

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 5

2020

© 2020 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at editor.ijlmh@gmail.com.

Surrogacy

SAKSHI SINHA¹

ABSTRACT

Surrogacy is a term used for the cases where couples who are unable to have a child rely on another woman who acts as a surrogate mother to carry their baby. Surrogacy was first introduced in the year 1980. And was legalized in India in the year 2002. But as the year progressed the GOI noticed some flaws and misuse of Commercial surgery. Observing this ICMR introduced some regulations to prevent the exploitation of surrogacy. As the years progressed several amendments were made to the bill. In the year 2015, the Government of India banned the practice of commercial surgery and also barred the foreign nationals, NRI's from participating. According to a survey from the UN in the year, 2012 India was declared as the "World Capital of Surrogacy" and was known as the Cradle of the World. The iconic case of "Baby Manjhi Yamda vs. Union of India" where travel documents for a baby of Japanese parents who was conceived and born by an Indian surrogate mother revealed several flaws in the surrogate bill which further led in the several regulations of the act. In the latest Surrogacy Regulation Bill the key points focused were on facts such as the term defining infertility was revised and the process of commercial surrogacy was banned only a close relative of the couple would be eligible to become a surrogate mother and also post-delivery 36 months was defined where the couple needed to care of any medical complications that arose from the pregnancy of the surrogate mother. Even after all the amendments in the bill, India has still a long way to go to curb the presence of malpractices and misuse of surrogacy.

I. INTRODUCTION

Being a parent in India is considered to be a blessing & infertility is considered as curse. The societies in India have got a very stable family structure and particularly son to carry out the vansh. In case of infertility in female. it is considered a curse for them. Women with conceiving issues or infertility are considering as "Banjh" in India. The advancement in science and reproductive technologies has proved to be a blessing for infertile couples as they can have their own babies. The clinics in India have provided Assisted Reproductive Technology ie;

- *"In Vitro Fertilization (IVF);*

¹ Author is a student of KIIT School of Law, KIIT Bhubaneswar, India.

- *Pre-implementation Genetic Diagnosis (PGD);*
- *Intrauterine Insemination (IUI);*
- *Intra-Cytoplasmic Sperm Injection (ICSI);*
- *Genetic Donation;*
- *Surrogacy"*

II. SURROGACY:

Surrogacy is an option for couples to have a child for whom it is impossible to carry a baby on their own by physical or medical practices. During surrogacy, the mother bears the baby for the duration of her pregnancy and upon delivery returns the baby to the intended parents after the birth. The 2 types of surrogacy are:

- *"Traditional Surrogacy;*
- *Gestational Surrogacy"*

Traditional Surrogacy: *"The insemination in this scenario is artificial and is done between a surrogate mother and either by intended father or an anonymous donor."*

Gestational Surrogacy: *"It is done by creating an embryo by fusion of an egg and sperm which is produced by intended parents and then is transferred into the womb of the surrogate mother."*

III. HISTORY OF SURROGACY IN INDIA:

- Surrogacy is a blessing for infertile couples. A woman carrying a baby for others in her womb for others by transfer of embryo or gametes created using the intended parents is called surrogacy. It has been practiced in India from ancient times it was known by the term Niyoya Dharma.
- The seventh child of Devki and Vasudev. Balram was transferred in womb of Rohini who was Vasudev's first wife while it was embryo. It was done to prevent the baby being killed by Kansa;
- Gandhari in Mahabharata delivered a mass after two years of long pregnancy. It was found by Rishi Agyasa that the mass contained 101 cells. These cells were put in a nutrient medium and grown outside the womb out of which 100 male babies known as Kaurans and a female body known as Dushala were developed;
- Kartikey mostly known as god of fertility was also born out of Surrogacy through Shiva and Ganga (the surrogate mother).

It is clear that surrogacy existed in ancient times also and so there is no conflict between assisted reproduction and socio religious mores.

IV. LAWS OF SURROGACY IN INDIA:

It was back in 2002 that Commercial Surrogacy was legalized in India, which led to an increased demand from the couples who were infertile and could not produce their child biologically. The market of surrogacy was increasing rapidly as the demand from the national and the foreign couples. India is now the surrogacy capital in the world because of proper framework and legislation. The ICMR (Indian Council for Medical Research) drafted a set of guidelines in the year 2005. but the same did not have any Act to govern and regulate the same.

In the case "*Baby Manjhi Yamada vs Union of India*"² the matter related to "*obtaining travel documents for a baby of Japanese parents who was conceived and born in India by means of commercial surrogacy.*" As per the Supreme Court commercial surrogacy is legal in India. This judgment in turn coincided with the formulation of the "*Assisted Reproductive Technology Bill*" in the year 2008. But, no steps had been taken to formulate the Bill of the year 2008 before Parliament and hence, promoted the "*Law Commission of India to raise up the issue of surrogacy*" for further research. Then in the year 2009 Law Commission of India submitted the report on legislation for controlling of surrogacy and solving issues pertaining the same, In the year 2010 ICMR revised the guidelines and put forward a legal agreement between intended parents, surrogate mother and ART clinic before initiating the process of surrogacy. The ministry of health and family welfare further submitted suggestions to revise the draft of Act Bill.

In 2012, a study was conducted by the UN revealed "*the economic scale of the Indian Surrogacy Industry which came out to be 400 million dollars a year with more than 3000 fertility clinics all over the country.*"

Where India has led to earn the sobriquet "world capital for surrogacy", Anand in Gujarat known as "Cradle of the World".

The Government of India put a complete ban on commercial surrogacy and also barred the foreign nationals, NRI's from participating in 2015. "*The Union Cabinet approved the Surrogacy Regulation Bill in 2016*" which allows only Indian married infertile couples to avail surrogacy services. The Bill that was passed in 2016 was different from the Bill of 2014 in

² Chinmoy Pradip Sharma, Surrogacy Laws in India – Past Experiences and Emerging Facets, Bar and Bench (Nov. 23, 2019, 10:45 AM), <https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets>

many areas.

However, it still continued to elude the law of surrogacy and the Bill wasn't introduced in the Rajya Sabha. Subsequently, an exact replica of the Bill of 2016 was re-introduced in the Lok Sabha termed Surrogacy (Regulation) Bill, 2019 and was passed by the then Union Cabinet to protect the women who become an easy prey for the couples due to their financial position.

V. WHY REGULATION IS IMPORTANT?

As per the Black's Law Dictionary, "*surrogacy means the process of carrying and delivering a child for another person.*" Thus, it can be said that a woman who carries the child in her womb and gives birth to the baby, on behalf of the other woman, is a surrogate mother. The baby can be carried by her if the sperms and embryo of the couple is implanted in her womb, or when she uses her own egg to fuse with the sperm of the man to give birth. In India, the very purpose of the marriage is said to be "*procreation of children*", and of course to carry on the name of the family. and if the couple are unable to deliver a child to the family, they are looked down upon by the whole society. The sexual potency and the masculinity of the husband can only be proved if the couple delivers a child, and thus surrogate has become a good option for the couples seeking a child.

Low Cost³: The cost of surrogacy is quite less if we compare the price with other developed countries like USA. Many foreigners find India a very budget friendly place for surrogacy, with hardly any laws governing the same, and an easier route for them to get babies. India has always been very popular for medical tourism due to excellent facilities at very low rates of treatment. However, the same was banned by the government in 2015. The child was being treated as a commodity where in women were exploited by such couples financially and sexually.

Middlemen and Clinic: There were numerous cases where the middlemen and the doctors in the clinic have exploited the mothers in delivering children at very low cost with no due attention to their health post-delivery. The agents were involved in such cases, where they guided the couples to go for surrogacy, and they had some women on the panel to deliver the services. The worst affected was always the mothers. The surrogate mothers were not provided adequate nutrition and good quality food which is generally important during the pregnancy and post- delivery of the child.

³ Drishti IAS, Surrogacy (Regulation) Bill 2019, (July. 27, 2019), <https://www.drishtiiias.com/daily-updates/daily-news-editorials/surrogacy-regulation-bill-2019>

VI. THE SURROGACY (REGULATION) BILL, 2020:

The Surrogacy Act⁴ has brought significant changes in the regulation of the surrogacy which are as follows:

- *"The Bill has led in deletion of the predefined infertility which the inability to conceive even after five years of unprotected intercourse;*
- *It was observed by the drafting committee that stating a period of 5 years for waiting for the couple to deliver the baby is too long and unreasonable, and it is directly in contradiction with the stated objects of this particular Act;*
- *It has banned commercial surrogacy totally, and a woman who is a close relative of the couple is only allowed to be the surrogate mother of the child with her consent;*
- *The bill has allowed altruistic surrogacy and put a blanket ban of the commercial surrogacy including the sale and purchase of human embryos/gametes, to ensure that the women is not doing this for such financial problems or any kind of perks, however the Act has ensured that proper medical facilities will be provided to her, and a complete medical Insurance for a period of 36 months would be given to her.*
- *Registration of the clinics where surrogacy take place has been made mandatory under the Act, so that they can be regulated timely*
- *The couple between the age of 23-55 years can opt for ethical Surrogacy under the Act. However, the nationality of such a couple should be Indian in all cases. The Act is progressive enough as it has given the right to single mothers aged between 35-45 years to opt for surrogacy and have a baby.*
- *The Act has made it mandatory to obtain certificate of essentiality along with a certificate of eligibility for the couple before proceeding with the treatment of surrogacy:*
- *The couples trying for surrogacy are not allowed to abandon the baby for any reason, and the baby will be entitled to all the privileges and the rights which are granted to a natural born child, plus sex selection has been completely banned under the Act."*

The offender under the bill attracts fines up to a sum of Rs 10,00,000/- and imprisonments upto 10 years. The Act has proposed a regulatory body to be set up at national and state level named as National Surrogacy Board (NSB) and State Surrogate board (SSB) and appropriate

⁴Ayush Verma, Surrogacy (Regulation) Bill, 2020: The Way Forward, IP Leaders (Jun. 24, 2020, 10:04 AM), <https://blog.ipleaders.in/surrogacy-regulation-bill-2020-way-forward/>

authorities are to be appointed at the central and state level respectively. to whose major functioning would help the government on formulating policy matters and also to supervise the functioning of the surrogacy clinics.

VII. IMPORTANCE OF THE CHANGES:

In India, surrogacy has been practiced for a very long time, and most of the times we have heard cases where a sister has given a baby to her own sister who is either unable to conceive, or there are other issues. However, earlier, it was done within the families, and there was hardly any legal framework to deal with the same. Though there were some random and vague guidelines to govern surrogacy⁵, but there were hardly any rights for the biological mother of the child Where the surrogate mother is not related to the parents who need a child, the rights of the women were required to be protected who were subject to exploitation. The couple who came from abroad to avail a surrogate mother, the same has been entirely banned to make sure that such commercial surrogacy is banned totally. This Act is necessary to cut the malpractices and monitor the surrogacy. Now that the commercial surrogacy has been banned, it will make sure the poor women are not exploited and medical health insurance for 36 months is to be provided to the mother. The children were abandoned after birth was given to them, and now, this will also be regulated

VIII. CONCLUSION:

Motherhood has been considered a blessing from God in India from ancient ages and is adjudged as the most precious experience in every woman's life. Motherhood is also termed as a second birth for a woman. Being a surrogate mother is risky and has a probability of developing severe complications despite the medical assistance and care that the mother receives which is rarely accessible or affordable for them in their natural pregnancies.

Although due to the malpractices present in the society “*several women rights activists and feminist groups in India has been against commercial surrogacy, but it remains an undying fact, that it had been an important source of income for many women from financially deprived Ingrown, and they will be unfortunately deprived of their means of livelihood.*”

Where the Surrogacy industry is fully grown in India and banning it at this stage may also create implementation challenges and push the business underground where it would go unnoticed from the government. India is facing a rise in male infertility cases where ban in the

⁵Surrogacy (Regulation) Bill 2020, The Hindu (Mar. 3, 2020,)<https://www.manifestias.com/2020/03/03/surrogacy-regulation-bill-2020/>

commercial Surrogacy takes away the couple's right to a child. In spite of banning commercial surrogacy, proper law with strict regulations and enforcement is required which would address the concerns of all stakeholders in the industry.
