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AN EVOLUTION OF SURROGACY: TRADITIONAL TO MODERN

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### ABSTRACT

The Paper is centred on “A Critical evaluation of surrogacy from traditional to modern.” Which result in boon or curse to the society at large. After introducing the topic briefly, it clarifies the meaning and concept of Surrogacy. Thereafter, the paper has put forth various definitions of Surrogacy. It also discusses the two different kinds of surrogacy followed by the discussion of its historical background. The traditional way of surrogacy, how it came into practice and converted to modern IVF. The paper also mentions about the different religious approach about surrogacy in India. Thereafter, various social and ethical issues relating to surrogacy have been discussed. The Indian council of medical research guidelines in India regarding surrogacy has also been discussed. The paper thus concludes after putting forth the concluding observation followed by some suggestions and recommendations on surrogacy.

Keywords : Surrogacy, Gestational Surrogacy, Genetic Surrogacy, Total Surrogacy, Egg Donor, Surrogate Mother, Gestational Mother etc.

### INTRODUCTION

The history of surrogacy goes back to the beginning of time. But modern surrogacy began in the late 1970s. Infertility is not a new problem that only modern women face. Women have struggled to conceive in every moment, and one way to start a family has been with the help of a surrogate mother. The first documented case of surrogacy comes from the Bible. The genesis of surrogacy dates back to the beginning of time. The story of Abraham and Sarah mentions that Sarah was barren and asked her servant Hagar to give birth to a son for her and Abraham. Of course, Hagar was his slave. There have likely been many such surrogate pregnancies since biblical times, but it wasn't until the late 1970s that anything was recorded again. But modern surrogacy began in the late 1970s. Infertility is not a new problem that only a modern woman experiences. "Old-fashioned" cases of surrogacy were probably rarely mentioned and undocumented.

Surrogacy seems like a revolutionary idea, but it is true that legality and medical advancement are constantly changing. The fact is, surrogacy has been around for thousands of years. Ever since humans have been reproducing, surrogacy has been a useful alternative way of doing it. Traditional surrogacy has been practiced for centuries; Surrogacy has developed much more recently. In 1978 the first baby with In vitro fertilization (IVF) was born. The first baby from the egg donation was born just five years later.

The combination of these two innovative technologies led to the birth of surrogacy, which was first performed in 1985 and has grown exponentially in popularity over the past 20 years. In 1986, surrogacy encountered its first real legal problem when a traditional surrogate mother decided after the child was born that she wanted to keep the child. A two-year legal battle between the surrogate mother and the prospective parents ultimately resulted in the prospective parents retaining custody. As surrogacy continues to grow, this landmark case, as the Baby M case, has caused many legal problems in many countries in Ukraine; However,

# Saarth

## E-Journal of Research

ISSN NO: 2395-339X

prospective parents from countries where surrogacy is illegal can travel abroad to have a child legally through surrogacy.

In 1999, surrogacy took another step forward with the development of the Special Assisted Reproduction Program (SPAR), which allows an HIV-positive man to become the biological father of his children without the disease through the sperm test of the HIV and sperm wash transfer.

Infertility is not a new problem that only modern women experience. Women have had a hard time getting pregnant at all times and one way to start a family has been with the help of a surrogate mother.

The commercial surrogacy currently practiced in this modern era in which the surrogate mother is paid in excess of necessary medical expenses. Surrogacy is the union of science, society, services and the person who makes it a reality. Surrogacy results in a win-win situation for both the infertile couple and the surrogate mother. The infertile couple can fulfil their most important wish and the surrogate mother receives the appropriate reward.

The following misconceptions about a surrogate mother:

- She is not the genetic mother of the child she feeds and gives birth to.
- She is not the wife of the father of the child who gives birth.
- This is a scientific idea, a scientific process. No body contact is required.
- She is not a sociable woman.
- This is not an illegal practice.
- She decides whether she wants to become a surrogate mother or not.
- She has no claims or rights over the born child.
- She is not a woman who sells children.
- She is not responsible for the child (once the child is born).
- Surrogacy is a concept of mutually beneficial service provision

### MEANING AND CONCEPT OF SURROGACY

According to the Black's Law Dictionary, surrogacy means to bear and give birth to a child for another person. The New Encyclopaedia Britannica defines surrogacy as a practice whereby a woman gives birth to a child for a couple who cannot have children in the usual way. According to the Warnock Report (1984), surrogacy is the practice in which a woman carries a child for another with the intention that the child be delivered after birth.

There are two types of surrogacy practices in India:

- (i) Traditional / Natural / Partial surrogacy
- (ii) Gestational Surrogacy.

As in other countries, in India the following two types of surrogacy arrangements are practiced:

### TYPES OF SURROGACY

Surrogacy is a generally contractually bound social arrangement in which a woman known as a pregnant or surrogate mother agrees to use Assisted Reproductive Technologies (ART) to carry and deliver a child for another person or family. In international trade agreements for surrogacy, Surrogate mothers often receive payments.

# Saarth

## E-Journal of Research

ISSN NO: 2395-339X

There are two main types of surrogacy, Gestational surrogacy and Traditional surrogacy.

- Traditional or partial surrogacy

In traditional surrogacy, the surrogate mother is naturally or artificially impregnate, but the resulting child is genetically related to the surrogate mother. In India, gestational surrogacy is more common than traditional surrogacy and is considered less legally complex. Intended parents can apply for surrogacy if the pregnancy is medically impossible, the risks of pregnancy may pose an unacceptable threat to the mother's health, or if same-sex couples choose a method of reproduction. In traditional surrogacy, a surrogate mother is artificially fertilized by the intended father or an anonymous donor and carries the baby until birth. This means that the child is genetically related to both the surrogate mother who provides the egg and the father of choice or anonymous donor. In the case of surrogacy, an egg is harvested from the intended mother or an anonymous donor and fertilized with sperm from the intended father or anonymous donor. The fertilized egg or embryo is then transferred to a surrogate mother who will carry the baby to term. Thus, the child is genetically related to the woman who donated the egg and the intended father or sperm donor, but not to the surrogate mother.

Financial compensation may or may not be included in surrogacy arrangements. If the surrogate mother receives compensation in addition to reimbursement for medical and other reasonable expenses, the arrangement is also called commercial surrogacy; it is often called altruistic surrogacy.

- Gestational Surrogacy or Total surrogacy

A gestational carrier also called a Gestational surrogate is an arrangement whereby a woman carries and gives birth to a child for another couple or another person (future parents). When using a gestation carrier, the eggs used to produce the embryos do not come from the carrier. Because eggs are collected from one woman and implanted in another, this technique requires the use of in vitro fertilization (IVF). In IVF, the eggs are fertilized in the laboratory and a limited number of embryos are transferred to the user's uterus.

[1] In surrogacy, pregnancy is the result of the transfer of an embryo created by in vitro fertilization (IVF) so that the resulting child is not genetically related to the surrogate mother.

[2] Gestational surrogate mothers are also called carriers of the pregnancy for the child. The intended partner must bear the cost.

### **RELIGIOUS APPROACH OF SURROGACY IN INDIA**

- Surrogacy in Hindu religion:

In India, surrogacy can be pursued in ancient civilization. According to Mahabharata, Gandhari, the wife of King Dhritarashtra, became pregnant, but the pregnancy lasted for almost two years, after which she gave birth to a mass (mole). Lord Vyasa discovered that the mass contained 101 cells that were normal. These cells were placed in a nutrient medium and cultured in vitro to full maturity. Of these, 100 became male children (Duryodhana, Duhshasana and other Kauravas) and one as a girl named (Duhsheela). Hindu mythology offers many examples of how Sage Bharadwaj gave birth to Drona, who later became the

# Saarth

## E-Journal of Research

ISSN NO: 2395-339X

teacher of Pandavas and Kauravas. The story of the birth of Drishtadyumna and Draupadi is even more interesting and reflects the supernatural powers of the great Rishis. King Draupada was hostile to Dronacharya and wanted a son strong enough to kill Drona. Rishi gave him medicine and, after collecting his semen, he processed it and suggested that his wife be given AIH, who nevertheless refused. Then the rishi put the seed in a yajnakunda from which Dhrishtadyumna and Draupadi were born. While the above are cited as examples of IVF and parthenogenesis in the Hindu faith, there is another story related to embryo transfer. This referred to Devaki's seventh pregnancy, the embryo was transferred to the uterus of Rohini, Vasudev's first wife, at the will of the Lord to prevent the baby from being killed by the baby Kamsa of surrogacy in BhagvataPurana, where the embryo of the Devaki's womb was transferred to Yogmaya's womb, who eventually gave birth to the child.

- Surrogacy in Islam

Surrogacy is not allowed as many evils result from this procedure. Islam considers it illegal and immoral to give a woman the sperm of a man other than her husband. It will be haram (forbidden) to form the embryo by fusing the ovum of a woman with the sperm of a man other than her husband. It is also not allowed to implant a woman's sperm and / or an embryo in another woman's uterus.

The uterus is exclusively for the husband who is married to this woman under a valid marriage contract, and no one else has the right to use it for a pregnancy abroad. If the woman who rents her womb is not married to that man, then she leaves her private parts and her womb to a man who is strange to her; she is not allowed to him and he is not allowed to her. While this is not complete zinaa (adultery), it is definitely haram because it allows a man who is a stranger to her (that is, who is not married to her) to plant his seed on her lap. ”

Surrogacy is prohibited in Islam.

- Surrogacy among Christians

Mention of surrogacy in the form of regulations can be found in the famous code of Hammurabi. This dates back to 1800 BC. Even in the Hebrew Bible, surrogate and surrogacy are mentioned quite frequently. In Genesis chapter 16, Sarah and Abraham suffered as a childless couple. Sarah is sterile, but wants to be a mother. In this way he acquires the service of his servant Hagar, who allows Abraham to impregnate her and Sarah gives birth to a son. According to Jewish law, the child's parents are the man who gives the sperm and the woman who gives birth to the child. More recently, Jewish religious institutions have only accepted surrogacy if it involves full surrogacy during pregnancy, in which the gametes of both intended parents are included and fertilization occurs through In vitro fertilization.

Jewish law allows surrogacy if it involves full surrogacy during pregnancy. Also, gametes from both intended parents should be included and in vitro fertilization should be the mode of fertilization.

The Catholic Church declares immoral except husband and wife when they participate in the birth of a child (donation of sperm or eggs, surrogacy).

# Saarth

## E-Journal of Research

ISSN NO: 2395-339X

### **SOCIAL AND ETHICAL ISSUES RELATING TO SURROGACY**

At a glance, surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long-desired biologically related baby and the country earns foreign currency, but the real picture reveals the bitter truth. Due to lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. There is no transparency in the whole system, and the chance of getting involved in legal problems is there due to unpredictable regulations governing surrogacy in India.

ART clinics in India, these guidelines are repeatedly violated. Frustration of cross border childless couples is easily understandable who not only have to cope up with language barrier, but sometimes have to fight a long legal battle to get their child. Even if everything goes well, they have to stay in India for 2-3 months for completion of formalities after the birth of baby. The cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage, and rights of a child. There are occasions where children are denied nationality of the country of intended parents and this results in either a long legal battle like in case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage or have a bleak future in orphanage for the child. There are incidences where the child given to couple after surrogacy is not genetically related to them and in turn, is disowned by the intended parent and has to spend his life in an orphanage.

If we look upon the problem of surrogate mothers, things are even worse and unethical. The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right on decision regarding their own body and life. In India, there is no provision of psychological screening or legal counselling, which is mandatory in USA. After recruitment by commercial agencies, these women are shifted into hostels for the whole duration of pregnancy on the pretext of taking antenatal care. The real motive is to guard them and to avoid any social stigma of being outcast by their community. These women spend the whole tenure of pregnancy worrying about their household and children. They are allowed to go out only for antenatal visits and are allowed to meet their family only on Sundays. The worst part is that in case of unfavourable outcome of pregnancy, they are unlikely to be paid, and there is no provision of insurance or post-pregnancy medical and psychiatric support for them. Rich career women who do not want to take the trouble of carrying their own pregnancy are resorting to hiring surrogate mothers. There are a number of moral and ethical issues regarding surrogacy, which has become more of a commercial racket, and there is an urgent need for framing and implementation of laws for the parents and the surrogate mother.

### **INDIAN COUNCIL OF MEDICAL RESEARCH GUIDELINES (ICMR)**

A child born by surrogacy must be adopted by genetic (biological) parents unless fingerprints can be made by means of genes (DNA) (your records taken and care in the clinic) that the child belongs to them.

- Normally, assisted conception surrogacy should only be considered for patients for whom it would be physically or medically impossible / undesirable to have a baby. Surrogate

# Saarth

## E-Journal of Research

ISSN NO: 2395-339X

mother payments must cover all actual costs related to the pregnancy. Evidence of the financial surrogacy agreement must be available. The ART centre should not participate in this monetary aspect.

- The ART clinic should not advertise surrogacy. The responsibility for finding a surrogate mother, through advertising or otherwise, should rest with the partner or a sperm bank.

- A surrogate mother must not be over 45 years of age. Before accepting a woman as a potential surrogate mother for a particular couple's child, the ART clinic must ensure (and record) that the woman meets all verifiable criteria for a successful full-length pregnancy.

- A relative, a known person or a person unknown to the couple can act as a surrogate mother for the couple. In the case of a surrogate relative, the relative must be of the same generation as the women who want the surrogate.

- An expectant surrogate mother should be tested for HIV shortly before embryo transfer and be shown to be seronegative for this virus. You must also provide written certification that (a) you have not received any intravenous medication with a shared syringe, (b) you have not undergone a blood transfusion; and (c) she and her husband (to the best of their knowledge) have not had an extramarital affair in the past six months. (This is to ensure that the person does not show symptoms of HIV infection during surrogacy.) The prospective surrogate must also declare that she will not use any intravenous medications or undergo blood transfusions, with the exception of blood certified by a blood bank.

- No woman can act as a substitute more than three times in her life.

### **ASSISTED REPRODUCTIVE TECHNOLOGY (ART)**

In vitro fertilization is the technique of letting fertilization of the male and female gametes (sperm and egg) occur outside the female body.

Techniques usually used in in vitro fertilization include:

- Transvaginal ovum retrieval (OVR) is the process whereby a small needle is inserted through the back of the vagina and guided via ultrasound into the ovarian follicles to collect the fluid that contains the eggs.

- Embryo transfer is the step in the process whereby one or several embryos are placed into the uterus of the female with the intent to establish a pregnancy.

On 25 July 1978, Louise Brown was born; this was the first successful birth of a child after IVF treatment. The procedure took place at Dr Kershaw's Cottage Hospital (now Dr Kershaw's Hospice) in Royton, Oldham, England. Patrick Steptoe (gynaecologist) and Robert Edwards (physiologist) worked together to develop the IVF technique. Steptoe described a new method of egg extraction and Edwards were carrying out a way to fertilise eggs in the

# Saarth

## E-Journal of Research

**ISSN NO: 2395-339X**

lab. Robert G. Edwards was awarded the Nobel Prize in Physiology or Medicine in 2010, but not Steptoe because the Nobel Prize is not awarded posthumously.

The first successful birth by ICSI (Intracytoplasmic sperm injection) took place on 14 January 1992.

The Assisted Reproductive Technology (Regulation) Bill, 2020 was introduced in Lok Sabha on September 14, 2020. The Bill seeks to provide for the regulation of Assisted Reproductive Technology services in the country.

The Bill defines ART to include all techniques that seek to obtain a pregnancy by handling the sperm or the oocyte (immature egg cell) outside the human body and transferring the gamete or the embryo into the reproductive system of a woman. Examples of ART services include gamete (sperm or oocyte) donation, in-vitro-fertilisation (fertilising an egg in the lab), and gestational surrogacy (the child is not biologically related to surrogate mother). ART services will be provided through: (i) ART clinics, which offer ART related treatments and procedures, and (ii) ART banks, which store and supply gametes.

### **SURROGACY REGULATION BILL**

The Surrogacy (Regulation) Bill, 2020 (Surrogacy Bill) is an ethical, moral and social piece of legislation which protects both exploitation of the surrogate mother and the rights of a child born through surrogacy. One of the Bill's most noticeable features is that it has continued the ban on commercial surrogacy.

The Bill predominantly proposes to allow/limit altruistic ethical surrogacy to intending infertile Indian married couples only between the ages of 23-50 for women, and 26-55 for men. Couples should be citizens of India, or non-resident Indians, persons of Indian origin or overseas citizens of India. There are, however caveats for a couple of Indian origin opting for surrogacy arrangements. They cannot have a surviving child, either biological or adopted, except when they have a child with a mental or physical disability, or who suffers from a life-threatening disorder with no permanent cure. This unfortunate position must be confirmed by the appropriate authority with a due medical certificate from a District Medical Board.

These developments come amidst a growing trend of the Supreme Court broadening the scope of 'liberty' under Article 21 to include the right to make reproductive choices. By banning commercial surrogacy, the Bill does not take into account the intersectional aspects of how the law would impact women's right to their bodies. The altruistic model expects a woman to go through the physical and emotional tolls of surrogacy free of cost and only out of 'compassion'. Such an expectation is paternalistic, unrealistic, and patriarchal in its approach. Its effect is the denial of a legitimate source of income to surrogates. This in turn severely limits the number of women willing to go through surrogacy, and indirectly denies intending parents the opportunity to avail of it.

The proposed Bill also continues to deny this opportunity to LGBTQ+ persons, live-in couples, and single parents. Even those included within its ambit are required to have a 'certificate of essentiality' stating that it is biologically impossible for the person(s) to have a child in any other way. It does not consider other medical conditions which even though do not render women infertile, make the pregnancy riskier and more difficult.

# Saarth

## E-Journal of Research

ISSN NO: 2395-339X

### CONCLUSION

It seems ironic that people are moving into surrogacy when nearly 12 million Indian children are orphaned. Receiving a child in India is a complicated and time-consuming process for childless couples who wish to create a home for these children. Even 60 years of independence has yet to introduce a comprehensive adoption law that applies to all of its citizens, regardless of religion or the country in which they live, such as Non-Resident Indians (NRIs), people of Indian descent in India (PIO) or overseas citizens of India (OIC). Therefore, they must resort to the options of IVF or surrogacy. The Guardian and Wards Act of 1890 authorized guardianship but not adoption. The Hindu Adoption and Maintenance Act of 1956 do not allow non-Indians to adopt Hindus, and post-adoption immigration requirements are fraught with obstacles.

The major debate around surrogacy is the conflicting interests of its different stakeholders. On one hand, is the state's duty to prevent exploitation of the surrogate and to protect the interests of the to-be-born child. On the other hand, is the right of women to make their own reproductive choices and the right of persons to parenthood. India's regulation of surrogacy has struggled to find a balance between these conflicting interests.

The adoption process must be reviewed and simplified for everyone. This will reduce the rate of surrogacy. Legislation should be designed and implemented to cover grey areas and protect the rights of women and children. Commercial surrogacy should be regulated and laws should be made keeping into mind the basic human rights of every citizen.

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