnam*, (2015) 10 S.C.C. 681.

48 A.I.R. 1974 S.C. 555.

and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness.”⁴⁹

Arbitrary regulation of surrogacy in India coupled with prevention of potential exploitation of surrogates and protection of rights of child born through surrogacy is against the Constitutional principles and ethos. Thus, in absence of strong enforceable municipal laws in India regulating surrogacy presently, obligations under applicable international treaties ought to be confirmed to.

49 Id.

Chapter

4



TRANSNATIONAL SURROGACY

Transnational Surrogacy, as the name suggests, involves the transfer of the child from one country to the other. Reproductive rights are relatively new in international law. The basic concept first appeared in the final document approved by the Teheran Conference on Human Rights in 1968, which recognized the “rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights.”¹ However, it was not until the World Conference on Population in 1994 at Cairo

1 Proc. of Teheran, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41 (1968).

that the reproductive rights were clearly articulated.² Although convened to address population issues, the participants in the Cairo Conference recognized that:

- Family-planning programs should not involve any form of coercion;
- Government sponsored economic incentives and disincentives were only marginally effective; and
- Government goals “should be defined in terms of unmet needs form information and services”, rather than quotas or targets imposed on service providers.³

“The aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice.”⁴ The Conference in Cairo recognized that reproductive rights include both “the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health.”⁵ Surrogacy was not on the agenda at Cairo and hence the question of

² U.N. Population Information Network, *Report of the ICPD*, U.N. Doc.A/Conf.171/13 (1994).

³ Id.

⁴ Id.

⁵ Id.

supporting or condemning it never arose there.

As a result of widely divergent religious, political and legal perspectives throughout the world, and the impact of those perspectives on access to reproductive technologies from country to country, a growing number of would-be parents are seeking treatment outside their home country. Thus, cross-border reproductive care (CBRC) is an exponentially growing phenomenon. In 2010, the Human Fertilization and Embryology Authority (HFEA) called 'reproductive tourism' the 'most pressing and challenging new development in assisted reproduction treatment'.

While some nations continue to provide 'traditional' surrogacy options, the majority of the intending parents seek, and professionals offer, 'gestational' surrogacy. Though it is expensive, gestational surrogacy avoids any genetic connection between the child and the gestational surrogate.

In December 2010, a groundbreaking, multidisciplinary conference on CBRC was held in Cambridge, United Kingdom titled 'Crossborder reproductive care: ethical, legal and socio-cultural perspectives'. Chaired by two internationally prominent anthropologists, Marcia Inhorn and Zeynep Gurtin, the conference explored many of the critical issues in the field of cross-border reproductive care, and identified four primary categories of 'drivers' for patients seeking CBRC: (i)

legal and religious prohibitions; (ii) resource considerations, such as cost, lengthy in-country waits or fewer available assisted reproduction facilities or treatments; (iii) quality, including success rates and safety concerns; and (iv) personal preferences, including patients choosing to travel abroad for cultural, family or privacy reasons.

Instances of such restrictions can be found all around the globe. For example, legal restrictions in Belgium, France, Germany, the Netherlands and Italy all deny IVF treatment to same sex couples. In 2005, Italy enacted restrictive laws that replaced a much more liberal legal structure which made it an assisted reproduction treatment destination before the Catholic-based government took over. In the UK, both surrogacy and gamete donation are highly regulated through a series of comprehensive laws as discussed in the previous chapters. The law prohibits commercial surrogacy, facilitating commercial surrogacy agreements and payments to surrogate mothers above 'reasonable expenses'. Centralized ongoing oversight of all assisted reproduction treatment practice in the United Kingdom is provided by HFEA, an independent regulatory authority. Effective in 2012, the HFEA authorized an increase in compensation to egg donors from two-fifty pounds to seven-fifty pounds with an aim to reduce the shortage of egg donors. In 2008, the law in the country was amended to allow same-sex and unmarried couples to apply for a parental order.

Because of such restrictions, most couples prefer such nations that have more liberal laws regulating surrogacy. The United States of America thus becomes a viable option for such couples. Though in the U.S. each State makes its own laws, there are a substantial number of states with relatively liberal laws and policies surrounding the assisted reproductive treatment and gestational surrogacy. Many states, either by way of statutes or judicial pronouncements authorize pre-birth or post-birth orders for intended parents thereby establishing a legal relationship between intended parents and the child upon birth. This protects the legal status of intended parent vis-à-vis both their gestational surrogate and one another. When there is no genetic connection to the child, establishing legal parentage can be less predictable and is much more variable from one state to the other. International differences in legal recognition of homosexuals are also likely to create legal complexities and vulnerable families for those who come to the United States or other countries for surrogacy and wish to return home with their child. Homosexual couples from countries that do not recognize their marriages can turn to the United States for surrogacy. There are fast moving developments in the United States with regard to homosexual marriages with most states legally recognizing the same. The Defense of Marriage Act⁶ had permitted any state to disregard a same-sex

6 The Defense of Marriage Act, Pub. L. No. 104-199 (1996).

marriage entered into in another state. The law was repeatedly challenged. In June 2013, the U.S. Supreme Court ruled Section 3 unconstitutional which denied federal recognition to legally married homosexual couples.⁷ In another case decided on the same day, the Court held that private citizens do not have legal standing to challenge California's same-sex marriage law, in essence reinstating same-sex marriages in that state.⁸

Talking of India, in 2012 a number of protective guidelines were put in place by the Union Home Ministry. Protections included requiring all commissioning couples to have a letter from their home country stating that their home country recognizes surrogacy; have a notarized legal agreement with the surrogate; have the surrogacy only performed in a nationally registered assisted reproductive clinic; provide assurance that the child will be permitted entry into the commissioning couple's home country as their child and that they will take care of the child; and have an 'exit permission' and a certificate from the treatment clinic confirming that the commissioning couple has fully discharged its obligations to the surrogate. The guidelines also required the couple to be married for two years and also India doesn't recognize homosexual marriages. This last Indian policy of an absolute ban on homosexual couples has always been

7 Windsor v. U.S., 570 U.S. 744 (2013).

8 Hollingsworth v. Perry, 671 F. 3d 1052 (2013).

criticized by the proponents of surrogacy.

At the outset it can be concluded that cross-border surrogacy is here to stay. Whether and how it may be possible to create an internationally acceptable framework, or at least basic legal principles, is a challenge that has till date eluded legal and ethical scholars, and law and policy-makers alike. Legal complications have arisen in all countries, irrespective of how liberal they may be. Even those countries that completely prohibit surrogacy have in many cases allowed the return of their citizens and judicially accorded legal recognition to their surrogate child while others like Belgium, have required an adoption. It is indeed a long road ahead.

Chapter

5



WOMB ON SALE

The most common argument against surrogacy is based on the concerns of exploitation of the surrogate mother.

Exploitation is often seen as unfair where the injustice consists of redistribution of harms and benefits. A connection between exploitation and benefit can be drawn, where the idea that the exploiters derive a benefit from their behavior or action. Hence, the exploiters get something in return when they exploit somebody. Exploitation may include various things such as exploiting people's trust, fears, loyalty, bad luck, homelessness or joblessness. Here it can be argued that exploiting a person's attributes is not the same thing as exploiting a person *per se*.

Commodification is another criticism of the surrogacy process. To commodify is to treat something or somebody as a commodity, which can be traded. This, at times, is considered a very harsh criticism by the proponents of surrogacy who feel that it is equivalent to demeaning a woman's stature and her position in the society. Moreover, this also means taking away her autonomy over her own body.

If commodities are fungibles, to commodify is to treat "as fungible something which isn't fungible and/or oughtn't to be waived as such". Therefore, to treat people as fungibles or objects, fails to respect their human dignity.

According to the 'Harm Principle' of John Stuart Mill, neither the State nor any other individual has the moral right to intervene in an individual's actions, as long as it doesn't compose any harm to somebody else. As per Mill, an individual should freely make choices concerning himself as he is his own sovereign over his mind and body. The only exception in such a case is of children and people who are not in a state of mind to judge the consequences of their actions such as lunatics, etc. Another exception to Mill's theory is that if someone does an act harmful to others, the State has a right to punish such person. This emancipates from the duty of a State to protect its citizens.

Surrogacy, thus, can be said to derive its validation from the Harm Principle. Thus to say that commercial surrogacy is an exploitation of the surrogate mother when clearly she enters into such agreement willingly, is wrong and unjust.

The whole idea of ‘womb on sale’ as a criticism of commercial surrogacy is flawed to its core. The surrogates usually are citizens in the global South, Eastern Europe, or living in a financially vulnerable situation in the West, where choosing to be a surrogate becomes an option to secure the future and survival of herself and her family. Majority of surrogates would not consider entering the surrogacy business if there was no financial benefit to it.

In commercial surrogacy, it can be argued that both the surrogate and the commissioning parents benefit from the practice. However, the surrogate is the only person within the contract who is at a harmful risk. Looking at the concept of exploitation and redistribution of harm and benefits, the commissioning parents can be seen as the exploiters.

However, the proponents of commercial surrogacy rightly argue that once the surrogate agrees to enter into such an agreement willfully, without any force or coercion, no accusations of any kind can be casted upon the commissioning parents.

Kajsa Ekis Ekman points out that the surrogate can be compared to the proletariat, the lowest class in the Roman Empire because the only property both

the surrogate and the proletariat own is themselves, their bodies and their fertility. Ekman here also sees a similarity in surrogacy arrangements, where the contract is used to make the economic power relations between the commissioning parents and the surrogate (or the higher class and the proletariat) look like a mutual favorably usage of one another.¹ Although the proletariat is used as a metaphor for describing the situation of the surrogate's place in society, it brings a valid point to the discussion of mutual benefits. However, the question raised here is if the surrogate is using the commissioning parent's vulnerable situation of not being able to procreate to the same extent as they are using the surrogate's reproductive capabilities to get a child? Can it be argued that both parties are equally exploiting each other, or can it be seen as a fair exchange of means? According to the concept of benefit- exploitation it cannot, as attributes of the surrogate, her uterus, and body, is used and exploited to achieve the end, a child. Thus, benefit-exploitation is entitled of the use condition, as the exploiters use the exploited as a means of achieving their own goal. The only option available on the market for commissioning parents to get a child carrying their genes today is through a surrogacy arrangement. Looking at the goal of the surrogate,

¹ Sofia Emanuel Persson, Womb for rent (May. 16, 2022, 4:02 PM),

<https://www.divaportal.org/smash/get/diva2:1481554/FULLTEXT01.pdf>.

the main goal is to get compensated for her labor. As stated before, surrogacy is in the majority of cases seen as the last option taken for women already in a vulnerable situation. Also, a person can only be exploited if they have one or several useful attributes which are benefit exploitative, for example being both vulnerable and useful. Put into the context of the attributes of the surrogate, she is probably in a vulnerable economic situation and useful for the exploiters, because of her reproductive capabilities and fertility. Looking at the same issue, but from commissioning parents' point of view, they are in the opposite of the surrogate, most likely, not in a vulnerable financial situation. They can, however, be in a vulnerable situation, because of their childlessness and infertility. Hence, useful for the surrogate since they have the financial means which are useful to achieve the surrogate's goal.

Having a look at the commodification argument, the critics of commercial surrogacy argue that the surrogate in a commercial surrogacy arrangement is treated as a property where her uterus and reproductive capabilities become a commodity to rent. Therefore, justifying commercial surrogacy could result in extending the social practice of commodification and encourage humans to treat others as commodities. This argument doesn't hold a strong ground since in most cases the surrogate mother enters into such an agreement willfully, without any force or coercion. Also, the comparison

of surrogacy to prostitution is flawed to its core since though both are done for monetary benefits the purpose is clearly distinguished from and independent of each other.

More often than not, surrogacy is also counted as an estranged labor. One of the primary reasons for the same is that as compared to other forms of labor the surrogate sells their labor every hour of the day for at least nine months. Surrogacy thus becomes a form of labor which affects every aspect of the surrogate's life. Kelly Oliver argues that because of the relationship between the body and labor in the context of surrogacy, the surrogate becomes doubly estranged.² The surrogate is thus treated as a machine whose services are exchanged for money. This argument is flawed on the ground that machines don't breathe, they don't have a mind and soul of their own and thus they don't provide services to human beings by their will or consent, unlike a surrogate mother who enters into such an arrangement by her own free will.

Kutte Jonsson in his study of surrogate motherhood³ argues that surrogacy should be justified if the following conditions are upheld:

- The surrogacy arrangement is based on free choice.

² Id.

³ Id.

- The agreement has been made through mutual consent between competent and well-informed adult individuals.

The arrangement does not harm the child.

Now these conditions somewhat do not exist in all surrogacy arrangements. Especially in developing countries like India where the surrogacy market for the commissioning parents are mostly the poor and illiterate. Amrita Pande has done one of the most in-depth empirical study of the Indian surrogacy industry, in which she stayed at a surrogate clinic for nine months. She stated that most of the surrogates at the clinic do not speak or understand English, and thus are unable to understand the terms in the surrogacy agreement. Although, the basics such as handing over the child to the commissioning parents and the terms regarding the payment are made clear to the surrogate mother, what is often not conveyed is her rights in the surrogacy agreement and the appropriate forum to redress her grievances, if any. Also, it is hardly conveyed to her any bodily risk involved in the entire process. She has no idea of the medications she will go through and whether any post-surrogacy treatment would be provided if need be. She is also mostly unaware of any legal rights or remedies she can avail of in case of breach of any clause in the surrogacy agreement on behalf of the commissioning parents or the doctors. Thus though such an agreement is entered by the surrogate mother through her own free will, how much of that

free will is made through application of mind and taking every possible risk into account, is something that can always be argued against commercial surrogacy agreements in India.

Thus as far as India is concerned, the 'womb on sale' criticism of commercial surrogacy somewhat holds good and unless and until surrogate mothers in India are made fully aware of their rights in a surrogacy arrangement and the legal remedies they can avail of, India cannot afford to legalize commercial surrogacy.

Chapter

6



CONCLUSION

Surrogacy as a practice is definitely not something new to the world though many countries across the globe are yet to accept it. These countries, as much as they claim to be developed and progressive, both de-recognise and condemn such methods of having a child.

Cases like Baby M¹ and Jaycee B² are watershed moments in the history of surrogacy jurisprudence. Traditional surrogacy is the oldest form of the practice that has been prevalent since time immemorial. This, however, is not so common nowadays primarily because of legal complexities, though it still remains a viable option for intended

1 In the matter of Baby M, 109 N.J. 396 (1988).

2 Jaycee B v. Superior Court, 42 Cal. App. 4th 720 (1996).

parents.

Gestational surrogacy or in-vitro fertilisation (IVF) is quickly becoming an acceptable form *en masse*. However, the hurdles arise due to non- recognition of the process in many countries and the expensive treatment in countries that offer it.

One of the techniques gaining popularity is that of Gamete donation, having similar or rather greater success rates than other forms of surrogacy. Legalising the same in India could be a threshold for the surrogacy industry in the country that has almost become redundant after the ban imposed in 2015.

After years of deliberating upon a definite legislation on the issue, India has finally achieved its law on Surrogacy with the Surrogacy Regulation Act, 2021. However, it is yet to be seen how far it proves to be effective.

A country like India has many ethical and socio-economic issues as well apart from the legal complexities in implementing any policy. Lack of proper legislative framework in India has led to exploitation of the poor and needy who are desperately in need of money. This is from where critics of surrogacy raise their argument of ‘womb for sale’. Undoubtedly such exploitation is a direct attack on the rights of such poor women over their own body which is very much a part of their right to

life.³

Commercial surrogacy is a growing business in India. Surrogacy is becoming a booming industry here precisely due to the fact that surrogate mothers are easily available and entire cost of the method is comparatively less than other countries. A high demand of surrogates has been witnessed in India due to the ease with which foreigners can find surrogate mothers. Legalisation in 2002 made surrogacy a half-a-billion-dollar a year industry in India, with almost three hundred and fifty clinics offering surrogacy services. Indian clinics have become more competitive in terms of pricing as well as hiring and retention of Indian females as surrogates. Thus legally regulating this industry will not only protect women from exploitation but also garner massive revenue for the Indian State.

India is a religiously rich country and also the most religiously diverse in the world. Article 25 of the Indian Constitution guarantees to its citizens the freedom to profess a religion of one's choice freely, though the right is not absolute. The 'freedom of religion' *inter alia* includes 'freedom from religion'. Thus any individual who wants to practice something which is abhorred by its religion or all religions unanimously can do so provided it is not harmful to anybody else or the public at large. Homosexuality is a big example. Thus, surrogacy,

3 The Indian Constitution, art. 21 (1950).

though condemned by most religions, is constitutionally protected in India.

Rules of inheritance and succession in India are by and large governed by the personal laws of every religion and since religious communities in India mostly condemn such practices of having a child, a surrogate child and even the surrogate mother face difficulties and hindrances in inheriting family property. This devoid them of basic amenities and benefits one gains from such inheritance. The law must look into this and protect such rights of the surrogate child and the surrogate mother.

As a result of widely divergent religious, political and legal perspectives throughout the world, and the impact of those perspectives on access to reproductive technologies from country to country, a growing number of would-be parents are seeking treatment outside their home country. Thus, cross-border reproductive care (CBRC) is an exponentially growing phenomenon. Due to restrictions in the home country, most couples prefer such foreign destinations that not only allow surrogacy but even offer cheap and affordable techniques. It is important to regulate such transnational surrogacy.

Edmund Burke, an Irish statesman, economist and philosopher once said, "People crushed by laws, have no hope but to evade power. If the laws are their enemies, they will be enemies to the law and those who have most to hope and nothing to lose will

always be dangerous.”

Having a robust law on surrogacy in India is the only way to end all the menace that is created because of the unregulated surrogacy industry and exploitation of the individuals involved in the entire process.