



AIJACLA 

Annual International Journal on Analysis of Contemporary Legal Affairs

Vol. 1

January, 2021

About the Journal

An International,
Double-blind,
Peer-reviewed and
Annually published
Journal.

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Published By

**Aequitas Victoria
Foundation**

www.aequivic.in

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4. Any other immoral, offensive, comments, or comments against any established custom or culture.

OBJECTIVES

1. To provide a platform for Indian Legal Professionals including Judges, Academicians, Advocates, and Students for showcasing their research skills;
2. To build an endeavor of research and analytical altitude amongst the young legal professionals under the experience and guidance of the senior legal experts;
3. To highlight the possible developments needed in the area of law through research and analytical spirits;
4. To encourage the habit of critical analysis and argumentative behavior amongst the law students; and
5. To help in policy formulation and legal drafting in India by expressing suggestions brought forward through research skills.

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SURROGACY IN INDIA: A LEGAL PERSPECTIVE

Section:	B
Category:	Article
Paper Code:	RA-SG-21
Page Number:	312 - 319
Date of Publication:	February 10, 2021
Citation:	Dr. Shrutimala Goswami & Arunav Barua, Surrogacy in India: A Legal Perspective, 1, AIJACLA, 312, 312-319, (2021).

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ABSTRACT

Surrogacy has been a topic of discussion for quite some time now. Though this has been for various reasons, the underlying factor has always been parenthood and the human desire to beget children. Years of unsuccessful copulation that fails to produce children often lead willing parents to take this step, the step of surrogacy. This article highlights the nature of surrogacy and the circumstances which necessitate such a step. With an introduction that highlights the definition, nature, and scope of surrogacy, the article attempts at defining surrogacy, especially from the Indian perspective. Though a common practice in almost all countries, there are certain commercial aspects of surrogacy that make it a profession, other than mere altruism. This can have negative effects and as such needs legal understanding. We discuss the historical beginnings of surrogacy as found in annals of history and also the legal framework concerning surrogacy in India. Also discussed is a comparison of surrogacy and adoption which seem to be the only recourse for parents who desire children but are unable to beget them. There are certain purposes and criteria for which surrogacy is permitted and this has also been discussed. We do not dwell upon the moral 'right' or 'wrong' of surrogacy which it often finds itself embroiled in, but we do touch upon all aspects of surrogacy, especially in India.

KEYWORDS

Indian Law, Infertility, Surrogate children, and Surrogacy Regulation Bill

INTRODUCTION

Human beings, like all other animals, play a role that nature decrees. In this role, a very important paradigm is one of parenthood. The structure of society is such that the mere union of man and woman is not complete until it has been given the gift of a child. Especially in Indian society, there is great pressure to beget children. Even otherwise, man or woman, with or without marriage desires the joy of children or progeny. To belong to a group of peers, it becomes necessary at some point in our lives to have children as most of our peers have children of their own. Even without this need, there is hardly anyone who would not want parenthood.

MEANING OF SURROGACY

Now that we have touched upon the importance of parenthood for all without exception, let us discuss why surrogacy has come to be a well-established manner of parenthood. Those couples, who cannot conceive a child through the traditional method have no recourse left except surrogacy. Surrogacy is the process where a woman, known as a surrogate is contracted to conceive a child for the couple desiring a child. The surrogate then relinquishes all her parental rights to the couple, after carrying it to term. The word surrogate' has its origin from the Latin

word 'surrogates', meaning a substitute which means a person appointed to act in place of another. So a surrogate is someone who carries a child on behalf of another woman. For this, her ovum is used or a fertilized egg from another woman is implanted in her womb. In brief Cambridge dictionary defines surrogacy as "the action of a woman having a baby for another woman who is unable to do so herself".¹

According to the *American Law Reports*, surrogacy is defined as:

"...A contractual undertaking whereby the surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural or biological father, to bare and deliver it to the natural or biological father, and to terminate all of a parental rights after the child's birth".²

PURPOSE AND CRITERIA FOR WHICH SURROGACY IS PERMITTED

According to the Surrogacy (Regulation) Bill, 2019 the main purpose of surrogacy is laid down as: It is for intending couples who suffer from proven infertility. Also, when it is altruistic and not for commercial purposes. It cannot be used for

¹ Explore the Cambridge Dictionary, Cambridge Dictionary make your words meaningfull, (Oct. 2020, 18, 10:00 AM), <https://dictionary.cambridge.org/>.

² Surrogacy: Is it your rights?, Iskarasmith (Oct. 2020, 18, 07:00 PM), www.iskarasmith.blogspot.com.

producing children for sale, prostitution, or other forms of exploitation and any condition or disease specified through Regulations.

Further, the Bill laid down the eligibility criteria for intending couples. The intending couple should have a 'certificate of eligibility' issued by the appropriate authority. A certificate of essentiality would be issued upon fulfillment of the following conditions:

1. A certificate of proven infertility of one or both members of the intending couple from a District Medical Board.

2. An order of parentage and custody of the surrogate's child passed by the Magistrate's court, and

3. Insurance coverage for 16 months, covering postpartum delivery complications for the surrogate.

HISTORICAL BACKGROUND

Surrogacy is not a new concept; it has been in practice since time immemorial. The Book of 'Genesis' has this story Sarah and Abraham; who were married but could not conceive a child of their own. They had a servant, Hagar to whom they turned to be the mother of Abraham's child. This is a case of traditional surrogacy. It is when the surrogate uses her act in a child she is carrying for intended parents. Even as recently as 30 years ago traditional surrogacy was the only way intended parents could create a child through surrogacy.

In the 19th century, 1884 to be exact, the first successful artificial insemination of a woman is completed through the ethics of the process is questionable. It was only in 1975, that the first ethically completed IVF embryo transfer was successful. 1976 marked the first legal surrogacy agreement which was brokered by Lawyer Noel Keane. Keane went on to establish the infertility center, which would go on to arrange hundreds of surrogates' pregnancies a year and in doing so play a key role in the history of surrogacy in the United States.

In actuality, surrogacy has added families for centuries though there is documentary evidence. It has been seen that surrogacy is a way that facilitates the process of parenthood for couples who are unable to have children in other ways. But the question is; is surrogacy ethical often surrogacy leads us to the question of the mental and emotional state of the birthing mother. She loses all rights to her child and gives up her nature and endowed rights to the child she has naturally carried.³

INDIAN LAW ON SURROGACY

Surrogacy has been popular and widely prevalent in India for the last few decades. The process though involves multiple parties and the question of human rights needs to be considered. This consideration is

³ How to become a surrogate, Surrogate (Oct. 2020, 19:08:05 PM), Surrogate.com.

based on the rightful balance of interest of every party to prevent misuse of justice. It has been seen that surrogacy and all related matters are being abused by many at the expense of surrogate mothers and surrogate children.

This leads us to ‘The Surrogacy (Regulation) Bill 2019’ which was passed by the Lok Sabha on 5th August 2019, in an attempt to mitigate this widespread exploitation. The drafting committee comprised of 23 members of the Rajya Sabha on a Motion adopted by the House on the 21st Nov 2019 for the examination of the Bill and the report thereafter.

The Bill proposes:

The need to establish Regulatory Bodies:

To regulate surrogacy by establishing a National Surrogacy Board at the Central level and State surrogacy at the state level and one or more appropriate authorities for each of the United territories.

Prohibition of commercial surrogacy :

Recommendation was given by the Law Commission of India for the prohibition of commercial surrogacy by establishing a proper Legislation in its 228 report. A similar ban has been in place in countries like Australia, New Zealand, United Kingdom, Canada, Netherland, South Africa etc.

The transaction from ambiguous to a definite definition of infertility :

The Surrogacy Bill 2019 needed at least one of the intending couple to the suffering from proven infertility and required the process to be carried out only after five years of unprotected coitus. The Select Committee decided that five years is an unreasonable and long waiting period for couples who wish to opt for surrogacy. This is in particular to certain medical conditions where the couple can't have a child.

Widening of horizons of the Act:

In the 2019 Bill, only married Indian couples could choose and opt for the process of surrogacy. This strict Legislation was at least in the 2020 Bill with the use of the phrase “intending woman” which included women who is a widow or divorcee could opt for surrogacy with the mere ‘intention’ of harming a child. The previous Bill used an ambiguous and undefined term “close relatives” which meant that the availability of surrogate mothers will be restricted to only close relatives. The term “close relatives” was changed to “a willing woman”, which meant that anyone willing to carry out surrogacy could opt for it.

Case Laws

Baby Manji Yamada vs Union of India⁴ For a Japanese couple, Baby Manji Yamada was an infant born to an Indian surrogate mother who divorced before a month of gestation and leaving the child's future in darkness. Ikufumi Yamada, the biological father, tried to take the child to Japan, but for such a situation, the legal system provided no such clause, nor did the Japanese government authorize him to carry the child back home. In the end, India's Supreme Court had to intervene and the girl was permitted to leave the country with her grandmother. The greatest effect of the Baby Manji Yamada decision was that it forced India's government to enact a surrogacy regulatory rule. In 2008, after the Manju case, the Supreme Court of India ruled that surrogacy was legal in India, which enhanced international confidence in going to India for surrogacy.

Jan Balaz Vs Anand Municipality⁵

Gujarat High Court ruled that the birth certificate of the infant born by surrogacy must bear the surrogate mother's identity against the biological mother and the child would be given an Indian passport certifying him as the Indian Citizen and the surrogate mother in exchange had to send the child in adoption to the German couple who had requested the Indian surrogate mother's services.

An appeal against this ruling is already before the Supreme Court and after its hearing, the Supreme Court saw a strong need for the proposal of the Bill of Parliament on the matter.

Both of these cases have created intellectual attention and brought into existence the law barring surrogacy, which rules out surrogacy rules for international nationals entering Indian mother.

The ban is already in effect via a letter from ICMR to all clinics in India dated 28 September 2015 that orders them not to help foreign couples have a child through an Indian surrogate mother.

INTERNATIONAL FRAMEWORK

An umbrella word is the right to parenthood. This can be viewed from two major perspectives: the negative right of the first generation to reproductive control and the positive right of the second generation to medical help in the event of infertility. Around the same time, it places a burden on parents to take care of the well-being of infants.⁶

The right to a person's parenthood is expressed by many foreign instruments. According to Article 16(1) of the International Magna Carta for All Men Everywhere the UDHR has acknowledged the freedom to create a family as accessible to all individuals without reservation based on race,

⁴ Baby Manji Yamada v. Union of India AIR2009 SC.

⁵ Jan Balaz v. Anand Municipality AIR2010 Guj21.

⁶ Sarvesh Kumar Shahi, Surrogacy Bill is a big step forward Deccan Herald (Mar. 2020, 05).

ethnicity, or faith. Also, the family has been defined as a basic unit of society and is thus entitled to the security of society and the state. According to Article 17 of the Universal Convention on Civil and Political Rights, 1966 (ICCPR), "No one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or to unlawful attacks on his or her honor and reputation" and everyone shall be entitled to the protection of the law against such interference or attacks." Article 12 of the European Convention on Human Rights (ECHR) also acknowledges the freedom to marry and to form a family. Also, Article 23 of the United Nations Convention on the Rights of People with Disabilities, 2006 (CRPD) guarantees respect for the home and the family. It stated the duty of the State to take concrete and reasonable action to ensure that people with disabilities are not discriminated against in matters of marriage, family, parenthood, and relationships.⁷ To guarantee non-discrimination against people with disabilities, Article 23 of the CRPD allows the State to take positive action regarding their right to life to create a family and to parenthood.

In addition to both of these, couples' abortion rights are being increasingly accepted under international human rights law. "The 1968 Teheran Conference on Human Rights, which addressed the "human rights

⁷ The United Nations Convention on the Rights of Persons with Disabilities, 2006, Art. 23(1).

implications of family planning," acknowledged that "couples have a fundamental human right to openly and responsibly decide on the number and spacing of their children and the right to sufficient education and information."⁸ The Cairo Conference on Population and Growth, 1994, subsequently developed that everyone has the right to enjoy the highest attainable physical and mental health standards"⁹

Health covers couples' reproductive and sexual health. Furthermore, it has been held under Principle 9 that separate forms of the family exist in different cultural, political, and social environments and that all forms of family are entitled to care and support without prejudice.¹⁰

The Report of the Fourth World Conference on Women, 1995, echoed these goals. The study highlighted fair access and equal care for men and women in the areas of education and health, sexual and reproductive health, and women's health.¹¹

All these international legal provisions ensuring the right to found a family and parenthood are based on the basic human right to equality and freedom from discrimination. The various equality provisions of

⁸ Final Act of the International Conference on Human Rights, UN Doc. A/CONF.32/41 (1968).

⁹ Report of the International Conference on Population and Development, A/CONF.171/13/Rev.1 (1994).

¹⁰ Supra Note 10.

¹¹ United Nations Report of the Fourth World Conference on Women, A/CONF.177/20/Rev.1 (1995).

international law ensures that the rights discussed above are available to not just a section of the society but everyone including homosexual couples.¹²

COMPARATIVE STUDY BETWEEN ADOPTION AND SURROGACY

Having stated that the need to have a child is a natural urge, let us explore ways that bring about the culmination of this desire. Adoption, it has been seen, is an age-old process where a child is adopted even when it is someone else's child. Adoption of a child has historical significance as found in various scriptures and a religious document even as early as Biblical times with examples like that of Moses who was found floating in a river and adopted is one such. Closer home we have the example of Sita, Queen of Mithila, and the central character of Ramayana was adopted by King Janaka when he found her in an agricultural field.

We see from these two examples that adoption has been a practice in both the Eastern and Western hemispheres since time immemorial. Even surrogacy for that matter is old and has similar claims to historical legitimacy as a method of parenthood. The question before us is; which is better; surrogacy or adoption:

1. During surrogacy, the birthing mother loses all rights to her naturally birthed offspring.

¹² Ibid.

This causes mental and emotional stress and feelings of guilt in a mother who was used as a vehicle to birth a child. On the other hand, adoption means that the couples who opt for adopting a child do so with a child who is already there but without parents. In this case, the child has no natural parents and sometimes a black future. Adopting such a child means giving him or her a future and a home.

2. Surrogacy often has a monetary angle imbibed in the process. A surrogate mother usually agrees for giving birth to a child for monetary compensation. In the United States, the price for surrogacy ranges from \$110,000 to \$170,000 for most families.¹³ In India, the Bill on Surrogacy 2020 has banned all forms of commercial surrogacy but there seem to be loopholes. Paid surrogacy is often unethical and undesirable but has become an accepted form of parenthood. Adoption on the other, sometimes involves the transfer of benefit in money or kind, but it is not a norm. This transfer of benefit is less than what is paid for surrogacy. Infact, most adoption cases don't involve monetary compensation, except in rare cases.

¹³ The FCLV team breaks down the price of US surrogacy, Price of Surrogacy (Oct. 2020, 21, 04:45 PM), <https://fertilitycenterlv.com/diagnosis-treatment-care/price-us-surrogacy>.

3. Single men or women or even members of the LGBTQ community can adopt a child and are legally permitted to do the same. On the other hand, the Bill lays down that only couples can opt for surrogacy. This is an important factor indifferently the two.

CONCLUSION

The discussion of surrogacy as a means to parenthood is one that involves several aspects; legal, ethical, humanitarian, natural, and medical. Exploring all of these dimensions is a long drawn out affair that should require years of study and observation. We have tried to touch the core of the matter through the objectification of the main points. This topic needs to be further explored and the points need further elaboration. Let us take all these issues have a statutory point and build our promise from here.