

SURROGACY LAWS OF INDIA: A BLISS OR CURSE

- *Bhumani Tyagi and Diksha Chouhan¹*

Abstract-

India is a country where people think it is important to give birth to children so that they can carry forward their genes and the couple who can't give birth to children are considered ill-fated, but Medical Science gave birth to many techniques that can help couples in becoming parents and one such method is "Surrogacy". Back when the technique of Surrogacy was invented it was called the blessing for women who are unable to conceive because of certain physiological women. Surrogacy is basically an agreement in which woman agrees to carry child of a couple in her womb, most often on the basis of a legal agreement. But no technique is exclusively good, it comes with some abysmal as well and the same happened with this technique as well. This technique turned the poor women into baby producers and to prevent this a proper law was important because due to lack of proper legal framework, people found a way to exploit the females on the name of surrogacy and because of these exploitation government had to come up with a Surrogacy (Regulation) Bill to prevent the misuse of Surrogacy. ²In 2008 the Hon'ble Supreme Court after the case Baby Manji Yamada vs. Union of India (UOI) and Another threw light on the importance of framing of proper laws for surrogacy. The paper helps us understand the concept of surrogacy and the conditions that lead to the need of proper laws for surrogacy. The researcher used an analytical approach to understand different provisions of the Surrogacy bill that protect the rights of surrogate mother as well as couples and the loopholes that are still there within this law.

Keywords- Surrogacy, Surrogate mother, Infertility, Altruistic, Commercialization

Introduction-

¹ Students at Lloyd Law College

² Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518 (India)

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³The 'Surrogate' word came from a Latin word 'Surrogatus' which means substitute. Surrogacy is a process in which a woman agrees to carry a child for someone else till the child takes birth and after the birth she handover the custody and guardianship of the child to the couple. The woman who carries the child is called "Surrogate Mother". Most of the women who are not able to conceive because of some problems such as a blockage in the fallopian tube, or due to the weak uterus and want a genetic child opt this process to become a mother. It is also appropriate in the condition when getting pregnant can be dangerous for a woman.

Based on the biological process it can be of 2 types-

- ⁴Traditional/Partial/Natural Surrogacy- This is the type of surrogacy in which a Surrogate mother is genetically related to the child means ovum of surrogate is used for fertilization.
- ⁵Gestational Surrogacy- In this the surrogate mother just act as a carrier of the child until he is born that means surrogate mother is not genetically related. Usually in this type of surrogacy the sperm and ovum are fertilized using In vitro fertilization technique and then the fertilized embryo is transplanted in the womb of surrogate mothers.

Based on the monetary terms it can be of following types-

- ⁶Commercial Surrogacy- In this type of surrogacy the mother is paid for carrying the child in her womb.
- ⁷Altruistic Surrogacy- This is the type of surrogacy in which a surrogate mother enjoys no monetary compensation except the basic hospital expenses.

Pros of Surrogacy-

- Surrogacy helps those couple to have child who are unable to produce themselves because of certain medical issues. There is a process of adoption as well that can help couple in becoming parents but then the child adopted would not be genetically related to parents while surrogacy help couples to have a genetically identical baby.

³ Shikha Goyal; Surrogacy in India: History, Impact on poor and fact; Jagran Josh; AUG 17, 2020; <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1#:~:text=History%20behind%20Surrogacy,%22the%20hub%20of%20surrogacy%22>

⁴ Saxena P, Mishra A, Malik S ; Surrogacy: ethical and legal issues; Indian J Community Med. ; 2012 Oct-Dec; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/>

⁵ Saxena P, Mishra A, Malik S ; Surrogacy: ethical and legal issues; Indian J Community Med. ; 2012 Oct-Dec; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/>

⁶ R.S. Sharma; Social, ethical, medical & legal aspects of surrogacy: an Indian scenario; Indian Journal of Medical Research; 2014 Nov; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/#ref14>

⁷ ibid

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- Some surrogate mother find it satisfying to help the commissioning couple because of the satisfaction that commissioning couple get after holding the baby in their hands.
- Commercial surrogacy is a good option for poor women because they can simply make money from this process while doing a great deed of making parents to the willing people. She can utilize this money for the education of her real child.

Cons of Surrogacy-

- The cons of surrogacy include the mental harassment that a surrogate mother has to face while separating herself from the child.
- Sometimes the process of surrogacy can turn into the battle between commissioning parents and surrogate mother that can harm the upbringing of the child.
- The commissioning parents sometimes have to struggle a lot to adopt the surrogate child.
- The surrogate mother has to face a lot of criticism in some traditional families.
- In most cases it has been seen that a poor woman is coerced by the family members to act as a surrogate mother because this brings money. Thus violating the personal liberty and freedom of woman.

History of surrogacy-

The history of Surrogacy takes us back to the ⁸Biblical time when a couple named Sarah and Abraham became parents with the help of their maid named Hagar. This was the type of Natural Surrogacy where Hagar's own ovum was used for fertilization and after the child was born she gave the custody of child to Sarah and Abraham. ⁹The first legal surrogacy agreement was made in 1976 in United States which was brokered by the lawyer named Noel Keane. ¹⁰The first commercial surrogacy took place in 1980 when a woman named Elizabeth Kane got \$10,000 to become a surrogate mother. ¹¹In 1986 the famous case popularly named as "Baby M." case brought a revolution in the field of surrogacy laws. In this case a couple named William and Elizabeth Stern hired Mary Beth Whitehead to give birth to their child. Closer to the date of birth of the child Whitehead violated the contract and denied to give the child to them, she also denied the money. After listening to both the sides The New Jersey Supreme Court gave the custodial rights to William and Elizabeth Stern while Whitehead was given the

⁸ ABOUT SURROGACY, FROM THE BIBLE TO TODAY: THE HISTORY OF SURROGACY; surrogate.com; Accessed on 20 December 2020; <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>

⁹ ibid

¹⁰ ibid

¹¹ Clyde Haberman; Baby M and the Question of Surrogate Motherhood; The New York Times; March 23, 2014; <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>

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visitation rights. Finally in 1989 the American Bar Association made the laws to regulate the practice of Surrogacy.

Different countries have different laws to regulate the practice of surrogacy. ¹²Canada, Britain, Australia, and Denmark permit Altruistic surrogacy whereas France, Germany, Italy, Portugal, and Bulgaria have banned all kinds of surrogacy.

¹³In India the practice of commercial surrogacy was legalized in 2002 but soon India turned into the “Hub of Surrogacy” this was because surrogate mothers were available at very low cost. The availability of surrogate mother at such low cost attracted the foreign couples. Soon the middlemen and commercial agencies started exploiting poor women and it became an ethical issue.

Why the need of legal regulations arise in India?

Different people have different opinion about the pros and cons of surrogacy. Some believe that the entire concept of surrogacy is against Human rights while some believe that this technique is good because it helps those who are unable to become parents. In 2002 the legalization of commercial surrogacy was done to promote medical tourism in the country but soon it showed its harmful consequences. The foreign couples were attracted to India for the procedure of surrogacy because of the low cost and the absence of proper legislation. ¹⁴It was estimated that during this time almost 3000 fertility clinics were set up that carried out the process of surrogacy. The poor women were used to act as a surrogate mother and they were attracted to this process because of the money that was offered to them but this process turned out to be tiring for them both mentally and physically because carrying a baby for the complete nine months within her and then giving that baby to someone is a hard task. The only thought of giving the baby to someone else ran a shiver down the spine of women. There were many cases in which it was found that the surrogate mother was so much attached with the baby that she refused to give baby to the couples. There were many ethical concerns that arose. The process of surrogacy require proper medical attention and a routine check up and sometimes the stress is not laid on the routine checkup that result in deterioration of surrogate mother as well as child. The question that arose was that just for the sake of money, can a woman rent the most pious organ that the god gifted her and is it ethical to exploit a woman for money? The other concerns

¹² Shikha Goyal; Surrogacy in India: History, Impact on poor and fact; Jagran Josh; AUG 17, 2020; <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1#:~:text=History%20behind%20Surrogacy,%22the%20hub%20of%20surrogacy%22>

¹³ ibid

¹⁴ ibid

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were that what will be the relationship between a child and his surrogate mother? Can there be two mothers of a single child? The legal issues that aroused include the question about the citizenship of the surrogate child and what are the provisions that can enforce the surrogacy agreements. There are some judicial cases as well that exaggerated the need of having proper surrogacy laws.

The most mentioned cases are-

¹⁵Baby M Case-

This was the case in which the surrogate mother declined to give the baby to the intending couple. But later when the matter was put before court, the court decided to give the guardianship to the couple while the surrogate mother was just given the visiting rights. This was the case which brought the new era of legal provisions in surrogacy in America.

¹⁶Jaycee B. v. Superior Court (John B.) (1996)-

In this case the intending couple (John and Luanne) used the ovum and sperm of some anonymous person and then implanted it in the body of surrogate mother. This step was taken to prevent the aftermath that happened in Baby M case. So basically there were five people who could claim the child. Just a month prior to the birth of child, John and Luanne separated and John declined to pay child support for the child. The issue was then raised in the court and the California court granted temporary custody to Luanne and ordered John to pay for child support.

¹⁷Baby Manji Yamada vs. Union of India and Another (2008)-

This is the most relevant case in the Indian legal history because for the first time it threw light on the topic of surrogacy in India and it won't be incorrect to say that this case laid down the foundation for Assisted Reproductive Technologies Bill, 2010. This case is regarding the custody of a child named Manji Yamada. In this case a baby named Manji Yamada was born with the process of Gestational surrogacy and her biological parents were the native of Japan and the surrogate mother was the resident of India but soon the parents had some marital problem and they declined to claim the baby. The guardianship of the baby was given to her paternal grandmother. Now the issue was about the nationality of the baby. Finally the Hon'ble

¹⁵ Clyde Haberman; Baby M and the Question of Surrogate Motherhood; The New York Times; March 23, 2014; <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>

¹⁶ Jaycee B. v. Superior Court (John B.) 42 Cal.App.4Th 718 (1996)

¹⁷ Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518 (India)

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Supreme court in its verdict issued an order to give passport to the baby and one year extension of the visa of her grandmother. Later Indian Government gave her Identification certificate that helped her move out of Indian Territory.

But this case raised the questions on the legal identification of the baby that is born by the process of surrogacy.

¹⁸Jan Balaz v. Anan Municipality and Others (2009)-

In this case a German couple hired an Indian Surrogate mother and after the child was born the issue of the citizenship of the twin babies aroused. German Government declined to give citizenship to children on the ground that the state do not recognize the surrogacy as means of parenthood and Indian government declined the declined the passport of the babies on the ground that the children are not the citizen of India. So during the hearing the appellant cited the Baby Manji case that she has been granted the passport in order to return to her home country. Hearing the arguments the Hon'ble court decided to grant passport to the babies. The court held that the babies are born to an Indian Surrogate mother and ¹⁹hence are the citizen of India within the meaning of 3(1) (c) (ii) of the Citizenship Act. The German couple had to complete the inter-country adoption process to claim the babies. This case gave another strong reason of having a proper surrogacy laws in India.

Legal Insights (Evolution of Surrogacy Laws in India)-

India legalized commercial surrogacy in 2002 after which the need to regulate this practice was felt so in ²⁰2005 the Indian Council of Medical Research (ICMR) came up with draft which made it compulsory for foreign couples to accept the surrogate child after the child born. Also it was compulsory for foreign couples to appoint any local guardian for taking care of the surrogate mother. All the surrogacy related agreements would be enforceable by law.

²¹Then in August 2009 the Law Commission of India submitted its 228th report that discussed the need for legislation to regulate surrogacy clinics as well as rights and obligations of parties to a surrogacy. The findings and suggestion of the Law Commission are worth mentioning-

¹⁸ Jan Balaz v. Anan Municipality and Others; Special Civil Application no. 3020 of 2009; SC 31639/2009 (India)

¹⁹The Citizenship Act, 1955; (Act no. 57 of 1955)

²⁰ Dev; Surrogacy in India; Legal Service India; <http://www.legalserviceindia.com/legal/article-782-surrogacy-in-india.html>

²¹ 228th report of Law Commission of India; August 5, 2008

- The report mentioned the instances that proved the necessity of having a proper legal framework about surrogacy. The report highlighted that surrogacy should not be completely banned in India because simply prohibition on vague moral grounds will be the violation of reproductive rights of a person. While giving the recommendation the report highlighted the need to ban commercial surrogacy and the need of having a life insurance of a surrogate mother in the surrogacy contract.
- The report highlighted that the fee of surrogacy in India is almost 1/3rd of that of U.S. that attract the foreign couples which should be regulated.
- The report includes a proper analysis of Assisted Reproductive Technology (Regulation) Bill and Rules 2008 which was drafted by Indian Council of Medical Research (ICMR). The draft made it compulsory for foreign couples to accept the surrogate child after the child born. Also it was compulsory for foreign couples to appoint any local guardian for taking care of the surrogate mother. All the surrogacy related agreements would be enforceable by law. After analyzing the draft the Law Commission realized that it still has some loopholes.
- The report also highlighted the need of protection of privacy of surrogate mother as well as the donor and the need for the prohibition of sex- selective surrogacy.
- Only the name of commissioning parents should be highlighted on the birth certificate.
- The surrogacy should take place with proper agreement and should include the consent of surrogate mother as well as her family members. The whole expense of the process of surrogacy will be fulfilled by the commissioning parents and finally after the child is born it will be given to the commissioning parents. Surrogate agreement should also have a clause that provides financial support to the child in case of any mishappening such as death of the commissioning couple or their separation.
- One parent should also act as a donor because to avoid the aftermaths and so that the child can have the genetic relation with parents.
- Medical Termination of Pregnancy, 1971 will govern the cases related to abortion.
- Commissioning parents would have the proper legal rights on the child born through the process of surrogacy. They don't need to claim any kind of guardianship or complete any adoption procedure.

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²²After this Health and Family Welfare Ministry passed Assisted Reproductive Technologies Bill (ART) in 2010, the bill proposes that a surrogate mother should be between the age of 21 to 35 years and should belong to the family of commissioning parents. The bill also highlight that commissioning parents can't hire more than one surrogate mother simultaneously. For foreign couples it has issued the guidelines that the foreign couple must give in writing that their country accept the child born through the process of surrogacy and the child will enter the country as the genetic child of the couple. But this bill is pending in the cabinet. ²³in 2013 India banned surrogacy for homosexual couples and single parent. ²⁴Later in 2015 the government of India prohibited commercial surrogacy and banned surrogacy for foreign couples. ²⁵Thereafter in 2016 first Surrogacy (Regulation) Bill was introduced in Lok Sabha for the first time but it lapsed after the parliament was dissolved. The bill was again introduced in Lok Sabha on 15 July, 2019 and finally it was passed in the lower house on 5 August, 2019. The bill has not yet passed by the Rajya Sabha. Once it is passed by Rajya Sabha and got presidential assent it will become an act.

Deep Dive into ²⁶the Surrogacy (Regulation) Bill 2019-

The bill has total eight chapters which contain 51 sections. Various provisions have been laid down by this bill which talks about safeguarding the rights of surrogate mother as well as commissioning parents. The eight chapters are as follows-

- Chapter I tell about the various definitions discussed in the Act.
- Chapter II talks about provisions that regulate surrogacy clinics.
- Chapter III laid provisions for regulation of surrogacy and surrogacy procedures.
- Chapter IV talks about rules for registration of surrogacy clinics.
- Chapter V talks about various National and State Surrogacy Boards.
- Chapter VI talks about the appropriate authorities.

²² Priyattama Bhanj; The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities? JILS Blog NUJS; July 17 ,2014; <https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/>

²³ India bans gay foreign couples from surrogacy; Daily Telegraph (ISSN 0307- 1235); January 18, 2013; <https://www.telegraph.co.uk/news/worldnews/asia/india/9811222/India-bans-gay-foreign-couples-from-surrogacy.html>

²⁴ Shikha Goyal; Surrogacy in India: History, Impact on poor and fact; Jagran Josh; AUG 17, 2020; <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1#:~:text=History%20behind%20Surrogacy,%22the%20hub%20of%20surrogacy%22>

²⁵ The Surrogacy Regulation Bill; PRS Legislative Research; <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>

²⁶ The Surrogacy Regulation bill, 2019; Bill no. 156-C of 2019 (India)

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- Chapter VII tells the offences and penalties for not following the provisions.
- Chapter VIII tells about other miscellaneous provisions related to surrogacy.

Section 4 clarifies the purposes for which surrogacy can be used. According to section 4(ii) only altruistic form is allowed for the parents when either one or both members are suffering from proven infertility. The bill bans the surrogacy for sale of child or any kind of prostitution. The consent of surrogate mother will be applicable in case of abortion according to the provisions laid under Medical Termination of Pregnancy Act, 1971. The intending couple do not have any say in this but after the birth of the child only commissioning parents have the right on the child.

27 Provisions for eligibility of intending couple- Only altruistic surrogacy will be permitted for the couples in which either one or both members are infertile and have proof. The couple should be Indian citizen and should be married for at least five years. The wife must lie in the age group 23-50 while husband must be of the age group 26-55. The commissioning couple must not have any living biological or adopted child. The exception is given if the surviving kid is mentally or physically challenged or is suffering from some serious incurable disease. Single parents are not allowed to choose this option.

28 Who can be surrogate mother- The women should be married and must lie in the age group 25 to 35 to become eligible for becoming a surrogate mother. The woman must have child of her own can become a surrogate mother or can help by donating her egg. Additionally the women must be a close relative of the couple but this clause faced a lot of criticism and ²⁹when the selected parliamentary committee met on January 21, 2020 they recommended to abrogate this clause of close relative and recommended that any women can become a surrogate mother given that all other requirements are fulfilled. One woman can only become a surrogate mother once in her lifetime. A surrogate mother is not allowed to use her own ovum and she must have a proper certificate that state that she is fit to become a surrogate mother.

30 National and State Surrogacy Boards- Chapter V of the bill ask central and state government for the establishment of National and state surrogacy boards respectively. Section 14 govern the National surrogacy board which have the task of advising central government about surrogacy

²⁷ ibid

²⁸ ibid

²⁹ Ranjit Malhotra; Highlights and brief analysis of the Surrogacy (Regulation) Bill, 2020 and suggested potential safeguards; International Bar Association; June 26, 2020; <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B5C65969-4901-49A9-82CF-8DC4C8BEB1E2>

³⁰ The Surrogacy Regulation bill, 2019; Bill no. 156-C of 2019 (India)

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and laying down the guidelines that are related to surrogacy. Section 23 governs State Surrogacy Board which will basically review the work done by authorities related to surrogacy matters and will send the report to the National Surrogacy Board.

³¹Who will be liable for punishment- Any individual who is caught exploiting surrogate mother through any means or is found advertising or undertaking surrogacy will be liable for punishment. Any person who is found importing, trading or selling embryos or gametes will also be liable for punishment. Sex selection for surrogacy is completely prohibited. Commissioning parents cannot abandon, exploit or disown a surrogate child. If a person is caught doing any of the act then he will be liable for a fine up to 10 lakh rupees or imprisonment up to 10 years.

Criticism of The Surrogacy (Regulation) Bill, 2019- The surrogacy regulation bill was widely criticized by the people. The people felt that this bill is against the reproductive rights of the person. Reproductive rights are considered in universal human rights. According to article 16.1 of the Universal Declaration of Human Rights, 1948 every person has the right to marry the partner of his own choice and to develop the family. ³²The US Supreme Court also characterized the right to reproduce as the basic civil right of a person in the case of Jack T. Skinner v. State of Oklahoma. ³³Indian judiciary has even recognized the reproductive rights in the case of B. K. Parthasarthi v. Government of Andhra Pradesh. In this case the High Court of Andhra Pradesh supported the right of reproductive autonomy of a person and agreed with the decision of U.S. court in the case Jack T. Skinner v. State of Oklahoma.

Another reason for its criticism was its clause which doesn't allow single parents, homosexuals and LGBT community to seek the process of surrogacy. People say that ³⁴this is the violation of article 14 of Indian Constitution which talks about equality among citizens.

The bill only talks about the intending couples who are infertile. It don't talk about couples have some medical complications like uterine fibroids, in which a woman can conceive but cannot successfully deliver the child.

The list of flaws in the bill goes on: like it doesn't give the intending couple any right in the decision of abortion and criminalizing the spouses and relative of woman who agree to becomes a commercial surrogate.

Arguments favoring the bill- The bill was passed so that the people can take benefit out of this

³¹ ibid

³² Jack T. Skinner v. State of Oklahoma;316 US 535

³³ B. K. Parthasarthi v. Government of Andhra Pradesh; AIR 2000 A. P. 156

³⁴ INDIA CONST. art. 14

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technique without exploiting others. It banned commercial surrogacy which was the reason behind all that coercion and exploitation that poor women had to face. It was also seen that the surrogate mothers were not given the proper attention and medical facilities during this process so it became important to make some laws that include proper provisions to take care of surrogate mothers. It also banned the surrogacy by foreign couples which will oppress the “rent a womb” industry in India. This bill prevents the unethical treatment of sex selective surrogacy thus preventing the unethical practices of forcing and selling surrogate girl child into prostitution. The bill also took care of the enforceability of surrogacy agreement and health of the surrogate mother. Proper provisions of punishment to the culprits are also penned.

Conclusion-

This technique of surrogacy can be considered bliss for the society and mankind but on the other hand the misuses of this technique can't be neglected and the only way to stop this misuse is proper surrogacy regulation act which is framed keeping in mind the interest of all the section of societies. On one side the current Surrogacy Regulation act provides safety and insurance to surrogate mother and on the other hand it neglects the LGBT and single parents. The invention was done so that everyone can utilize it properly and differentiating someone only on the basis of gender or marital status can't be justified. Equality is the fundamental right. Every law that is made must be equal for every person irrespective of their sex and gender. Equality of a person can't be infringed on the basis of some vague moral grounds. India is the largest democracy in the world and it guarantees fundamental and human rights to its citizens. By banning surrogacy for some people this bill not only infringes the equality of rights but also the reproductive rights which were even recognized in International Human Rights. Proper legal framework can never infringe rights of the people. After proper analysis of the bill it can be inferred that despite of the efforts and deliberations there are still loopholes in the bill and it should be amended to prevent the exploitation of the rights of people and to provide equality to every citizen. A few progressive provisions should be implemented to prevent the misuse of surrogacy but they should be made keeping in mind the interest of every single person irrespective of gender and marital status.