UNIT 13 SURROGACY

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13.1 INTRODUCTION

You may have heard the word 'surrogacy' in T.V. programmes or read about it in newspapers that certain Hindi film actors had children through surrogacy. Let us understand what surrogacy means, and familiarize ourselves with some of the terms associated with it. The word 'surrogate' is derived from the Latin word 'subrogare', which means 'appointed to act in the place of', or, in other words a substitute. In simple terms, a surrogate woman is one who agrees to carry a pregnancy to term for a couple or an individual, in case it is not possible for the couple or individual to do so themselves. Although surrogacy can be done through different techniques/technologies, it in itself is not a procedure, but an arrangement. Generally, this arrangement is placed under the umbrella term of Assisted Reproductive Technologies (ARTs), which you have read about in the previous unit on 'Reproductive Technology'. The surrogacy arrangement involves the use of these technologies and procedures. In this unit, we are going to discuss various issues related to surrogacy like the growing commercialization of surrogacy, the debates, and the status of surrogacy regulation in India.

In this unit, we are going to discuss various issues related to commercial surrogacy and the status of regulation in India.

13.2 LEARNING OUTCOMES

After going through the units, you will be able to:

- Understand the meaning and types of surrogacy arrangements;
- Familiarize yourself with the political economy of surrogacy arrangements;
- Critically analyze surrogacy within feminist thought and action as a form of sexual and reproductive labour; and
- Learn about some of the legal complexities and regulatory challenges that emerge from surrogacy arrangements, through case studies.

13.3 SURROGACY: MEANING AND TYPES

The arrangement of surrogacy can be defined on the basis of whether the child is born using the ovum (egg) of the surrogate woman, or of the intended mother, or of the egg donor.

1. **Genetic Surrogacy** or **Traditional Surrogacy** is an arrangement when the surrogate provides the egg and carries the pregnancy. This is done through the process of Artificial Insemination (AI) or Intra Uterine Insemination (IUI). These procedures entail transferring semen/ sperm (whether commissioning parent's or donor's) into the surrogate's reproductive system and the process of fertilization happens within her body. Since the genetic material (egg) of the surrogate is being transferred, this kind of surrogacy is termed as genetic surrogacy.

2. **Gestational Surrogacy** is when the surrogate conceives through Embryo Transfer, following the procedure of *in vitro* Fertilization. The fertilization of the ovum happens outside the body and the fertilized embryo is transferred to the uterus of the surrogate. The embryo might be a result of the fertilized gametes (egg and sperm) of the commissioning parents, or gametes obtained from the donors. Since the surrogate carries the pregnancy but does not provide the genetic material (i.e. her egg), such an arrangement is known as gestational surrogacy (Sama, 2012).

Another way of identifying different types of surrogacy is on the basis of the motive behind entering into the surrogacy arrangement, and the payment made to the surrogate. In this category, two types of surrogacy can be defined. One is **Commercial Surrogacy** and the other is **Altruistic Surrogacy**.

Commercial surrogacy is a form of surrogacy in which the surrogate enters the arrangement purely for financial reasons. In such instances, the gestational carrier (surrogate) is paid to carry a child to maturity in her womb. This is usually resorted to by well off infertile couples who can afford the cost involved, or people who save and/or borrow in order to fulfill their dream of being parents. In comparison, instances of altruistic surrogacy have

moral connotations, as they are done for the 'greater good' and to help someone have a child. In such situations, the surrogate receives no financial reward for her pregnancy and the relinquishment of the child (although usually all expenses related to the pregnancy and birth are borne by the intended parents; such as medical expenses, maternity clothing, and other related expenses). In altruistic surrogacy, it is mostly members of the same family or relatives who act as surrogates. However, it is important to know the way the legal documents defined Surrogacy, surrogate mother and Altruistic Surrogacy.

Box 13.1: Definitions of Terms Associated with Surrogacy according to Report of The Select Committee on The Surrogacy (Regulation) Bill, 2019

Surrogacy means a practice whereby one woman bears and gives birth to child for an intending couple with the intention of handing over such child to the intending couple after the birth.

Surrogate mother means a woman bearing a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub clause (b) of clause (iii) of Section 4.

Altruistic surrogacy means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative

13.4 THE COMMERCIALIZATION OF SURROGACY

Over the last three decades, with new advancements in reproductive technologies and forces of globalization acquiring new vigor, India has seen an explosion of fertility services that promise a cure for the allegedly increasing infertility. ARTs[1] have proliferated unchecked into a veritable 'industry'. This industry in India is an integral part of the country's expanding medical market and medical tourism industry. ARTs are available predominantly as part of the private medical market (Nadimpally and Venkatachalam 2016); the latter having witnessed exponential growth enabled by the economic climate of the country's post-liberalization era and being largely unregulated. The ART market is not limited to only IVF procedures but also includes commercial surrogates and commercial egg

[1] Assisted Reproductive Technologies are a group of technologies, which assist conception and pregnancy. These techniques are designed to increase the number of eggs and/or sperms, or bring them closer together, resulting in improved 'probability' of conception/pregnancy not otherwise possible. These technologies used for assisting reproduction range from 'low-tech' methods like intrauterine insemination (IUI) to 'high-tech' methods such as in vitro fertilization (IVF) in all its variations. Though Surrogacy is an arrangement it has been included in ARTs.

donors. As India's ART industry grows, so does commercial surrogacy and commercial egg donation. In the absence of a national registry, recording and monitoring of ARTs, statistics on the number of surrogacies, egg donors being arranged are not available.

Within this, the commercial surrogacy industry has drawn much attention and raised significant ethical concerns.

13.5 GROWTH OF SURROGACY INDUSTRY

An exponential growth in the surrogacy industry is evident from the comparative figures over the past years. Indeed, the surrogacy business alone is said to be over 2000 crores (379, 362,661.93 USD)[2] (Kohli, 2011). According to the National Commission for Women (NCW), there are about 3000 clinics across India offering surrogacy services (Kannan 2009)[3] to couples from America, Australia, Europe and the other continents. According to one estimate, India's rapidly growing commercial surrogacy industry was worth U.S. $2.3 billion per year (Reuters, 2017).

The growth of the fertility industry was not unilinear. Sama's research (Sama op cit)[4] indicates that the ART clinics were no longer concentrated in metropolitan and big cities, but are also appearing in smaller towns and cities that otherwise lack even basic civic amenities and necessary health care facilities.; clinics located in metros and larger cities exploring the potential markets in the rural and semi-urban areas and have tried innovative schemes and methods to reach this market and attract 'customers'. On the other hand, clinics in smaller cities and towns providing these technologies expressed their keenness in establishing practice in bigger cities and metros towards expanding their services as well as their user base. Apart from these clinics that offered surrogacy as one in a range of services, other organizations have also sprung up to provide diverse kinds of support services to further the growth of the surrogacy industry. These included private healthcare consultants, travel agencies, the hospitality industry, government tourism departments, surrogacy agents, hostels for surrogates and surrogacy law firms. The most important actor is the fertility clinic where the pregnancy is induced in the surrogate through In Vitro Fertilization (IVF), aided by agencies and individual agents who facilitate their recruitment and supervision.

13.5.1 India, the Favored Destination for ARTs and Surrogacy

Factors such as lack of regulation, comparatively less cost with regard to many of the other developed countries (like, Canada, UK, USA), less waiting time, possibility of close monitoring of the surrogates by the commissioning couples, availability of a large pool of women willing to be surrogates, infrastructure and medical expertise in the private healthcare sector comparable to the international standards, in combination have created a conducive environment for the expansion of the industry. For instance, a

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[2] Kohli, N. Moms Market, *The Hindustan Times*2011, March 12

[3]Kannan, Shilpa. "Regulators eye India's surrogacy sector." *BBC Worldnews*18 Mar. 2009.

[4] Sama (2010), op cit.

surrogacy arrangement, including IVF and other ART charges, costs about $11,000 (approximately INR 5,00,000) in India, while in the US, surrogacy alone, excluding IVF and other ART charges, costs $15,000 (approximately INR 6,75,000). A similar arrangement in the UK costs about £10,000 (approximately INR 7, 00,000) (Sama 2010)[5]

13.5.2 Entry into Surrogacy Arrangement

The socio-economic background of the surrogates who enter into surrogacy arrangements has a direct bearing upon their choice to enter as well as the terms of the arrangement. The women come from similar economic working-class background- they have low education level (apart from two who were graduates, the rest were below class 10 or had not received any formal education), employed in low-paying, informal, casual work such as piece garment stitching work, domestic work, cooking, or as housewives. Their household monthly income ranged from Rs.3000 to Rs.15,000. Surrogates described conditions of unemployment or nature of work available to them as insufficiently low-paying, casual work and struggle to run a household. Some women came from families that faced immediate needs and along with their husbands they bore the responsibility of paying off debts, or buying a house. The appeal was also in the fact that no other work option would enable them to earn such a large sum of money in a short span of time and this was the only way for realizing their aspirations regarding securing their children's future and affording them education or some financial security by creating savings. After finding out about surrogacy, many women had to convince their husbands who expressed initial reluctance, before entering the arrangement. Some surrogates also considered surrogacy as a better option than domestic work or factory work available to them. In a couple of cases the surrogates also stated the continued persistence of couples and agents as a factor in them agreeing to take up surrogacy. (SAMA, 2012)

From the surrogate's perspective, financial benefit was cited as the main reason why women are ready to act as surrogates. The money earned from surrogacy can be used to provide the surrogate's own children with a good education, to buy a house, to overcome a financial crisis, or to generally improve the living standard of the family. Surrogacy was thus projected as a better option than, and even a way out of, the sex trade. While the comparison between surrogacy and sex work is not a simple one, it does provide an additional dimension to examine and understand commercial surrogacy. The comparison between the two in the public imaginary as stigmatized work, also results in constant negotiation by the surrogates both at an ideological and practical level.

13.5.3 Recruitment of Surrogates

While friends or relatives can act as surrogates in altruistic surrogacy arrangement, in instances of commercial surrogacy, the surrogates are generally recruited through:

[5]Sama- Resource Group for Women and Health. (2010). Constructing Conceptions: The Mapping of Assisted Reproductive Technologies in India. New Delhi: Author

- fertility clinics, which have surrogacy programmes
- surrogacy agents, and websites or online recruitment links
- advertisements in the classified section of magazines (both English and Hindi)
- voluntary advertising by individuals looking to act as surrogates.

Clinics and other actors that offered/ promoted surrogacy services would claim that by providing surrogacy as an option, they are simply responding to the existing market demand of desperate women to become mothers

Box 13.2: Advertisements for Fertility Services

The website of a fertility services provider Institute of Reproductive Medicine and Women's Health (IRMWH) has the heading 'A woman's best friend', under which the caption reads 'They say women make the world go round. How true! It is because they are mothers: The creators and sustainers of every generation.' Their work is described as 'revolving around women' and is a 'harbinger of hope for childless couples' (http://www.madrasmedicalmission.org/irm.html).

Agencies made large profits by recruiting commercial surrogates, whose services were aggressively advertised by the agencies. The 'selling point' became the 'quality' of the surrogate, which was determined by her social background, looks and, preferably, by proven fertility. The advertisements for surrogates highlighted this, and typically read, "Good looking, fair, 27-year-lady from respected family available for surrogate mother. Only rich and genuine people contact" (Sama, 2009, p.14). As a whole, ART services were advertised on websites, in fancy brochures, on walls and hoardings on streets, near adoption agencies and on local cable channels and bus stops. The images, language and slogans used serve to reinforce the tragedy of childlessness and the sentimentality of childbearing, particularly motherhood. At the same time, concerns and complications that come with medical intervention (like side effects, costs, efficacy, and so on) were pushed into the background. Within the larger discourse of the medicalization of childlessness, surrogacy was projected as the altruistic and noble 'gift' of motherhood, from one woman to another. Surrogacy was most often associated with the values of benevolence and altruism. 'Giving the gift of life', 'helping someone build a family' and other such phrases are often used to emphasize the 'good deed' of renting one's womb. This was deployed equally in commercial surrogacy, wherein the economic aspect was disguised as well as justified in altruistic terms. The ever-expanding access to ARTs and the option of surrogacy also meant that alternative forms of parenthood or voluntary childlessness are not even considered and more or less excluded as choices.

It is therefore not surprising to find that commercial surrogacy was routinised and normalized to a large extent, with 'stories' of surrogacy slowly finding their way into popular imagination, as well as local moral worlds and discourses. Though very few and highly dramatized, there are some films and television dramas on childlessness and treatments for childlessness like IVF

and surrogacy. Director Meghna Gulzar, Filhaal (2002) is a mainstream Bollywood film is about a surrogacy arrangement between two friends and its many accompanying emotional complications. Many television channels (including regional channels) have telecasted serials depicting the issue of infertility and surrogacy. It was possible for childless women to gain a sense of community and solidarity from these shows, which were about the suffering of 'others like them'. However, the focus of these productions was on the emotional and even 'moral' dilemmas of surrogacy, rather than its wider social, economic and political realities and complexities. In order to understand the wider social, economic and political dimensions of surrogacy, we must examine surrogacy within the particular context of its operation, and its implications for the actors involved.

Box 13.3 Activity:

Identify a film in any Indian language which deals with the theme of surrogacy.

Discuss it with your peers at the Study Centre or in the online discussion forum keeping in mind the various issues you have read about in this unit.

3.6 FEMINIST PERSPECTIVES ON SURROGACY

The debate around the female body being 'inferior' and 'weak' has been a matter of long-standing contestation, and feminists have long struggled to challenge this patriarchal notion of 'biology as destiny'. Surrogacy is able to push pregnancy from the private to the public, from care to work, and in doing so, is able to destabilize binary notions of women's capabilities and roles. **Shulamith Firestone (1971)** has hailed reproductive technologies as having the potential to emancipate women by liberating them from motherhood, which is their primary link to the private sphere. With surrogacy, not only is the domestication of women's sexual and reproductive labour challenged, but women's autonomy—financial and otherwise-- is also enhanced. In regarding surrogates as providers of a 'service', we are recognizing reproduction as a resource in society, for which we are compensating surrogate women as economic agents in the public sphere. As such, the surrogacy contract may carry the potential to extend to all pregnancies *as contracts*, or at least, to sexual and reproductive labour as work. However, this romantic image of surrogacy arrangements needs some critical analysis.

Suze G Berkhout (2008) argues that the objectification inherent in commercial surrogacy diminishes women's self-respect, which is critical for a robust sense of autonomy. In a similar vein, **Ellen Goodman (2008)** finds the commercialism of "a free-market approach to baby-making" problematic and compares it to slavery and baby-selling. She describes surrogate women as a "new coterie of international workers who are gestating for a living" (www. infertilityanswers.typepad). She stresses that no matter how good the 'deal', some things cannot be sold. As such, international surrogacy

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arrangements can be seen as crossing not just geographic borders, but also ethical ones. Goodman objects to the commodification of the body in surrogacy, be it the child who becomes a product, or the woman whose body becomes a resource.

On the other hand, **Amrita Pande (2009b)** proposes that rather than taking a moral position, surrogacy should be seen as a new kind of sexualized care work; "a structural reality, with real actors and real consequences" (Pande, 2009b, p.144). In its alleged commercialization of motherhood, surrogacy involves the body of poor women. Like other feminist scholars writing on sex work, domestic workers and women factory workers, the author argues that "moral rhetoric and stigma are often evoked whenever the bodies of poor women are in focus" (Pande, 2009, p. 154). **Sabala and Meena** point out that the "low status accorded to the manually laboring body" seems to be a strong marker of caste and class (2010, p, 44). As such, the notion of surrogacy as "dirty work" must be subject to critical scrutiny (Hughes, 1951 cited in Pande, 2009, p.155).

Chayanika Shah's (2009) work examines the politico-historical context of surrogacy and in doing so, arrives at a middle ground in the surrogacy debate. She draws attention to notions of chastity and naturalness that make sexual and reproductive labour acceptable only within marriage. Taken outside the domestic sphere of family, childbearing for explicit commercial gain is completely stigmatized. Feminist understandings of surrogacy are usually uncomfortable with viewing motherhood as pure and sacrosanct, because that serves to glorify motherhood as special. This view can trap women into the role of the mother as the primary and essential feature of their personhood. Rather, according to Shah, the conflict about surrogacy surrounds the "disconcerting use of the language of 'rights' and 'choice' by the promoters of these businesses on behalf of the women going in for these technologies" on the one hand, and "the assertion of rights over the body as a resource" on the other (Shah, 2009, p. 5).

In a context that is overwhelmingly patriarchal and heteronormative, women's bodies become resources with which they negotiate their complex realities. As such, the body can be a survival tool for some, and motherhood can become their only available access or route to greater comfort and privilege within the family and the community. For instance, it is common to find women being accorded more respect, control, and mobility once they have had children, especially male children. Perhaps it is necessary to understand sexual and reproductive labour as "a possible choice, restricted but made with dignity, knowledge and consent" (Shah, 2009).

However, does an admission that surrogacy is a 'legitimate' choice satisfy all political and ethical concerns associated with surrogacy? Acts of agency framed within patriarchal institutions—like marriage—also contribute to the functioning of heteronormativity. As such, it becomes important to view the 'compulsions' behind a choice, as well as the implications that flow from it. In the case of commercial surrogacy, there is a coming together of patriarchal ideology that equates womanhood with motherhood, as well as a market that has turned health technology into a consumer good, and left poor women

with few work options. Let us now try to understand the wider context in which this 'choice' to be a surrogate is articulated and regulated within the market economy.

13.6.1 The Context of 'Choice'

Can it be said that women become surrogates because the other options available to them are even worse? There are cases in India, where women have undergone surrogate pregnancy more than once for financial reasons. Authors like Pande (2009) have documented how poor women take to surrogacy out of compulsion in order to ensure the survival of their families (cited in Jaiswal, 2012).

Here it is pertinent to interrogate the context of political economy that determines women's work environment under globalization. Women have always been part of the unorganized informal sector in urban and rural areas. However, they now find themselves pushed into contractual, small sector work such as export zones and sweat shops. They are considered cheap labour: docile, nimble-fingered and easily dispensable. Women have to contend with low wages, long hours, poor work conditions and sexual exploitation. With a shrinking of their already-limited access to resources, women from marginalized communities find themselves more impoverished and powerless than before. Even as traditional livelihoods are in jeopardy, new markets for their labour—especially sexual and reproductive labour—are opening up. Surrogacy comes at the "peculiar intersection of a high reproductive technology and a low-tech workforce" (Goodman, 2008).

In a rapidly commercializing ART market, service providers use the language of altruism to promote surrogacy. The exploitation of, and profiteering from, surrogacy is concealed within discussions of women's economic 'empowerment' on the basis of surrogacy, the booming medical tourism industry, the supposedly high success rate of cutting-edge technology, and the 'gift' of a baby. Some of the many significant aspects that go unaddressed, particularly due to the absence of state regulation, include the inefficiency and health risks of invasive procedures, the disruption to women's lives, the insecurity of surrogacy dealings, the possible legal tangles regarding the citizenship of the child, inadequate compensation and lack of bargaining power of surrogates. There is an urgent need to acknowledge the vulnerability and marginality of surrogate women, whose rights must be secured through a fair and binding contract, as is the practice for all other forms of labour bought and sold in the market. Currently, a woman who is recruited by an agent to be a surrogate is likely to be taken to an IVF doctor, who may be high-handed and intimidating, and may give her a very basic and sketchy picture of what surrogacy entails. It is highly unlikely that all short term and long-term health risks of the medicines and procedures involved will be told to her. You may refer to the Unit 2 on 'Reproductive Technologies' to reacquaint yourself with these procedures. The surrogate may not even be told that a Caesarian delivery is likely, or that there is a higher than usual possibility of multiple births. The cost, however, is fixed at the outset, and the surrogate is given a long list of Dos and Don'ts.

The surrogate mother is told not to have sexual intercourse with her husband for the duration of her pregnancy. The contract that is signed is drawn up by the doctor, the commissioning parents and their lawyer. Normally, it is in English and may be read to the surrogate in Hindi before she signs, but she has no legal counsel to guide her through this process. Since there is no law to regulate surrogacies at present, there is no standard according to which contracts must be drawn up. As such the surrogate remains at the mercy of the other stakeholders, and has little bargaining power. Even if the contract is not honored, she is unlikely to be in a position to take legal action against these parties. Moreover, the social stigma surrounding the practice means that most commercial surrogates keep their arrangements secret, sometimes even from family. Thus, we can get a sense of the extent of vulnerability of women who become surrogates.

Finally, a recognition that women have agency vis-a-vis their bodies is evident in the shifts that gender theory and the women's movements have made in discussions and positions around sex workers or bar dancers. As Sabala and Meena state, such shifts in theorizing within the women's movement should not be seen as inconsistency or the inability to have one stable position, but rather as "a reflection of the strength of the movement to engage with diversity and multiplicity" (2010, p. 43). Women's complex and layered relationships with their bodies in a patriarchal society are further complicated and intensified for those who earn their living through their bodies. Moreover, with a globalized economy throwing up new and numerous options for women's employment that heavily deploy women's bodies (in sectors like entertainment, travel, hospitality, fashion, care and so on), new and numerous conflicts are going to be created in the contemporary moment. To be able to confront these, a continued engagement with women's diverse experiences will be required.

13.7 EVOLVING REGULATORY FRAMEWORK ON SURROGACY- CHRONOLOGY

The Indian state has been attempting to regulate the ART industry since the early 2000s – the first being the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, which were developed **in 2005** by the Indian Council of Medical Research (ICMR). According to these Guidelines, for any commissioning couple, a known woman or a relative could not become a surrogate. It mandated that those who opt for surrogacy using ARTs, are patients for whom it is medically or physically not possible to carry a pregnancy to full term. Moreover, it also stipulated that the child(ren) born through surrogacy were to be adopted legally by the commissioning parents. Such children are to be considered 'legitimate', at par with children born within a wedlock, entitled to inheritance and support. Yet, despite the implicit understanding of a couple as 'married' and the mention of 'wedlock', the Guidelines also explicitly held that it was not illegal for single and unmarried to resort to ARTs. It is noteworthy though, that the 2005 Guidelines by the ICMR were not legally binding on ART clinics.

Following this, draft legislations – Assisted Reproductive Technology (Regulation) Bill and Rules by the Ministry of Health and Family Welfare (MOHFW) have been formulated since **2008**. The broad approach adopted in the various versions of this Bill was to regulate and supervise the operation as well as the services provided by ART Clinics (including surrogacy) in the country. **In August 2016** the Cabinet announced approval to a new Surrogacy (Regulation) Bill 2016 at a press conference. This Bill seeks to ban commercial surrogacy and allows only 'altruistic' arrangements among 'close relatives'. All surrogacy arrangements by foreign nationals in India has been banned while allowing only altruistic surrogacy that can be commissioned by childless Indian heterosexual couples who have been married for five years. The Bill was introduced in the Lok Sabha on 21 November 2016 and was then referred to the Department-Related Parliamentary Standing Committee (PSC) on Health and Family Welfare which come up with recommendadtions in August 2017.

Thereafter, the Lok Sabha passed the Surrogacy (Regulation) **Bill 2019** had been passed by the Lok Sabha (the Upper House of the Parliament) on 5th August 2019. On 20th November, it was presented in Rajya Sabha (the Lower House of the Parliament). There was an extensive deliberation in the Rajya Sabha on the Bill.

Box 13.4: RS Select Committee on the Surrogacy (Regulation) Bill, 2019

1. No place including a surrogacy clinic shall be used or caused to be used by any person for conducting surrogacy or surrogacy procedures, except when an intending couple has a medical indication necessitating gestational surrogacy, when only for altruistic purpose, not for commercial purpose or for commercialization of surrogacy or surrogacy procedure, when not for producing children for sale, prostitution or any other form of exploitation and any other condition or disease as may be specified by regulations made by the Board;
2. No surrogacy procedure shall be conducted, undertaken, performed or initiated without reasons recorded in writing by Director or in-charge of the surrogacy clinic;
3. The maximum age at which a woman can become surrogate has been reduced to 35 years and for intending couple who are married the age should be between 23 to 50 years in case of female and 26 to 55 years in case of male;
4. No woman shall act as a surrogate mother more than once in her lifetime;
5. The intending couple have not had any child biologically or through adoption or through surrogacy earlier;
6. The intending couple or intending woman shall not abandon the child, born out of a surrogacy procedure, whether within India or outside, for any reason whatsoever, including but not restricted to, any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like

7. No person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall force the surrogate mother to abort at any stage of surrogacy except in prescribed conditions.
8. No person shall establish any surrogacy clinic for undertaking surrogacy or to render surrogacy procedure in any form unless registered under the Act.
9. The Bill provides for 16 months of insurance coverage to the surrogate mother and the committee recommends extending it to 36 months.
10. As per the Bill, the intending couple can undertake a surrogacy arrangement following the inability to conceive after 5 years of unprotected coitus or other medical condition prevention conception. The Committee observed the waiting period is too long.
11. The Committee recommended that ART Bill should be introduced before Surrogacy (Regulation) Bill 2019 allowing highly technical and medical aspects in the Bill.

Check Your Progress: *Regulation Bill 2019 from a fee gender perspective. Give any two points in support of your answer.*

13.8 DEBATES AND COMMENTS ON THE BILL

As per the Bill, only heterosexual married couples can avail of surrogacy services to have children. Several NGOS pointed out that this provision in the context of a changing India reinforces the hetero-normative construction of a family. Another provision of the Bill which was subject to recurrent criticism was the five-year waiting period for couples before they could avail of surrogacy. The Bill defines infertility as an inability to conceive after five years of unprotected intercourse or other proven medical condition preventing a couple from conception. Five years is a punitively long time to wait before accessing surrogacy services. It is also important to keep in mind that infertility need not be the only reason for a failure to conceive. The Bill withholds the benefits of surrogacy for those born without a uterus or experiencing early menopause or frequent miscarriages. Another clause of the Bill that was critiqued repeatedly was the requirement for the surrogate mother to be a close relative of the intending couple. The Bill has not defined who is a 'close relative', leaving it to be delineated in later Rules. This leaves a major ambiguity in the proposed law. There was also significant discomfort with the practical and larger implications of allowing only close relatives to become surrogate mothers.

13.8.1 The Case of Baby Manji

A Japanese couple, Ikufumi and Yuki Yamada travelled to India to have a child through surrogacy. In November 2007, they visited the Akanksha Fertility clinic in Anand, Gujarat, selected the surrogate and began the process. The surrogate mother was implanted with an embryo which had been created using Ikufumi's sperm and eggs harvested from an anonymous Indian egg donor. In June 2008, during the course of the pregnancy, the couple got divorced. On July 25 2008, baby Manji was born to the surrogate mother. The father, Ikufumi, came alone to take the baby back to Japan. The mother, Yuki, did not want to raise the child. Baby Manji had three mothers; the egg donor, who had no rights over her, the surrogate by contract, who had relinquished all her rights to the baby, and the intended mother, who did not feel genetically or legally responsible for the baby. Nonetheless, there was a clause in the surrogacy agreement stating that if the couple separated, the father would raise the child.

However, the trouble began when the father initiated the process of taking the baby back to Japan with him. The Japanese Embassy did not give the required travel documents to Manji on the grounds that the child's mother was Indian, and the Japanese civil code does not recognize surrogate children. Ikufumi Yamada tried to adopt the child, but in India, the law does not permit a single man to adopt a baby girl. Finally, he approached the Indian Government for an Indian passport for the baby. However, a passport requires a birth certificate, and with the confusion over which mother should be considered Manji's mother, the Anand Municipal Council refused a certificate. But as Ikufumi was not Indian and it was not clear whether the Indian surrogate should be considered the mother, the national offices in India refused to issue the passport. Following an appeal filed on 8th August 2008, the Municipal Council of Anand granted a birth certificate to Manji with only the father's name. Meanwhile, Ikufumi's mother and Manji's grandmother, Emiko Yamada, came to India to take care of the baby.

Baby Manji was shifted to Jaipur by Indian friends of Ikufumi. She was hospitalized because she had septicemia and viral infections. However, even after recovering she continued to be in the hospital in Jaipur, as there was no clarity on who should be granted her custody. As soon as the vital records office granted the birth certificate, Emiko Yamada filed a petition in the Rajasthan High Court for temporary custody as Manji's closest blood relative in India, until such time that custody could be transferred to her son. However, in mid- August 2008, a Jaipur-based NGO, Satya, filed a habeas corpus petition in the Rajasthan High Court claiming that baby Manji was a victim of a child trafficking racket and that she had been abandoned. The NGO sought custody of the child on the grounds that custody cannot be granted to Yamada in the absence of laws to govern surrogacy in India.

The matter reached the Supreme Court, and the Solicitor General told the Court on September 15, 2008 that the decision about Manji's passport rested with the Union Government. A month later, the Rajasthan regional passport office issued Manji an identity certificate as part of a transit document, which would enable her to get a visa for Japan. It was the first such certificate

issued by the Indian Government to a surrogate child born in India. It did not mention the child's nationality, mother's name or religion, and was only valid for Japan. On October 27, 2009 the Japanese Embassy gave a one-year visa to Manji on humanitarian grounds, stating that she would become a Japanese resident only after a parent-child relationship had been established by Ikufumi Yamada; by proving his paternity, or by adopting her. It was only after this prolonged legal battle that baby Manji could be taken back to Japan (Points, http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf).

Baby Manji's case attracted much media attention and coverage. However, this is not an isolated case highlighting the legal problems of surrogacy arrangements.

In the case **of Jan Balaz**, the commissioning father of twins born out of surrogacy in India, there was an entanglement of citizenship issues: they were not entitled to Indian passport since Jan Balaz is German, and Germany denied them passports since commercial surrogacy is prohibited there. The Gujarat High Court and the Supreme Court of India intervened to facilitate that the twins could travel out of India with the commissioning parents. However, these cases were important examples that highlighted the many concerns with the commercial surrogacy industry including questions regarding the status of citizenship of the child born out of surrogacy in India, about motherhood, identity and so on.

13.9 LET US SUM UP

The above-mentioned examples highlight the complexities and the dilemmas associated with surrogacy, especially in the legal domain (including the issues of citizenship). Although surrogacy as an arrangement has increased the 'reproductive choices' of couples, it has also opened up a Pandora's box of questions. Both commercial and altruistic surrogacy raise complex ethical and legal dilemmas with more questions than answers. Importantly, issues of commercialization and commodification of women's bodies in such arrangements cannot be ignored or underestimated. Arguments supporting the prohibitionist approach towards commercial surrogacy, often identify the fact of gestating a child and of giving birth in exchange for money as problematic. In a similar vein, the Surrogacy Bill 2019 only allows "altruistic surrogacy" with close relatives, i.e. within the "family". While the new proposal seeks to prohibit commercial surrogacy, the vast terrain of ARTs/ IVF, which are part of a huge industry that use irreversible procedures and immensely medicalized reproduction, have been left largely untouched. However, we, as part of the women's movement, must strive towards bringing the focus back on certain fundamental issues – the way legal engagement with surrogacy is placing a premium on the heteronormative family, marriage and the patriarchal obsession with one's "own" biological children. It is imperative that the women's movement at this juncture strongly and effectively articulates position(s) and concerns vis-a-vis ARTs and surrogacy.

An argument against banning to favor strict regulation of commercial surrogacy as a more appropriate policy response does not imply an uncritical acceptance of the practice in its current form. Nor does it imply choosing its

legalization only because of an anticipation of its invisible, underground growth outside the purview of the law, even though this is a probable and undesirable consequence. Similarly, the preference of non-commercial/altruistic surrogacy over commercial surrogacy raises concerns since it obscures the gravity or precariousness of the conditions in which women may enter into such arrangements, being pressured by relationships of power and the lack of autonomy to make certain choices regarding reproduction and childbearing. The need of the hour is to have a more nuanced, informed debate and bring back into the public domain, issues around essentializing of motherhood, the promotion of compulsory parenthood for all, and genetic essentialism, that are the foundations of the ART industry.

13.10 UNIT END QUESTIONS

1. What is the difference between genetic and gestational surrogacy?
2. Which form of surrogacy is illegal?
3. What is the difference between altruistic and commercial surrogacy?
4. What is the most common reason for choosing to become a surrogate mother in India?
5. Which criteria are looked at when a woman wants to become a surrogate?
6. Who are other key players in a surrogacy arrangement?
7. Are there any health risks for surrogate women?
8. Select any two case Laws of surrogacy and discuss them in the contest of some of the feminist debates that you have read in this unit

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