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## Analysis of surrogacy laws in India

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### ABSTRACT

*Surrogacy is when a woman carries a baby for another couple and gives up the baby at birth. In the past decade, commercial surrogacy has grown tremendously in India. It is currently estimated to be a \$2-billion industry. Before November 2015, when the government imposed a ban, foreigners accounted for 80 per cent of surrogacy births in the country. The total disregard for the rights of the surrogate mother and child and have resulted in a number of public interest litigations in the Supreme Court to control commercial surrogacy. To overcome this problem, The Surrogacy Regulation Bill 2016 was introduced. The bill does seem to do more harm than good. Although formulated to curb the exploitation of women and trafficking of children; again, it exhibits the general policy of a state banning or censoring an activity almost completely, instead of looking at ways to use laws to regulate and improve the situation. Hence the need of the hour is that the laws need to be re-looked so that they actually benefit surrogate mothers, prospective parents, and children born from surrogacy.*

**Keywords**— Surrogacy, Rights, Women, Surrogacy regulation bill, Children

### 1. INTRODUCTION

Nature awards us a wonderful ability to procreate life within a woman. It is observed that every woman values the experience of parenthood. Unfortunately, there are a few women who because of some physiological conditions cannot give birth to their own child. The intense longing to become parents and to encounter the delights of parenthood drives them to search for alternative options Artificial Reproductive Technology (ART), In-Vitro Fertilization and Intra-Uterine Injections (IUI), and for a few, surrogacy presents itself as a standout amongst the most reasonable alternatives.

India having legalized commercial surrogacy in 2002, slowly gave rise to a booming industry of foreign surrogacy requirements and fertility tourism, so much so that commercial surrogacy was banned in 2015. The question of foreign surrogacy became more relevant after the case of *Baby Manji Yamada*. [1] In 2007, Dr. Patel working at the Akanksha Infertility Clinic, arranged for Japanese couple Ikufumi and Yuki Yamada to have a surrogate baby by Pritiben Mehta. [2] Pritiben was impregnated using a mix of Yamada's sperm and an anonymous Indian woman's egg. However, subsequent to the impregnation, Yamada and his wife filed for divorce. None of the Indian laws covered whose child the baby (Manji) was: the woman who donated the egg, Pritiben, or Yuki Yamada. Furthermore, there was even a petition filed later in court that Dr. Patel was running a child trafficking racket by abusing the lack of surrogacy laws and gaining easy money by enabling surrogacy. [3] Although the case was resolved and Baby Manji was given to her grandmother Emiko, this, as well as the booming surrogacy industry, the easy abandonment of children, and the exploitation of women who were forced to become surrogates many times in order to sustain their family, led to the necessity of a bill. [3]

### 2. COMMERCIAL SURROGACY

Surrogacy is business or altruistic relying upon whether the surrogate mother gets any monetary reward for getting pregnant and conveying a child for expected couples and giving up the child when conceived, or not.

In a commercial surrogacy assertion, the surrogate mother goes into a comprehension with the proposed couple or a solitary parent where she consents to bear the burden of pregnancy. As a result of her agreement to such a course of action, the surrogate mother is paid a specific sum of the amount by the commissioning agent. India one of the most favored destinations for couples who search for a savvy and economic treatment for infertility and as a result the whole branch of medical tourism is thriving in such surrogate practice. Commercial surrogacy in India was sanctioned in 2002. Since its beginning then, it has turned out to be one of the quickest developing industry in the nation.

### 3. ARGUMENTS IN FAVOR OF SURROGACY

Supporters of surrogacy contend that surrogacy agreements are useful for all the involved parties as the needs of both the parties are met in a surrogacy transaction with one finally fulfilling the desire to have a child and the other taking benefits of the financial

reward. It is commonly said that in a surrogacy course of action “the barren gets a baby, the broke gets a bonus”. The surrogates generally utilize the money for sustaining their families [4] and taking care of them in a better manner.

Others also claim that right to procreate is an imperative right. As far as the extent of the legality of the idea of surrogacy concerned Article 16.1 of *Universal Declaration of Human Rights 1948* states that “men and women of full age without any limitation of race, nationality, and religion have the right to marry and start a family”. Indian judiciary also perceives right to bear children as an essential human right. For instance, Andhra Pradesh High Court in a case [5] upheld “the right to reproductive anatomy” of an individual as a facet to his “right to privacy” and also agreed with the decision of the Supreme Court of USA in *Jack T. Skinner V State of Oklahoma* [6], which characterized the right to produce as “one of the basic civil rights of the man”. The couples thus have the right to practice their right in the most reasonable and practicable manner accessible to them given their infertility.

It is also asserted by many that if men can donate their sperms for whatsoever reason and get paid in return then surrogacy should also be accepted as a similar exchange in case of women. [7] The constitutional right of a mother where a birth mother has a right to the companionship of her child can be used as an argument against surrogacy because such substantive right cannot be overridden by any contractual right is another legal issue worth considering.

The liberal contention in favor of surrogacy is one’s autonomy to make decision and independence to make a free choice. Wherein one’s decision does not affect and in no way hurt other, one has the right to do what he wants to do. This identifies with the intended parents and the surrogate mothers. But in practice it is marginally different as sometimes surrogate mothers are pressurized and intimidated to carry out such task in order to earn some money.

The economic argument in favor of surrogacy is that productivity and efficiency will enhance with free trade. And this could only happen when there are couples available who yearn to have children of their own and there are such women available who are willing to become surrogates. And if this exchange of parental rights through the process of surrogacy is prohibited or banned as in some countries it will give rise to such exchange in the black market. Some also state that due to convoluted adoption regulations in many countries, individuals have started preferring going to other nations to sidestep such complicated regulations giving rise to the black market. Thus, in the long run, it is more ideal to recognize the presence of such a market which allows it to be controlled in a better manner and to make it more efficient.

Interestingly, there are exceptionally dedicated women activists on both sides of the issue. According to Radical feminists who would like to completely legitimize surrogacy take after the thinking that the world is not an ideal place. Men and women have not been equivalent and for a long period of time woman were separated and kept at home and were not permitted to step out and take part in commerce. This somehow made women powerless since the place of power is marketplace which since long had been under the domain of men. Such power implies the liberation of men and women need to attain the same. They do not require men to tell them as what to sell and not sell. Thereby the decision that selling of child and surrogacy whether ethical or not should be taken by women alone. Many of the women activists use this argument and line of thinking to assert the reason to make surrogacy legal.

However, others though agree that women have kept away from the marketplace for too long but also point out women have also been used as for a long while only as baby producing machines. Legalizing and allowing selling of child and surrogacy would imply that woman remain being treated as anonymous interchangeable breeders and strengthen the objectification and subordination of woman. Thus legalizing of surrogacy for a woman would be far from free but would rather be degrading. [8]

#### **4. ARGUMENTS AGAINST SURROGACY**

The adversaries of surrogacy state that the practice of surrogacy exploits the women physically, emotionally and economically. One of the major reasons for women to get involved with surrogacy and agree to become surrogate is the light of the fact that they are in desperate need of financial assistance to maintain their family. Moreover, agents enter into such contractual agreements which are not completely legal. The contracts basically state that the women need to bear all the burden of surrogacy and to transfer the child as soon as it is born to its intended parents. The surrogate mothers are often ignorant of their rights by law and due to their monetary situations are not in a position to engage a lawyer to fight for her rights. The agreement once signed makes it impossible for the women to escape. It is also argued that the practice of surrogacy represents a unique and new form of slavery of women. Also, the surrogate mothers do not feel comfortable speaking of carrying a child for another due to the huge social stigma attached to it. It is also believed that due to the commoditization of the labor services in such a process though money is being made it also reflects that there must be some kind of exploitation. Thus though surrogacy is reflected as a procedure generative of life what it really generates by all accounts is sexism and profits.

It is contended that surrogate mothers also face physical exploitation once they sign up surrogacy agreement assenting to give birth to a child for someone else. The contracts may contain terms like that the surrogate would have to abort the child in case of any medical reason or also on the demand of the intended parents. To aggravate the matters if by any chance surrogates do abort the child then they are paid a very marginal amount instead of the original amount agreed. The contracts might also have terms which place liability of any risk including pregnancy-related disease, deaths or any post-partum complications on the shoulders of the surrogate mother.

It is also argued that numerous surrogate mothers also face emotional and psychological problems in wake of having to surrender the child for another. But there are others who disagree with this notion. According to 2003 by Java, Murray, Lycett, Macullum, and Golombok it was stated that surrogate mothers do not seem to experience any kind of psychological issues as aftereffects of

going through surrogacy procedure. [9] Although they did acknowledge that some women did face emotional problems in giving over the child but such sentiments appeared to lessen during the weeks following the delivery.

## **5. THE SURROGACY REGULATION BILL, 2016**

The Surrogacy Regulation Bill that was passed in 2016 was heralded as a landmark step in the positive direction with respect to surrogacy in India. The Bill employs sufficient importance on de-commercializing and preventing the commercialization of surrogacy, against exploitation of surrogate mothers and children born out of surrogacy. The Bill outlines a detailed regulatory guide for existing surrogacy clinics. However, the draft law is not one without concerns.

They are as follows.

### **1. It bans commercial surrogacy**

India faces a peaking rate of commercial surrogacy. The Health Ministry is perturbed by it and has proposed to amend the existing laws to target this problem. The Ministry issued a press statement citing that India has emerged as a surrogacy hub for couples from different nations where the laws are not particularly favorable. This has resulted in the increase of unethical practices, putting both surrogate mothers and their children at risk. It is important to note that the government has responded to this problem by banning it completely rather than imposing checks and limits.

### **2. Foreigner nationals can't get Indian surrogate mothers**

The bill effectively bans foreigners to seek an Indian surrogate mother. This includes non-resident Indians (NRIs). The Associated Press reported that the Indian surrogacy industry is at "around \$1 billion a year and growing".

### **3. It legalizes surrogacy for infertile Indian couples**

The law is specifically tailored to suit the needs of heterosexual married Indian couples with medically proven infertility. This will, by omission, keep out any homosexual couples as the law does not cover them, as well as live-in partners, and single men and women who might want a surrogate child.

### **4. Duration of marriage is important**

A couple should have been married for at least five years before approaching a surrogate mother, according to the proposed legislation. Further, the woman has to be between 23-50 years of age and the man should be 26-55 years old.

### **5. You can't pay a surrogate mother**

If you're a heterosexual married couple who have proven infertility, and you find someone who agrees to be a surrogate mother, you can't pay her. The couple can fund any and all of her medical bills, but not remunerate her for agreeing to bear a child for the benefit of the couple. A surrogate mother in New Delhi takes one of her many daily doses of medicine.

### **6. You can only approach a close relative for surrogacy**

The law requires the chosen surrogate mother to be someone who is a "close relative" of the couple. The objective of this law is to ensure that the woman who has agreed to be a surrogate mother has not decided to do so for any remuneration or self-serving benefits but out of genuine concern for the childless couple. This ensures that destitute women do not look at surrogacy as a means of livelihood. However, this poses a problem as "close relative" is subjective and leaves out friends and others.

### **7. If you have a child, you can't try for another one**

Surrogacy is an option that is exclusively available for childless couples. Couples who have natural born children and/or adopted children cannot choose to have more children by means of surrogacy. Thus, the law is specifically meant to serve the interests of childless couples. External Affairs Minister Sushma Swaraj on Wednesday lashed out on celebrity couples who she reprimanded (without naming names) for having a surrogate child "even though they have two children, one boy, and one girl".

### **8. Surrogacy will be allowed only once**

Surrogacy is a one-time option. A couple who already received a child out of surrogacy cannot opt for it again for a second child. Also, a woman who has been a surrogate once cannot do so again.

### **9. Surrogacy regulatory bodies**

A National Surrogacy Boards will be instituted at the Central level and will be headed by the Health Minister. Subsequently, there will be State Surrogacy Boards and appropriate authorities at lower levels to oversee and supervise all cases and matters relating to surrogacy and the regulation of hospitals and clinics that offer such service.

## **6. CRITICAL ANALYSIS OF THE SURROGACY REGULATION BILL 2016**

Although the bill was made and passed with the intention of preventing this exploitation, some of the clauses had both the medical community and the general public outraged. [10]. For one, the need of just a relative being a surrogate mother. This restricts the likelihood of surrogacy to an expansive degree, particularly since most circumstances, surrogacy turns into the last alternative a couple picks. Despite the fact that adoption is constantly another decision, the adoption procedure is long and monotonous [3]. One additionally needs to remember, the disgrace connected to adoption and the yearning of "genuine" beneficiary (read: male) in Indian social orders. Regardless of the possibility that the state needed to check surrogacy with a specific end goal to encourage adoption, to stop the privileging of organic youngsters; there should be a streamlining of adoption strategies. The possibility of "charitable surrogacy" communicated in the Bill, as has been accounted for, enormously restricts both potential surrogate moms and couples needing kids: since ladies can get to be surrogates just once, and since couples who can't discover willing relatives

have just a single way out— adoption (In different nations benevolent surrogacy is permitted however is not constrained to relatives, and one-time pregnancy). [3]

Also, restricting a woman's surrogacy decision to just a single time is largely constraining the income of the individuals who make due on this business. Once more, it comes down to the issue of assent. On the off chance that a woman enthusiastically agrees to be a surrogate mother, is guaranteed of a safe delivery; [3] and the infant is guaranteed of a protected home, why would it be a good idea for her to be constrained to just a single surrogacy? After the surrogacy business blasted, a considerable measure of ladies was reliant on the same. The issue here is by all accounts that the woman is "exploited" for her body. Furthermore, this as well as a legitimate issue. Similarly, as on account of sex work, when a woman is pressured into the business since she must choose between limited options, and on the grounds that she urgently needs the financial resources, it doesn't imply that she has completely agreed to the occupation. It implies that she has not been given, or is not ready to discover, substitute work to manage herself. In any case, on the off chance that she is consenting and is being paid the best possible sum, then this ought not to be an issue by any means. In certain European nations, sex work is completely managed and sex specialists have full established rights, not at all like in India. This is altogether different from consenting to go into sex work for the absence of some other choices. Likewise, surrogacy laws ought to be set out in a manner that there is the full assent of the woman being referred to. Here, rather than controlling the ways and approaches in which a woman's misuse is averted, what the bill has done is wipe out the thought completely.

Moreover, egg donations are likewise banned, maybe so as to check kid trafficking and illegal surrogacy racket. [11] Be that as it may, again a sweeping ban won't help in this circumstance. Approaches should be organized and laws should be actualized in a manner that the issue is settled without blue-penciling the whole industry itself.

A standout amongst the most petulant purposes of the bill is its barefaced ban on surrogacy rights of homosexual couples. This is the first occasion when that the government's straightforward homophobia has moved into the open. Sushma Swaraj plainly expressed that surrogacy for homosexuals is against "Indian ethos", in spite of the fact that homosexuality has been continually specified in different Indian writings. [12] Presently, despite the fact that this ban could be interpreted as a negligible after of the law (Section 377 against "unnatural" intercourse), this would just bode well if hetero couples likewise damaging the segment were denied surrogacy rights. Since there is no real way to decisively discover, this is clearly a tremendous foreswearing of equity to the strange community [3]. Besides, since as indicated by marriage laws just hetero couples are permitted to get hitched; the express expressing of the ban of surrogacy to homosexual couples implies two exceptionally disheartening things: one, since this is the first run through there has been an unequivocal expressing of "homosexuality", this lone uncovers that the government is not in any case open to the thought; and two, the government is practically expressing that the community should stop to exist in the previous' eyes, since the last have no rights as to their sexuality [13]

However, sometimes we are quick to criticize policies without understanding the true extent of the situation. The bill is extremely necessary in certain places in India; for example, Gujarat, where 'baby farms' exist, i.e. [14]. Underprivileged women are rounded up in scores and given out as surrogates to potential parents. Here there is a paradox which the government needs to tackle: women are being exploited as baby-carriers, but this is a source of income; and if this 'exploitation' stops, then how will they survive? In this industry, middlemen play a large role and take huge slices of the amounts paid by the parents, and only about 25% ends up with the actual surrogate mothers. And now although the bill will greatly benefit these women, where will they go for wages. [15]

Aside from this one glitch, in any case, the bill seems to accomplish more damage than great. Albeit planned to check the misuse of women and trafficking of minors; once more, it shows the general arrangement of a state banning or blue penciling a movement totally, rather than taking a gander at approaches to utilize laws to manage and enhance the circumstance. Furthermore, while most nations, particularly in Europe, just permit benevolent surrogacy, surrogate moms are not constrained to relatives, and medical costs are secured. One might say that in spite of the fact that India has not banned surrogacy totally (like Germany, France, and Italy), the laws should be re-looked so that they really advantage surrogate moms, forthcoming parents, and kids conceived from surrogacy.

Gradually yet relentlessly, the government is demonstrating genuine what was left implied this while: homophobia, discrimination towards non-heteronormative connections, and a paternalistic requirement of social standards. The bill displays an absence of comprehension of the agency which should be given to a woman; that a woman ought to have the capacity to settle on choices when the question is as to her body.

## **7. ARGUMENTS IN FAVOUR OF THE BILL**

Those who are in favor of this bill believe that this is indeed a step in the right direction as profiting commercially from a woman's womb by exploiting her helplessness is a terrible crime. An evolved society is one that seeks to protect the right of all. A poor woman is undoubtedly among the most voiceless of India's citizens, and the draft Surrogacy Bill 2016 [3] seeks to protect her. They argue that since the inception of commercial surrogacy, a number of incidents have sparked unpleasant legal questions surrounding commercial surrogacy involving foreigners. In 2012, for example, an Australian couple who had twins by surrogacy arbitrarily rejected one while selecting the other. Such issues reveal the complexities that surround commercial surrogacy. Also in 2014, "Al Jazeera" carried a story which documented how Indian women were exploited in the name of commercial surrogacy. While these women actually did the hard work of carrying a child for nine months, fertility clinics often pocketed more than 50 percent of the amount that was promised to them. As gay rights are still an evolving issue in India and the Supreme Court is sitting on a review petition on Section 377 of the Indian Penal Code, pertaining to the status of gay rights, on which no clear



legal stand on the issue has emerged. So, at this point, conferring legal rights to a surrogate child to gay parents would endanger the rights of the child itself. Meanwhile, the banning of commercial surrogacy can perhaps open up doors for adoption as well. In a country like India, where one encounters frequent stories of children being abandoned by their parents out of poverty or social stigma, especially girls, banning commercial surrogacy could encourage parents to look toward adoption as a means of fulfilling their dreams of parenthood.

## **8. ARGUMENTS AGAINST THE BILL**

While those people who are against this Bill argue that that commercial surrogacy in India has not only helped poor and needy surrogates financially but has also generated large revenues for the country by medical tourism and also helped those who were childless and believe that the Bill has focused on banning surrogacy more than regulating it and violates Article 21, by denying deserving people of parenthood. [3] They also argue that it will discourage even Indian citizens from surrogacy as the bill states that only a close relative can be involved in this process which would violate their need for confidentiality and personal space. They believe that the Bill sets an example of orthodox beliefs that the Government is enforcing on people. India, being a family-oriented society, couples face family and peer pressure to have a child. Failure to do so may lead to divorces or illegitimate relations. The rule of opting for surrogacy only after five years of marriage is irrational in today's late-marriage times. It also does not provide any solution to those who may need to opt for surrogacy for a second child, when a normal birth is not possible due to some medical reasons

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