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Surrogacy Laws in India

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ABSTRACT

A woman, who is also known as the surrogate, and the intended parents who are willing to have a child enter into a legal contract in order to fulfill their desire to become parents via the process of surrogacy. This arrangement has evolved into one that is considered standard and acceptable in today's culture. When a mother or a woman wants to have a child but cannot conceive for any number of reasons (whether they be medical or personal), a lot of individuals choose to go the route of surrogacy instead. A mother's life is likely to be put in danger as a result of giving birth to a child. It is a blessing for parents or people who want to have a kid but are unable to, which is why it is even more vital to have correct rules on this topic. Surrogacy is a blessing for parents or people who want to have a baby but are unable.

Keywords: Surrogacy, Women, Mother, Child.

I. INTRODUCTION

In 2002, India became the first country in the world to legalize the practice of commercial surrogacy. Since then, the surrogacy industry in India has experienced explosive growth, which has resulted in the establishment of a number of commercial firms and firms claiming expertise in surrogacy law. These businesses provide guidance and assistance to foreign tourists who travel to India in the hope of having an Indian woman rent her womb so that they can have a child. Such arrangements can be considered to be exploitative in nature because they not only encourage baby selling but also diminish the dignity of women's reproductive capacities and the inherent value of children by altering them. Furthermore, they encourage the sale of children who have been genetically modified. This paved the way for the establishment of a number of foreign companies in India, which helped people coming from all over the world find a surrogate mother in India, assisted foreigners with the paperwork associated with surrogacy, and assisted children in acquiring passports and visas so that they could leave the country.

This recommendation was made in order for relevant laws to be enacted.² One of the primary causes for the proliferation of surrogacy services in India is the country's rampant poverty, which forces impoverished Indian women to rent their wombs in exchange for monetary

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² In its 228th report, the Law Commission of India made a recommendation to allow ethical and altruistic surrogacy but outlaw commercial surrogacy.

compensation or other necessary goods.

Guidelines for the regulation of surrogacy agreements were published by the Indian Council of Medical Research (ICMR) in the year 2005.³ In addition, the standards required that the surrogate mother give up all parental rights to the surrogate child and that she cannot use her own eggs in the surrogacy process. The guidelines also said that the surrogate mother cannot contribute her own eggs for the surrogacy.

(A) Research Question

1. Whether a single mother is permitted to adopt a surrogate kid?
2. What rights does a surrogate mother have over the kid?

(B) Literature Review

- **Problems Of Commercial Surrogacy In India**

By: Aditya Kumar

Published By: SSRN Papers

In this paper, the author talks about Surrogacy in underdeveloped nations which are authorized in nowadays and he believes this wonderful move in the future of childless parents because they are unable to kid either physically or psychologically. But when we speak about its commercialization then it becomes a major problem for society and the Indian parliament should know about comprehensive research viewpoint of surrogacy in general and the situation existing in India and create the finest rule and regulations for Surrogacy.

- **Is Surrogacy Legal in India**

By: Ananya Bose

Published By: iPleaders Legal Blogs

In this paper, the author talks about the conventional method of surrogacy which is a very helpful approach that might assist women who, regrettably, are unable to generate quality eggs for reproduction or members of the LGBTQI+ community in having children. This kind of surrogacy has benefits since it keeps the cost of the process down. The number of medical procedures the surrogate mother must undergo is considerably less than in gestational surrogacy. There is no need to locate a different donor for fertilization if the intended mother's egg does not fertilize since the surrogate's egg may be utilized in that situation. The intended

³ According to the recommendations, the surrogate mother would be eligible for monetary compensation, the amount of which would be determined jointly by the intended parents and the surrogate mother.

father's (or donor's) sperm is simply artificially inseminated by the method of intrauterine insemination or intra-cervical insemination, and the procedure becomes less expensive since the egg does not need to be retrieved with the sperm outside the womb.

(C) Hypothesis

Although there aren't a lot of positive aspects to the Bill, there are a lot of negative aspects that come along with it. Article 21 of the Constitution, which protects a person's right to life, also protects a person's right to reproductive autonomy, which includes the right to procreate and the right to become a parent. The state has no authority to interfere with rights that are considered to be basic since it is not within its purview to do so. The manner in which a kid is brought into the world is a choice that must be made by the prospective parents; specifically, they must choose between having a child delivered naturally or with the use of a surrogate.

(D) Aim

The purpose of this research is to make an effort to investigate the business issue that surrogacy presents in the current day. The paper also aims to find out the certain rights of the couple and the surrogate mother pre- and post-birth of the child.

II. CONCEPT AND OVERVIEW OF SURROGACY

Although the practice of surrogacy and the rules that regulate it are not yet well established, some modern couples do choose it as a feasible choice to become parents. However, the number of couples who choose this path to parenthood is rather low. Despite the fact that commercial surrogacy has become more important over the last two decades, the sector in India has remained mostly uncontrolled throughout this time. Countries such as the Russian Federation, Columbia, and Ukraine, in addition to some states in the United States of America, allow for commercial surrogacy. On the other hand, countries such as France, Finland, Italy, Japan, Spain, Sweden, Switzerland, Hungary, and Ireland, amongst others, have outlawed any and all forms of surrogacy.⁴

Before a few years ago, it was believed that 20–25 million couples in India were unable to have children, which made assisted reproductive technology (ART) like surrogacy a viable option for resolving their issues. Since it was made legal in 2002, the commercial surrogacy industry in India has experienced significant growth. As a result, a study funded by the United Nations in July 2012 estimated that the surrogacy business in India at its new dimensions is worth \$400

⁴ Prior to the year 2008, the practice of surrogacy in India was almost exclusively for commercial purposes, and the country lacked any kind of formal regulating structure, despite the fact that the Indian Council for Medical Research had developed certain recommendations (ICMR).

million per year, and there are more than 3,000 fertility clinics located throughout the country. Additionally, the significance of surrogacy in the field of medical tourism in India cannot be overstated and should not be ignored. At first, when commercial surrogacy was legalized in India in 2002, it was said to be a part of the country's drive to promote medical tourism, which was an industry that back in 2012 generated the estimated \$2–3 billion annually in the United States. However, this was later proven to not be the case. Although accurate estimates are difficult to come by, it is believed that more than 25,000 children have been born to surrogates in India since then, with fifty percent of those infants having Western ancestry.

III. REGULATORY FRAMEWORK OF SURROGACY

(A) Guidelines published by the Indian Council of Medical Research in 2005

These rules were developed in order to control the behaviour of the Assisted Reproductive Technology facilities that perform surrogacy procedures in the Indian subcontinent. This recommendation laid out the procedures and treatments that fertility clinics should use when implementing Assisted Reproductive Technology (ART). Despite the fact that this occurred before the ART Bill was passed, these Guidelines are just advisory in nature and do not have any legal weight.

(B) The Surrogacy Regulation Bill, 2019

The Bill does not enable any kind of surrogacy that is performed for financial gain; nevertheless, it does not ban altruistic surrogacy. In the case of altruistic surrogacy, the surrogate mother does not get any monetary compensation of any kind. This includes not only the cost of her pregnancy-related medical care but also the cost of her insurance coverage. Commercial surrogacy is defined as the practice of carrying out a gestational carrier arrangement in exchange for monetary gain or reward (in cash or kind), in addition to covering needed medical expenses and insurance coverage.

The appropriate authorities have to provide the prospective pair both a "certificate of essentiality" and a "certificate of eligibility" before the adoption may take place. In order to get a certificate of essentiality, one must first satisfy a number of prerequisites, which include the following requirements:

- A certificate of infertility issued by a District Medical Board is required as evidence to demonstrate that either one or both members of the couple who wants to have the baby are infertile or unable to have a child at this time.
- It is necessary for the Magistrate Court to issue an order determining who will have

custody of the surrogate kid.

- After the baby is born, the surrogate mother has to have health insurance covering postpartum difficulties in her name for a period of sixteen months after the baby is born.

Included in the scope of the Bill are the following infractions:

- Promotion of surrogacy and other forms of commercialization of the practice
- The intended parents exploit the surrogate mother in order to have their own children.
- Surrogate children are at risk of being disowned, exploited, or abandoned.
- Transactions involving the sale or importation of human gametes or embryos.
- A violation of this kind may result in a sentence of up to ten years in jail and a fine of up to ten lakh rupees (about \$15,000).

(C) The Surrogacy (Regulation) Act, 2021

Early in the month of December in 2021, this Bill was finally approved. The following is a list of some of the most important aspects of the Act:

- Under this Act, each and every clinic that offers surrogacy as a therapy or facility must be registered, and the medical professionals who work in such clinics must meet the requirements outlined in this law in order to be allowed to practice.
- Within the first sixty days after the appointment of the competent authority, any institution that offers surrogacy treatments is required to submit an application for registration. It is necessary to renew your registration every three years.
- Any surrogacy clinic, gynecologist, embryologist, or other medical practitioner is not allowed to engage in any sort of commercial surrogacy. This includes the practice of gestational carrier. Under the terms of the 2021 Act, surrogacy may only be performed for charitable purposes.
- In order to comply with Indian law, the couple who is planning to have a child together, often known as the "intending couple," must first be married. The age range for male candidates should be between 26 and 55 years old, while the age range for female candidates should be between 25 and 50 years old. Additionally, another essential need is that they should not already have any other children, whether they were born naturally or the result of surrogacy or adoption.
- It is necessary for the woman who will be offering this service, who will be the surrogate

mother, to be between the ages of 35 and 45. During her whole lifespan, a woman is not eligible to serve as a surrogate mother more than once.

- An intended couple that has a medical necessity for surrogacy is required to submit a "Certificate of Essentiality/Infertility" to the National or State Assisted Reproductive Technology and Surrogacy Board. This certificate must be renewed annually.
- The intended surrogate mother has a right to know about any and all potential risks and side effects associated with the procedure. In addition to this, the surrogate mother is required to offer written informed consent in a language that she is able to comprehend.
- In accordance with the provisions of this bill, a registry known as the National Assisted Reproductive Technology Registry would be established, and its primary responsibility would be to oversee the process of registering medical facilities that provide surrogacy services.
- Any couple who is found to have obtained a child via the practice of commercial surrogacy would be subject to the provisions of this Act, which stipulates that they will be responsible for a fine of up to 50,000 rupees as well as a jail sentence of up to 5 years.⁵
- Any person, company, or clinic that is proven to be engaged in the exploitation of surrogate mothers or children who were born as a result of surrogacy is subject to a maximum punishment of 10 years in prison as well as a fine of ten lakhs of rupees.

IV. ISSUES AND CHALLENGES

The EU Health Ministry has announced regulations concerning surrogate pregnancies. While generally well-intended, the regulations' application is crucial. A blanket prohibition on commercial surrogacy could actually be counterproductive, even if strict regulations to control private surrogacy facilities are acceptable. In order for the millions of infertile couples to have a biological kid of their own as well as the women who offer their wombs, a balanced strategy with strict regulation and control would be beneficial. Couples who want to have children must now purchase three-year health insurance for surrogate mothers in accordance with the Surrogacy (Regulation) Act's new regulations. This is an advance that will benefit surrogate moms.⁶

⁵ In addition, if the same violation is done several times, the fine will increase to one lakh, and the amount of time spent in prison would increase to ten years.

⁶ According to estimates, up to 15% of Indian couples seek medical help for issues connected to infertility.

Surrogacy is becoming a more popular choice among them. However, it is a sector that is rife with several unanswered questions and legal difficulties. The Surrogacy Act forbids commercial surrogacy and only permits it for charitable reasons when a couple is dealing with infertility or a medical condition. Other than the medical costs and insurance coverage throughout the pregnancy, altruistic surrogacy does not include any financial payment to the surrogate mother. For 'ethical humanitarian' reasons, only close relatives will be allowed to serve as surrogates. Additionally, only a married woman in the age range of 25 to 35 who has a kid of her own will be permitted to serve as a surrogate for the intended infertile couple, who again should be close relatives.

Such moralistic directives would limit the alternatives available to childless couples in addition to being hard to follow. Understanding the socioeconomic environment in which women choose to become surrogate moms is crucial. Surrogacy may be a safer and better alternative for certain women than other ways to protect their lives. In reality, banning commercial surrogacy would stop vulnerable surrogates from being used in risky scenarios in an unregulated market. Russia, South Africa, and Israel serve as precedents for enacting stringent regulations for State-run commercial surrogacy services.

However, the new legislation only enables altruistic surrogacy, despite the significant arguments made by social activists and opposition parties in India for the ability of surrogate mothers to profit economically from the service they provide. While it is true that there have been several instances of unscrupulous organizations using weak women, improved legislation and open regulatory frameworks need to be the way to go. If close relatives are permitted to be surrogates, the law immediately believes that all exploitation would miraculously disappear. It's also critical to understand that the women involved in altruistic surrogacy will not get paid for their reproductive labour. In the real world, the idea of altruistic surrogacy has no merit.

V. CONCLUSION

The process of surrogacy in India is a difficult one. Even before beginning the process, there are a number of legal duties that need to be satisfied. In addition to this, there is also a societal stigma associated with the practice of surrogacy. The general population in India does not make use of reproductive technologies to the same extent that celebrities do, such as Priyanka Chopra and Nick Jonas, Shilpa Shetty and Raj, and many others. As a result, we still discover a lack of usage of such operations among the general population. Even though having a baby via surrogacy is a wonderful option for families in these situations, the practice still needs to gain greater social acceptance. It is necessary to come to terms with the reality of the situation if a

woman is unable to give birth.

In this area, there is a pressing need for heightened awareness, as well as some clarification on the applicable legal framework. The decision to outlaw commercial surrogacy should be re-examined as soon as possible. Additionally, the laws need to be revised to better accommodate gay couples as well as single parents. There also has to be more stringent regulations in place to manage the health of the kid, as well as the surrogate mother and the environment in which they live. It is a privilege for people or couples who desire to experience the joys of motherhood to have the option of surrogacy.
