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Altruistic Surrogacy V. Commercial Surrogacy: A Way for India

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ABSTRACT

Surrogacy is one of the many available forms of Assisted Reproductive Technologies available. Since the introduction of the technique, India had been on the forefront to commercialise the act. By the year 2005, India had grown to become one of highest demanded places in terms of 'fertility tourisms. But, owing to large scale disparities, the government banned international surrogacy in the year 2015. Subsequently, there was a draft bill that was introduced in the parliament to pass the first legislation dealing with surrogacy in India. Currently, through the legislation, India completely bans commercial surrogacy and only allows for Altruistic Surrogacy. In the following research, the researcher will carefully analyse the right to parenthood, commercial and altruistic methods of surrogacies and the pending legislation to answer a question – what is best suitable for India – commercial surrogacy or altruistic surrogacy?

I. INTRODUCTION

*It's her egg and his sperm, and I'm just the oven, it's- totally their bun."*²

It is difficult to miss the satire and comedy in the line mentioned above. This is the line Phoebe Buffay, a character from the popular serial F.R.I.E.N.D.S said when she agreed to become the surrogate for her brother and her sister in law. This line may not be causally related to the context of this research paper, it certainly does deliver the emotion of what the word 'surrogacy' means to people. In its true essence, surrogacy is carrying a baby as a gestational carrier for an intending/commissioning parent.³ As the promising nature of surrogacy started in the year 1978 in the U.K., it has been growing, developing and expanding ever since.⁴ Childbirth is indeed one of the most relinquished moments in one's life. Surrogacy opens up that opportunity for intending parents.⁵ But a certain question arises,

¹ Author is a student at Symbiosis Law School, Hyderabad, India.

² *Friends: The One with Phoebe's Uterus* (NBC television broadcast Jan. 8, 1998)

³ *Baby Manji Yamada v. UOI*, 13 SCC 518 (2008)

⁴ Law Commission of India Report No 228, 2009

⁵ Nayana Patel, Yuvraj Jadeja, Harsha Bhadarka, Molina Patel, Niket Patel and Nilofar Sodagar, *Insight to Different Aspects of Surrogacy Practices*, 11(3) J HUM REPROD SCI., 212 (2018).

why surrogacy? If a couple wants a child, they can go for other ART methods or adoption as well. The simple answer to this question is the continuance of genes. In surrogacy, one of the intending parents has to be a donor. This means that although the child is gestated in another woman womb, it can still have the characteristic features of the intending parents.⁶ There are four main kinds of surrogacies defined.⁷ Of these, Commercial surrogacy took India by storm.⁸ A UN backed research suggest that in the year 2009, the commercial surrogacy market in India was valued at \$400 Million.⁹ Majority of this was the contribution of foreign nationals who found India to be a suitable destination for commercial surrogacy owing to India's economic prices, western trained doctors, lower healthcare charges and availability of surrogates.¹⁰ Owing to large scale exploitation of women in the industry, the government of India completely banned foreign nationals from opting for commercial surrogacy in India.¹¹

Today, from a legislative aspect, India has not solid legislation with regards to any form of Surrogacy. In accordance with the 2009 Law Commission of India Report, a draft proposal of the bill has been presented before the Parliament twice. It is through this draft that the concept of Altruistic Surrogacy as a permanent alternative to commercial surrogacy has been proposed.¹²

In the following research paper, the research sought to fulfil a set of research objectives. They are – understanding the concept and evolution of Surrogacy as a phenomenon, Understand the legislations and cases in India with respect to surrogacy and its various types, to analyse commercial and altruistic surrogacy and determine the more beneficial form of surrogacy for India and lastly suggest reforms to the draft legislation through judicial pronouncements.

The researcher, for the purpose of this research work has followed a strictly doctrinal research methodology. This includes the review and analysis of texts and documents from various primary and secondary sources of literature. Doctrinal research method was preferred for the following research since the primary objective of the research is to analyse various legislations and cases to determine a suitable option and to suggest corrective changes to the proposed draft.

⁶ Manasi Kumar & Isha Saluja, *Relocating Fertility: Charting the Course for Uterine Transplant in India*, 23 QUINNIPIAC HEALTH L. J. 49 (2020).

⁷ Supra 3

⁸ Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429 (2009)

⁹ J.N POSTGATE, *EARLY MESOPOTAMIA SOCIETY AND ECONOMY AT THE DAWN OF HISTORY*, 105 (Routledge, 1992)

¹⁰ Supra 8

¹¹ Jaya Reddy, *Indian Surrogacy: Ending Cheap Labor*, 18 Santa Clara J. Int'l L. 92 (2020).

¹² The Surrogacy (Regulation) Bill, 2019, PRS LEGISLATIVE RESEARCH (Date Accessed Oct 15, 2020) <https://www.prsindia.org/billtrack/surrogacy-regulationbill2019>

(A) Introduction to the Concept of Surrogacy

The concept of Assisted Reproduction is not new to the world. Mythological and Historic references have shown the prevalence of surrogacy.¹³ Although the current forms of Assisted Reproduction have evolved greatly through the course of time, people often do not intend to know about it since this is still considered by many as matter of private concern and rather choose to not ‘broadcast’ it.¹⁴ Data collected and analysed by the World Health Organisation shows that Infertility has now turned into a global health issue where over 12% females¹⁵ and 7% males¹⁶ of the global population are affected by it. Still, it has remained a fairly less talked about subject. In this section of the research, the research will Introduce the topic of Assisted Reproduction, specifically surrogacy and discuss the relevance of it in India.

(B) History and Background of Surrogacy

Surrogacy as a concept has been expressed around the world through the course of history time and again. It is an important and life altering In Vitro Fertilisation practice which helps infertile parent(s) or individuals with a chance of parenthood.¹⁷ Although the new world concepts differ with the originally institution of Surrogacy, the concept still remains the same. As a first Instance, it is prominent to note in the old testament.¹⁸ It is said that Abraham’s wife, Sarah after losing all hopes of bearing a child, forced her maidservant Hagar to have intercourse with her husband and bear a child.¹⁹ Under the Babylonian law, a women, in case found to be infertile, had to divorce her husband, which was almost inevitable, until Surrogacy helped them have a child and sustain the marriage.²⁰ Other accords of history vividly show the instances where women from the lower strata were often forced to bear children of higher mistresses who were incapable of having a child by inseminating themselves with the sperm of their masters.²¹ After rigorous improvements and immense medical advancements, the first ever artificially inseminated child was born in Great Britain

¹³ Sonali Kusum, *Legal Glitches Facing Surrogacy Agreement in India*, 1 INDIAN J.L. & PUB. POL’Y 26 (2014)

¹⁴ Kelly Wallace, *Infertility: Why don’t more people talk about it?*, CABLE NEWS NETWORK (Date Accessed Oct 10, 2020) <https://edition.cnn.com/2015/04/09/living/feat-infertility-why-people-dont-talk-openly-about-it/index.html>

¹⁵ *How Many People Have Infertility*, RESOLVE (Date Accessed Oct 18, 2020)

¹⁶ Lotti F & Maggie M, *Ultrasound of male genital tract in relation to male reproductive health*, 21(1) HUMAN REPRODUCTION UPDATE 56 (2014)

¹⁷ Nayana Patel, Yuvraj Jadeja, Harsha Bhadarka, Molina Patel, Niket Patel and Nilofar Sodagar, *Insight to Different Aspects of Surrogacy Practices*, 11(3) J HUM REPROD SCI., 212 (2018).

¹⁸ Genesis 16, 1-6; 30 1-24)

¹⁹ Sharyn Roach Anleu, *“Surrogacy: For love but not for money”*, 6, GENDER AND SOCIETY, 30 (1992)

²⁰ J.N POSTGATE, *EARLY MESOPOTAMIA SOCIETY AND ECONOMY AT THE DAWN OF HISTORY*, 105 (Routledge, 1992)

²¹ Ayan Guha & Neha Chauhan, *Regulation of Commercial Surrogacy in India: Some Suggestions*, 6 INDIAN J.L. & JUST. 92 (2015)

in the year 1978.²²

Not long after this, the Indian doctors were also able to artificially inseminate and successfully birth India's first and only the world's second baby in Calcutta in the year 1978 itself.²³ Although a great feat for the Indian masses as a whole, this opened up for more necessary and rather important commercial opportunities in India. Out of all the Assisted Reproductive Techniques available, India surprisingly too on to surrogacy very quickly.²⁴ Although there were no laws in India in relation to allowance of commercial surrogacy in India, but neither were there laws prohibiting it. The market took on so well that at an Instance India became one of the most famous hotspots from Commercial Surrogacy.²⁵ Highly Qualified internationally taught doctors, lucrative prices and higher quality of healthcare at lower price all made India one of the most favoured destination for Commercial Surrogacy in the World.²⁶ It was estimated that India had grown its commercial surrogacy market to a whopping \$2 Billion through needy couples wanting a economical option for child birth and surrogacy.²⁷ But with boon there is a definite, maybe not a obvious bane.

Although the commercial market opened up a new financial dimension for India, the greed for higher profitability had already taken over. While the foreign nationals who visited India gave in for the 'higher standard of healthcare services'²⁸ in India, the Indian surrogates were still treated with the least most dignity possible. Further, cases of statelessness and abandonment were also on rise.²⁹ There was no regulation to sought after the state of the surrogate mothers. A closer look at one of the surrogates signing contracts shows a host of issues at a prima facie level in the contract. For instance, the contract extended maximum comfort to the genetic parents, not only in terms of medical assurances, but also beyond them while the host or the surrogate mother has to limit herself in every manner way or form possible.³⁰ In a case reported in the year 2012, a one Premila Vaghela had died due to complexities arising out of her pregnancy.³¹ While the child she was carrying for an

²² Law Commission of India Report No. 228, 2009

²³ *Ibid.*

²⁴ *Supra* 20

²⁵ Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429 (2009)

²⁶ *Ibid.*

²⁷ Jaya Reddy, *Indian Surrogacy: Ending Cheap Labor*, 18 SANTA CLARA J. INT'L L. 92 (2020)

²⁸ *Supra* 24

²⁹ *Supra* 26

³⁰ Jessica Cussins, *Indian Surrogate Dies Amid Complications in Eighth Month of Pregnancy*, CENTER FOR GENETICS AND SOCIETY (Date Accessed Oct 16, 2020) <https://www.geneticsandsociety.org/biopolitical-times/indian-surrogate-dies-amid-complications-eighth-month-pregnancy>

³¹ *Ibid.*

American Couple survived, the survival of her own children is in jeopardy.³² Along with the fertility clinics cutting corners, even surrogate who contact their wombs went around the necessary requirements owing to financially unstable conditions.³³ In a case reported, a surrogate mother had died of complications from childbirth while carrying twins due to the fact that she withheld information with regards to her health from the contracting agency.³⁴

(C) Definitions and Process

There are two main contracting parties in a surrogacy agreement – the ‘surrogate’ and the ‘intending parents’.

The word ‘Surrogate’ origins its meaning from Latin. Its root is in the word ‘subrogare’ which means ‘appointed to act in the place of’.³⁵ This essentially means that a surrogate ‘acts as’ a mother carrying her own children.

The Intending Parent(s) or ‘commissioning parent(s)’³⁶ are the parents or the Individual who will raise the child after it is born.³⁷

Thus, in basic layman terms, an expecting parent(s), contracts, or appoints another party, called the surrogate, to carry their baby for gestation, conceived through various artificial methods under a contractual obligation to then rear it as their own after the birth is completed. S

Although the definition is quite expressive and understandable on its own, there still are a few questions from a legal standpoint which raise concern and need to be answered. In the definition, there is only the mention of parent(s). One concern that can be raised here is, is there any relation of the parent(s) sexual orientation for them being qualified as per definition to be an intending party.³⁸ Although this has been mentioned as a suggestion in the *Baby Manji Yamada’s*³⁹ case, it is yet to be ascertained if the legislature resonates with the idea.

When both the surrogate and contracting parties get into a legal contract, the process of surrogacy is initiated. A brief legal counselling is followed by the medical follow up procedures.⁴⁰ In the weeks leading up to the delivery, the medical expenses, living costs, etc.

³² *Ibid*

³³ Rachel Rebouche, *Contracting Pregnancy*, 105 IOWA L. REV. 1591 (2020)

³⁴ Durgesh Nadan, *Delhi: Surrogate hides health information, dies bearing twins*, TOI, October 1, 2019

³⁵ *Baby Manji Yamada v. UOI*, 13 SCC 518 (2008)

³⁶ *Supra* 17

³⁷ *Supra* 35

³⁸ Kimberly Mutcherson, *Building Queer Families and the Ethics of Gestational Surrogacy*, 54 U. RICH. L. REV. 901 (2020)

³⁹ *Supra* 35

⁴⁰ Shabeer Allh & Dr Asha Sundaram, *Commercialisation of Surrogacy in India & its Legal Context: A Critical Study with Regard to Baby Manji Yamada’s Case*, 120(5) INTL. J. OF PURE AND APPLIED

of the surrogate are borne by the commissioning parents, which may extend up to a period post-delivery as well, or on the basis of surrogacy agreement.⁴¹

There are four kinds of Surrogacies mentioned by the Hon'ble Supreme Court in Baby Manji Yamada's⁴² case, they are

1. TRADITIONAL SURROGACY/STRAIGHT METHOD – here, the child is the biological offspring of the surrogate mother but is conceived with the intention of relinquishing the child to be raised by another. This another person maybe the biological father who might raise the child with his spouse or anybody else. Here, fresh, or frozen sperm of the other partner can be used. Methods such as Intrauterine Insemination (IUI) or Intracervical Insemination (ICI) can be used.

2. GESTATIONAL SURROGACY/HOST METHOD – here, the child in the surrogate's womb has not resemblance or rather is not genetically related to the surrogate and in some cases even the commissioning parent(s). This is the case where the child is either born out of both sperm and egg donation or the donation of an embryo. The surrogate mother is called as the 'gestational carrier' since she carries the child only for the period of gestation and then relinquishes the child to the commissioning parent(s).

3. ALTRUISTIC SURROGACY – here, the surrogate or the gestational carrier enjoys no real benefit of carrying the child. The surrogates in this case are generally either close to the surrogate parents or are close family members.

4. COMMERCIAL SURROGACY – here, the commissioning parents approach a commercial establishment and pay for a woman to become a gestational carrier till the end of duration under a formal contract.

II. SURROGACY LEGISLATIONS IN INDIA – A CRITICAL ANALYSIS

With the development in fertility clinics across the country, the legislature was bound by the clock to come up with some form of legislation in order to protect the massive Industry and its subjects from various legal issues. There have been a certain number of milestones in the legislative side regarding surrogacy in India. But, since the main objective of the paper is to assert the implication and the choice of surrogacy suitable for India, it is necessary for the researcher to venture into the intricacies of Constitutional Law and understand the rights of an individual associated to marriage and having a child.

MATHEMATICS, 4137 (2018)

⁴¹ *Ibid*

⁴² *Supra* 35

(A) Constitution and the Fundamental Right to bear a Child

In the incredibly famous case of *Shafin Jahan v Ashokan K.M.*⁴³ the supreme court gave a series of arguments through with, the right to marriage by choice was established as an element of the Article 21 of the Indian Constitution. But it was back in the year 2006, when the Supreme Court came to the decision that there existed a 'right to marriage' within the deep reasons of Article 21 of the Constitution. Around the world it is quite clearly established that the right to marriage is a key component to personal liberty, association, and privacy.⁴⁴ Marriage as an institution is basic to every humans in terms of societal views and maintaining genetics and lineage.⁴⁵ The concept of a person's right to reproduction is relatively new to the national and international context and thus not a lot is spoken or researched about it.⁴⁶

In the case of *Lata Singh v Union of India*⁴⁷, the apex court made an incredible observation relating the rights associated with the right to life under the Indian Constitution. Justice Katju observed that within India, once a person reaches the age of majority, he/she can marry with their free will to anybody since it is their democratic right to do so, subject to reasonable restrictions as mentioned under the various family laws in India.⁴⁸ Further in the case of *Shafin Jahan*⁴⁹ the court held that the individual, apart from the having the right to marry, also inherently possesses the right to marry 'with choice'.⁵⁰

Since it is duly established by the court that there is a 'right to marriage' under the Indian Constitution, there exists an argument not pondered upon much, is there an inherent right to reproduction and progeny?

To answer this question, let us consider the Hindu Marriage Act⁵¹ and the Special Marriage Act⁵². Under specific section under these legislations, there are provisions for voidability of marriages. Now, if marriage is recognised as a fundamental right, the fulfilment of all its necessities is also a fundamental right.

Under the Hindu Marriage Act⁵³, under section 12⁵⁴ under the chapter of Nullity and

⁴³ *Shafin Jahan v Ashokan*, AIR 2008 SC 357

⁴⁴ *14 Supreme Court Cases: Marriage is a Fundamental Right*, AMERICAN FOUNDATION FOR EQUAL RIGHTS (Date Accessed Oct 12, 2020) <http://afer.org/blog/14-supreme-court-cases-marriage-is-a-fundamental-right/>

⁴⁵ *Supra* 40

⁴⁶ *Ibid*

⁴⁷ *Lata Singh v State of UP & Anr.*, 5 SCC 475, (2006)

⁴⁸ *Ibid*

⁴⁹ *Supra* 43

⁵⁰ *Supra* 44

⁵¹ Hindu Marriage Act, 1955

⁵² The Special Marriage Act, 1954

⁵³ *Supra* 51

Voidability, the conditions for a voidable marriage are mentioned. Voidability here would mean that the parties, in case of fulfilment of any provision mentioned under this section, can be nullified at the option of the aggrieved party. Section 12(1)(a) reads,

*“that the marriage has not been consummated owing to the impotence of the respondent”*⁵⁵

It is essential to note that here, apart from consummation and sexual satisfaction, an intercourse also signifies insemination and birth of progeny. Thus, in the essentials of marriage, the capability of having a progeny can also be considered to be an associated right under the right to marriage. Similarly, under specific provisions of the Special Marriage Act, the same can be said for special marriages.

To further supplement the validity of the argument placed, the UDHR (Universal Declaration of Human Rights) provides that men/women after attaining the age of majority will have the right to marry and found family.⁵⁶ Further in the case of *B.K Parthasarathi v Government of Andhra Pradesh*⁵⁷, the High Court of Andhra Pradesh upheld the right of a person towards reproductive autonomy and in the case of *Javed v State of Haryana*⁵⁸, the Supreme Court held that the right to procreate and further one's lineage is a basic human right.⁵⁹

The researcher, in putting forth this argument, aims at getting more research done in this particular area to better relieve this limitation to the research. Since there is only an extremely limited research done in this respect the researcher provides these arguments as rather ideas for future exploration of the topic.

(B) Mainstream Legislations Relating to Surrogacy in India

There were no legislations in India in the initial days that banned surrogacy or restricted surrogacy in any way. Thus, commercial surrogacy, of all Assisted Reproductive Methods possible, took on the Indian society and Economy by storm.⁶⁰ But with time, the need and demand for a proper legislation for controlling the trade of commercial surrogacy in India increased. The law relating to Surrogacy in India has remained highly silent, in that there is no legislation to regulate any form of surrogacy.⁶¹ As a first step towards the assistance of an regulation, the Indian Council of Medical Research (ICMR) proposed a narrow guideline for

⁵⁴ Supra 51, see § 12

⁵⁵ Supra 51, see § 12(1)(a)

⁵⁶ Universal Declaration of Human Rights, 1948

⁵⁷ B.K Parthasarathi v. Government of Andhra Pradesh, AIR 2000 A. P. 156

⁵⁸ Javed v. State of Haryana, 8 SCC 369 (2003)

⁵⁹ 228th Law Commission of India Report.

⁶⁰ Supra 20

⁶¹ Izabela Jargilo, *Regulating the Trade of Commercial Surrogacy in India*, 15 J. INT'L BUS. & L. 337 (2016)

ART clinics to operate one.

Legalisation of Commercial Surrogacy, 2002 -

In the year 2002, India formally legalised Surrogacy in all forms.⁶² It was in the same year that the Indian Council of Medical Research put forth their guidelines for surrogacy arrangements across fertility clinics in India.⁶³ This regulation which legalised commercial surrogacy, in a way allowed for poverty stricken women to get out of their economical limitations. Although the legalisation didn't follow up with the ICMR guideline for the next 3 years, the ICMR had already placed their draft guidelines before the Parliament in the year 2002 itself. Without a specific guideline protecting women contracting their wombs, the industry soon turned to the worse with it being termed as 'reproductive slavery in disguise'.⁶⁴

ICMR Guidelines, 2005

Finally, in the year 2005, after a three year wait and review period, the Parliament gave a nod to the formal guidelines for 'Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics in India'⁶⁵ which was implemented across ART clinics in India.

The guidelines firstly formalised the Surrogacy institutions. Under the guidelines, all clinics would have to get accreditation from that particular states Accreditation Authority. Medical confidentiality as under the Hippocratic oath was also to be maintained in fertility clinics.⁶⁶ Further it was mandated that the clinic participating in Commercial surrogacy could not be a part of any donor programs or in any gestational surrogacy agreement.⁶⁷

The guidelines mandated a surrogate to disclose full medical history, irrespective of its relation to reproductive system and further mandated the usage of the surrogate mothers name in all medical documents, which would help in case of maternal death.⁶⁸ Further, all costs during the gestational period and post-delivery, up to natal care had to be borne by the commissioning parent(s).⁶⁹ Further, the guidelines mandated that the birth certificate be issued under the name of the genetic parent only.⁷⁰ Further, it was mandated that the

⁶² Supra 27

⁶³ *Ibid*

⁶⁴ *Ibid*

⁶⁵ INDIAN COUNCIL OF MED. RESEARCH, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA, Ministry of Health, Family and Welfare, Government of India. (2005)

⁶⁶ Y. F. Jayakumar, *Socio-Legal Aspects of Surrogacy in India*, 1 INDIAN J.L. & JUST. 86 (2010)

⁶⁷ *Ibid*

⁶⁸ Supra 65

⁶⁹ *Ibid*

⁷⁰ *Ibid*

Surrogate and in case there is, the third party egg donor, shall in writing, relinquish all right to the surrogate child.⁷¹ The age of donation and qualification as a surrogate was set as in between 18 and 35 years and that of the sperm donor as in between 21 and 45 years.⁷² All advertising with regards to ART clinics, their services and package pricing was also prohibited.⁷³

Although the guidelines helped to formalise the process of surrogacy, they are still guidelines and would never suffice the purpose of law that is enforceable in its very nature. Even in these guidelines, there are a few noteworthy considerations that the guidelines still left out. Some of the important ones are⁷⁴-

1. The sourcing of surrogate was rested with the sperm bank and the donors. This extremely narrowed down the possibilities. In this case, independent negotiations might show concerns such as underpayment.
2. The whole service is determined as a 'hetero-sexual' process with no mention of either single parent or of homosexual parents. Even in heterosexual couples, the guidelines clearly mentioned that only those couples who have trouble conceiving can approach surrogacy.
3. The guidelines limit the surrogate to act as a surrogate only three time through her lifetime. This does not necessarily mean three successful pregnancies.

Proposed ART Regulation Bill, 2008 -

Carrying forwards the purpose of the guidelines laid by ICMR in their regulatory guidelines, the Government of India proposed an ART Regulation Bill in the year 2008 which would resolve all issues relating to the operation and functioning of Fertility clinics across India. As of 2020, this bill has been passed by the Union Cabinet and awaits the Presidential Assent for enforcement.⁷⁵

In addition to all the guidelines mentioned in the original guidelines issued by the ICMR, there were a few elements and changes made in the proposed bill.

Firstly, the age for a woman to be a suitable surrogate has been changed and now it can be between 21 and 45 and it was specified that a woman could be a surrogate for up to three

⁷¹ *Ibid*

⁷² *Ibid*

⁷³ *Ibid*

⁷⁴ *Supra* 27

⁷⁵ *ART of life: On Assisted Reproductive Technology Regulation Bill*, THE HINDU (Date Accessed Oct 14, 2020) <https://www.thehindu.com/opinion/editorial/art-of-life-on-assisted-reproductive-technology-regulation-bill/article30873613.ece>

'live births'.⁷⁶ Further an important issue regarding abandonment of child was rectified. It mandated the parents to accept the child even if the child is abnormal or is born with any form of anomaly.⁷⁷ Further to tackle the issue of abandonment arising out of statelessness, the bill mandated for the foreign commissioning parents to show valid proof that they would be able to take custody of the child after birth and were further mandated to appoint a local guardian to assume the legal responsibility of the child post birth.⁷⁸ Lastly, the child born out of this arrangement was given a legitimate status even in the event of divorce or separation of the parents.⁷⁹

Surrogacy (Regulation) Bill (2016/2019/2020) -

The Law Commission of India, in its 228th report, published in the year 2008, laid out the need for a rock-solid legislation related to ART as well for Surrogacy in India. Some salient points mentioned in the report were⁸⁰ –

- A surrogacy should be back by a proper contract including all the necessary requirements in terms of monetary compensation, consent, etc.
- In case the commissioning parent(s) die in any unlikely circumstance or they separate and do not measure responsibility of the child, alternate financial arrangements for the child has to be taken care of.
- To maintain genetic relationship between the commissioning parents and the child, one of the parents has to be a donor if the situations allow.
- The report requested the government to directly imply the commissioning parents as the parents of the surrogate child without the need for any kind of declaration. Further, the birth certificate of the child should bear the name of the commissioning parents.
- Sex selective surrogacy should be completely banned and in case of an abortion, it has to be done in accordance with the Medical Termination of Pregnancy Act, 1971⁸¹

In accordance with the suggestions made by the law commission report, the government came up with the first draft of the Surrogacy Regulation Bill in the year 2016. The bill was placed before the parliament, but it eventually lapsed since the Parliament was adjourned *sine*

⁷⁶ Supra 66

⁷⁷ *Ibid*

⁷⁸ *Ibid*

⁷⁹ *Ibid*

⁸⁰ Supra 59

⁸¹ Dr.Lakshmi T and Rajeshkumar S., *In Vitro Evaluation of Anticariogenic Activity of Acacia Catechu against Selected Microbes*, 3(3) INTL R. J. OF MULTIDISCIPLINARY SCIENCE & TECHNOLOGY 20 (2018)

die.⁸²

The draft was again reintroduced as the Surrogacy (Regulation) Bill in the year 2019. The draft was referred to a select cabinet committee for review by the lower house of the Indian Parliament (*Lok Sabha*) in 2019 itself. Currently, at the time of writing this paper, the 2020 bill has been passed by the Parliament of India. It further awaits the acceptance of the upper house of the Indian Parliament (*Rajya Sabha*) followed by the Presidential Acceptance before becoming a full-fledged law. Some of the elements of the bill are⁸³,

- The bill completely prohibits commercial surrogacy in any form and promotes Altruistic Surrogacy.
- The bill allows only Indian couples with medically proven Infertility to opt for Surrogacy. Further specific eligibility criteria are mentioned for Couples to qualify for Surrogacy.
- Further qualifications of a Surrogate mother are also enlisted as,
 1. Close relative of the Intending parents,
 2. Married and having children her own,
 3. 25 to 35 years age,
 4. Has never been a surrogate before,
 5. Medically both physically and mentally fit to bear a child.
- Setting up of apt authorities at central and state level,
- Guidelines for abortion and parenthood of the child,
- Specific offences and penalties w.r.t to surrogacy.

Ban on International Surrogacy -

Owing to growing complexities in the commercial surrogacy market, the government in a two-step implementation banned foreign nationals from opting commercial surrogacy in India. In the year 2013, India banned foreign homosexual couples and single parents from opting commercial surrogacy in India.⁸⁴ Further in an effort to curb 'Fertility Tourism' and

⁸² Ananya Srivastava, *Explained: Citizenship (Amendment) Bill, triple talaq bill among 46 draft laws set to lapse as Parliament adjourns sine die*, FIRSTPOST (Date Accessed Oct 15, 2020) <https://www.firstpost.com/india/explained-citizenship-amendment-bill-triple-talaq-bill-among-46-draft-laws-set-to-lapse-as-parliament-adjourns-sine-die-6082661.html>

⁸³ Pranav Rao, *Analysis of Surrogacy Laws in India*, 4(5) INTL J. OF ADVANCE RESEARCH, IDEAS AND INNOVATIONS IN TECH., 335 (2018)

⁸⁴ Jessica Geen, *India bans gay couples from surrogacy*, PINKNEWS (Date Accessed Oct 15 2020)

the effects arising out of it, the Government laid a complete ban on International Surrogacy for foreign intending couples in India.⁸⁵

III. INDIA AND SURROGACY: THE WAY FORWARD

In the research following up to this phase, it is well established that since the very beginning of Assisted Reproduction in India, commercial surrogacy really grew on the prevailed over other, maybe more prominent forms of ART. In the current draft of the regulation act, prescription to completely curd commercial surrogacy is being made.⁸⁶ In the advent scenario that a complete ban is carried forward, India will be forced to resort to the prescribed format of surrogacy, that would be Altruistic.⁸⁷ Now that the options for the country are narrowed down to two major categories, it becomes imperative to establish which method is the most benefiting to the flourishing land that India is. But, before asserting the applicability of a form of surrogacy, it is important that it is first established that Surrogacy is the better from of ART of all the options available.

1. SURROGACY

Both Sides of the Argument -

The most important and striking feature when it comes to surrogacy is the maintenance of genetic relation of the commissioning parents with the surrogate child.⁸⁸ In other methods of parenthood like adoption, there is no genetic link between the child and the parents. In the case of surrogacy, since either a parent or both the parents can be an active donor, the genetics are carried forward and a successful progeny is created with strong genetic resemblance. Further surrogacy arrangements are often said to be a process in which “*the barren get a baby, and a broke get the bonus*”⁸⁹. Further, surrogacy give the essential reproductive liberty to a person.⁹⁰ The law commission in its 228th report, through research found that a sect of women also exist who, despite wanting to becoming a mother, don’t want to go through the emotional and physical pain associated with childbirth. In case of altruistic surrogacy, the ultimate gift of giving a person their child is an argument sufficient for most

<https://www.pinknews.co.uk/2011/02/25/india-bans-gay-couples-from-surrogacy/>

⁸⁵ Supra 27

⁸⁶ Manasi Kumar & Isha Saluja, *Relocating Fertility: Charting the Course for Uterine Transplant in India*, 23 QUINNIPIAC HEALTH L. J. 49 (2020).

⁸⁷ *The Surrogacy (Regulation) Bill, 2019*, PRS LEGISLATIVE RESEARCH (Date Accessed Oct 15, 2020) <https://www.prsindia.org/billtrack/surrogacy-regulationbill2019>

⁸⁸ Supra 40

⁸⁹ Supra 83

⁹⁰ Supra 40

people to give in and help their close ones.⁹¹ In more typical commercial arrangements, the surrogates often come from a place of poverty and economical neediness. For them, the economic benefits of surrogacy are extremely helpful to maintain a better form of life.⁹² Ultimately, it helps single parents and homosexual couples who want their children to be genetically related to them.

But, with all the benefits possible, it also carries a set of negatives directly associated with the concept of surrogacy itself. After all, it is another woman that carries a baby for the intending parents. Insecurities and doubts in later parts of the pregnancy might let the parents to reconsider their decisions. Further, the surrogate herself has to go through a boatload of trauma including mental and physical stress, economic stress etc. which might overall affect the baby in an irreversible way.⁹³ Further, anomalies in contract might lead to the surrogate being exploited.⁹⁴ Surrogacy is considered to be one of the more 'socially complicated' ART methods.⁹⁵ Often times, in commercial arrangements it becomes a social shame for a surrogate to declare publicly about her pregnancy which her society might accept or not.⁹⁶ Often times in Altruistic arrangements, it might become a questionable arrangement for the society.⁹⁷

Although, there are both boons and banes associated to surrogacy, the research after careful and thorough research deems it fit that surrogacy is the viable option for India. If the social stigma associated to some specific arrangements can be looked beyond, then the preservation of autonomy and the genetic relation to the child are some very favourable contentions for continuance of Surrogacy.

2. COMMERCIAL SURROGACY

Commercial Surrogacy is a contractual arrangement where intending or commissioning parent get into a formal contract with a commercially established Institution to appoint a Surrogate to carry their child in exchange for monetary benefits.⁹⁸

India has been one of the best places for foreign couples who are looking for commercial surrogacy options that is before the government banned international surrogacy completely in

⁹¹ *Ibid.*

⁹² Johnson v. Calvert, 851 P.2d 776 (Cal. 1993)

⁹³ *Supra* 83

⁹⁴ Rachel Rebouche, *Contracting Pregnancy*, 105 IOWA L. REV. 1591 (2020)

⁹⁵ *Supra* 21

⁹⁶ *Ibid*

⁹⁷ *Ibid*

⁹⁸ *Supra* 35

the year 2015.⁹⁹ Prior to this, India's commercial surrogacy establishment was a rather profitable one. In the 2012, a study backed by the United Nations found that India accounted for \$400 Million in the Commercial surrogacy establishment.¹⁰⁰ For some people on the positive side of commercial surrogacy, the abject economical value for a poverty struck society outweighs most arguments made against the commercial structure.¹⁰¹ In a series of interviews conducted by Amrita Singh, it was noted that most women who participate in becoming surrogate mothers, have their husbands working in either informal sectors, or in low paying formal jobs.¹⁰² In some instances, husbands of these surrogate women were not employed at all and all the financial burden of the family laid in the hands of the wife.¹⁰³ The supreme court of the United States, while hearing the case of *Johnson v Calvert*¹⁰⁴ made an observation with regards to the economic necessity of women to engage in commercial surrogacy –

*"Women who agree to become surrogates for economic reasons don't do it for fun. Economic necessity is a reality for many women who become surrogate mothers and this economic reason does not make the surrogacy arrangements indecent or undignified."*¹⁰⁵

The commodification of any kind anywhere leads to a plethora of negatives which are hard to let go of.¹⁰⁶ The same is the instance in Commercial Surrogacy. For instance, although women enter into the arrangement out of dire necessity, they often do not contemplate the consequences of the pregnancy which would directly affect their mental, physical, and emotional wellbeing. Further, commercial surrogacy promotes a market mentality in that the babies are often times viewed as a commodity for sale on the market.¹⁰⁷ Further, there might be limitations by contract which the surrogate might not be aware of due to which there might be legal complexities. It is imperative to understand the after becoming a surrogate mother there is no point of return, the surrogate has to live with it. Further Indian laws are still not evolved enough to deal with these changes in a modern setting. For instance, the case of maternity leave has been one of the more debated topics in case of surrogacy. In the case of

⁹⁹ *Ibid*

¹⁰⁰ *Supra* 21

¹⁰¹ *Ibid*

¹⁰² *Ibid*

¹⁰³ *Ibid*

¹⁰⁴ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)

¹⁰⁵ *Ibid*

¹⁰⁶ Stephen Clowney, *Does Commodification Corrupt? Lessons from Paintings and Prostitutes*, 50 SETON HALL L. REV. 1005 (2020).

¹⁰⁷ *Supra* 35

*K. Kalaiselvi v Chennai Port Trust*¹⁰⁸, it was held that even when a person decides to opt for surrogacy, maternity leave has to still be granted since the commissioning mother still has to execute the duties of new motherhood, even if she didn't have to go through the physical perils of childbirth.¹⁰⁹ The same has also been held by the Kerala and the Bombay High Court in other separate instances. Further, in lieu of commercial success and profit making, there might be instances of exploitation of surrogates.¹¹⁰ With the increase in commercialisation, there also is a persistent risk of marketisation of surrogate mothers where they might be asked to work for a lower payment.¹¹¹

Further there are a plethora of arguments that can be made against international commercial surrogacy, but the research passionately believes that since that practice has been completely banned and prohibited in India, the arguments do not the case against commercial surrogacy any stronger.

3. ALTRUISTIC SURROGACY

Altruistic Surrogacy is an social arrangement where intending parents approach a close relative, friend or any person to carry their child, or rather become a gestational mother in exchange for no monetary consideration.¹¹²

It is a joy of life if one has a chance to give somebody the utmost joy of their lives – a child. In traditional altruistic arrangements, the surrogate mother is generally a close relative or a friend who willingly agrees to become the gestational mother to a child intended for the intending parents who in this care are closely related. This results in more familiarity between the surrogate and the intending parents.¹¹³ In an ideal setting, the concept of altruistic surrogacy can be parallel to the concept of organ donation.¹¹⁴ The parents in this case bear no monetary charges towards the surrogate mother although, the primary care and expenses of the surrogate mother has to be carried out by the intending parents themselves and since there is no middle man (in case of commercial arrangements the agencies), the costs are relatively open and straightforward.

There are not many negatives when it comes to Altruistic surrogacy apart from the societal

¹⁰⁸ *K. Kalaiselvi v Chennai Port Trust*, 13 SCC 518, (2008)

¹⁰⁹ *Supra* 34

¹¹⁰ Stephen Wilkinson, *The Exploitation argument against commercial surrogacy*, 17(2) *BIOETHICS J.* (2003)

¹¹¹ *Not for profit: the case against commercial surrogacy*, *THE CONVERSATION* (Date Accessed Oct 15, 2020) <https://theconversation.com/not-for-profit-the-case-against-commercial-surrogacy-18512>

¹¹² *Supra* 35

¹¹³ Pros and Cons of Altruistic Surrogacy, *CONCIEVEABILITIES*, (Date Accessed Oct 15, 2020) <https://www.conceiveabilities.com/about/blog/pros-and-cons-of-altruistic-surrogacy>

¹¹⁴ Anindita Majumdar, *What is altruistic surrogacy?*, *THE HINDU*, (Date Accessed Oct 15 2020) <https://www.thehindu.com/opinion/op-ed/what-is-altruistic-surrogacy/article25814445.ece>

concerns. In many cases, it has been noted that often times the society objects to certain surrogacy arrangements.¹¹⁵ There have been situations where mothers-in-law have agreed to carry a baby for their children. Here, although the parents have no objection to the arrangement, the society will rather see it in a bizarre manner.¹¹⁶ Further, the gestational carrier may have a family of her own which, in case of a pregnancy are unintended and might feel left out.¹¹⁷ Since the agreement here based solely on familiarity and trust, in situations of miscarriage there is no safety net for the parents or the surrogate.¹¹⁸ This results emotional trauma in both the surrogate and the intending parents. Although there are zilch hidden costs, a medical emergency may force the intending parents to shell out huge amounts for medical expenses, not to mention the physical pain the surrogate would have to go through.¹¹⁹

IV. CONCLUSION AND SUGGESTIONS

The research through thorough research of various literature, its analysis and then their cross reference with each other, deduces that both – commercial and altruistic surrogacy methods are required for India.

In the Indian context, both the forms of surrogacies are required. In the essence that a great amount of societal difference exists in India, the difference of opinion might forward certain individuals to certain decisions. Altruistic Surrogacy servers as a helpful option for those people who value privacy and want the utmost amount of Intimacy possible with their child.¹²⁰ In the growing culture of nuclear family¹²¹, not all families are as tightly knitted. People who might hesitate to approach their family or peers might choose to go for Commercial Surrogacy. Altruistic Surrogacy might prove to be a better option for families with economic constraints since the cost there can be negotiated and there are no significant charges otherwise. But in the case of Commercial Surrogacy, it provides a solid assurance to the expecting parent that under normal circumstances night might go wrong since the surrogate is in constant care of the commercial agencies.¹²²

Commercial Surrogacy has time and again been criticized for its commercial and commodity-

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ *Pros and Cons of Altruistic Surrogacy*, CONCEIVEABILITIES, (Date Accessed Oct 15, 2020) <https://www.conceiveabilities.com/about/blog/pros-and-cons-of-altruistic-surrogacy>

¹¹⁸ *Ibid*

¹¹⁹ *Ibid*

¹²⁰ *Supra* 113

¹²¹ Varun B Krishna, *How the Nature of Indian Families in Changing*, THE HINDU (Date Accessed oct 15, 2020)

¹²² *Supra* 9

based operation.¹²³ In the researcher's opinion, commercial surrogacy should be continued in India under more strict legislations with continuous monitoring of clinics and facilities. Through common analogy, it has been found that complete ban on commercial institutions might result in the formation of a black market of sorts since the ban will not curb the basic element associated with commercial surrogacy – Poverty.¹²⁴ Thus through stricter guidelines the commercial set can be opened. But the researcher is strongly against allowing foreign nationals to opt for Commercial Surrogacy in India. Abandonment, Statelessness and Lack of regulation have all lead to the market being not stable enough for the re-entry of foreign couples to India.¹²⁵

The research found one major drawback in the Surrogacy (Regulation) Bill, 2019. The bill, in its language, makes it clear as to who can opt for Surrogacy. It specifically states that only 'married couples, who have been married for a period of at least 5 years, who have proven Infertility can opt for surrogacy'.¹²⁶ At the very face of it, this violated Article 21 of the Indian Constitution.¹²⁷ This curtails a person's reproductive freedom and the right to parenthood.¹²⁸ Further, the bill doesn't recognise the rights of Single Parents to parenthood.¹²⁹ Although homosexual rights are yet to be brought forward in India, and steps are being taken in furtherance of the endeavour, laws should become more adaptive in their nature to substantiate their recognition and help in the Inclusion in the Society. The researcher passionately believes that this paper substantiates future research on the same and allied subjects to better implement Surrogacy.

¹²³ Supra 106

¹²⁴ Supra 104

¹²⁵ Supra 40

¹²⁶ Supra 87

¹²⁷ Supra 47

¹²⁸ Supra 58

¹²⁹ Supra 56