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The Law of Surrogacy: Indian Perspective

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ABSTRACT

Mother Teresa rightly said - "The greatest good is what we do for one another." Surrogacy and Assisted Reproductive Techniques (hereinafter referred to as 'ART') have proved to be encouraging treatments for infertility all over the world. They have the potential to solve numerous troubles that are faced by the infertile couples and their families. Nonetheless, in India, the issues of Surrogacy and ART have always been a bone of contention due to the medical, social and gender notions attached to them. Surrogacy and ART pitches the taboos of childlessness against the fears of commercialisation of the female body. In India, Surrogacy has often been condemned as it can lead to exploitation of vulnerable women. On February 19, 2020, the Union Cabinet of India approved the Assisted Reproductive Technology Regulation Bill 2020 (hereinafter referred to as 'The ART Bill'). The ART Bill is the latest in the line of proposed legislations, namely the Surrogacy (Regulation) Bill 2020 (hereinafter referred to as 'The Surrogacy Bill'), and the Medical Termination of Pregnancy Amendment Bill 2020 which have been approved by the Cabinet. The author of this research paper intends to discuss the hypothesis and legal position of the practice of Surrogacy and ART vis-à-vis the Indian context. The author while focussing on the mythological and historical perspective of Surrogacy and ART has thrown some light on their possible ramifications in a country like India. The author has made use of the doctrinal method to search for the grounds related to the topic. This research paper is completed by the use of primary and secondary sources such as statutes, judgments, reports, journals, and books available on the concerned topic.

Keywords: Surrogacy, Surrogacy Bill, Assisted Reproductive Technology, IVF.

I. SURROGACY IN MYTHOLOGY

The Bible has a reference to surrogacy. The *Old Testament* illustrates an example of Sara, who was infertile. Sara authorised her servant, Hagar, to have her child by influencing Abraham to sleep with her. Likewise, Rachel, the wife of Jacob, authorised her maid, Bilhah, to bear a child for her by convincing Jacob to sleep with her. These two stories are some of the examples of surrogacy practices that were prevalent in the earlier times.

In the Indian mythology, there are various instances that refer to the practices of surrogacy. In

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the Bhagvata Purana, the birth of Balaram is suggestive of the art of surrogacy. The evil king of Mathura, Kamsa, imprisoned his sister Devaki and her husband Vasudeva because a prophecy had informed Kamsa that their eighth offspring would kill him. Kamsa killed six children of Devaki. But the Gods intervened at the time of birth of the seventh child. With the help of Goddess Yogamaya, the foetus was transferred from the womb of Devaki to the womb of Rohini, who was the sister of Yashoda. Rohini gave birth to Balaram who was a brother of Krishna (the eighth child of Devaki). Thus the child conceived in Devaki's womb was delivered through Rohini's womb. The birth of Balaram is a clear reflection of the medical knowledge that existed during ancient India. The birth of Kartikeya also known as Subramanya Swamy is another example of the art of surrogacy that existed during ancient India. Lord Kartikeya, the son of Lord Shiva and Goddess Parvati, is considered as the God of fertility by tradition.² It is often believed that Lord Shiva gave a bija so that it could be implanted in Mother Ganga³. However after sometime it became very difficult for the surrogate mother Ganga to carry the embryo. She had a miscarriage. Then the embryo was kept by Agni, the God of fire leading to the birth of the God Kartikeya.

II. EVOLUTION

Louise Joy Brown, the first IVF (in vitro fertilization) baby of the world was born on July 25, 1978. Roughly after 2 months, Kanupriya alias Durga, India's first IVF baby was born on October 3, 1978 in Kolkata.⁴ The year 1986 is often regarded as a breakthrough in the history of surrogacy. In the USA, world's first gestational surrogate pregnancy took place in the year 1986. In this case the surrogate mother incubated the biological child of a woman who had undergone a surgery for removal of the uterus. The identities of the couple and that of the surrogate mother are not available in the public domain. It is pertinent to note that the term 'surrogacy' came to public limelight in 1986 as a result of the case of *Baby M*⁵. In the said case, Ms. Mary Beth Whitehead gave birth to baby Melissa as a conventional surrogate mother. However after the birth of the child, Ms Mary refused to hand over the baby to the Sterns who were the intending parents. Ms Mary decided to keep the baby herself. A two year long legal battle ensued between Ms. Mary and the Sterns. The custody of the child was given to the Sterns and Ms. Mary was given visitation rights.⁶

² BASAVARAJ NAIKAR, INDIAN ENGLISH LITERATURE, 23 (Atlantic Publishers and Distributors, 2003).

³ DR. B. R. KISHORE, LORD SHIVA, 23 (Diamond Pocket Books Pvt. Ltd., 2001).

⁴ Law Commission of India, "228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy", 2 (Aug, 2009).

⁵ *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

⁶ *Ibid.*

In India, the first gestational surrogacy took place in 1994 in Chennai.⁷ In 1997, India witnessed the first commercial surrogacy. A woman from Punjab agreed to bear a child for 50,000 rupees in exchange of medical treatment for her paralyzed husband.⁸

III. CONCEPT OF SURROGACY AND ASSISTED REPRODUCTIVE TECHNOLOGY

The word 'surrogate' has originated from a Latin word '*surrogatus*' which means a substitute, which in the human context means 'a person in place of another'. In simple terms, surrogacy is defined as the procedure in which a couple enters into a contract with a woman (who is known as the surrogate mother) to conceive a child for them and then the woman relinquishes all the parental rights of the child in favor of the couple.⁹ Therefore, a surrogate mother is a woman who carries a child for or on behalf of another woman, either from her ovum or from the fertilized egg which is implanted in the womb of a surrogate mother from another woman.¹⁰

ART i.e. assisted reproductive technology refers to all the techniques and procedures which are used to treat infertility. ART is inclusive of treatments which handle both a woman's egg and a man's sperm. The eggs are removed from a woman's body and then the eggs are mixed with a man's sperm in a laboratory to form embryos. These embryos are then put back into the woman's uterus. Some of the most common forms of ART are: In Vitro Fertilization (IVF), cryopreservation which means the preservation of gametes or embryos in very low temperatures.

In India, the terms 'surrogacy' and 'assisted reproductive technology' have been intricately defined by the two bills i.e. The Surrogacy Bill and The ART Bill respectively. The Surrogacy Bill¹¹ defines the term 'surrogacy' as follows: '*surrogacy*' means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth.'

As per The ART Bill¹², the definition of the term 'assisted reproductive technology' is as follows: '*assisted reproductive technology*', with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body and transferring the gamete or

⁷ KAVIRAJ SINGH, REPORT ON LEGAL MEDICAL ISSUES INDIA, 23 (INDIAN NATIONAL BAR ASSOCIATION, 2015).

⁸ Sandhya Srinivasan, *Surrogacy Comes Out of the Closet*, TOI, July, 6, 1997, at A1.

⁹ Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or Commodification of Women's Bodies and Children*, 12(1) WIS WOMEN'S L.J. 113, 115 (1997).

¹⁰ *Supra* note 3.

¹¹ The Surrogacy (Regulation) Bill, 2020, s. 2(zd).

¹² The Assisted Reproductive Technology (Regulation) Bill, 2020, s. 2(e).

the embryo into the reproductive tract of a woman.'

IV. KINDS OF SURROGACY

There are two types of Surrogacy¹³:

1. Genetic surrogacy/partial surrogacy – It refers to a surrogacy wherein the egg of the surrogate mother is fertilized by the sperm of the male partner (commissioning father) of the intending couple in either of two ways – artificial insemination or natural intercourse.
2. Gestatory/Gestational surrogacy – It refers to a surrogacy wherein the sperm and the egg are obtained from the commissioning couple or the donors and then the embryo is implanted into the surrogate mother.

V. INTERNATIONAL SCENARIO

Different countries had set up different committees for the identification and regulation of various issues involved with surrogacy. Some of the examples of the said committees are as follows: The Warnock Committee set up by the United Kingdom in 1982, the Ministerial Committee on Assisted Reproductive Technology set up by New Zealand in 1994 and The Aloni Commission set up by Israel in 1994.

Israel

Israel was the first country that adopted specific legislation in the form of The Surrogate Motherhood Agreements Law, 1996 for the regulation of surrogacy. It resulted in making Israel the pioneer in the regulation and facilitation of commercial surrogacy agreements. As per the surrogacy law of Israel, the birth mother is not accorded any legal status. The legal parenthood immediately vests with the intended parents. The intended parents are the default parents of the child and they, in the absence of extraordinary circumstances, are given full custody and parentage rights of the child upon its birth.¹⁴ Further, the child after its birth should be delivered by the birth mother into the custody of the intended parents in the presence of a Welfare Officer as soon as possible.

Canada

The Assisted Human Reproduction Act was enacted in Canada in 2004. The said act

¹³ S.S Das & Priyanka Maut, *Commercialization of Surrogacy in India: A Critical Analysis*, 5 JCC Law Review 14, 17 (2014).

¹⁴ Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood- A Comparative Legal Analysis*, 9 DGLJP, 91, 98 (2002).

prohibits the payment of consideration to a surrogate woman.¹⁵ In addition to this, the Act also forbids the payment to any other person to arrange the services of a surrogate mother.¹⁶ The said act also provides for reimbursement of the expenditure related to surrogacy to the surrogate mother. One of the interesting facets of the act is that it talks about the reimbursement for loss of work-related income to the surrogate mother.

United Kingdom

In the UK, the law on surrogacy can be found in the Surrogacy Arrangements Act, 1985 and the Human Fertilization and Embryology Act, 1990. The Surrogacy Arrangements Act applies to surrogacy arrangements irrespective of the fact that they are lawful and enforceable or not.¹⁷ Section 2 (1) of the said act deals with the aspect of payment. It states that no person shall initiate or take part in any negotiations to make a surrogacy arrangement on a commercial basis. The Human Fertilization and Embryology Act, 1990 deals with the parentage and the procedure by which the commissioning parents will be treated as the parents of the child.

United States of America

The United States of America doesn't have a federal law on surrogacy. As many as eighteen states of the US do not have a specific law on surrogacy.¹⁸ But many other states have enacted laws dealing with surrogacy. Acts of some states prohibit surrogacy contracts or declare them void or unenforceable.¹⁹ Others have explicitly authorized and regulated surrogacy agreements.²⁰ Arrangements which are altruistic and not commercial are permitted. Thus, there is a lack of uniformity in the state laws on surrogacy.

It is imperative to note that in countries such as France, Germany, Italy, Egypt, and Switzerland, the surrogacy contracts are entirely forbidden.

VI. LEGALITY OF SURROGACY IN INDIA

(A) Assisted Reproductive Technology (Regulation) Bill, 2020

The ART Bill and the Rules were drafted by a committee that consisted of experts from the Ministry of Health and Family Welfare, Indian Council of Medical Research (hereinafter referred to as 'ICMR') and ART specialists. The ART Bill comprises 66 sections which are

¹⁵ The Assisted Human Reproduction Act, 2004 (Canada), S. 6(1).

¹⁶ The Assisted Human Reproduction Act, 2004 (Canada), S. 6(2).

¹⁷ The Surrogacy Arrangements Act, 1985 (UK) S. 1(9).

¹⁸ Susan Markens, *Surrogate Motherhood*, University of California, California (2007), pp. 28-29, table 2.

¹⁹ The Statutes of States such as Arizona, the District of Columbia, Indiana, Louisiana, Michigan, Nebraska, New York, North Dakota, and Utah.

²⁰ The statutes of states such as Florida, Nevada, New Hampshire, and Virginia.

divided into 10 chapters. The ART Bill provides for a framework for the accreditations, regulation, and supervision of assisted reproductive technology clinics in India. It aims at the prevention of misuse of assisted reproductive technology. Some of the key elements of The ART Bill are as follows –

1. The ART Bill primarily proposes the setting up of a National Advisory Board and State Boards whose primary functions shall be inclusive of recommending the modifications in rules and schedules relating to the minimum requirements of ART Clinics and its staff etc.
2. The Bill proposes the guidelines for the sourcing, storage, handling, research and record-keeping for gametes, embryos, and surrogates.
3. The Bill suggests the procedures for registration of ART Clinics along with their duties.
4. The Bill propounds the rights, duties, and confidentiality of intending couples, donors, surrogates and children.
5. The Bill proposes a certain age requirement for both the man and the woman who wish to avail of the services of ART Clinics.
6. The Bill also proposes strict punishment for those who indulge in pre-natal sex determination, sale of embryos and those who operate rackets.

(B) Surrogacy Regulation Bill 2020

The Surrogacy Bill comprises 52 sections which are divided into 8 chapters. Some of the key features of The Surrogacy Bill are as follows –

1. The Surrogacy Bill prohibits commercial surrogacy but it permits altruistic surrogacy. Altruistic surrogacy does not involve the payment of any monetary compensation to the surrogate mother except the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy involves a monetary reward or benefit (in cash or kind) in addition to the basic medical expenses and insurance coverage.
2. The Surrogacy Bill proposes surrogacy only in the following circumstances:
 - In cases of proven infertility;
 - Altruistic;
 - Any disease or condition specified in the regulations;
 - Not for commercial purposes;

- Not for producing children for sale or prostitution or other forms of exploitation.
3. The Surrogacy Bill proposes the mandatory requirement of the procurement of the Certificate of Essentiality and the Certificate of Eligibility by the intending couple which is subject to the fulfilment of certain conditions such as the age of the intending couple, the duration of their marriage and their citizenship.
 4. The Surrogacy Bill encompasses certain guidelines for the woman who intends to be a surrogate mother such as her age and marital status. Further, the woman must be a close relative of the intending couple.
 5. The Surrogacy Bill proposes that the woman to be a surrogate mother should have a child of her own. Also, as per the bill, a woman can be a surrogate mother only once in her lifetime.
 6. The Surrogacy Bill proposes stringent punishment for offenses such as advertising of commercial surrogacy, sale or importation of human embryo, exploitation and/or disowning of the surrogate child.

It is significant to note that, until The Surrogacy Bill and The ART Bill are passed by the Parliament and are implemented, the Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India passed by the ICMR in 2005 remain the sole law on the regulation of ART in India. The Guidelines also contain certain provisions dealing with surrogacy. The Guidelines prescribe the minimum qualifications of the ART team along with the approved procedures. The Guidelines also lays down certain mandatory conditions concerning the consent of the intending couple, age and cohabitation of the husband and wife along with the rights of the child, etc.

(C) 228th Report of the Law Commission of India in 2009²¹

Some crucial aspects of the report are as follows:

- Recognition of surrogate child as legitimate child of the commissioning parents without the need for adoption.
- Surrogacy arrangement shall be within the scope of the contract between the parties. Such a contract should have terms like the consent of surrogate mother to bear the child, medical procedures, approval of the surrogate mother's husband and other family members for surrogacy, willingness to hand over the child born to the

²¹ *Supra* note 3.

commissioning parents etc. However, such an agreement shall not be for commercial purposes.

- The birth certificate of the surrogate child shall entail the particular(s) of the commissioning parents only.

VII. JUDICIAL INTERPRETATION

In *B.K. Parthasarathi vs. Government of Andhra Pradesh*²², the Andhra Pradesh High Court held that 'the right of reproductive autonomy' of an individual is a part of his 'right to privacy'. The court in the said case also concurred with the judgment of the Supreme Court of the US in *Skinner vs. the State of Oklahoma*²³ wherein it was observed that the right to reproduce is 'one of the fundamental civil rights of man'.

The Supreme Court of India in *Baby Manji Yamada vs. Union of India and Another*²⁴ dealt with the meaning, scope, and types of the term 'surrogacy'. The primary issue in the said case revolved around the legality of surrogacy in India in absence of any specific legislation on the same. The apex court inter-alia observed that the intended parents may arrange a surrogate mother in cases where the woman who intends to be a parent is infertile i.e. she cannot carry a pregnancy to term. For example a woman who has undergone a hysterectomy or uterine malformation or a woman who has a health condition which makes it dangerous for her to be pregnant. The court also observed that there are four forms of surrogacy namely:

1. Traditional Surrogacy/ Straight Method – In this method, the surrogate mother gets pregnant with her biological child but this child was conceived to relinquish the child to be raised by the biological father and his spouse.
2. Gestational Surrogacy/ Host Method – The surrogate mother gets pregnant through the embryo transfer with a child of which she is not the biological mother. Therefore, the surrogate mother is referred to as the gestation carrier.
3. Altruistic Surrogacy – The surrogate mother does not receive any monetary compensation or payment for her pregnancy or the relinquishment of the child. In such type of surrogacy, only the medical expenses are borne by the intending parents.
4. Commercial Surrogacy – The surrogate mother is rewarded a monetary compensation by the intending couple.

²² B.K. Parthasarathi v. Government of Andhra Pradesh, AIR 2000 AP 156 (India).

²³ *Skinner v. the State of Oklahoma*, 316 US 535 (1941).

²⁴ *Baby Manji Yamada v. Union of India and Another*, (2008) 13 SCC (India).

The Gujarat High Court in *Jan Balaz vs. Anand Municipality*²⁵ referring to the ICMR Guidelines and The ART Bill, 2008 observed that there is a pressing need to adopt legislation answering all the surrogacy related issues. Further, the Supreme Court of India in *Devika Biswasi vs. Union of India*²⁶ recognized the right to reproduction as a significant element of the 'right to life' guaranteed under Article 21 of the Indian Constitution.

VIII. PROBABLE IMPACT OF THE PROPOSED BILLS

The partisans and the critics of the surrogacy laws of India have always been at loggerheads with each other due to the advantages and disadvantages of the bills:

(A) Positive Impact

The proposed bills have the following advantages:

1. Boon for the Infertile couples

Generally, it is one of the most heartfelt wishes of a couple to have a baby. But at times, this desire of theirs is left unfulfilled due to reasons such as infertility. Both the bills are a boon in disguise for the infertile couples of India. They give childless couples the freedom to have children via surrogacy and other assisted reproductive means. The bills allow the couple to raise a child from birth which is comparatively better than adoption.

2. Benefits for Surrogate Mother

The Surrogacy Bill allows the women to be a surrogate mother only once in her lifetime which in turn prevents their exploitation. These bills aim to ensure a better life for the surrogate mother by banning commercial surrogacy. There is a mandatory requirement in The ART Bill and The Surrogacy Bill to inform the surrogate mother of the risks associated with surrogacy and to take written consent from her. As a result, a surrogate woman will be in a better position to make an informed choice.

3. Improves Sex Ratio of the Country

The bills propose an embargo on the sex determination and sex selection of the child by providing harsh punishments. This may improve the sex ratio of the country.

4. Stringent Punishment for Contravention

²⁵ Jan Balaz v. Anand Municipality, AIR 2009 Guj 21 (India).

²⁶ Devika Biswasi v. Union of India, (2016) 10 SCC 726 (India).

By proposing strict punishment for the contravention of their provisions, the bills inter alia ensure that there is a complete ban on the exploitation of the surrogate child, sale, and import of embryos, etc.

(B) Negative Impact

Although tailored to accommodate contemporary needs of the society, the two bills have certain shortcomings:

1. Position of Same-sex couples

There exist lacunae in cases where same-sex couples intend to avail of the services of surrogacy or ART clinics in India. The Surrogacy Bill explicitly states that to obtain the eligibility certificate, the intending couple should be married for a specific period. Despite the decriminalization of Section 377 of the Indian Penal Code, 1860, same-sex marriages are not yet legally recognized in India. The word 'couple' as defined by both The ART Bill and The Surrogacy Bill means a legally married Indian man above the age of 21 years and a legally married Indian woman above the age of 18 years. Both The Surrogacy Bill and The ART Bill stipulate an exhaustive definition of the term 'infertile couple'. These bills restrict the meaning of the term 'couple' to only heterosexual couples leaving no leeway for the same-sex couples. The dreams of same-sex couples to have a surrogate child are very far from being fulfilled. Further, men and women exceeding the age of 50 and 45 years respectively, are not eligible to avail ART services. This is a blatant disregard and violation of Article 14 of the Constitution of India which stipulates equality for all.

2. Lack of Background Check of the Intending Couple

Both the bills are silent on the aspect of background checks and screening of the intending couples. The bills suffer from a lack of guidelines on the investigation of the criminal record, age, family background, etc of the intending couple which could prove to be detrimental to the child's safety.

3. Exploitation of Surrogate Mother

It is estimated that at least 30 percent of the rural population of India is poverty-stricken. As a result, many women from rural areas turn to urban areas in search of better opportunities. Many rural women turn to surrogacy. Surrogacy is often termed as 'rent a womb'. Many women conceal their medical history for financial gain via

surrogacy.²⁷ This proves fatal for both the mother and the child. The Surrogacy Bill and The Art Bill are silent on the aspect of medical negligence which may prove lethal to the poor and vulnerable women of India. This can also lead to the commoditization of poor women of India. The bills may end up in creating an underground market for the surrogate mothers.

4. Status of Single Women

The ICMR Guidelines granted the single women with an access to ART services but the two proposed bills remains silent on the same. Therefore, excluding individuals of a certain age, sexual orientation or relationship status from the ambit of those 'eligible' to avail ART services would be a contravention of Article 21. These limitations also violate the right to equality guaranteed under Article 14 of the Constitution.

5. Possibility of Unethical Practices

Stringent punishments often lead to the mushrooming of unethical practices. The chances of corruption and malpractices are often high in case of harsh punishments which in turn may defeat the purpose of both the bills.

IX. CONCLUSION

Surrogacy has been in practice in the Indian subcontinent since the early days of Mahabharata and Bible, in which it is highly supported. The noble art of surrogacy has its share of advantages coupled with the disadvantages. Often, it is termed as 'god's gift' or 'rent a womb' depending upon the person's perspective. Different people have different reservations on surrogacy. Yet, it is considered as bliss to the mankind. The laws on surrogacy in India have been segregated till now. The Surrogacy Bill and The Art Bill are meant to consolidate the laws related to surrogacy and ART in India. The primary aim of the two proposed bills is to protect the rights of both the surrogate mother and the surrogate child. However, the market for surrogacy in India is at its peak. A complete ban on commercialisation of surrogacy may force the market to go underground and operate unnoticed. Nevertheless, the deliberations of the government of India to introduce these two progressive bills are commendable.

²⁷ Neha Sharma et al., *Regulation of Surrogacy in India: Need of the Hour*, 3(1) RFP Journal of Hospital Administration, 33, 35 (2019).