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Surrogacy: Renting Wombs & Desire of Parenthood

Birinder Pal

INTRODUCTION

The desire of motherhood is inherent to every human or animal. Everybody seeks the joy of parenthood. According to ancient Indian philosophy the biological purpose of life is to propagate once (ones) own traits (genes) and all living creatures are here on a transition phase to pass their own traits (genes) to the next generation.¹ The propagation is dependent on many factors and species go through every necessary condition for their offspring. With enormous modern age developments in medical health still there are areas to which there are no solutions till date, as one is infertility.

According to the Indian Society of Assisted Reproduction, infertility currently affects about 10 to 14 percent of the Indian population, with higher rates in urban areas where one out of every six couples are impacted.² Nearly 27.5 million couples actively trying to conceive suffer from infertility in India.³

In a country like India where societies stable structure is judged as having a complete family, having children. It doesn't end at that, families seek a son to carry forth their *Vansh* or lineage, living with infertility is considered nothing less than a curse. Infertility is considered as a social stigma in India. Some modern age medical technologies as Assisted Reproductive Technology (**ART**) such as *in vitro* fertilization (**IVF**) or intracytoplasmic sperm injection (ICSI), etc., have been developed, proved to be a boon for the couples fighting fertility issues. Couples mostly seek a natural way of having a child and opt for Surrogacy.

SURROGACY : A genetic trade

When we are considering the legal, social acceptance and implication of surrogacy, it is important first to understand the word itself.

In Latin "*Surrogatus*" means a substitute i.e. a person appointed to act in the place of another.⁴ As per the Balck's Law Dictionary surrogacy means the process of carrying and delivering a child for another person.⁵ Simply put, surrogacy is understood as a situation where a woman rents her womb to nurture the fertilized egg of another couple who were unfortunately unable to have it themselves.

For further understanding Surrogacy, it is important to know different types of Surrogacy;

First, there are two types of surrogacy to consider: ⁶

¹ Gupta PD, Lino A. Bikaner: Capricorn Publishing House; 2010. Mothering a cause: Practical knowledge of reproduction and motherhood.

² <https://thediplomat.com/2018/05/indias-hidden-infertility-struggles/>

³ Ibid

⁴ Surrogacy in Latin. (<http://www.latindictionary.org/surrogatus>, <http://en.wiktionary.org/wiki/surrogatus>

⁵ <http://www.britanica.com/EBchecked/topic/575390/surrogate-motherhood> .

⁶ <https://surrogate.com/surrogates/becoming-a-surrogate/the-six-steps-of-the-surrogacy-process/>

1. **Traditional** – In traditional surrogacy, the surrogate is also the biological mother of the child she carries. Her egg is fertilized using sperm from the intended father or a donor using intrauterine insemination.
2. **Gestational** – In gestational surrogacy, the child is not biologically related to the surrogate mother. The embryo is instead created using an egg from the intended mother or a donor and sperm from the intended father or a donor using in vitro fertilization. Once the egg is fertilized in the laboratory, the embryo is transferred to the surrogate.

Secondly, there are two types of surrogacy professionals who can complete your surrogacy:⁷

1. **Surrogacy Agency-** May provide any or all surrogacy services, including matching, case management, support, counselling, legal and more.
2. **Surrogacy Attorney-** Required in any surrogacy to complete the legal work, but may not provide other important services found with a surrogacy agent.

Addition to this there are two surrogacy agreements prevalent in various countries including India:⁸

1. **Altruistic Surrogacy:** Where surrogate mother doesn't expect any financial reward and the parents bear the medical expenses.
2. **Commercial Surrogacy:** Where surrogate mother is paid for her service in addition to the medical expenses.

EVOLUTION

Surrogacy is not new to this world and there are many historical instances which show that it was widely accepted even in the Christ era. The bible too cites an ancient instance of traditional surrogacy in Genesis – Sarah, who was infertile, requested that her handmaiden, Hagar, carry her husband, Abraham's child.⁹ Traditional surrogacy has been in practice since ages, but gestational surrogacy came into existence only recently. In 1884 first successful artificial insemination was completed, although in an ethically questionable way. In 1976 first legal surrogacy agreement in the history of surrogacy was brokered by a lawyer in US and in 1978 first baby conceived through IVF was born. And in the year 1986.¹⁰ the first legal hurdle faced by surrogacy, when a traditional surrogate decided to keep the child and lead to 2 year long legal battle named 'The

⁷ <https://surrogate.com/surrogates/becoming-a-surrogate/the-six-steps-of-the-surrogacy-process/>

⁸ Steven P, Misha A, Malik S. Surrogacy: Ethical and legal issues. Indian J Community

⁹ <https://www.circlesurrogacy.com/blog/circle-surrogacy/history-surrogacy-surrogacy-evolved/>

¹⁰ <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>

Baby M case', resulted in development of stricter surrogacy laws in US. Then by the year 2004-08 almost 5000 children were born via surrogacy in the US.¹¹

The practice of surrogacy is long engrained in the history of India as well and there are centuries old evidences about its acceptance. Hindu mythology also offers instance of surrogacy and reflects the secrecy that still surrounds surrogacy practice. In Bhagavata Purana, Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard their prayers and had an embryo from Devki's womb transferred to the womb of Rohini, and secretly raised the child while Vasudev and Devki told Kansa that the child was born dead.¹² Contemporarily the procedure became a successful practice in India with the birth of world's second and India's first IVF baby Kanupriya alias Durga who was born in Kolkata on Oct. 3, 1978.¹³ Since then the field of ART and surrogacy developed at a great pace. Till date no robust

India has become the world's "surrogacy hub". Infertile couples, single women and gay couples around the world are hiring wombs of Indian women for carrying embryos. There are no official figures on how large the fertility industry is in India. A U.N.- backed study in July 2012 estimated the surrogacy business at more than \$400 million a year, with over 3,000 fertility clinics across India.¹⁴

Activists always considered this fertility clinics as the 'baby factories' for the rich. The state opened up to commercial surrogacy in 2002 and the availability of cheap medical facility and lack of strict medical regulations led to India becoming a preferred nation for surrogacy.

SURROGACY EVOLUTION IN INDIA : BIRTHING MARKET

Though India, have the traces of surrogacy in the history, but the modern age surrogacy evolves with the birth of India's first IVF baby Kanupriya alias Durga in Kolkata on 3rd October, 1978. Since then the field of Assisted Reproductive Treatment (**ART**) have developed substantially in a short span of time. The gestational surrogacy is widely promoted and the number of people participating has increased at such an unexpected pace, that India has become one of the worlds most preferred surrogacy destination.

Surrogacy has always remained a widely debated topic. Being a multi-cultural, multi-ethnic, multi-religious, multi-lingual state, the approach by each community is different and getting a harmonious balance between all is a tough task. The diversity of the country, leads to much deliberation about the issues which hits out at socio-religious beliefs of any community. The religious beliefs have been discussed above and now comes, the place to decide upon the

¹¹ Ibid.

¹² Jasdeep Kaur, "Surrogacy: A paradox regarding Motherhood rights with special reference to India"; Vol. II No. 1, 2012 The Legal Analyst (113 to 121) at 114.

¹³ <http://indiansurrogatemothers.com/history-surrogacy-india/>

¹⁴ https://www.medscape.com/viewarticle/811861?nlid=35152_2043&src=wnl_edit_medn_obgy&uac=149266AJ&spn=16 ; By Nita Bhalla and Mansi Thapliyal

birth and growth of the surrogacy in India. Starting from a IVF birth, presently the surrogacy is being regulated by a national statute.

Medical industry in India has welcomed the practice of surrogacy with open hands. To understand the surrogacy in the India context, one must begin with the fact that, while the Transplantation of Human Organs Act, 1994 banned the sale of human organs, organ loaning-an equally difficult and risky venture- is being promoted through paid surrogacy.¹⁵ This is due to a medical industry that welcomes profitable international ventures like “reproductive tourism” even when infertility constitutes a small segment of domestic priorities. The incidence of total infertility in India is estimated at 8 to 10 per cent, and for the vast majority of Indian women it is preventable as it is caused by poor health, nutrition, maternity services and high-level infections.¹⁶ Only about 2% of the Indian women who suffer from “primary” infertility which is amenable to ART alone.¹⁷ Moreover, there are rarely any cases which actually require surrogacy and cannot be treated with other procedures.

India has become a global hub of surrogacy specifically due to lower cost of treatment, lack of regulation, poor law and most importantly the availability of surrogate mothers in huge number. Medical procedure in India are estimated to be 30 to 40 % cheaper than in the West.¹⁸ Even after every kind of checkup and agreements, surrogacy is a risk venture for the surrogate mothers. In the most scenario the mother is being exploited and especially since they belong to socio-economically weaker section of the society and seen as an instrument to earn money.

India opened its doors for commercial surrogacy in 2002, when it was legalized, but that is just the start of a new vulnerability to the society. The Indian Council of Medical Research (ICMR) proposed its draft National Guidelines for the Accreditation, Supervision and Regulation of ART Clinics in India, in 2002, which mentioned commercial surrogacy arrangements, and The Ministry of Health and Family Welfare approved these guidelines in 2005.¹⁹ Even thereafter commercial agreements, were not barred, as these guidelines were not backed up by any legislative force. This led to impeccable growth of the fertility clinics, IVF practice, surrogacy consultancy and reproductive tourism. After a while only, the reports showing the fate of such legislature started coming up, which were not pleasing. This led to establishment of institutions and agencies assisting to find surrogate mothers, providing facilities for paper work and all sort of forward-backward linkages. What was thought of an altruistic act, was made a commercial giant by the medical industry and resulted to an insult to the dignity of female pregnancy.

Later in the year 2005, Indian Council of Medical Research (ICMR) issued guidelines to regulate surrogacy agreements and the clinics. These guidelines prescribed conduct and use of

¹⁵ Imrana Quadeer and Marry E John, “The Business and Ethics of Srrogacy” Economic and Political Weekly https://www.jstor.org/stable/40278374?seq=1#page_scan_tab_contents (10th January, 2009)

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Supra 39.

¹⁹ Indian Council of Medical Research, National Academy of Medical Sciences. National guidelines for accreditation, supervision and regulation of ART clinics in India, 2005. New Delhi: Ministry of Health and Family welfare, Government of India;2005. (https://icmr.nic.in/art/Prilim_Pages.pdf)

ART procedures or treatment by the fertility clinics.²⁰ The problem behind lack of regulations came to the light first time with the birth of Baby Manji, which latter led to *Baby Manji Yamada vs Union of India & Anr.* (AIR 2009 SC 84). Baby Manji, was born to a surrogate mother through IVF using a Japanese man's sperm and an egg from an unknown donor at Anand in Gujrat on July 25. The biological parents came to India in 2007 and had chosen a surrogate mother in Gujrat, they entered into an agreement. There were some matrimonial discords between biological parents and meanwhile the genetic father had to return to Japan due to expiration of his visa and the Municipality at Anand has issued a birth certificate indicating the name of the genetic father²¹. The father found himself in a catch-22, India requires that a child be legally adopted before leaving the country, but bars single men from adopting.²² Manji was eventually permitted to leave to Japan, when her grandmother approached the apex court. This case initiated an alarming notice on the lack of provisions regulating the surrogacy. The Supreme Court in 2008 held surrogacy valid and after Manji's case, increased the international confidence in going for surrogacy in India. This case became the basis for the ART Bill, came up in the year 2010 and the ICRM Regulations updated into 2010.

In the year 2009, the Law Commission of India submitted its 228th Law Commission report titles "*Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy*" to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India.²³ The report albeit highlighted several issues on surrogacy, but it failed to deal with deeper aspects of surrogacy and its generally superficial and below expectations. It failed to consider the prevailing socio-economic situation in India, which led to the growth of surrogacy, ignored to focus on the future of surrogacy. It recommended for prohibiting commercial surrogacy and allowing ethical altruistic surrogacy by enacting suitable legislation.²⁴

Afterwards, in the year 2015, Indian government banned surrogacy for the International intended parents.²⁵ Health industry estimates put the size of India's surrogacy business at \$138 M and growing at 20% a year.²⁶ The ban on foreign intended parents was only the start of legislation regulating the surrogacy and in the coming years after long deliberations, an India Surrogacy law was passed for regulating the surrogacy.

The Surrogacy (Regulation) Bill, 2019 was introduced by the Ministry of Health and Family welfare, Dr. Harsh Vardhan in Lok Sabha (Upper House) on 15th July, 2019 and which was subsequently passed by the house on 5th August, 2019. The bill defines surrogacy under *Section 2(zc): means a practice where by 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.*²⁷ Bill specifically

²⁰ICMR Guidelines, 2005 : https://www.icmr.nic.in/guidelines?field_select_disease_tid=90

²¹ Manji Yamada vs Union Of India & Anr. (AIR 2009 SC 84)

²² <https://www.geneticsandsociety.org/biopolitical-times/complications-surrogacy-case-baby-manji>

²³ <http://lawcommissionofindia.nic.in/reports/report228.pdf>

²⁴ Ibid.

²⁵ <https://www.theguardian.com/world/2015/oct/28/india-bans-foreigners-from-hiring-surrogate-mothers>

²⁶ Ibid.

²⁷http://www.prsindia.org/sites/default/files/bill_files/Surrogacy%20%28Regulation%29%20Bill%2C%202019.pdf

prohibits commercial surrogacy under *Section 3(ii)* and allows for altruistic surrogacy.²⁸ The legislation seeks to discourage the commercialization of wombs and was concerned for the genuine cases in which it should be allowed. Under *Section 4* of the Act, five situations have been mentioned, only under which surrogacy could be practiced, also specifying the eligibility criteria for both the intending couple as well as the surrogate mother.²⁹

In case of altruistic surrogacy, no monetary arrangement is involved and it covers mainly the medical coverage and insurance expenses whereas, commercial surrogacy involves monetary reward besides the medical and insurance charges. The decision to allow only for the altruistic surrogacy is widely accepted, it will kernel in restraining the exploitation of wombs. Moreover, under section 4 of the Bill, special eligibility criteria is settled down for commissioning parents and surrogate mother. Commissioning parents must fulfill the following conditions and for this they need to get a 'Certificate of Eligibility' as well as 'certificate of essentiality' from the designated authority:

For Certificate of Essentiality they need:³⁰

- (i) A certificate of proven infertility of one or both members of the intending couple from a District Medical Board;
- (ii) An order of parentage and custody of the surrogate child passed by the Magistrate's court;
- (iii) Insurance cover for a period of 16 months covering the postpartum delivery complications for the surrogate.

For certificate of eligibility they need:³¹

²⁸ **Section 3 Surrogacy (Regulation) Bill, 2019**

(ii) no surrogacy clinic, paediatrician, gynaecologist, embryologist, registered medical practitioner or any person shall conduct, offer, undertake, promote or associate with or avail of commercial surrogacy in any form;

²⁹ **Section 4 Surrogacy (Regulation) Bill, 2019**- On and from the date of the commencement of this Act-

(i) no place including a surrogacy clinic shall be used or cause to be used by any person for conducting surrogacy procedures, except for the purposes specified in clause (ii) and after satisfying all the conditions specified in clause (iii);

(ii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purposes, namely-

- (a) When either or both members of the couple are suffering from proven infertility;
- (b) When it is only for altruistic surrogacy purposes;
- (c) When it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures.
- (d) When it is not for producing children for sale, prostitution or any other form of exploitation; and
- (e) Any other condition or disease as may be specified by regulations made by the Board;

(iii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or initiated, unless the Director or in-charge of the surrogacy clinic and the person qualified to do so are satisfied, for reasons to be recorded in writing, that the following conditions have been fulfilled, namely:-

- (a) The intending couple is in possession of a certificate of essentiality issued by the appropriate authority, after satisfying itself, for the reasons to be recorded in writing, about the fulfilment of the condition;
- (b) The surrogate mother is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of condition;
- (c) An eligibility certificate for intending couple is issued separately by the appropriate authority on fulfilment of the condition;

³⁰ Supra note 27.

³¹ Ibid.

- (i) Couple being Indian citizen and married for at least 5 years;
- (ii) Between 23 to 50 years old (wife) and 26 to 55 years old (husband);
- (iii) Don't have any surviving child (biological, adopted or surrogate); excluding any child who is mentally or physically challenged or suffers from life threatening disorder or illness;
- (iv) Other conditions that may be specified by regulations.

Surrogate mother must also fulfill certain conditions as:³²

- (i) A close relative of the intending couple;
- (ii) A married woman having a child of her own;
- (iii) Between 25 to 35 years old;
- (iv) A surrogate only once in her lifetime
- (v) Possess a certificate of medical and psychological fitness for surrogacy. Further, surrogate mother cannot provide her own gametes for surrogacy.

The bill deals with the multiple issues related with the regulation of surrogacy. Next essential feature is the provision for the appointment of the appropriate authorities for functions such as registration of clinics, enforcing the standards of the surrogacy, investigating in case of any breach of provision and recommending the essential changes and improvements whenever needed through timely recommendations. Chapter VI of the bill deals with the provisions of appropriate authorities at both central and state level within 90 days of the commencement of this Act.³³

Other special feature of the bill, strikes at the biggest hurdle of the surrogacy adaption i.e. the registration of surrogacy clinics and constitution of the National and State Surrogacy boards. Chapter IV of the bill deals with the regulation on registration of surrogacy clinics, accordingly every clinic engaged in the practice of surrogacy have to register within 60 days of the commencement of the act.³⁴ Chapter V of the bill constitute the directions for the constitution of the Surrogacy boards at both state and national level and there functions were mainly; advising the central government on policy matters relating to surrogacy, laying down the code of conduct of surrogacy clinics and supervising the functioning of State Surrogacy Boards (SSBs). The bill substantially deals with all the major focus areas of the Surrogacy conflict, special laws have been provided in case of abortion and adoption. Chapter VII of the Bill, is solely marked to the offences and penalties in case of violation the legislation. It contain strict provision against sex determination, unauthorized fertility clinics, commercial surrogacy etc.

The Bill came at an alarming time, where lack of legislation and rules has led to its rampant commercialization, unethical practices, exploitation of surrogate mother, abandonment of children born out of surrogacy and import of human embryos and gametes. In line with the recommendation forwarded by the ICMR and Law Commission, the ministry has come out with a balanced law.

³² Ibid.

³³ Ibid. (Section 32)

³⁴ Supra note 27.

Unfortunately, still in many ways it has not been able to match with the desired regulation. Bill totally excludes the non-heterosexual couples and totally devoid them of any chance of having a child in near future, further limiting surrogacy to married couples also bar live-in couples, divorced women or widows to have a child. Then it didn't explain the scope of the 'close relative' and if not defined rigidly will become another loophole to exploit the procedure and along with this it is a very restrictive provision. It is not possible all the time for an individual to convince a relative for such a huge favour, it gets very challenging. Certain liberty should be provided in these cases, where a person is not able to look for a relative, they may approach other surrogate mother in exchange of some consideration. The cooling period of five years after the marriage is also not rational, there are couples who need surrogate help before five years. The couples nowadays prefer to marry at later age, their biological stage may not permit them to have their baby at that time, for them 5-year waiting is irrational. This span should be revised. Even the WHO and the ART Bill of 2014 proposed a period of 'One Year'.³⁵

Other major concern is that for surrogacy to happen, we need embryos, and embryos re cultured in various In-Vitro Fertilisation (IVF) laboratories. So regulation of surrogacy must be preceded by law on Assisted Reproductive Technology (ART). Rather than penalizing surrogacy, the person providing a womb for surrogacy must be secured with a contract, ensuring proper, insurance and medical checks. Non-disclosure of the information is imperative to all couples. Right to privacy of donor as well as surrogate mother should be protected at all cost. Finally, Surrogacy should be made inclusive for all class of people irrespective of their sexuality.

The Surrogacy (Regulation) Bill 2019 cements the ban on commercial surrogacy, but it fails to effectively tackle larger social, physical, psychological, emotional and economic issues that continue to challenge the welfare and safety of both the surrogate mother and the child. With the removal of commercial segment in the present surrogacy arrangements does not do away the chances of exploitation. So, the rights of surrogate mother and the child born must comprehensively be formulated, along with that ART must be regulated and monitored thoroughly. Moreover, the Bill is still pending in the Upper House (Rajya Sabha), its effects are still unknown.

SURROGACY: CHALLENGES & WAYFORWARD

Though it looks comforting that during the process both the sides get benefitted. It's an attractive option for a poor surrogate mother and a rich couple fulfills their desire of having a biological child, but the truth behind this barter is not satisfying. Due to lack of transparency, a robust legislative mechanism and involvement of middle men and agencies are leading to exploitation of poor mothers. In 2005, ICMR issued guidelines for accreditation, supervision and regulation of ART clinics in India, these guidelines are repeatedly violated.³⁶ Moreover there were

³⁵ <https://www.businesstoday.in/current/policy/surrogacy-regulation-bill-2019-infertility-indian-council-of-medical-research-icmr-surrogate-mothers-in-vitro-fertilisation-ivf/story/372797.html>

³⁶ National guidelines for the accreditation supervision and regulation of ART clinics in India. https://www.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf

no legal provisions directly dealing with surrogacy laws to protect the rights and interests of the surrogate mother, child or commissioning parents. Surrogacy raises difficult ethical, philosophical and social issues. With the involvement of the monetary consideration it is becoming an altogether different commercial market. This system of outsourcing pregnancy may lead to inevitable hardships. The business volume of this trade is estimated to be around \$500 million and the numbers of cases of surrogacy are believed to be increasing at a galloping rate.³⁷ But exact estimation of this practice is still unknown.

Surrogacy is something that even after long discussions and regulations, is still not socially accepted. A child is considered to be a bliss out of love and having a child through a rented womb is displeasing. Contemporarily the appreciation to surrogacy is minute and it faces different kinds of issues. There are specific issues related to the practice which need to be dealt with to make it more adaptable and safer:

(a) Social Stigma

The commodification of human body is not something new, but the market of human organs, tissues and reproductive parts has shown unprecedented growth in contemporary time. The eligibility of what can and cannot or should or should not be sold or exchanged is weakening day by day and similarly the growth of surrogacy is one such instance. A surrogate mother is the one which is most effected during this process and she is the one who remains invisible during the whole process. Scheper-Hughes quotes George Soros who asserts that markets are “indiscriminate [and] promiscuous... [and] reduce everything, including human beings and their sexual and reproductive capacities to the status of commodities, things [that] can be bought, sold, traded and stolen”³⁸ The new age bio-technologies bring back the same question and concerns regarding the women’s right over their body as well about the respect of women. Even after being a proliferating million-dollar industry and where multiple players are involved in it, the surrogacy is still not accepted as a wise approach.

The stigma prevails even though the practice strengthened. Albeit, the procedure is being agreed between the potential surrogate and commissioning couples as an asexual practice that includes technological interventions in the form of assisted reproductive technologies (ART) – its association with sexuality, with sex and prostitution- continues to mark the participation of the surrogate. It is this conditions that develops the desire to escape these engagements and further drags the surrogate mothers to ‘invisibility’. Sama’s research on surrogacy conducted in Delhi and Punjab found that surrogates oscillated between positioning their work as a ‘good deal’ and one that has to be hidden from relatives, neighbours and their own children.³⁹ Strategies include deciding who to confide in from a close circle of acquaintances, creating a narrative around the

³⁷ <https://wcd.nic.in/sites/default/files/final%20report.pdf>

³⁸ Scheper-Hughes N: Commodity fetishism in organs trafficking. *Body & Society*. 2001, 7 (2-3): 31-62. (<https://journals.sagepub.com/doi/abs/10.1177/1357034X0100700203>)

³⁹ <http://www.tarshi.net/inplainspeak/voices-the-invisible-mother-the-stigma-of-surrogacy/>

pregnancy, and shifting residencies.⁴⁰ Travel from their home town to other city was undertaken by surrogate mothers to hide their pregnancy and to escape the stigma of commercial surrogacy. ⁴¹whether its shifting to another city or moving to different surrogate hostels, the surrogate is pressed to alienation at every door. This isolation has further emotional, physical and psychological consequences.

(b) Eligibility

The second major challenge to surrogacy is eligibility for practicing surrogacy. In reality it should be opted by the couple having fertility issues, who are not able to have the baby due to certain medical condition and not by the women who are healthy and fit for rearing a child, but opt for surrogacy just to avoid the pain. As revealed recently the famous personalities as Shahrukh Khan- Gauri Kahn, Amir Khan-Kiran Rao, Sohail Khan-Seema Khan opted for surrogacy. These cases promote commercialization, which shouldn't be the case. Surrogacy practice should be streamlined and be allowed through authorized channels only. The agencies should be accredited with the government, which further decide whether to allow or not. Guidelines should be laid down to determine whether surrogacy should be allowed or not and if allowed, reasons should be recorded. Secondly the surrogate mother should also be scrutinized on the scale of her health, consent, agreement, relationship etc., to prevent her from any kind of coercion or exploitation.

It is necessary that a **proper record of surrogate mothers** and of commissioning parents be maintained, reasons to be recorded and a forceful agreement should be patched up which is in benefit of both the parties. Lack of research on the issues is also one concern which limits the agencies and authorities to take needful action. More importantly why the criteria should be set is, because as a procedure, surrogacy involves great psychological risks. Giving birth is a bliss and a mother goes through a span of lots of emotional breakthroughs, giving away a child is not that easy for everyone and psychological care is necessary. Other major issue involved is Social devaluation of women. Specifically, the devaluation of Indian women. Due to poor economic conditions and lack of opportunities women were forced to into this practice, further lack of social acceptance is demeaning the status of women. Social awareness and proper channels of process are imperative today for the benefit of all the interested parties.

Setting out strong eligibility criteria is the need of the hour, otherwise the **commodification** of this taboo trade will be too great a social crisis. Belittling the value of child birth will come haunting to the society at large. Commodification will take out all the altruistic value attached to this natural reproducing and lead to exploitation of wombs. Anything natural and so pure when goes to the market won't benefit anyone, rather shows the insensitivity engrossing in the society. According to Stop Surrogacy Now (SSN) campaign, surrogacy "exploits women (in many cases poor and marginalized)

⁴⁰ Ibid.

⁴¹ Ibid.

who are paid to bear children” and makes surrogacy-conceived children “objects of contract.”⁴² As such, children of surrogacy are “subject to sex-selection or abandonment.”⁴³ Furthermore, commercial surrogacy, says the coalition, is “indistinguishable from the buying and selling of children.”⁴⁴

The other major issue that is contemporarily faced by the surrogacy clinics is the **age bar**. There is no age bar set for practicing the surrogacy. Globally, an estimated 15% of the couples are infertile. The Assisted Reproductive (Regulation) Bill, 2010, states that in the Indian social context, children are “old-age insurance”. The Bill proposes the upper limit at 45 for women and 50 for men to undergo IVF procedure. Societal pressure to have children, the fear of living without support in old age, and the loss of an only child often encourage couples to opt for surrogacy at later age. Even for adoption, the total age of the couple must not exceed 110 years. The average life expectancy of an Indian woman is 70 and of a man 68, and there is big concern over the future of the children born to elderly couple.⁴⁵ Even though the statutory provisions are prevalent, but they are related to IVF, adoption, pregnancy etc. and none for the surrogacy. Old age parenthood builds new concern for the society at large.

(c) Surrogacy Agreement

With the increasing cases of infertility, the demand of surrogacy is increasing daily and today surrogacy is becoming a well-established business. The most effected individual during this whole procedure is the surrogate mother. She is the one who has to bear all the pain of a child birth and go through all the sufferings. She is the one who is most exploited and tried emotionally. Women who are generally up for the procedure come from low income class of the society and are in need of extra income. Most of them are even married. Due to this poor fettle sometimes, couples crack good deal for them which is actually not favorable for the surrogate mothers. Therefore, it is necessary to protect the interest of the surrogate mothers.

The whole **procedure is arranged very informally** and many a times when there are ups and downs in the relation of the commissioning parents, the consequences of it are later passed to the surrogate mothers. During pregnancy if couples, due to any reasons, alter their decision of having a child or marriages may end during this time. These situations pose difficult question about the status of the unborn child and the surrogate mother. The surrogacy contract is one of the most important pieces of every surrogacy process.⁴⁶ The contract guides the entire surrogacy journey, clearly outlining each party’s rights, roles and responsibilities before, during and after the

⁴² <https://lozierinstitute.org/surrogacy-the-commodification-of-motherhood-and-human-life/>

⁴³ Ibid.

⁴⁴ ibid

⁴⁵ <https://www.worldlifeexpectancy.com/india-life-expectancy>

⁴⁶ <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts/>

pregnancy.⁴⁷ For the interest of the surrogate mothers and the unborn child a proper agreement must be made mandatory and certain rights should be provided to all the interested parties. When the surrogacy contract is comprehensive and done correctly, it can help limit disputes and miscommunication while protecting everyone involved in the surrogacy process: the intended parents, the surrogate and most importantly, the baby.⁴⁸ This is all possible only when the whole procedure is institutionalized.

Each party should comprehensively prepare the agreement with taking into consideration all the circumstances which may come up in the time to come. General practice is that the commissioning parents send an agreement drafted by their counsel to the surrogate for the review and consent. The surrogate may take the advice of its counsel, but this is not always available to the poor surrogate mother and many a times fell into a trap by signing agreements which are not in their favour. Counsel access may be provided at no cost in cases like these to protect the right of the poor women. It is necessary to protect all parties during the medical process, and most fertility clinics will not perform the surrogate's medical procedures until the contract is in place.⁴⁹ An agreement in general should cover: Financial arrangement, risks and liability associated with the pregnancy, agreement regarding termination of pregnancy, insurance, prohibition on sex- selection and more. Indian Surrogacy Law Centre⁵⁰ recommends that not only intended parents and the surrogate mother but the spouse of the surrogate mother also signs the agreement, so as to show his acknowledgement to the surrogacy agreement. The commissioning also, if they wish so may appoint a mediator, who will have the possession of the child on behalf of the parents, in case there is any issue with the biological parents.

Other major concern with the agreements is the **Cross-border surrogacy**. The National Commission for Women, India highlighted the increasing availability of medical services for surrogacy and India's emergence as a surrogacy market, almost to an unofficial value of US\$ 1 billion.⁵¹ Cross-border agreements lead to diverse serious issues as Jurisdictional issue, Cause of action, Performance of contract, application of rights and most importantly the issue of recognition of the legal parentage and nationality of the child. The Hague Conference on Private International Law has been working towards resolving this issue, since 2011. Estimates suggest that around 20% of the intended parents seeking surrogacy are foreigners.⁵² The first challenge faced by the cross-border surrogacy was in 2008. In the year 2008, 'The Manji case' came up in which a baby Manji was born through surrogacy to a Japanese couple. The couple got separated before the birth of the child. Later when father tried to take the child in his possession, he was barred by the Indian law, which does not allow single father to take

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ India's first fertility law firm, Chennai

⁵¹ Cross-border Surrogacy: Indian State Practice by Stellina Jolly

⁵² The study by the Confederation of India Industry (CII) states the number of foreign intended parents who visited India in 2012 to be around 10,000. <https://www.thehindu.com/news/cities/Delhi/art-bill-may-close-surrogacy-doors-for-foreigners-unmarried-people/article7793884.ece>

custody of a girl child and moreover Japanese law did not recognize surrogacy. However, the baby got the visa, but this showed the need for a regulatory framework in India. This case became the genesis of the Assisted Reproductive Techniques (Regulation) Bill, 2014. Under the existing rules, the foreign couple need to enter into an agreement in India. Other instance happened in the year 2011, when a German couple commissioned an Indian woman for surrogacy. The German embassy in India later on refused to provide passport to the child, as the German stand was that Surrogate motherhood is prohibited in Germany, albeit permitted in India. Afterwards, with the Apex court's intervention the baby was provided to the couple through adoption. Another case came up in 2012, where an Australian couple from twins, left behind a male child born through surrogacy and took away only the female child.⁵³ The same issue happened again due to lack of bilateral understanding. Surrogacy agreements are legal in India, but it's illegal in most of the Australian states.⁵⁴ International surrogacy agreements are the most ignored one and cause the major problems in the procedure. The surrogacy agreements require attention both at the local as well as the international stage for saving the surrogacy and not letting it to be a cause for the fraud and exploitation.

(d) Surrogacy and Religion: The ethical Aspect

According to a Pew report published in 2012, more than eight-in- ten people in the world identify with a religious group.⁵⁵ In the modern era though, technological developments have undermined the importance of the religion, but religion still play an important role in the acceptance and rejection of new developments. Surrogacy is one such procedure where the physicians have to provide services to such patients who is having different religious belief then him. When it comes to surrogacy, main religious argument is that it takes away the role of mother and father from the pregnancy. Even after having great opposition to the concept of the Egg/Sperm donation, surrogacy, IVF treatments and cryo-preservation, these are increasingly developing and becoming common in all demographics. It becomes imperative for the medical professionals to be aware of different religious backgrounds related to the issue and avoid any kind of tussle with the beliefs. There are thousands of religions (more than 4000) in the world and there is no unanimous view of the religions with respect to the surrogacy. While most people actually applaud the concept of surrogacy, a handful finds it be unethical in the light of their faith. For that matter considering the few religious view points as:

(i) Christianity

Christians themselves are not unanimous on their opinion about the surrogacy. Using a surrogate mother to bear a child for a childless couple is as old as the story of Abraham and Sarah in Genesis chapter 16.⁵⁶ However, the Roman

⁵³ <https://www.theguardian.com/australia-news/2014/oct/09/surrogate-baby-left-in-india-by-australian-couple-was-not-trafficked-investigation-finds>

⁵⁴ Ibid

⁵⁵ <https://www.pewforum.org/2012/12/18/global-religious-landscape-exec/>

⁵⁶ Supra note 6.

Catholic church does not, approve of surrogacy. Their belief is on 'Natural Law' and it propounds that what is given to us by the god is the constitution of the nature which God has endowed us.⁵⁷ Children are believed to be the gift from God, not an object of desire. Besides this Christianity as a whole are more accepting of the assistive reproduction and they have expressed their concern for the physical and mental care of the surrogate mothers along with the future of the unborn child.

(ii) Judaism

Judaism views surrogacy as a mean to end the suffering and sadness coming out the issue of infertility. As long as nobody is harmed in the process, it is condoned.⁵⁸ However, the extremist sect within Judaism tend to speak against the surrogacy, describing it as the enslavement of the wombs. Even after wide acceptance of the surrogacy, the Jewish religion seeks the man and women to use their own egg and sperm.

(iii) Islam

Islamic belief is divided on surrogacy. The main issue is that, the practice is considered as adultery. The surrogate carries the embryo which biologically does belong to her and conceived from other men and the child born out of such pregnancy will be an illegitimate one,

(iv) Buddhism

Buddhism is one of the religions out of all which is most liberal with respect to the concept of surrogacy. They don't consider procreation as a moral and ethical obligation. Surrogacy and for that matter any other fertility treatment is not opposed.

(v) Hinduism

Hindu mythology provides many examples like that of Sage Bharadwaj produced Drona, later to be the teacher of Pandavas and Kauravas.⁵⁹ Another noted story of embryo transfer in Hindu mythology is, the seventh pregnancy of Devaki, by the will of the Lord, the embryo was transferred to the womb of Rohini, the first wife of Vasudev, to prevent baby being killed by baby Kamsa. These stories make it evident that surrogacy is historically widely accepted in the Hinduism. Contemporary society accepts the surrogacy in specific circumstances and allow for all and any kind of medical help if needed. Children hold a special place for any Hindu family and thereby, all the efforts made are largely accepted.

(e) Health Risks to the Surrogate Mother

⁵⁷ <https://surrogacyandethics.weebly.com/religious-perspectives.html>

⁵⁸ <https://www.montanasurro.com/blog/2018/2/28/religion-surrogacy>

⁵⁹ http://twocircles.net/2011oct11/surrogacy_mirror_hinduism_and_islam.html

Becoming a surrogate is the most noble blessing, one could wish out for someone who's losing a blessing of a child. A surrogate fulfills the desire of parenthood of a couple, which is crushed down due to unforeseen medical conditions. A mother, when pregnant face numerous physical and hormonal changes to bring a miracle of life. Like any mother, surrogate mother goes through all the pain and sufferings, moreover builds a bond with the child in their wombs. Even though they were aware of the situation of separation with the child, one cannot break that bond between a mother and her child.

The physical sufferings that they go through are nowhere taken into consideration. A mother in most cases is not supported by the family or husband and is left to undergo all the pain. The clinics or the institutes that acts as the care centers for the surrogate mothers are working with sheer insensitivity. The clinics main focus is to running up the money, while mother bear all the sufferings. A qualitative study on the experience of eight surrogate mother published in the Iranian Journal of Reproductive Medicine, revealed surrogate moms experience significant emotional attachment to the children they carry.⁶⁰

The next complication is the issue of multiple pregnancies, the unexpected child situation. In surrogacy and IVF multiple pregnancy though is very uncommon but, now with technological developments, multiple embryos were often transferred at the same time and thereby increases the chances of multiple pregnancy. Along with the issue of multiple child births, another condition is the premature birth, in case of twins or triplets. While pregnancy has risks, many risks are dramatically increased with twin births: Singleton deliveries are associated with a 9% risk of low birth weight, a 2% risk of very low birth weight, and a 14% risk of prematurity, while these same risks jump to 57%, 9% and 65%, respectively, with twin births.⁶¹ The financial and emotional costs of caring for children with lifelong disabilities, if any result, may be high.⁶² Often in these cases doctors suggest for selective reduction, but that is not the dilemma a mother would ever want to face. Clearly, the best way to avoid the risks of a multiple pregnancy is to implant only one embryo at a time.⁶³

Every month a new surrogate success story is reported yet there are still plethora of risks associated with the surrogate motherhood, one such other issue is the Ethnic factors involved in the process. Pregnancy is fraught with risks at all stages and puts a huge mental and physical strain on the surrogate mother.⁶⁴ The surrogacy laws vary with the country and therefore the issue of compatibility rises with the foreign commissioning parents. Negligence of the health of the mother and child by the fertility clinic can lead to the complete wastage of the entire procedure.⁶⁵

⁶⁰ Emotional experiences in surrogate mothers: A qualitative study
(<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4126251/>)

⁶¹ <https://www.artparenting.com/surrogacy-blog/gestational-surrogacy-singleton-or-twins-there-are-known-risks-and-costs-associated-with-multiple-births>

⁶² Ibid

⁶³ Ibid

⁶⁴ Dr. Archan Dhawan, "[Paving Path to Parenthood](#)" *The Tribune*, December 30, 2011

⁶⁵ Ibid.

Besides these major complications, there is the fear of disease transmission. The risk of transmitting infection, some serious as HIV or Hepatitis to the surrogate from the commissioning parent. However, this risk can be easily cut down by testing and if the sperm or embryos are quarantined.

CONCLSUION

Looking over the major concerns around the practice of surrogacy, the prominent issue is the selection of couples eligible for the practice of Surrogacy and the Surrogate mothers. The common practice is that, women from poor household looking for making extra money were pushed to this practice and due to lack of institutionalization and security to them, usually get out of it exploited. Today, national registry of ICMR lists 454 ART clinics in India, but in reality, every corner of the country today hosts a plethora of IVF clinics here and there and are totally unregulated.

The new law under consideration, discussed above have tried to deal with related issues and to some extent dealt with the issue of registration and eligibility of the couples to practiced Surrogacy, but somewhere the law missed to observe the bigger picture on line. The legislature must expand the application of the practice and make stringent regulation on the IVF clinics and doctors. Most importantly the law makers must not miss out to protect the fundamental rights of the women who are being forced or pushed to this trade. The blessing of a child have the inviolable sanctity and therefore the practice itself on the whole is not bad and just needed to be regulated. If proceeded under strict regulations and under the mechanism designed by the institution it will be a bliss for the couples around the state.