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SURROGACY IN INDIA WITH SPECIAL REFERENCE TO SURROGACY REGULATION ACT, 2021¹

Authored By- Kamaljit Kaur

ABSTRACT

Nature has given the beautiful capacity to procreate a life within a woman and every woman has a right to hold such an experience of motherhood. Unfortunately due to some problems in a body due to which the body cannot procure a child. The desire of being and experiencing the motherhood behaviour they go for alternative solution like surrogacy, IVF and among them surrogacy is the most suitable from all of alternative solutions. ART that is Assisted Reproductive Technology it is the procedure which involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and placing them to the woman's body or donating them to another woman. The dictionary meaning of the word "surrogate" is "deputy or substitute", it means when a woman is not able to bear the child due to weak womb then they heir another woman who give birth to their child and that woman is known as surrogate mother. Surrogacy is the most socially complicated and controversial ART. Surrogacy is changing the traditional role of parenthood. If the mother undertakes surrogacy for her daughter / mother-in-law takes for daughter in law rocking the relationship between the child and its parents, it is socially questionable. Marital status is not a pre-condition for getting child through surrogacy. There is a religious and doctrinal objection to the very concept of surrogacy through ART. In India, the Hindu religion is silent on surrogacy and it does not say anything in allowing or disallowing surrogacy or ART procedures, because some of the incidents are traced in the history of India. Therefore this Research Paper will focus on the rights of surrogate mother and children born out of surrogacy. And surrogacy related socio-legal problems. This paper will also try to give the suggestions that can be done to remove the evil practices in regard to surrogacy in the society.

Keywords – Surrogacy, Surrogate Mother, Child, Surrogacy Regulation Act, 2021

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INTRODUCTION

Nature has given the beautiful capacity to procreate a life within a woman and every woman has a right to hold such experience of motherhood. Unfortunately, due to some problems in the body, sometimes a woman is not able to bear a child. The desire of being a mother and experiencing motherhood encourages women to go for alternative solutions like surrogacy, IVF, etc. The Surrogacy is not a new concept in India infact its instances can be traced back to the mythological surrogate mothers such as Yashoda and Gandhari.² The primitive urge to have a biological child of one's own DNA with the help of the commercial aspects provided by the ART clinics have resulted in the 5000 million dollar reproductive tourism industry in India.³ In today's world surrogacy is of prime importance for individuals and therefore it is very important to regulate the laws related to surrogacy. The Surrogacy Regulation Act, 2021 is incorporated with all the recommendations made by the selected committee of Rajya Sabha and it came into effect from 25th January 2022.

The Act seeks to act as an ethical, moral and social which is going to protect the reproductive rights of a surrogate mother including the child born through surrogacy. It will also helps in establishing the regulatory mechanism for the proper functioning of surrogacy. The Regulation Act, 2021 aims to curb the unethical practices of commercial surrogacy including the exploitation of surrogate mothers. The Act is all set to cater with the controversies that were surrounded on different aspects of surrogacy. Thusly the Regulation Act, 2021 makes a departure from the bills of 2008 and 2014 which allowed commercial surrogacy.

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MEANING AND DEFINITION

The word "Surrogate" means "Substitute". It means when a woman is not able to bear the child due to weak womb then she hires another woman who gives birth to her child and that woman is known as surrogate mother.⁴

According to Black's Law Dictionary, Surrogacy is defined as "the process of carrying and delivering a child for another person".⁵

² Anu Aneja and Shubhangi Vaidya, *Embodying Motherhood: Perspective of Contemporary India*, 140 (SAGE Publications India Pvt. Ltd., 1st edn, 2016)

³ Anil Malhotra and Ranjit Malhotra, *Surrogacy in India – A Law in the Making*, 52 (Universal Law Publishing, 2th edn., 2016)

⁴ Sanjay Inu, *Surrogacy in India*, available at <http://www.legalservicesindia.com/article/222/surrogacy-in-india.html> (visited on 20-03-2022)

⁵ Garner, Bryan A., *Black's Law Dictionary*, pg 4529, 8th edn., 2009

According to Article 16(1) of Universal Declaration of Human Rights, 1948, - “men and women of foliage and without any limitation in regard to race, nationality or religion have the right to marry and to found a family. In Medical Sciences it means using of a substitute mother in place of natural mother”.

According to the Artificial Reproductive Technique (ART) Guidelines, “Surrogacy is an arrangement in which a women agrees to a pregnancy achieved through assisted reproductive technology in which neither of the gametes belong to her or her husband with the intention of carrying it to the term and handling over the child to the person or persons for whom she is acting as a surrogate and a surrogate mother is a women who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents”.⁶

In layman words, “Surrogacy can be defined as an act of having a child with the help of another person through medical facilities”.

In the landmark case of **Baby Manji Yamada v Union of India**⁷, the Supreme Court bench consisting of Justice Arijit Pasayat, Mukundakam has described the kinds of surrogacy which includes Gestational Surrogacy, Traditional Surrogacy, Commercial Surrogacy and Altruistic Surrogacy.

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Surrogacy Laws In India

Surrogacy is prevalent in our country since ancient times. It can be traced back to mythological surrogate mothers such as Yashoda and Gandgari. India now has become the popular destination for infertile couples from across the world because of the low cost, non-restricted laws and availability of surrogate mothers. India is considered as the surrogacy capital of the world due to the advancements in IVF technology and the growth of IVF clinics across the country.⁸ With India rapidly emerging as a popular destination for childless couples across the world, commercial surrogacy raises a host of moral, ethical and legal issues.

⁶ *The Assisted Reproductive Technologies (Regulation) Bill – 2010*, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4 available at <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2020> (visited on 21-03-2022)

⁷ *In Baby Manji Yamada v Union of India*, 2008 13 SCC 518

⁸ Chinmoy Pradip Sharma, *Surrogacy Laws in India – Past Experiences and Emerging Facets* (Bar & Bench, 23 November 2019) available at <https://www.barandbench.com/column/surrogacy-laws-in-india-past-experiences-and-emerging-facets> (visited on 20-03-2022)

In 1986 surrogacy experience its first legal hurdle in the case of **Baby Manji Yamada v Union of India**⁹, when upon giving birth to the child a traditional surrogate mother decides to keep the child with her. After two years the intended parents retained the custody of the child. This landmark case raises many legal questions on the practice of surrogacy.

In 2002, India has legalized the commercial surrogacy. This legislation helps in the emergence of an industry which attracted international attention to India's reproductive market. India has proved to be one of the most popular destinations for surrogacy preferred internationally. This gives a way for woman exploitation, abandonment of children born out of surrogacy and unethical practices. The financially weaker and cheap reproductive labour made low-income Indian woman the perfect sellers of their reproductive capabilities.

To curb such exploitation, the Indian Council for Medical Research laid down the guidelines in 2005 which enshrines the contractual agreement between commissioning parents, fertility clinics and the surrogate mother as well as clauses of consent, privacy and support.

In 2012 the Union Home Ministry come proposed certain amendments to 2002 law to ban the foreign nationals especially the same sex couples and single parents in India.

The 228th report of the Law Commission of India has recommended the ban on commercial surrogacy and allowing altruistic surrogacy by stating the concerns over the rapidly use of surrogacy by foreigners and lack of proper legal framework resulting in the exploitation of surrogate mother.

Again in 2016 Surrogacy Regulation Bill, 2016 proposed in the parliament. The bill contained the provisions of establishing national and state level surrogacy boards. Also only heterosexual Indian couples legally married for the period of five years could avail surrogacy with the precondition of proven fertility which has to be approved by the recognized medical practitioner. But unfortunately the bill lapse in the Lok Sabha due to some flaws in the laws.

Then again the Surrogacy Regulation Bill, 2019 reintroduced and was passed by the Lok Sabha which was referred to the selected committee of Rajya Sabha.

Recently the latest bill is incorporated with all the recommendations made by the selected committee of Rajya Sabha and the Union Cabinet has approved it as the Surrogacy Regulation Bill, 2020. And the Surrogacy Regulation Bill, 2020 has now become an act and came into effect from 25th January 2022 as Surrogacy Regulation Act, 2021.

⁹ *Baby Manji Yamada v Union of India*, 3 February 1988

The Act states the complete ban on commercial surrogacy and allows only altruistic surrogacy. It also bans on the overseas, foreigners, unmarried couples, single parents, live-in partners and gay couples from commissioning surrogacy.

Surrogacy Regulation Act, 2021

The Selected Committee which was appointed consisting of 23 members of Rajya Sabha look into the Surrogacy Regulation Bill, 2019. This Selected Committee itself visited certain surrogacy clinics and interacts with the surrogate mothers, intending couples, doctors. The Committee has discussed the various issues like Altruistic or Compensated Surrogacy, period of insurance coverage, waiting period to establish infertility, the close relative to be a surrogate mother etc. The Act is the reformed version of the draft legislation which was passed by the Lok Sabha in August 2019.¹⁰ This 2021 Regulation Act has included all the recommendations made by the selected Rajya Sabha Committee and is aimed at banning Commercial Surrogacy and allowing Altruistic Surrogacy.

Salient Features Of The Surrogacy Regulation Act, 2021

1. It states that any willing woman can be a surrogate mother and proposes that widows and divorced women can also get benefit from its provisions besides infertile Indian couples.
2. The Act has also proposes to regulate surrogacy by establishing National Surrogacy Board at the Central level and State Surrogacy Board at the State level and Union Territories respectively.
3. The Act also ensures the insurance coverage for the Surrogate Mother to 36 months from 16 months.
4. It removed the definition of infertility given in section 2 (p), inability to have a child after 5 years of unprotected sex.
5. Ethical Surrogacy to Indian married couples, Indian-origin married couples and Indian single woman (only widow or divorcee between the age of 35 years and 45 years) will be allowed on attainment of certain conditions.

¹⁰ *The Surrogacy (Regulation) Bill, 2020 (Draft)*, available at <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2020> (visited on 20-03-2022)

6. Instead of close relative now any willing woman shall act as a surrogate mother. The willing woman who wants to be a surrogate mother shall be taken to an appropriate authority by the intending couple.

Provisions Of The Surrogacy Regulation Act, 2021

Section 2 of the Surrogacy Regulation Act, 2021 states the definition clause. The terms have been defined like Altruistic Surrogacy, Commercial Surrogacy, and Intending Woman. Compensatory Surrogacy has been omitted from the bill.

Section 3 of the Surrogacy Regulation Act, 2021 states the “Parentage and Abortion of Surrogate Child”. It states that a child born through surrogacy will be deemed to be the biological child of the intending couple. The Act has also strengthened the provisions related to the abortion of surrogate child. It requires the consent of the surrogate mother and the authorization of appropriate authority.

Section 4- 10 of the Surrogacy Regulation Act, 2021 are divided in to 4 parts. The Part I deal with the permissible purposes of the surrogacy. The Part II deals with the eligibility criteria for the intending couples which includes “Certificate of Essentiality and Certificate of Eligibility” issued by an appropriate authority. As this will helps in strengthening the regulatory mechanism which will facilitate the contractual relations in a smooth manner.

The Act also covers the insurance of the surrogate mother which has extended from 16 months to 36 months. The Part III deals with the eligibility criteria of the surrogate mother.

The Act has widened the scope by allowing any married and willing woman between the age of 25 to 35 years having a child of her own can act as a surrogate mother.

The Part IV deals with the “Rights of the Surrogate Child”. It states that a surrogate child will be treated equally as a natural child and shall be entitled to get all the rights and privileges under law.

Section 11- 16 of the Surrogacy Regulation Act, 2021 states the process of the “Registration of the Surrogacy Clinics”.

Section 17- 34 of the Surrogacy Regulation Act, 2021 deals with the National and State Surrogacy Board consist of members from the Parliament, State Legislative Assemblies, Executives and Ten Expert Members appointed by the Central and the State Government. The boards have to give their advice to the Central Government on policy formulation in relation to the surrogacy, monitor and

review the implementation of the act or rules and regulations laying down the code of conduct of surrogacy clinics, supervise the functioning of the State board.

Section 35- 37 of the Surrogacy Regulation Act, 2021 states the functioning of the “Appropriate Authority”. To put a stricter regulatory mechanism the Act empowers the appropriate authority to issue, suspend or cancel the registration of the surrogacy clinics and investigate the matters related to unethical practices.

Section 38- 45 of the Surrogacy Regulation Act, 2021 includes the “Penal Provisions”. The penalty upto 10 years imprisonment and fine upto 10 lakhs in case of violation of the provisions mentioned in the bill.

Section 46- 54 of the Surrogacy Regulation Act, 2021 deals with the “Miscellaneous Provisions”

Constitutional Validity Of The Surrogacy Regulation Act,

2021

Surrogacy has become a trend in the country for more than 12 years. The Surrogacy Regulation Act, 2021 has been made by amending the earlier versions of bill. The main purpose of this Surrogacy Regulation Act, 2021 is to affirm the effective regulation of Surrogacy and moreover it prohibits the Commercial Surrogacy and allows the Ethical Surrogacy. The Act was made in order to curb the exploitation of surrogate mothers and children born through surrogacy. No doubt the Act was made with the intention of preventing the exploitation but some of the clauses of this Act are not in consonance with the constitutional provisions. As this Act fails to pass the “Golden Triangle”¹¹ test laid down by the Supreme Court which checks the constitutional validity of the laws made by the legislation.

Article 21 Guarantees Right To Life And Personal Liberty

¹²Article 21 of the Indian Constitution states the principles of Right to life, Personal liberty and Livelihood. It also states that No person shall be deprived of his life or personal liberty except according to the procedures established by the law. “Article 21 of the Indian Constitution is a sacred and cherished right to life and personal liberty it has an important role to play in every person’s life”.

¹¹ *Minerva Mills Ltd. & Ors, v Union of India & Ors.*, AIR 1980 SC 1789

¹² Article 21, *the Constitution of India*, 1950

In the Consumer Education and Research Centre and Ors v Union of India¹³, the Supreme Court Bench consist of Justice Ramaswamy K held that “Right to Life” under Article 21 of the Indian Constitution has a much wider meaning and it also includes the “Right to Livelihood”.

In the case of **Olga Tellis v Bombay Municipal Corporation**¹⁴, the Supreme Court Bench consist of Justice Y Chandrachud has again recognized the this principle of “Right to Livelihood”.

But this principle of “Right to Livelihood” is violated in the Surrogacy Regulation Act, 2021 as it imposes a complete ban on Commercial surrogacy. It creates a hindrance for the poor women who want to achieve some kind of financial independence or stability for themselves and their families by giving consent to be surrogates instead of monetary compensation.

In Devika Biswas v Union of India¹⁵, the Hon’ble Supreme Court Bench consisting of Justice Madan B, Lokur J held that Right to Reproduction is an important element covered under Right to Life under Article 21 of the Indian Constitution. Reproductive Rights of a woman includes the right to carry a baby to term, give birth and raise the children. It also includes Right to Privacy, dignity and integrity.

Further in the case of **R. Rajagopal v State of Tamil Nadu**¹⁶, the Supreme Court bench consisting of Justice Jeevan Reddy, B.P has stated the law in the following words, “any right to privacy must encompass and protect the personal intimacies of the home, family, marriage, motherhood, procreation”.

However denying the rights of surrogacy to people belonging to LGBTQ community, single persons, older couples and restricting surrogacy only to heterosexual couples, widows and divorcee women of a certain age violates the fundamental “Right to Life” guaranteed under Article 21 of the Indian Constitution.

According to the Indian Constitution, State cannot intervene in the prerogative of any person whether the child born through natural process or through surrogacy. In **B.K. Parthasarthi v Government of Andhra Pradesh**¹⁷, the Andhra Pradesh High Court held that state’s intervention on procreation would amounts to direct encroachment on one’s Right to Privacy”.

In **K.S. Puttaswamy v Union of India**¹⁸, the Supreme Court bench consisting of 9 judges held that the privacy of a person extends to his/her personal autonomy relating to mind, body and making

¹³ *Consumer Education and Research centre and Ors, v Union of India*, 1985 42 SCC 3

¹⁴ *Olga Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180

¹⁵ *Devika Biswas v Union of India*, 2016 10 SCC 726

¹⁶ *R. Rajagopal v State of Tamil Nadu*, AIR 1995 SC 264

¹⁷ *B.K. Parthasarthi v Government of Andhra Pradesh*, 1999 5 ALT 715

¹⁸ *K.S. Puttuswamy & Anr, v Union of India & Ors*, 2017 10 SCC 1

choices.

As the right to decide about reproduction is very personal and private decision and it must be respected and done according to the women's choice but in this Act state interfere in such decision making process. If a woman wants to help a childless couple through surrogacy then the state should not interfere with this humanitarian act rather such act should be appreciated. The Government has fails to mention the proper reasoning that why unmarried and childless women would not become surrogates. "A woman alone should be entitled to decide upon the right to control her body, fertility and motherhood choices"¹⁹. Therefore we can say that this Act has partially aligned with the Right to Livelihood, Right to Privacy and Right to Reproductive autonomy under Article 21 of the Indian Constitution.

Article 19(1) (G) Guarantees Right To Trade And Profession

The Surrogacy Regulation Act, 2021 violates the Article 19(1) (g) which guarantees the Freedom of Trade and Profession²⁰. Article 19(6) enlist certain grounds on which the said right can be reasonably restricted. One of which include restrictions in the interest of the general public. This Act presents itself in the interest of the general public but it fails.

In Chintaman Rao v State of MP²¹, the hon'ble court has correctly limited the word "Restrictions" under Article 19(6) and stating that the phrase "Reasonable Restrictions" imposed the limitation on a person in the enjoyment of the right which should not be an arbitrary or of excessive nature beyond what is required in the interest of the public. It has also stated that there must be a reasonable balance between the freedom granted and the restriction imposed.

By criminalizing the commercial surrogacy completely nullify the individual's freedoms and also fails to strike the balance between individual freedom and social control.

In the case of **State of Maharashtra v Indian Hotel and Restaurant Association**²², held that a total ban on bar dancing is unconstitutional as the ban stating that the "cure is worse than the disease" given that contrary to its purpose resulting in many woman being forced into prostitution which will violate right to carry one's profession or occupation guaranteed under Article 19(1) (g) of the Indian Constitution. Similarly a blanket ban on Commercial Surrogacy and allowing only

¹⁹ Arijeet Ghosh & Nitika Khaitan, *A Womb of One's Own: Privacy and Reproductive Rights*, available at <https://www.epw.in/engage/article/womb-ones-won-privacy-and-reproductive-rights> (visited on 22-03-2022)

²⁰ Supra Note, 17 at 11

²¹ *Chinatman Rao v State of MP*, AIR 1651 SC 118

²² *State of Maharashtra v Indian Hotel and Restaurants Association*, AIR 2013 SC 2582

Altruistic Surrogacy would go against the Article 19(1) (g) of the Indian Constitution.

Article 14 Guarantees The Right To Equality

Article 14 of the Indian Constitution guarantees every citizen “Equality before Law and Equal Protection of Laws²³. It forbids class legislation but permits reasonable classification. The Hon’ble Supreme Court laid down the two tests which must be satisfied to pass the test of reasonable classification i.e. intelligible differentia and rational nexus²⁴.

In **E.P. Royappa v State of Tamil Nadu**²⁵, it was held that equality is a dynamic concept and its dimensions cannot be cribbed, cabined and confined with the traditional doctrine limits. When the classification is not done on the basis of intelligible differentia and has no nexus with the object sought to be achieved then that differentiation is deemed to be invalid.

Recently the Hon’ble Supreme Court struck down Section 377 of the Indian Penal Code, decriminalized the consensual sexual relations between two adults of any sexuality²⁶. However the Surrogacy Regulation Act, 2021 goes against this judgement. It denies the rights of homosexual couples to commission a child and refuse to acknowledge these couples as legitimate.

Transgenders have also been recognized as a third gender by the Supreme Court of India in the case of **National Legal Services authority v Union of India**²⁷. But the Act is silent on providing equal rights to the third gender. The grounds mentioned in the Act are very narrow for commissioning surrogacy and it would disentitle transgenders from commissioning surrogacy.

Allowing Altruistic Surrogacy to Indian citizens who are married, widowed or divorced and the exclusion of others bears no nexus whatsoever the object of the Act is. It reveals that in the Act the classification is based on marriage and such classification is not reasonable under Article 14 of the Indian Constitution.

The Act aims to prevent the misuse of surrogacy and to provide shield to women from exploitation. But this could prove harmful as domestic surrogacy will offer more opportunities for corruption and exploitation thus pushing the surrogacy into unethical hands.

²³ Article 14, *the Constitution of India*, 1950

²⁴ *Vikram Cement v Union of India*, AIR 2007 SC 7; *Ashutosh Gupta v State of Rajasthan*, 2002 4 CC 34

²⁵ *E.P. Royappa v State of Tamil Nadu*, AIR 1974 SCC 555

²⁶ Shubhangi Priya, *Evaluating Surrogacy Legislation in India*, Social & Political Research Foundation, available at <https://www.sprf.in/post/2019/08/02/evaluating-surrogacy-legislation-in-india> (visited on 22-03-2022)

²⁷ *National Legal Services Authority v Union of India*, AIR 2014 SC 1863

Socio Legal Challenges To Surrogacy

1. Surrogacy is mostly complicated and controversial ART. It is not a simple arrangement. The situation can be very much stressful, overwhelming and intense.
2. Patience and Perseverance is much needed, both the Surrogate mother and the infertile couple should engage a legal counsel before entering into and signing any contract related to surrogacy.
3. Disclosure of the surrogate relationship should also be limited in order to avoid the unwarranted scrutiny.
4. There is a religious and doctrinal objection to the surrogacy through ART. In India the Hindu religion is silent on surrogacy and has not define the surrogacy or said anything in regard to allowing or disallowing surrogacy or ART procedures.
5. Surrogacy is changing the traditional role of parenthood. Marital status is not a pre-condition for getting a child through surrogacy.
6. The Child's right to know the parenthood is affected.
7. Surrogate mother may develop an emotional attachment with child and may refuse to handover the child.
8. The possibility of engaging surrogacy in developing countries are increasing day by day in view of the availability of the surrogate mothers at low cost.
9. Surrogacy degrades the pregnancy to a service and a baby to a product.
10. Islam is against the procreation of child through surrogacy (No historical incidents are traced).

CONCLUSION & SUGGESTIONS

At last it is concluded that the advancement in the technology has brought a great change in human's life. At the same time it has also brought problems which were otherwise unheard of. The concept of motherhood has also broadened and has been changed to include genetic mother, surrogate mother, biological mother and social mother. In the past two decades there has been a striking change in the field of reproductive technologies. The techniques like donor insemination, in vitro fertilization and embryo transfer methods have completely transform the reproductive environment. These solutions have become a blessing for the infertile couples. Surrogacy has become the need of the society. It is the last hope for the infertile couples who are unable to have their biological child. Surrogacy is a very crucial sector in India which is estimated to grow by leaps and bounds in the subsequent years.

Following are the Suggestions:-

1. The Act allows only altruistic surrogacy and puts complete ban on commercial surrogacy. It seems as this step has not been properly taken into consideration by the government. In many cases commercial surrogacy acts as an attractive alternative for the parties. Because it will provide financial stability to the poor surrogate mother and it also includes foreign currency investment.
2. The main purpose of law is to protect the liberty of individuals as well as act as an instrument of a distributor of positive entitlements. In order to fulfill its obligations law must keep pace with the emerging technologies so that the benefits out of it could be availed by those in need.
3. There is no such provision mentioned in the Act to reimburse "surrogate" about the loss of wages during pregnancy if she would have been working during the time of pregnancy. Therefore proper compensation to the surrogate should be regulated by the government so that no scope for bargaining left behind.
4. The altruistic surrogacy promotes forced labour. Therefore in order to cope up with this problem the concept of "compensatory surrogacy" must be put in place. This would make good for the losses suffered by the surrogate mother in terms of health, wages, sufferings and death. So the term "altruistic surrogacy" should be replaced with the word "compensatory surrogacy".