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Surrogacy (Regulation) Bill, 2019

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In the last two decades, India has grown as a surrogacy hub and destination for couples from all over the world. Fertility clinics have sprung up all across India, offering artificial insemination, IVF, and surrogacy treatments to both Indian and international couples. Complex legal and ethical concerns are becoming more prevalent. Incidents of unethical activities such as surrogate mother exploitation, selective breeding, and child abandonment have grown. This article discusses several case scenarios in India as well as the history of various legislation introduced by the Indian government to regulate surrogacy services. Various guidelines and regulatory legislation have been debated in simple tables during the period, including the most recent surrogacy regulation bill of 2019. Issues that were not addressed in the latest Indian regulation were also highlighted. The Surrogacy (Regulation) 2019, Bill clarifies stakeholders' rights in surrogacy agreements and strives to safeguard the vulnerable. This is an excellent opportunity to have a thorough debate about all elements of surrogacy arrangements in India so that the legislation becomes a successful vehicle for societal advancement. This Paper examines the gaps in the bill on the aforementioned elements, taking into account Indian and global experience, and seeks to offer viable solutions that may be implemented for more relevant and just legislation.

Keywords: *surrogacy, artificial insemination, IVF.*

INTRODUCTION: SURROGACY AND ITS HISTORICAL BACKGROUNDS

Surrogacy is a legal arrangement in which a woman (the surrogate mother) agrees to carry a child for one or more people who will become the child's parent after delivery. When pregnancy is medically impossible, when the dangers of pregnancy are too hazardous for the intended mother, or when one guy or a male couple wants to have a child, people may seek a surrogacy arrangement. According to the Black law's dictionary 'The term "surrogate" derives from the Latin word "surrogatus," which means "substitution or replacement.' The practise of bearing and delivering a child for someone else is known as surrogacy¹. Surrogacy is accessed in some ways like traditional surrogacy, gestational surrogacy, commercial surrogacy, and altruistic surrogacy.

In **traditional surrogacy**², both the woman who gave the egg and the intended father or anonymous donor is genetically related to the child whereas in **gestational surrogacy**³, the intended father or sperm donor, as well as the egg donor, are all genetically connected to the child, but not the mother.

Many nations around the world restrict commercial surrogacy arrangements, making finding a surrogate mother extremely difficult. In comparison, procedural costs or rates for IVF and surrogacy procedures cost less than one-third of what they do elsewhere in the globe, and the easy availability of surrogacy services has prompted a worldwide influx of patients to India. Surrogacy treatments are widely offered in India, especially by clinic agents that specialise in infertility. Surrogates are chosen by agencies that target ignorant and impoverished women. Womb for rent, womb outsourcing, child farms, and child factories has all become popular mocking expressions. In India, cases of unethical surrogate mother exploitation, child abandonment, and the import of human embryos and gametes are on the rise. Global criticism

¹ Deiya Goswami, 'Lending The Womb – Surrogacy' (*iPleaders*, December 28, 2015)

<<https://blog.ipleaders.in/lending-he-womb-surrogacy-types-of-surrogacy-factors-responsible-for-surrogacy-rights/>> assessed 01 June 2021

² Amartya Bag, 'Regulating Babies' Factory in India – Surrogacy and the law' (*iPleaders*, December 12, 2014)

<<https://blog.ipleaders.in/regulating-babies-factory-in-india-surrogacy-and-the-law/>> assessed 01 June 2021

³ Bag (n 2)

and reporting, on commercial surrogacy, through different media, continues to cast a gray shadow⁴.

Several jurisdictions across the world have different levels of regulation. Surrogacy is illegal in various nations, including Sweden, Norway, France, and Italy. Surrogacy is still unregulated in India, Ukraine, and the United States, therefore the geographic origin is unclear. Surrogacy remains legal in some jurisdictions, including the United Kingdom, despite the fact that surrogacy contracts are unenforceable. Some nations, notably the United Kingdom, a few states in the United States, and Australia, allow altruistic surrogacy⁵.

With all of the favourable conditions, India became the epicenter of surrogacy. Concerns about surrogate motherhood being exploited, the monetization of parenthood, and human rights violations have grown. Many surrogate mothers used to sign a contract agreeing that if they were seriously wounded or fell unwell during the later stages of pregnancy, they would be "kept using life-support equipment" to preserve the foetus. Furthermore, they often agreed to assume all medical, financial, and psychological risks, absolving the genetic parents, their attorneys, physicians, and other experts of all liability.

In the case of *Baby Manji Yamada v Union of India and Others* (2008)⁶, Baby Manji Yamada, a surrogate baby, was stranded in India for at least three months following her birth due to a lack of clarity on her citizenship. She was neither an Indian nor a Japanese citizen, and her intended parents had divorced before she was born. Her intended mother was adamant about not having custody of her. Her father did, but his visa had expired, so he had to leave India. After being granted a visa on humanitarian grounds, the case was settled. The action was filed on behalf of Baby Manji by the baby's paternal grandmother, Emiko Yamada, who was challenging the High Court of Rajasthan's Habeas Corpus writ for his production. The Indian Supreme Court stated that this medical procedure is lawful in various nations, including India, and that "the comment appears to be a simple obiter dictum of the case."

⁴ Gerard Pradeep Devnath & Senthil Kumaran, 'Surrogacy in India: Ethical and Legal Aspect' [2020] PL 386

⁵ Astha Srivastava, 'The Surrogacy Regulation (2019) Bill of India: A Critique' [2021] PL 142

⁶ *Baby Manji Yamada v Union of India* (2008) 13 SCC 518; *In re Baby M* 217 NJ Super 313 (1987)

THE OBJECTIVE OF BILL

The Surrogacy (Regulation) Bill, 2019, was introduced in the Lok Sabha by Dr. Harsh Vardhan, Minister of Health and Family Welfare. The bill succeeds the surrogacy (regulation) bill of 2016, which was rejected by India's Parliament. Surrogacy is defined as a procedure in which a woman gives birth to a child for the purpose of handing the child over to an intended partner after the birth⁷. Surrogacy Boards at the national and state/UT levels, as well as the nomination of suitable authorities to regulate the practise and process of surrogacy, are proposed in the bill. The measure aims to outlaw commercial surrogacy in India, allowing only altruistic surrogacy, in which the surrogate mother receives no monetary remuneration. Commercial surrogacy is prohibited, as is the sale or import of human embryos for the purpose of surrogacy. It requires surrogacy clinics or anyone who executes surrogacy treatments in any manner, to register. Violations of the bill's terms would result in a minimum sentence of ten years in jail and a fine of up to Rs. Ten lakhs.

Surrogacy (regulation) bill, Surrogacy-related medical procedures will be performed only at designated surrogacy clinics beginning in 2019. It also regulates them through registration, prohibiting the use of unqualified experts and enticing women to become surrogates via advertisements and other means. It prohibits these clinics from performing abortions on surrogate mothers unless they have their agreement and the proper authority's permission. Surrogate child sex selection and storage of embryos and human gametes is additionally prohibited⁸.

PROVISIONS OF THE BILL

Regulation and Purpose for which surrogacy bill is permitted: Commercial surrogacy is prohibited by the statute, however, Altruistic surrogacy is permitted. Apart from additional medical bills and insurance coverage during pregnancy, there is no monetary compensation for the surrogate mother in altruistic surrogacy. Surrogacy or comparable operations

⁷ 'The Surrogacy (Regulation) Bill 2019' (PRS Legislative Research) <<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>> accessed 03 June 2021

⁸ Srivastava (n 5)

performed for monetary compensation or reward (in cash or kind) in excess of minimum medical expenses and insurance coverage are referred to as commercial surrogacy.

Surrogacy is legal for the following reasons: intended couples with proven infertility; altruistic; not for commercial objectives; not for the goal of creating children for sale, prostitution, or other forms of exploitation; and any ailment or disease specified by laws.

Registration of surrogacy clinics and Certificate of Registration: No individual may open a surrogacy clinic for the purpose of performing surrogacy or providing surrogacy operations in any manner unless the clinic is properly registered under the act. Every application for registration under sub-section (1) must be submitted to the competent authorities in the form, manner, and with the fees stipulated. Every surrogacy clinic that conducts surrogacy or surrogacy treatments, partly or entirely, for the purposes referred to in clause (ii) of section 4 must apply for registration within sixty days of the date of appointment of suitable authority: No one may open a surrogacy clinic or provide surrogacy services in any way unless they are licensed to do so.

After conducting an investigation and determining that the applicant has met all of the requirements of this Act and the rules and regulations promulgated thereunder, the appropriate authority shall issue a certificate of registration to the surrogacy clinic within ninety days of receiving the application, in such form, on payment of such fees, and in such manner as the appropriate authority may specify. Every certificate of registration is valid for three years and must be renewed in the manner and at the fees stipulated.

Eligibility criteria for intending couple and the surrogate mother: The intending couple should have a 'certificate of essentiality' and a 'certificate of eligibility issued by the appropriate authority.

Following the completion of the following conditions, a 'certificate of essentiality' will be issued: a certificate of provenance from a district medical board for one or both members of the intending spouse; a magistrate's court order of paternity and custody of the surrogate child; and insurance coverage for a period of 16 months covering postpartum birth problems.

The 'certificate of eligibility to the intending couple' is granted if the following conditions are met: the couple must be Indian citizens and have been married for at least five years; the wife must be between the ages of 23 and 50, and the husband must be between the ages of 26 and 55, and the couple must not have any surviving children (biological, adopted, or surrogate); this does not include a child who is mentally or physically disabled; and any additional conditions that may be imposed by regulations. The surrogate mother must be: an in-depth relative of the intending pair; a married woman with a kid of her own; 25 to 35 years old; only surrogate once in her lifetime; and have a certificate of medical and psychological suitability for surrogacy. In addition, the surrogate mother is unable to donate her gametes for surrogacy.

National and State surrogacy board: The National Surrogacy Board (NSB) and State Surrogacy Boards (SSB) will be established by the federal and state governments, respectively. The NSB's responsibilities include; advising the federal government on surrogacy policy, developing a code of conduct for surrogacy clinics, and monitoring the operation of SSBs.

Appropriate Authority: For the purposes of this Act, (1) the Central Government shall appoint one or more relevant authorities for each of the Union territories within ninety days of the Act's commencement, by notification. (2) The State Government shall appoint one or more relevant authorities for the entire or any portion of the State for the purposes of this Act within ninety days of the Act's commencement, by notification.

The appropriate authority is responsible for performing the following tasks: granting, suspending, or cancelling a surrogacy clinic's registration; enforcing the standards that must be met by surrogacy clinics; investigating complaints of violations of this Act, its rules, and regulations, and taking legal action as required by this Act; suo motu or when brought to its attention, to take appropriate legal action against the use of surrogacy by any person in any place other than as prescribed, and to launch independent investigations in such cases; to supervise the implementation of the provisions of this Act and the rules and regulations made thereunder.

Surrogate child parentage and abortion: The intended couple's biological kid will be considered if a child is born through surrogacy. Abortion of the surrogate child requires the surrogate mother's written agreement as well as the approval of the authorised authority. The Medical Termination of Pregnancy Act of 1971 must be followed in order for this license to be valid. Furthermore, before the embryo is deposited in the surrogate mother's womb, she will have the option to withdraw from surrogacy.

Offenses and Penalties: The bill punishes those who engage in or advertise commercial surrogacy, as well as those who exploit the surrogate mother, abandon, exploit, and disown a surrogate child, and those who sell or import human embryos or gametes for surrogacy. Such offences carry a punishment of up to ten years imprisonment and a fine of up to Rs. ten lakh. For additional violations of Bill's provisions, the Bill includes a number of offences and penalties.

CONCLUSION

As of today, India has no law to regulate the provisions of surrogacy in the country and still, India has been recognized as a potential hub for the development towards the scope of surrogacy. In the present time and looking into the field of research and development regarding surrogacy, had by bounds and leaps proved that it is in the need of the hour for a progressing nation such as India to make relevant law that holds the capability to secure the rights of the parties involved in such conditions. Through the Surrogacy (Regulation) Bill, 2019, India appears to have chosen a regulatory model. Thou the bill still need through discussion as well as proper alterations and modification that would result in less amendment of the act in the future. The makers of the bill should also look into:

- 1.) Introducing a transparent rule regarding the custody of the child,
- 2.) The legal custody of the child should be the responsibility of the state,
- 3.) The bill should also consider the privacy of the parent seeking surrogacy as an option as well as upholding the privacy of the surrogate mother,

4.) It is also recommended that artificial restrictions on access to surrogacy, such as the requirement that a surrogate is a close relative and a married woman, be removed.