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The Legal and Ethical Implication of Surrogacy (Regulation) Act 2021 on India's Family Law and Social Norms

DIKSHA SINGH¹

ABSTRACT

Women plays diverse roles during her lifetime, Motherhood being one of them. Motherhood makes a girl complete but not all women can embrace motherhood naturally. Health problems such as infertility is faced by people around the world. The development of In Vitro fertilization has revolutionized the landscape of fertility solutions, giving individual a chance of having biological children. The concept of surrogacy has been mentioned in ancient texts like Bible and Hindu Puranas.

Motherhood is considered a natural and joyous gift, bestowed upon women by nature. From the point of conception to the milestones of childhood, motherhood encompasses a journey of growth, sacrifice, and unconditional love. Since the time of immemorial, couples have faced the issue of infertility. Infertility can occur due to male factor, female factor or combination of both. There are two major types of infertility – Primary Infertility meaning inability to have a baby whereas Secondary means inability to get pregnant after a successful conception. The rising problem of infertility affects 10- 15% of the population of India according to report. Due to low cost, less legislation control and availability of surrogates, India became a center for international surrogacy. The exploitation of poor surrogates and moral arguments against renting of womb could be seen as a boom in surrogacy. The Indian Legislature through enactment of Surrogacy Regulation Act, 2021 try to overcome such issue. This paper critically analysis the provision of the act and its legal and ethical implications. The objective of the study is to shed light on the provisions of the surrogacy regulation act 2021 and its impact. This study also explores the legal and moral issues related with surrogacy.

This study utilizes a multidisciplinary approach, integrating sociological perspectives, legal examination to elucidate the intricate dynamics inherent in surrogacy regulations in India. This study assesses the effectiveness of Indian legislature and judicial rulings in analyzing the impact of surrogacy regulation in India. Moreover, the dissertation explores the historical background of the surrogacy regulation in India and its various amendments. The study highlights the shortcomings in the present legislation and suggestions for better legal framework for the surrogacy market. The main aim of this dissertation is to enhance

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the academic discussion on the surrogacy regulation act 2021, its historical background, key highlights of the Act, shortcoming in the present regulation and legal and moral issues related to surrogacy. The findings of this study provide valuable insights for legal professionals, scholars and policymakers who are committed to examine the ethical and moral ramification related to surrogacy.

Keywords: Surrogacy, Surrogate maternity, Ethical Issues, infertility, Assisted Reproductive Technologies, Surrogacy regulation.

I. INTRODUCTION

Motherhood is considered a natural and joyous gift, bestowed upon women by nature. From the point of conception to the milestones of childhood, motherhood encompasses a journey of growth, sacrifice, and unconditional love. Women plays diverse roles during her lifetime, Motherhood being one of them. Motherhood makes a girl complete but not all women can embrace motherhood naturally. Health problems such as infertility is faced by people around the world. The development of In Vitro fertilization has revolutionized the landscape of fertility solutions, giving individual a chance of having biological children. The concept of surrogacy has been mentioned in ancient texts like Bible and Hindu Puranas. Since the time of immemorial, couples have faced the issue of infertility. Infertility can occur due to male factor, female factor or combination of both. There are two major types of infertility – Primary Infertility meaning inability to have a baby whereas Secondary means inability to get pregnant after a successful conception. The rising problem of infertility affects 10- 15% of the population of India according to report.

The Indian society places a strong cultural emphasis on marriage, family and parenthood². A couple who is unable to bear a baby suffers from aspects like social expectations, family dynamic, gender roles and emotional impacts. Childlessness may be viewed as deviating from societal norms³. Women who is unable to conceive a baby goes through stigma as motherhood is often seen as a central aspect of femininity. In India a lot of importance is given to have a pure blood lineage thus surrogacy is preferred over adoption by the couples. Surrogacy is an arrangement wherein a surrogate undertakes pregnancy for another couple who are unable to produce their own child. The entire process of surrogacy is dependent on various factors like a couple wanting a child, a surrogate who is physically fit to reproduce, medical facilities, and person donating eggs and embryos. It is essential to regulate interplay between these factors

² Article 16 (1) of The Universal Declaration of Human Rights

³ Imrana Qadeer, “Social and Ethical Basis of Legislation on Surrogacy: Need for Debate”

and give it legal sanctity to void issues like exploitation of the surrogates.

Surrogacy means an arrangement whereby a surrogate conceives baby for the intended couple who are unable to have children. Surrogacy can be seen as an effective method to treat infertility. The surrogate only rents her womb as neither of the gametes belong to her, and the child is handed over to the intended couple after the birth. The Surrogacy Regulation Act 2021 is the first legislation relating to surrogacy in India. The Surrogacy Act 2021 was approved by president on December 25, 2021. As per the provision of the Act only altruistic surrogacy is allowed. The act strictly bans commercial surrogacy. Surrogacy is often seen as reproductive right available to all but the act provides for certain exclusions. Single, Foreigners, homosexual couple, couple in live in relationship, and unmarried couple are all prohibited from opting surrogacy under the provisions of the Act. The progressive law, which attempts to regulate surrogacy leaves room for various ambiguity.

(A) Definition of surrogacy

Surrogacy can be understood as a procedure of assisted reproduction. The word “surrogate” originates from the Latin word “Surrogatus” which means “Substitution” or “to act in the place of”⁴. Surrogacy is an arrangement wherein women undertake pregnancy for another couple who are unable to produce their own child due to any biological reasons⁵. ‘Surrogate’ is the women who gives birth to the child whereas ‘intended couple’ is couple for whom the child is being conceived by the surrogate. The development of In Vitro fertilization has revolutionized the landscape of fertility solutions, giving individual a chance of having biological children. The concept of surrogacy has been mentioned in ancient texts like Bible and Hindu Puranas. Due to low cost, less legislation control and availability of surrogates, India became a centre for international surrogacy. The exploitation of poor surrogates and moral arguments against renting of womb could be seen as a boom in surrogacy.

Surrogacy can be seen as an effective method to treat infertility. The surrogate only rents her womb as neither of the gametes belong to her, and the child is handed over to the intended couple after the birth. Surrogacy was legalised in India back in 2002 by the Government of India. Since then Indian surrogacy market has grown exponentially. The major reasons for transforming India into a surrogacy hub are low cost, easy availability of surrogates and less legislative control. Around three thousand surrogacy clinics along with a large number of surrogates were established. This multi-billion-dollar business of surrogacy also led to many

⁴ Social, ethical, medical & legal aspects of surrogacy: An Indian scenario by RS Sharma https://www.researchgate.net/publication/272189347_Social_ethical_medical_legal_aspects_of_surrogacy_An_Indian_scenario

⁵ Surrogate, <https://thelawdictionary.org/surrogate/>

challenges. However, by the late 2015 there were various amendments made to the regulations outlawing surrogacy in India for Indian couples.

Surrogacy was legalised in India back in 2002 by the Government of India. Since then Indian surrogacy market has grown exponentially. The major reasons for transforming India into a surrogacy hub are low cost, easy availability of surrogates and less legislative control. Around three thousand surrogacy clinics along with a large number of surrogates were established. This multi-billion-dollar business of surrogacy also led to many challenges.

(B) Rationale

The study of surrogacy in the Indian Context is of paramount significance because of its implications on individuals, families and society at large. Motherhood is considered a natural and joyous gift, bestowed upon women by nature. From the point of conception to the milestones of childhood, motherhood encompasses a journey of growth, sacrifice, and unconditional love. Being a parent at some point of time is a dream of every individual. However, since the time of immemorial, couples have faced the issue of infertility. Infertility can occur due to male factor, female factor or combination of both. There are two major types of infertility – Primary Infertility meaning inability to have a baby whereas Secondary means inability to get pregnant after a successful conception. The rising problem of infertility affects 10- 15% of the population of India according to report.

Understanding, the historical background and impacts of surrogacy in India is crucial for several reasons. Firstly, it provides insights into the situation of surrogates then and now. The surrogates in India are forced to undertake surrogacy due to financial needs or family pressure. The act bans commercial surrogacy which could have possibly been source of livelihood for the surrogate mother. Though, the act covers insurance amount that includes the medical needs of the surrogate.

Secondly, it leads us to the question whether ban of commercial surrogacy will curb the issues related to surrogacy. Commercial Surrogacy is usually done for economic benefit. In such a surrogacy, the surrogate mother is remunerated or paid by the intended couple to carry out a pregnancy. The Act puts an complete ban on commercial surrogacy. Prohibiting commercial surrogacy can lead to illegal arrangement between surrogate and intended couple if they are willing. It can further lead to the surrogacy sector being undergrounded allowing it to survive illegally. As per the Act, surrogate women should be a close relative of the intending couple which often lead to mild persuasion of her becoming a surrogate. Thus, banning commercial surrogacy is no solution.

Thirdly, a comprehensive study of surrogacy regulation act is essential to dispel myths and misconceptions relating to it. People often compare surrogacy to prostitution. The study seeks to challenge these views by throwing light on the positive aspect of surrogacy.

Moreover, surrogacy is a social, legal, and ethical debatable topic around the world. Surrogacy is legalised in various part of the world but still a taboo in others. The study helps us get idea about different types of surrogacy laws prevalent around the world.

In the subsequent chapters, we will delve deeper into the surrogacy regulation act prevalent in the country, its key features, challenges and propose recommendations for better legal framework for surrogacy regulation in India.

(C) Objectives

1. Initiate an investigation regarding the history and background of surrogacy in India. The development of surrogacy regulation in India.
2. Acknowledging the efficiency of the surrogacy laws growing with the time and checking the present situation of the law prevailing to operate the surrogacy in India.
3. Analysing the reasons for India turning into a hub for surrogacy.
4. Discussing the ethical and legal impact of surrogacy regulation act in India.
5. To provide recommendations for potential alterations and enhancements that could be executed within the existing legal structure.

(D) Research Question

1. Meaning of surrogacy and its application in contemporary world?
2. Historical background of surrogacy legislation in India?
3. Salient features of Surrogacy (Regulation) Act, 2021?
4. Pros and Cons of Surrogacy Regulation Act 2021?
5. Efficacy of Surrogacy law in India?
6. Surrogacy Regulation Act 2021 and its impact on social norms in India?

(E) Research Methodology

The present research article is based on Traditional Doctrinal Research Method. Most of the information used in the article is sought by referring books, articles, journal and website. A systematic review of literature was done to collect data on the new law, its provision and its expected impact on the surrogacy arrangements and society at large. Literature review are

available on electronic databases such as Scopus, PubMed, other relevant website.

The present research is based on secondary sources of information. This includes information available on websites, books, articles. The data collected from various sources are then examined using quantitative and qualitative methods. The article can provide valuable insight into the impact of surrogacy regulation act 2021, and its impact on legal and social norms in India.

(F) Literature Review

1. In the book entitled *Making Babies: The Science and Ethics of Conception*⁶ two Australian Authors, Peter Singer and Deane Wells, have provided an overview of attitudes towards surrogacy in the United States, Great Britain, and Australia. They reviewed the legal framework in the different countries.
2. Martha A. *Field in Surrogate Motherhood; The Legal and Human Issues*⁷ has mentioned about the legality and enforceability of surrogacy contracts in her book.
3. Dr. Nandita Adhikari's *law and Medicine*⁸ discusses on surrogate motherhood, its evolution and legality of the contracts. She has further reviewed issues relating to surrogacy arrangements.
4. Nikita Kaushik's *Law and Surrogacy*⁹ reviews the surrogacy regulation act 2019. She has also mentioned about surrogate mother roles and responsibility.
5. *Wombs in labour: transnational commercial surrogacy in India*. Amrita Pande.

The Author, Amrita Pande interviewed around “fifty-two surrogates, their husbands and in-laws, twelve intending parents, three doctors, three surrogacy brokers, three hostel matrons, and several nurses” and based on observation, the study is an intimate analysis of the life sustained by Surrogacy. In addition, she reviews on recently proposed legislation in India on surrogacy.

6. *Social ethics, medical and legal aspects of surrogacy: An Indian scenario*, R.S. Sharma

The author has reviewed the draft assisted reproductive technology (regulation) bill which proposes to establish a national board, state boards and national registry of assisted reproductive technology (ART) in India for accreditation and supervision of ART clinics and ART banks, ensuring that survives provided by these are ethical and that the medical, social

⁶ Scribners New York (1985)

⁷ Harvard University Press , London (1990)

⁸ Central Law Publication, Allahabad (2012)

⁹ Indian Journal of Health and Medical law (July 2019)

and legal rights of all those concerned including surrogate mother are protected with maximum benefit to all the stakeholders within a recognized framework of ethics and good medical practices.

7. Surrogacy and women's rights to health in India: issues and perspective deep Inder and Nandini Sharmear (2013) Volume: 57 Issue: 2 pages; 65- 70

The Author has emphasized on the need for codification of Surrogacy Regulations in the Country.

II. SURROGACY: MEANING, CONCEPT AND HISTORICAL BACKGROUND

(A) Surrogacy and its meaning –

Surrogacy can be understood as a procedure of assisted reproduction. The word “surrogate” originates from the Latin word “Surrogatus” which means “Substitution” or “to act in the place of”¹⁰. Surrogacy is an arrangement wherein women undertake pregnancy for another couple who are unable to produce their own child due to any biological reasons. ‘Surrogate’ is the women who gives birth to the child whereas ‘intended couple’ is couple for whom the child is being conceived by the surrogate¹¹. The development of In Vitro fertilization has revolutionized the landscape of fertility solutions, giving individual a chance of having biological children. The concept of surrogacy has been mentioned in ancient texts like Bible and Hindu Puranas. Due to low cost, less legislation control and availability of surrogates, India became a centre for international surrogacy. The exploitation of poor surrogates and moral arguments against renting of womb could be seen as a boom in surrogacy.

Surrogacy can be seen as an effective method to treat infertility. The surrogate only rents her womb as neither of the gametes belong to her, and the child is handed over to the intended couple after the birth. Surrogacy was legalised in India back in 2002 by the Government of India. Since then Indian surrogacy market has grown exponentially. The major reasons for transforming India into a surrogacy hub are low cost, easy availability of surrogates and less legislative control. Around three thousand surrogacy clinics along with a large number of surrogates were established. This multi-billion-dollar business of surrogacy also led to many challenges. However, by the late 2015 there were various amendments made to the regulations outlawing surrogacy in India for Indian couples.

¹⁰ Social, ethical, medical & legal aspects of surrogacy: An Indian scenario by RS Sharma https://www.researchgate.net/publication/272189347_Social_ethical_medical_legal_aspects_of_surrogacy_An_Indian_scenario

¹¹ Supra 3

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(B) Type of surrogacy

Surrogacy can be understood as a procedure of assisted reproduction. The word “surrogate” originates from the Latin word “Surrogatus” which means “Substitution” or “to act in the place of”¹². Surrogacy is an arrangement wherein women undertake pregnancy for another couple who are unable to produce their own child due to any biological reasons. ‘Surrogate’ is the women who gives birth to the child whereas ‘intended couple’ is couple for whom the child is being conceived by the surrogate¹³. The development of In Vitro fertilization has revolutionized the landscape of fertility solutions, giving individual a chance of having biological children. The concept of surrogacy has been mentioned in ancient texts like Bible and Hindu Puranas. Due to low cost, less legislation control and availability of surrogates, India became a centre for international surrogacy. The exploitation of poor surrogates and moral arguments against renting of womb could be seen as a boom in surrogacy. Surrogacy can be seen as an effective method to treat infertility. The surrogate only rents her womb as neither of the gametes belong to her, and the child is handed over to the intended couple after the birth. Surrogacy was legalised in India back in 2002 by the Government of India. Since then Indian surrogacy market has grown exponentially. The major reasons for transforming India into a surrogacy hub are low cost, easy availability of surrogates and less legislative control. Around three thousand surrogacy clinics along with a large number of surrogates were established. This

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¹³ Supra 3

multi-billion-dollar business of surrogacy also led to many challenges.

(C) On the basis of motive, surrogacy can be further divided into two types –

a. Commercial Surrogacy ¹⁴

Commercial Surrogacy is usually done for economic benefit. In such a surrogacy, the surrogate mother is remunerated or paid by the intended couple to carry out a pregnancy.

b. Altruistic Surrogacy ¹⁵

Whereas in Altruistic surrogacy no economic benefits are included. The surrogate mother gets no monetary benefits for carrying out pregnancy. In Altruistic Surrogacy, the surrogate mother's contribution is seen as a noble deed for the greater good.

(D) Surrogacy can be classified into two categories –

Surrogacy can be classified into two categories ¹⁶–

a. Traditional Surrogacy

- In traditional surrogacy, surrogate mother is often artificially inseminated with intended male sperms through medical procedures. The surrogate mother then carries out the pregnancy and delivers the baby to the intended parents on the date of birth. Under such an surrogacy arrangement, the surrogate mother is considered and seen as biological mother of the new born as it was her egg that was fertilised during the process of pregnancy and she carried the child in her womb during the pregnancy.
- In this method, surrogate has a biological link to the baby as the eggs were provided by her.
- Traditional Surrogacy is cheaper than Gestational Surrogacy.
- In traditional surrogacy, the surrogate undergoes Intrauterine Insemination, where the sperms are placed in surrogate uterus.
- Involves more risk of legal implications in the near future as the baby is genetically and biologically related to the surrogate and the surrogate is seen as biological mother of the new born as it was her egg that was fertilised during the process of pregnancy and she carried the child in her womb during the pregnancy. Thus it is advisable to have surrogacy agreement between the

¹⁴ <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-commercial-surrogacy/>

¹⁵ Id.

¹⁶ <https://www.indiaivf.in/blog/traditional-surrogacy-vs-gestational-surrogacy-know-the-difference/>

surrogate and intended parents that is legally binding on both the parties to contract.

b. Gestational Surrogacy

- In gestational surrogacy the intended parent sperms and eggs are surgically blended and then deposited in surrogate who has no genetic ties to the child.

In this technique involves the eggs from the mother are first collected and fertilizing it with the sperm of the intended male to develop an embryo. The embryo is later placed into the uterus of the surrogate.

- In this method, the surrogate has no biological and genetical link to the baby as the egg are sourced from the intended mother and sperms is of the intended father as well. In gestational surrogacy the intended parent sperms and eggs are surgically blended and then deposited in surrogate who has no genetic ties to the child. In this technique involves the eggs from the mother are first collected and fertilizing it with the sperm of the intended male to develop an embryo. The embryo is later placed into the uterus of the surrogate
- It involves more cost than traditional surrogacy.
- In Gestational surrogacy In Vitro Fertilisation is used where the sperm and egg of the intended parents is fertilised through medical procedures and the embryo is then put inside the womb of the surrogate
- Safer and risk free as baby is genetically related to the parents

(E) History and evolution of the surrogacy act –

Surrogacy can be understood as a procedure of assisted reproduction. The word “surrogate” originates from the Latin word “Surrogatus” which means “Substitution” or “to act in the place of”. Surrogacy is an arrangement wherein women undertake pregnancy for another couple who are unable to produce their own child due to any biological reasons. Surrogacy was legalised in India back in 2002 ¹⁷by the Government of India. Since then Indian surrogacy market has grown exponentially. The major reasons for transforming India into a surrogacy hub are low cost, easy availability of surrogates and less legislative control. Around three thousand surrogacy clinics along with a large number of surrogates were established. This multi-billion-dollar business of surrogacy also led to many challenges. In India, all sorts of artificial reproductive technology, including surrogacy was permitted for everyone including

¹⁷ <https://blog.ipleaders.in/commercial-surrogacy-law-india/>

foreigners couples till 2015. Before the enactment of the Surrogacy Regulation Act 2021, the Indian Surrogacy industry was majorly unregulated. Although certain guidelines were issued, but there was no legal framework to regulate the operations of the surrogacy industry. There was ambiguity in defining the legal rights and responsibilities of the surrogates and intending parents. In 2015, the Government of India passed a bill to regulate the surrogacy industry and ban commercial surrogacy. However, the bill didn't become a law, and the surrogacy industry operated same as before. Later Surrogacy(Regulation) bill 2016 and Surrogacy (Regulation) bill 2019 was introduced. Finally on April 1, 2021 the Surrogacy (Regulation) Act 2021 came into effect. However the view of government was changed after two famous case studies.

1. Baby Manji Yamada v. Union Of India¹⁸

The apex court for the first time gave decision related to surrogacy in this case. This case has a huge significance in developing of the Surrogacy Regulations in India.

Facts of the case –

A couple Dr Yuki Yamada and Dr Ikuyumi Yamada flew from Japan to India in looking out for surrogates in November 2007. They were availing medical services from a fertility clinic in Anand, Gujrat.

The surrogacy contract between the surrogate mother and intended parents was prepared by the clinic itself. The embryo was created from the sperms of the genetic father Ikuyumi Yamada and egg donor was a unknown women. Gestational surrogacy was opted as the method of surrogacy. As a resulted of which the embryo was implanted inside womb of the surrogate mother.

In June 2008, the intended couple got divorced. There were contentions that the intended mother didn't want to raise the child born out of surrogacy arrangement as she thought she wasn't biologically related to the baby. Dr Ikuyumi Yamada, the intended father was willing to have the custody of the child was ordered to return back due to expiration of his visa. Finally on 25th July 2008 Baby Manji was born in an hospital in Gujrat. The Grandmother of the baby came to India to look after the child. Soon after her birth the baby was shifted from Anand, Gujrat to Arya Hospital, Jaipur due to the riots. In August 2008, Baby Manji was issued an birth certificate with name of the genetic father in it by Anand municipality. A writ petition was filed before High court of Rajasthan, by an NGO challenging the legality of surrogacy. Another petition under Article 32 of Indian constitution was filed by the grandmother in the

¹⁸ <https://docs.manupatra.in/newsline/articles/Upload/B2DC0190-6995-4560-A6E0-6B65B4895120.pdf>

Supreme Court challenging the order passed by the Rajasthan High Court.

Issue before the court¹⁹

1. Legality of Surrogacy in India
2. Need for enactment of surrogacy regulations in India
3. Locus Standi of the NGO to file Habeas corpus petition before the High Court has challenged

Judgement of the case-

The Supreme Court in the above case held that Commission for the Protection of Child Right Act 2005 was made with an objective to protect the rights of the children and if any decision is to be made, it should be made by the commission itself. Further directed that any persons having issue need to refer to the commission itself.

The judgement was criticised on the ground of it being short and hurried. The whole responsibility of legality of surrogacy and its regulation was assigned to the commission. It missed a chance of setting an important precedent on such a contemporary and unregulated issue. Court failed to answer the question of locus standi of respondent to file the petition. The bench did not use the opportunity to discuss the legality of surrogacy contracts. Instead of taking stand on the issue, it directed the parties to seek redressal from the commission.

2. Jan Balaz v. Anand Municipality²⁰

This is a significant case in the development of Surrogacy Regulations in India.

Facts of the case-

The petitioner in this instant case is German national. The petitioner and his wife desired to have a baby but due to certain biological issues they couldn't reproduce. The petition then opted for surrogacy as a solution. The wife of the man in the instant case was not in a condition to produce ova (eggs) as a result it was not possible to conceive a child even through surrogacy. Later an anonymous women volunteered to donate ova, which was fertilised with the sperms of the petitioner and the fertilised embryo was implanted in the uterus of the surrogate mother. A surrogacy contract was prepared between the intended parents and women who gives birth for the intending couple. The surrogate mother agreed to give the baby to the intended couple immediately after birth and she will have no responsibility regarding the baby.

¹⁹ Id.

²⁰ Id.

Issues before the court –

When an surrogacy contract takes place between an Indian surrogate and foreign couple will the baby born out of the surrogacy contract will get citizenship by birth?

Judgement of the case

It was decided by the Gujrat High Court that the child born in India will get citizenship by birth. The twin babies whose biological father was a foreign national and surrogate was an Indian citizen would to be regarded as citizen of India.

III. SURROGACY LEGISLATIONS IN INDIA

Surrogacy was legalised in India back in 2002 by the Government of India. Since then Indian surrogacy market has grown exponentially. The major reasons for transforming India into a surrogacy hub are low cost, easy availability of surrogates and less legislative control. Around three thousand surrogacy clinics along with a large number of surrogates were established. This multi-billion-dollar business of surrogacy also led to many challenges. In India, all sorts of artificial reproductive technology, including surrogacy was permitted for everyone including foreigners couples till 2015. However the view of government was changed after two famous cases namely Baby Manji and Jan Balaz Case. Before the enactment of the Surrogacy Regulation Act 2021, the Indian Surrogacy industry was majorly unregulated. Although certain guidelines were issued, but there was no legal framework to regulate the operations of the surrogacy industry. There was ambiguity in defining the legal rights and responsibilities of the surrogates and intending parents. In 2015, the Government of India passed a bill to regulate the surrogacy industry and ban commercial surrogacy. However, the bill didn't become a law, and the surrogacy industry operated same as before. Later Surrogacy(Regulation) bill 2016 and Surrogacy (Regulation) bill 2019 was introduced. Finally on April 1, 2021 the Surrogacy (Regulation) Act 2021 came into effect.

(A) Recommendations of the law commission of india ²¹

The 208th report published by the Law Commission of India recommended a ban on commercial surrogacy. Though Altruistic surrogacy was still legalised. Commercial Surrogacy is usually done for economic benefit. In such a surrogacy, the surrogate mother is remunerated or paid by the intended couple to carry out a pregnancy Whereas in Altruistic surrogacy no economic benefits are included. The surrogate mother gets no monetary benefits for carrying

²¹ SURROGACY IN INDIA A CRITICAL ANALYSIS https://www.researchgate.net/publication/377411084_SURROGACY_IN_INDIA_A_CRITICAL_ANALYSIS
file:///C:/Users/91620/Downloads/A-Study-on-Surrogacy-Issues-and-Perspectives-in-Indian-Scenario.pdf

out pregnancy. In Altruistic Surrogacy, the surrogate mother's contribution is seen as a noble deed for the greater good. Commercial surrogacy is banned due to the various reasons –

- It often leads to Exploitation of surrogates in the long run. Since there was no proper legislation there was a constant fear of exploitation of surrogate.
- Surrogacy was used majorly by the people of foreign country. Since there was no proper regulation for surrogacy the government thought it would be best to ban commercial surrogacy.
- Lack of proper legal framework and regulatory body for surrogacy in the country.

The Law Commission placed a lot of emphasis on the need to regulate commercial surrogacy. The Government of India through a notification banned surrogacy in India for foreigners.

(B) The Surrogacy (Regulation) Bill of 2016 ²²

Surrogacy Regulation Bill 2016 was introduced in Lok Sabha in the month of November. It is considered as the first bill for regulation of surrogacy in the country.

Key provision of the bill are as follows –

- Commercial surrogacy was banned completely
- Intended couple should prove their infertility
- Intended parents to be married for more than 5 years
- Registration of all surrogacy clinics
- All registered clinic should maintain a records for past 25 years
- Homosexuals or single parent cannot become surrogate parents
- Unmarried or childless women cannot become surrogates

The surrogacy regulation bill 2016 was not enforced and lapsed after dissolution of parliament. The surrogacy regulation bill 2016 does not deem to be fit for implementation as it violates golden triangle (Article 14, 19 and 21) of the Indian Constitution.

ARTICLE 14 OF THE INDIAN CONSTITUTION

The bill violates article 14 as an un-married women is not given equal rights as married women to be eligible as a surrogate. According to the bill, only married females can become surrogate mother.

²² https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/The%20Surrogacy%20Bill.pdf

ARTICLE 19 OF THE INDIAN CONSTITUTION

The surrogacy (regulation) bill 2016 bans commercial surrogacy. The bill violates Article 19(1)(d) which states the right to carry out any occupation or profession of choice. Thus a women who wants to opt for surrogacy as an occupation shall be allowed to become surrogate mothers.

ARTICLE 21 OF INDIAN CONSTITUTION

Under the provision of the bill the couple needs to provide a certificate of infertility which is violation of Right to Privacy. Right to earn livelihood comes under Right to live with dignity ;thus banning of commercial surrogacy is violative of Article 21 of Indian Constitution.

(C) The Surrogacy Regulation Bill 2019²³

On 15 July, 2019 the surrogacy (regulation) bill 2019 was presented by Minister of Health and Family Welfare. The bill prohibits commercial surrogacy but allows altruistic surrogacy in India. Commercial surrogacy was legalised in India back in 2002. Commercial surrogacy promoted medical tourism and soon India was seen as a Hub of Surrogacy.

a. Features Of Surrogacy (Regulation) Bill 2019

- National And State Surrogacy Boards –

The bill aims at constitution of surrogacy boards both at national and state level to ensure effective regulation. The national surrogacy board has the duty to advise the central government on policy involving surrogacy, provides the code of conduct that surrogacy clinics need to abide by during its day-to-day operations. The national surrogacy board is further responsible for supervising the functioning of state surrogacy board.

- Purpose of surrogacy

The bill bans commercial surrogacy but allows ethical altruistic surrogacy to the intending infertile couple. Surrogacy is permitted only under the following conditions-

1. The intended couple must prove its infertility
2. Only altruistic surrogacy is permitted. Commercial surrogacy is banned under the provision of this act
3. Surrogacy should not be carried out for purposes such as sale of the child born out of surrogacy arrangement. It should not be carried out for prostitute or any

²³ <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>

other form of exploitation.

- Eligibility for intending couple to opt for surrogacy
 1. The eligibility for the purpose of intending couple are
 - Indian Couple
 - Legal marriage
 - Married for a minimum period of 5 years
 2. Before going ahead with surrogacy it is essential to obtain a certificate of essentiality and also a certificate of eligibility. Intending couple should not abandon the child born out of surrogacy under any circumstance.
 3. A Certificate of essentiality can be granted on fulfilment of the following criteria-
 - a) A Certificate of prove of infertility by the couple issued by the District Medical Board ;
 - b) An order by the Magistrate for custody of the baby born out of surrogacy contract ;
 - c) Surrogate women is entitled for an insurance coverage for a period up to 16 months by the intending parents for covering her postpartum delivery complications occurred due to surrogacy.
 4. Criteria for certificate of eligibility for the intending couple to opt for surrogacy
 - a) The eligibility for the purpose of intending couple are -
 - Indian Couple
 - Legal marriage
 - Married for a minimum period of 5 years
 - b) The opt for surrogacy the wife shall be between 23 to 50 years of age and husband should be minimum of 26 years and maximum of 55 years to be eligible ;
 - c) They shouldn't have any surviving child of their own(biological, adopted; or surrogate);
 - d) However a mentally or physically challenged child would not be included ;

e) Other conditions according to the provision of the Act.

- Eligibility criteria for surrogate
 1. As per the provisions the surrogate shall be related to the intending couple like she can be a close relative of the couple who wants to carry out surrogacy.
 2. The surrogate shall be a married women.
 3. The surrogate shall have a child of her own.
 4. Surrogate must be mentally fit to carry out the surrogacy contract.
 5. Surrogate must be physically fit to carry out the surrogacy contract.
 6. Surrogate should be between the age of 25-35 years
 7. A women can become surrogate only once in her lifetime.

- Parentage and Abortion Of Surrogate Child

The act states that the child born out of surrogacy contract will have same legal status as a biological child of the intending couple. He /she shall enjoy all the rights and privileges that a biological child gets. Thus, as per the provision the intending couple shall treat child born out of the surrogacy lock as their own child and shall provide him with all rights and privilege that they would give to their biological child.

- Regulation of surrogacy clinic

The bill also regulates the functioning of surrogacy clinics. It is necessary for surrogacy clinics in the country to be registered by the authority as mentioned in the act.

Clinics carrying out surrogacy must get themselves register within a maximum time 60 days from date of appointment. And such registration shall be done by appropriate authority.

- Other Provisions

1. It provides various safeguards for the surrogate mother like providing compensation to cover not only the period of pregnancy but post pregnancy complications too.
2. The bill specifies that no sex selection can be done in surrogacy.

(D) Surrogacy (Regulation) Bill 2020 ²⁴

The Ministry of Health and Family Welfare presented the Surrogacy (Regulation) Bill 2020 in

²⁴ https://journals.lww.com/mjdy/fulltext/2023/16020/surrogacy__regulation__bill_2020_and_its.15.aspx

Lok Sabha on 15 July, 2019. The bill of 2020b was approved by Rajya Sabha and received presidential consent on December 29, 2021.

Features of Surrogacy Bill 2020

- The bill clearly mentions surrogacy as a practice wherein a woman known as surrogate gives birth to a child for the couple which is not able to conceive a baby. After the birth of the child, it is handed over to the intending couple.
- The bill permits Altruistic surrogacy but prohibits the practice of commercial surrogacy.
- As per the provisions of the Act, a woman can become a surrogate mother only once.
- The bill allows any willing woman to become a surrogate mother, and it opens the domain for widows, divorcees and infertile couple to opt for surrogacy to have children.
- The bill puts a restriction on single men and women from opting for surrogacy.
- The bill provides for insurance coverage to the surrogate mother for 36 months to cover post-birth complication and other physically and mental issues.
- The bill provides for compulsory registration of all surrogacy clinics. Clinics carrying out surrogacy must get themselves registered within a maximum time 60 days from date of appointment. And such registration shall be done by appropriate authority. Only registered clinics can undertake surrogacy related procedures.
- The act states that the child born out of surrogacy contract will have same legal status as a biological child of the intending couple. He /she shall enjoy all the rights and privileges that a biological child gets. Thus, as per the provision the intending couple shall treat child born out of the surrogacy contract as their own child and shall provide him with all rights and privilege that they would give to their biological child.
- surrogate mother has an option to withdraw from surrogacy before the embryo is implanted.
- No sex selection can be done in the process of surrogacy.

(E) Major Changes Brought In The Surrogacy (Regulation) Bill ²⁵

Some of the significant changes introduced by the surrogacy (regulation) bill 2020 are-

The bill completely bans commercial surrogacy that is surrogacy in which surrogate receives

²⁵<https://blog.ipleaders.in/surrogacy-regulation-bill-2020-way-forward/>

monetary benefits other than the basic medical expenses and insurance coverage. However altruistic surrogacy is allowed as per the provisions of the Act.

The Surrogacy (Regulation) bill 2020 deletes the definition of 'infertility'. Infertility is the ability to reproduce due to any biological cause. The time period for infertility was previously 5 years which was regarded as unreasonable in the present bill. The committee thought that five years is a very long time for a couple to keep trying to have a baby.

As per the bill only Indian Married Heterosexual couples can opt for surrogacy. The age of the couple shall be between 23 years to 50 years for wife and 26 to 55 years for husband. Single Indian Women (only widows and divorce) between age of 35-35 can opt for surrogacy.

The insurance cover period for surrogate mother has been increased from 16 months to 36 months to cover post-birth complications.

Intended couple can opt for surrogacy only after obtaining a Certificate of Essentiality and Certificate of Eligibility. The act states that the child born out of surrogacy contract will have same legal status as a biological child of the intending couple. He /she shall enjoy all the rights and privileges that a biological child gets. Thus, as per the provision the intending couple shall treat child born out of the surrogacy lock as their own child and shall provide him with all rights and privilege that they would give to their biological child. The intended couple cannot abandon the child born out of surrogacy contract under any circumstance.

The bill provides for compulsory registration of all surrogacy clinics. The surrogacy clinic must apply for registration within 60 days from the appropriate authority appointment date. Only registered clinics can undertake surrogacy related procedures.

Offences written down under the provision of the bill of 2020 are

- Carrying out commercial surrogacy or advertising of commercial surrogacy in any form is prohibited and is considered as an offence
- importing or exporting or selling and buying of embryo for the purpose of surrogacy,
- exploitation of surrogate mother, or child is also considered as an offence.
- Such offences are penalised with an fine of 10 lakh rupee and imprisonment of 10 years.

The bill aims at constitution and establishment of surrogacy boards both at national and state level to ensure effective regulation. The national surrogacy board has the duty to advises the central government on policy involving surrogacy, provides the code of conduct that surrogacy clinics needs to abide by during its day-to-day operations. The national surrogacy boards is

further responsible for supervising the functioning of state surrogacy board.

IV. SURROGACY (REGULATION) ACT 2021

The Surrogacy (Regulation) Act 2021 is divided into eight chapters consisting of 54 sections. These provisions deal with the regulation of surrogacy sector in India. The act finally got President's approval on 25th December 2021 after a long wait.

(A) Prerequisites of the act-²⁶

1. Eligibility for intending couple

- The eligibility for the purpose of intending couple are -
 - Indian Couple
 - Legal marriage
 - Married for a minimum period of 5 years
- Before going ahead with surrogacy it is essential to obtain a certificate of essentiality and also a certificate of eligibility. Intending couple should not abandon the child born out of surrogacy under any circumstance.
- A Certificate of essentiality can be granted on fulfilment of the following criteria-
 - A Certificate of prove of infertility by the couple issued by the District Medical Board
 - An order by the Magistrate for custody of the child ;
 - Insurance coverage for a period of 16 months to the surrogate for covering her postpartum delivery complications.
- Criteria for certificate of eligibility-
 - The couple must be an Indian citizen and should be married for at least 5 years ;
 - The opt for surrogacy the girl shall be between 23 up to 50 years of age and husband should be minimum of 26 years and maximum of 55 years to be eligible
 - They shouldn't have any surviving child of their own(biological, adopted; or surrogate);
 - However a mentally or physically challenged child would not be included

²⁶ <https://www.hpnlu.ac.in/PDF/4fc3eed4-d38b-4ec6-9f9b-ca4419857aa7.pdf>

- Other conditions according to the provision of the Act.

2. Eligibility for surrogate mother –

- As per the provisions the surrogate shall be related to the intending couple like she can be a close relative of the couple who wants to carry out surrogacy.
 - The surrogate shall be a married women.
 - The surrogate shall have a child of her own.
 - Surrogate must be mentally fit to carry out the surrogacy contract.
 - Surrogate must be physically fit to carry out the surrogacy contract
 - Surrogate should be between the age of 25-35 years, and not been a surrogate earlier;
 - Sign up surrogacy once in her lifetime, but up to three attempts may be taken if embryo transfer is not properly;
 - She shall be prohibited from providing her own gametes for the purpose of surrogacy;
 - Surrogate mother shall not be entitled to receive any compensation other than insurance and medical costs ;
 - Insurance shall be for a period of 36 months covering the post- partum complications

3. The surrogacy is carried out for charitable purpose and not being done for financial gain.

(B) Important provisions under the surrogacy (regulation) act²⁷

SECTION 2. DEFINITION CLAUSE

The section 2 of the act provides for various definitions –

- **ALTRUISTIC SURROGACY**
 - It is defined under section 2(b) of the Act. It means surrogacy in which medical expenses, insurance coverage and other prescribed expenses in the act will be given to the surrogate mother by the intended parents to carry out the procedure of surrogacy. Though, Altruistic surrogacy doesn't incorporate other expenditures like such incentives in form of money or

²⁷

<https://blog.iplayers.in/surrogacy-act/#:~:text=The%20Surrogacy%20Act%20of%202021,of%20insurance%20and%20medical%20coverage.>

other things. It is usually carried out love and affection of the surrogate and often seen as a good deed. The primary consideration here is not money but the joy of helping the needy.

- **COMMERCIAL SURROGACY**

- It is defined under section 2(g) of the Act. It means surrogacy in which all kinds of incentives whether cash or kind is given to the surrogate. The prime consideration here is money and such contract are often carried out by poor surrogate in search of money. Commercial Surrogacy often leads to exploitation of surrogates. The surrogates are often under-paid and are not aware of the post-pregnancy complications that may occur due to surrogacy. Commercial Surrogacy is often seen as a kind of occupation by poor women to make easy money but in long run its implications are pathetic-

It restricts women to explore other areas and they start seeing themselves as a reproductive tool, they lose her autonomy.

- The practice of commercial surrogacy is banned in India.

- **COUPLE**

- The term ‘couple’ is defined under section 2(h) of the Act. It means a legally married couple wherein age of husband is above 21 years and wife is above 18 years.

- **INTENDING COUPLE-**

- Defined under section 2(r) of the Act. It means couples who are willing to be parents through process of surrogacy. To opt for surrogacy the girl shall be between 23 up to 50 years of age and husband should be minimum of 26 years and maximum of 55 years to be eligible.

- **INTENDING WOMEN-**

- Defined under Section 2(s) of the Act. The term includes women (either widow or divorcee) between the age of 35 to 45 years.

- **SURROGACY –**

- Defined under section 2(zd) of the Act. Surrogacy can be understood as a procedure of assisted reproduction. The word “surrogate” originates from the Latin word “Surrogatus” which means “Substitution” or “to act in the

place of'. Surrogacy is an arrangement wherein women undertake pregnancy for another couple who are unable to produce their own child due to any biological reasons. 'Surrogate' is the women who gives birth to the child whereas 'intended couple' is couple for whom the child is being conceived by the surrogate

SECTION 3. SURROGACY CLINIC AND ITS REGULATION

- Every surrogacy clinic must be registered.
- Carrying out commercial surrogacy or advertising of commercial surrogacy in any form is prohibited and is considered as an offence. No surrogacy clinic shall. It means surrogacy in which all kinds of incentives whether cash or kind is given to the surrogate. The prime consideration here is money and such contract are often carried out by poor surrogate in search of money. Commercial Surrogacy often leads to exploitation of surrogates. The surrogates are often under-paid and are not aware of the post-pregnancy complications that may occur due to surrogacy. Commercial Surrogacy is often seen as a kind of occupation by poor women to make easy money but in long run its implications are pathetic-
 - It restricts women to explore other areas and they start seeing themselves as a reproductive tool, they lose her autonomy.
 - The practice of commercial surrogacy is banned in India.
 - undertake commercial surrogacy as it is a punishable offence.
- Only registered surrogacy clinic shall perform procedures related to surrogacy.
- Employment shall be on the basis of merit and not honorary basis.
- Sex selection is strictly prohibited and no surrogacy clinic should engage any activity to determine the gender of the child born out of the surrogacy contract.
- Surrogacy clinics are not allowed to Storage of embryo or gamete for the purpose of surrogacy.

SECTION 4. REGULATION OF SURROGACY AND SURROGACY PROCEDURES²⁸

- As per Section 4 of the Act, only registered surrogacy clinic can participate in, assist in any way with activities related to surrogacy and its procedures;

²⁸

<https://blog.ipleaders.in/surrogacy-act/#:~:text=The%20Surrogacy%20Act%20of%202021,of%20insurance%20and%20medical%20coverage.>

- Any medical practitioner such as gynaecologist, embryologist shall not promote, advertise commercial surrogacy:

SECTION 6. WRITTEN CONSENT OF SURROGATE MOTHER

- As per Section 6 of the Surrogacy regulation act 2021 , the surrogate mother has a right to be informed of all pros and cons of the procedures, and a written consent shall be provided by the surrogate mother mentioning her approval to undertake the process of surrogacy.

SECTION 7. PROHIBITION TO ABANDON A CHILD

- A child born out of a surrogacy contract shall not be abandon due to any reason. The intended couple cannot abandon a child on any ground like birth defect like loss of eye sight or hearing issue, any genetic defect or any other medical condition such as any disease whether in our own country or foreign land.

(A) Rights of a surrogate child

SECTION 8

- The act states that the child born out of surrogacy contract will have same legal status as a biological child of the intending couple. He /she shall enjoy all the rights and privileges that a biological child gets. Thus, as per the provision the intending couple shall treat child born out of the surrogacy lock as their own child and shall provide him with all rights and privilege that they would give to their biological child.

SECTION 10-

- Surrogate mother shall not be force by any person or organisation to abort at any stage expect under conditions provided under the Act.

(B) Registration of surrogacy clinic

SECTION 11. REGISTRATION

- The bill also regulates the functioning of surrogacy clinics. The bill provides for compulsory registration of all surrogacy clinics. Clinics carrying out surrogacy must get themselves register within a maximum time 60 days from date of appointment. And such registration shall be done by appropriate authority. However, the appropriate authority can reject the application if necessary requirements, has not been met.

SECTION 12. CERTIFICATE OF REGISTRATION ²⁹

- The bill also regulates the functioning of surrogacy clinics. The bill provides for compulsory registration of all surrogacy clinics. Clinics carrying out surrogacy must get themselves register within a maximum time 60 days from date of appointment. And such registration shall be done by appropriate authority. However, the appropriate authority can reject the application if necessary requirements, has not been met.
- The appropriate authority will provide certificate of registration after proper scrutiny of the applicant. The applicant needs to pay a certain amount in order to get the certificate of registration.
- The appropriate authority as prescribed under the act has power to reject the application if the applicant has not met the requirements. Reasons for rejection of the application needs to be provided in writings.

SECTION 13. CANCELLATION AND SUSPENSION OF REGISTRATION

- Chapter IV provides for registration of surrogacy clinics, i.e. every surrogacy clinic must be registered to carry out procedures of surrogacy. Section 13 provides for cancellation or suspension of registration upon receipt of complaint or suo motu. The burden of proof lies on the clinic. Thus, the clinic has to provide reasons for non - cancellation or suspension of registration.

SECTION 14. APPEAL

- Under section 14 of the act, the surrogacy clinic can make an appeal within a period of 30 days.

(C) Establishment of registry

SECTION 15. ESTABLISHMENT OF NATIONAL ASSISTED REPRODUCTIVE TECHNOLOGY

- Section 15 of the Act states for the creation of the national assisted reproductive technology.
- Section 16 provides for registration of all bodies created under section 15 of the Act. The registration shall be done under section 9 of the assisted reproductive technology act as well.

SECTION 17. ESTABLISHMENT OF NATIONAL REGISTRY FOR SURROGACY AND

²⁹ Id.

ASSISTED REPRODUCTIVE TECHNOLOGY

- Section 17 of the Surrogacy Regulation Act 2021, provides for establishment of National Registry for Surrogacy and Assisted Reproductive Technology.

SECTION 19. MEETING OF BOARD

- Under provision of the Act, a meeting shall be held once in every six month in an year , which shall be headed over by the chairperson and, in case he is not there then by the vice chairperson. The decisions in the meeting are taken on the basis of majority vote.

SECTION 21. DISQUALIFICATION OF MEMBERS ³⁰

- Section 21 of the Act mentions the grounds of disqualify members. Some of the grounds mentioned are-
 - Insolvency or becoming bankrupt
 - moral turpitude,
 - mental or physical incapability to understand basic things
 - or any other grounds as deemed fit by the Central Government.
- The members can be removed only by order of the Central Government.

SECTION 24. REAPPOINTMENT

- As per Section 24 reappointment of ex-officio member can be done for two consecutive terms.

SECTION 25. FUNCTIONS OF THE BOARD

- The functions are as follow –
 - Advises and guides the central government on any issue regarding surrogacy
 - Monitoring or reviewing the implementation of the Act.
 - Providing a code of conduct for surrogacy clinic for their proper functioning.
 - Supervise the functioning of surrogacy boards, clinics and registries.
 - Other functions as prescribed.

SECTION 35. APPOINTMENT OF APPROPRIATE AUTHORITY

- Appropriate Authority is appointed by the central government.

³⁰ Id.

- Such appointment shall be done within 90 days of the commencement of the surrogacy act 2021.
- Authority shall be appointed for each territory of India
- Every State Government has a duty to appoint at least one Authority for each state or any part of its state.

SECTION 37. POWER OF APPROPRIATE AUTHORITY

- Powers of the appropriate authority shall include-
 - Summon a person – the appropriate authority has power to call any person for gathering information.
 - Search and seizure
 - Production of any document when required
 - Any other power

SECTION 40. PUNISHMENT FOR NOT ALLOWING ALTRISTIC SURROGACY ³¹

- According to Section 40 of the Act, every couple has a right to opt for surrogacy. And if any couple is excluded from undertaking the services of altruistic surrogacy by any clinic or authorised person it would result in an offence punishable with imprisonment. The period of imprisonment may extend up to five years, and fine levied for a maximum amount of five lakh rupees for the first time. For a subsequent offence, punishment shall increase imprisonment up to ten years and a fine of maximum ten lakh rupees.

SECTION 43. CLASSIFICATION OF THE OFFENCE UNDER THE ACT

- Every offence committed under the Act shall be cognizable, non- bailable and non-compoundable.

SECTION 46. MAINTENANCE OF RECORDS

- Section 46 provides for the maintenance of records by the surrogacy clinics.
- Surrogacy clinics shall preserve all records for a period of 25 years.
- In case there is a criminal or other proceedings going on , it shall be preserved until the disposal of the case.
- Surrogacy clinics are obliged to provide records for the purpose inspection as and when

³¹ Id.

required.

SECTION 47. POWER TO SEARCH AND SEIZURE

- Under the provision of the Act, Appropriate Authority has power of Search and Seizure if act has been committed.

(D) Critical Analysis Of The Act ³²

The act was enacted with the intention of regulating the practice of surrogacy in India and combating against exploitation of women and surrogates, still some of its provision re considered to be discriminatory against women. The succeeding paragraphs highlight the lacunae of the Act. Though the Act can be seen progressive step towards regulating and managing the surrogacy procedures in India. Though, it suffers several flaws like lack of inclusiveness, prohibition of commercial surrogacy, exclusion of non- binary gender and vagueness of the Act.

1) INFRINGEMENT OF WOMEN'S REPRODUCTIVE RIGHTS –

Reproductive Rights refers to the women's ability to determine whether or not to have children, and whether or not to keep or end an intended pregnancy. it also includes family planning and contraception technique she chooses. Reproductive rights include rights like access to contraception, right to legal and safe abortion, rights against harmful practices such as coerced childbearing. The supreme court and High court in various cases has held that the right of reproductive autonomy is part of our fundamental rights guaranteed under Article 21 of Indian constitution which clearly mention about Right to Life. The Supreme Court in famous case of Suchita Srivastava v. Chandigarh Administration held that right to reproductive choices is a part of Right to life guaranteed under Article 21 of the Indian Constitution. In the case of B K Parasarathi v State of Andhra Pradesh, the High Court held that reproduction is a very personal decision on the side of the man/ women. Justice K.S Puttaswamy reiterated that the reproductive choice of the women is a part of right to life under Article 21 of the Indian Constitution.

In Navtej Singh Johar v. Union of India and Joseph Shine v Union of India the courts establish a constitutional requirement to strike down laws that reflect discriminatory stereotypes or hampers reproductive choices. Despite these landmark judgements, the surrogacy act 2021 excludes certain classes of women from the benefits of surrogacy. As per the provisions of the Act, unmarried women, a single man, couple in live in relationship, couples belonging to

³² <https://www.hpnlu.ac.in/PDF/4fc3eed4-d38b-4ec6-9f9b-ca4419857aa7.pdf>

LGBTQI community are excluded from availing the benefits of surrogacy. The act is violative of Article 21 i.e. Right to Life, Article 14 i.e. Equality before law and equal protection before law and Article 15 runs as the state should not discriminate any person on the criteria of caste, religion, sex, place of birth etc.

The Surrogacy Act mandates the intending couple to provide a certificate of essentiality and eligibility from District Medical Board which is violation of Right to Privacy of the intending couple. In cases such as –

1. PUTTASWAMY & ANR V. UNION OF INDIA
2. SURUPSINGH HARYA NAIK V. STATE OF MAHARASHTRA

In the above mention cases, the court held that showing certificate of infertility is violation of Right to Privacy as well as against the moral and ethical point of view of society. Further it elaborated that right to medical confidentiality is fundamental right under Article 21.

2) DISCRIMINATION AGAINST DISABLED CHILDREN ³³

According to the provision of the Act, intended couple can opt for surrogacy on the condition that they do not have any living children. Though the disabled children are treated as an exception under the act. The UN Convention on the Rights of persons with disability states that children with disability should have same access to all human rights and fundamental freedom as an ordinary child and shall not be discriminated against on any basis. Thus, the act discriminates disabled children by dividing disabled and non-disabled child for the purpose of undertaking surrogacy.

3) COMPLETE BAN OF COMMERCIAL SURROGACY

Commercial Surrogacy is usually done for economic benefit. In such a surrogacy, the surrogate mother is remunerated or paid by the intended couple to carry out a pregnancy. The Act puts an complete ban on commercial surrogacy. Prohibiting commercial surrogacy can lead to illegal arrangement between surrogate and intended couple if they are willing. It can further lead to the surrogacy sector being undergrounded allowing it to survive illegally. As per the Act, surrogate women should be a close relative of the intending couple which often lead to mild persuasion of her becoming a surrogate. Thus, banning commercial surrogacy is no solution.

³³

[https://juriscentre.com/2023/08/10/critical-analysis-of-the-surrogacy-regulation-act-2021/#:~:text=The%20Surrogacy%20\(Regulation\)%20Act%2C%202021%20is%20a%20progressive%20step,th e%20vagueness%20of%20certain%20provisions.](https://juriscentre.com/2023/08/10/critical-analysis-of-the-surrogacy-regulation-act-2021/#:~:text=The%20Surrogacy%20(Regulation)%20Act%2C%202021%20is%20a%20progressive%20step,th e%20vagueness%20of%20certain%20provisions.)

4) INFRINGMENT OF RIGHT TO LIVLIHOOD

The Surrogacy Regulation Act 2021, bans commercial surrogacy which is violative of Article 19 (1)(g). Human gametes and embryos must not be traded or sold. The ban on commercial surrogacy is detrimental to surrogate mother's interest as it could be a source of income for her. In various cases like *Consumer Education and Research Centre v. Union of India* and *Olga Tellis v. Bombay Municipal Corporation* the expression 'life' under Article 21 has a wider meaning including 'right to livelihood'. Thus, putting a complete ban on commercial surrogacy is violative of Article 21 of the Indian Constitution.

5). RESTRICTED DEFINITION OF INTENDING COUPLE

The definition of intending couple is as follow-

- The eligibility for the purpose of intending couple are -
 - Indian Couple
 - Legal marriage
 - Married for a minimum period of 5 years
- Before going ahead with surrogacy it is essential to obtain a certificate of essentiality and also a certificate of eligibility. Intending couple should not abandon the child born out of surrogacy under any circumstance.
- A Certificate of essentiality can be granted on fulfilment of the following criteria-
 - A Certificate of prove of infertility by the couple issued by the District Medical Board
 - An order by the Magistrate for custody of the child ;
 - Insurance coverage for a period of 16 months to the surrogate for covering her postpartum delivery complications.
- CRITERIA FOR CERTIFICATE OF ELIGIBILITY-
- The eligibility for the purpose of intending couple are -
 - Indian Couple
 - Legal marriage
 - Married for a minimum period of 5 years
 - The age of wife should be between minimum of 23 years and maximum 50 years and that of man should be 26 to 55 years

- They shouldn't have any surviving child of their own(biological, adopted, or surrogate);
- However a mentally or physically challenged child would not be included
- Other conditions according to the provision of the Act.

THE DRAWBACKS OF THE DEFINITION ARE ³⁴—

- Foreigners, homosexual couple, couple in live in relationship, and unmarried couple are all prohibited from opting surrogacy under the provisions of the Act.
- The exclusions are unreasonable and is violative of Article 14 of Indian Constitution. The exclusion fails to pass the reasonable classification test, especially when individual of any martial status is allowed to adopt and child born out of a live-in relationship has been given status of legitimate child.
- Further, the act ignores the rights of third gender (National Legal Services Authority v. Union of India).

6). ABSENCE OF PROVISIONS FOR FIXATION OF TIME LIMITS IN CERTAIN CASES

- As per the provision of the Act, surrogacy cases are to be dealt by the courts. But the Act fails to provide any deadline for the same.

7). AMBIGUITY IN THE PROVISION OF THE ACT

- The Act is ambiguous about establishment, control or monitoring of ART Bank.
- The Act provides for appropriate authority but is uncertain about who shall be appointed in the authority.
- The Act does not provide for a procedure for surrogacy. There is no provision regarding keeping the surrogate's name confidential.
- As per Act, a women can become a surrogate only once in her lifetime, but there's no limit on number of embryo transfers to help produce a baby.
- There is no mention of time limit in the Act.
- The Act does not mention the time of handing over the child to the intending parents. If the child is handed over immediately then the child's right to breast feed is exploited.

³⁴

https://ijemh.com/issue_dcp/A%20Critical%20ANALISIS%20of%20Surrogacy%20Regulation%20ACT,%202021.pdf

(E) The challenges behind the surrogacy (regulation) act, 2021 ³⁵**EXCLUSION**³⁶ –

- Single, Foreigners, homosexual couple, couple in live in relationship, and unmarried couple are all prohibited from opting surrogacy under the provisions of the Act.
- The exclusions are unreasonable and is violative of Article 14 of Indian Constitution. The exclusion fails to pass the reasonable classification test, especially when individual of any martial status is allowed to adopt and child born out of a live-in relationship has been given status of legitimate child.

PATERNALISTIC-

- In Altruistic surrogacy, the surrogate mother gets no monetary or economical benefits for carrying out the pregnancy and relinquishment of the baby. The surrogate mother's contribution is seen as a noble deed for the greater good.

FEMALE AUTONOMY

- With the ban of commercial surrogacy, the rights- based approach is replaced with the needs based approach.

CHALLENGES OF ALTRUISTIC SURROGACY

- Under Altruistic surrogacy, the surrogate mother gets no economical benefits for carrying out the pregnancy and relinquishment of the baby. the surrogate mother's contribution is seen as a noble deed for the greater good.
- The surrogate in Altruistic Surrogacy is often family relative of the couple which can lead to emotional issues.

KIDS WITH DISABILITY ³⁷

- According to the provision of the Act, intended couple can opt for surrogacy on the condition that they do not have any living children. Though the disabled children are treated as a exception under the act. The UN Convention on the Rights of persons with disability states that children with disability should have same access to all human rights and fundamental freedom as an ordinary child and shall not be discriminated against on any basis. Thus, the act discriminates disabled children by dividing disable and non-

³⁵<https://www.drishtiiias.com/printpdf/surrogacy-4#:~:text=Challenges%3A,to%20balance%20these%20two%20interests.>³⁶ <https://theprobe.in/stories/surrogacy-in-india-the-fight-for-inclusivity-and-fundamental-rights-in-parenthood-4317421>³⁷ Id.

disabled child for the purpose of undertaking surrogacy.

(F) Assisted Reproductive Technology (Regulation) Act, 2021 ³⁸

- The aim of Assisted Reproductive Technology Act 2021 is to regulate assisted reproductive technology clinics and related banks. It also supervises these organisation and prevent them from misuse.
- As per the provisions of the Act, every assisted reproductive technology clinic and bank shall apply for registration. Such registration shall be done under the National Registry of Banks and Clinic in India.
- The National Registry has a duty to keep database of all ART clinics and banks in the country.
- The act provides provision regarding gamete donation and supply.
- The Act clearly mentions that the donor will not have any parental rights over the child born out of ART.

V. ETHICAL AND MORAL RAMIFICATION RELATED TO SURROGACY

(A) Surrogacy's ethical and moral issues³⁹

Surrogacy was legalised in India back in 2002 by the Government of India. Since then Indian surrogacy market has grown exponentially. The major reasons for transforming India into a surrogacy hub are low cost, easy availability of surrogates and less legislative control. Around three thousand surrogacy clinics along with a large number of surrogates were established. This multi-billion-dollar business of surrogacy also led to many challenges. In India, all sorts of artificial reproductive technology, including surrogacy was permitted for everyone including foreigners couples till 2015.

Surrogacy often leads to exploitation of surrogate mother. Oppressed, impoverished are often forced to be surrogate mothers by the wealthy infertile couple. In rural areas, women enter into the role of surrogate through their husband, or intermediary just for money. These women are deprived of their rights and have no freedom to make choices regarding their bodies or lives.

Surrogacy which is an unnatural process of reproductive is consider to breaks the emotional tie that the biological mother and the child shares. Surrogacy raises a lot of ethical and moral issues

³⁸https://www.researchgate.net/publication/377411084_SURROGACY_IN_INDIA_A_CRITICAL_ANALYSIS

³⁹ https://dergipark.org.tr/tr/download/article-file/412634_ETHICAL_ISSUES_IN_THE_SURROGATE_MATERNITY_PRACTICE Rukiye Türk1, Fusun Terzioğlu2

like –

1. Does surrogacy jeopardise natural fertility ?

Surrogacy is often criticized on the fact that it does not use ways of “natural reproduction”. Surrogacy is performed through medical procedures like insemination or In vitro fertilisation (IVF) METHOD. The fact that human being as a living organism impairs his identity through natural reproductive capacity. The catholic church is against the procedure of surrogacy as it harms the identity of individual. Surrogacy can convert the ethical consideration of creating and raising a child into a financial transaction which contributes to change in reproductive way of human being and erodes the social and individual values. Thus, practices like insemination and in vitro fertilisation sacrifice the natural reproductive capacity of the human being. There are a lot of factors involved in surrogate maternity beyond a pure altruistic approach.

2. Is the female body sold during surrogacy ?

Surrogacy is an arrangement wherein women undertake pregnancy for another couple who are unable to produce their own child due to any biological reasons. ‘Surrogate’ is the women who gives birth to the child whereas ‘intended couple’ is couple for whom the child is being conceived by the surrogate. The development of In Vitro fertilization has revolutionized the landscape of fertility solutions, giving individual a chance of having biological children. Surrogacy is often understood as selling the female body. People compare surrogacy to prostitution, as women are forced to sell their uteri and do not have right over their own bodies. Women undertake the responsibility to become surrogate mothers for economical benefits. Poor women are forced to become surrogate mother by the wealthy intending couple. It is feared that women do not turn into a ‘baby machine’ with time. According to reports, 11 out of 19 surrogate women, undertake surrogacy for monetary benefits.

3. Are women used as a reproductive tool?⁴⁰

Under commercial surrogacy, female body are treated as commercial property and a tool for reproduction. Surrogate mother’s body is like a hotel and they do not have any emotional connection with the baby. Surrogacy is considered as ‘renting of womb’ by the surrogate mother for altruistic or commercial purpose. Thus making women serve like breeding box.

4. Is the surrogate mother medicalized?

The surrogate women under goes prepartum diagnostic tests like amminocentesis, abortion,

⁴⁰ ETHICAL ISSUES IN THE SURROGATE MATERNITY PRACTICE
Rukiye Türk1, Fusun Terzioğlu2 <https://dergipark.org.tr/tr/download/article-file/412634>

caesarean section etc.

5. Are the surrogate mother prone of the risks associated with pregnancy and delivery?

The process of pregnancy involves a lot of risks. The pregnant women under goes through bodily deformations and disorders (cardiac, respiratory, excretory, nervous etc) according to reports, some surrogate mothers have experienced severe times of pregnancy, and have faced a lot of health problem related to abortions.

6. Does surrogate mother lose her autonomy ?

Reproductive Rights refers to the women's ability to determine whether or not to have children, and whether or not to keep or end an intended pregnancy. it also includes family planning and contraception technique she chooses. Reproductive rights include rights like access to contraception, right to legal and safe abortion, rights against harmful practices such as coerced childbearing. The supreme court and High court in various cases has held that the right of reproductive autonomy is part of our fundamental rights guaranteed under Article 21 of Indian constitution which clearly mention about Right to Life. The Supreme Court in famous case of *Suchita Srivastava v. Chandigarh Administration* said that right to reproductive choices is a part of Right to life given under Article 21 of our Indian Constitution. In the case of *B K Parasarathi v State of Andhra Pradesh*, the High Court held that reproduction is a very personal decision on the side of the man/ women. Justice K.S Puttaswamy reiterated that the reproductive choice of the women is a part of right to life under Article 21 of the Indian Constitution. Does such processes make the surrogate mother lose her autonomy and personality.

7. Does surrogate maternity weaken the marriage relation?

Surrogacy is often seen as a solution for infertile couple, but it can lead to issues like

- Surrogate developing a warm feeling towards the sperm donor
- The sperm donor might perceive pregnancy as a miracle and attribute more value to the surrogate than her formal wife.

8. Does the child need to know its genealogy and its natural parents?

It is argued that whether the baby needs to know about his biological parents since baby is not autonomous. Will knowing about the genealogy will affect his psychological health or change in behaviour towards his intending parents.

9. Surrogacy compared to sale of children?

Surrogacy which is an unnatural process of reproductive is consider to breaks the emotional tie that the biological mother and the child shares. People often compare surrogacy with buying a baby with money. The child is treated as a tool, to satisfy the needs of the couple. Hence, the child's right are infringed.

10. Would the intending couple will treat the baby as their own ?

Once the surrogacy procedure is over and baby is handed over to the intending couple by the surrogate mother, there's no guarantee whether the couple will treat the baby as their own. The baby born out of surrogacy might suffer if he is not treated well by the intending parents. Thus, for an ethical surrogacy, the baby must be brought up by the intending parents as their own.

(B) Ethical consideration to be taken are of during surrogacy ⁴¹

AUTONOMY AND REPRODUCTIVE FREEDOM –

Surrogacy provide autonomy and reproductive freedom to the intending couple. It provides a viable solution for infertile couple, or couples who are unable to conceive due to medical reasons like recurrent pregnancy loss etc. However, it is criticised on the ground that it leads to potential exploitation of surrogate mother.

EXPLOITATION AND INFORED CONSENT

Surrogacy often leads to exploitation especially in cases where the primary motive is money and not the noble good for the intending couple. The surrogate mother must be informed about the potential risk, her wilful consent to go through the process of surrogacy and fair compensation are considered some of the ethical consideration.

COMMODIFICATION OF REPRODUCTION –

Surrogacy can convert the ethical consideration of creating and raising a child into a financial transaction. Commercial Surrogacy is usually done for economic benefit. In such a surrogacy, the surrogate mother is remunerated or paid by the intended couple to carry out a pregnancy. Though commercial surrogacy is banned as the provision of the Act.

RIGHTS AND WELL BEING OF SURROGATE MOTHER-

The rights and well being of the surrogate mother is often prioritized under ethical surrogacy practices. The surrogate mother must be informed about the potential risk, her wilful consent to go through the process of surrogacy and fair compensation are considered some of the ethical consideration.

⁴¹ <https://www.quora.com/What-are-the-ethical-considerations-involved-in-surrogacy>

PSYCHOLOGICAL IMPACT ON SURROGATES-

Since pregnancy is a tough job surrogate mother often goes through physical and mental issue during this period. There are post-partum pregnancy challenges added too like changes in body of the women, abortion etc. thus, for a ethical surrogacy it is essential that the surrogate mothers mental and physical health are taken care of.

SOCIAL JUSTICE AND ACCESS TO SURROGACY

Surrogacy is an expensive procedure and not all people can afford it. The issue of social justice arises when certain classes of people in the society can afford surrogacy while others are denied due to lack of finance creating disparities in access to reproductive options.

PARENTAL RIGHTS AND LEGAL PROTECTION

The legal rights and liability of the intending parents, the surrogate and the child shall be the primary concern of an ethical surrogacy. Establishing clear legal framework between the parties are beneficial for avoiding conflict in the long run.

CULTURAL AND RELIGIOUS PERSPECTIVES

The cultural and religious belief of people play a significant role in shaping the attitude towards surrogacy. Since the cultural and religious beliefs vary, it is important to respect the diverse perspective.

CHILD'S RIGHTS AND IDENTITY

The ethical consideration of surrogacy ensures that the baby born out of surrogacy is aware about his genetic and gestational origins. It is essential for the child to know his identity and understand it.

(C) Arguments in favour of surrogacy

Surrogacy meaning an arrangement in which women carries and delivers a baby for another individual who are unable to conceive a baby due to any reason. Surrogacy has been a topic of ethical, legal and social debate. It is often criticized as it breaks the emotional tie that the biological mother and the child shares. Since it is an unnatural process of reproductive people often compare it to prostitution or buying of baby. It leads to issues like exploitation of surrogate mother, seeing women as a reproductive tool, and commercialisation of surrogacy. Despite such issue, it is like an miracle for infertile couple who are unable to conceive due to any reasons.

Following are the arguments in favour of surrogacy as an means of reproduction-

INFERTILITY SOLUTION

Surrogacy provide autonomy and reproductive freedom to the intending couple. It provides a viable solution for infertile couple, or couples who are unable to conceive due to medical reasons like recurrent pregnancy loss etc. It enables the intending couple to have a baby who is genetically related to one or more parents.

ADVANCEMENT IN MEDICAL FIELD

The success rates of surrogacy procedures are rising due to advancement in reproductive technologies like insemination and in vitro fertilisation.

AUTONOMY AND REPRODUCTIVE FREEDOM –

Surrogacy provide autonomy and reproductive freedom to the intending couple. It provides a viable solution for infertile couple, or couples who are unable to conceive due to medical reasons like recurrent pregnancy loss etc. However, it is criticised on the ground that it leads to potential exploitation of surrogate mother.

ECONOMIC BENEFIT TO THE SURROGATE

Surrogates are often paid by the intending couple for carrying out the task of surrogacy. Though, commercial surrogacy is banned in India as per the provisions of the Act.

EMOTIONAL SATISFACTION FOR THE SURROGATES

Some women often get emotional satisfaction by helping others. Surrogacy provides a sense of fulfilment and satisfaction to the surrogate mother. Surrogates find happiness and joy in being able to contribute to the happiness of another couple.

LEGAL PROTECTIONS

There are various legislation developed in India for surrogacy. The legislations are amended time and again to meet the requirements of the society. Having a clear legislation for surrogacy helps in preventing potential disputes and ensuring a smoother process.

GLOBALISATION AND CROSS BORDER OPTIONS

The globalisation of surrogacy makes it easier for the couples to opt for the process. The couples have an option to explore surrogacy options in other countries and choose the best feasible option out of the given choices. India is often considered as the hub of surrogacy due to availability of surrogates, cheaper rates and flexible legislation for surrogacy.

EVOLVING SOCIAL NORMS

The society is changing with time and people are accepting surrogacy as a method of

reproduction. Surrogacy is being normalised and peoples attitude towards the family arrangements are constantly changing.

Surrogacy an boom for single parents

Surrogacy is helpful for single parent for the following reasons –

Empowerment of single working women –

Surrogacy provides an option to a single parent to enjoy the joy of being a parent without a partner. Women who do not want to get pregnant due to their career or personal growth can also opt for surrogacy.

Building a family -

Surrogacy provides an option to a single parent to enjoy the joy of being a parent without a partner. Surrogacy provides an avenue for building a family on own terms.

Carrer choices-

Individuals who do not want to get pregnant due to their career or personal growth can also opt for surrogacy.

Genetic connection -

In the process of surrogacy, the embryo is related to the intending parent. Thus, they share an genetic connection.

Time Flexibility and Resource Availability-

The process of reproduction is a time taking task and hence individual who want to focus on their career or personal growth usually undergo surrogacy. Surrogacy services are available in most of the part of the world and people can avail those services by paying a certain amount.

Legal Protections-

There are various legislation developed in India for surrogacy. The legislations are amended time and again to meet the requirements of the society. Having a clear legislation for surrogacy helps in preventing potential disputes and ensuring a smoother process.

(D) Surrogacy and lgbtq community ⁴²

The Surrogacy Act 2021 excludes homosexual couples from using altruistic surrogacy. As per the societal norms, laws and religious doctrine the holistic development of a child is dependent

⁴² <https://www.thehindu.com/news/national/same-sex-couples-live-in-partners-not-included-in-surrogacy-and-assisted-reproduction-laws-says-govt-in-supreme-court/article66831323.ece>

upon the fact that they shall be raised by parents of different genders. This is seen as hypocrisy as the act permits widow and divorcees to opt for surrogacy. Such an exclusion can be considered discriminatory.

Reproductive Rights refers to the women's ability to determine whether or not to have children, and whether or not to keep or end an intended pregnancy. It also includes family planning and contraception technique she chooses. Reproductive rights include rights like access to contraception, right to legal and safe abortion, rights against harmful practices such as coerced childbearing. The supreme court and High court in various cases has held that the right of reproductive autonomy is a part of right to life and personal liberty mentioned under Article 21 of the Indian Constitution. The supreme court and High court in various cases has held that the right of reproductive autonomy is part of our fundamental rights guaranteed under Article 21 of Indian constitution which clearly mention about Right to Life. The Supreme Court in famous case of *Suchita Srivastava v. Chandigarh Administration* said that right to reproductive choices is a part of Right to life guaranteed under Article 21 of our Indian Constitution. In the case of *B K Parasarathi v State of Andhra Pradesh*, the High Court held that reproduction is a very personal decision on the side of the man/ women. Justice K.S Puttaswamy reiterated that the reproductive choice of the women is an integral part of right to life given under Article 21 of our Indian Constitution.

In *Navtej Singh Johar v. Union of India* and *Joseph Shine v Union of India* the courts establish a constitutional requirement to strike down laws that reflect discriminatory stereotypes or hampers reproductive choices. Despite these landmark judgements, the surrogacy act 2021 excludes certain classes of women from the benefits of surrogacy. As per the provisions of the Act, unmarried women, a single man, couple in live in relationship, couples belonging to LGBTQI community are excluded from availing the benefits of surrogacy. The act is violative of Article 21, Article 14 and Article 15. These fundamental rights guarantee a life with dignity of an individual. These are Right to life which includes right to livelihood, right to get basic necessities of life, equality ensures there's no discrimination among citizen and every is treated equally in a similar situation.

VI. INTERNATIONAL LEGAL POSITION OF SURROGACY AND ROLE OF JUDICIARY

(A) Legal position of surrogacy in countries other than india⁴³

The practice of surrogacy gained support in the mid- 1970, and there witnessed a reduction in

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https://www.researchgate.net/publication/377411084_SURROGACY_IN_INDIA_A_CRITICAL_ANALYSIS

the number of children who were adopted. Surrogacy is a conflicting issue in many countries. Surrogacy often welcomes a number of issues like matter of payment and the rights of the individual involved. The perception regarding surrogacy different across the globe.

UNITED STATES OF AMERICA

On march 1990, united states did not have any rules regarding surrogacy. The issue of surrogacy arose with Baby M case in 1980s. The Baby M decision resulted in development of laws regarding surrogacy in the United States.

1. Baby M Case Study

Facts Of The Case

In 1985, William Stern and his wife Elizabeth who are considered the intending couple in the instant case entered into a surrogacy contract. The contract was between the intending couple and with Mary Beth Whitehead as Stern's wife couldn't conceive a baby due to infertility. Mr. Stern sperm was inseminated through medical process. As per the contract Mrs. Whitehead would immediately give away the child to the Sterns and transfer her maternal rights to the intending parents. Mrs. Whitehead husband, Richard was also a party to the contract. Mr stern agreed to pay \$10,000 to the surrogate mother after the child's birth. He also agreed to pay

\$ 7,500 to the Infertility Centre of New York, and the medical clinic was responsible arranging for an contract between parties to the process of surrogacy. The contract was based on good faith.

However, Mrs. Whitehead from the moment of birth realised she couldn't part with the baby. She handed the baby on March 30 but later the same evening she felt sad and there were concern that she might commit suicide. The intending parents got scared and turned the baby to the surrogate mother with an condition to return the baby back to the intending couple. It became apparent that surrogate mother didn't wanted to return the child and the intending couple having no resort filed an complaint for enforcement of the surrogacy contract. The order was passed in favour of Mr. Stern.⁴⁴

Issue –

Whether surrogacy contract enforceable in nature, and if not then who should be given the custody or duties of the child ?

Judgement –

44

The court held that surrogacy contract is unenforceable in nature, but the surrogates who are the intending couple would retain custody based upon the best interest and future of the child. The case inspired legislatures around United States to pass laws regarding surrogacy.

UNITED KINGDOM

The Surrogacy Arrangements Act 1985 and Human Fertilisation and Embryology Act 1990. The Surrogacy Arrangements Act 1985 makes it a criminal offence for commercial surrogacy and prohibits advertising.

OTHER COUNTRIES

In Iceland, law does ban surrogacy. According to them, the surrogate's legal husband is the child's father not the intending couple.

In Belgium, altruistic Surrogacy is legal but commercial surrogacy is ban.

In Hongkong, Commercial surrogacy is a criminal offence under the Human Reproductive Technology Ordinance 2000.

In Hungary, Serbia and Pakistan surrogacy is illegal.

(B) Role Of Judiciary ⁴⁵

The Indian society places a strong cultural emphasis on marriage, family and parenthood. A couple who is unable to bear a baby suffers from aspects like social expectations, family dynamic, gender roles and emotional impacts. Childlessness may be viewed as deviating from societal norms. Women who is unable to conceive a baby goes through stigma as motherhood is often seen as a central aspect of femininity. In India a lot of importance is given to have a pure blood lineage thus surrogacy is preferred over adoption by the couples. Surrogacy is an arrangement wherein a surrogate undertakes pregnancy for another couple who are unable to produce their own child. The entire process of surrogacy is dependent on various factors like a couple wanting a child, a surrogate who is physically fit to reproduce, medical facilities, and person donating eggs and embryos. It is essential to regulate interplay between these factors and give it legal sanctity to void issues like exploitation of the surrogates. India does not have an effective legislation to deal with the issue of surrogacy.

○ Baby Manji Yamada V. Union Of India ⁴⁶

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https://www.researchgate.net/publication/377411084_SURROGACY_IN_INDIA_A_CRITICAL_ANALYSIS

⁴⁶ <https://www.legallore.info/post/commercial-surrogacy-the-baby-manji-yamada-case#:~:text=The%20case%20of%20%22Baby%20Manji,the%20legality%20of%20such%20arrangements.>

The apex court for the first time gave decision related to surrogacy in this case. This case has a huge significance in developing of the Surrogacy Regulations in India.

Facts of the case –

A couple named Dr Yuki Yamada and Dr Ikuyumi Yamada flew from Japan to India looking out for surrogates in November 2007. They were availing medical services from a fertility clinic in Anand, Gujrat. The surrogacy contract between the surrogate mother and intended parents was prepared by the clinic itself. The embryo was created from the sperms of the genetic father Ikuyumi Yamada and egg donor was a unknown women. Gestational surrogacy was opted as the method of surrogacy. As a resulted of which the embryo was implanted inside womb of the surrogate mother. In June 2008, the intended couple got divorced. There were contentions that the intended mother was not ready to accept the baby thinking the baby is not related to her genetically. Dr Ikuyumi Yamada who wanted to have the custody of the child was ordered to return back due to expiration of his visa. Finally on 25th July 2008 Baby Manji was born in an hospital in Gujrat. The Grandmother of the baby came to India to look after the child. Soon after her birth the baby was shifted from Anand, Gujrat to Arya Hospital, Jaipur due to the riots. In August 2008, Baby Manji was issued an birth certificate with name of the genetic father in it by Anand municipality. A writ petition was filed before High court of Rajasthan, by an NGO challenging the legality of surrogacy. Another petition under Article 32 of Indian constitution was filed by the grandmother in the Supreme Court challenging the order passed by the Rajasthan High Court.

Issue before the court

1. Legality of Surrogacy in India
2. Need for enactment of surrogacy regulations in India
3. Locus Standi of the NGO to file Habeas corpus petition before the High Court has challenged

Judgement

The Supreme Court held that the commission for the Protection of Child Right Act 2005 was formed to protect the rights of the children and if any decision is to be made, it should be made by the commission itself. Further directed that any persons having issue need to refer to the commission itself.

The judgement was criticised on the ground of it being short and hurried. The whole responsibility of legality of surrogacy and its regulation was assigned to the commission. It

missed a chance of setting an important precedent on such a contemporary and unregulated issue. Court failed to answer the question of locus standi of respondent to file the petition. The bench did not use the opportunity to discuss the legality of surrogacy contracts. Instead of taking stand on the issue, it directed the parties to seek redressal from the commission.

○ **Jan Balaz V. Anand Municipality** ⁴⁷

This is a significant case in the development of Surrogacy Regulations in India.

Facts of the case-

The petitioner in this instant case is German national. The petitioner and his wife desired to have a baby but due to certain biological issues they couldn't reproduce. The petition then opted for surrogacy as a solution. The wife of the man in the instant case was not in a condition to produce ova (eggs) as a result it was not possible to conceive a child even through surrogacy. Later an anonymous women volunteered to donate ova, which was fertilised with the sperms of the petitioner and the fertilised embryo was implanted in the uterus of the surrogate mother. A surrogacy contract was prepared between the intended parents and women who gives birth for the intending couple. The surrogate mother agreed to give the baby to the intended couple immediately after birth and she will have no responsibility regarding the baby.

Issues before the court –

When an surrogacy contract takes place between an Indian surrogate and foreign couple will the baby born out of the surrogacy contract will get citizenship by birth?

Judgement –

It was decided by the Gujrat High Court that the child born in India will get citizenship by birth. The twin babies whose biological father was a foreign national and surrogate was an Indian citizen would be regarded as citizen of India.

○ **H Siddaraju & Anr V. Umion Of India & Other** ⁴⁸

The Karnataka High Court in the instant case has developed triple test theory to permit a couple to opt for surrogacy.

The triple test theory is mentioned below-

○ **GENETIC TEST**

The court has asked the husband to undergo genetic test in order to test the condition of the

⁴⁷ <https://www.casemine.com/judgement/in/56b48efa607dba348fff6a16>

⁴⁸

https://www.researchgate.net/publication/377411084_SURROGACY_IN_INDIA_A_CRITICAL_ANALYSIS

sperm. This is basically done to ensure that the child born out of surrogacy is healthy.

- PHYSICAL TEST

This is to ensure that the couple is able to manage the child.

- ECONOMIC TEST

The intending couple must be financially fit.

(C) Examples Of Surrogacy In Recent Era ⁴⁹

Becoming a parent is like entering into a new chapter of life. Parenthood often comes along with a lot of responsibilities and expectations. With advanced technology and growth in medical science, people can become parent without carrying the child for 9 months. Many celebrities have opted for surrogacy in recent times.

- PRIYANKA CHOPRA - NICK JONAS

The Global Icon and her husband opted for surrogacy instead of traditional surrogacy. The couple announced their pregnancy through an Instagram post. As per report, the couple opted for surrogacy due to medical complications.

- PREITY ZINTA - GENE GOODENOUGH

The dimple queen of Bollywood too opted for surrogacy. The actress has twin babies namely Jai and Gia. They shared their pregnancy on Instagram on November, 2021.

- SHILPA SHETTY – RAJ KUNDRA

The couple welcomed their second child, Samisha through surrogacy in 2020. In an interview, Shilpa Shetty said her son always wanted an sibling but due to medical complications couple they couldn't opt for traditional way of pregnancy. The couple experienced a number of miscarriages as the actresses suffered from an autoimmune disease called APLA, leaving her with no option other than surrogacy.

- SUNNY LEONE – DANIEL WABER

Sunny Leone and her husband welcomed their twin baby namely, Noah and Asher, via surrogacy in 2018.

- SHAHRUKH KHAN – GAURI KHAN

The power couple welcomed their third child, Abram, through surrogacy.

⁴⁹ <https://economictimes.indiatimes.com/news/web-stories/bollywood-celebs-who-became-parents-through-surrogacy/slideshow/89058238.cms>

- **KARAN JOHAR**

Karan Johar is a single parent in the list of celebrities who opted for surrogacy. He became a father of two twins, Yash and Roohi through surrogacy in 2017.

- **AAMIR KHAN – KIRAN RAO**

The couple opted for surrogacy in 2011. The couple was struggling to have a baby since a long time.

Apart from these famous celebrities, surrogacy has been common amongst normal people as well. People are getting inspired from such celebrities and various Bollywood movies like Mimi.

- **Centre For Bio- Ethical Reform V/S Union Of India (2011)**

In the above case, the question whether commercial surrogacy is legal or not was been challenged by the petitioner.

The Supreme Court upheld the legality of surrogacy but suggested proper measures must be taken by the government to regulate it and prevent exploitation of the surrogate mother.

- **Lior Avi Ben David & Anr V/S Union Of India & Ors (2014)**

The case is also known as Baby Manorama Case. It revolves around citizenship of a baby born to an Indian Surrogate for an German Couple. Due to absence of genetic link to German couple, the Indian Government refused to grant the baby a passport and citizenship. Thus, the case highlights for provisions relating to commercial surrogacy.

- **Sreeja V/S State Of Kerela (2016)**

The Kerela High Court ruled that a single women should not be allowed to avail the procedure of surrogacy as it would violate the Indian laws on adoption and guardianship.

- **Sabu Mathew George V/S Union Of India (2017)**

The Surrogacy (Regulation) Bill 2016, was challenged by the petitioner on the ground that it violative of Right to Equality (Article 14) and right to reproductive autonomy. The Supreme Court upheld the constitutionality of the stating that it is the right of the government to regulate surrogacy to prevent exploitation and ensure rights of the child born out of surrogacy.

Suchita Srivastava v. Chandigarh Administration

The Supreme Court in Suchita Srivastava v. Chandigarh Administration held that right to reproductive choices is a part of Right to life and personal liberty under Article 21 of the Indian Constitution.

○ Navtej Singh Johar V. Union Of India

In Navtej Singh Johar v. Union of India and Joseph Shine v Union of India the courts establish a constitutional requirement to strike down laws that reflect discriminatory stereotypes or hampers reproductive choices. Despite these landmark judgements, the surrogacy act 2021 excludes certain classes of women from the benefits of surrogacy. As per the provisions of the Act, unmarried women, a single man, couple in live in relationship, couples belonging to LGBTQI community are excluded from availing the benefits of surrogacy. The act is violative of Article 21, Article 14 and Article 15. These fundamental rights guarantee a life with dignity of an individual. These are Right to life which includes right to livelihood, right to get basic necessities of life, equality ensures there's no discrimination among citizen and every is treated equally in a similar situation.

VII. CONCLUSION AND SUGGESTIONS

(A) Conclusion ⁵⁰

Surrogacy can be understood as a procedure of assisted reproduction. The word “surrogate” originates from the Latin word “Surrogatus” which means “Substitution” or “to act in the place of”. Surrogacy is an arrangement wherein women undertake pregnancy for another couple who are unable to produce their own child due to any biological reasons. ‘Surrogate’ is the women who gives birth to the child whereas ‘intended couple’ is couple for whom the child is being conceived by the surrogate. The development of In Vitro fertilization has revolutionized the landscape of fertility solutions, giving individual a chance of having biological children. The concept of surrogacy has been mentioned in ancient texts like Bible and Hindu Puranas. Due to low cost, less legislation control and availability of surrogates, India became a centre for international surrogacy. The exploitation of poor surrogates and moral arguments against renting of womb could be seen as a boom in surrogacy.

The Indian society places a strong cultural emphasis on marriage, family and parenthood. A couple who is unable to bear a baby suffers from aspects like social expectations, family dynamic, gender roles and emotional impacts. Childlessness may be viewed as deviating from societal norms. Women who is unable to conceive a baby goes through stigma as motherhood is often seen as a central aspect of femininity. In India a lot of importance is given to have a pure blood lineage thus surrogacy is preferred over adoption by the couples. Surrogacy is an arrangement wherein a surrogate undertakes pregnancy for another couple who are unable to

⁵⁰ <https://ijcrt.org/papers/IJCRT2308435.pdf>

produce their own child. The entire process of surrogacy is dependent on various factors like a couple wanting a child, a surrogate who is physically fit to reproduce, medical facilities, and person donating eggs and embryos. It is essential to regulate interplay between these factors and give it legal sanctity to void issues like exploitation of the surrogates.

The field of surrogacy has been unregulated since a long time. Thus Surrogacy Regulation Act 2021 is often viewed as a significant step towards regulating the surrogacy Industry in India. The Surrogacy Regulation Act 2021 has addressed various concerns associated with commercial surrogacy and legal framework regarding the parties to the surrogacy contract. The act has provided the much-needed legal protection to the surrogate mothers and children born out of surrogacy contract. Implementation of the Surrogacy Regulation Act 2021, has led to a more transparent and accountable surrogacy industry in India. The Act provides for the following. It completely bans commercial surrogacy. Commercial Surrogacy is usually done for economic benefit. In such a surrogacy, the surrogate mother is remunerated or paid by the intended couple to carry out a pregnancy. The Act puts an complete ban on commercial surrogacy. Prohibiting commercial surrogacy can lead to illegal arrangement between surrogate and intended couple if they are willing. It can further lead to the surrogacy sector being undergrounded allowing it to survive illegally. As per the Act, surrogate women should be a close relative of the intending couple which often lead to mild persuasion of her becoming a surrogate. Thus, banning commercial surrogacy is no solution. With the ban of commercial surrogacy, the rights- based approach is replaced with the needs-based approach. Surrogacy can be opted by married couples only. Though the Act is a progressive step towards regulating the surrogacy procedures in India it suffers several flaws like lack of inclusiveness, prohibition of commercial surrogacy, exclusion of non- binary gender and vagueness of the Act. Section 15 of the Act provides for the establishment of the national assisted reproductive technology and surrogacy registry. Section 16 provides that bodies registered under Section 15 of the Act shall be Registered under Section 9 of the Assisted Reproductive Technology Act as well. According to the provision of the Act, intended couple can opt for surrogacy on the condition that they do not have any living children. Though the disabled children are treated as a exception under the act. The UN Convention on the Rights of persons with disability states that children with disability should have same access to all human rights and fundamental freedom as an ordinary child and shall not be discriminated against on any basis. Thus, the act discriminates disabled children by dividing disable and non-disabled child for the purpose of undertaking surrogacy. Thus the Act provides for protection of children born out of surrogacy. The act has been criticized on major grounds like the exclusions provided in the Act and its

prohibition on commercial surrogacy. It act provides surrogacy services only to married couples and various categories of people like single, LGBTQ, cannot avail surrogacy under the provision of the Act. The Surrogacy (Regulation) Act 2021 has been well appreciated for meeting the needs of the unregulated Surrogacy industry. The act aimed to regulate the unregulated surrogacy industry. The act was enacted with the intention of regulating the practice of surrogacy in India and combating against exploitation of women and surrogates, still some of its provision re considered to be discriminatory against women. Though the Act is a progressive step towards regulating the surrogacy procedures in India it suffers several flaws like lack of inclusiveness, prohibition of commercial surrogacy, exclusion of non- binary gender and vagueness of the Act. Commercial Surrogacy is usually done for economic benefit. In such a surrogacy, the surrogate mother is remunerated or paid by the intended couple to carry out a pregnancy. The Act puts an complete ban on commercial surrogacy. Prohibiting commercial surrogacy can lead to illegal arrangement between surrogate and intended couple if they are willing. It can further lead to the surrogacy sector being undergrounded allowing it to survive illegally. As per the Act, surrogate women should be a close relative of the intending couple which often lead to mild persuasion of her becoming a surrogate. Thus, banning commercial surrogacy is no solution. With the ban of commercial surrogacy, the rights- based approach is replaced with the needs-based approach.

The Act is undoubtedly a great step for regulating the surrogacy industry but the act has certain defeats and is ambiguous in certain areas. Reproductive Rights refers to the women's ability to determine whether or not to have children, and whether or not to keep or end an intended pregnancy. it also includes family planning and contraception technique she chooses. Reproductive rights include rights like access to contraception, right to legal and safe abortion, rights against harmful practices such as coerced childbearing. The supreme court and High court in various cases has held that the right of reproductive autonomy is a part of right to life and personal liberty mentioned under Article 21 of the Indian Constitution. The Supreme Court in *Suchita Srivastava v. Chandigarh Administration* held that right to reproductive choices is a part of Right to life under Article 21 of our Constitution. In the case of *B K Parasarathi v State of Andhra Pradesh*, the High Court said that reproduction is a very personal decision on the side of the man/ women. Justice K.S Puttaswamy reiterated that the reproductive choice of the women is a part of right to life. Does such processes make the surrogate mother lose her autonomy and personality. Article 21 that is right to life also includes right to procreate. Thus, restricting reproductive alternatives is against Article 14 and 21 of Indian Constitution.

(B) SUGGESTIONS⁵¹

The field of surrogacy has been unregulated since a long time. Thus Surrogacy Regulation Act, 2021 is often viewed as a important step towards regulation and control of the surrogacy Industry in India. The Surrogacy Regulation Act 2021 has addressed various concerns associated with commercial surrogacy and legal framework regarding the parties to the surrogacy contract. The act has provided the much-needed legal protection to the surrogate mothers and children born out of surrogacy contract. Implementation of the Surrogacy Regulation Act 2021, has increased the transparency by making registration compulsory for the clinics and other provisions for the safety of surrogate and child born out of the contract. The act helped the corrupt surrogacy market to become more accountable. The act has been criticized on major grounds like the exclusions provided in the Act and its prohibition on commercial surrogacy. It act provides surrogacy services only to married couples and various categories of people like single, LGBTQ, cannot avail surrogacy under the provision of the Act.

Various suggestions to improve the regulation of the surrogacy industry in India are-

1. EXCLUSION PROVIDED IN THE ACT –

The policymakers must address the concerns of single individuals, same sex couples and live in partners. Single, Foreigners, homosexual couple, couple in live in relationship, and unmarried couple are all prohibited from opting surrogacy under the provisions of the Act. The exclusions are unreasonable and is violative of Article 14 of Indian Constitution. The exclusion fails to pass the reasonable classification test, especially when individual of any marital status is allowed to adopt and child born out of a live-in relationship has been given status of legitimate child. Its high time that policymakers should expand the access of surrogacy services for these groups. But regulation is the surrogacy industry is necessary for the process to be carried out safely and ethically.

2. AMOUNT PAID TO THE SURROGATE

As per the provisions of the Act, commercial surrogacy is prohibited, but the surrogate mother is provided with compensation for the services they have offered. But the present act, Surrogacy Regulation Act 2021 provides no information regarding the compensation provided to the surrogate mother. It neither provides for a specific compensation that needs to be paid nor the system through which such amount can be calculated. Providing clear guidelines

⁵¹ <https://aklegal.in/impact-of-the-new-surrogacy-regulation-act-2021-on-surrogacy-arrangements-in-india/>.

ensures that the surrogate mother is adequately compensation.

3. ISSUE OF INTERNATIONAL SURROGACY-

The provision of the Act aims to regulate Surrogacy arrangements that takes place within India. There's no provision to regulate international surrogacy arrangements.

India was once considered as the hub of surrogacy, thus it is necessary to address the issue of international surrogacy.

4. ISSUE OF SURROGACY TOURISM

Due to restrictions provided in the Act, there has been an decline in number of surrogacy arrangements taking place in India. Surrogacy tourism basically means intending parents travelling to other countries to access surrogacy services.

Surrogacy can be understood as complex web of legal, ethical, social and technological consideration. The issues relating to surrogacy shall be addressed in such a way that morals are not compromised and simultaneously technological advancement can be used. Allowing just altruistic model of surrogacy in which surrogates carry the child without any monetary benefits just out of love seems unrealistic. Instead of prohibiting commercial surrogacy and exclusions for single and LGBTQ there shall be proper legislation to deal with the issue.

VIII. REFERENCES

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