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## ETHICAL PERSPECTIVES ON COMMERCIAL SURROGACY

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Gabriella Judith Martin, Symbiosis Law School, Hyderabad

### ABSTRACT

Surrogacy is a widely debated topic, with the concern of ethics conforming to the medical standards as well as the socio-political domain. Commercial surrogacy in particular has been the centre of this debate since it has been viewed as exploitation of the human body and exceeds the natural means of reproduction. The paper covers important aspects that determine the ethics of commercial surrogacy in India. These aspects range from religious perspectives and folklore, the legislative deliberation that has taken place from decades ago, and the constitutional rights that guarantee fundamental rights based on the principles of natural justice. Theological perspectives explore the concept of surrogacy from the holy books and the word that is preached by the religious order of Christianity in particular, followed by Islam and Hinduism. Understanding the Indian society in terms of the laws that are being passed and the legal status of commercial surrogacy is explained through the “*Surrogacy (Regulation) Bill, 2019*” and the “*Assisted Reproductive Technology (Regulation) Bill, 2020*”. It defines conditions for surrogate eligibility and affirms rights to surrogates, the intending parents as well as the child born through this process. Concluding the segment, the author expands on the pros and cons of commercial surrogacy and the aforementioned bills. After assessing the aforesaid points, it can be said that commercial surrogacy is bliss rather than a curse. It helps out one party, the surrogate, financially and provides a bundle of joy for the other party, the parents. The right to a dignified life as well as the personal liberty of the surrogate is protected by the Indian Constitution.

## INTRODUCTION/BACKGROUND

Childbirth is a natural phenomenon and succeeds a beautiful story that lasts nine months in the womb of a woman. Unfortunately, not every woman would be able to carry her baby due to a multitude of reasons, usually because of health issues. Surrogacy is another way to grow a child in the womb; only the womb belongs to another female. It is a good deed to bring life into this world, even if that life is not technically your own. It stills brings the same output of joy the parents would have even if the baby was grown in his mother's womb, if not more. Essentially, 'Surrogacy' has been defined in the Merriam-Webster medical dictionary as "*the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children*".<sup>1</sup> There are a few types of surrogacy available: traditional surrogacy or gestational surrogacy, and altruistic surrogacy or commercial surrogacy.<sup>2</sup> Traditional and gestational surrogacies are the actual types of surrogacy, while altruistic and commercial surrogacies are based on financing throughout the pregnancy.

Traditional Surrogacy is a method that involves using the surrogate's healthy egg and the artificial insemination of sperm given by the donor father. This way, the infant born is biologically linked to the surrogate and only halfway biologically linked to the parents who raise him or her.<sup>3</sup> The surrogate mother then gives up her parental rights over the child. Gestational Surrogacy, on the other hand, is when the couple's sperm and egg are combined in vitro, producing an embryo, and then transferred into the womb of the surrogate. This is commonly called in-vitro fertilization.<sup>4</sup> Then we have Altruistic Surrogacy, which is when the surrogate mother carries out the pregnancy without compensation. Only the medical bills, pregnancy-related costs and insurance are paid by the intended parents of the child.<sup>5</sup> And finally, we have Commercial Surrogacy, which is when the intended parents foot the bills and every other cost related to the pregnancy *in addition to* a compensatory amount for the surrogate

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<sup>1</sup>Definition of Surrogacy, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/surrogacy#medicalDictionary> (last visited Feb 17, 2021).

<sup>2</sup>Nishant Vimal & Ishika Garg, CONCEPT OF SURROGACY AND VARIOUS APPLICABLE SURROGACY LAWS IN INDIA IPLEADERS (2019), [https://blog.ipleaders.in/surrogacy-laws-india/#Types\\_of\\_Surrogacy](https://blog.ipleaders.in/surrogacy-laws-india/#Types_of_Surrogacy) (last visited Feb 18, 2021).

<sup>3</sup> *Ibid.*

<sup>4</sup> Janelle Martel, *In-Vitro Fertilization (IVF): Procedure, Preparation & Risks* HEALTHLINE (2016), [https://www.healthline.com/health/in-vitro-fertilization-ivf#:~:text=In%20vitro%20fertilization%20\(IVF\)%20is](https://www.healthline.com/health/in-vitro-fertilization-ivf#:~:text=In%20vitro%20fertilization%20(IVF)%20is) (last visited Feb 18, 2021).

<sup>5</sup>*What is Altruistic Surrogacy?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-altruistic-surrogacy/> (last visited Feb 18, 2021).

mother. It may also include buying or selling healthy eggs or sperm for the creation of the embryo.<sup>6</sup>

Commercial Surrogacy has expanded the traditional meaning of childbirth and family.<sup>7</sup> It involves an “informal” member of the family and poses as a mother in the nine months of pregnancy. But it has also raised many questions on the basis of ethics. How does one ask another to give up their own blood? Who is the mother of the child? What rights do surrogate mothers have? The dignity of every person must be kept intact, as per Article 21<sup>8</sup> of the Indian Constitution and as a fundamental principle of natural justice. For this very reason, we must divulge the ethical perspective of commercial surrogacy. By doing so, we shall encroach upon the concept of humanity, theological foundations and their moral policies, and the backing of jurisprudence in drafting laws related to surrogacy.

For conducting this research, the author shall be using doctrinal legal research and analytical legal research. Doctrinal legal research follows a pattern of designated steps involving framing a hypothesis or posing questions regarding the topic and then analysing the relevant data to come to a conclusion. It may also involve recommendations and suggestions. The latter methodology involves breaking down the topic into its elements and finding the relative forces between each element. Using these methodologies together will help the researcher reach an elaborate understanding and description of arguments concerning the ethical perspective of commercial surrogacy. The author will attempt to comprehend the concept of surrogacy and define the various types of surrogacy, visit historical understandings of surrogacy in terms of religious norms and mythologies and, finally, analyse the rights of the surrogate mother, the biological parents and the child born to a surrogate. These objectives will help answer questions like how history treated the concept of surrogacy and surrogate mothers, what commercial surrogacy is in the modern era, the different types of surrogacy and of challenges surrogate mothers face and what are the ethics that go into reproductive technology. Finally, in the legal sphere, the author will question whether surrogates have rights, and what rights parents have in relation to surrogacy and, the rights and the status of the child born to a surrogate.

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<sup>6</sup> *Supra* note 2, at 1.

<sup>7</sup> Franziska Krause, CARING RELATIONSHIPS: COMMERCIAL SURROGACY AND THE ETHICAL RELEVANCE OF THE OTHER PUBMED (2018), <https://www.ncbi.nlm.nih.gov/books/NBK543739/> (last visited Feb 12, 2021).

<sup>8</sup> INDIA CONST. art 21.

## HISTORY OF SURROGACY

### Religion and Surrogacy

- *Christianity*

We can trace the earliest tale of surrogacy from The Book of Genesis in the Bible. Genesis chapter 16 says that Sarah and Abraham could not bear a child by themselves. Sarah then offered her Egyptian slave named Hagar to her husband so that she may conceive his child. The Lord appeared to Hagar and told her to name the child Ishmael.<sup>9</sup> Similarly, Genesis chapter 30 talks about the story of Rachel and Jacob. They could not have children, so Rachel told her husband Jacob to conceive a child with Bilhah, their chambermaid, and they would raise the child as their own. This event took place and when the child was born to Bilhah, Rachel named the boy Dan.<sup>10</sup> Jacob continued to have more children through traditional surrogacy. This being said, we must note that the Catholic church does not believe in surrogacy. It has been preached by many higher officials of the Church that getting pregnant and having a child is a gift of God, not a matter of desire.<sup>11</sup> However, Christianity as a whole does not look down upon surrogacy and assisted reproduction.<sup>12</sup>

- *Islam*

The religious laws view surrogacy as adultery since the woman carries a fertilized embryo with the sperm of another.<sup>13</sup> According to the ayah in Surah al-Mujadalah (58: 2)<sup>14</sup>, the Holy Quran says that the child of the mother is the one who conceives and bears him or her.<sup>15</sup> So there is no concept of surrogacy for Muslims.

- *Hinduism*

The Mahabharata is a fascinating source for the history of surrogacy in India. It enlists six types of sons for kinship and succession; one of which is the son born to one's wife who is later reimbursed for him. It was often done to further the lineage and to do the funeral rites.<sup>16</sup> It has described many women who had the sons of men who were not her husband, through extra-

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<sup>9</sup> Genesis 16:12 (King James).

<sup>10</sup> Genesis 30:4 (King James).

<sup>11</sup> Mark E. Lones, *A Christian Ethical Perspective on Surrogacy*, 1 *BIOETHICS IN FAITH & PRAC.* 23, 27-28 (2016) (discussing what procreation means in Christianity).

<sup>12</sup> *Ibid.*

<sup>13</sup> Ann M. Fisher, *The Journey of Gestational Surrogacy: Religion, Spirituality and Assisted Reproductive Technologies*, 18 *INT'L J. OF CHILD. SPIRITUALITY* 235, 237 (2013).

<sup>14</sup> THE QURAN, XXXXXVIII: 2.

<sup>15</sup> M Naushad Ansari, *Surrogacy in the Mirror of Hinduism and Islam* TWO CIRCLES.NET (2011), [http://twocircles.net/2011oct11/surrogacy\\_mirror\\_hinduism\\_and\\_islam.html](http://twocircles.net/2011oct11/surrogacy_mirror_hinduism_and_islam.html) (last visited Apr 13, 2021).

<sup>16</sup> Ralla Guha Niyogi, "May You Be the Mother of a Hundred Sons": *Social and Ethical Impact of Surrogacy in Ancient Indian Myths*, 1 *BHARATIYA PRAJNA: AN INTERDISC. J. OF INDIAN STUD.* 20–28 (2016).

marital relationships, like Kunti, Yajnakunda, Madhavi, and Rohini.<sup>17</sup> Women who are surrogates were not just socially accepted but were, in fact, respected and praised for submitting their bodies for a noble cause. Even today, it is not looked down upon. However, it is preferred that the embryo is created by the biological parents.<sup>18</sup>

### Mythology and Surrogacy

In Greek mythology, Zeus and Elara had a child named Tityus. But when Elara was pregnant with Tityus, Zeus hid her beneath the ground so that his wife Hera wouldn't find out.<sup>19</sup> When Elara gave birth to Tityus, Gaia (the Goddess of the Earth) nursed him to become a huge child. A spin on this tale was that Elara's womb got ruptured and couldn't carry the large foetus to full term, so Gaia became the surrogate.<sup>20</sup> According to Roman folklore, the King of Galatia, Deiotarus and his infertile wife Stratonica picked a surrogate among his prisoners. They chose the beautiful Electra, who produced Deiotarus' children. These children were brought up by the king and his wife as if they were theirs.<sup>21</sup>

### Registering Developments in Artificial Reproductive Methods

Artificial Reproductive Methods have been around for a very long time, from the 19<sup>th</sup> century. 1884 marked the first successful artificial insemination of a woman but it was ethically challenged.<sup>22</sup> Almost a century later, the first ethically completed IVF embryo transfer was successful in 1975.<sup>23</sup> The following year was the entry of the legal sphere in the medical field, as the first surrogacy agreement was brokered by an American lawyer.<sup>24</sup> 1978 witnessed the birth of the first IVF baby.<sup>25</sup> Commercial surrogacy was introduced in 1980, wherein the surrogate received \$10,000.<sup>26</sup> The most famous surrogacy concerning case took place between

<sup>17</sup> Kavita Kane, *Kavita Kane Writes about Surrogacy in Mythology* SHETHEPEOPLE.TV (2017), <https://www.shethepeople.tv/news/surrogacy-in-mythology/#:~:text=Surrogacy%2C%20or%20the%20transfer%20of> (last visited Apr 13, 2021).

<sup>18</sup> Amber Campanelli, *Religion & Surrogacy Montana* SURROGACY (2018), <https://www.montanasurro.com/blog/2018/2/28/religion-surrogacy> (last visited Apr 13, 2021).

<sup>19</sup> Dina G. Tiniakos, Apostolos Kandilis & Stephen A. Geller, *Tityus: A forgotten myth of liver regeneration*, 53 JOURNAL OF HEPATOLOGY 357, 357-358 (2010).

<sup>20</sup> *Ibid.*

<sup>21</sup> Konstantin Svitnev, *Surrogacy in Russia and in the World* SURROGACY.RU (2020), [https://surrogacy.ru/en/surrogacy/surrogacy\\_history/#:~:text=Surrogacy%20was%20also%20common%20in,%20C%20with%20love%20and%20generosity](https://surrogacy.ru/en/surrogacy/surrogacy_history/#:~:text=Surrogacy%20was%20also%20common%20in,%20C%20with%20love%20and%20generosity). (last visited Apr 13, 2021).

<sup>22</sup> *History of Surrogacy - from the Bible to Now*, SURROGATE.COM (2017), <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/> (last visited Apr 13, 2021).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Supra* note 22.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Supra* note 22.

1984 and 1986: The Baby M case<sup>27</sup>. The New Jersey Supreme Court declared the surrogacy agreement between the intending parents and the surrogate (who was the biological mother of ‘Melissa’/ baby M) to be illegal. While the intending parents got custody, the surrogate, who initially refused to give up her baby, was granted visitation rights.<sup>28</sup>

## THE LEGALITY OF SURROGACY: THE INDIAN EXPERIENCE

### “Surrogacy (Regulation) Bill 2019”.

Recently, surrogacy has been viewed as a form of exploitation of women and their bodies. The Bill was passed in the Lower House in 2019 and is yet to have the assent of the Rajya Sabha and, subsequently, the President’s seal.<sup>29</sup> It has prescribed the eligibility criteria for women to become surrogates, who can be the intending parents and the mode of surrogacy. Besides these, it has called for a National Surrogacy Board as well as State Surrogacy Boards in order to regulate and exercise the powers delegated through the Bill.<sup>30</sup>

Firstly, it only allows surrogacy under a few conditions: either or both of the intending parents have been declared infertile by the District Medical Board, through altruistic surrogacy and the prohibition of the sale or prostitution of the child. It also requires the assent of a magistrate to declare that the child to be born is of the custody of the intending parents.<sup>31</sup> As for the surrogate, she has the right to be covered by insurance for 16 months. The woman should be between the age of 25 to 35 years<sup>32</sup>, a close relative of the intending parents, and cannot provide her own egg for the embryo. Additionally, it would have to be the first time that she is a surrogate, as well as possess a medical certificate that declares her mental and physical stability to carry the baby to term.<sup>33</sup>

While Commercial Surrogacy has been banned to reduce the exploitation of the female body, the bill allows altruistic surrogacy for childless families of Indian origin.<sup>34</sup> Furthermore, it

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<sup>27</sup> Baby M, 537 A.2d 1227, 109 N.J. 396 (1988).

<sup>28</sup> *Supra* note 22, at 4.

<sup>29</sup> Sidak Singh Kalra, *Surrogacy (Regulation) Bill of 2020: Balancing Interests* LATEST LAWS (2020), <https://www.latestlaws.com/articles/surrogacy-regulation-bill-of-2020-balancing-interests/> (last visited Apr 13, 2021).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Supra* note 2, at 1.

<sup>32</sup> The Surrogacy (Regulation) Bill, 2019, PRS LEGISLATIVE RESEARCH, <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019> (last visited Apr 14, 2021).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Supra* note 29.

secures the custody of the child to the intending parents in order to protect the surrogate from unwanted motherhood.

### **Factoring in Ethics in Reproductive Technology**

Indian society is well known for its complex yet stable familial structures. This creates a negative impact on couples who cannot have children of their own. This is when they opt for fertility treatments and other assisted reproductive technologies such as in-vitro fertilization and egg and sperm donation, among others. In 1978, India witnessed the birth of the first 'test-tube baby' in Kolkata.<sup>35</sup> But how ethical is the use of reproductive technology? Many scholars argue on this controversial topic, with each having a different perspective on human rights, religion, materialism and the concept of humanity.

Talking about surrogacy and the various treatments that surrogates undergo, it takes strength and willpower to be able to carry a child, one who is not yours. The ultimate goal of surrogacy or IVF treatments is to bring another human into this world. However, there is a larger picture that we see; the women who opt for surrogacy are not coming out of the kindness of their heart or for purely altruistic purposes, but mainly because they believe that the compensation which they receive may help their family. This surrogate sees her children going to school, or helping out her elderly parents, or even supporting her husband. For this, we see that she is especially motivated by external forces.<sup>36</sup>

The Assisted Reproductive Technology Bill of 2020 lays down the guidelines for clinics that work in the ART and fertility clinics. It also describes the conditions for donors and intending parent(s) who offer and accept these services. Further, it calls for a central database of clinics and banks, to regulate these services, and establishes a national board that prescribes the code of conduct as well as fixing standard protocols which are similar to the Surrogacy (Regulation) Bill 2019.<sup>37</sup> It requires parties to the process, including the spouse of the surrogate or donor, to provide written consent for the procedures in order to prevent any marital or legal complications thereafter. Like the Surrogacy Bill, it also says that the commissioning party must cover insurance for the donor for losses, damages or even death.<sup>38</sup> Men between 21 and 25 years of

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<sup>35</sup> R. S. Sharma, *Social, Ethical, Medical & Legal Aspects of Surrogacy: An Indian Scenario*, 140 INDIAN JOURNAL OF MEDICAL RESEARCH (2014).

<sup>36</sup> *Supra* note 7, at 2.

<sup>37</sup> PRS Legislative, *The Assisted Reproductive Technology (Regulation) Bill, 2020*, YouTube (Jan. 18<sup>th</sup>, 2021), <https://www.youtube.com/watch?v=HS1UdCyRAS8&t=29s>.

<sup>38</sup> *Ibid.*

age can donate semen and women between ages 23 and 35 (married with a child of at least 3 years) can donate eggs.<sup>39</sup> The Bill also penalizes offences like sex-selective services, exploiting commissioning parents, donors and surrogates in any manner, trading, selling or importing human embryos, abandoning the child born through ART and more.<sup>40</sup> Overall, this Bill seeks to standardize and regulate ART services at banks and clinics by providing ethical guidelines to ensure the dignity and rights of the people involved in the process.

### **Arguments defending the Bill**

Commercial surrogacy encourages women to rent out their wombs for compensation. However, the idea of surrogacy is to carry the embryo of a couple so that they may have a child in their lives. The Bill is a reinforcement of this idea; that a child is a gift to the people, and not a product. It also stops the exploitation of fertility clinics from feeding on the money that surrogates receive, in addition to the bills that the intending parents deal with. Adoption becomes a clearer option for childless couples since it would take a lot of resources and a long duration to complete the behemoth task of commercial surrogacy. It is the country's job to provide for and protect people equally and should not inspire women to opt to be a surrogate mother in helpless times.<sup>41</sup> Pregnancy has many side effects which affect overall health chronically. This Bill saves multiple women from the effects of deteriorating mental and physical health.

### **Arguments criticizing the Bill**

The Surrogacy (Regulation) Bill, 2019 violates the Indian Fundamental Rights by showing surrogacy in a negative light.<sup>42</sup> This is because of the ban on commercial surrogacy. If women have the right to personal liberty then they must be free to exercise what is immoral for their own bodies. Surrogacy should not be taboo, and this Bill only encourages society to oppress the women who are already downtrodden with poor financial states and social status. It also takes away the right to earn an amount for the hardships of bearing a child who is not hers. The Bill has also stopped the influx of medical tourism, which takes out a huge chunk of the total

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<sup>39</sup> *Supra* note 37, at 6.

<sup>40</sup> *Ibid.*

<sup>41</sup> Pranav Rao, *Analysis of Surrogacy Laws in India*, 4 INT'L J. OF ADVANCE RES., IDEAS & INNOVATIONS IN TECH. 335, 338-339 (2018).

<sup>42</sup> Dipankar Debnath, *The Surrogacy (Regulation) Bill, 2020: A Critical Analysis of The Provisions in the Light of Procreative Choice of Surrogate Mother to Use Her Agency*, 8 INT'L J. OF CREATIVE RES. THOUGHTS 1651, 1655-1657 (2020).

revenue that India earns.<sup>43</sup> It is not specific on who a “close relative” is and discriminates against women who choose to become surrogates even if they are not married. Additionally, it does not protect same-sex couples who wish to have a biologically related child, nor does it safeguard heterosexual couples who have not been married for at least 5 years.<sup>44</sup>

## **RIGHTS OF SURROGATE MOTHER**

### **Challenges to Being a Surrogate Mom**

A pregnant woman goes through a lot of pain. She would require regular check-ups, a nutritional diet, someone to supervise her welfare, and also, abstinence from harmful substances like alcohol and cigarettes. But a surrogate mother goes through a lot of challenges besides these. Women are sometimes left with no option but to become a surrogate as they need the money to cover debts and to provide for their family. But sometimes, the consideration given to the surrogate is not enough to cover the cost of living, especially in India where the price for commercial surrogacy is extremely cheap compared to other nations.<sup>45</sup> Moreover, they are taken away from their families and are placed in hostels with 24x7 supervision.<sup>46</sup>

It is often seen that surrogates are often shamed by many people in society. This is due to the fact that these surrogates carry someone else’s child and the embryo may belong to another couple, with the sperm belonging to a man who is not her husband.<sup>47</sup> When it comes to altruistic surrogacy, the surrogate is either a close relative or close friend. If it is a family member like a sister, then it is declared incestuous. And when it comes to commercial surrogacy, when the surrogate is a stranger and receives compensation or consideration amount, it is seen as impure.<sup>48</sup> Commercial surrogacy is often deemed to be similar to prostitution because of the fact that genitalia is involved in the process and there is a payment of some amount to the woman. Additionally, it does not help the cause of objectification of women because of the “rent a womb” service that commercial surrogacy is associated with.<sup>49</sup> Furthermore, it is hard and heartbreaking for the surrogate mother sometimes to give up the baby growing in her womb

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<sup>43</sup> *Supra* note 41, at 7.

<sup>44</sup> *Supra* note 2, at 1.

<sup>45</sup> RT Documentary, *Wombs for Rent: Surrogate Mothers in India | Short Doc*, YOUTUBE (Aug. 11, 2020), <https://www.youtube.com/watch?v=AimfKOZs8p8>.

<sup>46</sup> Pikee Saxena, Archana Mishra & Sonia Malik, *Surrogacy: Ethical and Legal Issues*, 37 INDIAN J. OF COMMUNITY MED. 211 (2012).

<sup>47</sup> *Supra* note 45.

<sup>48</sup> VPRO Metropolis, *Commercial surrogacy in India*, YOUTUBE (Oct. 3, 2014), <https://www.youtube.com/watch?v=qYVR0vXEdn8>.

<sup>49</sup> *Ibid.*

for nine months as the baby is her flesh and blood.<sup>50</sup> They bond with the child for 9 months, contributing to the nature, personality and narrative of the baby. She is removed from the intimacy of this new family when the baby is born, and sometimes, they are left with unplanned parenthood when the intended parents refuse to take the child.<sup>51</sup>

### **Rights and Duties of Surrogate Mother**

In the case of commercial surrogacy, the surrogate and the intending parents enter into a contractual agreement. This binds the whole process with the force of law, therefore, ensuring the execution of terms in the agreement. The surrogate's income through consideration is safeguarded. But in return, she must give up the infant to the intending parents.<sup>52</sup> She gives up all parental rights to the baby and the commissioning parents are listed as the biological parents on the birth certificate.<sup>53</sup> As mentioned in the previous section, the surrogate requires medical check-ups often to ensure the proper functioning and growth of the foetus, and the health of the woman. All the medical expenses of the surrogate are to be covered by the commissioning parents<sup>54</sup>, regardless of the process being altruistic or commercial. Additionally, this also includes psychological counselling for the woman, insurance that covers her pregnancy and an additional three months.<sup>55</sup>

### **Status of Motherhood**

When a woman agrees to be a surrogate, it is understood that she has to carry someone else's baby. Commercial surrogacies can be traditional or gestational, depending on whether the intending mother wishes to use her egg for the embryo. Regardless of that fact, the surrogate agrees to give up the baby without hesitating, after she delivers it. She is counselled to be reminded that she cannot keep the baby but at the same time, must nurture and care for the baby as if it were her own.<sup>56</sup> She can no longer be termed the mother of the baby, even if the egg used was her own.

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<sup>50</sup> *Supra* note 45, at 8.

<sup>51</sup> *Supra* note 48, at 8.

<sup>52</sup>T. Choudhury, *Rights of Surrogate Mothers* LEGAL SERVICES INDIA (2018), <http://www.legalservicesindia.com/law/article/950/16/Rights-of-Surrogate-Mothers> (last visited Apr 4, 2021).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* note 52.

<sup>55</sup> *Ibid.*

<sup>56</sup>Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 THE UNIV. OF CHI. PRESS J. 969, 976 (2010).

The Maternity Benefit Act of 1961<sup>57</sup>, guarantees paid maternity leave to a pregnant woman. According to Section 5<sup>58</sup> of the Act, this paid leave is twelve weeks: six weeks prior and including the day of the delivery of the child, as well as six weeks postpartum. Section 12<sup>59</sup> bans employers from dismissing or discharging pregnant women due to their absence at work. And Section 13<sup>60</sup> does not allow the employer to reduce the wages the woman would receive on an average day. The Punjab and Haryana High Court has affirmed that surrogates have the right to claim maternity leave.<sup>61</sup>

## **RIGHTS OF INTENDING PARENTS**

### **Contractual Obligations for Commissioning Parents**

It is very important that intending parents and the surrogate form an agreement prior to the proceedings. This is so that there is a legal understanding and consensus between the parties and shall protect either side from any kind of infringement of rights or non-performance of duties. The intending parents are mostly obligated to deal with the financial matters in the process. These matters are related to paying for the medical treatment throughout the duration of their surrogate's pregnancy: all doctors' appointments, sperm or egg donation, insurance for 16 months, maternity wear and other living expenses related to the pregnancy. In the case of commercial surrogacy, which is banned by the Surrogacy (Regulation) Bill from 2019, the intending parents have to also pay a compensatory amount to the surrogate apart from the compulsory medical payments. This is the consideration given in respect to the surrogate bearing the child for 9 months, the delivery and the postpartum effects. Furthermore, they are bound to accept the child after delivery even if he or she has an anomaly or deformity. They cannot refuse or abandon the baby.

### **Rights of Intending Parents**

When parents choose a surrogate, they tend to choose a woman who is ready to be in contact with them. This means that the commissioning parents and the surrogate form a relationship. Intending parents have the right to visit and keep in touch with them throughout the pregnancy.

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<sup>57</sup> Maternity Benefit Act, No. 53 of 1961, INDIA CODE (1993).

<sup>58</sup> §5, Maternity Benefit Act, No. 53 of 1961, INDIA CODE (1993).

<sup>59</sup> §12, Maternity Benefit Act, No. 53 of 1961, INDIA CODE (1993).

<sup>60</sup> §13, Maternity Benefit Act, No. 53 of 1961, INDIA CODE (1993).

<sup>61</sup> *Now, maternity leave for commissioning, surrogate mothers*, THE TRIBUNE, Feb. 18, 2020, <https://www.tribuneindia.com/news/chandigarh/now-maternity-leave-for-commissioning-surrogate-mothers-43824>.

They also have the right to attend medical appointments and be there at the time of the delivery.<sup>62</sup> A first-class magistrate court (or higher) needs to declare that the parentage of the child born from surrogacy. In commercial surrogacies, once the child is born, they assume all duties and responsibilities as any other ordinary parent. Therefore, the court certifies that the child born from surrogacy is the natural and legitimate child of the intending parents, and they shall have full custody of him or her following the delivery.<sup>63</sup>

In the event that the surrogate mother refuses to give up the baby, claiming that the child is hers despite the gestational surrogacy, the parents can enforce the agreement<sup>64</sup> through the Indian Contract Act 1872<sup>65</sup>. This agreement is a prerequisite to the surrogacy process. In case it is further claimed that there was no compensation in order to form a contract, the commissioning parents may argue that the compensation was valued through the medical services that they paid for, as well as the maternity services like hostel lodging, maternity wear, insurance, etc.

Additionally, it must be noted that women employees of government offices have the right to maternity leave after she receives her baby via surrogacy. Just because she may not be genetically related, doesn't mean she is not a new mother. Motherhood is about creating a bond with her baby, a critical feature during the first couple of months after the birth of the child.<sup>66</sup> This ensures a wholesome environment for the baby to develop as well as have the new mom settle into the new lifestyle and fix a routine. Therefore, it would be unjust to deny maternity leave to mothers who opted for surrogacy.<sup>67</sup>

## **RIGHTS AND STATUS OF CHILD**

### **Status of Child: A Product or a Human Being?**

The attachment formed between the surrogate and the child is hard to break and results in many issues, especially for the surrogate. But the commercialization of it makes it seem like a business transaction with a contract.<sup>68</sup> The child is then seen as the product of service and the

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<sup>62</sup> Katharina Beier & Sabine Wöhlke, *An Ethical Comparison of Living Kidney Donation and Surrogacy: Understanding the Relational Dimension*, 14 PHIL., ETHICS, & HUMAN. IN MED. (2019).

<sup>63</sup> *Supra* note 2, at 1.

<sup>64</sup> *Supra* note 46, at 8.

<sup>65</sup> The Indian Contract Act, No. 9 of 1872, INDIA CODE (1993).

<sup>66</sup> Can't deny maternity leave to woman if she's mother through surrogacy: HC, HINDUSTAN TIMES (2021), <https://www.hindustantimes.com/cities/chandigarh-news/cant-deny-maternity-leave-to-woman-if-she-s-mother-through-surrogacy-hc-101614925915512.html> (last visited Apr 16, 2021).

<sup>67</sup> *Ibid.*

<sup>68</sup> Bryn Williams-Jones, *Commercial Surrogacy and the Redefinition of Motherhood*, 2 THE J. OF PHIL., SCI. & L. 7, 1–16 (2002).

rights of the surrogate are then transferred to the biological/commissioning parents. Like transferring property. But on the other hand, the definition of motherhood changes and how we perceive it.<sup>69</sup> In spite of all this, we need to remember that a child born is the same as the intending parents or the surrogate: a human being with rights. He or she cannot be exchanged or returned upon the disappointment of the intending parents.

### **Rights of Child**

Children become curious as their minds develop. At a certain point, they may question their origin or how she or he was born, and therefore, knowing these relevant facts would enhance one's identity which is a human right. According to Article 7(1)<sup>70</sup> of the Convention on the Rights of the Child of 1992, a child has the right to know his parents or his origin. In the case of *Laxmikant Pandey v. Union of India*<sup>71</sup>, the petitioner questioned whether the child had the right to know his or her biological parents. The bench at the Supreme Court of India stated the following: “...*But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child has attained maturity, it is not likely to be easily affected by such information and in such a case, the foreign adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.*”<sup>72</sup> Moreover, the ART Bill 2020 and Surrogacy (Regulation) Bill 2019 authorize the National Board to maintain a central database of the clinics and banks that use ART services. This also means that they must maintain records of the surrogates and donors. This being said, it would violate the privacy of surrogates and donors if their names and addresses were provided to the family, especially the child.

Usually, cross border surrogacy leads to various problems, most importantly affects the nationality of the child. There were two prominent cases in India regarding this. The premier case was *Baby Manji Yamada v. Union of India*<sup>73</sup>. In this case, the intending parents were a Japanese couple who came to India to have a baby through surrogacy. However, the couple went through a divorce after the baby was born, and the mother refused to take the child. The grandmother of the baby has custody of the baby thereafter, but couldn't leave the country since

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<sup>69</sup> *Ibid.*

<sup>70</sup> Convention on the Rights of the Child, art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>71</sup> *Laxmikant Pandey v. Union of India*, 1984 AIR 469 (India).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Baby Manji Yamada v. Union of India*, [2008] INSC 1656 (India).

she was neither a Japanese national nor an Indian national. Eventually, the Apex court let the grandmother leave with the baby.<sup>74</sup>

The second case is of *Jan Balaz v. Union of India*<sup>75</sup>. Two twins were born with the sperm of Jan Balaz, a German national. There were issues related to the nationality of the twins since Germany had banned surrogacy and India does not have a law for dual citizenship. It was then decided by the Supreme Court that the babies may go back to Germany with the parents where they will adopt them according to the relevant procedures.<sup>76</sup>

However, this issue has been resolved since 2015. Circular no. 462 from the Ministry of Home Affairs dated 3<sup>rd</sup> November 2015 prohibits foreign nationals from receiving visas for the intention of commissioning surrogacy and if any visas were issued prior to the circular, it would be allowed to prevent any medical issues.

## CONCLUSION & RECOMMENDATIONS

Surrogacy is a form of assisted reproductive technology, which is a miracle and a scientific achievement. Commercial surrogacy may be traditional or gestational but ensures that the commissioning parents pay some compensatory amount to the surrogate in addition to the medical services which they also pay for. For this very reason, there is so much ethical controversy that surrounds this type of surrogacy. It has been found that religions have different views on surrogacy based on the nobility of the act and the way people perceive the female body. According to the legislation in India, commercial surrogacy has been banned due to the mass exploitation of surrogates. “*The Surrogacy (Regulation) Bill 2019*” along with the “*Assisted Reproductive Technology Bill 2020*” lay down strict guidelines but they have flaws to be corrected. The bills show commercial surrogacy in a negative light when many women in India have gone through this type of surrogacy to manage their households or send their children to school. Surrogates need to be protected with laws that enshrine human rights. Intending parents have to perform contractual obligations like covering the medical bills and more. The children born through surrogacy have the right to know their parents but that is also limited. All in all, India has been known for being a baby-booming nation. However, banning commercial surrogacy and not granting visas to foreign nationals for commissioning surrogacy

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<sup>74</sup> *Supra* note 2, at 1.

<sup>75</sup> *Jan Balaz v. Union of India*, AIR 2010 Guj 21 (India).

<sup>76</sup> *Supra* note 2, at 1.

in India does not show the progressive mindset of Indian society. We need to strive for better and guarantee human rights to all.

The author of this paper makes the following suggestions:

- Allow commercial surrogacy but have appropriate authorities to regulate the proceedings and enforce agreements.
- The ART and fertility clinics should agree on essential terms to be specified in surrogacy contracts as a standard, pre-requisite practice.
- Lift the ban on inter-country surrogacy to increase national revenue through medical tourism. Pass or amend legislation to make them inclusive of surrogacy, which specially dictates the rules for determining the nationality of a child born through surrogacy.
- Pass a new law or amend the Maternity Benefit Act 1961 to add and specify maternity leave and paternity leave for intending parents after the birth of the child born through surrogacy.