

SURROGACY

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ABSTRACT

Nature has endowed women with the extraordinary power to reproduce on a daily basis, and every mother cherishes her parenting experience. Unfortunately, due to physiological reasons, a few ladies will be unable to have their own children. Surrogacy seemed to be the best choice for them to become parents. The gestational carrier is the surrogate mother, and surrogacy is a contract between a woman and a couple or an individual to carry and deliver a kid. Despite the numerous laws enacted to protect surrogate mother interests, the reality is that the efforts made thus far to ensure surrogate mother protection have been few curative drops in the ocean of surrogate mother misery, and the vast majority of people are unaware that they have been protected as surrogate mothers by a plethora of laws. In this context, it's important to grasp current surrogacy practices and rules, if any, as well as the plethora of challenges that come with the practice, such as social, legal, medical, and psychological problems. Surrogates can only be in charge if they use their legal rights to do so.

The goal of this study is to comprehend the legal difficulties surrounding surrogacy in modern India, while also taking into account surrogates' current conditions and reality. India now has a new surrogate protection system, according to the enactment of the Surrogacy (Regulation) Act, 2021. The new law strengthens surrogate protection and expands the number of options available, but it is not without flaws. In terms of public perception, surrogacy is still in its early stages. To overcome the multiple obstacles, comprehensive legislation on the issue requires the legislature's active engagement. The goal of this research project is to address legal concerns surrounding surrogacy, give information about surrogate rights, and provide ideas for bolstering surrogate rights by adopting new solutions to current problems. As a consequence, we have a better understanding of surrogacy protection in India and can evaluate the new legislation objectively. The goals of this research article are to show judicial tendencies that favour surrogate protection, the growth of legislation in India, and, finally, some recommendations for raising knowledge about surrogate protection laws.

Keywords: Surrogacy (Regulation) Act, Surrogacy Protection, Awareness, Rights of Surrogates

1.INTRODUCTION

In India, being a parent is regarded as a blessing, whereas infertility is regarded as a misfortune. In India, the family structure is quite secure, and sons are particularly well-equipped to carry out the vansh. Infertility is regarded as a misfortune in the case of females. In India, women who have difficulty conceiving or who are infertile are referred to as "Banjh." Infertile couples have benefited from advances in science and reproductive technology since they can now have their own children.

The clinics in India have provided Assisted Reproductive Technology i.e.

- i. In Vitro Fertilization (IVF);

- ii. Pre-implementation Genetic Diagnosis (PGD);
- iii. Intrauterine Insemination (IUI);
- iv. Intra-Cytoplasmic Sperm Injection (ICSI);
- v. Genetic Donation;
- vi. Surrogacy

Surrogacy is a way for a couple to have a child if they are physically or medically unable to have a kid on their own. Surrogacy is when a woman has a child throughout the course of her pregnancy and then gives the infant to the intended parents after the birth.

The 2 types of surrogacy are:

- i. Traditional Surrogacy;
- ii. Gestational Surrogacy

i.NATURAL/TRADITIONAL/PARTIAL SURROGACY: " Artificial insemination takes place between a surrogate mother and either the intended father or an anonymous donor in this case." This type of surrogacy uses the surrogate's own ovum and entails a genetic link between the surrogate and the embryo. The commissioning father can supply sperm and therefore become the biological father of the kid. If there are two female commissioning couples, sperm from a third male individual can be harvested, or the child can be commissioned by a single woman. Sexual activity, intrauterine insemination (IUI), and in vitro fertilisation (IVF) are all options for women who want to start a family¹

ii.GESTATIONAL SURROGACY: " It is accomplished by fusing an egg and sperm generated by the intending parents and then implanting the embryo in the womb of the surrogate mother."²

Surrogacy is an issue that has been discussed since ancient times and is known to practically every society in the globe. Surrogacy is the practise of carrying a kid for another woman who is unable to have a child owing to various complications. Natural surrogacy, gestational surrogacy, commercial surrogacy, and altruistic surrogacy are the four main forms of surrogacy. Although India legalised commercial surrogacy in 2002, the country's legislature has yet to provide it legal status. But, in the year 2008, the Honourable Supreme Court of India, by giving the positive decision in the favour of surrogacy on the case Baby Manji Yamada vs. Union of India (UOI) and Another³ which has thrown the light on the surrogacy to get the legal context in the country. Many ethics organisations have endorsed surrogacy to a wider extent, just recognising it as a new technique for conceiving a kid if no one is harmed in the process.

2.HISTORY OF SURROGACY IN INDIA

- i. Infertile couples can benefit from surrogacy. Surrogacy is the process of a woman bearing a child for another in her womb by the transfer of embryos or gametes made by the intended parents. It has been practised in India from ancient times, and the word Niyoya Dharma was used to describe it.
- ii. Devki and Vasudev's seventh kid, Balram was implanted when still an embryo in the womb of Rohini, Vasudev's first wife. Kansa was about to kill the infant, thus it was done;
- iii. After two years of pregnancy, Mahabharata's Gandhari gave birth to a child. The mass was discovered to contain 101 cells by Rishi Agyasa. These cells were cultivated outside the womb

in a nutritional medium, yielding 100 male newborns known as Kaurans and a female body known as Dushala;

- iv. Kartikey, the deity of fertility, was likewise conceived through surrogacy by Shiva and Ganga (the surrogate mother).

Surrogacy was clearly used in ancient times, hence there is no conflict between aided reproduction and religious beliefs.

Surrogacy has been a source of controversy in disciplines such as legal, ethical, social, and many others for a long time. This approach is fast gaining traction throughout the world. It has a number of perplexing scenarios, as some individuals support it while others reject it. Surrogacy is permitted in certain countries but not others. Surrogacy is legal in a number of countries, including the United Kingdom, Ireland, Denmark, Belgium, various US states, India, Russia, and Ukraine. From a legal standpoint, India's law has done little to address it. People who have never been blessed with a kid support this viewpoint, yet many others do not. People that support it want it to be legalised so that everyone may enjoy the joy of having a child for the future growth of their family and country. Researchers looked at a number of documents and instances and discovered that some people have supported surrogacy since the beginning of time. The dilemma that emerges is whether legalising surrogacy will be in violation of natural laws?

2.1 PRESENT CONDITION

Many people believe that surrogacy should be legalised or outlawed at the moment. It is lawful in many nations, yet it is illegal in many others. Despite the fact that it is illegal in certain countries, it is done as a gift or service to those who are unable to bear children. This is most commonly seen in households when one or more members are unable to bear children. However, if it is discovered, stiff penalties are in place. Surrogacy is mostly permitted in Altruistic countries, rather than Commercial countries, where it is done only for the goal of serving others in exchange for monetary recompense for medical expenditures paid by the commissioning parents.

Surrogacy of the sorts altruistic and commercial has been legal in India since 2002. However, it lacks any legal standing in the country. To avoid exploitation and violations of women's rights, it is critical to have legal status for surrogacy since foreigners are flocking to India for kids because the costs are lower than in other nations.

3.NEED FOR REGULATIONS RELATING TO SURROGACY

Surrogacy is defined as "the procedure of bearing and delivering a child for another person" by Black's Law Dictionary. A surrogate mother is a woman who bears a kid in her womb and gives birth to the infant on behalf of another woman. She can carry the child if the couple's sperm and embryo are placed in her womb, or if she utilises her own egg to fuse with the man's sperm to give birth. In India, marriage is said to be only for the sake of "offspring reproduction" and the continuation of the family name. The entire society looks down on a couple that is unable to conceive a child. Because the husband's sexual potency and masculinity can only be demonstrated if the couple has a child, surrogacy has become a viable option for couples seeking a child.

- i) **LOW COST-** When compared to other industrialised nations, such as the United States, the cost of surrogacy is very low. Many foreigners consider India to be a particularly cost-effective country for surrogacy, as there are few rules limiting the practise and it is a simpler way for them to have children. India has traditionally been a popular destination for medical tourism because of its superb facilities and inexpensive treatment costs.⁴

- ii) **MIDDLEMEN AND CLINIC:** There have been several instances in which the clinic's middlemen and physicians have taken advantage of mothers by delivering children at a low cost while paying little attention to their health after birth. The agents were involved in scenarios where they recommended couples to explore surrogacy and had women on their list who could supply the services. Mothers were the ones that suffered the most. Surrogate mothers were not provided with adequate nutrition and high-quality meals during pregnancy and after childbirth.

4. THE SURROGACY (REGULATION) ACT, 2021⁵

The statute aims to prevent unethical activities including sex selection and surrogate abuse. The Surrogacy Act has made substantial modifications to the surrogacy regulations, as follows:

- " The Act has resulted in the elimination of the predetermined infertility, which is defined as the inability to conceive after five years of unprotected sexual activity;
- The drafting committee noticed that declaring a waiting period of 5 years for the couple to birth the baby is excessive and unjustified, and it is directly contradictory to the stated objectives of this specific Act;
- It has outright prohibited commercial surrogacy, allowing only a woman who is a close family of the couple to be the child's surrogate mother with her agreement;
- The Act has allowed altruistic surrogacy and has placed a blanket ban on commercial surrogacy, including the sale and purchase of human embryos/gametes, to ensure that the women are not doing this for financial reasons or any kind of perks. However, the Act has ensured that proper medical facilities will be provided to her, as well as a full medical insurance for a period of 36 months.
- The Act makes it essential to register clinics that perform surrogacy so that they may be controlled in a timely manner.
- Under the Act, a couple between the ages of 23 and 55 can choose ethical Surrogacy. In all situations, though, the couple's nationality should be Indian. The Act is progressive in that it allows single women between the ages of 35 and 45 to use surrogacy to conceive a child.
- Before beginning surrogacy treatment, the Act requires the couple to get a certificate of need as well as a certificate of eligibility.
- Couples seeking surrogacy are not permitted to leave the baby for any reason, and the infant will be entitled to all of the protections and rights accorded to a natural born child; moreover, sex selection is expressly prohibited under the Act."

The perpetrator faces penalties of up to Rs 10,000,000/- and imprisonment for up to ten years under the law. The Act proposes establishing a regulating organization at the national and state levels known as the National Surrogacy Board (NSB) and the State Surrogacy Board (SSB), as well as appointing suitable authorities at the federal and state levels. Its primary duty would be to assist the government in creating policies and to monitor the operation of surrogacy clinics.

5.IMPORTANCE OF THE CHANGES

Surrogacy has long been practiced in India, and we've heard of cases when a sister has delivered a child to her own sister who is unable to conceive or has other issues. It was formerly done inside families, and there was no legislative framework in place to handle the issue. Though there were some

random and vague guidelines to govern surrogacy⁴, however, there were little rights for the biological mother of the child when the surrogate mother was not linked to the parents who needed a child, and the rights of the women who were exploited had to be preserved. The couple that travelled from another country to obtain a surrogate mother has been completely barred from doing so in order to ensure that commercial surrogacy is completely prohibited. This Act is required to eliminate surrogacy malpractices and to supervise surrogacy. Now that commercial surrogacy has been outlawed, it will ensure that impoverished women are not exploited, and the mother will be given with medical health insurance for the next 36 months.

5.1 CRITERIA FOR THE COUPLE AND THE SURROGATE MOTHER

The statute also establishes stringent eligibility requirements for both the surrogate mother and the couple considering surrogacy. A "certificate of essentiality" is required for the couple in question, which includes a certificate of proven infertility for one or both parties, a Court order on the parentage and custody of the child born through the surrogate, and insurance coverage for the surrogate mother for 16 months, including post-partum delivery complications. A male between the ages of 26 and 55 must also be present, as must a woman between the ages of 25 and 50. Both must be Indians who have been married for at least five years and have no biological, adopted, or surrogate children (unless the kid is intellectually or physically challenged or suffers from a life-threatening condition).

The bill also lays out the severe requirements for anybody interested in becoming a surrogate mother. The lady in issue must have been married at least once in her life and have a child of her own. She should be between the ages of 25 and 35 and a close relative of the couple that is considering surrogacy. Any woman who agrees to be a surrogate cannot do so more than once in her life, and she must be evaluated for medical and psychological competence at the time.

6. EXAMINING THE BILL AGAINST INDIA'S OBLIGATIONS UNDER INTERNATIONAL LAW

When there is no obligatory municipal legislation controlling the relevant subject-matter, the Supreme Court has traditionally linked its rulings with India's international commitments. In *NALSA*⁶, "In the absence of conflicting legislation," the Court concluded, "Indian municipal courts would observe international law." Notably, the Court referred to the Universal Declaration of Human Rights (hereinafter, "UDHR") while extending constitutional protection to transgender people, and stated that any international convention that is in harmony with the spirit of the fundamental rights guaranteed by the Constitution must be read as part of those provisions, thereby promoting the constitutional guarantee's goal.

This applies to surrogacy, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (hereinafter, "ICCPR"), and the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter, "CEDAW").⁷ (hereinafter, "CEDAW") are India's Parliament has approved all relevant international treaties. Article 1 of the UDHR ensures that all human beings have equal rights, whereas Article 7 requires states to provide equal legal protection to all people without discrimination. Similarly, the International Covenant on Civil and Political Rights (ICCPR) forbids States Parties from discriminating against anybody for any reason. In addition, the CEDAW demands signatory countries to guarantee that men and women have equal freedom in determining how many children they want and when they want them.⁸ The Bill, in its current form, is clearly in breach of India's previous commitments to the international community for the following reasons: (a) it arbitrarily excludes certain classes of citizens from its scope; (b) it requires that intended parents have no surviving offspring; and (c) it states unequivocally that women can only act as surrogates once in their lives.

7. JUDICIAL TRENDS

Clause 4 of the Bill outlaws all types of commercial surrogacy, allowing only altruistic surrogacy to take place.⁹ Only a "close relative" of the intending parents can be the surrogate mother of their kid, according to the bill. The phrase "near related," on the other hand, has not been defined.

At first glance, the Bill's stringent requirements for surrogates and intended parents appear to be an overreach by the government into people's private lives. Article 21 of the Constitution of India¹⁰ (hereinafter, "Constitution") universally guarantees the right to life and personal liberty, and in *K.S. Puttaswamy v. Union of India*, The Supreme Court has affirmed an individual's right to privacy as a fundamental right under Article 21, noting that privacy is linked to the constitutional freedom to make reproductive decisions.¹¹ Moreover, in *Suchita Srivastava v. Chandigarh Admn.*, "A woman's freedom to make reproductive choices is also a component of 'personal liberty,' as envisaged under Article 21 of the Indian Constitution," the Supreme Court had concluded."¹² As a result, it is clearly evident from judicial history that the Constitution protects and secures reproductive decisions as part of an individual's fundamental right to personal liberty. In this context, the Bill's stringent qualifying requirements appear to intrude on the private lives of both surrogates and intended parents, robbing them of reproductive autonomy.

In the 2018 landmark judgment of *Navtej Singh Johar v. Union of India*, The Supreme Court had stated that the moment had come for the constitutional promise of equality and inclusion to terminate decades of discrimination based on a "majoritarian inclination of assigned gender norms," in which consenting same-sex partnerships were decriminalised."¹³ In *Puttaswamy*¹⁴, According to the Supreme Court, "sexual orientation is a fundamental element of privacy, and any discrimination against an individual based on sexual orientation is gravely repugnant to the individual's dignity and self-worth."¹⁵ The Court had also stated that the preservation of an individual's right to privacy and sexual orientation was at the heart of the fundamental rights granted by Articles 14, 15, and 21 of the Constitution. Similarly, in *National Legal Services Authority v. Union of India*, Members of the marginalised transgender community were recognised as the "third gender" by the Supreme Court, which stated that discrimination based on gender identity and sexual orientation violates Article 14 of the Constitution by undermining equality before the law and equal protection under the law.¹⁶

Finally, the Act prohibits surrogacy for singles and heterosexual cisgender couples who are in a "live-in relationship," i.e. cohabiting but not legally married. It is worth noting that Parliament has already granted such partnerships formal legitimacy by defining them as "relationships in the type of marriage."¹⁷ The Supreme Court has ruled that an individual's decision to marry or not marry is beyond the scope of the state's legitimate concerns, so prohibiting singles and cohabiting couples from becoming parents through surrogacy simply because they are not married appears to be an invasion of their privacy and an unjustified infringement of their right to equality.

8. CONCLUSION

The Constitution provides everyone equal legal protection and allows class legislation only if it is based on "real and significant differentiation" and has a reasonable connection to the legislative goal. If no such difference is made, the discrimination may be considered "arbitrary" and in violation of Article 14.

Surrogacy is fraught with conflicting interests and has an enigmatic influence on society's fundamental unit, the family. Non-intervention of the law in this difficult subject would be inappropriate at a time when the law is supposed to be an enthusiastic defender of human liberty and a tool for distributing positive entitlements. At the same hand, prohibiting surrogacy for vague moral reasons without a thorough examination of the societal aims and purposes that it can serve would be illogical.

Active legislative involvement is essential to enable proper use of the new technology, i.e. ART, and to abandon the cocooned approach to surrogacy legality that has hitherto been used. The time has come to take a realistic approach by allowing both altruistic and commercial surrogacy agreements, so that all parties engaged in surrogacy obtain what they want without anybody taking advantage of the other.

The Surrogacy (Regulation) Act of 2021 is a light for moving forward in the direction of developing legislation that regulates not only ART facilities, but all parties to a surrogacy, including the surrogate child's rights and duties.

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