

## **A LEGAL AND LEGISLATIVE FRAMEWORK FOR THE PROTECTION OF SURROGACY IN INDIA**

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### **ABSTRACT**

A great importance is attached with the law that governs surrogacy because India is often referred to as the world's "surrogacy capital." Owing to the cheap cost of substitution arrangements as compared to other nations and less regulations to deal with surrogacy India becomes the favourite destination for begetting the child for those including the bachelor, separated, elderly, homosexuals and lesbians who may face discrimination in their own country to have the child via surrogacy. In addition to this, there are other reasons also such as in India doctors are well qualified and experienced, private health services are world class and more importantly surrogate women are easy accessible. This rise in practice of surrogacy arrangement further gave rise to many issues and recognition of many rights and obligation. Surrogacy is a procedure or arrangement whereby a person who becomes a neonatal parent after birth decides to take pregnancy with another person. It's a contract in which a lady is "with" another pair of pregnant ladies for an extended period of time. A lady who transfers and delivers a kid for another pair is also used to use "substitute mother" or "surrogate." It is considered in the Black Law Dictionary as a gift and wonder of science.

**KEY WORDS: Law Commission, Surrogacy Bill Etc**

### **INTRODUCTION**

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While this agreement seems to help all parties involved, this arrangement also gives rise to certain sensitive issues that need to be dealt with in careful frame-up laws to ensure the welfare of the mother and proposed parents are safeguarded. Trade substitutes in India are now illegal in August 2016 when a bill was passed. The ever increasing infertility prevalence worldwide has resulted in the creation of helpful methods of reproduction (ART). Substitutes came here like a possibility if the lady or couple cannot reproduce infertile. Individual gestational surrogacy is a situation in which a mother acts as a surrogate and delivers a child to some other couple. An embryo is inserted in the womb of woman who is responsible for carrying and delivering the child, which get fertilised by in vitro fertilisation. The substitute lady is synthetically impregnated with the proposed father's sperm in conventional substitutes, making her genetic mother. Depending on who benefits financially from her pregnancy, surrogacy can be profitable or altruistic.

### **LEGAL COMPLEXITIES INVOLVED IN SURROGACY**

Since the beginning of advances in medical science at the end of the 20th century, commercial substitution has prevailed in India. The practice gathers popularity worldwide, is increasing quickly every day and becomes an industry in India, despite the social and legal complexities involved in the concept. As business suitability practice in India is conducted on a large scale, in our country, there is no such law to deal with substitution process or control practices, leading to the misuse of this troubling practice. More complicated legal difficulties are attributed to India's lack of appropriate legislation and many others to legislation. The legal aspects of surrogacy are complicated, varied, and unsolved, which leads to difficulties defining the lawfulness of substitution arrangements, deciding the rights of surrogate children, commissioning parents, resolving custody, citizenship, and parenting conflicts for the surrogate child. Although some ICMR guidelines do not have any guidance for resolving all those problems, they do not have any binding impact, and current legislation is also not enough to resolve the situation. The main objection against surrogate motherhood is that a legal system does not protect its proportions. As long

as the rights and obligations of all parties are established and upheld by law, the status of the child and those concerned are at risk. What if the mother-substitute wants to hold the baby? Will she benefit from the overarching law of the biological father who has signed with her? Who will obtain parental rights when the couple are divorced or separated? Do they both have the right in this situation to change their minds? What if you are widowed? Who is responsible for the abortion if the baby survives?<sup>6</sup>

### **LAW COMMISSION 228TH REPORT, AUGUST 2009**

The expansion of Assisted Reproductive Technology procedures is discussed in this research, which is in acknowledgement of the fact that sterility as a medical problem is a significant hindrance to couple's general interests and cannot be neglected, particularly in a patriarchal nation like India. Because affinity and familial bonds are depending on kids, sterility is considered as a serious issue. Substitution process is the ultimate rescuer in this case. Surrogacy law is complicated, and it will require complete legislation to solve it. Surrogacy is fraught with conflicting interests and has a perplexing influence on society's fundamental unit, the family. Non-interference by the law in this thorny matter will be inappropriate at an instance when the law is supposed to be an enthusiastic protector of human liberty and a tool for the distribution of positive entitlements. On the other hand, prohibiting surrogacy on hazy ethical basis devoid of a thorough examination of the societal aims and rationale that it can provide would be irrational. The time has come to take a realistic approach and legalise altruistic substitution agreements while prohibiting commercial substitution. The most significant aspects of the surrogacy partners' rights and duties, as well as the surrogate child's rights have been discussed in this report. It condemns commercial substitution and states the need to establish a law to prevent the physical, psychological, and financial exploitation of un-educated and poor surrogate mothers.

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<sup>6</sup> Nigam, M., Nigam, R., Chaturvedi, R., & Jain, A., —Ethical and Legal Aspects of Artificial Reproductive Techniques Including Surrogacy, in Anil Aggrawal's Internet Journal of Forensic Medicine and Toxicology, Vol. 12, No. 1 (January - June 2011)

## **THE SURROGACY (REGULATION) BILL, 2016**

J. P. Nadda, Minister for Health and Family Welfare, introduced the Surrogacy (Regulations) Bill, 2016 in Lok Sabha on November 21, 2016. The Bill describes substitution status as a method out in which a female gives birth to a baby for betrothed couple and then agrees to give the child to the engaged couple. The Surrogacy (Regulation) Bill, 2016, intends to control substitution process in India by allowing couples who do not have children naturally and have no other choice for assisted reproductive systems to have children. The Bill controls altruistic substitutes and forbids trade substitutes. The bill's purposes are to ban foreigners, especially in rural and tribal areas, from exploiting women. The bill will help authorities take action on the different substitution rackets currently in place across the world. There have also been several cases of exceptionally advanced childless couples preferring to be replacement and IVF.

Though the law so far bans the choice of great substitution for individual parents, homosexuals and relationship partners, many expect the guidelines will also help in these dissuasive 'senior couples' It forbids all commercial substitutes in India. Altruistic substitution in compliance with certain requirements is allowed. Only childrenless couples who marry for at least five years are proven to have fertility-related problems in at least one of these cases. Married couples with children, single persons, living partners or gay individuals who have biological or adopted children will not be qualified for substitution. Substitution in India will not be permitted to foreign nationals, NRIs, OCIs etc. Unmarried or childless women will be prohibited from becoming mothers in substitution. Substitute moms may be close family members only, and they are allowed to be substitutes only once. Substitute mother and kid's rights are covered as laid down in the Bill. The Bill would regulate substitution in India by creating the Central National Surrogacy Board, the State Substitute Boards and appropriate authorities in the State and Union Territory.<sup>7</sup>

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<sup>7</sup> Id. at p.189.

## **THE SURROGACY (REGULATION) BILL, 2019**

The Surrogacy (Regulation) Bill, 2019 was proposed by the Union Cabinet, in the Lok Sabha on 15th of July 2019, with an aim to promote altruistic surrogacy in India this bill is replica of Surrogacy bill of 2016, which due to the dissolution of the 16<sup>th</sup> Lok Sabha, have expired. It sets out guidelines for substitutes. A woman of 25 to 35 years old, a near relation of the commissioning parents married to at least one child born, should be the substitute. It should have been a physically and mentally stable person and never before should have been a surrogate. The surrogate cannot supply her eggs. This bill only provides substitute status for Indian couples married having proven infertility for five years or longer, wives between the ages of 23 and 50, and husbands between the ages of 26 and 55. There is no surviving kid for the intended pair (biological, adoptive or surrogate), and they shall obtain from the relevant state or central government authority an Essentiality and Eligibility Certificate. With many celebrities opting for it, the idea of substitution had become trendy. These boards will create and supervise the surrogacy clinic code of ethics the substitute mother may reject the agreement before transferring the embryo. She is permitted for abortion in writing through her authorisation by competent authorities as per the Medical Termination of Pregnancy Law in 1971. The punishment for infringers involved with commercial substitution, misuse of the substitute, leaving behind fine of up to 10 lakh rupees that might be imposed and imprisonment up to 10 years or exploiting the surrogate child or misuse gametes/embryo for surrogacy. It identifies biological parents of the surrogate kid as true parents of the kid born using substitution process<sup>8</sup>.

## **INDIA'S SUBSTITUTION BILL AND INTELLIGIBILITY IN ASSISTIVE REPRODUCTIVE TECHNOLOGY (ART)**

Today Assisted Reproductive Technologies is an industrial enterprise of 30 billion in India with more than 3 000 clinics worldwide. Over the years, the benefit for those

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<sup>8</sup> Carter J. Dillard, —Rethinking the Procreative Rightl, 10 Yale Human Rights and Development Law Journal, (2007), p.1.

deprived of a progeny has been Assisting Reproductive Technologies (ART). In recent years ART has expanded rapidly and is now increasingly available in developing and developed countries for infertile couples. With significant expansion in ART centres and yearly ART cycles, India is likely to be the world person in charge in ART. The most popular type of ART is in vitro fertilisation (IVF). IVF is a man-made technology for granting parenthood that has made lakhs of people smile. In the IVF process, fertilisation is done through the manual combination of the sperms and egg on a lab dish and transfer to the uterus. The main advantages of an IVF operation are a successful pregnancy and a hale and hearty kid. More often than not, however, some legal and ethical factors deter its smooth implementation. Infertility is on the rise as a result of unpredictable lifestyles and delayed marriages, and now many pairs are choosing ART or adopting children. ART's reliable performance rate is 40%. Today, ART is an industry of 30 billion in India, with more than 3,000 clinics worldwide.

Infertility in India is the most common medical issue in the age of 30-40 years. Worldwide economic globalisation, in which reproductive tissues such as eggs, sperms and wombs are traded for profit similar to any other product, assisted reproductive technology has grown in popularity (ART), according to a new report, which adds that India is now the world's surrogate capital. The ART (regulation) bill, 2010 suggests that a Central Board, State Boards, and National Registry of (ART) be established in India for the certification and oversight of ART clinics and banks, guaranteeing that these facilities are principled and protect the health, legal, and societal rights of all parties involved. In the light of recognised ethics with the utmost benefit to all stakeholders. The Health Ministry proposed to legalise domestic altruist surgery as the consequence of the Surrogacy Bill of 2016. The legislation aims to regulate the abuse for immoral purposes of surrogate children and mothers. However, the bill does not fix numerous concerns such as fairness and fair practice in the view of many specialists in the ART sector<sup>9</sup>.

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<sup>9</sup> J.E.S. Fawcett, *The Law of Nations*, Basic Books, Inc., New York (1968), p.158.

## **SURROGACY ETHICAL AND LEGAL ISSUES: AN ASSESSMENT OF INDIA'S PROPOSED SURROGACY BILL**

Substitution agreements pose many concerns, both ethically and legally. A discussion of the surrogacy's value and desirability, as well as the necessity for regulation, must be recognised at the outset. While the idea of family has evolved over time and through practices, the advancement of reproductive expertise in current decades has resulted in fundamental shifts in how we think about family, motherhood, and the birth of life itself. Society is beginning to tolerate diverse families, such as homosexual couples and their offspring, as well as single parents who aren't obligated to marry before starting a family. Substitution as a method of bearing a kid is viewed differently by feminists, legal practitioners, countries, and international organisations. Feminists have articulated their outlook on reproduction and contractual motherhood while acknowledging gender roles and inequality in society as well as the consequences. On reproductive rights and surrogacy, the radical-cultural feminist and radical-libertarian perspectives are diametrically opposed.<sup>10</sup>

According to radical-libertarian feminists, Women's reproductive independence is improved by collaborative reproduction frameworks like contracted parenthood. Substitutes and commissioning parents will collaborate in parenting the kid that neither of them could have raised on their own. While they recognise a woman's autonomy over her body, they fail to consider that such collaboration is uncommon, particularly when the substitute is from a budding country and pays for the surrogacy. It has been argued that contractual maternity relies on the idea that it separates lady into the efficiently wealthy or the poor. The affluent will enlist the help of the poor to satisfy their reproductive needs, giving also the gestational care to the latter's already extensive kid-rearing services. The approval of this practice in society would perpetuate the notion that impoverished women's wombs may be used for profit. The urge of couples or single parents to have a baby must be balanced against the

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<sup>10</sup> See, Laura Shanner, —The Right to Procreate: When Rights Claims Have Gone Wrong!, 40 Mc Gill Law Journal, 823 (1995)

externalities that result from substitution. Such a thing does not exist as a right to a child and control over it, Surrogacy access restrictions, or even outright bans, are legal wherever they are required. Simultaneously, though limiting access to surrogacy is legal, it must always be done on just, equal, and rational grounds. The Surrogacy Regulation Bill 2019 limits who may use substitution to have a kid in a blatantly arbitrary manner. According to the bill, this option is only available to wedded pairs from a specific age group who has obtained an eligibility certificate from the relevant agencies. Only sterile couples are eligible for an infertility certificate. The definition of barrenness as the incapability to conceive is likewise somewhat narrow although there might be a variety of other explanations why the couple is unable or unwilling to conceive. Because of these circumstances, choosing this path is a tough one. In a culture that has become more tolerant of alternative sexuality, late marriages, and women opting to stay solo, in the guise of law, the measure fails to strengthen women's rights and respect individual choices. Any legally married couple who is infertile should be permitted to use surrogacy, as well as any Indian woman or man, married or unmarried, divorced, or bereaved, regardless of their capability to have the baby.

## **JUDICIAL RESPONSE**

### **BABY MANJI YAMADA VS UNION OF INDIA & ANR**

The Hon'ble Superior Court, observed that for a speedy trial for crimes or infringements on children's rights and incidents related to the child, and for cases relating to such activities and incidental cases, the Hon'ble Apex Court had adopted the Commission for the Preservation of the Rights of the Child Act, 2005. Section 13, Chapter 3 of the Act elaborating on the Tribunal's duties, was further underlined by the Hon'ble Court. The Court further noted that substitute reproduction is a renowned reproductive mechanism by which a female decides to be pregnant to gestate and bring forth a child that is not raised but given to a contracted group, maybe the child's genetic mother gestational carrier. In certain instances, substitutes are the only choice open to parents who have their biological child. Finally, the Hon'ble Court disposed of



the writ petition with the instruction that any individual who has a dispute may take it to the Commission recognised under the Commission for the Preservation of the Rights of the Child Act, which has the authority to investigate grievances and potentially take suo moto action in cases including;

- (i) Exclusion and infringement of a kid's rights.
- (ii) Non-enforcement of legislation aimed at protecting and developing kids, and
- (iii) Failure to follow through on policy choices, directives and directions to alleviate problems, ensure children's wellbeing, relieve those kids, or resolve concerns esulting from those issues with the relevant authorities

Shortly after that, when it comes to *Jan Balaz vs Anand Municipality*, significant questions regarding substitution arrangements and their legal validity, as well as the kid born as a result, were determined by the Gujarat High Court. The court emphasised the regulatory gap in this region, noting that In India, there is no law prohibiting artificial insemination, egg donation, lending a womb, or surrogacy agreements. The court continued by stating that under the current legal system, we have no choice but to hold that the babies born in India to the gestational surrogate are citizens of this country, Regardless of whether the commissioned parents were both foreign nationals. The reproductive liberty of humans has been recognised as a core human right by the Indian judiciary. As an example, in *B.K. Parthasarathi vs Government of Andhra Pradesh*, the High Court of Andhra Pradesh affirmed an individual's "right to reproductive autonomy" as a component of "right to privacy," and approved the judgment of the United States Supreme Court in *Jack T. Skinner vs The State of Oklahoma* where "One of man's core civil rights" is described as the right to generate<sup>11</sup>.

In the *Javed vs The State of Haryana* 168, though the two existing children rule was maintained by the Supreme Court for disqualifying an individual from running in a

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<sup>11</sup> Id. Art. 2

Panchayati Raj election, it did not state that breeding is not an essential human right. If the constitution guarantees reproductive rights, substitution, which gives a barren couple the opportunity to exercise that privilege, is also protected by the constitution. In *Devika Biswas vs Union of India*, the Apex Court accepted the reproduction right as a necessary component of Article 21's 'right to life'. Women's reproductive rights comprise the right to bring a foetus to full span of time, deliver a kid, and bring up kids. The privacy rights, decency, and inviolability are also included. Article 21 is violated by limiting substitution to married couples and widowed or divorced when women of a specific age range refuse reproductive alternatives to LGBT persons, individuals, and elderly couples. In *K S Puttaswamy vs Union of India*, interference by the state in procreation is a direct infringement on one's right to procreate and right to privacy and Article 21 recognises it as a component of one's right to life. The Indian legal system has never permitted surrogacy.

There is no legislation for substitution, apart from a Bill of 2019 which is in wait list in legislature due to various legal issues, even though the Indian judiciary has approved surrogacy in many cases. In the *Javed vs The State of Haryana*, though the two existing children rule was maintained by the Supreme Court for disqualifying an individual from running in a Panchayati Raj election, it did not state that breeding is not an essential human right. If the constitution guarantees reproductive rights, substitution, which gives a barren couple the opportunity to exercise that privilege, is also protected by the constitution. In *Devika Biswas vs Union of India*, the Apex Court accepted the reproduction right as a necessary component of Article 21's 'right to life'. Women's reproductive rights comprise the right to bring a foetus to full span of time, deliver a kid, and bring up kids. The privacy rights, decency, and inviolability are also included. Article 21 is violated by limiting substitution to married couples and widowed or divorced when women of a specific age range refuse reproductive alternatives to LGBT persons, individuals, and elderly couples. In *K S Puttaswamy vs Union of India*, interference by the state in procreation is a direct infringement on one's right to procreate and right to privacy and Article 21 recognises it as a component of one's right to life. The Indian legal system has never permitted

surrogacy. There is no legislation for substitution, apart from a Bill of 2019 which is in wait list in legislature due to various legal issues, even though the Indian judiciary has approved surrogacy in many cases<sup>12</sup>.

## CONCLUSION

Surrogacy has undergone numerous transformations that reflect the state of society at the instance, from being mentioned in ancient books to being an accepted practise and a source of revenue for a country to being controlled by strict restrictions. This was a common practice in ancient times, but it was abused, as we can see in Kunti, who received a much too young boon for her. Between 2002 and 2018, India grew in popularity as a commercial surrogacy destination and the practice was unregulated due to a lack of surrogacy legislation. On the other hand, commercial surrogacy was outlawed in 2018, and a slew of new rules were enacted. However, rather than outright restricting an idea, laws should be enforced to ensure that it does not become exploitative or misapplied. A lady must be safeguarded from abuse, but she must have ultimate say over her own body. Let's analyse how abortions were done before their legalisation. We can see that there is often a loophole in any statute that can be abused, making the intent of that specific pic of law meaningless.

Rather than restricting substitution to barren married couples, the government should make certain that everyone can procreate and that those who assist them are compensated, economically or else. The laws of a country replicate the sentiments of its citizens, and all countries should strive to progress with the each passing times rather than regress by implementing regressive legislation. Surrogacy has been marred by much debate and the question of what is legally acceptable. Though well-intentioned, current rule reflects a restricted view of what is best for women, as well as an unflattering stigma towards homosexual and live-in relationships. It is out of date and has a slew of arbitrary legislation that must be abolished. Ironically, people are engaged in substitution process when almost 12 million Indian kids are orphaned.

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<sup>12</sup> See, Steven M. Recht, —\_M' is for Money: Baby M and the Surrogate Motherhood Controversy| 37

Adopting a kid in India is a difficult and for barren couples who wish to give these youngsters a family, it's a prolonged procedure. Despite the fact that the country has been independent for 60 years, India presently lacks a widespread adoption legislation that applies to every of its citizens, not considering of belief or state of residency (OCIs). Consequently, they must revert to IVF or surrogacy Guardianship rather than adoption, which is permitted under the Guardian and Wards Act of 1890. The Hindu Adoption and Maintenance Act of 1956 forbid non-Hindus from adopting a Hindu child, and the conditions for immigration after adoption present additional challenges. The Substitution Bill of 2016 makes endeavour to reconcile the interests of major surrogacy stakeholders: substitute mother and substitute child to avoid abuse and guard their rights. The prominence of bill should be on two things:

- a) ensuring the substitute baby's rights and
- b) Upholding contract between the surrogate lady and commissioning parents.

Nevertheless, by ruling out commercial substitution entirely, the measures place an unwarranted burden on the substitute mother. India's substitution sector is well-established nowadays.

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