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COMMERCIAL SURROGACY AND EXPLOITATION: LEGAL SAFEGUARDS IN INDIA

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I. ABSTRACT

Henry Ward Beecher has rightly quoted, "*We never know the love of a parent till we become parents ourselves*". The nature has bestowed upon humans- the blessed opportunity to procreate and acquaint themselves to parenthood. "It is considered to be one of the honor, gift, right and grant for any parent to have a child of their own"[1], however, it is also very natural for couples, intending to be parents, to be infertile-due to any physiological or psychological reasons. Diverting from the natural method of procreation, the rapid technological advancement in science has fulfilled the dreams of many infertile couples who intend to be parents and has "made possible to have a child who is genetically identical even when one of the parents is infertile"[2]. Assisted Reproductive Technologies are utilized by such couples which are namely- In Vitro Fertilization (IVF), Intracytoplasmic Sperm Injection (ICSI), Intrauterine Insemination (IUI), Egg and Sperm Donation, Embryo Donation, Surrogacy etc. In regards to all the techniques, Surrogacy has evolved to be the most viable option for infertile couples and people who wish to be single parents. India has long served as a prominent hub for surrogacy *especially the commercial type*, drawing a large number of people seeking surrogate mothers in the country. The method may prove to be a boon for intending parents, however, commercial surrogacy is associated with various socio-legal

[1] Shravani Reddy Yr, *Study on Legal Framework Regulating Surrogacy in India,* 5, INDIAN J.L & LEGAL RSCH, 1, 1-2, (2023).
[2] Shefali Kolhe & Anuj Kumar Gupta, *Commercial Surrogacy: A Cluster of Issues and Complexities of Rights under the Constitution of India,* 9, NLIU L. REV., 442, 442-443, (2020).

implications and hardships for surrogate mothers. The undertaking shall, therefore, analyse- the implications and subsequent exploitation in commercial surrogacy, "the preservation of the rights of women undergoing surrogacy and the legitimacy of children born out such practice"[3] and legal safeguards regarding surrogacy in India.

II. RESEARCH QUESTIONS

1. *How is commercial surrogacy exploited in India?*

2. *What are the legal safeguards in India in respect to commercial surrogacy?*

3. *What are the issues raised against these legal safeguards in the Indian Society?*

III. INTRODUCTION

Often referred to as "*womb for rent",* Surrogacy is a prominent Assisted Reproductive Technique which has been prevalent from the biblical times till date. The word "Surrogacy" has been derived from Latin word "*surrogatus*" which implies a replacement or substitute deed. Surrogacy is defined as an "arrangement wherein, a couple or a person agrees to have a child through another woman's womb. Such a woman, called the surrogate, undergoes pregnancy for the intended parents, who consequently, become the legal parents of the newly born child out of the Surrogacy"[4]. "The American Law Reports defined Surrogacy as a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father and to terminate all parental rights of surrogate mother subsequent to the child's birth"[5] As a practice, surrogacy is diversified on the basis of monetary compensation involved and on the basis of embryos. Differentiating in regards to embryos, <u>*traditional and gestational surrogacy*</u> are the two types. <u>*Traditional surrogacy*</u> refers to the practice, wherein, the sperm of the intended father or a male donor is fertilized

[3] Ashish Sharma, *Commercial Surrogacy in India: An Overview,* 32, SUPREMO AMICUS, 1, 1-2 (2023).
[4] Kolhe & Gupta, *supra* note 2, at 3.
[5] Greeny Mourya, *Commercial Surrogacy in India and Rights of Surrogate Mother,* 6, INT'l J.L. MGMT. & HUMAN, 2727, 2728-2729. (2023).

with the surrogate mother's egg and subsequent to fertilization, it is artificially inseminated in surrogate's womb and the child is carried by her during the pregnancy. The child, thus born, is genetically related to the surrogate mother. *Gestational Surrogacy* occurs when the sperm of intended father or a male donor is fertilized with the egg of the intended mother in a laboratory or clinic which is then implanted into the womb of the surrogate mother who carries the baby during pregnancy. Therefore, there is no genetic connection between surrogate mother and the child. The prevalent avoidance of traditional surrogacy is justified as no parent would wish their child to have a genetic relation with the surrogate mother and therefore, in most countries such as Russia and Ukraine do not permit this kind of surrogacy.

Upon the basis of monetary compensation, surrogacy is bifurcated as *altruistic and commercial surrogacy*. In case of *altruistic surrogacy*, no monetary compensation is provided to the surrogate mother, except for the medical expenses which are incurred and the surrogate is usually a close relative of the intended parents. In surrogacy where monetary compensation, above medical expenses is covered, is known *as commercial surrogacy.* "Commercial surrogacy is more of a concept related to employment and has now become a worldwide business"[6]. In order to ameliorate her poor family's socio-economic issues, various helpless women have taken the assistance of commercial surrogacy to earn considerable amount of money. In addition to benefitting the needy surrogate mothers, "research conducted by various independent organizations found that the surrogacy industry made a significant contribution to the Indian economy, growing into a business worth over 445 million dollars annually"[7]. Through this approach, which was legalized in India, in 2002, India did not aim to offer an exclusive solution for infertile couples but rather focuses on maintaining "hegemony in an increasingly viable industry". The rapidly emerging market evolved at a time when there were no laws in the country for the protection of the rights of the surrogate. However, the scenario now, is quite different and has evolved in a positive way, through the formulation of laws regulating surrogacy. Due to its amicable approach towards scientific advancement, lax regulations as well as appropriate medical care, India became the "capital of commercial surrogacy" where the process was relatively cheaper than nations where it was much more expensive. Also, the perpetual presence of such women-illiterate and poor, who were ready to participate in surrogacy as a way of having an earning, was also one of the main reasons

[6] Kolhe & Gupta, *supra* note 2, at 3.

[7] Sasthibrata Panda & Sanskar Jain, *Understanding Commercial Surrogacy: The Pact between Barren and Broke,* 1, DNLUSLJ, 18, 19-20, (2022).

for the unparalleled growth of the industry. In essence, with surrogacy becoming increasingly common and widely accepted, the demand for the surrogate mothers is expected to rise in the global market. This growth will lead to the expansion of surrogacy programs, an increase in cross-border surrogacy agreements and ongoing national and international debates.

IV. ANALYSIS

1. COMMERCIAL SURROGACY AND EXPLOITATION INVOLVED

Significant social, ethical, moral, legal and economic concerns were raised regarding the practice of commercial surrogacy-particularly regarding the potential for exploitation, before it was legally banned in India through The Surrogacy (Regulation) Act, 2021. *Firstly,* the practice made surrogate mothers and the children born out of commercial surrogacy, susceptible to Vulnerability. A person is said to be vulnerable when he/she is "exposed to the possibility of being attacked or harmed, either physically or emotionally and in the need of special care, support, or protection because of age, disability, or risk of abuse or neglect"[8]. The surrogate mothers were vulnerable as they may be exposed to health risks-pregnancy itself exposes women to inherent health hazards and surrogacy can further multiply them. Risks like-*preeclampsia, gestational diabetes and complications in IVF* raised serious concerns. The psychological impact on mental and physical health of surrogate mothers is worrisome as in order to obtain some money, the potential surrogate mothers were not aware of the extent of complicated medical interventions and emotional distress involved in the process as- the emotional journey of carrying and relinquishing a child can be complex and emotionally challenging. Furthermore, no laws regulated the practice of surrogacy and protected the surrogate mothers from being vulnerable through even exploitation in this regard. The children born were made vulnerable because of complexity in confirmation of their identity and origin and there were cases where legal uncertainties surrounding parentage can create vulnerabilities for children, particularly in cases of international surrogacy or disputes between intended parents and surrogate mothers. *Secondly,* in case of commercial surrogacy, the situation in which surrogate mothers were seen were hideous as there was no other reason to pursue surrogacy other than money. In our country, several interviews were conducted by activists, like an empirical study at an infertility clinic in the Anand District

[8] Vulnerable, Oxford English Dictionary (3rd ed. 2010) https://www.oed.com (last visited Feb. 27, 2025).

(Gujarat) where it was found that small hostels or surrogate houses were arranged for surrogate mothers to live in, where they were confined and not permitted to exit the premises[9]. They could not go out for the least time and they were "forbidden to even take the staircase that goes down to the open area of the complex where the clinic is located"[10]. A large number women lived in the same room without having any individual space for themselves. The food, delivered by the clinic particularly, was not found to be of good quality-which is a necessity at the time of pregnancy for the child born to be healthy and fit. Furthermore, the system discouraged interaction between surrogate mothers and the commissioning couples, leaving the women without potential emotional upliftment. The excessive control and power exercised by these external agencies by totally confining the surrogate mothers made them feeble and unguarded.

Thirdly, in order to be aware of her rights, the surrogate mother should be educated, or at least literate to that extent. However, in case of commercial surrogacy, mostly women who opted for the process were illiterate and poor women who were in dire need of earning some money. If a layered approach was adopted in the process and illiteracy being a layer could be removed, then exploitation of these women would have reduced to a large extent. Someone who has very less to no education due to various adverse economic and social issue, is perpetually aloof from "basic rights institutes and established under right to life, such as that of right to privacy, right to freedom of movement, right to reproductive autonomy and the like"[11]. Also, the contract involved in commercial surrogacy which were signed by surrogate mothers and intending couple was in English language, and the illiterate surrogate mothers did not know any language other than their native one and signed the contract without being aware of the clauses written in it. Therefore, they could be easily exploited through these contracts and they did not even know regarding any legal aid if any breach of contract took place or not and the situation worsened for them. Despite forming the natural bonds with the child, surrogate mothers were forced to relinquish the child immediately post-birth and clinics denied them any contact. They had no legal safeguard to reconsider giving away the child, unlike in some other countries. Further exploitation occurs when clinics use machines for milk extraction from surrogate mother, despite the woman's emotional connection.

[9] Diksha Munjal-Shankar, *Commercial Surrogacy In India: Vulnerability Contexualised,* 58, JILI, 350, 351-352 (2016).
[10] Id.
[11] Shankar, *supra* note 9, at 6.

Even the children born out of commercial surrogacy were vulnerable as much as the surrogate mothers. A large number of potential women could become the legal mother of these children such as -the surrogate mother, the intended mother or any female anonymous donor who had donated the egg. However, the question as to true maternal identity remained unresolved. Such issues had arisen in several cases and mostly in the cases of agreement of commercial surrogacy with foreigners, where the children could even remain ultimately stateless. A like situation was observed in the case of *Baby Manji Yamada v Union of India*[12] where a Japanese couple contracted for commercial surrogacy in India and subsequent to the surrogacy agreement, they had been divorced. The commissioned mother, due to the divorce, refused to take the custody of child (Baby Manji) who was born out of surrogacy and she was ultimately left as an orphan. In this case, the surrogate mother could never foresee the possibility of her filing as suit for such kind of breach of contract. In the case, prioritizing the welfare of the child, The Apex Court "directed the issuance of travel documents" and permitted the grandparents to travel with the child to Japan, when they had filed the suit for custody. Financial motivations, coupled with social stigma and clinic control, force surrogate mothers into secrecy, undermining their ability to resist exploitation.

Before 2015- the year in which the Government of India completely restricted foreigners to pursue commercial surrogacy in India, prevalent alarming issues were that even though the foreign clients paid large amount of money in the process of surrogacy, very less fraction of it was received by the surrogate mother and most of the cash was retained by the agencies or clinics for themselves. Apart from being confined and exploited in "*production houses*" having low quality living conditions, no monetary or emotional support was provided to their families, while the women were away from them for pregnancy. Furthermore, surrogate mothers generally faced medical complications such as "*multiple pregnancies, ectopic and heterotrophic pregnancy which increase the risk of perinatal morbidity and mortality and they may develop ovarian hyper stimulation syndrome where the ovaries become significantly enlarged due to an excessive response to fertility drugs, specifically HCG during ART which results in the development of numerous follicles"*[13]. Therefore, "a single, independent and isolated factor does not, but an amalgamation of various imbricated layers of internal

[12] Baby Manji Yamada v. Union of India (2008) 13 SCC 518.

[13] J.S.R.G Saran & Jagdish Rao Padubidri, *New Laws Ban Commercial Surrogacy in India,* 88, MEDICO-LEGAL J. 48, 49-50 (2020).

elements compounded with the external elements that leave the surrogate mothers debilitated"[14].

2. LEGAL SAFEGUARDS AGAINST COMMERCIAL SURROGACY IN INDIA

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Prior to 2002, the prevalence of surrogacy, particularly the commercial type was largely unregulated in the country, so as to say there existed no laws in regards to this practice. India, therefore, became a renowned hub of commercial surrogacy among foreigners, where they could easily get access to the '*baby farms'* due to their low cost and effortless availability. The practice of surrogacy was, for the very first time, documented in 1994, in Chennai, India and the "first documented case" of commercial surrogacy was observed in 1997 when "an Indian woman consented to carry a child for another family in exchange for payment"[15]. Through this, commercial surrogacy embarked its journey upon the path of achieving more recognition in the Indian Society. In **2002**, in the pursuit of legalizing surrogacy, ***the Indian Council of Medical Research issued guidelines*** to provide a framework of assisted reproductive technologies in India, regulating the ART Clinics and maintaining a national registry for the said clinics and explicitly permitting surrogacy in India. The guidelines were **formally approved and published by the Government in 2005**, however "they were unenforceable by law and were only in the nature of recommendations as to methods to be inculcated by the ART clinics"[16]. Thereafter, ***in 2009, the Law Commission of India*** focused on the "*Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*" in the **228th Report** and suggested to regulate the growing practice of surrogacy and aimed to provide recommendations for legislation that would protect the rights of all parties involved, including surrogate mothers, intended parents, and children born through surrogacy. The Report was evolved when India emerged as a major hub of commercial surrogacy across the globe. Despite the Government's keen efforts to somehow regulate the unethical practice of commercial surrogacy, several cases of the same were on the rise and it was in **2008** when the landmark case of ***Baby Manji Yamada***[17] took place which highlighted what prospective threats could commercial surrogacy impose in

[14] Mourya, *supra* note 5, at 4.
[15] Ankesh Kumar, *Surrogacy Laws in India,* 5, INDIAN J.L & LEGAL RSCH, 1, 2-3 (2023).
[16] Sharma, *supra* note 3, at 3.
[17] Baby Manji Yamada v. Union of India (2008) 13 SCC 518.

India. In consideration of the Hon'ble Supreme Court's recommendation to curb the evils of commercial surrogacy, the ***Assisted Reproductive Technology (Regulation) Bill was formulated in the year-2008***. The first ever bill to regulate commercial surrogacy in India, it provided for the National Advisory Board to prescribe provisions regarding commercial surrogacy and also restricted the practice of traditional surrogacy due to its inherent drawbacks. Unmarried couples could have a child through surrogacy and in case of intending parents who were foreigners, a guardian was to be appointed for the surrogate mother till the couple takes the baby. Also, if it is possible for a woman to carry a baby to the term, no ART clinic shall assist in surrogacy.

However, the Bill was criticised as "it seemed to only create a balance between the function of motherhood and commercialization"[18]. This ART Bill remained to be pending till 2010 and solely, the guidelines issued by the ICMR were there for regulation of surrogacy, which were also not enforceable by the law. Thereafter, ***the Assisted Reproductive Technology (Regulation) Bill, 2010*** was formulated. The Bill provided for an age limit of the surrogate mother (*21-35 years*), medical examination of her, there shall be maximum three embryo transfers in case it fails in the first time, the intended couple is legally bound to accept the child notwithstanding any disabilities in the child, consent of the surrogate mother and her husband is necessary, the child born is considered legitimate-even when the couple is unmarried, if foreign couple pursue surrogacy in India, then the child born is not an Indian Citizen. The Bill was revised consecutively in **2013 and 2014** introducing legal parentage rights, but it lapsed due to lack of political consensus. In the case of *Kaushal Kadam v Union of India*[19] certain guidelines were issued by Ministry of Home Affairs for the foreigners who wished for surrogacy that "the couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother and the court held that there was no law which regulated commissioning of surrogacy for that matter"[20].

In the same year, ***2015 the Government of India banned foreigners in regards to commercial surrogacy in India***. The next milestone achieved in regulating the malpractices of commercial surrogacy was the formulation of ***The Surrogacy (Regulation) Bill, 2016, after being introduced in 2014.*** Only Indian, married heterosexual couple who had been suffering from infertility from past five years were permitted to pursue surrogacy. The Bill

[18] Kumar, *supra* note 15, at 7.
[19] Kaushal Kadam v Union of India (2015) SCC Bom 805.
[20] Reddy Yr., *supra* note 1, at 3.

banned commercial surrogacy and only allowed altruistic surrogacy. However, lapsed and was reintroduced in 2019 as ***The Surrogacy (Regulation) Bill, 2019.*** It banned commercial surrogacy too and aimed to regulate the surrogacy process in order to safeguard the rights of children born through surrogacy and stop mothers from being exploited. The Bill effectively became an Act in 2021known as ***The Surrogacy (Regulation) Act, 2021.*** The Act significantly revised the 2019 Bill and particularly, the requirement for a surrogate to be a close relative, in the previous Bill, was dropped, allowing any willing woman to act as the surrogate mother. Additionally, surrogate rights were strengthened by increasing mandatory insurance coverage for pregnancy and postpartum complications from 16 to 36 months. It bans commercial surrogacy and promotes only altruistic surrogacy and punishment is also prescribed for commercial surrogacy. The surrogate mother cannot receive monetary compensation beyond medical expenses and insurance. There are specific eligibility criteria for surrogate mother and intending couple and the parents should have proven infertility. Commercial surrogacy, sex selection and abandonment of the child are strictly prohibited under the Act. In Sections 38 to 40 of the Act, punishment is prescribed for practicing commercial surrogacy ("*imprisonment for a term which may extend to five years and with fine which may extend to five lakh rupees for the first offence and for any subsequent offence with imprisonment which may extend to ten years and with fine which may extend to ten lakh rupees*[21]*"*.) Furthermore, the Act specifies Regulation of Surrogacy Clinics, Registration of surrogacy clinics, provision of National and State ART Boards, Appropriate Authorities. Similarly, ***the Assisted Reproductive Technology (Regulation) Act, 2021*** was passed- India's first comprehensive law in this regard to regulate ART services such as IVF, sperm donation, egg donation and embryo transfers. Ethical practices, rights of intended parents, surrogate mothers and the children born, prevention of exploitation of women are ensured. It mandates registration of clinics through National Registry and regulation or ART clinics and banks under National and State ART Boards. The act allows ART services only for married heterosexual couples and single women (widows or divorcees), while excluding single men and LGBTQ+ individuals. It provides for the anonymity of donors, compulsory insurance coverage for egg donors, and prohibits the sale of embryos or gametes. The act also lays down penalties for clinics violating ethical standards and engaging in illegal practices. Therefore, the presence and shield of The Surrogacy (Regulation) Act, 2021 and The Assisted Reproductive Technology (Regulation) Act, 2021 have protected the rights of surrogate

[21] The Surrogacy (Regulation) Act, 2021, §40, No.47, Acts of Parliament, 2021 (India).

mothers and children born out surrogacy to a considerable extent and curbed the evils of commercial surrogacy for the betterment of the society.

3. ISSUES RAISED AGAINST THESE LEGAL SAFEGUARDS

The Constitution of India confers upon certain inherent rights- known as *fundamental rights* upon the people of the country and they cannot be violated by ay action of the State. Through judicial precedents, various facets have been observed in reference to these rights so that "the needs of the society are fulfilled to the maximum". The significant shift in the interpretation of fundamental rights was elaborated in *Maneka Gandhi v Union of India*[22] "where the concept of golden triangle was laid down. The golden triangle rule lays down the interconnection among Articles 14, 19 and 21 of the Constitution upholding the principles the equality, freedom and personal liberty"- which cannot be implemented in isolation. In regards to ban on *Commercial Surrogacy,* the Surrogacy (Regulation) Act, 2021 contradicts and violates the fundamental rights conferred upon in Articles 14, 19 and 21. Article 14 lays down "*equality before the law and equal protection of the law*"[23]. The Act infringes this right as only allowing Indian couples who are married and infertile while excluding others on the basis of marital status, nationality and sexual orientation violate the Right to Equality because "this is not a reasonable classification and there is no intelligible differentia"[24]. There no harmony between the object sought and classification prescribed as the object was to protect surrogate mothers from exploitation and to prevent the commercialization of birth process and prevent trafficking in the surrogacy market. Secondly, the Act is considered by many to "Infringe the Freedom of Trade and Commerce of the Surrogate Mother under Article 19(1)(g)[25]". The conscious choice and freedom of women to pursue surrogacy as a trade and job to earn their living cannot be completely restricted by the Government as according to Article 19(1)(g). Absolute ban was not the solution, rather laying down rules and regulations for the practice of commercial surrogacy while allowing it, could have been the right approach, as opined by many. Restrictions can only be permitted if the matter comes under the arena of "interest of general public which comprises of public order, morality, health etc"[26]. However,

[22] Maneka Gandhi v Union of India, 1978 AIR 597.
[23] INDIA CONST. art. 14.
[24] Kolhe & Gupta, supra note 2, at 3.
[25] INDIA CONST. art 19 (1)(g).
[26] Kolhe & Gupta, supra note 2, at 3.

none of these grounds hold true if the women themselves want to earn money through surrogacy and banning the same on the basis of morality is also not adequate as "morality is a term which has no definite meaning, it is as fluid as liquid, it will be in one shape at one point of time and in another shape at another point of time". Many practices which were considered a taboo and immoral are now considered moral and commercial surrogacy provided considerable earning not only to surrogate mothers, but also to doctors and clinics. Thirdly, the "*Right to Life and Reproductive Autonomy under Article 21*[27]" is also said to be violated by the Act. The Right to livelihood also comes under the ambit of Right to life and complete ban on commercial prevents the women to improve her quality of life as she cannot earn money through this process even if she wants to and the process does not harm others. Also, only providing medical expenses in the tedious and long procedure of surrogacy also conflicts with the interests of the surrogate mothers as these payments may not assist the surrogate mother as an extra monetary compensation would. Despite issues being raised by many contemporaries, the Surrogacy (Regulation) Act, 2021 has, in effect, prevented the exploitation involved in commercial surrogacy to a large extent in the country.

V. CONCLUSION

Many concerns regarding the Act banning commercial surrogacy, despite being raised, are overshadowed by the initial socio-legal implications regarding the practice which were the inherent reason as to why the Act was formulated. Exploitation of vulnerable surrogate mothers and their children have been curbed to a large extent because they have a legal backing to them now and if they are subjected to any malpractice, they can effectively approach the Courts to receive justice. Altruistic surrogacy is allowed; however, suggestions have been formulated to avoid that too and promote the practice of adoption to a larger extent. It would rather uplift the needy, orphan kids with couples also experiencing the blessed joy of becoming parents. Therefore, the laws made by the Government of India, coupled with personal morality that commercialisation of the birth process may be incorrect, can further restrict the exploitative nature of financially motivated surrogacy.

[27] INDIA CONST. art. 21.