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A STUDY ON SURROGACY: ISSUES AND PERSPECTIVE IN INDIAN SCENARIO

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ABSTRACT

Surrogacy initially appears to be a desirable option because a needy surrogate mother receives much-needed money, an infertile couple has their long-desired biologically linked child, and the nation gains foreign exchange, but the reality shows the painful truth. Due to a lack of adequate legislation, commercial agencies and middlemen profit from the exploitation of both intended parents and surrogate mothers. Due to the unpredictability of the laws governing surrogacy in India, there is no transparency in the entire system, and there is a potential that one could become entangled in legal issues. This article gives fundamental understanding of what surrogacy is and the legal procedures that are followed in various nations throughout the world. It also highlights judicial approach, issues and analysis on this issue.

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

INTRODUCTION

When a female gives birth to a kid for a couple who desire to have a child, this procedure is known as surrogacy and is conducted all over the world. When the kid is born, the surrogate mother gives it to the parents. Due to numerous reports of unethical practices, mistreatment of surrogate mothers, desertion of kids born via surrogate, and scams employing intermediaries importing human embryos and gametes, rigorous surrogacy regulations are necessary.

According to data gathered by the “Confederation of Indian Industry”, India's surrogacy market was worth \$2 billion by 2012. In the same year, at least 25,000 infants were born via surrogacy. Surrogacy cost between \$18,000 and \$30,000, with the surrogate mother receiving roughly \$8,000 of that total. Government statistics revealed that there were up to 3,000 unlicensed

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clinics in India as of 2019. However, the government outlawed overseas surrogacy in 2015 after discovering several instances of families abandoning their surrogate children because of local rules, which had a negative impact on the expanding sector.²

Before delving into the specifics of what makes surrogacy legal or if it is legal in India, it is crucial to have a fundamental understanding of what surrogacy is and the legal procedures that are followed in various nations throughout the world.³

MEANING AND TYPES OF SURROGACY

The term "surrogate" derives from the Latin word "surrogatus" which means "a substitute" or "someone designated to operate in place of another." Consequently, a woman that carries a child for yet other woman whether through the use of her own ovum or through the implantation of a fertilized egg from a different woman in her uterus is known as a surrogate mother.⁴

The American Law Report⁵ provides the definition of "surrogacy" as a standard: "a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth"

There are several ways to define surrogacy under that wide concept, but two forms of surrogacy are medically practiced in India given the country's current social norms:

- *Traditional Surrogacy*: Often known as "traditional surrogacy" is the original kind of surrogacy agreement in which the surrogate mother's eggs are used to conceive the child. Due to the fact that the surrogate is genetically connected to the kid in this procedure, she is essentially seen as the biological mother. "Artificial insemination" is the term used to describe the method of conception.⁶
- *Gestational surrogacy*: This involves utilizing "in vitro fertilization" (IVF) to create the kid the resultant embryo is inserted in the surrogate woman's uterus after being created using

² Taniya Dutta, *India's new surrogacy laws*, NATIONAL NEWS (June 21, 2022),

<https://www.thenationalnews.com/world/2022/03/29/indias-new-surrogacy-laws-could-limit-chances-for-some-would-be-parents/>.

³ Shreya Kumari, *Surrogacy provisions in India*, TOI (June 22, 2022),

<https://timesofindia.indiatimes.com/readersblog/legal-writing/surrogacy-provisions-in-india-35429/>.

⁴ *Legal Analysis of Surrogacy in Indian Context*, THE AMICUS QRIAE (June 20, 2022),

<https://theamikusrqiae.com/legal-analysis-of-surrogacy-in-indian-context/>.

⁵ Radhika Yadav, *A comprehensive analysis on reproductive health and surrogacy in India*, SCC ONLINE (June 23, 2022), https://www.scconline.com/blog/post/2021/09/27/reproductive-health-and-surrogacy-in-india/#_ftn7.

⁶ Babu Sarkar, *Commercial Surrogacy: Is it Morally and Ethically Acceptable in India?*, PRACTICAL LAWYER (June 22, 2022), <https://dokument.pub/the-practical-lawyer-commercial-surrogacy-is-it-morally-flipbook-pdf.html>

the wife's eggs and her partner's sperm. The woman is fertile but unable to bear a developing baby.⁷

In addition to this, there are several arrangements used to practice surrogacy:

- *Altruistic Surrogacy*: The surrogate mother does not receive any monetary compensation for bearing the child or delivering it to the biological parents, except from necessary medical bills. Altruistic surrogacy, sometimes known as "women helping women," occurs when a surrogate offers to carry the couple's kid for no payment at all.
- *Commercial Surrogacy*: "Commercial surrogacy" refers to scenarios where the surrogate woman is compensated for her childbirth or the child's abandonment (in addition to clinical and other reasonable charges), when these circumstances typically adhere to a pre-determined lump sum contract, but when the surrogacy arrangement mother obtains recompense far beyond required healthcare bills.

LEGAL ASPECT OF SURROGACY IN INDIA

Since 2002, commercial surrogacy has been permitted in India. By 2018–2021, the Indian Council of Medical Research predicted that the surrogacy market will expand to \$6 billion. Surrogacy has been a growing component of the Indian medical business; many couples from other nations travel there for this reason because to the permissive regulations, reasonably inexpensive fees, and availability of surrogate moms. However, the Surrogacy (Regulation) Bill, 2020 was submitted by the Ministry in an effort to ban commercial surrogacy and allow altruistic surrogacy in India.⁸

The Court acknowledged commercial surrogacy in *Manji Yamada v. Union of India*⁹ in 2008 and emphasized the necessity for surrogacy legislation in India since the practice is a money-making scam that is ongoing throughout the country. The NCPCR was allotted this responsibility.

The Law Commission of India's 288th Report¹⁰, published in 2009, estimated "the industry to be worth Rs 25,000 crore and recommended banning commercial surrogacy while allowing

⁷ Divyansh Singh, *Surrogacy under framework of the Indian Constitution*, IPLEADER (June 23, 2022), <https://blog.ipleaders.in/surrogacy-under-framework-of-the-indian-constitution/>.

⁸ Sakshee Kumari, *India's attempt to regulate surrogacy*, SCC ONLINE (June 21, 2022), <https://www.sconline.com/blog/post/2021/10/01/indias-attempt-to-regulate-surrogacy/>.

⁹ (2008) 13 SCC 518

¹⁰ Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, <https://lawcommissionofindia.nic.in/reports/report228.pdf> accessed on June 23, 2022.

altruistic surrogacy, citing concerns over the widespread use of surrogacy by foreigners and the lack of an adequate legal system that leads to the mistreatment of the surrogate mother, who is typically forced to become a surrogate due to generational poverty.”

Another incidence that occurred later in 2012 that gave rise to this problem was an Australian couple who abandoned one of their twins who had been born through surrogacy because the other had Down syndrome. When a 23-year-old died following an egg donation operation at an IVF facility in 2014, this problem once more gained attention. At 2015, a public interest lawsuit was filed in the SC asking for the legalization of commercial surrogacy in light of these tragic events. Her PIL influenced public opinion and increased government pressure to enact legislation.¹¹

THE SURROGACY (REGULATION) BILL, 2016

It was presented to Parliament in 2016. Surrogacy boards can now be established at the federal and state levels thanks to the Bill. Moreover, national resident heterosexual couples who've been legally wed for 5 years are qualified to become surrogates, with the need that their proven fertility be verified by a reputable medical expert. Also prohibited from hiring a surrogate are foreigners, live-in partners, unmarried couples, overseas Indians, single parents, live-in partners, and homosexual couples. Although it was presented, the Surrogacy (Regulation) Bill, 2016¹², never passed the Rajya Sabha and was referred to the Parliamentary Standing Committee. The Committee stated in its 102nd Report in 2017 that banning commercial surrogacy is unethical and is primarily motivated by moral considerations rather than by any scientific standards.¹³

THE SURROGACY (REGULATION) BILL, 2020

¹¹ Zulfikar Memon, *Surrogacy regulations in India*, MONDAQ (June 18, 2022),

<https://www.mondaq.com/india/constitutional-administrative-law/1126150/surrogacy-regulations-in-india>.

¹²The Surrogacy (Regulation) Bill, 2016, <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2016#:~:text=In%202015%2C%20a%20government%20notification,Sabha%20on%20November%2021%2C%202016.&text=The%20Bill%20prohibits%20commercial%20surrogacy%2C%20and%20allows%20altruistic%20surrogacy>. Accessed on June 19, 2022.

¹³ Yvonne Ng and Qianyu Wang, *Surrogacy law in Asia*, DURHAM ASIAN LAW JOURNAL (June 24, 2022), <https://www.durhamasianlawjournal.com/post/surrogacy-law-in-asia-a-comparative-analysis-between-china-and-india>.

The Bill was tabled in the Lok Sabha on June 26, 2020, which included all the recommendations of the Select Committee and 15 significant amendments recommended by the 23-member Committee that were approved by the Union Cabinet.¹⁴

Dr. Harsh Vardhan commented with regards to the Bill¹⁵:

“The Bill is aimed at ending the exploitation of women who are lending their womb for surrogacy and protecting the rights of children born through this. The Bill will also look after the interests of the couple that opts for surrogacy, ensuring that laws are protecting them against exploitation by clinics that are carrying this out as a business.”

THE SURROGACY (REGULATION) ACT, 2021

The Act¹⁶ became operative on January 25, 2022. The Act intends to outlaw commercial surrogacy while allowing altruistic surrogacy. In commercial surrogacy, the surrogate mother receives payment for her services in addition to being reimbursed for her healthcare bills. Inequality in society may allow for the exploitation of intended parents and surrogate mothers due to the compensation system. Other than the medical costs and insurance throughout the pregnancy, the surrogate mother receives no financial remuneration in an altruistic surrogacy.

The qualifying requirements for couples planning to choose surrogacy are laid forth in the Bill. The responsible authorities must give a "certificate of eligibility" and a "certificate of essentiality" to the qualified couple. The people who want to become parents through surrogacy also meet the following additional requirements:

1. Heterosexual pair with a male between the ages of 26 and 55 and a female between the ages of 25 and 50.
2. The marriage should be at least five years old.
3. No further children, whether biological, adoptive, or surrogate, should be had. Couples having children who have a (a) physical or mental handicap or (b) a life-threatening ailment are exempt from this requirement under the Act.

¹⁴ Parliament of India- Rajya Sabha, Select Committee on the Surrogacy (Regulation) Bill, 2019, https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/Press_ReleaseFile/70/137/255P_2020_1_12.pdf accessed on June 24, 2022.

¹⁵ Lok Sabha Passes Surrogacy (Regulation) Bill, THE HINDU (June 25, 2022), <https://www.thehindu.com/news/national/lok-sabha-passes-surrogacy-bill/article28824277.ece>

¹⁶ The Surrogacy Regulation Act, 2021 <https://egazette.nic.in/WriteReadData/2021/232118.pdf> accessed on June 27, 2022.

By outlawing commercial surrogacy, the rights-based approach is replaced with a needs-based one, taking away the women's control over their own reproductive choices and parental rights. One may contend that the state has to safeguard the child's birthright and put an end to the exploitation of vulnerable women who participate in surrogacy. These two interests are not sufficiently balanced by the existing Act, nevertheless.¹⁷

JUDICIAL APPROACH

Courts have played an important role when it comes to surrogacy that can be studied in the following cases:

In *Suchita Srivastava v. Chandigarh Administration*¹⁸ the judges observed that “a female’s freedom to make reproductive decisions falls under the personal liberty protected by article 21. This includes the right to carry a pregnancy to term; it is entirely up to the woman to decide whether or not to give birth to the kid. These rights are an element of women's rights to physical integrity, privacy, and dignity.”

In *Justice KS Puttaswamy & Anr v. Union of India*¹⁹, the court ruled that obtaining a "certificate of infertility" from the district medical board violated the plaintiff's right to privacy, which has been deemed a "basic right" that must be upheld.

In *Jan Balaz v. Anand Municipality*²⁰, the Gujarat HC decided that the surrogate mother's name would appear on the surrogate child's birth certificate and that the biological parent of the child would receive an Indian passport in exchange for giving the child to a German couple for adoption. The surrogate mother then appealed this decision to the Supreme Court, which is still considering the appeal.

ISSUES AND PERSPECTIVES ON SURROGACY

Despite the fact that surrogacy appears to benefit both parties, several sensitive problems must be handled through carefully crafted regulations to safeguard the intending parents' and surrogate's rights. Some contend that commercial surrogacy involves the unethical act of purchasing and

¹⁷ Karan Babbar, *The Surrogacy Regulation Act 2021*, FII (June 26, 2022), <https://feminisminindia.com/2022/02/02/the-surrogacy-regulation-act-2021-another-attempt-to-reproduce-a-heteronormative-patriarchal-society/> (Last Accessed on 28th June, 2022)

¹⁸ (2009) 14 SCR 989

¹⁹ (2017) 10 SCC 1

²⁰ AIR 2010 Gujarat 21

selling a woman's womb. Indian women in poverty would be used as childbearing labour and taken advantage of by wealthy and powerful infertile couples.

Because surrogate parenting forcefully "breaks" the emotional tie that exists between a child and their biological mother, it is unnatural and immoral. We frequently ignore the biological kid's needs while ignoring the potential pain associated with the mother giving her child up for adoption. There are various cultural and religious-based strings linked to this, including ethical considerations around the child's rights to know the surrogate mother, how her emotional state affects the surrogate child's behavior, social exclusion, and social isolation.

“If we look into the difficulties faced by a surrogate, the conditions are worse and unethical. The illiterate poor women of rural background are often induced in such deals by their partner or middlemen for earning easy money. These women have no right or to decide on their own body and life”.²¹

The fact that individuals engage in surrogacy while over 12 million Indian children are orphans is ironic. For childless couples who desire to provide these youngsters with a home, adoption in India is a difficult and drawn-out process.

COUNTRIES WHERE SURROGACY IS LEGALISED

New York - The possibility of using a surrogate to start a family is gaining popularity. However, many nations' laws governing such agreements have found it difficult to keep up with advancements in science, society, and reproductive therapy. New surrogacy legislation has just been passed in New York, legalizing commercial gestational surrogacy and allowing for pre-birth instructions while attempting to safeguard the surrogates. Gestational surrogacy agreements were not regarded as legally binding until the statute was passed, making the practice unlawful in New York.²²

Australia - It is one of the few nations where surrogacy is permitted. However, in the case of Australia, only charitable surrogacy is allowed. This implies that you are exempt from paying the surrogate's compensation. However, you are required to cover the costs associated with the surrogacy procedure. Additionally, it is prohibited to advertise for surrogacy under Australian

²¹ Bhumitra Dubey and Yash Tiwari, *Analysis of the Surrogacy (Regulation) Bill, 2020*, ILJ (June 25, 2022), <https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill.php>

²² Vishal Sawant, *Surrogacy Market to hit USD 260.3 Million in 2027*, CISION (June 22, 2022), <https://www.prnewswire.com/news-releases/surrogacy-market-to-hit-usd-260-3-million-in-2027--growing-at-6-8-cagr--says-brandessence-market-research-301534133.html>.

legislation. The donor must be recognized in the event of a donation. In some cases, the ethics committee's clearance is also necessary.

Canada - Only altruistic surrogacy is legal in Canada. This implies that the intended parents are unable to provide the surrogate mother with financial recompense. However, they have the right to repay the surrogate mother for legitimate medical expenses. A surrogacy agency, for example, cannot provide surrogacy services; nevertheless, they can give assistance and direction to the parents.

UK - In the UK, surrogacy was first made acceptable in 1985. In accordance with the legislation, intended parents in the UK may also be homosexual parents. Gestational surrogacy is legal in the UK, as is conventional surrogacy. In the UK, commercialization or advertising of surrogacy are prohibited. In the UK, only charitable surrogacy is permitted. Therefore, in the UK, you are just need to pay the reimbursement amount to the surrogate.²³

USA - The most common and well-organized kind of surrogacy is in the United States. However, parents must research whether states in the US permit surrogacy. Not every state in the USA is supportive of surrogacy.²⁴

CRITICAL ANALYSIS WITH RESPECT TO RECENT TRENDS IN INDIA

The elements of the new legislation that bar millions of Indian residents from receiving ART and surrogacy have also drawn criticism from certain specialists. LGBTQ people, same-sex couples, cohabiting heterosexual couples, and single males cannot use these services.

The law is a kind of discrimination against young people with impairments. The Act defines having special needs children as being childless. It also advises contemplating surrogacy if the couple's child suffers from a serious illness.

The new legislation includes a long list of onerous requirements even for heterosexual married couples looking for a kid delivered through surrogacy. The requirement that couples seeking surrogacy be married for at least five years, for example, is an attempt to restrict their ability to have a family sooner if they so choose.

The pair must be Indians, and neither may be the biological, adoptive, or surrogate parent of any kid.²⁵ A woman must be married (at least once in her life) and have her own kid in order to meet

²³ Kriti Bhatia, *Comparative Study on Surrogacy Laws around the world*, PEN ACCLAIMS (June 25, 2022), <http://www.penacclaims.com/wp-content/uploads/2019/12/Kriti-Bhatia.pdf>.

²⁴ *International Surrogacy Countries*, IVF Conceptions (June 24, 2022), <https://www.ivfconceptions.com/international-surrogacy-countries/>.

the requirements for being a surrogate mother. She must be a close relative of the couple choosing surrogacy and between the ages of 25 and 35. Any woman who agrees to be a surrogate can only do it once in her lifetime, and she must be deemed physically and mentally fit at that time.

Additionally, the statute specifies eligibility requirements for both the couple choosing surrogacy and the surrogate mother. The couple in question must possess a "certificate of essentiality," which includes proof of infertility in one or both partners, a court order establishing the parentage and custody of the child conceived through surrogacy, and insurance coverage for the surrogate mother for 16 months, including coverage for complications following delivery.²⁶

CONCLUSION AND SUGGESTIONS

A complex web of social, ethical, legal, and technical concerns surrounds surrogacy. Surrogacy is not simply a legal issue that needs to be thought through; society as a whole also has to consider it a societal concern and take appropriate action that preserves our ethical principles while also allowing us to benefit from the developing technology. When drafting such legislation, governments must consider the interests of the relevant stakeholders. To create surrogacy contracts with the fewest ethical lapses, best practices for surrogacy contracts must take into consideration surrogates' individual experiences.

²⁵ Chinmoy Pradip Sharma, *Surrogacy Laws in India – Past Experiences and Emerging Facets*, Bar & Bench (June 21, 2022), <https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets>

²⁶ *India's Proposed Commercial Surrogacy Ban Is an Assault on Women's Rights*, The Wire (June 22, 2022), <https://thewire.in/law/surrogacy-ban-assault>