

AN ANALYSIS OF SURROGACY AND FAMILY LAW

Authors - HARIHARAN R*, Dr. K. SELVAKUMAR & PAZHAMALAI S*****

* Research Scholar(PT), PMIST (Deemed University), Thanjavur & Guest Lecturer, Government Law College, Tiruchirappalli

** Director, KKCPs, PMIST (Deemed University), Thanjavur

*** Tutor at RACE Institute, Chidambaram

Best Citation - HARIHARAN R, Dr. K. SELVAKUMAR & PAZHAMALAI S, CASE COMMENTARY ON BIJOE EMMANUEL V. STATE OF KERALA (1986) 3 SCC 615, *ILE JUDICIAL AND LEGAL REVIEW*, 1 (1) of 2023, Pg. 123-128, ISSN - 2583 - 8040

ABSTRACT

Surrogacy is a complicated process that involves numerous legal, moral, and societal issues, and laws governing it vary widely between various countries. The legal framework for surrogacy agreements and the rights and obligations of the parties involved, including intended parents, surrogate mothers, and the children born as a consequence, are heavily influenced by family law. This abstract gives a general overview of the major issues surrounding surrogacy and family law, such as the legal standing of surrogacy agreements, how paternity is determined, how custody and visitation are arranged, and how courts and administrative authorities play a role in conflict resolution. It also analyses the difficulties and prospects for further regulation of surrogacy while examining the effects of new technological developments and shifting societal norms. In the end, the complicated ethical and legal issues created by surrogacy highlight how crucial it is to develop family law policies that are well-educated and informed, as well as to maintain constant communication among parties.

Keywords: Surrogacy, family law, legal status, parentage determination, custody, access arrangements, courts, administrative bodies, emerging technologies, social attitudes, reform, policy development, stakeholders.

INTRODUCTION

"The parents construct the child biologically, while the child constructs the parents socially."

- Law Commission of India, Report No. 228, August 2009¹⁶⁵

According to the Indian National Guidelines for Regulation of IVF Clinics¹⁶⁶ ("National Guidelines"), surrogacy is generally considered to mean:

"an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, intending to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate".

¹⁶⁵ <https://lawcommissionofindia.nic.in/reports/report228.pdf>

¹⁶⁶ https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf

Before the prohibition on non-Indians having surrogates in India last year, India had a well-deserved reputation as the global centre for surrogacy. Given its population, consistent availability of skilled medical professionals, high-quality clinics and hospitals, and plenty of willing surrogates who participate in surrogacy for financial gain, India was (and still is) well positioned as a centre for surrogacy. There has been widespread criticism in India of several parts of surrogacy agreements due to frequent reporting on the exploitation of surrogate mothers. The fundamental distinction between commercial surrogacy and altruistic surrogacy, both forms of surrogacy agreements, is the amount of compensation. Altruistic surrogacy is free (subject to acceptable expenditures) and is viewed as a good gesture by the surrogate mother, in contrast to commercial surrogacy, which is for money and is typically frowned upon.

REVIEW OF LITERATURE

- ***Pande, Amrita. "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker."***

With the proliferation of reproductive technology brought on by globalization, India may be the first nation where commercial surrogacy has emerged as a new type of temporary employment for underprivileged women, but it is unlikely to stay the only one. It is difficult to say if other clinics worldwide will adopt the Anand approach. However, it will not be shocking if it is considered the Anand surrogacy program's success after only three years of operation.

- ***Scott, Elizabeth S. "SURROGACY AND THE POLITICS OF COMMODIFICATION."***

The political story of surrogacy that played out in the 1980s and early 1990s as landmark cases in American law stands in stark contrast to the legislative process in action.

- ***Munjal-Shankar, Diksha. "COMMERCIAL SURROGACY IN INDIA: VULNERABILITY CONTEXTUALIZED."***

In India, the commercial surrogacy industry is expanding quickly. The availability of women eager to serve as surrogate moms has been among the numerous factors contributing to its remarkable expansion. The impoverished, illiterate women have little protection since the legal situation is ambiguous. This essay seeks to examine the general idea of commercial surrogacy and make a case for why surrogate mothers and the children they bear may be seen as vulnerable individuals without a legal definition of what constitutes vulnerability. The debate is then taken a step further to examine whether the existence of weaker people in a community results in comparable responsibility on the part of others in the same pool.

- ***CHANG, M. (2009). Womb for Rent: India's Commercial Surrogacy.***

India uses its comparative advantages to welcome a range of international service industries. Nevertheless, India has also experienced a sharp rise in its international surrogacy market recently, in addition to luring typical occupations like IT services.

STATEMENT OF PROBLEM

The banning of commercial surrogacy is a counter-blast to the incidents of exploitation of women in commercial surrogacy arrangements while avoiding the somewhat tricky task of regulating such commercial arrangements. Also, surrogacy permission for homosexuals seems legally impossible.

HYPOTHESIS

Before the Surrogacy Bill became legislation passed by the Parliament, it was hoped that many problems would be discussed during the following months. The Surrogacy Bill, however, is commendable and shows legislative determination to control a market that urgently

requires a developed, well-considered, and well-thought-out regulation.

METHODOLOGY

This Project is done by the method of doctrinal research. All material in the following study is written after careful research and considering legislation and facts.

RESEARCH OBJECTIVES

- To analyze the concept of surrogacy in India.
- To analyze and look into laws regulating surrogacy in India.
- To bring out the issues around the concept of surrogacy.
- To state the intersection of surrogacy and family law.

SURROGACY LAW IN INDIA

There is no explicit legislation governing surrogacy in India. The National Guidelines, developed in 2005 by the National Academy of Medical Sciences and the Indian Council of Medical Research, do not take the place of legislation passed by the Parliament. The new Surrogacy (Regulation) Bill, 2016 ("Surrogacy Bill"), which has been the subject of lengthy internal deliberations and debate, was recently forwarded to the Indian Parliament for approval.

The Surrogacy Bill reopens several discussions by calling for outlawing "commercial surrogacy" and the legalization of only "altruistic surrogacy," in which the surrogate mother is selected from close relatives. Additionally, it aims to ban surrogacy arrangements for some groups, such as live-in partners, single parents, homosexuals, etc., and to only enable surrogacy for Indian couples who have not had children after five years of marriage and meet specific requirements.

Before the Surrogacy Bill becomes law, the following essential elements are likely to be discussed from the legal, social, and scientific perspectives:

- **Close Relative:** According to the Surrogacy Bill, a surrogate mother should only be a "near relative." This raises several issues in addition to being against the National Guidelines. A close relative has not yet been established. Perhaps a definition that includes more details like the branch of the family (husband or wife), degree of separation, generation, etc., is necessary. Lack of such requirements may result in religious and societal problems, such as the surrogate kid having both parents who are blood-related, as well as an increased chance of congenital disabilities. A barrier to choosing a surrogate mother might be the requirement that she be married and already have a biological kid (s). A similar assumption on the availability of organ donors is claimed to have failed; therefore, it is possible that the assumption regarding the availability of close relatives agreeing to act as "altruistic surrogate mothers" is also inaccurate.

- **Confidentiality:** Confidentiality is a crucial component of surrogacy agreements since it offers these partnerships security and the child's mental well-being. Confidentiality is incompatible with a surrogacy relationship with a close relative. Confidentiality breaches might not be rare when the surrogate mother is a close relative. When a surrogate kid reaches puberty or adulthood, their behaviour is unpredictable and may have severe social and emotional repercussions for both the subject person and the entire family. In addition, if the surrogate mother already had a child, as required by the Surrogacy Bill, then that youngster would typically be interested in her or his mother's pregnancy and would probably always be aware of their genuine relationship. A youngster cannot be forced to maintain confidentiality.

- **A blanket prohibition on commercial surrogacy:** Without sound reasoning from science, the law, and society, a prohibition would fuel the underground market. A ban's opposite consequence would be the inhumane treatment of surrogate mothers and abandoned infants. It is, therefore, necessary to

broaden the definition of surrogacy, maybe by allowing commercial surrogacy under circumstances that guarantee the surrogate mother's free consent and her care and protection.

- **Adoption versus Surrogacy:** Adoption of a genetically unrelated kid is permitted; however, the use of a surrogate child from anybody who is not a close relative is not. The possibility of surrogacy is essentially eliminated for couples without close family members. India also has a unique social structure, wherein marriages between members of different castes or religions frequently result in families terminating their connections. Long-term marriages may benefit a diversified society, but such couples may be unable to obtain assistance from a close family for a surrogacy arrangement.

- **Ban for Special Groups:** Commercial surrogacy appears to be prohibited for specific groups primarily because children require a safe and secure family setting. A child may not benefit from a "walk-in, walk-out" interaction between parents. On the other hand, the institution of marriage stipulates a process for divorce and separation where care and custody of the kid are prudently considered, if practicable.

However, under certain conditions that guarantee the safety and care of the child, surrogacy agreements may be reconsidered and permitted for legally recognized special groups (such as live-in relationships, single parents, and married couples who have a biological child but are unable to conceive another one).

On the other hand, same-sex partnerships are illegal in India and are thus considered a criminal offence. As a result, allowing such people to use surrogates is illegal until the law recognizes their inter-person connection.

The National Guidelines acknowledge the surrogate kid as a genuine child and briefly discuss the surrogate child's legal rights to parental support, inheritance, and other rights.

The surrogate child and parents should not be denied any advantages conferred under separate laws in this respect; therefore, the surrogacy bill would also need to thoroughly address issues related to inheritance, maintenance, successions, etc. Such questions of parental authority and other legal rights should be addressed to avoid future claims, worries, or worse – litigation, especially when the surrogate mother is a close relative. It may also be necessary to make the proper changes to specific laws.

COMMERCIAL SURROGACY AND VULNERABILITY

In India, the commercial surrogacy industry is expanding quickly. The availability of women eager to serve as surrogate moms has been among the numerous factors contributing to its remarkable expansion. The impoverished, illiterate women have little protection since the legal situation is ambiguous. This essay seeks to examine the general idea of commercial surrogacy and make a case for why surrogate mothers and the children they bear may be seen as vulnerable individuals without a legal definition of what constitutes vulnerability. The debate is then taken a step further to examine whether the existence of weaker people in a community results in comparable responsibility on the part of others in the same pool.

In India, commercial succession is a significant industry. One of the various options open to infertile couples to fulfil their desire to become parents is surrogacy. A woman accepts to carry a pregnancy that is genetically unrelated to her, and her husband intends to carry the pregnancy to term and give the child to the genetic parents for whom she is serving as a surrogate. The amount of money given to the surrogate mother in commercial vs altruistic surrogacy is different.

In contrast to altruistic surrogacy, which limits payment to the surrogate mother's medical costs, commercial surrogacy pays the woman more than just those costs. This exact sum of "something more than the medical fees" is what

attracts women to serve as surrogates for prospective commissioning couples.

The "business of commercial surrogacy"¹⁶⁷ is promoted and maintained for reasons other than simply the financial compensation a surrogate mother gets. The current Indian legislation does not mainly cover the matter. The National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India are set out by the Indian Council of Medical Research (ICMR Guidelines). These unenforceable regulations were created in 2005 due to the government's endeavour to close the gap between surrogacy agreements and their actual execution.

The recommendations served as a model for the Assisted Reproductive Technology (Regulation) Bill draughts of 2008, 2010, 2013, and 2014, the most recent. However, the aforementioned proposed legislations do not have the power of law because they are only bills. 5 To the best of one's abilities, one can go to the Indian Constitution and the Indian Contract Act, 1872, for advice on the enforceability of such agreements and contracts. However, they, too, avoid addressing the touchy subject of surrogacy since it involves competing interests. A situation like this offers a fertile foundation for all criminal activities to proliferate.

Infertility clinics are creating their norms and regulations because there are no laws controlling the industry! India is one of the most sought-after locations in the world for commercial surrogacy due to the availability of impoverished and uneducated women willing to participate as surrogate moms and better technological know-how at lower rates.

The current scenario, which is already highly hazy, has the potential to lead to more severe issues. There is a strong likelihood that the number of stateless persons worldwide will rise since no law covers the issue, including the

issues of citizenship of the children born via such arrangements. Therefore, it is appropriate to say that the surrogate mothers and the offspring of such relationships are at risk.¹⁶⁸

VULNERABILITY AND RESPONSIBILITY

The absence of a support structure that would attend to their needs and take responsibility for them frequently results in the vulnerable continuing to be vulnerable. However, the question is whether vulnerability justifies any moral responsibilities or statutory requirements meant to serve the interests of justice.

The persons who could be regarded as vulnerable are not explicitly defined by Indian law. However, it implicitly offers specific individuals protection. The Indian Constitution, the Legal Services Authorities Act, 1987, the Indian Contract Act, 1872, the Juvenile Justice (Care and Protection of Children) Act, 2000, the Protection of Women from Domestic Violence Act, 2005, the Mental Health Act, 1987, the Hindu Minority and Guardianship Act, 1956, and the Guardians and Wards Act, 1890 are just a few pieces of legislation that reflect the importance of this protection.

There is a recognition of those who may be vulnerable, however quietly and softly. However, because of these laws, people are "tagged" as vulnerable without giving much or any thought to the "layers" that keep piling up to make them such. The laws designed to safeguard children may end up damaging them since they may not be able to exercise their right to self-determination. Conflicting interests abound in the field of commercial surrogacy.

Although its goal is to financially and genetically secure two families, it ultimately jeopardizes the status of the two main participants in the arrangement—the surrogate and the kid hired and born via her. As a result, the courts and the legislature bear a higher obligation since "those whose interests are most in need of

¹⁶⁷ Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005)

¹⁶⁸ HCR, Convention Relating to the Status of Stateless Persons, 1954 art.1, available at <http://www.unhcr.org/3bbb25729.html>

preservation are those least able to come to the table.

The Constitution's preamble states that all of its residents are guaranteed "justice—social, economic, and political." Since the presidency has already taken a position, although one that is temporary and subject to change, it is time for the other two branches of government to do their part; in doing so, the scenario that puts lawmakers and judges must carefully examine surrogate mothers and the children born through them in danger.

A robust educational system would go a long way toward assisting surrogate moms in overcoming their innate incapacities to handle their circumstances and therefore cope with the pervasive and damaging layer of illiteracy. Each infertility clinic that offers surrogacy must have an NGO and a legal-aid team to assist the surrogates as and when necessary, even as the education system becomes more widely used and approved by the public. These outside actions might offer the ladies strong support. Additionally, India has to draught law that has been well thought out and debated concerning children born through surrogacy. When making decisions about this delicate topic, the courts must also consider the children's best interests.

The business and the country will face many obstacles on the way forward, but with the right policies in place, justice will eventually be achieved.

CONCLUSION

"Law does not define society, it reflects society"

– by Tom White.

Similarly, it might be claimed that the Surrogacy Bill, as it stands, more closely resembles social and political ideology than scientific and legal logic and reasoning.

It would seem that:

- The abuse of women in commercial surrogacy situations can be combated

by outlawing the practice while avoiding the challenging issue of regulating such business partnerships;

- A crucial feature of surrogacy partnerships that has been overlooked is confidentiality;
- The definition of "near relative" must take scientific avoidance of the likelihood of congenital abnormalities in the surrogate kid into account;
- Legalizing homosexuality is already a contentious topic. However, surrogacy permissions for homosexuals appear to be legally impossible until homosexuality is legalized in India.
- Live-in partners also seem to be on the short end of the stick because such living arrangements are still frowned upon in India, even though live-in couples have gained some legal recognition and rights. They may be granted permission to act as surrogates, weighing it against the necessity that a kid live in a stable family.

Before the Surrogacy Bill becomes legislation passed by the Parliament, it is hoped that many of these problems will be discussed during the following months. The Surrogacy Bill, however, is commendable and shows legislative determination to control a market that urgently requires a developed, well-considered, and well-thought-out regulation.

BIBLIOGRAPHY

- Munjal-Shankar, Diksha. "COMMERCIAL SURROGACY IN INDIA: VULNERABILITY CONTEXTUALIZED." *Journal of the Indian Law Institute*, vol. 58, no. 3, 2016, pp. 350–66. *JSTOR*, <http://www.jstor.org/stable/45163396>.
- <https://www.mondaq.com/india/family-law/529884/the-surrogacy-debate-in-india>
- <https://egazette.nic.in/WriteReadData/2021/232118.pdf>
- <https://www.thequint.com/news/india/explained-the-surrogacy-regulation-bill-why-it-took-years-to-be-enacted>