

ISSN: 2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

## **EDITORIAL TEAM**

### **EDITORS**

#### **Megha Middha**



*Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society*

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



## Dr. Namita Jain



**Head & Associate Professor**

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*

## Mrs.S.Kalpana

**Assistant professor of Law**

*Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*



## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **ANALYSIS OF THE RIGHT TO SILENT UNBORN CHILD**

Authored By - SHAASHWAT SHARMA

IPL02046

Term I, Section A

Indian Institute Of Management Rohtak, Haryana

## **TABLE OF CONTENTS**

Certificate of Originality.....	
Introduction.....	
Review of literature.....	
Rationale .....	
Statement of problem.....	
Objectives of report.....	
Hypothesis.....	
Sources of the study .....	
Nature of the Study .....	
Contribution of the study .....	
Limitation of the study.....	
Chapter – 1 Landscapes of surrogacy in India.....	
Chapter – 2 Legal Perspective of Surrogacy.....	
Chapter – 3 Analysis of the Surrogacy(Regulation) Bill, 2016.....	
Conclusions.....	
Suggestions .....	
Bibliography .....	

## CERTIFICATE OF ORIGINALITY

This serves as confirmation that Mr. Shaashwat Sharma, Roll No. IPL02046, a student in Section A of the Integrated Program in Law at the Indian Institute of Management Rohtak, has completed the research for the project work titled “ **Surrogacy: Analysis of the right to silent unborn child**”

### INTRODUCTION

Every woman treasures the mothering experience since nature has endowed her with the lovely ability to generate a child. Unfortunately, some women cannot have children because of specific medical issues. They look for other options in their quest for motherhood, and surrogacy emerges as the most practical one. A woman voluntarily accepts to become pregnant and give birth to another person as part of the surrogacy process. Surrogacy has established itself as a reliable way for infertile families to have a baby. According to ICMR's guidelines in 2005, surrogacy is a method of supporting people who are unable to conceive naturally. Surrogacy's rapid expansion in recent years has garnered a lot of attention and raised various issues related to human rights, children's rights, and surrogate mothers' rights. One of the most prevalent medical disorders, infertility affects 15% of all couples globally, according to estimates. The two main factors that influence women's decisions to become surrogate moms are poverty and human kindness, both of which might lead to physical and emotional health issues for the surrogate mother. Many nations are turning to surrogacy as a booming business to increase income and get through tough times. For human rights law and policy, surrogacy raises challenging issues. This study offers a critical review of how surrogacy is now governed by Indian domestic and international law, namely the UN Convention on the Rights of the Child. Unregulated surrogacy currently results in egregious human rights violations. The majority of surrogate mothers in India receive payment in nine-month instalments on average. They frequently receive no payment if they are unable to get pregnant, and if they miscarry, they occasionally lose some of their fee. Surrogacy appears to have been used historically by a variety of cultural groups, but it has only recently grown to be a major social problem that raises ethical, social, legal, and psychological issues. Legal lapses occasionally permit extortion and other criminals to target surrogate mothers as victims in addition to moral and ethical disagreements around surrogacy.

## REVIEW OF LITERATURE

**1. Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts, McLachlan, Hugh V.; Swales, J. Kim, Law and Contemporary Problems, 2009 (Page No. 17-18)**

Despite the loud and widespread resistance to them, commercial surrogate-motherhood contracts should be legally binding. Here, we will make the case that they neither involve the commodification of children nor run counter to their best interests. Elizabeth Anderson, possibly the most vociferous, eloquent, and well-known opponent of what is usually referred to as "contract pregnancy" or commercial surrogate motherhood, criticised earlier defences of the practice, prompting us to respond with our argument.

**2. Wombs in Labor: Transnational Commercial Surrogacy in India. Amrita Pande. Columbia University Press. 2014.**

The author summarises the interviews with "52 surrogates, their husbands and in-laws, twelve intending parents, three doctors, three surrogacy brokers, three hostel matrons, and several nurses" and adds participant observation to the study, which is an intimate analysis of the lives sustained by this trade. Amrita Pande explores the complexity of its power, the absurdity of a booming reproductive industry in a historically anti-natal state, and the use of religion to support surrogacy. She also provides her opinion on the recently put out surrogacy law in India. She argues for enhanced surrogate rights protection by imagining a global fair-trade surrogacy model.

**3. Social, ethical, medical & legal aspects of surrogacy: an Indian scenario, R. S. Sharma Indian J Med Res. 2014 Nov; 140(Suppl 1): S13-S16.**

The author analyses the Assisted Reproductive Technology (Regulation) Bill, 2008, using the social, ethical, and legal context of India to support the claim that it calls for the creation of a National Board, State Boards, and National Registry of Assisted Reproductive Technology (ART) in India for the accreditation and supervision of ART clinics and ART Banks, ensuring that the services provided by these are morally upstanding.

**4. Surrogacy and women's right to health in India: Issues and perspective, Deep Inder & Nandini Sharma (2013) Volume: 57 Issue: 2 Page: 65-70**

The authors conclude that to safeguard and direct couples looking into such possibilities, the government must seriously consider passing legislation regulating surrogacy in India. Couples

will undoubtedly be misled and the surrogates will be taken advantage of if there is no impenetrable legal framework.

**5. Mukherjee S, Legal and Ethical issues of Commercial surrogacy: An Overview Human Reproduction Journal, Vol.22, No.2 pp. 260–276, 2016**

Reaches the conclusion that the ability to procreate is a basic human right. Surrogacy is the only method for overcoming social and biological disability. It enables us to have kids on our own regardless of marital status. He also comes to the conclusion that legalising gestational surrogacy will protect the rights of both the surrogate mother and the desperate parents who commission the procedure.

## **RATIONALE**

This study is an attempt to understand the various aspects of surrogacy through diverse perspectives relevant to Indian society. This study is very relevant in the present scenario because of the unregulated surrogacy in India; many women have to suffer mental and physical problems arising from surrogacy. The mother and child's fundamental human rights are violated when surrogacy is not regulated.

## **STATEMENT OF PROBLEM**

It might be difficult to determine surrogacy in India, if the women are acting in accordance with their legal rights or are being forced to do so by their in-laws or spouse to meet their monetary needs. Surrogacy detractors contend that because of its resemblance to prostitution, the practice should be prohibited for moral reasons. Surrogacy raises a number of legal, moral, social, and ethical difficulties and endangers the mother's and the child's human rights. The researcher has made an effort to evaluate the surrogacy problem that exists in India in this study.

## **OBJECTIVES OF THE REPORT**

The objectives of this project are:

1. To study surrogacy in the Indian scenario.
2. To analyze the legal and ethical aspects of surrogacy.
3. To study and analyze the Surrogacy (Regulation) Bill, 2016

## **HYPOTHESIS**

Owing to advances in medical research, changes in legislation, and changes in social norms, surrogacy may now be seen as a more acceptable way to build a family for many infertile and inadvertently childless people, as some women cannot have their own children due to specific physiological concerns. Accepting surrogacy in India will inevitably have negative consequences, including forced and commercial surrogacy. According to research, unregulated surrogacy in India, which is only motivated by financial gain, will result in several crimes and violations of human rights.

## **SOURCES OF THE STUDY**

Both primary and secondary data sources have been cited in the current study. Case law, statutes, rules, and bills are all part of the fundamental source. The Internet, books, journals, and articles are examples of secondary sources.

## **NATURE OF THE STUDY**

The nature of this project's study is doctrinal and primarily descriptive and analytical. This project is based mainly on primary data sources such as cases and reports of committees. However, secondary & electronic sources of data have been referred to a great extent. Books, case laws, journals & other references, as guided by the faculty of Jurisprudence, are primarily used to complete this project.

## **CONTRIBUTION OF THE STUDY**

This research will examine the various legal implementation strategies for surrogacy as well as the numerous surrogacy-related topics. Initiating a conversation on surrogacy, a modern medical advancement, is the goal of this endeavor. Additionally, it will cover the key elements of surrogacy, such as human rights, commercial surrogacy, forced surrogacy, etc.

## **LIMITATION OF THE STUDY**

Due to a paucity of time and resources, the author has briefly dealt with surrogacy in the Indian scenario and analyzed the Surrogacy (Regulation) bill 2016. Furthermore, analyse the various aspect of Surrogacy from the Indian perspective.

# CHAPTER-1

## LANDSCAPES OF SURROGACY IN INDIA

The 21st century has given infertile couples worldwide a whole new range of options because of growing globalization and advancements in artificial reproduction procedures. Developed and developing nations are framing different surrogacy laws. Though there are many opportunities, there are also many ethical and legal restrictions. Despite the abundance of choices, there are a lot of moral and legal limitations. Although surrogacy appears to have been used historically by a variety of ethnic groups, it has only lately become a serious societal issue, offering moral, social, legal, and psychological conundrums.<sup>1</sup> A greater number of infertile and inadvertently childless people may now view surrogacy as a more acceptable way to establish a family as a consequence of advances in medical technology, changes in legislation, and changes in societal standards. The current scenario, in which there is no international regulation of surrogacy agreements and just a web of conflicting national laws that reduce protections for both the surrogate and the commissioning spouse and create loopholes, has increased fears of exploitation and invasion of autonomy.

**According to American Law Report<sup>2</sup>**, a surrogacy agreement includes the clauses below:

“..A contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights after the child’s birth.”<sup>3</sup> **Additionally, the Black’s Law Dictionary<sup>4</sup>** categorises Traditional and gestational surrogacy as the two types of surrogacy. Depending on whether the surrogate earned payment for carrying the kid or giving it up, the situation may be either commercial or charitable.

---

<sup>1</sup> Eric Blyth, Children's Welfare, Surrogacy and Social Work, The British Journal of Social Work, Vol. 23, No. 3, pp.259-275 (1993)

<sup>2</sup> In Re Baby M, (1988) N.J.77 A.L.R.4th 1.

<sup>3</sup> Smita Chandra, Surrogacy & India, (2017, Aug 16), <http://ssrn.com/abstract=1762401>

<sup>4</sup> Jyoti Bhakare, Surrogacy- A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspectives, 2 INDIAN JOURNAL OF LAW & JUSTICE 80 (2011) [hereinafter Surrogacy-A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspective]

According to the **Indian Council for Medical Research**<sup>5</sup>, "Assistive Reproductive Technology (ART)" is defined as: "For the purpose of these guidelines, ART would be taken to encompass all techniques that attempt to obtain a pregnancy by manipulating the sperm or/and oocyte outside the body, and transferring the gamete or embryo into the uterus."

**The Supreme Court of India**<sup>6</sup> has defined surrogacy as: "a reproduction technique in which a woman consents to conceive, carry to term, and give birth to a kid whom she will not nurture but instead donate to a contracting party."

Among other medically assisted reproductive techniques, surrogacy is promoted as a cure for infertility. It's frequently portrayed as a kind of an altruistic gesture aimed to give couples who cannot naturally produce kids the joy of parenting.<sup>7</sup> In surrogate-mother agreements, a lady agrees to bear a child for a couple and deliver the child to them.<sup>8</sup>

## Outsourcing pregnancy: India's surrogacy clinics

India is quickly becoming a market leader for international surrogacy and a popular fertility tourism destination. Because they are relatively inexpensive, Indian surrogates are becoming more and more common among fertile couples in industrialised countries. In India, the idea of surrogacy is not new. In India, the business of "Womb for rent" or commercial surrogacy is expanding. In India, a setting where English is spoken and less expensive services draw in willing customers. The business opportunities range from opportunity to exploitation for surrogacy in future. From lifting rural Indian women out of poverty to the dystopian nightmare of creating a national baby farm, can be a nightmare.<sup>9</sup>

The first successful delivery achieved through gestational surrogacy was witnessed in 1984. This first occurred in India ten years later, in Chennai. The number of births through surrogacy has increased over the last two years, with estimates for 2008 ranging from 200 to 350. (Lal, 2008). As mentioned

---

<sup>5</sup> Jyoti Bhaskar, Surrogacy- A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspectives, 2 INDIAN JOURNAL OF LAW & JUSTICE 80 (2011) [hereinafter Surrogacy-A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspective]

<sup>6</sup> Baby Manji, supra note 2.

<sup>7</sup> <http://icolf.org/surrogate-motherhood-a-violation-of-human-rights/>

<sup>8</sup> Surrogacy: For Love but Not for Money? Author(s): Sharyn Roach Anleu Source: Gender and Society, Vol. 6, No. 1(Mar., 1992), pp. 30-48 Published by: Sage Publications, Inc.

<sup>9</sup> Jadva V, Murray C, Lycett E, MacCallum F, Golombok S. Surrogacy: The experiences of surrogate mothers. HumReprod 2003;18:2196-204.

earlier, various connected variables have led to India quickly becoming the most popular fertility tourism destination (Smerdon, 2008). India has the potential to grow its medical tourism industry, according to research issued in 2002 by the Confederation of Indian Industry (CII). The Indian Finance Minister at the time, who desired India to become a global health destination, took note of this. He proposed measures to facilitate the medical tourism business, such as infrastructure improvements, to encourage its development (Chinai & Goswami, 2007).<sup>10</sup>

In India, commercial surrogacy has been legal since 2002. Surrogacy is quite affordable and well-regulated legally in India. The Supreme Court of India ruled in Manji's case (Japanese Baby) in 2008 that commercial surrogacy is permissible in India with a request to the Legislature to enact a sufficient Surrogacy Law. Currently, the Assisted Reproductive Technique (ART) Clinics guidelines and the parties' Surrogacy Contract serve as the primary governing documents. In India, commercial surrogacy has been legal since 2002. Surrogacy is quite affordable and well-regulated legally in India. The Supreme Court of India ruled in Manji's case (Japanese Baby) in 2008 that commercial surrogacy is permissible in India with a request to the Legislature to enact a sufficient Surrogacy Law.<sup>11</sup> India's law commission examines the necessity for laws to control clinics that utilise assisted reproductive technologies as well as the rights and obligations of people who engage in surrogacy in its 228th Report. The law commission's principal findings are as follows: Contracts between the parties will continue to control surrogacy arrangements, but they should not be done for profit. Both a surrogate mother's and a donor's right to privacy should be safeguarded. Surrogacy that is gender-specific ought to be outlawed. Only the Medical Termination of Pregnancy Act of 1971 should apply to abortion cases.<sup>12</sup>

---

<sup>10</sup> <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>

<sup>11</sup> [http://surrogacylawsindia.com/legality.php?id=%207&menu\\_id=71](http://surrogacylawsindia.com/legality.php?id=%207&menu_id=71)

<sup>12</sup> [http://www.nt.gov.au/justice/policycoord/documents/polcoord\\_surrogacy\\_consultationpaper.pdf.pdf#search=%22Surrogacy%22](http://www.nt.gov.au/justice/policycoord/documents/polcoord_surrogacy_consultationpaper.pdf.pdf#search=%22Surrogacy%22)

## CHAPTER – 2

### LEGAL PERSPECTIVE OF SURROGACY

To put it mildly, the legal framework around surrogacy is convoluted. Surrogacy legislation, which is distinct from other artificial reproduction techniques, is still a relatively new phenomenon. The nations that have taken a position in favour of or against the various surrogacy arrangements have done so on their own terms, with different results that serve as examples. Due to a clash of national laws, the taboo around payments, threats of exploitation, as well as court cases and parental right disputes after birth, inter-country surrogacy contracts are now unsustainable.<sup>13</sup>

Baby selling, the practice of parents giving up their children in exchange for money, is now illegal globally. In addition, several nations have laws that restrict or forbid paying intermediaries in connection with the transfer of children (Field, 1990). Surrogacy has a legal foundation and operates on the principles of necessity and desire. Surrogacy is a “desire” of individuals who are otherwise unable to reproduce or conceive a kid of their own, as well as a “necessity” for individuals who lack the financial means to support themselves without the use of accessible resources. Most countries restrict marketing women who are interested in renting wombs and condemn the surrogacy business in order to protect women from exploitation. There is an odd circumstance in India where surrogacy is not effectively controlled. This is due to the fact that it is unknown what the legal implications of a surrogacy transaction are, making it neither lawful nor specifically against the law.<sup>14</sup>

#### **Does the right to privacy include the liberty to make reproductive decisions?**

The Indian Constitution's Article 21 has been amended to include "the freedom to have reproductive choices." In **R. Rajagopal v. State of Tamil Nadu**, the Supreme Court<sup>15</sup>, held that The "right to privacy" is part of the "right to life." A individual has the right to protect his or her privacy as well as other matters like their family, marriage, reproduction, motherhood,

---

<sup>13</sup> Re X and Y (Foreign Surrogacy) [2008], EWHC 3030 (Fam)., Re L (a minor) [2010], EWHC 3146 (Fam) , CW v NT[201 1] EWHC 33 (Fam) In the matter of N (a child) [2007] EWCA Civ 1053. , Re IJ (a child) [201 1] EWHC 921

(Fam). ,Re X (children) [201 1] EWHC 3147 (Fam)

<sup>14</sup> Jan Balaz vs. Anand Municipality, AIR 2010 Guj 21 at 14.

<sup>15</sup> R. Rajgopal v. State of Tamil Nadu, (1994) 6 SCC 632.

childbearing, and education. The Andhra Pradesh High Court in **B.K. Parthasarathy v. Government of Andhra Pradesh**<sup>16</sup> highlighted the importance of reproductive rights. It supported a person's "right to reproductive autonomy," which is a component of his right to privacy. The state's involvement with or limits on procreation amount to a direct invasion of one's privacy when the idea of privacy is extended to concerns of procreation. Hence, even though the Supreme Court in **Javed v. State of Haryana**<sup>17</sup> It refrained from saying that the right to procreate is not a basic human right and supported the "two living children" rule to prevent someone from running in a Panchayati raj election.<sup>18</sup>

## Law Relating to Surrogate Mothering Abroad

In many foreign countries, the matter is regulated by legislation enacted recently. Surrogacy (including commercial, fee-for-service surrogacy) is permitted in nearly half of the states in the United States. Surrogacy laws have been adopted in several states. Some other states recognize surrogacy though not expressly enacted. Few states have declared surrogacy contracts void and unenforceable.<sup>19</sup> Two outstanding Florida State laws explicitly govern surrogacy. According to this law, a childless couple intending to engage in such a situation must execute a contract with a surrogate authorising her to carry the intended father's biological child. The surrogate consents to the engaged couple obtaining custody of and adopting the kid when the baby is born<sup>20</sup>. In situations when there is no parental genetic connection between the surrogate and the kid, the intended parents are regarded as the child's legal parents in California and Ohio. Whether the surrogate has a genetic connection to the child's parents or not, Arkansas acknowledges the intended parents as the child's legal parents.<sup>21</sup>

---

<sup>16</sup> B.K. Parthasarathi v. Government of Andhra Pradesh, AIR 2000 AP 156.

<sup>17</sup> Javed v. State of Haryana, (2003) 8 SCC 369.

<sup>18</sup> Law Commission of India, 228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a Surrogacy, (Aug, 2009), <http://lawcommissionofindia.nic.in/reports/report228.pdf> at 1.9. [hereinafter 228th Report of the Law Commission of India]

<sup>19</sup> 'Legal overview of surrogacy laws by States'. The American Surrogacy center. Inc. (TASC), Marietta, G.A.

<sup>20</sup> 4. Surrogacy Here In Florida: Source; [www.legalsuri-ogacv.com/surrogacv-law.html](http://www.legalsuri-ogacv.com/surrogacv-law.html).

<sup>21</sup> "Surrogate Motherhood": Current Status Source (Available at - [www.geneletter.org/archives/surrogatestatus.html](http://www.geneletter.org/archives/surrogatestatus.html).)

## CHAPTER – 3

### ANALYSIS OF THE SURROGACY (REGULATION) BILL, 2016

The Surrogacy (Regulation) Bill 2016 was presented by the government to restrict commercial surrogacy in order to protect women and the rights of children born via surrogacy. If the Bill is approved, it will offer a comprehensive set of guidelines for surrogacy and result in more vigorous enforcement. **Points of the Surrogacy (Regulation) Bill 2016 are listed below.**<sup>22</sup>

- a. The Bill states that the only Indian couples who can demonstrate that at least one of them has fertility-related issues are those who have been married for at least five years.
- b. Only blood relatives who are also close relatives will be permitted to provide altruistic surrogacy to qualified couples.
- c. The new Bill completely outlaws the practise of commercial surrogacy.
- d. Additionally, it prohibits gays, cohabiting couples, and single people from choosing altruistic surrogacy. Foreigners—including Overseas Indians—can no longer request surrogacy.
- e. Only for philanthropic causes may a woman act as a surrogate mother; under no circumstances may she receive compensation, however money may be offered to cover medical costs.
- f. Both a central and state regulatory board for surrogacy will be established.
- g. The law will apply to India, except for the states of Jammu and Kashmir.
- h. Although surrogate mothers cannot be paid, surrogacy facilities are permitted to charge for the services provided during the procedure.
- i. Violations of commercial surrogacy, abandoning the surrogate child, abusing the surrogate mother, and importing or selling human embryos have all been designated as crimes that are each subject to a minimum ten-year prison sentence and a fine of up to Rs 10 lakh.
- j. The surrogate child will have the same rights as a biological child.

The Bill, if passed, will have a significant impact on the parties involved in surrogacy<sup>23</sup>.

- Whether a male or a girl, a surrogate kid cannot be abandoned by parents.
  - All of a biological child's rights, including the right to property, are also granted to a surrogate child.
  - The clinic or the parent couple cannot mistreat a surrogate mother.
- The basis for banning commercial surrogacy is considerable, as it is to prevent the exploitation of poor women.

<sup>22</sup> <http://indiatoday.intoday.in/education/story/surrogacy-bill/1/749353.html>

## SUGGESTIONS

Despite the fact that surrogacy is promoted as a way for a close friend or family member to support a loved one who is unable to carry a baby to term in their desire for a child, the vast majority of surrogacy agreements are made between strangers. Even though the surrogate is the child's biological mother, the majority of surrogates and contracting couples perceive the surrogate pregnancy as a business transaction.<sup>24</sup>

One of the most challenging transactions the legal system or the legal community has to deal with is surrogacy. To comprehend why this transaction is so complicated, researchers in this field work very hard. Three factors can be mentioned in this context:

1. The many concerns and parties involved in a surrogacy transaction.
2. The lack or unclear application of the legislation governing surrogacy.
3. Some restrictions in the current system make it challenging for the parties to enforce surrogacy agreements.

(i) This, however, also emphasises the requirement for a thorough psychiatric assessment of the surrogate moms to lower the likelihood that surrogates may participate into agreements only for empowerment-related reasons. Psychological disengagement on the side of gestational mothers is implied by surrogacy. Both the mother and the kid are impacted by detachment. The relationships formed between the mother and the unborn child throughout pregnancy and their significance for the development of the kid are being highlighted in an increasing number of medical and psychological studies.

(ii) Kimbrell (1988) asserts that the majority of women who act as surrogates do so for financial gain. Because of their precarious financial situations, the surrogate mothers frequently are not aware of their legal rights. Horsburgh (1993) asserts that after signing contracts promising to carry out clients' pregnancies, surrogates are subjected to physical exploitation. To make matters worse, the surrogates

---

<sup>23</sup> Salient points of Surrogacy Bill, by IANS, <http://economictimes.indiatimes.com/news/politics-and-nation/salient-points-of-surrogacy-bill/articleshow/53847817.cms>

<sup>24</sup> Jon Bernardes, Responsibilities in Studying Postmodern Families, 14 J. FAM. ISSUES 35 (1993)

frequently receive only a small portion of the initial payment if the pregnancy is in fact aborted. The contracts may also hold the mother liable for risks including diseases brought on by pregnancy, decease, and postpartum issues.

(iii) In 1991, France outlawed surrogacy, stating that "The human body is not leased out, is not hired, and is not sold." Many people in India, on the other hand, hold a different opinion and think that commercial surrogacy has advantages because it generates rewards for both parties that have the power to alter lives. Even while it is accepted that some women face emotional difficulties when giving the baby to others or as a result of their surroundings, these sentiments seem to subside in the weeks after the birth.<sup>25</sup>

(iv) The commercialization of surrogacy has led to significant concern in the contemporary era. With time, the objective of surrogacy has changed from that to help infertile couples to gain happiness to earning a livelihood through this. Various countries have banned the practice of surrogacy, which is too expensive for others; with this, India becomes a very suitable option and provides a better option for foreign nations to come here in search of surrogate mothers, so India should also frame the law to regulate surrogacy.

## CONCLUSION

The 21st century has been recognized as the Bio-Tech century. As a developing country and the western world, India is actively engaged with Genetic Engineering, which has posed many challenges, including Medico-legal problems. Surrogacy leads to posing various challenges related to legal and Ethical issues. Any legal system or statute that creates laws for surrogacy must take into account a number of aspects and difficulties. These considerations cover social, ethical, moral, and natural dimensions. Some cases of human trafficking and exploitation, such as surrogacy, have received less worldwide attention than others. Surrogacy results in the exploitation of the surrogate mother and the offspring and a parenting arrangement that is not in the child's best interests. We are discovering that news reports regarding shady surrogacy rings are just the tip of the iceberg. When one is ready to look further, one might realise that even surrogacy arrangements that appear consensual and driven by humanitarian intentions violate the mother's and child's basic dignity.

---

<sup>25</sup> Jadvā V, Murray C, Lycett E, MacCallum F, Golombok S. Surrogacy: The experiences of surrogate mothers. *Hum Reprod* 2003;18:2196-204 Available at - <https://www.ncbi.nlm.nih.gov/pubmed/14507844>

Surrogacy essentially transforms a woman's body into a "bread oven," a resource to be utilised and taken care of while the "contract" is active and to be abandoned once it has been completed. Surrogacy has already been drastically curtailed or outlawed in a few of nations. Surrogacy in India is only a contractual relationship between the partners, and any such contract must be carefully drafted to ensure that it doesn't go against the law or ethical principles. The only country that only worships female goddesses in beautifully designed temples is undoubtedly India. But India's history of reproductive politics reveals a profusion of rhetoric and regulations that deter impoverished women from having children..<sup>26</sup> Endeavour to bring about legislation on surrogate mothering will be a boon to childless couples, not only solving their problems but also the legal issues arising out of Surrogate mothering.



---

<sup>26</sup> Ankit Sourav Sahoo , Legality of Commercialisation of Surrogacy in India and Social Implications, Global Journal for Research Analysis Volume-4, Issue-7, July-2015 Available at - [https://www.worldwidejournals.com/global-journal-for-research-analysis- GJRA/file.php?val=July\\_2015\\_1436858446\\_53.pdf](https://www.worldwidejournals.com/global-journal-for-research-analysis- GJRA/file.php?val=July_2015_1436858446_53.pdf)

## BIBLIOGRAPHY

### Journals and Articles

1. Ankit Sourav Sahoo, Legality of Commercialisation of Surrogacy in India and Social Implications, Global Journal for Research Analysis Volume-4, Issue-7, July 2015
2. B.K. Parthasarathy v. Government of Andhra Pradesh, AIR 2000 AP 156.
3. Baby Manji Yamada v. Union of India & Anr (2008) 13 SCC 518
4. Buchanan, Jim, Baby M & Surrogate Motherhood: A Resource Guide, 1987. 17p.
5. Vance Biblios
6. Eric Blyth, Children's Welfare, Surrogacy, and Social Work, The British Journal of Social Work, Vol. 23, No. 3, pp. 259-275 (JUNE 1993)
7. Feminisms: Some reflections and Concerns in Relation to Globalization of Reproductive Technologies, 13 EUR.J Women's stud.23, 30 (2006)
8. Field, Martha A, Surrogate Motherhood, 1988. 224p. Harvard University Press
9. Inder D, Sharma N, Anu, Kumar P, Surrogacy and women's right to health in India:
10. Issues and perspective. Indian Journal of Public Health 2013; 57:65-70
11. Jan Balaz vs. Anand Municipality, AIR 2010 Guj 21 at 14.
12. Javed v. State of Haryana, (2003) 8 SCC 369.
13. Jon Bernardes, Responsibilities in Studying Postmodern Families, 14 J. FAM. ISSUES 35 (1993)
14. Jyoti Bhaskar, Surrogacy- A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspectives, 2 INDIAN JOURNAL OF LAW & JUSTICE 80 (2011)
15. Jyotsna Agnihotri Gupta, towards Transnational
16. Kevin T. The ethics of surrogacy contracts and Nebraska's surrogacy law. Vol. 41.
17. Creighton Law Review; 2008. p. 185-206
18. Law Commission of India, 228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a Surrogacy, (Aug 2009),
19. N.R. Raghavachary's Hindu Law, Principles and Precepts, 8th Edition. 1987, Page 93
20. R. Rajgopal v. State of Tamil Nadu, (1994) 6 SCC 632.
21. Radin, Margaret Jane, 1988, —Market Inalienability, Harvard Law Review, 100: 1849–1937

## Internet Sources

1. [www.heinonline.org](http://www.heinonline.org)
2. [www.jstor.org](http://www.jstor.org)
3. <http://www.ijph.in>
4. <http://www.wcd.nic.in>
5. [www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov)
6. [www.academia.org](http://www.academia.org)
  - [1] Eric Blyth, Children's Welfare, Surrogacy, and Social Work, The British Journal of Social Work, Vol. 23, No. 3, pp. 259-275 (JUNE 1993)
  - [2] Eric Blyth, Children's Welfare, Surrogacy and Social Work, The British Journal of Social Work, Vol. 23, No. 3, pp. 259-275 (1993)
  - [3] In Re Baby M, (1988) N.J. 77 A.L.R 4th 1.
  - [4] Smita Chandra, Surrogacy & India, (2017, Aug 16), <http://ssrn.com/abstract=1762401>
  - [5] Jyoti Bhaskar, Surrogacy- A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspectives, 2 INDIAN JOURNAL OF LAW & JUSTICE 80 (2011) [hereinafter Surrogacy-A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspective]
  - [6] Indian Council Med. Res. National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, (2017, Aug 16), [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm). [hereinafter National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India.
  - [7] Baby Manji, supra note 2.
  - [8] <http://icolf.org/surrogate-motherhood-a-violation-of-human-rights/>
  - [9] Surrogacy: For Love but Not for Money? Author(s): Sharyn Roach Anleu Source: Gender and Society, Vol. 6, No. 1 (Mar. 1992), pp. 30-48 Published by: Sage Publications, Inc.
  - [10] Java V, Murray C, Lycett E, MacCallum F, Golombok S. Surrogacy: The experiences of surrogate mothers. Hum Reprod 2003;18:2196-204.
  - [11] <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>
  - [12] [http://surrogacylawsindia.com/legality.php?id=%207andmenu\\_id=71](http://surrogacylawsindia.com/legality.php?id=%207andmenu_id=71)
  - [13] [http://www.nt.gov.au/justice/policycoord/documents/polcoord\\_surrogacy\\_consultationpaper.pdf](http://www.nt.gov.au/justice/policycoord/documents/polcoord_surrogacy_consultationpaper.pdf)

[.pdf#search=%22Surrogacy%22.](#)

[14] Re X and Y (Foreign Surrogacy) [2008], EWHC 3030 (Fam)., Re L (a minor) [2010], EWHC 3146 (Fam), CW v NT [201 1] EWHC 33 (Fam) In the matter of N (a child) [2007] EWCA Civ 1053.

, Re JJ (a child) [201 1] EWHC 921 (Fam). , Re X (children) [201 1] EWHC 3147 (Fam)

[15] Jan Balaz vs. Anand Municipality, AIR 2010 Guj 21 at 14.

[16] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632

[17] B.K. Parthasarathy v. Government of Andhra Pradesh, AIR 2000 AP 156.

[18] Javed v. State of Haryana, (2003) 8 SCC 369.

[19] Law Commission of India, 228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a Surrogacy, (Aug

2009), <http://lawcommissionofindia.nic.in/reports/report228.pdf> at 1.9. [hereinafter 228th Report of the Law Commission of India]

[20] Legal overview of surrogacy laws by States'. The American Surrogacy center. Inc. (TASC), Marietta, G.A.

[21] 4. Surrogacy Here In Florida: Source; [www.legalsuri-ogacv.com/surrogacy-law.html](http://www.legalsuri-ogacv.com/surrogacy-law.html).

[22] "Surrogate Motherhood": Current Status Source (Available at [www.geneletter.org/archives/surrogatestatus.html](http://www.geneletter.org/archives/surrogatestatus.html).)

[23] <http://indiatoday.intoday.in/education/story/surrogacy-bill/1/749353.html>

[24] Salient points of Surrogacy Bill, by IANS, <http://economictimes.indiatimes.com/news/politics-and-nation/salient-points-of-surrogacy-bill/articleshow/53847817.cms>

[25] Jon Bernardes, Responsibilities in Studying Postmodern Families, 14 J. FAM. ISSUES 35 (1993)[26] <http://www.andrewkimbrell.org/andrewkimbrell/doc/surrogacy.pdf>.

[27] Surrogate Motherhood-Ethical or Commercial, Centre for Social Research (CSR) 2, Nelson Mandela Marg, Vasant Kunj- 110070.

Availablefrom: <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>.

[28] Java V, Murray C, Lycett E, MacCallum F, Golombok S. Surrogacy: The experiences of surrogate mothers. Hum Reprod 2003;18:2196-204

[29] A Paper by the Iona Institute, the Ethical Case Against Surrogate Motherhood: What we can learn from the law of other European Countries,( Available at - [www.ionainstitute.ie](http://www.ionainstitute.ie))

[30] Ankit Sourav Sahoo, Legality of Commercialisation of Surrogacy in India and Social Implications, Global Journal for Research Analysis Volume-4, Issue-7, July-2015 Available at - [https://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/file.PHP?val=July\\_2015\\_1436858446\\_53.pdf](https://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/file.PHP?val=July_2015_1436858446_53.pdf)

