
HISTORICAL BACKGROUND OF SURROGACY IN COMPARISON WITH MODERNISED SOCIETY

Danish Chandra, Vivekananda Institute of Professional Studies

INTRODUCTION

Surrogacy implies the process wherein a lady agrees to carry a child for the expected guardians who can't bear a kid because of clinical reasons or a couple with same-sex relations. It is completed via a legitimate agreement. There are two forms of surrogacy that are traditional surrogacy the second is gestational surrogacy that is also called in vitro fertilization.

Indian surrogacy has its history and is an exceptionally old procedure. It turned into an effective practice in India with the introduction of India's first IVF child Kanupriya who was brought into the world in Kolkata on October third, 1978. From that point forward the field of assisted reproductive technology has shown significant improvement.

The History of surrogacy likewise had a place with the Mahabharata, as in Mahabharata Gandhari conveyed a semi-strong material on the spot where a youngster was born. Maharishi Vyas further partitioned that semi-strong material into 100 pieces and established them in various pans. Subsequently, the 100 Kauravas were conceived.¹

WHAT ARE THE RECOMMENDATIONS OF THE LAW COMMISSION OF INDIA?

It highlighted that there is a need to enact a law to regulate commercial surrogacy. The LCI in the 208th report recommended prohibiting commercial surrogacy. Reasons were:

1. Use of surrogacy prevalently by the foreigners.
2. Lack of a proper legal framework.

¹ Sisodiya, D. S. (n.d.). Surrogacy under framework of the Indian Constitution. iPleaders. Retrieved February 17, 2022, from <https://blog.ipleaders.in/surrogacy-under-framework-of-the-indian-constitution/?amp=1>

3. Surrogate mother exploitation may have been coerced to become a surrogate due to poverty and lack of education.

Therefore in 2015, the notification of the government of India prohibited surrogacy for foreign nationals. In Lok Sabha, the first Surrogacy (Regulation) Bill was introduced in 2016 and lapsed after Parliament was dissolved.

The Surrogacy (Regulation) Bill 2019 was introduced in Lok Sabha 15 July, 2019 and passed by Lok Sabha on 5 August, 2019. Further, for more discussion, it was referred to a Select Committee.

ANALYSIS

The Indian government has prohibited commercial surrogacy on the grounds of the abuse of helpless ladies. Analysts have chalked out various explanations behind cross-border commercial surrogacy to be shady - moral, monetary and emotionally exploitative. It is viewed as ethically wrong to permit poor fertile ladies from the worldwide south to "lease their belly" for rich infertile ladies from the worldwide north. As an expansion of this, some have even portrayed it as current bondage and a joke of parenthood. Commercial surrogacy often leads to some form of human trafficking. The UN estimates this form of trafficking to be worth some \$10 billion.

It can likewise be emotional, originating from factors connected with informed assent, nobility of regenerative work, and the mental prosperity of the gatherings in question. From that angle, without a doubt, the design of commercial surrogacy in India has been everything except palatable. Aspects, for example, surrogates not even being aware of the identity of the aiming guardians, and not getting psychological counselling are without a doubt equivalent to exploitation. From a financial outlook, "selling a belly" or "purchasing a child" brings up numerous moral issues. Regardless, one contemplates whether eliminating the payment makes it more exploitative.

While the Center has voiced its consent to altruistic surrogacy - the surrogate doesn't get monetary incentives above the necessary basic expenses of bearing a kid - for fruitless Indian couples, it has its own conceivable restrictions.

Bhupender Yadav, an individual from Parliament who led the select committee, wrote in a

February 2020 Hindustan Times segment. "Under these conditions, there have been many reported incidents of unethical practices on encompassing surrogacy. These practices incorporate the abuse of surrogates, abandonment of youngsters conceived out of surrogacy, and the import of human embryos and gametes." The new regulation, he contended, would safeguard substitutes from trafficking and safeguard the freedoms of kids brought into the world through surrogacy.²

WHO WILL BE ELIGIBLE FOR SURROGACY?

The Surrogacy Regulation Bill (2019) bars same sex couples from adopting a surrogate in India. As per the more current regulations, married Indian couples, who have been together for at least five years and have been considered medically unfit by a specialist or expert to conceive youngsters normally will be permitted to rely upon a surrogate. They have to provide a certificate of essentiality and also a certificate of eligibility. Also, they have to undertake that they will not abandon the child born out of surrogacy.

The move currently makes it challenging for individuals to run surrogacy as a 'rent a womb' business and take advantage of ladies in the economically weaker segments, who are regularly left in the dark regarding their rights.

That being said, choosing surrogacy will likewise be unimaginably challenging for same-sex couples and Non-resident Indians who want to be a parent. Under the new regulation, foreigners and NRIs cannot adopt a surrogate mother.

JUDICIAL INTERPRETATION

In the landmark judgment of *Baby Manji Yamada v. Union of India* [3], the Apex Court has defined surrogacy and held that it is legal.

However, aspects such as commercial surrogacy have been unregulated which are considered as the root cause of evils surrounding surrogacy in India. With the intent of curbing such loopholes, the 2020 Bill was proposed in order to close such loopholes³.

² Anindita Majumdar, what is altruistic surrogacy? *The Hindu* (2021), <https://www.thehindu.com/opinion/op-ed/what-is-altruistic-surrogacy/article62110491.ece/amp/> (last visited Sep 22, 2022).

³ Siddhart Behara, A Critical Analysis of the Surrogacy (Regulation) Bill, 2020 *Lex Forti* (2021), <https://lexforti.com/legal-news/surrogacy-regulation-bill-2020/> (last visited Sep 22, 2022).

In the case of *Jan Balaz v. Anand Municipality*, the Gujarat High Court held that although regulations are required to protect the rights of a surrogate mother, guardianship, responsibilities of the fertility clinic, etc., the position of law remains the same i.e. public welfare and policy does not affect the enforceability of surrogacy contracts. The 2020 Bill seeks to fulfil these lacunae by substantiating the provisions governing surrogacy.

CONCLUSION AND SUGGESTIONS

Women rights advocates agree that the business needs more guideline. The issue with the proposed regulation, they say, is that it neglects to resolve the fundamental issues with current practices and doesn't consider the interests or voices of surrogates. They are essentially worried about the law that makes altruistic surrogacy lawful, contending that it will lead to women being pressurized into becoming surrogates without wanting to. Altruism could lead to forcefulness.

Not compensating a person for reproductive labour cannot prevent exploitation and trafficking of women.

Despite absolving same sex couples, single people, and live-in couples from looking for surrogacy, not clearly characterizing the regulative mechanism in altruistic surrogacy, and the extremely regressive endorsement for couples with differently abled youngsters to select surrogacy, the Bill needs to be modified and amended and must include same sex couples who are unable to bear a child.

India faces the severe problem of poverty, and with the advent of surrogacy in the country, poor women indulge themselves in the process. Therefore, it is necessary to arrive at a mid-way that facilitates commercial surrogacy but in a better and sufficient regulatory manner. The prices must be fixed by the appropriate authorities and bargaining shouldn't be permitted. Although the Bill promotes altruistic surrogacy, the same can lead to corruption, black-marketing and a clandestine surrogacy procedure. In the case of an altruistic agreement, the gestational carrier could incur more out of pocket costs, and the intended parents could also end up paying more due to misinformation or other various outliers. The bill expects a surrogate mother to go through the entire process of surrogacy out of compassion. These issues have not been addressed in the bill. Addressing them will lead to a more comprehensive framework.

Surrogacy is the last hope for infertile couples who want to have a child. It continues to be an important issue and must be viewed in light to the fundamental rights of article 21 that include right to privacy which include right to reproduction and article 14 which talks about intelligible differentiation. There is no logic as to the differentiation made between married couples and same sex couples or single parents. Moreover, a blanket ban on commercial surrogacy leads to a threat of underground trafficking which worsens the situation as per article 19(1)(g) of the Constitution of India which is one of the most important rights that talks about right to freedom of speech and expression. Therefore, the authorities must make reforms to the bill and include various stakeholders including the infertility clinics, healthcare providers. Informed stakeholders will make the law a better one.