

THE LEGALITY OF SURROGACY IN INDIA AND RELATED ASPECTS

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Abstract

The commercial viability of surrogacy in India is the main topic of this paper. As a result of the estimated \$ 400 million being spent annually by foreign couples on fertility tourism in India, the country's legislators have taken notice. The Surrogacy (Regulation) Bill, 2016, which aimed to outlaw commercial surrogacy in India, was enacted by the Lok Sabha against the background of a booming surrogacy business in India. The paper then aims to trace the history of commercial surrogacy in India, from its legalization in 2002 with the legislation of CGS to its proposed ban with the Surrogacy (Regulation) Bill, 2016. The introduction to the topic is followed by explanations of the meaning and concept of surrogacy, as well as its types and historical background. Moreover, the purpose of this research is to critically examine the factors that have made India a haven for childless couples from throughout the world. Lawmakers feel that only permitting altruistic surrogacy would avoid the "possible exploitation of surrogate mothers", but is it really the "commercial" aspect of surrogacy that is at the root of the problem? The article intends to raise doubts. The court reaction of India towards surrogacy will also be discussed in this article, with primary emphasis on the 'Baby Manjhi' case that brought attention to India's surrogacy regulations, or lack thereof. The purpose of this paper is to examine the arguments made by those who oppose commercial surrogacy, specifically whether or not the practise should be viewed as exploitative because of a lack of opportunities and stigma against a surrogate mother, and whether or not women should have the choice and freedom to engage in surrogacy as a service. Finally, some thoughts on the ethical implications of commercial surrogacy in India are presented.

Keywords: Commercial surrogacy, Fertility tourism, Surrogacy (Regulation) Bill, etc.

Introduction

The right to procreate is the most fundamental human right, as Robert Browning famously put it when he wrote, "Motherhood: All love begins and ends there". No one wants to go through the unimaginable suffering of being unable to have children. Family values are highly regarded in our society. Ten to fourteen percent of the Indian diaspora experiences infertility, with the rate being significantly higher among Urban couples, as reported by the Indian Society of Assisted Reproduction. The field of assisted reproductive technology has made great strides in recent decades.¹ In vitro fertilization (IVF), intrauterine insemination

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¹ NEETA LAL, INDIA'S HIDDEN INFERTILITY STRUGGLES, THE DIPLOMAT (MAY 30, 2018) <https://thediopmat.com/2018/05/indias-hidden-infertility-struggles/>.

(IUI), in vitro maturation (IVM), and vitrification² are just some of the modern methods that have made it possible for infertile couples to have children. Surrogacy through in vitro fertilization is the most well-known option for such couples because it creates a genetic link between the parents and the child and has a high success rate.

The practise of using a surrogate mother to carry a child has been around for a very long time, as evidenced by numerous reliable sources. The Babylonians, for instance, sanctioned the use of surrogacy as a means of keeping infertile couples together. In the Book of Genesis, servant Hagar is mentioned as having conceived a child for childless Sarah by way of her husband Abraham³. This is the earliest known reference to surrogacy. In addition, in 1980, a lawyer from Michigan named Noel Keane drafted the first surrogacy contract. The surrogacy industry has come a long way since then.

Due to the expansion of the global services market and the growing popularity of medical tourism, India has emerged as a leading provider of healthcare and, more recently, of reproductive services. The Indian government is encouraging medical tourism as the private health care industry promotes it. Recent years have seen a surge in “reproductive tourism” to India, with the industry now worth an estimated \$2.2 billion USD and serving primarily international infertile couples.⁴ The low cost of surrogacy procedures, favourable tax policies, and lack of a clear law regulating the practise all contribute to India’s popularity.

In 2002, India became one of the minority of countries to legalize commercial surrogacy. However, because of the absence of regulation on the practise of surrogacy, fertility clinics began engaging in unethical practices; in 2016, a bill was introduced in parliament to ban commercial surrogacy and only allow altruistic surrogacy; however, the bill was never passed. In July of 2019, the same law, the Surrogacy (Regulation) Bill, 2019, was reintroduced in Parliament and approved by Lok Sabha in August of the same year. In addition, the Union

2 PROFESSOR STUART CAMPBELL, FIVE TREATMENTS IN ASSISTED REPRODUCTIVE TECHNOLOGY, CREATE FERTILITY, <https://www.createfertility.co.uk/blog/5-treatments-in-assisted-reproductive-technology>.

3 NAYANA HITESH PILLAI, YUVRAJ DIGVIJAYSINGH JADEJA, HARSHA KARSAN BHADARKA, MOLINA NIKET PATEL, NIKET HITESH PATEL & NILOUFAR RAHAEMATKHAN SODAGAR, INSIGHT INTO DIFFERENT ASPECTS OF SURROGACY PRACTICES, 11(3) J HUM REPROD SCI., 212-218 (2018).

4 NEETA LAL, REPRODUCTIVE TOURISM IN INDIA: NO CHILD’S PLAY, AISA SENTINEL (JULY 12, 2016) <https://www.asiasentinel.com/econ-business/india-reproductive-tourism/>.

Cabinet has approved the Surrogacy (Regulation) Bill, 2020, which includes the recommendations of the Rajya Sabha Select committee.⁵

Description, Scope and Subtypes of Surrogacy

The Latin word “*subrogare*”, which means “*to appoint in place of*”, is where we get the word ‘surrogacy’. It refers to the act of appointing a person to fill the duties of another person who is absent or unable to do so. Surrogacy, in the context of reproduction, simply means that a woman becomes pregnant in order to provide a child to a couple or single parent who are unable to have children of their own. Assisted reproductive technologies like In Vitro Fertilization (IVF) have made it possible for women with uterine abnormalities to have children through surrogacy.

The following are a few definitions of surrogacy to help frame the discussion:

“an agreement whereby a woman agrees to be artificially inseminated with the semen of another woman's husband”, as defined by Black’s Law Dictionary. Surrogate motherhood is defined as when a woman gives birth on behalf of a couple who are unable to conceive naturally. The term ‘surrogacy’ refers to the practise of employing a surrogate mother in place of the biological mother.

According to the definition provided under the ART Act, surrogacy is “an arrangement in which a woman agrees to a pregnancy acquired by assisted reproductive technology in which neither the gametes belong to her or her husband, with the aim to bring it to term, and give over the kid to the person or individuals for whom she is serving as surrogate.”⁶

‘Surrogacy’ is defined as “the practise whereby a woman carries and gives birth to a child for an intended couple with the purpose of giving over such child to the intending couple after delivery” in the Surrogacy (Regulation) Bill, 2019.⁷

There are three different types of parental roles that can be established in a surrogacy agreement. In the first place, the legal guardianship of the kid rests with the intended or social parents. These are the people who wanted to have a family but were unable to do so because of medical issues related to reproduction. Second, the child's genetic relatives consist of the

5 S.S. DAS & PRIYANKA MAUT, COMMERCIALIZATION OF SURROGACY IN INDIA: A CRITICAL ANALYSIS, JCC LAW REVIEW, 14-29 (2014).

6 ASSISTED REPRODUCTIVE TECHNOLOGY BILL, 2008.

7 SURROGACY (REGULATION) BILL, 2019.

child's biological parents. Finally, the surrogate mother is the one who really gives birth to the kid.⁸

The Various Forms of Surrogacy

Different types of surrogacy include:

1. Surrogacy of the Natural/Traditional/Partial Kind

The intended father's sperm is used in this type of surrogacy, so he will have a biological connection to the child. Third-party sperm donation is an option when there are two female intending parents or a single male parent.

2. Full or Gestational Surrogacy

The surrogate mother in this scenario is not a relative of the intended parent and is not involved in the child's development in any way other than acting as a carrier. Eggs and sperm can be sourced from the intended parents or anonymous donors.

3. Surrogacy for Profit

It's common knowledge that the surrogate mother in commercial surrogacy arrangements is compensated monetarily by the intended parents.

4. Surrogacy for Good Causes

This type of surrogacy differs from traditional surrogacy in that the surrogate mother receives no monetary compensation and only her medical bills are paid by the commission parents. In most cases, a close friend or relative will act as a surrogate for the intended parent.

The Legal Aspects of Surrogacy in India

The International Committee for Medical Research (ICMR) adopted the Biomedical Research on Human Participants' Assisted Reproductive Technology Guidelines in 2000 and issued the "Statement of Specific Principles for Assisted Reproductive Technologies, 2000" at the same time.

In addition, the ICMR submitted a draught of the National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics, 2002 to the Ministry of Health and Family

⁸ TERESA K. WOODRUFF, LAURIE ZOLOTH, LISA CAMPO- ENGELSTEIN & SARAH RODRIGUEZ, ONCOFERTILITY.

Welfare in 2002, marking a significant step toward the legalisation of commercial surrogacy in India. Although the ICMR modified this draught in 2005 with the consultation of the National Academy of Medicine, ART specialists, and the Ministry of Health and Family Welfare, the guidelines had no effect on the legalisation of commercial surrogacy in India since the draught was never approved by the Government of India.

2005 Icmr Recommendations

While the adoption of these guidelines was motivated by a desire to better regulate clinics offering assisted reproductive technology in India, they also included recommendations for how the country should handle surrogacy. Some highlights from the regulations are as follows:⁹

- i. Surrogate mothers can't be older than 45 years old.
- ii. No woman should ever become a surrogate mother more than three times in her life.
- iii. Surrogate mothers can be a family member, close friend, or even a complete stranger.
- iv. The surrogate mother should be a close relative, but no more than one generation removed from the mother who is paying for the service.
- v. The surrogate mother must register as a surrogate mother under her own name and provide all relevant information about the commissioning parents, including their names, addresses, and other contact information.

Commission on Law and Order 228th Annual Report

Assisted reproductive technology and the rights and responsibilities of parties to a surrogacy were among the topics covered in India's 228th law commission report, which was submitted in 2009.

Taking into account the current state of surrogacy in India, the Law Commission proposed the following changes in their report:¹⁰

First, the parties involved in the surrogacy arrangement will continue to rely on a legally binding contract to outline all the relevant terms, including the surrogate mother's permission

9 INDIAN COUNCIL OF MEDICAL RESEARCH, NATIONAL ACADEMY OF MEDICAL SCIENCES (INDIA). NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVIVION AND REGULATION OF ART.

10 CLINICS IN INDIA. NEW DELHI: MINISTRY OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF INDIA; 2005, SUJAY DIXIT, SURROGACY IN INDIA, LEGAL SERVICE INDIA, <http://www.legalservicesindia.com/article/222/surrogacy-in-india.html>.

to bear a child, the consent of her husband and other family members for the same, the medical procedures of artificial insemination, the reimbursement of all reasonable expenses incurred by the surrogate throughout the pregnancy, the surrogate's willingness to hand over the child born to the commissioning parent(s), etc. However, a business motive is inappropriate for this kind of cooperation.¹¹

Second, in the event that the commissioning couple or individual dies before the child is delivered, or if the intended parents divorce and neither is willing to take delivery of the child, the surrogate child should be financially supported by the surrogacy arrangement.¹²

Third, the surrogate mother's life insurance premiums should be paid for by the intended parents, as per the terms of the surrogacy agreement.¹³

Fourth, one of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. If the intended parent is a single person, he or she must be a donor in order to have a child via a surrogate. Otherwise, if the intended parents and the biological parents are not the same people, adoption is the next best alternative.¹⁴

Fifth, surrogate children should be legally recognised as the legal children of the commissioning parents without any further legal procedures, such as adoption or a declaration of guardianship.¹⁵

Sixth, there should be no further information shown on the birth certificate than the names of the parents who paid for it.

Seventh, the donor and surrogate mother both have a right to privacy.

Eighth, sexist surrogacy should be illegal.

Ninth, only the Medical Termination of Pregnancy Act of 1971 should be used to decide abortion cases.

A revised version of the Assisted Reproductive Technology Bill and Rules from 2008 was presented in 2010. The current draught attempts to address some of the issues of the 2008

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draught. The primary focus of the proposed legislation was on how to expand the surrogacy market, rather than on regulating the business itself.

Following that was the Assisted Reproductive Technology (Regulation) Bill of 2014, which included the following clauses:¹⁶

- i. Surrogate mothers can only be women aged 21–35.
- ii. Conditions under which an international couple may pursue surrogacy in India are discussed.
- iii. The commissioning parents and the surrogate will work out the details of any compensation directly; ART clinics should not be involved.
- iv. The measure prohibits live-in couples, single parents, and homosexuals from using surrogacy.

The bill's primary flaw was its failure to provide protection for the rights of women undergoing IVF who are afterwards used as surrogates. It also fails to account for the crucial function performed by intermediaries in the arrangement of surrogates.

Sponsorship in Business Circumstances

Commercial surrogacy is defined in Section 2(f) of the Surrogacy (Regulation) Bill, 2019 as “the commercialization of surrogacy services or procedures or its component services or component procedures, including the sale or purchase of human embryos or trading in the sale or purchase of human embryos or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration, or monetary incentive, except the medical expenses incurred on the surrogate mother.”¹⁷

Since the 1990s, many Western couples who wanted to have children via surrogacy travelled to India, where the procedure was less expensive and less of a nuisance because to lax legislation and good medical facilities. The surrogacy market is worth an estimated \$2.2 billion each year, with some of the most well-known institutions located in Bhopal, Surat, etc.

Commercial surrogacy was made legal in India in 2002 so that businesses may take advantage of the country's burgeoning surrogacy market. Guidelines for ART were published by the Indian Council of Medical Research's Central Ethics Committee on Human Research. A proposal prepared by Baidya Nath Chakrabarty's committee. The draught include

16 DR. S.S. DAS & PRIYANKA MAUT, COMMERCIALIZATION OF SURROGACY IN INDIA: A CRITICAL ANALYSIS, RESEARCHGATE.

17 SURROGACY (REGULATION) BILL, 2019.

specifications for the accreditation, monitoring, and control of ART clinics in India. It also discusses the establishment of a legislative body for the purpose of accrediting, regulating, and supervising ART facilities in India. However, as these recommendations are not legally obligatory, they were useless.

If we look at the numbers involved in the surrogacy procedure in India, we find that a surrogate mother in India is paid in payments over the course of nine months, and that if the pregnancy does not reach term, the surrogate may not be compensated at all. From in vitro fertilization until hospital birth, fertility clinics in India will charge you between \$10,000 and \$28,000. However, Indian fertility clinics are becoming more competitive, both in terms of cost and their ability to attract and keep surrogate mothers for their patients.

Many surrogate moms in India originate from the cities of Anand in Gujarat, Indore in Madhya Pradesh, Pune, Mumbai, Delhi, Kolkata, and Thiruvananthapuram. Many women from other countries who want to become surrogate moms have also signed up with reputable clinics in India. Since most surrogate mothers come from economically disadvantaged backgrounds, their rights are not adequately protected when surrogacy contracts are drafted. There is no provision for compensation if the surrogate mother fails to deliver a child, and there is no cooling off time if the surrogate mother changes her mind, making these contracts exploitative.

The legality of surrogacy varies from one nation to the next. Commercial surrogacy in India was made legal in 2002, bringing the country into line with the Ukraine, Georgia, Russia, and a handful of states in the United States. However, nations like France and the United Kingdom have outlawed surrogacy entirely. Meanwhile, nations like Belgium and the Netherlands have restricted surrogacy to cases of selfless charity.¹⁸

According to Article 17/6 of the French Civil Code, any agreement with a third party about pregnancy is null and invalid. In a momentous ruling, France's highest court, the Cour de Cassation, outlawed surrogacy partnerships with other countries. Contracts for surrogacy are illegal under Article 1 of the German Constitution and are thus unenforceable under German law.¹⁹

18 SHABEER ALLH & DR. ASHA SUNDARAM, COMMERCIALIZATION OF SURROGACY IN INDIA & ITS LEGAL CONTEXT: A CRITICAL STUDY WITH REGARD TO BABY MANJI YAMADA'S CASE, 120 INTERNATIONAL JOURNAL OF PURE AND APPLIED MATHEMATICS, 4137- 4154 2018.
19 IBID.

Only a few number of institutions in Belgium and the Netherlands are authorised to undertake altruistic surrogacy, in accordance with the country's restrictive commercial surrogacy rules. Most intended parents go abroad for surrogacy since their own country has a less extensive network of medical facilities.²⁰

The Surrogacy Arrangements Act, 1985 makes surrogacy unlawful in the United Kingdom. Surrogacy agreements are not binding, and the birth mother is the child's legal guardian until either the intended parents adopt the kid or a court issues a parental order.²¹

States like California, which permits commercial surrogacy and has one of the most comprehensive surrogacy regulations in the US, are an exception. Some jurisdictions only permit surrogacy for charitable purposes, while others outlaw it entirely.

Business Surrogacy and Ethics

The argument over whether or not surrogacy is a profession or whether or not it is an exploitative practise that takes advantage of impoverished surrogate mother's lack of options is ongoing.²² Proponents of commercial surrogacy claim that legalizing the practise would help end the stereotype of women as 'baby-making machines' and children as 'commodities', while opponents say the opposite is true. It has been argued that the low salaries offered to Indian surrogate mothers are a reflection of their helplessness owing to their low socioeconomic status, and are thus against public policy. Were this to be taken into account, however, it would imply that the issue might be remedied if the surrogate mothers were given a sum commensurate with that received by international surrogate moms. But this isn't as easy of an issue as it sounds on the surface; there isn't a clear answer. Women are objectified as 'baby creating machines' when surrogacy is used, which devalues motherhood. In addition, surrogate mothers will be judged based on their outward looks, which is degrading in and of itself.

Since most surrogate mothers come from economically disadvantaged backgrounds, surrogacy has been criticized on the grounds that it violates public policy by paying them below-average wages. Both the value of their services and the compensation they get fall well short of what is fair, and it has been noted that Indian surrogate mothers are paid less than

20 IBID.

21 IBID.

22 JENNIFER RIMM, BOOMING BABY BUSINESS: REGULATING COMMERCIAL SURROGACY IN INDIA, 30 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW, 1429- 1462 (2009).

their counterparts in other countries. Even if we assume that surrogate mothers be paid at least as much as their international counterparts, this won't alleviate the issue since women would perceive surrogacy as a means to make a lot of money quickly and easily without any special training. Additionally, this would lead to a woman feeling pressure from her husband and in-laws to join the military so that she can contribute financially to the household.

Commercial surrogacy has been attacked on the grounds that it exemplifies racism and white privilege. However, surrogacy does include the commodification of human bodies of colour for the profit of white people, which is not acceptable. If one considers the global context of surrogacy, one would conclude that the practise of offering surrogacy at 'discount pricing' to affluent foreigners is akin to the drain of a developing country's resources for the advantage of a first-world country.²³ For those who believe that African-American women will be employed as gestators because they are willing to take lower pay than Caucasian women, consider this: they have fewer economic options than Caucasian women.

One of the arguments against commercial surrogacy is the question of how well informed and educated the surrogate moms are. Because most surrogate moms are from lower socioeconomic brackets, they are unlikely to get accurate information about their rights and the potential consequences of being a surrogate. A surrogacy contract in New Jersey was thrown out by the Honorable court in the case of *Re Baby M* of the United States of America because the surrogate mother had not been provided enough legal and psychological counselling before entering into the agreement.

Reasons to Support Commercial Surrogacy

When defending surrogacy, opponents often argue that it is moral because it allows childless couples a second opportunity at parenthood. Although the financial incentive is undeniable, proponents of surrogacy argue that many surrogate moms are motivated by the opportunity to do good in the world by participating in surrogacy agreements.

Surrogacy proponents argue that the practise is not the same as 'baby selling' since it involves a legally binding contract. Moreover, the motivation behind a surrogacy agreement is not financial, but rather the desire to have a family. Since surrogacy is a service, the

23 ELO LUIK, CROSS- BORDER SURROGACY: EXPLOITING LOW INCOME WOMEN AS BIOLOGICAL RESOURCES?, THE GUARDIAN (28 MARCH 2017, 11:26 BST), <https://www.theguardian.com/science/blog/2017/mar/28/cross-border-surrogacy-exploiting-low-income-women-asbiological-resources>.

payment made to the surrogate mother ought to be seen as compensation for the work she has done, similar to the fees given to attorneys and medical professionals. In addition, some naysayers contend that a surrogate mother's constitutional right to contract is being violated when a commercial surrogacy contract is declared null and invalid.

Many people who support surrogacy believe that the state shouldn't get involved if a couple wants to have a child and a woman is prepared to carry the kid for them. They say that a government shouldn't get in the way of a woman's free will if she wants to get into a surrogacy arrangement and be compensated for it.

Evaluation of The Surrogacy (Regulation) Bill 2020

The Surrogacy Regulation Bill of 2019

To facilitate charitable surrogacy in India, the Union Cabinet proposed the Surrogacy (Regulation) Bill, 2019 in the Lok Sabha on the 15th of July 2019.

The following are some of the situations in which surrogacy will be legal under section 4(ii) of the Surrogacy (Regulation) Bill, 2019:²⁴

- i. No plans to sell or distribute
- ii. only for the benefit of others
- iii. No use in child production for the purposes of sale, prostitution, or other exploitation
- iv. In the event that a couple has been medically diagnosed with infertility,
- v. Additional requirements as established by law.

The surrogacy bill of 2019 had been presented in 2016, but it died with the 16th Lok Sabha's dissolution. The Standing Committee on Health and Family Welfare reviewed the legislation and made their recommendations in August of 2016.

The group made many suggestions, including the ones listed below:

- i. Advice on whether to choose for-profit or non-profit surrogacy.
- ii. Impact of having a close relative act as a surrogate.
- iii. Have a look at the rules for sperm and egg donation.
- iv. Controlling access to abortions.

24 RSTV: IN DEPTH- NEW SURROGACY BILL, INSIGHTS ON INDIA (AUGUST 5, 2019), <https://www.insightsonindia.com/2019/08/05/rstv-in-depth-new-surrogacy-bill/>.

The Surrogacy (Regulation) Bill, 2019 will be examined by a Rajya Sabha select committee led by Shri Bhupender Yadav. On 5 February, the committee reported its findings to the Rajya Sabha.

- i. The concept that a surrogate mother must be a 'near relative' is outdated.
- ii. The second condition is that the surrogate be a single woman of Indian descent (a widow or divorcee).
- iii. Third, expanding a surrogate mother's insurance coverage from 16 to 36 months.
- iv. Accordingly, the meaning of the term infertility should be updated to remove the 5 year waiting time before an infertile couple may use surrogacy, as is currently specified in the definition of surrogacy in the bill.
- v. If a kid is born via a surrogate, the District Magistrate's custody and parentage order may be used as the child's birth affidavit.
- vi. Since the ART Act already has the backing of the parliament and deals with the technicalities of surrogacy, the committee has suggested that it be brought up before the surrogacy bill in front of the house.
- vii. As the altruistic approach might lead to a surrogate mother being exploited, the committee has advocated a compensating form of surrogacy instead.

As a consequence of the select committee report and its subsequent deliberations, the Surrogacy (Regulation) Bill, 2020, was drafted to include its findings and suggestions.

Some of the most important parts of the law are outlined here:

- Commercial surrogacy is outlawed entirely, but altruistic surrogacy is allowed, with the surrogate mother receiving financial recompense for her time, effort, and physical and emotional sacrifices in carrying a child.²⁵
- Surrogacy will be legal if it is necessary to;²⁶
 - i. Individuals who have been diagnosed with infertility and are trying to conceive, particularly women of Indian ancestry
 - ii. Selfless motives
 - iii. It is not for profit.
 - iv. Never to be used in child prostitution or for sale
 - v. Any other sickness for which laws have been established

25 SURROGACY (REGULATION) BILL, 2020.

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- The surrogacy-seeking couple must provide certificates of essentiality and eligibility from the relevant authorities.²⁷
 - a) Before a certificate of essentiality may be awarded to a couple, they must satisfy the following requirements:
 - i. Official documentation attesting to the infertility of both partners or either partner alone.
 - ii. Magistrate's court order establishing paternity and granting legal custody
 - iii. Insurance for a gestational carrier for a full 36 months, including coverage for any difficulties that may arise after giving birth.
 - b) Before issuing a certificate of eligibility, a couple must meet the requirements listed in section
 - i. The ages of both members of the relationship should fall within the ranges shown below.
 - Wives should be between the ages of 23 and 50, and
 - Husbands between 26 and 55.
 - ii. Unless the kid is severely intellectually or physically impaired or has a terminal illness, the couple should not have any children who survive to adulthood, either those born to them or those born via surrogacy.
 - iii. Any other circumstances that may be detailed in rules.
- Surrogate mothers must meet the following requirements to be considered eligible.²⁸
 - i. The surrogate mother must have familial ties to the intended parents.
 - ii. Having a husband and a kid of her own
 - iii. Between the ages of 25 and 35 is preferred.
 - iv. Do not have any history of becoming a surrogate mother.
 - v. Be in good mental and physical health, as verified by an official document.
 - vi. Providing one's own gametes for surrogacy is illegal for the surrogate mother.
- In this case, the kid will be regarded the biological child of the parents. 5. In addition, the intended parents of a surrogate child will require the surrogate mother's written permission to terminate the pregnancy, as well as official authorisation to do so, after the Medical Term Pregnancy Termination Act of 1971.²⁹

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- The surrogate will be able to back out of the surrogacy arrangement before the embryo is implanted in her womb.³⁰
- The federal and state governments will select one or more relevant authorities whose duties are as follows:³¹
 - i. Issuing, revoking, or postponing surrogacy clinic licences
 - ii. Enforcement of penalties for violations of the Act
 - iii. Within 90 days after receiving an application, the Authority may approve or deny the Certificate of Eligibility and Surrogate Mother applications.
- The federal government and state governments will each establish a surrogacy board to regulate the practise. Section 14 of the law provides for the establishment of a National Surrogacy Board, while section 23 provides for the establishment of State Surrogacy Boards.³²
- The measure establishes the following offenses:³³
 - i. As a penalty for engaging in and promoting commercial surrogacy.
 - ii. The surrogate mother is often taken advantage of.
 - iii. Trafficking of human gametes or embryos.
 - iv. Neglecting or discarding the surrogate's offspring.

Section 36 of the Act specifies the aforementioned offences as being punishable by up to 10 years in prison and a fine of up to 10 million rupees.

Judicial Decisions Regarding Commercial Surrogacy

Baby Manji Yamada v. Union of India and Others

This case sparked widespread media coverage of commercial surrogacy in India. The details of the case are as follows:³⁴

Ikufumi and Yumi Yamada, a childless Japanese couple, travelled to India in 2007 to meet with fertility expert Dr. Nayna Patel about their options for surrogacy. Pritiben Patel, a married lady with children from Gujarat, signed a surrogacy contract facilitated by Dr. Nayna Patel. The embryo created by Ikufumi's sperm and an unidentified donor egg was placed into

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34 *BABY MANJHI YAMADA V. UNION OF INDIA AND ANOTHER*, (2008) 13 SCC 521.

the surrogate mother's uterus by the doctor. The Yamada couple divorced in June 2008, just one month before their first child was due to be born. Ikufumi's ex-wife didn't want to accept responsibility for raising the kid, so he went there alone to get the youngster.

The egg donor had no rights since she was anonymous; the gestational mother's duties ceased when the baby was born; and Yumi refused to assume legal responsibility for the kid because of the surrogacy agreement. Due to a terrorist incident in Ahmedabad, newborn Baby Yamada was evacuated to Arya Hospital in Rajasthan the next day, where she remained for a very long time due to her septicemia and viral illnesses. When baby Manji's condition stabilised, it was uncertain who would eventually take care of her.

The Japanese embassy in India declined to award Baby Manji a Japanese passport because the Japanese Civil Code does not recognise infants born via surrogacy. Furthermore, there are no provisions in the Guardian and Wards Act that allow a single parent to adopt a kid, therefore Ikufumi cannot adopt the infant. There is no way to get the infant an Indian passport since doing so needs knowing the mother's maiden name and the father's full legal name, and neither of those are known. Because the Fertility Clinic certified that Yamada was the baby's genetic father but the mother's identity was unknown, the Anand Municipality did not give the baby a birth certificate.

The Municipality of Anand has requested assistance from the federal government. Commercial surrogacy contracts have been ruled permissible by an Indian court.

Petitioners (the child's grandparents) stated that the Public Interest Litigation status of their Habeas Corpus petition before the Rajasthan High Court was improper since there was no public interest at stake.

Non-Governmental Organization (Satya) The reply contended that surrogacy in India is mostly operating as a money-making racket, with many cases of malpractice occurring in its name. Demanded that the government enact strict regulations to curb the behaviour.

The attorney general countered the NGO's claims by pointing out that the National and State Commissions are only in place to defend the rights of children thanks to the Commissions for Protection of Child Rights Act of 2005. Only the commission would have jurisdiction to investigate or take action under these circumstances. Since this is not a case of public interest litigation, and only a relative of the kid who has a grievance may file a writ, the petition of the NGO was denied on the grounds that the respondent had no *locus standi*. Since the matter

was still pending before the Federal and State Governments, the court also did not issue an order concerning passport issuing. Ultimately, the court ruled that commercial surrogacy is acceptable in India.

This case gained notoriety because it shed light on the problems associated with commercial surrogacy in India.

Jan Balaz v. Anand Municipality

This was another seminal case out of India, and it included the question of who legally has parental rights to a kid born via commercial surrogacy. The following is an outline of the particulars of the circumstance:³⁵

A German couple with the intention of starting a family travelled to India to sign a surrogacy agreement. The twins were conceived with the help of a surrogate mother and an unidentified donor who carried the intended father's sperm and eggs. Commissioning father and surrogate mother both listed as parents on birth certificate for twins. The commissioning parents initially sought to have the twins issued German passports, but were unsuccessful because German law does not recognize surrogacy as a means of establishing parenthood. They then sought, and were granted, Indian passports for the children on the basis that their surrogate mother was an Indian citizen, making the children also Indian citizens. The Supreme Court heard an appeal of the High Court's ruling. The question before the court was whether or not a kid born to a foreign couple in India through surrogate would be considered an Indian citizen.

In this case, the Supreme Court of India asked the Central Adoption resource agency (CARA), an autonomous body under the Ministry of Women & Child Development of Government of India, which is responsible for international adoptions and operates in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, which was ratified by the government of India in 2003, to make an exception on humanitarian ground considering the child's welfare.

35 *JAN BALAZ VS. ANAND MUNICIPALITY AND OTHERS*, AIR 2010 GUJ 21.

Baby M Case

One of the first decisions by an American court on the legality of surrogacy was made in the *Baby M* case. The following describes the circumstances:³⁶

The plaintiff and his wife were a US couple who tried unsuccessfully to have a family but were unable to. The plaintiff and his wife wanted to have a family, so they signed a surrogacy agreement with the defendant. According to the terms of the agreement, the defendant would serve as a surrogate for the couple, with the resulting kid having a genetic link to the plaintiff's wife. After the child was born, the defendant would relinquish her parental rights. The contract included just the commissioning father and the surrogate mother, but in the case of the father's death, the commissioning mother would have exclusive custody of the kid. The surrogate mother filed a lawsuit challenging the legality of the surrogacy agreement, arguing that the trial court made an error in granting exclusive parental rights to the commissioning father and approving the commissioning mother's adoption of the child.

At issue in this case was whether or not the Defendant's Parental Rights had been properly terminated. The contract was declared null and void by the court because it went against public policy. Contract was null and void and kid had to be turned over to a government agency under law. The adoption was deemed null and void because the termination of parental rights was deemed illegal by the court.

Conclusion

From its legalization in 2002 to its proposed ban with the Surrogacy (Regulation) Bill, 2019 and now the Surrogacy (Regulation) Bill, 2020, the path of commercial surrogacy in India has been a long and winding one. The question that has baffled everyone is whether the government's move to ban commercial surrogacy was right or whether it could prove to be counter-productive. Author not arguing that the Indian government's decision to outlaw commercial surrogacy was incorrect; rather, author emphasizing the possibility that the ban will lead to the proliferation of unlicensed clinics and middlemen who are willing to break the law in order to provide surrogacy services to would-be parents.

As a result of the lack of clarity in the Surrogacy (Regulation) Bill, 2020, many couples who were counting on the domestic surrogacy option are now seriously considering having a surrogate child in a nation where commercial surrogacy is permitted. Further, by outlawing

³⁶ *N RE BABY MI*, 109 N.J. 396, 537 A.2d 1227 (1988).

commercial surrogacy, lawmakers are disregarding the reality that some women would prefer work in a windowless profession for a higher salary than as a surrogate, robbing them of a source of income. What author advocating for is not a total ban on commercial surrogacy, but rather the enactment of rules to control the industry, something that was lacking from India's earlier surrogacy regulations. Rather than outright outlawing commercial surrogacy, more attention should be directed into regulating it, since the emergence of illicit procedures to conduct commercial surrogacy would be detrimental to everyone involved. Surrogacy is something that the government should control, as opposed to leaving it up to the private sector. Instead than relying on exploitative commercial companies, the government should set up facilities where surrogacy is legally practised, and all surrogates should be registered with a single government agency.

To further confirm that a surrogate is signing up with her own agency and not succumbing to family pressure, a screening test of her history should be performed. The government also has the responsibility of determining and regulating the surrogate's remuneration, which must be fair and proportionate to the work she does. Additionally, as is done in the adoption process, a thorough investigation of the intended parents history is necessary. Finally, author would want to suggest that a clear-cut piece of law is urgently needed to control the practise of surrogacy in India. Commercial surrogacy has the potential to improve the lives of millions of childless couples if utilized responsibly.