

Abolition of commercial surrogacy in India: A Right move or a wrong decision?

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Abstract:

Since a very long time ago, commercial surrogacy (CS) has been discussed and is indeed a contentious subject. Evidently, there have been instances of surrogacy from ancient times; in India, CS first appeared in the modern era in 2002. CS is still in the early stages of being legalized. The act of carrying a child for another woman who is willing to be a mother but is essentially unable to do so owing to a difficult medical condition is known as surrogacy. Currently, infertility affects 15% of Indian couples. And there are alternative methods in which a couple can have a child. Surrogacy is one such alternative method. Baby Manji Yamada v. Union of India (UOI), a landmark case that shed light on surrogacy in India in 2008, was heard by the Hon'ble Supreme Court (SC) of India which is being discussed in this article. The goal of the research is to evaluate the significance of commercial surrogacy's legality. It is crucial that we grasp both the advantages and disadvantages of (CS) for the good of society and to fully appreciate how modern technology may benefit women who wish to become mothers. The research examines the different forms of surrogacy. The article also discusses the challenges surrounding the CS in India. The primary goal of this article is to provide the current law governing surrogacy in India, the several types of surrogacies, the key elements of the Surrogacy (Regulation) Act, (SA) 2021, and what are the rights and obligations of a Surrogate Mother (SG) and the surrogate child.

Keywords: Surrogacy, Commercial surrogacy, Surrogacy (Regulation) Act 2021, Baby Manji Yamada

1. INTRODUCTION:

The frequency of infertility is growing globally, which has accelerated the development of assisted reproductive technologies (ART). When an infertile woman or spouse is unable to procreate, surrogacy is an alternative option. In a surrogacy agreement, a surrogate woman conceives and gives birth to an infant on behalf of another couple or individual. In surrogacy for gestation, an embryo that has undergone in vitro fertilization is inserted into the surrogate woman's uterus and she will carry the offspring to term. In a typical surrogacy, the intended father's sperm are surgically implanted into the surrogate woman, making her a natural and gestational mother. Depending upon whether or not the surrogate receives compensation for carrying the child, surrogacy can either be for commercial gains or for charitable purposes [1].

"Surrogacy" under the Indian SA 2021, refers to a process in which a lady conceives and delivers an infant on another's women's behalf and then gives the infant to the intended parents [2]. When CS was made legal in India between the years of 2002 and 2015, it has been a popular fertility tourism destination. The cost of the entire procedure in India is as little as one third of what it is in the United States and the United Kingdom, which draws couples from overseas to the country every year.

2. HISTORY:

The concept of surrogacy dates all the way back to the biblical era when natural surrogacy was practiced. The tale of Sarah and Abraham in "The Book of Genesis" contains the earliest reference to surrogacy. The couple could not conceive so they gave birth with the help of their servant where the SM owns egg were used in the embryo the surrogate was carrying. At that time, it was considered a taboo to be infertile and obtain a child through surrogacy [3].

During the period of 1975, the first successful IVF embryo transfer was carried out properly. Noel Keane, an attorney, helped negotiate the first surrogacy contract in history in the year 1976. The first child was born through an IVF treatment in the year 1978. The first agreement for a paid surrogacy was set up in 1980 [4].

3. TYPES OF SURROGACY

3.1.1 Altruistic surrogacy:

It refers to a procedure in which the surrogate mother, her family members, or her representative does not receive any remuneration, or monetary reward of any kind, apart from the cost of healthcare and other expenses that must be incurred on the SM as well as health insurance for the surrogate mother [5]. This form of surrogacy is legal in India.

3.1.2 Commercial surrogacy:

“It refers to the money making of surrogacy services, procedures, or its associated services or component procedures, such as the sale or purchase of human embryos or gametes or selling or acquiring the services of surrogate mothers by way of offering financial gains, or money consideration to the SW or her dependents or her representative” [6]. This form of surrogacy is prohibited in India.

3.1.3 Gestational surrogacy:

In the process of surrogacy during gestation, a person who did not contribute the egg that was used in conception carries a fetus and delivers birth to a child on behalf of another individual or couple. The "intended parent(s)" are the person or couple that are attempting to raise the child or children [7].

3.1.4 Traditional Surrogacy:

Traditional Surrogacy is also called natural surrogacy or conventional surrogacy. Traditionally, the surrogate mother's eggs are utilized. Since the surrogate mother's egg is utilized in this case, a donation of eggs is not required. In conventional surrogacy, intrauterine insemination is utilized. The surrogate does not need to undergo several reproductive procedures while using this straightforward approach. Given that her eggs are never utilized, the intended mother is not required to undergo any kind of treatment or go through the egg retrieval procedure [8].

In such a conventional method, the “sperm donor who will be the father artificially inseminates the SM. Since the SM used her own eggs, she is the child's biological mother. The sperm donor and the SM are therefore genetically related to the child. However, the intended parents must take custody of the infant when the SM surrenders her parental rights” [9].

4. SURROGACY CONTRACT AND ITS ISSUE

A surrogacy agreement is a legally binding contract that specifies the terms under which a woman will act as another person's SM or surrogate mother. It might or might not include financial compensation. It is a CS since the agreement includes monetary reward of some sort.

The legal status of commercial surrogacy, which may involve a worldwide or interstate surrogacy contract, differs from jurisdiction to jurisdiction. Sometimes people who want to become surrogates travel to a country where CS is legal. Surrogacy is only permitted in some nations provided there is no exchange of money.

One of the most crucial elements in the surrogacy procedure is the surrogacy agreement. It provides a comprehensive outline of the whole surrogacy process, including each party's rights, duties, and obligations prior to, during, and following the pregnancy.

To prevent disagreements, the surrogacy contract must be very clear, elaborate and easy to understand. The contract should be drafted, with the participation and approval of each party's legal counsel. The intending parents must consult with their attorney to prepare the original contract before sending it to the surrogate and her lawyer. The surrogate's attorney will see to it that her interests and demands are properly reflected and protected. The contract will be worked out by the two lawyers until both parties have agreed or given their consent with the conditions. The intended parents and surrogate can then proceed with the medical procedures after signing the contract. Before the procedure, the agreement must be completed and signed.

The medical treatments for the surrogate must be performed in order to safeguard each party, and usually fertility centers won't do so until such a contract has been signed [10].

For a legal agreement or contract, consent plays an important role. The capacity of a party to know the nature and implications of the act they choose to engage in, is a necessary prerequisite for consent. A long-term contract must always contain the constant presence of consent, which is also represented by intention. The surrogate will not be able to comprehend the consequences of parting away with the infant at the time of entering into the surrogacy agreement/ contract [11].

Surrogacy alters the decision to separate with the infant because under the terms of the contract, the natural mother is irrevocably committed before realizing the depth of her bond with her child. She never makes an entirely voluntary, informed decision because, obviously, any decision made prior to the birth of the baby is uninformed in the most significant sense, and any decision made following that is compelled by an existing contractual obligation [12].

While surrogacy is not new to India, there have been significant changes that was brought through the case *Baby Manji Yamada vs UOI*, where Baby Manji Yamada was a Japanese couple's surrogate kid, born to an Indian woman, but the pair split up before the baby was even a month old, leaving the infant's destiny unclear. Ikufumi Yamada, the kid's biological father, sought to bring the child to Japan, but neither the Japanese government nor the legal system allowed for such a situation. Ultimately, the Supreme Court of India had to step in, and the child and her grandmother were given permission to leave the country. The *Baby Manji Yamada* ruling had the most impact since it prompted the Indian government to pass legislation governing surrogacy. The Supreme Court did not find that the surrogacy contracts in this case were legal under Indian law, but it also did not rule against their legality. In fact, it went into detail on the idea of surrogacy, the procedures involved, and acknowledged both altruistic and commercial surrogacy. The SC acknowledged that surrogacy agreements occurred in India for a number of reasons but did not truly rule on the legality or execution of any component of surrogacy contracts [13].

UOI vs. Jan Balaz [14].

The difficulties surrounding the divergent surrogacy regulations in the two nations were addressed in this historic case. In this instance, the surrogate was from India and the intended couples were from Germany.

They used a Gujarat, India-based ART Clinic for their surrogacy needs. Due to the fact that there were twins born in this case and the children were related to the mother biologically, many questions regarding the legality, parenthood, nationality, citizenship, inheritance, succession rights over the surrogate child, and overall legal inconsistency between the two nations were raised. In order to prevent the twins from growing up without a parent, the Supreme Court granted the German couple's request to adopt the children and awarded them passports. In this judgment, the Apex court also reaffirmed the legal position of CS in India and stated that there are legal issues when it comes to the legality of surrogacy between an Indian surrogate and a foreign couple [15].

5. Surrogacy (Regulation) Act 2021

The Main changes brought in the 2021 Act are as follows:

- **Eligibility requirement to commission surrogacy:**
A couple is considered intending if they have a medical condition that calls for gestational surrogacy. A lady planning a pregnancy can also hire a surrogate. Such a lady has to be an Indian national, a divorcee or widow, and between the ages of 35 and 45. In addition to the eligibility and certificate of essentiality, the prospective couple and woman must acquire a letter of recommendation from the Board in accordance with the rules. If the intended couple or intended woman satisfies the requirements, including having a certification of the medical indication necessitating gestational surrogacy from the District Medical Board, the certificate of essentiality will be granted. The need for a certificate of confirmed infertility is no longer necessary. The five-year marriage requirement has been eliminated from the eligibility certificate requirements for the intended pair.
- **Eligibility to be a surrogate:**
It is no longer necessary for the surrogate to be an immediate relative of the intended parents. A woman who is willing to do so may use a surrogate mother, according to the 2021 Bill. When requesting a surrogate, the intended couple or woman must go before the relevant authority with the intending woman(surrogate). The other terms are unchanged.
- **Compensation for surrogate:**
The 2021 Act stipulates that additional prescribed expenses spent on the surrogate would also be covered alongside medical costs and insurance. But the Central Government will have the power to make rules for the prescribed expenses. The scope of insurance has been broadened to now include prescription costs as well as medical and other expenditures spent by the SM throughout the surrogacy procedure. The way of offering such insurance will also be regulated by the national government. A 36-month period has been added to the surrogate mother's insurance coverage.
- **Surrogacy Boards:** The National Assisted Reproductive Technology and Surrogacy Board (NARTSB) and State Assisted Reproductive Technology and Surrogacy Boards (SARTSB), respectively, have replaced the National Surrogacy Board (NSB) and State Surrogacy Boards (SSB). They continue to serve the same purposes and functions.
- **Experts and Appropriate Authorities:**
Experts in stri-roga or prasuti-tantra are removed from the pool of expert members by the 2021 Bill. The expert members' tenure has been extended to three years.
For the purposes of this Bill as well as the Assisted Reproductive Technology (ART) Act the central and state governments will establish the required agencies. Their roles continue to be the same. Information kept by the proper authorities must be provided to the National Surrogacy Board. The NARTSB register, established under the ART Act, will serve as the register for the registration of surrogacy clinics. An officer of the Health and Family Welfare Department (HFWD) with a rank equal to or higher than the Joint Secretary will preside (ex-officio) over any suitable authority for a state or UT. The vice-chairperson shall be the Joint Director of HFWD (ex-officio).
- **Appeals:**
The surrogacy clinic had the right to file an appeal with the state or federal government (where applicable) in response to any decision by the relevant body to deny an application, suspend registration, or terminate registration. The 2021 Bill further stipulates that an intended couple or woman may appeal against a communication on the denial of certificates of recommendation, need, or medical necessity for gestational surrogacy [16].
- **Punishment under the Act:**
The Act outlaws commercial surrogacy. Instead, it punishes intending couples, intending women, and others who engage in CS not including altruistic surrogacy with a period of imprisonment that may not exceed 5 years and a fine that may not exceed 5,00,000 Rs for a first offense, and by a term of

imprisonment which may extend to 10 years and a fine that may extend to 10,00,000 Rs for a second or subsequent offense [17].

6. RIGHTS OF SURROGATE MOTHER AND CHILD:

The term "surrogate mother" refers to a woman who consents to carry a child through surrogacy from the implantation of an embryo in her womb who is genetically linked to the intended couple or intended woman [18]. The Rights of SM includes claiming medical expenses and such other prescribed expenses incurred on her and the insurance coverage. The SM also has right to Privacy; therefore, the Surrogacy clinics are required to keep all information about the SM private. They are also prohibited from disclosing this information about the SM or surrogacy to anyone other than the HFWD's central database, except under special circumstances [19].

The SA 2021 also provides the rights of a surrogate child. The Act states that the child born via a surrogacy procedure will be considered the intended couple's or woman's biological child and will be entitled to every right and privilege accorded to the biological child [20].

7. COMMERCIAL SURROGACY:

CS refers to a surrogacy agreement in which the SM receives payment for the service she renders beyond the medical costs. It is done with an economic motive/financial motive. The situation which marked the beginning of the CS trend is in the year 1997, when a lady used gestational surrogacy to carry a child and get payment for the same, and later used the money to pay for her husband's medical care. Since then, CS has increased dramatically. According to recent statistics, about 2,000 children are born through surrogacy each year. There are numerous factors behind this surge. Some of the key determinants include the availability of affordable, top-notch medical care in India, the ease with which healthy surrogates can be found, and the legal framework surrounding surrogacy.

7.1 PROS OF COMMERCIAL SURROGACY:

- Those who are unable to have children can start a family through surrogacy.
- Parents who use gestational surrogacy might also connect genetically to their offspring.
- The majority of the time, mothers choose to become surrogates. They can do this to assert their bodily autonomy and exercise their free will. The prohibition of surrogacy might be seen as a blow to women's empowerment because it implies that women are unable to make their own decisions about what is best for them.
- Women who struggle financially can use the money they make via surrogacy to better their lives or the lives of those around them. Surrogacy proceeds are frequently used to fund education.
- When fertility treatments don't work, surrogacy can be used to replace them because it is frequently less painful and involves lesser medical treatment and procedures.

7.2 CONS OF COMMERCIAL SURROGACY:

- The surrogacy contract is considered to be unethical to some religious group since it deals with "sale of a self" which is renting out the womb of a woman which is frowned upon by these groups. Therefore, some religious views may be at odds with surrogacy.
- Being an intending woman (surrogate) is extremely challenging and can cause mental and emotional issues. For instance, injections of hormones can be dangerous, and miscarriage typically results in sorrow. Surrogates' lifestyles also undergo significant alteration.

- When they sign the surrogacy contract, surrogate mothers might not be fully aware of all the consequences and the psychological and physical side effects of their choices. Surrogate motherhood is sometimes forced upon women.
- Surrogates in certain nations only get compensated a SM all portion of what the intending couple pay.
- Surrogates occasionally have a change of heart and decide to keep custody of the kids, which could lead to legal issues and also emotional trauma.
- Considering how expensive surrogacy often is, many individuals cannot afford it.
- Lack of proper awareness about surrogacy legislation to weaker sections leads to exploitation [21].

7.3 CHALLENGES SURROUNDING COMMERCIAL SURROGACY IN INDIA:

- **Exploitation of Surrogate Mother:**
Concerns were raised about SM being taken advantage of since they frequently hailed from low-income families and might not have fully grasped the ethical, legal, and medical ramifications of surrogacy.
- **Lack of Regulation:**
There were many instances of unethical acts, such as disagreements over payment, health issues, and the abandoning of SM, as a result of the surrogacy industry's lack of thorough regulation in India.
- **Legal Ambiguities:**
Instances involving overseas intended parents in particular found it challenging to resolve disagreements and establish legal paternity due to the lack of clear and consistent rules governing surrogacy.
- **Ethical Concerns:**
Using a commercial surrogate for a pregnancy prompted ethical concerns about the monetization of human life, the potential for exploiting weak women, and the possibility of performing selective abortions depending on the fetus' gender.
- **Health and Safety:**
Given the lack of uniform medical standards and regulation, it was difficult to ensure the wellbeing of SM and the infant delivered through surrogacy.
- **Citizenship Problems:**
In situations of international surrogacy, questions about the nationality and citizenship of the infant may come up, which might cause legal challenges.
- **Selective Abortions:**
In certain cases, if the intended parents are unhappy/dissatisfied with the gender of the fetus or any health issues before the delivery, the SM will be forced to abort the fetus which causes several problems associated with both physical and mental health of the SM [22].

8. INDIAN PERSPECTIVE ON COMMERCIAL SURROGACY

India legalized CS in 2002. As a result of the enormous growth of surrogacy in India, numerous commercial firms and firms claiming specialization in surrogacy law have grown to prominence, assisting and guiding foreign tourists who travel to India in search of renting an Indian mother's womb for the blessing of a child. This paved the way for the establishment of numerous foreign businesses in India, helping travellers locate an Indian surrogate mother, assisting foreigners with surrogacy-related paperwork, and helping the child obtain a passport and a visa to leave the country.

Due to some of its detrimental effects on society, surrogate mothers, and intended parents, as well as the surge in foreigners traveling to India only for the purpose of surrogacy due to low costs, paved way for the exploitation of SW who were mostly from lower economic strata, CS was outlawed in India in 2015. The commercialization of the body and the infant (which was available in markets for sale at very low prices) where both the surrogate and the infant were treated as commodities and sold at very low prices, payment for the infant, payment for

reproductive labor, gender exploitation, human trafficking, health risks, inadequate pay, degradation of women's morals, etc. were some of the reasons for its ban. Commercial surrogacies in India were done through agencies whose main goal was to monetise surrogacy by profiting out of it and their focus was on foreigners and celebrities who opted for a child through surrogacy. These agencies were the profitable groups who exploited the surrogate women by paying them minimal than what they actually deserve. These surrogate women were unaware about their rights and the amount these agencies receive by renting out their womb.

In many cases the surrogate women's consent was obtained by coercion or undue influence or by taking advantage of their family situation.

The 228th report of the Law Commission of India has advised that appropriate legislation be implemented to forbid CS and permit morally upstanding altruistic surrogacy. Therefore, it is clear that the prevalence of surrogacy services in India is mostly due to the country's extreme poverty, which forces many Indian women to rent their wombs in exchange for cash or other necessities [23].

On November 21, 2016, the Surrogacy (Regulation) Bill (SB), 2016 was introduced in the Lok Sabha. The Standing Committee on HFWD looked into it and reported back on August 10th, 2017. The Committee made many recommendations regarding (i) commercial vs. charitable surrogacy, (ii) the effects of using a close relative as a surrogate, (iii) the addition of gamete donation rules, and (iv) the control of abortion. But after the 16th Lok Sabha was dissolved, the 2016 Bill became invalid. On July 15, 2019, the SB, 2019, which would replace the 2016 Bill, was introduced in Lok Sabha. On July 15, 2019, the SB, 2019, was presented in Lok Sabha and approved by the House. On August 5, 2019, a Select Committee was given the 2019 Bill, and they delivered their findings on February 5, 2020.

On December 8, 2021, the Rajya Sabha approved the 2019 Bill with the following modifications. The modification was incorporated by the Lok Sabha which passed the SB 2021, which later became the SA, 2021 [24].

The Act stipulates that no person, organization, surrogacy clinic, laboratory, or clinical establishment of any kind shall engage in commercial surrogacy, provide CS or any of its related procedures or services, run a racket to appoint or select surrogate mothers, or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures, at such clinics, laboratories, or at any other location, exploit the SM or the child born through surrogacy in any way; sell human embryos or gametes for the purpose of surrogacy; import or shall assist in the importation of human embryos or human gametes for surrogacy or for surrogacy procedures; and condition the human embryo or human gametes for use in surrogacy or for surrogacy procedures. Thus, the Act is clear in its prohibition of commercial surrogacy [25]. Any licensed physician, gynaecologist, paediatrician, embryologist, or person who owns or works for a surrogacy facility and provides his professional or technical services to or at that facility, center, or laboratory, whether on a paid or unpaid basis, and who violates any of the provisions of the Act shall be punished [26].

Any intended couple, intended mother, or other individual who seeks the assistance of a surrogacy clinic, laboratory, or a licensed physician, gynaecologist, paediatrician, embryologist, or other individual for not adhering to the charitable surrogacy policy or for carrying out surrogacy procedures for commercial purposes shall be punished with imprisonment for a term that may extend to five years and with a fine that may extend to five lakh rupees for the first offense [27]. Every offense under this Act shall be cognizable, non-bailable, and non-compoundable, regardless of anything stated in the Indian Criminal Procedure Code [28].

Recently there arose an issue/controversy with regard to the famous celebrity Vignesh Shivan and Nayanthara who welcomed their twins through surrogacy procedure which was done by a private clinic. The celebrity couple did not break the surrogacy law, according to the government of Tamil Nadu HFWD, but the department that formed a panel to look into the matter discovered that the hospital did not keep proper health records and did not adhere to the established guidelines. As a result, it issued a notice to the hospital asking for an explanation before deciding whether or not to cancel the hospital's license [29].

9. SUGGESTION & CONCLUSION

The practice of CS has been outlawed, which has had a significant negative impact on the financial security of low-income women. In a study by Neha Thirani Bagri Anand, a surrogate claimed that she had carried an infant for a couple who were unable to conceive, and in exchange, they had given her money to support her children [30]. Therefore, instead of outright outlawing commercial surrogacy, the government should establish a regulatory organization to control and oversee it thereby reducing the chance of surrogate women being exploited. So, the authors would recommend that an amendment should be brought in the present Surrogacy legislation which will legalize CS but under strict scrutiny and regulations which will benefit the women from lower strata.

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