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An Understanding of Surrogacy: A Legal Analysis in Indian Context and Comparative Study with Foreign Nations

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ABSTRACT

Surrogacy has emerged as a significant reproductive option for individuals and couples facing infertility, medical complications, or same-sex couples wishing to start families. This method involves a surrogate mother carrying and giving birth to a child on behalf of intended parents. The process can be classified into two primary types: traditional surrogacy, where the surrogate is biologically related to the child, and gestational surrogacy, where the surrogate carries an embryo created via in vitro fertilization (IVF) and is not genetically linked to the child. The increasing prevalence of surrogacy raises complex ethical, legal, and social implications. Ethical concerns include the potential exploitation of women, particularly in economically disadvantaged contexts, as well as the emotional and psychological impacts on all parties involved. Legal frameworks governing surrogacy vary widely across different jurisdictions, leading to a patchwork of regulations that can complicate parental rights and the status of the surrogate. Moreover, surrogacy poses significant social questions, including the impact on family structures and the commodification of childbirth. Public attitudes toward surrogacy have evolved, influenced by media representations and personal narratives, yet stigma persists in some cultures. This abstract aims to provide a comprehensive overview of surrogacy, examining its processes, implications, and the ongoing debates surrounding it. By addressing these multifaceted issues, we can foster a better understanding of surrogacy as a reproductive option, as well as its potential to both empower and challenge societal norms regarding parenthood and family formation. Ultimately, a nuanced discourse on surrogacy is essential for informed policy-making and ethical practices that prioritize the well-being of all parties involved.

Keywords: *Gestational, live-in relationships, International Surrogacy Arrangements (ISAs).*

I. INTRODUCTION

As per the Black's Law Dictionary, Surrogacy is defined as the process of carrying and

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delivering a child for another person². As per the Cambridge Dictionary, Surrogacy is defined as an act wherein a woman carries a baby for another woman, who is unable to do so herself³. The word surrogacy is derived from the latin word “surrogatus” which literally means a “substitute” [3]. Surrogacy is a process in which an embryo is created by the fusion of the sperm and egg of the intended parent(s) or donors, in some cases, and is then planted in the uterus of the surrogate (woman who has agreed to carry the baby for the intended parent(s)). Assisted Reproductive Technology (ART) is a method where a woman (surrogate) offers to carry on behalf of another couple (or person) until birth in return for an agreed amount of compensation. In Vitro Fertilization (IVF) is also one of the ways of having a baby through surrogacy but the only difference is that here the embryo is planted back in the woman’s womb without necessarily having a surrogate. Intra-uterine insemination (IUI), oocyte, sperm donation and cryopreservation are other methods of surrogacy.

Although surrogacy is a complex process in terms of the steps involved, they are only in order to ensure the best interests of the parties involved.

(A) Types of Surrogacy

Surrogacy is not one size fits all and therefore, there are many different types of surrogacies to choose from. The intended parents must choose which one can be the right fit for them with the consultation of a medical professional.

1. Gestational and Traditional Surrogacy: In traditional surrogacy, the surrogate’s egg is used in the creation of the embryo whereas in gestational surrogacy, the egg and sperm of the intended parents is used to create an embryo and then planted in the surrogate’s womb.

2. Compensated and Altruistic Surrogacy: When the surrogate is given some additional amount (base amount) except the amount for pregnancy expenses, it is compensated surrogacy. Whereas, in altruistic surrogacy, no additional amount is given.

3. Domestic and International Surrogacy: This decision is taken by parents on the basis of laws in the nation of residence. If the laws are strict, parents opt to find a surrogate in some other nation where the laws are comparatively lenient. This is termed as international surrogacy. In cases where the surrogate is of the same nation as the intended parents, it is termed as domestic surrogacy.

² Sharma R. S. (2014). Social, ethical, medical & legal aspects of surrogacy: an Indian scenario. *The Indian journal of medical research*, 140 Suppl, S13–S16.

³ Meaning of Surrogacy, available at: <https://dictionary.cambridge.org/dictionary/english/surrogacy> (last visited on October 10, 2024).

4. Agency and Independent Surrogacy: In agency surrogacy, the parties involved work with a surrogacy agency from the start to the end of the process while, in the case of independent surrogacy, the parties usually work with an independent lawyer and fertility clinic for the completion of the process.

(B) Why Surrogacy?

Surrogacy can be a convenient method for couples who cannot conceive naturally and wish to have children. Some reasons as to why couples opt for surrogacy are:

1. Concerning health conditions
2. Infertility
3. Previous issues with pregnancy
4. Lack of uterus
5. Same-sex couples

Although the arrangement for surrogacy is in the best interest of the parties, there are certain social, moral, and legal issues attached to it. For the same reason, the practice is called complex and it is the complexities involved that make the practice unpopular around the globe.

Starting from 2002, when India was considered as the surrogacy hub to the current year, the surrogacy laws in India and abroad have witnessed many changes. In this article we will be looking into the brief history of the laws and the in-detail present laws governing surrogacy in India and across the globe.

II. EVOLUTION OF SURROGACY LAWS IN INDIA

Laws which govern surrogacy hold great value in India because the nation has often been referred to as the surrogacy hub or the surrogacy capital of the world. Social stigma attached to the notion of being childless and the cumbersome procedure for adoption has increased the demand for Assisted Reproductive Technology (ART) in India. It is not surprising to note the fact that the ART industry in India has an annual compounded growth rate of 10%.

Before 2008, surrogacy, usually commercial, was widely carried out in various parts of India. No efforts were made by the government to bring into force a statutory law in order to govern surrogacy. Although certain guidelines were formulated by the Indian Council for Medical Research (ICMR) in the year 2002 and 2005 (National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India), these guidelines failed to have any statutory backing and hence, surrogacy was still being briskly carried out in the nation. It was

in 2008, that the Supreme Court dealt with the matter of surrogacy in the landmark case of Baby Manji Yamda v. Union of India. The case was associated with obtaining travel documents for a kid whose parents were Japanese but he was conceived and born in India via commercial surrogacy. The court in this case observed that the practice of commercial surrogacy was legal in India.

It was around the same time that the Assisted Reproductive Technology (Regulation) Bill, 2008 was formulated and presented before the Parliament. Unfortunately, no concrete steps were taken and the bill remained unpassed. This urged the Law Commission to take up the matter in their hands. Following which, in August 2009, the Commission came up with its 228th Report which suggested a revised and updated legislation for surrogacy regulation in India. Taking up the suggestions of the Law Commission, an improvised and updated Assisted Reproductive Technology (Regulation) Bill was prepared and came into being in 2014. However, just like the previous bill, even this bill was never passed by the Parliament.

In the meantime, the Surrogacy (Regulation) Bill, 2016 was introduced by the Ministry of Health and Family Welfare and was different from the 2014 bill in various aspects. The bill was passed by the Lok Sabha in December, 2018. However, finality continued to elude the surrogacy law and the Bill was not introduced in Rajya Sabha. Later, the Bill of 2016 was reintroduced without any amendments in the Lok Sabha as Surrogacy (Regulation) Bill, 2019 and was passed in August, 2019. Currently, the law regulating surrogacy in India exists in the form of a bill.⁴

III. KEY CHARACTERISTICS OF THE SURROGACY (REGULATION) BILL, 2019

The bill makes suitable provisions to promote Altruistic Surrogacy (surrogacy without any extended benefits). For decades, foreigners from all around the globe have benefitted from the lack of a law regulating surrogacy in India. India was also believed to provide services cheaper as compared to other nations and hence, was preferred by foreign nationals. The ART Bill of 2008 allowed foreign couples to seek surrogacy services in India but the same was reversed in the revised Bill of 2014 and surrogacy services were restricted to Indian nationals, Non Resident Indians (NRIs) and Persons of Indian Origin (PIOs).

Section 4(iii)(a) goes on to mention the eligibility of the couple intending to adopt which are,

- Couple should be of Indian Nationality.
- Should be married for at least five years.⁵

⁴ Supra note 2, pg. 1.

⁵ Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar, 1958 AIR 538.

- Age of the wife should range from 23 to 50 and that of the husband should range from 26 to 55 years.
- Couple should not have any other living child at the time even if it is through adoption, surrogacy and not only biologically unless the child is suffering from mental disorder.
- Any other condition as specified by the regulations.
- Further, Section 4(iii)(b) mentions about the eligibility of the surrogate which are,
 - Should be a close relative.
 - Should be a married woman with a child of her own.
 - Should be between 25-35 years of age.

The Bill also proposes to establish National (Section 14) and State Surrogacy Boards (Section 23) under Chapter V by the respective governments in order to advise the government in matters relating to surrogacy and to supervise the application of the Law.

Chapter VII of the Bill deals with penalties for offences which are acts such as involving in commercial surrogacy, exploiting the surrogate in any manner, abandoning, etc. The punishment for commission of such acts will result in imprisonment for 10 years and a fine which can go as high as 10 lakh rupees.

(A) Advantages of the Surrogacy (Regulation) Bill, 2019

Commercial surrogacy has often been perceived as unethical and the root cause of all the veil practices in India concerning surrogacy and hence, the bill comes with a major overhaul in the form of a complete ban on commercial surrogacy. It restricts the foreign nationals from availing surrogacy services in India. In this aspect, the bill makes a departure from the ART bills of 2008 and 2014 which allowed for commercial surrogacy.

The step is in the right direction considering the serious charges of misdoings, exploitation, and irregularities involved and largely reported in cases of surrogacy.⁶ Additional safety mechanism layers have been laid down by requiring the surrogate to be a close relative of the couple and by restricting a woman from participating in surrogacy only once in her lifetime. The term, close relative however has not been described in the Bill. Section 4(ii) of the Bill provides for the conditions under which surrogacy is permitted. It allows only couples who are infertile or suffer from any disease as mentioned under the and married for at least five years to go for surrogacy excluding single people and persons in live-in relationships.

⁶ (2009) 9 SCC 1.

The setting up of National and State Surrogacy boards will also add more authentication to the process and is a good effort in order to eradicate exploitation of surrogates.

(B) Shortcomings of the Surrogacy (Regulation) Bill, 2019

It can be inferred that the bill sure has certain shortcomings which need to be done away with and for the same, the Bill has been referred to the Select Committee of Rajya Sabha. The Parliamentary Standing Committee Report on Surrogacy has already stated that the Bill is not in consonance with the Constitution of India.

a. Right to Equality under Article 14:

Equality before law and equal protection of law subject to reasonable classification is protected under Article 14 [4] of the Indian Constitution. The Doctrine of Reasonable Classification has evolved over time in the form of judgments. It implies that a legislation shall not make improper discrimination by bestowing privileges upon a specific class of persons who are arbitrarily selected without any characteristics which differentiate them from the rest. Intelligible differentia is to be decided on the fulfilment of the guidelines formulated in the case and any law thereby in violation of such guidelines would be deemed violative of Article 14 [5].

The Bill does not qualify the test of reasonable classification because of the discrimination it places by restricting couples by mentioning several unreasonable qualifications (nationality, marital status, period of marriage, age of the intended parents, sexual orientation, etc.). For instance, the bill mentions age limit which implies that older people in need of a baby cannot avail these services. It also restricts the process of surrogacy⁷ only for married couples which means single persons, LGBTQ, etc. can never have a baby through surrogacy.

b. Right to Privacy under Article 21:

The Supreme Court in the case of *Suchita Srivastava v. Chandigarh Administration*⁸, held that right to reproduction is an inherent part of Right to personal liberty under Article 21 [7] of the Indian Constitution. The court went on to specify that the provision includes the right to “privacy, dignity and bodily integrity” of a woman and that “taken to its logical conclusion, reproductive rights includes a woman’s entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children”. The same point was reiterated by the court in the case of *Devika Biswas v. Union of India* [8].

Hence, restriction restricting the service of surrogacy only to married heterosexual couples with

⁷ *Supra* 5, art. 21.

⁸ *Chintaman Rao v. State of MP*, AIR 1951 SC 118.

specific age limit is unconstitutional. Single persons, LGBTQ, older people, persons in live-in relationships are denied rights to have a baby through surrogacy under the Bill which is again against Article 21 of the Constitution. The court observed in the case of *B.K. Parthasarthi v. Government of A.P* , that the right to make a decision regarding reproduction is essentially a personal decision and the involvement of the State in this decision making process is to be scrutinized. It has been mentioned earlier that a couple will need to have a prove that they are infertile and hence are opting for the method of surrogacy which goes against the Right to Privacy which is also a part of Right to life and liberty under Article 21.

c. Right to Trade and Profession under Article 19(1)(g):

The proposed bill is violative of Article 19(1)(g) [11] which guarantees the “freedom of trade and profession” subject to reasonable restrictions (Article 19(6)). Restrictions under this provision in the enjoyment of the right must not be arbitrary or excessive in nature. The law should strike the proper balance between the freedom under Article 19(1)(g) and the restrictions as under Article 19(6) As already mentioned above, Commercial Surrogacy has completely been banned by the Bill. While it has certain positive impacts (prevents exploitation, etc.), it is essential to spare a thought for the women and surrogacy clinics in the country who may lose their potential income. While forced pregnancy should not be propagated, in the cases where women made informed choices with free consent to be surrogates in lieu of monetary compensation, complete ban on commercial surrogacy will deprive them livelihood. The expression life as assured under Article 21 of the Constitution has a much wider scope and even includes right to livelihood . The same was recognized in the case of *Olga Tellis v. Bombay Municipal Corporation* as well.

The Select committee of Rajya Sabha led by Bhupender Yadav stated that the restriction that a surrogate mother should only be a close relative should be done away with as it restricts the availability of surrogates, affecting the genuinely needy persons

IV. INTERNATIONAL LAWS ON SURROGACY

In today’s era of globalization and more access to travel, the demand for alternative methods of reproduction has increased rapidly which in turn has led to an increase in the number of International Surrogacy Arrangements (ISAs) or cross border agreements. In such agreements, intending/ aspiring parents in one country can have a surrogate mother abroad to give birth to their child. As of now, there is no binding International agreement and hence, every country follows a different set of laws. The lack of international regulation, accompanied with the frequently changing laws of each nation, has created a bunch of legal challenges for the parties

involved. Therefore it is extremely essential to look into the laws of different nations prior to getting into any arrangement.

(A) Netherlands

Dutch Society of Obstetrics and Gynaecology Guidelines Netherlands allows for only Altruistic surrogacy and prohibits commercial surrogacy and those found practicing the same shall be imprisoned for a period of 1 year. The payment to the surrogate is only permitted to the extent of insurance, legal charges and other reasonable expenses. One can only resort to surrogacy if the parents are infertile or cannot conceive due to other medical reasons. However, even single persons can go for surrogacy. It is not compulsory for the surrogate to be a close relative of the intending parents. However, the surrogate should have a child of her own and should be above 44 years of age.

(B) United Kingdom

Surrogacy Arrangements Act, 1985

Similar to the Law of Netherlands, the UK too permits for only Altruistic surrogacy. Those found engaging in commercial surrogacy will be liable for imprisonment of upto 3 months. The payment to the surrogate is only permitted to the extent of insurance, legal charges and other reasonable expenses. There is no mention of the eligibility criteria for either the commissioning parent or the surrogate. Even single persons can go for surrogacy. It is not compulsory for the surrogate to be a close relative of the intending parents. Additionally, there is no restriction on the number of times a woman can act as a surrogate for another couple/ person.

(C) USA

There is no single unification of law in the USA. However, each federal state government has a separate law governing surrogacy. The laws vary from state to state depending upon the sexual orientation and marital status of the parties involved. While most states approve of surrogacy there are a few states that have put complete ban on the same. It is widely accepted that the USA is the friendliest and safest place for surrogacy.

(D) South Africa

Children's Act, 2005 (Chapter 19)

Only Altruistic surrogacy is allowed in South Africa while prohibiting commercial surrogacy. The payment to the surrogate is only permitted to the extent of insurance, legal charges, loss of income and other reasonable expenses. A married couple or a single parent is allowed to go for surrogacy only if the intending parent(s) is unable to give birth to a child due to some permanent

medical condition. There is no restriction on the basis of marital status of the intended parents. No restriction on the number of times a woman can act as a surrogate is provided for but the consent of her partner, if any, is essential. Those engaging in commercial surrogacy are liable for imprisonment upto 10 years.

(E) Greece

Article 1458 of the Greek Civil Code

The law is very similar to that of the Netherlands. The only difference here is that there is no eligibility criteria for the surrogate woman and there is no restriction as to the number of times the woman can act as a surrogate. Since the Greek Law favors only Altruistic Surrogacy, the ones engaging in commercial surrogacy shall be liable for a minimum imprisonment of upto 2 years.

It is to be noted that there are some nations such as that of Cambodia, Denmark, France, Germany, Ireland, Italy, Spain, Portugal, Bulgaria and Nepal which completely outlaw surrogacy.

V. CONCLUSION

Surrogacy is a practice wherein a woman (surrogate) consents to carry a baby until birth and then hands over to the indented parent(s). In nations around the world, it has been observed that most of them permit only Altruistic Surrogacy while prohibiting Commercial Surrogacy. Not to forget that there are nations which completely outlaw surrogacy too. In India the law regulating surrogacy is in the form of a bill (Surrogacy (Regulation) Bill, 2019) which is currently under scrutiny by the Select Committee and yet to be passed by the Rajya Sabha. In the article, I have thrown light on the key characteristics and the loopholes in the Surrogacy Bill, 2019 which still needs to be looked into and relevant amendments are required to be made.
