



INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

SURROGACY AND HUMAN RIGHTS IN INDIA

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ABSTRACT

The Latin word "surrogates" (meaning an alternate, a person designated to take up a role for another) is where the word "surrogate" first appeared. It is a procedure in which a woman, known as a surrogate mother, conceives a kid and gives birth to it on behalf of a person who is unable to have children.

It is clear that surrogacy in India has been practiced for more than a century. When Kanupriya alias Durga, the second in world and first in India in vitro fertilization (IVF) baby was born "in "Kolkata" in 1978, surrogacy in India achieved success. In 2002, commercial surrogacy became allowed in India. This choice was made to promote medical travel to India.

Finally, one can assert that the combination of science, society, services, and individuals has made surrogacy a reality¹. While some supporters of surrogacy argue that it results in "a win scenario for the surrogate mother and the infertile couple and claim that "The barren get a baby, the broken receive a bonus," others discuss different moral and ethical issues.

Research Methodology

The research methodology used for the present research article is traditional Doctrinal research method. As most of the information can be sought form the available literature by referring books, articles, journals, websites etc.

Research questions

1. What are surrogacy and its application in contemporary world?
2. How we get the codified the surrogacy law?
3. What are salient features of Surrogacy (Regulation) Act, 2021?
4. The issues behind the Surrogacy (Regulation) Act, 2021?

¹R.S. Sharma, Social, Ethical, Medical & Legal Aspects of Surrogacy: An Indian Scenario, IJMR, 2014 November 140 (Suppl 1): S13–S16.

5. What are salient features of The Surrogacy (Regulation) Rules, 2022?

Research Problem

What is the efficacy in the surrogacy law in India?

Objective

The research focus on checking the efficiency of the surrogacy laws growing with the time and what is the present situation of the law prevailing to operate the surrogacy in India. Further this paper aims at critically analyzing the reasons which culminated into India being one of the heavens for childless couples from abroad.

Key words: surrogate, surrogacy, IVF, Commercial surrogacy, Assistive reproductive technology.

INTRODUCTION

According to Robert Browning's famous line, "Motherhood: All attachment starts and finishes there," the right to procreate is a person's supreme freedom. No person wants to experience the excruciating pain of being not able to have children. The institution of the family is highly valued in the society in which we live. Suffering from infertility, 10% to 14% of Indian diaspora couples, with the rate being greater among urban couples, according to Indian Society of Fertility Treatment. Regarding assisted reproductive technologies, science has made great strides in the last few decades. Today, infertile couples can experience the gift of procreation in a number of ways, including IVF, intrauterine insemination, in-vitro maturation. The Surrogacy (Regulation) Draft, 2021, which is essentially the very same bill with certain amendments, was once more presented to Parliament. A new draught, the Surrogacy (Regulation) Bill, 2022, which incorporates the recommendations, was also approved by the Union Cabinet as a result of a legal challenge to the Act's gap space.

There are other ways to define surrogacy within that wide concept, but given the prevalent customs "in India, there exist two types in surrogacy that are medically accepted²:

- i. "Natural/traditional surrogacy": The first kind of surrogacy agreement is "surrogacy," in which the surrogate mother's eggs are utilized to conceive the baby. Due to the fact that the surrogate is genetically connected to the baby in this process, she is essentially seen as the biological mother. The method of conception is called to as "artificial insemination"³.

² Saxena P., Mishra A., Malik S., Surrogacy: Ethical and Legal Issues, Indian Community Med. (2012).

³ Babu Sarkar, Commercial Surrogacy: Is it Morally and Ethically Acceptable in India?, (2011) PL December S-11.

- ii. Gestational surrogacy: This practice involves conceiving a child by "in vitro fertilization" (IVF)⁴, ("in this process the wife is fertile but unable to carry a mature foetus so the embryo is created using "the eggs of the wife and sperm of her husband, then implanted in the surrogate mother's uterus").

In addition to this, there are several arrangements used to practice surrogacy⁵:

- i. Altruistic Surrogacy: Except the required medical costs in altruistic surrogacy no financial compensation is being given to the surrogate mother for her pregnancy or for giving up the child to the biological parents⁶. Altruistic surrogacy, sometimes known as "women assisting women," occurs when a surrogate offers to carry the couple's baby for no payment at all⁷.
- ii. Commercial surrogacy: This practice is referred to as "commercial surrogacy" when the surrogate mother receives compensation in addition to the necessary medical costs or when she receives payment for becoming pregnant or for giving up the child (along with medical and other reasonable expenses), typically in accordance with a pre-determined liquidated agreement⁸.

India was regarded as the global epicenter of "commercial surrogacy" and fertility travel. India used to be regarded as the world's most popular "surrogacy destination." From 2002 to 2016, commercial surrogacy was legal in India. Since commercial surrogacy is outlawed in most countries, a lot of people are travelling to India⁹.

Infertile couples, heterosexual couples, homosexual couples, handicapped and disabled people, and even elderly couples were the main consumers of surrogacy tourism. Indian medical tourism's profitable surrogacy industry had a lot of potential to bring in foreign exchange for the nation¹⁰.

To ensure the safe and moral provision of fertility services, the Indian Health Ministry has passed legislation that governs and oversees IVF and surrogacy clinics in India. The law restricts the treatment of Indians to charitable programs if the surrogate is also a blood relative of the intended parents and outlaws surrogacy for all international couples. Some established IVF clinics and agencies are extending out by offering innovative programs in other nations, such as legal surrogacy in the United States, the Ukraine, or Colombia, for people who choose to seek for possibilities outside of India. Embryos created at IVF clinics in India may occasionally be sent outside for use in approved surrogacy operations in nations that support surrogacy.

⁴ ibid

⁵ Steven J., Mt. Royal, New Jersey: International Federation of Fertility Societies Surveillance 2013: Preface and Conclusions, IFFS Surveillance Report (2014).

⁶ Babu Sarkar, Commercial Surrogacy: Is it Morally and Ethically Acceptable in India?, (2011) PL December S-11.

⁷ Reetu and Basabodutta, "Surrogate Birth", AIR 2009 Jour 108.

⁸ Casey Humbyrd, Fair Trade International Surrogacy, Developing World Bioethics 112 (2009)

⁹ Dr Binoy, T.A., An Evaluation of Surrogacy Tourism in India, International Journal of Current Research, (2018), Vol. 10, Issue 02, pp. 65160-65163.

¹⁰ ibid

Due to ongoing socio-economic injustices, disadvantaged women discovered an opportunity to "rent their wombs" and so make money to cover their bills. As a result, India has become a hub for infertility treatment, drawing people from all over the world.

LEGALITY OF SURROGACY IN INDIA

Since 2002, surrogacy has been legalized in India. All of that, however, changed in late 2015 when the government announced that it will pass new regulations outlawing surrogacy in India for both most Indian couples and all international couples¹¹.

The surrogacy industry has been booming in India. Commercial surrogacy was permitted until it was outlawed in 2018 after being authorized in 2002. According to reports, surrogates in India can expect to make anywhere between \$6,000 and \$16,000 USD every birth, depending on the clinic and the area¹².

Only couples in India who have legally wed for a span not less than five years and who have an infertility ailment that has been certified by a government-appointed medical body are permitted under the proposed legislation¹³. Additionally, married couples who must be between the ages of 23 and 55 (for females) or 26 and 55 (for males) will only be permitted to use surrogacy for "altruistic" purposes (for male). The surrogate must also be "a married lady who has her own child and her own age should be between 25-35 years," in addition to being a "related" of the intended parents.

The law outlines severe punishments for violators, including a 10-year prison sentence and fines up to 1 million rupees. In 2018, the Home Ministry sent a notification to all Indian Missions overseas and FRRO Offices cancelling surrogacy visas and other licences granted to foreigners. All those who received surrogacy visas, according to the circular, should be "advised of the position immediately."

Similar to this, FRRO offices in India are not permitted to grant exit visas in cases involving surrogacy. Any newborn wishing to leave the nation must obtain one of these exit visas. Even if a facility carried out a surrogacy process, the child would not be allowed to leave India lawfully under the new rule.

SURROGACY'S ETHICAL AND MORAL RAMIFICATIONS

Despite the fact that surrogacy appears to benefit all parties several sensitive problems must be handled through carefully crafted regulations to safeguard the surrogate's and intended parents' legal rights. Some contend that commercial surrogacy involves the immoral act of purchasing and selling a woman's womb. Indian women in poverty would be used as childbearing labour and taken advantage of by wealthy and powerful infertile couples.

¹¹Surrogacy Laws Archives; <https://www.scconline.com/blog/post/tag/surrogacy-laws/>; SCC Blog; date accessed 2 December 2022; date of publication 27 September 2022

¹²Opinion; <https://indianexpress.com/section/opinion/>; The Indian Express; date accessed December 3, 2022; date published October 27, 2022

¹³ Supra 11

Because surrogate parenting forcefully "breaks" the emotional tie that exists between the child and the biological mother, it is both unnatural and immoral¹⁴. We frequently ignore the biological child while ignoring the potential anguish associated with the mother handing her child away to the adopters¹⁵. There are various societal and religious-based restrictions associated with this, including ethical considerations around the child's right to know the mother (surrogate), how the surrogate mother's emotional state affects the surrogate child's behavior, social isolation, and social out casting.

India is now a destination for reproductive tourism as a result of the development and expansion of IVF clinics nationwide¹⁶. Supporters of contemporary commercial surrogacy can take into account this enterprise that might be expertly marketed in the capitalist economy. But the truth is a little different. The globe has experienced intense debate over the past 50 years on the moral, legal, and ethical implications of commercial surrogacy.

SURROGACY (REGULATION) ACT, 2021

A couple, defined as a lawfully married woman and man, or a lady who is divorced or widowed and is between the ages of 35 and 45 may choose to use a surrogate if they have a medical condition that calls for it. Additionally, commercial surrogacy is prohibited and is subject to a fine of up to Rs. 10 lakhs and a 10-year prison sentence¹⁷. Only altruistic surrogacy, in which no money is exchanged and the surrogate mother is genetically related to those seeking a child, is permitted by law. It talks about granting, suspending or cancelling registration of surrogacy clinics. Appropriate authority: One or more appropriate authorities must be chosen by the federal and state governments¹⁸. The National and State Surrogacy Boards are among the duties of the appropriate government. "The National Surrogacy Board (NSB) and State Surrogacy Boards (SSB) are constituted by the federal and state governments, respectively".

Further tells about Parenthood and surrogate child abortion: An abortion of the surrogate child requires both the competent authority's approval and the surrogate mother's written agreement. For this license to be effective, the "Medical Termination of Pregnancy Act of 1971" must be followed. She can have the option to cancel the surrogacy before the fetus is implanted in her womb. The Act is also setting guidelines for surrogacy clinics.

¹⁴Ragini Kulkarni, Ethical Dilemmas in Surrogacy, Hektoen International (2017). <<https://hekint.org/2017/01/30/ethical-dilemmas-in-surrogacy/>>

¹⁵Bhimji, S., Womb for Rent: Ethical Aspects of Surrogate Motherhood, CMAJ, Vol. 137 (1987).

¹⁶Siddhart Behera, A Critical Analysis of the Surrogacy (Regulation) Bill, 2020, LexForti, (4-12-2020), <<https://lexforti.com/legal-news/surrogacy-regulation-bill-2020/>>

¹⁷Opinion; <https://indianexpress.com/section/opinion/> ; The Indian Express; date accessed December 3, 2022; date published October 27, 2022

¹⁸Centre opposes plea challenging provisions of surrogacy law; <https://www.thehindu.com/news/cities/Delhi/centre-opposes-plea-challenging-provisions-of-surrogacylaw/article66107705.ece#:~:text=The%20Centre's%20affidavit%20came%20on,from%20the%20benefit%20of%20surrogacy> ; Return to frontpage; date accessed December 3, 2022; date published November 7, 2022

THE ISSUES BEHIND THE SURROGACY (REGULATION) ACT, 2021¹⁹

1. Exclusion: The eligibility requirements for legally utilizing surrogacy exclude a significant portion of society, including single parents, LGBTQ+ individuals, live-in couples, and unmarried women.
2. Paternalistic: According to the altruistic model, a woman will go through the psychological and physical strain of becoming a surrogate for no pay and purely out of compassion.
3. Female Autonomy: By outlawing commercial surrogacy, the rights-based approach is replaced with a needs-based one, taking away women's freedom to choose their own reproductive paths and parental rights.
4. Challenges of Altruistic Surrogacy: Using a family member as a surrogate mother could cause emotional issues. Altruistic surrogacy also severely restricts the prospective parents' choices of surrogate mothers by offering them just a small number of relatives.
5. Kids with Disabilities: According to the Act, being childless equates to having special needs children. If the child has a significant disease, it also suggests considering surrogacy. This clause blatantly violates the rights of children with disabilities, denying them treatment that is worthy of their dignity.

Before the Delhi High Court, a petition was filed challenging the ban on surrogacy for unmarried men and women who are pregnant as well as calling for the decriminalization of commercial surrogacy. The Surrogacy (Regulation) Act of 2021 and the Assisted Reproductive Technology (Regulation) Act of 2021 both prohibit the petitioners from using surrogacy, and they have challenged this exclusion.

The petitioner stated that the right to reproductive autonomy, or the ability to make an individual decision about the use of a surrogate to have a child, is a component of “The right to privacy protected by Article 21²⁰ of the Constitution”. Therefore, it is impossible to violate anyone's right to privacy and prevent unjustified governmental interference in factors that are crucial to a decision to carry a child through surrogacy²¹.

The Surrogacy (Regulation) Rules, 2022 were developed by the Ministry of Health and Family Welfare on June 21, 2022, while Mansukh Mandaviya served as the minister. They clarify on the requirements for the number of employees and the credentials they must have. Additionally, it specifies the format and manner in which registration will occur as well as the process for paying the surrogacy clinic's fees.

¹⁹Surrogacy; <https://www.drishtiias.com/daily-updates/daily-news-analysis/surrogacy-4> ; Drishti IAS; date accessed December 1, 2022; date published 28 may, 2022

²⁰Article 21 in The Constitution Of India 1949

Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

²¹KARAN BALRAJ MEHTA & ANR. v. UNION OF INDIA CASE NO. 8448/2022

THE SURROGACY (REGULATION) RULES, 2022²²

The Central Government announced the eligibility requirements and required personnel at a recognized surrogacy clinic through the publication of a notification. Additionally, specific information about the minimal equipment needed in such clinics is provided. According to the announcement, these clinics must each have a gynaecologist, anesthesiologist, embryologist, and counsellor as well as the option to hire more staff from ART Level 2 clinics. Gynaecologists at surrogacy clinics must have medical post-graduate degrees in gynaecology²³ and obstetrics, 50 ovum pickup procedures under their belts, and at least three years of experience working in an ART facility under the guidance of a certified ART specialist.

Assistive reproductive technology (ART) is defined as any methods that include manipulating the sperm or oocyte outside the body and putting the gamete or embryo within the reproductive system in an effort to conceive a²⁴ woman," with its grammatical variations and cognate expressions. Therefore, having knowledge of this technique is crucial for a gynaecologist. Form 1 in the notification details the request for a board certificate of recommendation. The requirement for insurance coverage, the intended couple / woman to purchase a 36-month surrogate mother's health insurance months²⁵, has been implemented to protect the surrogate mother's rights."

The lady or couple must submit an affidavit in front of a Metropolitan Magistrate or a Judicial Magistrate of the First²⁶ Class in order to provide a guarantee as required by Section 2 of the Surrogacy (Regulation) Act, 2021²⁷. The surrogacy technique may not be attempted more than three times in total. The surrogate mother must freely consent in accordance with the guidelines specified in the form. The gynaecologist will only implant 1 embryo, with the exception of 3 embryos in exceptional²⁸ circumstances. The "Medical Termination of Pregnancy Act, 1971" must be followed if a surrogate mother decides she wishes to abort the child.

CONCLUSION

By 2012, India has established itself as the "capital of surrogacy," with an estimated \$500 million in yearly surrogacy tourism sales. To stop unethical behavior, to curb the exploitation of women absence of legal regulations and lack of implementation we required stable and strong surrogacy legislation. The legislation lays out who is qualified for assisted reproductive treatments and techniques including in vitro fertilizations and

²²Surrogacy (Regulation) Rules, 2022; <https://www.scconline.com/blog/post/2022/06/23/surrogacy-regulation-rules-2022/> ; SCC; December 1, 2022; date published 23 June, 2022

²³Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations;https://www.researchgate.net/profile/NicoleBromfield/publication/271911619_Global_Surrogacy_Exploitation_Human_Rights_and_International_Private_Law_A_Pragmatic_Stance_and_Policy_Recommendations/links/58da9ecda6fdccca1c5ed385/Global-Surrogacy-Exploitation-Human-Rights-and-International-Private-Law-A-Pragmatic-Stance-and-Policy-Recommendations.pdf?origin=publication_detail ; date accessed 2 December 2022, date published 14 September 2022

²⁴Analytical Study on Surrogacy Regulation Rules, 2022 <https://www.lawrbit.com/article/analytical-study-on-surrogacy-regulation-rules-2022/Lawrbit>, date accessed 2 December 2022, date published 28 November 2022

²⁵ ibid

²⁶ ibid

²⁷ Supra 20

²⁸ ibid

surrogacy, and the legal foundation for gamete exchange and surrogacy, with the goal of regulating the billion dollar reproductive medicine business. It also describes the prerequisites for clinic operations.”

One aspect of the right to privacy protected by Article 21²⁹ is a person's individual decision to have a child through surrogacy, or the right of reproductive autonomy. The ban on commercial surrogacy, which was ostensibly put in place to help underprivileged women, really strips these women of their control over their bodies and removes their right to exercise agency over their sacred right to bear children³⁰.

Only wedded infertile couples and specific groups of women are permitted to use ARTs and surrogacy under the Acts. Other than insurance and medical costs the sale of gametes or any kind of reimbursement to a surrogate mother has been outlawed. Banks and clinics that perform ART procedures must be registered. The Act is undoubtedly a good thing because India is among the major hubs for these operations; however there are a few areas where the laws regarding surrogacy are incongruous. Article 21³¹ states that "Right to Life" is a fundamental principle and it includes the right to procreate. Women's reproductive rights encompass both the right to parent and the right to carry a pregnancy to term. So it is evident that restricting surrogacy while depriving reproductive alternatives is against Articles 21³² and 14³³



²⁹ Supra 17

³⁰ Supra 15

³¹ Supra 17

³² Supra 17

³³ **Article 14 in The Constitution Of India 1949** Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth