

LEGAL AND HUMAN RIGHTS CONCERN RELATING TO COMMERCIAL SURROGACY IN INDIA

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ABSTRACT

Nature has bestowed every woman with capability of procreating a life and thereby she can cherish the experience of motherhood. Right to procreate and reproduce is an inherent right of an individual. Every couple desire to have children since parenthood is eternally rewarding and life-changing experiences. The mental agony and pain of not fulfilment of this desire is immeasurable. Every community around the globe have given preference to the social institution of family. A family becomes complete only when there are partners along with their progeny. However, due to different factors, many couples are incapable to have their own baby and family is stigmatized. This problem has been resolved with the advent of surrogacy. The advancement in medical science has caused the emergence of surrogacy wherein reproduction is achieved by using the womb of a surrogate to reproduce child for another woman. It has now become an attractive option for an individual and partners to have a child in cases of infertility or any other reason. When the surrogacy is accomplished on the basis of contract that surrogate would be compensated for bearing the child, then considered as commercial surrogacy which has become widely recognized across the globe. However, apart from growth of commercial surrogacy in India, there are chances of exploitation against surrogate women and accordingly it has been prohibited under Indian Law. Even after the said prohibition, the surrogacy arrangement is still existing in the society. There are certain human rights and legal concerns pertaining to the commercial surrogacy which will be dealt in this article. The concept of commercial surrogacy and historical overview both at national and international level has been discussed in this research article. The article also mentions about the type's pf surrogacies, factors involved in popularity of commercial surrogacy and legislations regulating it. Further, the article also dealt about the legal and human rights issues involved commercial surrogacy. The article thus concludes the after mentioning the concluding remarks followed by few relevant suggestions on commercial surrogacy.

Keywords-

Commercial Surrogacy, Surrogate, Woman, child.

INTRODUCTION:

The modern and advanced technologies have given humanity a capacity to examine itself and its surroundings that has never before been possible. It is doubtful regarding its effect on human wisdom and intelligence which seeks to regulate it or to accept its consequences. Humanity has evolved as a result of the development of germinal technology³ and the idea of the human genetic code. In addition to germinal technology, the development of assisted reproductive technologies (ARTs)—such as artificial insemination, surrogacy, and in vitro fertilisation (IVF)—has fundamentally altered human interactions worldwide for the benefit of science, health, and society.

Surrogacy refers to the act of a woman bearing a child on behalf of another. Although sometimes included in the category of assisted reproductive technologies (ARTs), surrogacy is more of an arrangement than a technique because it uses many ARTs to achieve its objectives. The term Surrogacy has its origin from Latin word named as “Surrogatus” which signifies the substitute person chosen to act in place of another person. When surrogate mothers are being paid for surrogacy services, then it is called as commercial surrogacy. Due to its very nature and the conditions under which it is used, it differs greatly from other technologies in reproduction. There is a triangular relationship between the mother who is the baby's surrogate, the so-called biological parents, and the newborn child in this complicated scenario that can cause conflict and divergent needs.

Surrogacy is a kind of 3rd party reproductive arrangement or practice wherein it is jointly agreed that the surrogate mother would conceive, gestate and later on deliver the baby. After delivery, the child would be handed over by the surrogate mother to the intended parents and every parental duty of

Humanities and Social Science Studies, Vol. 13, Issue 2, No.6, July – December: 2024
 surrogate mother would be exhausted. When compensation is paid to the surrogate mother for bearing child on contractual basis then it is known as commercial surrogacy or womb for rent. In India, the commercial surrogacy industry flourished since 2002. It generated more than 2000 crores in the year 2014. The ICMR has predicted that the profit would reach to 6 USD billion in near future¹. With the rapid growth in this field, the term surrogacy is now denoted as “pot of gold”². The Commercial surrogacy is highly controversial issue as it is causing legal and human right issues. It has degraded the dignified life of women and involve various legal concerns.

RESEARCH PROBLEM:

Despite the guidelines and rules issued by the ICMR and recent legislation, the surrogacy industry in India is majorly unregulated. Even today, the surrogacy contract is prevailing in India. According the opinion of surrogates, owners of surrogacy agency, intended parents and medical professionals, surrogate mother are treated in unfair manner with respect to the compensation for surrogacy. Surrogacy contracts have caused conflict of interest and rights of surrogate particularly those who belong from economically weaker and low-income families. Presently, only altruistic surrogacy is allowed between close relatives and commercial surrogacy has been outlawed. There are concerns regarding physical and sexual autonomy of surrogate. Accordingly, the aspect of surrogacy challenges both the social conception of parenthood and legal aspect of family law.

LITERATURE REVIEW:

Numerous sources and works have been referred for this article. The analysis of these research literature reveals that the opinion of policymakers, academicians, and public at large is highly bifurcated. It has been found that it is possible to find out the solutions among different stakeholders involved in commercial surrogacy sector.

RESEARCH OBJECTIVE:

- To analyze the concept of commercial surrogacy and historical background relating to it.
- To examine the legislative framework for regulating commercial surrogacy in India.
- To find out the legal and human right issues associated with commercial surrogacy.
- To study the international perspective and judicial approach concerning commercial surrogacy in India.

RESEARCH METHODOLOGY:

The research methodology used in the article is entirely doctrinal. It is analytical and descriptive in nature. The present research is based on two kinds of sources namely primary and secondary sources. The relevant material from primary source is collected from statutory provision of the relevant Legislation and judicial precedents. The secondary sources are those materials which are collected from research articles, research paper, government documents, scholarly commentaries, books, online sources etc.

HYPOTHESIS:

Despite the societal, legal and ethical issues associated with commercial surrogacy, nothing prevents couples from becoming parents. Women belonging from lower strata and socio-economic class are involved in renting their womb. The recent legislations governing surrogacy namely ART Bill 2014 and Surrogacy Act 2021 has numerous problems and this has hampered the dignified life of surrogate women as these laws benefit wealthy couples who desires to become parents at the cost of exploitation of surrogate women.

SCHEME OF PRESENTATION:

The Article includes with Introduction about commercial surrogacy in India. Thereafter, Historical

¹ Aditya Ghosh, ‘Cradle of the World’ *Hindustan Times* (23 December 2006) 18.

² Government Of India, Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy, (ReportNo. 228, August 2009).

background to the surrogacy has been explained. The types of surrogacies have been elaborated by the researcher which includes Genetic, gestational, commercial and altruistic surrogacy. Then, the factors behind growth of commercial surrogacy in India has been analyzed. The research further dealt the legislative framework pertaining to commercial surrogacy under Indian Constitution and different laws. Thereafter the researcher dealt with the concerns relating to commercial surrogacy. Lastly, the researcher concluded the article with conclusion and providing relevant suggestions for addressing the issues.

HISTORICAL BACKGROUND:

The practices pertaining to surrogacy can be traced back to the Old Testament contained in Bible. The Book has provided the genesis of surrogacy by mentioning that Sarah asked the Abraham to cohabit with the servant in order to conceive her. Accordingly, a child was born who was raised and nurtured by both Sarah and Abraham. Even the wives of Leah, Racheal and Jacob permitted their respective partners to have similar relationship with their servants with an aim to have children. The surrogacy finds its origin from instances occurred under Indian mythology. The eighth offspring of Devaki was born out of surrogate mother who was supposed to be killed by one of his elder brothers. The traces of surrogacy are also found in Mahabharata, wherein the Gandhari gave birth to semi solid material and then divided it into hundred different parts and then placed it in various pans. Through this, about hundred Kauravas were delivered. The first instance of surrogacy in India was reported in 1978 where a female infant Kanupriya was born through the mechanism of IVF.

TYPES OF SURROGACY:

There are 4 kinds of surrogacy in medical field and they are:

- (i) **Genetic Surrogacy:** This type of surrogacy is also called as conventional or traditional surrogacy. It includes the process of inseminating eggs of surrogates with the sperm of intended father. These cases may be used when female partner is incompetent to bear an infant because of certain health issues or when homosexual partners or bachelor person desires to have a child. Under this kind of surrogacy, the child has the same genes as that of surrogate woman. Thus, surrogate mother is also the biological mother of the infant.
- (ii) **Gestational Surrogate:** It involves the mechanism of implanting fetus by using the sperm or eggs of the intended parents. A sperm of intended father is being treated with the given egg or an embryo is made by using the sperm and eggs of the donors. Unlike the genetic surrogacy, the infant born out of surrogacy doesn't carry the genes of surrogate female due to the fact that she is not his or her biological parent.
- (iii) **Commercial Surrogacy:** It includes surrogacy agreement for compensating the surrogate mother for bearing child on behalf of intended couples. This has become a concern in developed and developing nations because it has caused class, social and financial disparities between surrogate mother and commissioning parents.
- (iv) **Altruistic Surrogacy:** In this, the surrogate bears and delivers the child without any kind of compensation. However, surrogate can be remunerated for essential medical expenses.

FACTORS BEHIND GROWTH OF COMMERCIAL SURROGACY IN INDIA:

There are mainly 4 factors behind the growth of commercial surrogacy in the country like India and they are mentioned below:

- (i) **Lenient and flexible Regulations:** In India, the commercial surrogacy received legality in the year 2002. Few guidelines were issued by the ICMR with respect to Assisted reproductive technology clinics in 2005³. These guidelines provide the framework for practices such as baby delivered through surrogacy shall be adopted by the genetically related parents, payment to the surrogate mother should including cost related with pregnancy, surrogacy through assisted conception should be used in the cases where partners cannot carry the infant for the term, conducting medical test of prospective surrogate for avoiding any kind of infection etc. All these guidelines are favoring the ART Clinics and intended parents as it ensures that healthy infant could be provided to the parents without any kind of

³ Digvijay Singh, "Commercial Surrogacy in India" 10 *Pen Acclaims* 6-8 (2020).

Humanities and Social Science Studies, Vol. 13, Issue 2, No.6, July – December: 2024

problem. Further, in 2008 Assisted Reproductive Bill and Rules was brought by the ICMR which focused on the aspect of commercial surrogacy in detail. It was suggested by the Law Commission that commercial surrogacy should be treated as a legal contract. In 2009, the Commission in its 228th report suggested to render financial assistance to the infant, privacy to the donor of sperm, provision of life insurance for the surrogate and prohibition of sex selective surrogacy. All these lenient provisions along with recent amendments promote the practice of commercial surrogacy⁴. However, the Parliament has showed its willingness to prohibit commercial surrogacy.

(ii) Low Cost: It has been noted that the cost of commercial surrogacy in developed nation is expensive. For instance, the cost in US is around \$ 80,000 whereas in India, the costs for the same procedure are less i.e., \$12,000 (generally paid to surrogacy broker of medical tourism agency).

(iii) High Standard of Medical facilities: India has quality assured medical facilities and various medical staffs from foreign are coming for providing medical assistance. Accordingly, the concept of medical tourism has been introduced and commercial surrogacy has become the part of it.

(iv) Availability of Surrogates: India a country wherein most of the people are facing with poverty and due to financial constraints women go for commercial surrogacy. This results into easy availability of women who are willing to become surrogates.

COMMERCIAL SURROGACY UNDER CONSTITUTION OF INDIA:

Under the Constitution of India, the provisions against any kind of abuse or exploitation have been provided under Article 23⁵ and 24⁶ respectively. These provisions were incorporated by the Constituent Assembly as the exploitation has taken various forms including torture and personal harassment. Further, the exploitation and forced labor caused due to human trafficking have been prohibited under the said Article. It has been noted that the practice of ova removal trade or commercial surrogacy is covered within the ambit of human trafficking. In this, the illiterate women are being exploited for the purpose of delivering child. India seems to contribute to the commercialization of surrogacy. But the women who are facing financial crisis are being social stigmatized and are exploited. This menace created by commercial surrogacy has been forbidden by the said provisions of Constitution.

LEGISLATIONS DEALING WITH COMMERCIAL SURROGACY IN INDIA:

ICMR Guidelines 2005, 2008 & 2010

In 2005, the ICMR issued guidelines with an aim to prevent the ART malpractice or abuse. It stated about the medical standard which have to be adhered with respect to the conduct of surrogacy contract⁷. The 2008 & 2010 Guidelines dealt about the duties and entitlement of the stakeholders involved in arrangement of surrogacy such as child, partners, surrogate mother, ART Banks and Clinics. The said guidelines provides that surrogacy other than on the ground of medical reasons is forbidden. The Partners can take assistance of Clinics for the purpose of procuring surrogate mother, counseling, impact of undergoing infertility treatment etc. Surrogacy contract between surrogate mother and husband is legal. But the agreement for surrogacy involving foreign jurisdiction is subject to restriction. No limit has been fixed under it with respect to the payment for surrogacy services. The intended partners are obliged to accept the surrogate. The Act of Denial to accept the child would be penalized under the said guideline.

Foreign Nationals commissioning surrogacy Regulation 2012

It was provided under 2010 bill that foreigner or NRI who wish to become a surrogate mother in India shall furnish document proving that surrogacy has been recognized in their native country and infant delivered would be granted Indian citizenship. Accordingly, the Ministry of Home Affairs issued a regulation in 2012⁸. Under the regulation, the single foreign national, unmarried person and same sex

⁴ *Ibid.*

⁵ The Constitution of India, art. 23.

⁶ The Constitution of India, art. 24.

⁷ ICMR Guidelines 2005, "Commissioning surrogacy in India legal & Policy considerations", *Word Press*, available at- <<https://writingsonsurrogacy.wordpress.com/tag/icmr-guidelines-2005/>> (last visited on December 1, 2023).

⁸ Guidelines for Commissioning of Surrogacy in India, available at- <<https://www.hcizambia.gov.in/pages.php?id=81>> (last visited on December 2, 2023).

Humanities and Social Science Studies, Vol. 13, Issue 2, No.6, July – December: 2024 couple were not allowed to commission surrogacy in India. Only married heterosexual couples from foreign would be permitted and for that the couples must have been together for minimum 2 years.

Assistive Reproductive Technology Bill 2014

This Bill provides that surrogacy can be availed by infertile married partners excluding those who are unmarried and foreigner. The Bill allows Indian resident who are residing in foreign nations subject to condition that medical visa shall be taken. Further, in the cases of the child born out of the surrogacy the commissioning couples who are foreigners shall not be provided with the OCI status. The said bill seeks to legalize commercial surrogacy by mentioning that surrogate woman can take financial compensation for the service of bearing infant along with treatment and healthcare expenses during the period of pregnancy⁹. It seeks to provide for formulation of appropriate mechanism for compensating surrogate mother. After delivery of child the surrogate mother shall be required to surrender all the parental right and shall be married with age group of 23 to 25 years and shall have minimum 1 live child. The Commissioning couple are required to submit certificate indicating the fact that infant was born out of surrogacy.

Surrogacy (Regulation) Bill 2016

Under the bill, it was provided that intended partners shall be married (for minimum 5 years) and Indian citizen and one of them shall be infertile¹⁰. The bill prohibits the payment of money to surrogate mother except the reasonable expenses for medical treatment. The bill seeks to penalize the act of undertaking surrogacy for money and exploitation of surrogate mother has been prohibited¹¹. The Bill prescribes punishment of imprisonment up to 10 years and fine of up to 10 lakh rupees. The proposed bill faced with the criticism of prohibiting commercial surrogacy as women who face financial problem would be forced to use their wombs in shady clinics wherein discriminatory and dehumanizing treatment can be imposed upon them¹². The proposed bill failed to pass the reasonable classification test under Article 14¹³ of the Indian Constitution. The Bill discriminated people on the basis of their sexual orientation, marital status, age and nationality. Forbidding the practice of surrogacy rights by a specific class of couple and preventing exploitation of women is not sufficient enough as a reason or rational connection. It was stated that as the connection between object and intelligible differentia was irrational, it was violating Article 14. Further, the right to procreation and parenthood is a part of right to reproductive autonomy of a woman enshrined under Article 21¹⁴ of the Indian Constitution.

Assistive Reproductive Technology (Regulation) Act, 2021

This enactment was passed by the Parliament on 18th December 2021. The legislation aims to supervise and regulate the assisted reproductive technology (ART) clinics and technology banks, prohibition of misuse, ensuring ethical and safe practice of ART services in order to address the reproductive health issues wherein such technology is needed to become parents or for the purpose of freezing embryo, gametes for further use because of mental or social concerns, disease and infertility, and for supervision and regulation of development and research in these related matters¹⁵. The Act mandates for the registration of ART clinics and banks under the National Registry of Banks and Clinics. The Act provided for the establishment of National ART and Surrogacy Board and a National Surrogacy Registry. The enactment further provided about the registration process of ART Banks and Clinics and powers have been conferred upon the National Board and Registry for surrogacy. The Act provides for insurance coverage in favor of the oocyte donor in the case of death, damage or loss caused to the donor. Infant born out of ART would be considered as biological infant of the commissioning partners and would be entitled to entitlement ensured to the natural infant.

The Surrogacy (Regulation) Act, 2021

⁹ Sonali Kusum, "Review of ART Bill 2014- Contested Issues and Cases", *ILI Law Review* 3 (2016).

¹⁰ Cabinet approves introduction of the Surrogacy (Regulation) Bill, 2016, Press Information Bureau, available at: <www.pib.nic.in/newsite/PrintRelease.aspx?relid=149186> (last visited on December 4, 2023).

¹¹ Indrani Basu, "Things you should know about the proposed surrogacy bill in India", *Huffington Post India*, Dec. 5, 2023.

¹² Vishnu Sharma, "Surrogacy bill gets the Cabinet nod", *The Hindu*, Dec. 5, 2023.

¹³ The Constitution of India, art. 14.

¹⁴ The Constitution of India, art. 21.

¹⁵ "Issues for Consideration: Assisted Reproductive Technology (Regulation) Bill, 2021", *PRS India*, available at- <<https://prsindia.org/billtrack/prs-products/issues-for-consideration>> (last visited on December 5, 2023).

Humanities and Social Science Studies, Vol. 13, Issue 2, No.6, July – December: 2024

The Government of India passed a law to regulate surrogacy and arrangement relating to it in India¹⁶. The object of the Act is to safeguard the interests of surrogate child, mother and intended parents. This enactment has criminalized commercial surrogacy in order to stop the practice of exploiting women who are more prone to be lured into the contract of commercial surrogacy. This Act permits altruistic surrogacy wherein a surrogate can give birth to a baby for helping another couple or individual without receiving fees or medical expenses. This brings the aspect of transparency in surrogacy arrangement. Further, the Act has set forth the criteria for undertaking surrogacy. According to the provisions, the intended couple shall be legally married and require that:

- Male partner shall belong from the age group of 26 to 55 and for female partner the age criteria shall be between 23 to 50 years.
 - The intended partners shall not have any biological child born out of prior marriage.
 - Medical indication of the intended female should be presented for supporting the claim.
 - Unmarried female can also enter into surrogacy if she falls in the age group of 35 to 45 years.
- Further, homosexual partners are barred from indulging into surrogacy arrangement.

The Act has outlined certain requirement to become a surrogate mother in India. The surrogate shall genuinely consent to deliver infant for another partners without any monetary compensation due to the fact that commercial surrogacy is forbidden. The Surrogate shall be fulfilling the demographic eligibility and shall furnish psychological and medical fitness certificate regarding undertaking surrogacy process. Lastly, the safety of surrogate mother shall be ensured. The Act imposes legal requirement upon surrogates and intended couples for entering into surrogacy such as submission of essential documents like certificate of essentiality for surrogate, certificate indicating age, marriage certificate and medical indication. The intended parents are bound to provide financial assistance to the surrogate mother such as compensation for medical checkups, cloths, travelling cost etc. But they are prohibited from offering monetary expenses. In case of non-compliance of the provisions of the enactment, an imprisonment up to 10 years and a fine of around 10 lakh rupees would be imposed in the form of penalty.

INTERNATIONAL PERSPECTIVE ON COMMERCIAL SURROGACY:

The advancement of technology concerning ART has led to the expansion of surrogacy market across the globe. The most favorable destinations for surrogacy are US, India, Ukraine, Canada, Russia, Georgia, and Thailand¹⁷. The surrogacy cost in these nations includes surrogate compensation, medical and legal expenses, cost for health insurance etc. In US, the surrogacy agencies are highly skilled in fulfilling the expectations of intended parents and there are fewer friendly alliances. An international conference on surrogacy laws was organized by India, Ukraine and Thailand. Since there are disparities regulations concerning surrogacy laws, the need for drafting uniform law regulating surrogacy was felt and eventually it was suggested that the Hague Conference should conduct the study on the legal issues concerning international surrogacy¹⁸. Majority of the States suggested to formulate a distinct convention dealing with surrogacy agreement and safeguarding the rights of surrogate mother and intended couples. Legalizing and regulating surrogacy would result into upholding the contractual rights to compensation. Regulating surrogacy at international level would minimize the likelihood of exploitation of surrogate mother¹⁹. The suggested reforms were not adopted because there was lack of consensus among the States in bringing laws concerning surrogacy. Even if the consensus achieved among the States, the decisions of the countries would be confidential and nations would be reluctant

¹⁶ Niyati Vishwakarma, Sukanya Nema, "India: The Surrogacy Act 2021", *Mondaq*, (July 31, 2023), available at- <<https://www.mondaq.com/india/family-law/1349084/the-surrogacy-act-2021>> (last visited on December 5, 2023).

¹⁷ Jessica M. Caamano, International, Commercial, Gestational Surrogacy through the Eyes of Children born to Surrogate", 96 *Boston University Law Review* (2022).

¹⁸ Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption, June 17–25, 2010, Conclusions and Recommendations Adopted by the Special Commission, 25–26, available at <http://www.hcch.net/upload/wop/adop2010concl_e.pdf> (last visited on December 6, 2023).

Tourism in the Age of Globalization,

¹⁹ Krim, supra note 78, at 219–20 (discussing choice of law problems in international surrogacy arrangements); Lee, supra note 8, at 285–86 (providing a real-life example of such a problem).

Humanities and Social Science Studies, Vol. 13, Issue 2, No.6, July – December: 2024

in compromising their sovereignty while drafting international guidelines. About 14 countries have permitted surrogacy. However, there is lack of uniformity like some nations allow compensation in surrogacy, some of them require medical requirements for adopting surrogacy etc. Commercial surrogacy has been recognized by a statute of California wherein surrogate is compensated. While dealing with the cases of surrogacy the Courts in US are required to see whether husband of surrogate has given his informed consent prior to execution of surrogacy contract, whether surrogate has undergone pregnancy for at least one time and whether competence of surrogate and intended parents have been assessed for fulfilling the terms of the surrogacy contract. Uniform regulation is needed to govern surrogacy at international level along with the concerted efforts of the nations wherein surrogacy agreement should be made in a manner wherein ethical and legal concerns could be addressed.

SURROGACY AS A CONTRACT AND ITS LEGITIMACY:

Surrogacy is a Contract wherein a woman enters into an agreement with intended parents to bear or carry a child in her womb and after delivery she would hand over the child to intended parents. The infant is treated as a commodity and surrogate acts as incubator for facilitating the growth of the foetus. Separation of child from her biological mother raises the social and ethical issue in the contract. In India, the surrogacy is legal and legitimacy of surrogacy agreement would be determined in accordance with the relevant law. An application can be filed under Guardian and Wards Act by biological parents for requesting the appointment of surrogate and designating them as guardian of the child. A plaint can be filed under section 9 of the Code of Civil Procedure with respect to the enforcement of surrogacy agreement and to obtain reliefs through injunction or declaration. According to the surrogacy agreement, the child born with the help of ART would be considered as legitimate child of the partners and shall be entitled to all the rights which a natural child has.

CONCERNS RELATING TO COMMERCIAL SURROGACY:

Despite the passing of regulations and laws by ICMR, the surrogacy sector in India is highly unregulated. Even today the surrogacy on the basis of contract is prevalent widely. According to the medical experts, the women involved in surrogacy face unfair arrangement with respect to surrogacy and are usually exploited²⁰. But the government of India outlawed the aspect of commercial surrogacy. Still there are few socio-legal challenges and violation of human rights in the cases concerning commercial surrogacy. There are concerns relating to physical and sexual autonomy of surrogate mother. Further, it leads to the issue regarding the identity of both child and mother. It raises the issue over the matter of legitimacy of contract in commercial surrogacy. The aspect of commercial surrogacy also adversely affects the ethical principles such as voluntariness, informed consent, non-commodification and essentiality. The efforts have been taken to bring regulations for prohibiting commercial surrogacy²¹. However, these laws have been criticized as they have been made without the adequate and proper consultation from stakeholders and are patriarchal in approach.

The latest Surrogacy Act of 2021 further raises various grave ethical and legal issues. It completely outlawed the aspect of commercial surrogacy and allowed selfless surrogacy. This goal of promoting altruistic surrogacy would discourage the prospective surrogate mothers and infertile couple who are in need of child. Further, restricting the choice of women would adversely affect the pay of those females who are involved in surrogacy industry. Another problem which can arise is that it is not assured that other kinds of surrogacy like charitable or altruistic surrogacy would not lead to a situation wherein the wealthy couples who are infertile would take advantage of fertile surrogate woman. In altruistic surrogacy, the probability of establishing strong bond between surrogate mother and foetus is higher. Further, the concerned authority finds difficulty in tracing that whether the compensation has been given in the form of gift and lastly the altruistic type of surrogacy would put the oppressed

²⁰ Aditya Kumar, "Problem of Commercial Surrogacy in India" *SSRN* (July 8, 2020), available at- <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3625804#:~:text=A%20commercial%20arrangement%20is%20any,trafficking%20of%20women%20and%20children.> (last visited on December 7, 2023).

²¹ Anil Malhotra, Ranjit Malhotra, *Surrogacy in India*, 1st Edition (New Delhi: Universal Law Publishing Co. Ltd. 2013) at 13.

Humanities and Social Science Studies, Vol. 13, Issue 2, No.6, July – December: 2024 and voiceless females in disempowering condition²². There are various other legal and human right issues relating to commercial surrogacy which are mentioned below:

Infringement of Child's Basic Human Dignity: The idea of surrogacy violates the fundamental dignity as recognized by the UDHR²³. Both international and national laws like Indian Constitution aims to protect the interest of child to the fullest possible extent. Welfare of the child is the paramount consideration in every institution. The Child is considered as a commodity as after delivery the infant is transferred to the intended parents and identity of the child is lost due to this mechanism along with artificial insemination. It has been revealed that emotional bond is built between child and mother during and after pregnancy. The child himself faces problem to build connection with intended parent and many ill consequences could arise which eventually violates the dignified life of the child.

Violation of Surrogate's Dignity: Surrogate woman is treated as a child machine and thereby infringes the fundamental right of dignified life as she is considered as a medium rather than the real target. Most often woman agree to carry the child in their womb merely for some meagre sum of money. It is thus undeniable fact that renting one's body is a characteristic of prostitution which is somewhat similar to that of surrogate mother and it violates their dignified life of Surrogates.

Adverse effect on Surrogate's health and medical complications: Separation of child from mother affects the mental well-being of the mother and in some cases the surrogacy leads to health complications for woman²⁴. It causes rise in mortality rate as the health complications also results into death of the surrogate mother. Many cases have been registered in US, UK and India wherein the mother died after delivery of child or during pregnancy due to health complications and thus surrogacy has degraded the health of surrogate women²⁵. Various medical complications like miscarriage of child, infections etc. are caused during pregnancy.

Commodification of Children: Another problem in commercial surrogacy is that child is treated as a commodity as it is being handed over to the intended partners and it can result into legal dispute when transfer of child is denied by the by surrogate due to attachment with the infant. In countries like India, there is no protection as to the welfare of child in this aspect.

Breach of Surrogacy Contract: Commercial surrogacy is not successful as both surrogate mother and intended parents have an option to breach their contracts. For instance, the breach can be seen in the form of voluntary abortion, non-payment of fees and expenses by intended parents, refusal to abort after taking recommendation from physician etc.

Consent and privacy related concerns: In commercial surrogacy, the consent of a surrogate woman is compromised as due to financial issues she is forced to fulfil the demands of other and mostly they are threatened and coerced to carry a child. She is treated as a goods as the intended parents choose them as per their preference and her right to privacy is also violated because she is consistently followed by the intended parents. During her pregnancy, the intended parents have right to access the medical information of the surrogate and she has to use contraceptive methods while having sexual relation with her partner.

Exploitation of Infant and Surrogate Mother: In commercial surrogacy since both the mother and child is treated as the subject matter of the contract, they are often been exploited in various ways.

Ethical Issues: Commercial surrogacy has been considered to be ethically incorrect and inappropriate in India as unethical payments are given to the mother and on the other hand the brokers profit themselves at the cost of exploitation of surrogate mother.

JUDICIAL RESPONSE:

The issue of surrogacy contract has brought before the Apex Court in the case of *Baby Manji Yamada*²⁶, wherein Japanese parents were indulged in surrogacy arrangement pursuant to which a child was born to surrogate who was an Indian. The authorities refused to grant Japanese visa or

²² *Ibid.*

²³ Universal Declaration of Human Rights, 1948.

²⁴ Available at- <<http://www.lifeneews.com/2011/11/01/surrogate--mother--nearly--dies--left--with--200k--in--medical--bills>> (last visited on December 6, 2023).

²⁵ 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 119.

²⁶ *Baby Manji Yamda v. Union of India and Anr.*, AIR 2009 SC 84.

Humanities and Social Science Studies, Vol. 13, Issue 2, No.6, July – December: 2024

passport to the child because of the uncertainty in mother's name. The Court directed the petitioner to approach before the National Commission for Protection of rights of Child. In another case of *Jan Blaze v. Anand Municipality*²⁷, the Supreme Court dealt a case wherein twins were delivered by Indian surrogate mother for infertile German partners. The Court ruled that since there was no legislation recognizing the surrogacy, so the commissioning mother cannot be held to be legal mother and cannot become a natural parent. Thus, the Courts in India are reluctant in interfering in the cases of surrogacy.

CONCLUSION & SUGGESTIONS:

India was a hub for commercial surrogacy due to low cost and easy availability of surrogates. However, the latest regulation on Surrogacy has prohibited the commercial surrogacy in the nation on the ground that it results in exploitation of surrogates, trafficking of child and mother and commodification. The commercial surrogacy has caused certain human rights and legal issues like it affects the dignified life of the surrogate and affects the health of surrogate mother. It creates legal issues as breach of surrogacy contract is one of the substantial problem due to the reason that surrogate gets emotionally attached to the child and there are chances that women are exploited for gaining wealth. It would be appropriate that rather than banning the commercial surrogacy, the laws should be made more stringent to regulate the working of surrogacy. Although the recent surrogacy laws in India have prohibited the commercial surrogacy on the ground that it would result into exploitation of women on the basis of income. However, the laws shall not subjugate women as it might also violate their right to personal liberty under Article 21 to determine their relationships involving procreation, childbearing, motherhood etc. Thus, there is a need to strike a balance between safety concern of surrogate woman and her income and privacy.

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