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Surrogacy in India: A Study in Retrospect

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Introduction

The natural law of reproduction says that individuals are required to procreate in order to make full use of the potential that was given upon them by the one who created them in order to ensure the continuation of the human race as a whole. The current decrease in the probability of having a healthy baby or infant through international adoption has unavoidably contributed to the shift to alternative strategies for the creation of families, most notably global surrogacy, which is also known as international commercial surrogacy. When trying to have a family via more traditional means is unsuccessful for many infertile couples, they seek out assisted reproductive technologies such as in-vitro fertilisation, intrauterine insemination, and other similar treatments. Methods such as "surrogacy" are gaining popularity for a variety of reasons, one of which is that recent developments in health and science have made them safer and more successful. According to Black's Law Dictionary, "the act of carrying and delivering a child for another" is what is meant when referring to the practise of surrogacy. The Warnock Report from 1984 defines surrogacy as the act of one woman agreeing to bear a child for another woman with the understanding that after the kid is born, the surrogate mother would relinquish legal custody of the child to the other woman.¹ Paid services are optional in surrogacy agreements. If the surrogate gets compensated for her time and effort in addition to having her reasonable medical and other costs covered, the arrangement is known as commercial surrogacy.²

Definition of Surrogacy

The action of a woman having a baby for another woman who is unable to do so herself.³ In the Indian context, the Guidelines of Indian Council of Medical Research (ICMR)⁴ defines surrogacy as "Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband with the intention to carry it to term and hand over the child to genetic parents for whom she is acting as a surrogate." Thus in this context the word 'surrogacy' does not include traditional surrogacy arrangement. A standard definition of surrogacy is offered by the American Law Reports in the following manner: "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."⁵ The New South Wales Law Reform Commission defined surrogacy as: "an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer custody at or shortly after birth." Surrogacy is an arrangement under which a surrogate woman consents to bear a child with surrendering of her rights and duties as mother of the resulting child, after having been impregnated through assisted reproductive technologies. ⁶ Section 2(zd) of the Surrogacy(Regulation) Act 2021, defines 'surrogacy' means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intended couple after birth.

¹ Law Commission of India, report no. 228, need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy.

² J. Milliez. "Surrogacy: FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health." *International Journal of Gynecology & Obstetrics* 312-313 (2008).

³ *Cambridge Advanced Learner's Dictionary & Thesaurus*, As available at: <http://dictionary.cambridge.org/dictionary/english/surrogacy>.

⁴ Section 3.10 of the Guidelines of Indian Council of Medical Research (ICMR), 2005.

⁵ American Law Reports. "Validity and Construction of Surrogate Parenting Agreement". 77 *A.L.R* 4th70 (1989).

⁶ Uniform Status of Children of Assisted Conception Act, Alternative B, § 5, 9B U.L.A. 208 (Master ed. Supp. 1997).

Legal Implications of Surrogacy in India

In a surrogacy agreement, a woman consents to get pregnant and give birth to a child for the benefit of someone else who will raise the child. Due to the lack of severe and comprehensive surrogacy legislation till 2021, India has emerged as the top location for both domestic and international gestational surrogacy. In addition to these, in 2008 without any law deals with the complicated issues of surrogacy, in the famous *Baby Manji Yamada v. Union of India & Another*⁷ case the Supreme Court of India has held that business of surrogacy is allowed in India, which has again amplified the global certainty for surrogacy in India.

The National Guidelines for the Accreditation, Supervision, and Regulation of ART Clinics were written by a committee assembled by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences in 2002, and were approved by the Indian government in 2005. (NAMS). The regulations provide out a process for state governments to manage all issues pertaining to the accreditation, oversight, and regulation of ART Clinics. After that, the Law Commission of India presented the 228th Report on ART methods in 2009, which included the significance and necessity of surrogacy as well as the measures taken to regulate surrogacy agreements. The Indian government submitted bills in 2008, 2010, and 2014 to legalise commercial surrogacy in an effort to control the surrogacy market there, but none of these bills passed into law. Gay couples, single parents, and unmarried parents from outside India are not permitted to use surrogates as of 2013, according to the New Medical Visa Regulation 2012, which is enforced by the Indian government. Only legally wedded foreign couples who have been together for at least two years are allowed to go to India on a medical visa in order to commission a surrogacy. To regulate commercial surrogacy in India, thereafter in 2016, the Surrogacy (Regulation) Bill 2016 was introduced and passed by Lok Sabha proposing to permit only heterosexual Indian Couples married for at least five years with infertility problems to access altruistic surrogacy. However the Bill lapsed owing to the adjournment sine die of the parliament session. Again the Bill was reintroduced and passed by Lok Sabha in 2019 as the Surrogacy (Reg.) Bill, 2019.⁸ Very recently, the Parliament has enacted the Surrogacy (Regulation) Act, 2021. Recently ART (Regulation) Act 2021 has also been passed by both houses of parliament. This is the present picture of surrogacy which is prevailing in India and it is the demand of time to balance individual rights with public policy considerations through an appropriate comprehensive legislation.

The Surrogacy (Regulation) Act, 2021

The 23-member Select Committee made 15 important revisions that were approved by the Union Cabinet in the most recent Act, which was presented to the Lok Sabha on June 26, 2020 by Dr. Harsh Vardhan of the Ministry of Health and Family Welfare. He said⁹ “The Act 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 Act 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.”

Provisions of the Act¹⁰

This may be discussed under heads as follows:

Chapter I (Section 2)

Section 2 of the Act is the definition clause, terms such as:

“**Altruistic surrogacy**” [Section 2(b)]: 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 of the surrogate mother, are given to her dependents or the surrogate or her representative.

“**Commercial surrogacy**” [Section 2(f)]: Commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of a human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the

⁷ AIR 2009 SC 84.

⁸ The Surrogacy (Regulation) Bill (No. 156), 2019.

⁹ Lok Sabha Passes Surrogacy (Regulation) Bill, The Hindu, 5-8-2020. <<https://www.thehindu.com/news/national/lok-sabha-passes-surrogacy-bill/article28824277.ece>> (last accessed on 7-5-2021).

¹⁰ The Surrogacy (Regulation) Bill, 2020 (Reported by the Select Committee).

services of surrogate motherhood by giving the payment, benefit, reward, fees, remuneration or any kind of monetary incentive to the surrogate mother or her representative or her dependants, except the medical expenses *and such other prescribed expenses* incurred on the surrogate mother and the insurance coverage for the surrogate mother;

“Intending woman” [Section 2(s)]: An Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy;

Chapter II (Section 3) deals with “parentage and abortion of surrogate child” in which a child born by surrogacy procedure will be considered to be the biological child of the intending couple or intending woman. It requires the written consent of the surrogate mother and the authorisation of the appropriate authority for the abortion of the surrogate child. This authorisation must be according to the Medical Termination of Pregnancy Act, 1971¹¹. Further, before the embryo is implanted in her womb, the surrogate mother will have an option to withdraw from the surrogacy.

Chapter III (Sections 4-10)

(i) no woman, other than an ever-married woman having a child of her own and The first part deals (Section 4) with the five purposes for which surrogacy is permitted:

1. When an intending couple or intending women of India has a medical indication for gestational surrogacy;
2. When it is only for altruistic surrogacy purposes;
3. When it is not for commercial purposes or commercialisation of surrogacy or surrogacy procedures;
4. When it is not for producing children for sale, prostitution, or any other form of exploitation; and
5. Any other condition or disease as may be specified by regulations made by the Board.

The second part deals with eligibility criteria for intending couples who need to obtain two certificates issued by the appropriate authority which are:

1. Certificate of essentiality. [Section 4(iii)(a)]
2. Certificate of eligibility. [Section 4(iii)(b)]

An eligibility certificate for intending couple is given separately by the authority concerned on fulfilling the following conditions. [Section 4(iii)(c)]

- A certificate of essentiality shall be issued when the following conditions are fulfilled:¹²
- (i) A certificate of a medical indication in favour of either or both members of the intending couple or intending woman for gestational surrogacy from a District Medical Board.
 - (ii) An order of parentage and custody of the surrogate child passed by a Magistrate's court.
 - (iii) Insurance coverage for 36 months from 16 months provided in the earlier version which covers postpartum delivery complications for the surrogate.

To acquire a certificate of eligibility from the authority concerned, the surrogate mother should be:

- (i) between the age of 25 to 35 years on the day of implantation, shall be a help in surrogacy by donating her egg or oocyte or otherwise or a surrogate mother;
- (ii) a willing woman shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act: the intending woman shall approach the appropriate authority with a willing woman who agrees to act as a surrogate mother; no woman shall act as a surrogate mother by providing her own gametes;
- (iii) no woman shall act as a surrogate mother more than once in her lifetime;
- (iv) the surrogate mother cannot provide her gametes for surrogacy; and
- (v) a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner.

Section 8 deals with the rights of the surrogate child: A child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said child

¹¹ Medical Termination of Pregnancy Act, 1971.

¹² Bhumitra Dubey and Yash Tiwari, Analysis of the Surrogacy (Regulation) Bill, 2020, ILJ, (2020), <<https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill.php>> (last accessed on 9-5-2021).

shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.

Chapter IV (Sections 11-14)

“Registration of surrogacy clinics” by the authority concerned to undertake surrogacy or the procedure related within 60 days from the date of appointment of the authority concerned.

“Certificate of Registration” the validity of which is three years and can be renewed.
“Cancellation or suspension of registration” by the authority concerned if any infringement of the provisions of the Act.

“Appeals” can be made by surrogacy clinics or intending women or intending couple against orders such as rejection or cancellation of certificates, registrations, and applications passed by the appropriate authority to the State and Central Government.

Chapter V (Sections 15-32)

National and State Surrogacy Board consisting of various members from Parliament, State Legislative Assemblies, Executives, and ten eminent members appointed by State and the Central Government. Boards must guide the Central Government on policy formulation relating to surrogacy, monitoring and reviewing the implementations of the Act or rules and regulations, laying down the code of conduct of the surrogacy clinics, supervise the operation of the State Surrogacy Board, and the working of various bodies initiated under the Act¹³.

Chapter VI (Sections 33-35)

This chapter deals with the functioning of “appropriate authority”. To put a firm regulatory structure in place, the Act authorises the significant authority to issue, suspend, or terminate the registration of surrogacy clinics; advocate the explicit standards; examine and take actions in case of any deflections from the Act, and finally to take into consideration the change in technological and social conditions.¹⁴

Chapter VII (Sections 36-43)

Penalizes any person up to 10 years' imprisonment and fine up to 10 lakh rupees for offences like advertising or undertaking commercial surrogacy in any manner, disowning or exploiting the surrogate child or surrogate mother, selling or importing human embryo or gametes for surrogacy purpose, and conducting sex selection in any form for surrogacy.

Punishment for not following altruistic surrogacy shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to five lakh rupees for the first offence and for any subsequent offence with imprisonment which may extend to 10 years and with fine which may extend to 10 lakh rupees.

Conclusion

Early this year, the Surrogacy (Regulation) Act 2021 went into effect. The Acts seek to regulate the multibillion-dollar reproductive medicine industry, laying out who is eligible for assisted reproductive technologies and procedures like in vitro fertilisation and surrogacy, as well as the legal framework for gamete donation and surrogacy. They also lay out the conditions under which clinics must operate. An IVF specialist and others common people looking to start a family have filed petitions against the Acts with the Supreme Court and Delhi High Court, accusing the Act of discriminating against single individuals, those living together, and those in same-sex partnerships, as well as violating their right to reproductive autonomy and choice. Also, the petitions are against the commercial surrogacy prohibition, claiming that it is irrational and denies surrogate mothers their right to reproductive autonomy. The matter is of grave concern and needs an elaborate discussion on the present scenario of multibillion-dollar reproductive medicine industry.



¹³ Siddhart Behera, A Critical Analysis of the Surrogacy (Regulation) Bill, 2020, LexForti, (4-12-2020), <<https://lexforti.com/legal-news/surrogacy-regulation-bill-2020/>> (last accessed on 9-5-2021).

¹⁴ *Ibid.*