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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, 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

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Assistant professor of Law

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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.

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SURROGACY

AUTHORED BY – VAISHNAVI

INTRODUCTION

Infertility has emerged as a mounting healthcare concern impacting both genders, and its etiology encompasses various factors, including age, genetics, lifestyle, and environmental determinants. Given the escalating prevalence of infertility, the demand for alternative reproductive methods to facilitate parenthood has become imperative. Notably, surrogacy has gained prominence as a viable option due to advancements in assisted reproductive techniques. Furthermore, shifts in societal norms have contributed to the wider acceptance of surrogacy. In today's progressive society, infertility is recognized as a healthcare issue by both men and women, and parenthood is no longer confined to heterosexual couples. The advancements in assisted reproductive technologies have enabled individuals of diverse gender identities to embark on the journey of parenthood, with surrogacy emerging as a viable alternative.¹

The term "surrogacy" denotes the practice of utilizing a woman's uterus to carry a fetus to term, with the intention of raising the child by another party. This concept is rooted in the Latin word "subrogate," signifying "acting as a substitute" or "a replacement." According to American Law Reports, surrogacy is typically defined as "...a contractual arrangement wherein the biological or surrogate mother, in exchange for compensation, agrees to conceive a child through artificial insemination using the biological father's sperm, carry and deliver the child for the biological father, and relinquish all parental rights following the child's birth".

Surrogacy can be categorized into altruistic and commercial variants. Altruistic surrogacy, in alignment with its nomenclature, involves no financial remuneration for the surrogate. In contrast, commercial surrogacy entails compensation to the surrogate for her gestational services, implying a profit motive, while compensated surrogacy covers the surrogate's associated expenses and

¹ Mother or nothing: the agony of infertility. Cui W. Bull World Health Organ. 2010;88:881–882. [PMC free article] [PubMed]

income loss.²

India saw a boom in commercial surrogacy from 2002 to 2015, largely benefiting underprivileged women but also leading to exploitation. Global regulations on surrogacy vary widely, leading to legal clashes and concerns about cross-border travel.

Due to the vulnerability of surrogate mothers and children, there was a need for comprehensive regulation. The Indian government responded by proposing the Surrogacy Regulation Bill in 2015, which eventually became law in December 2021. This law permits altruistic surrogacy and prohibits commercial surrogacy, ensuring that surrogacy is not driven by profit and protecting the rights of commissioning parents.³ The issue was brought before the Lok Sabha of the Indian Parliament when the government decided to prohibit commercial surrogacy in its response to question 100 on December 4, 2015. This initiative culminated in the creation of the Surrogacy (Regulation) Bill in 2016, which, following multiple amendments, was approved by the Lok Sabha in 2018. The Rajya Sabha established a committee to engage stakeholders in discussions on the Surrogacy (Regulation) Bill 2019, resulting in further amendments and its eventual enactment into law on December 25, 2021. It was released alongside the Assisted Reproductive Technology (Regulation) Act, 2021, just a week before. On January 25, 2022, the new Surrogacy (Regulation) Act, 2021, came into effect. This amended legislation exclusively permits altruistic surrogacy, preventing individuals with financial means from exploiting the surrogacy option for profit. It also prohibits commercial surrogacy and the trade of human gametes and embryos.

Background/Gene

Surrogacy, comes from its origin from Latin term 'Subrogare; that acts as in place of substitution or replacement . It stands for an agreement where women chooses to carry someone's else child in return of payment with handing over its original parent Hence, surrogacy helps people to became parents in their own genetical way. Further surrogacy is divided into two parts that is commercial and non-commercial. Commercial surrogacy is that surrogacy where there is an arrangement of surrogate mother is compensated for services beyond reimbursement of medical expenses. And, on other hand non commercial surrogacy also refers as Altruistic surrogacy are

² Surrogate parenting: analysis and recommendations for public policy. Hartshorn MA. JAMA. 1989; 261:1811.

³ Ministry of Law and Justice, Government of India. The Surrogacy (Regulation) Act. [Apr; 2023]. 2021. <https://dhr.gov.in/document/acts-circulars/surrogacy-regulation-act-2021>

those where the surrogate does not receive monetary compensation. In most of this surrogacy, the surrogate is a close relation to the when intended parents (family member/close friend). In India, surrogacy is an accepted practice in society and its mention is also found in mythological text such as Mahabharata. Surrogacy has a complex history dating back centuries. The first recorded surrogacy-like arrangement traces back to biblical times with the history of Sarah and Abraham in the book of Genesis. However, modern surrogacy as we know it emerged in the 1970s when the concept gained attention through legal and medical developments. The famous 'Baby M' case in the 1980s brought surrogacy into the public eye. This case involved a traditional surrogacy arrangement where the surrogate used her own egg to conceive the child she carried for the intended parents. Legal battles and ethical debates arose, leading to changes in legislation and the differentiation between traditional and gestational surrogacy. Gestational surrogacy, where the surrogate carries a child conceived using the intended parents' or donors' genetic material, gained more acceptance due to advancements in reproductive technology and legal frameworks. Today, surrogacy remains a complex, regulated practice globally, influenced by cultural, ethical, and legal considerations.

1. Law related to surrogacy in India

In a significant move, the Surrogacy Regulation Act, 2021 has reshaped the landscape of gestational altruistic surrogacy in India. Let's delve into the key provisions and critical reflections on this legislative milestone.

- **Defining the Participants: Who Qualifies?**

Chapter 1 of the Act identifies

the main players – the "intending couple," an infertile married Indian duo, and the "intending woman," a widow or divorcee aged 35 to 45. The criteria are stringent, allowing surrogacy only if the couple has no living children or if existing children face disability or serious health risks. The definition of a "surrogate mother" has also evolved, outlining eligibility, restrictions, and a lifeline for her participation.

- **Prerequisites for Surrogacy:**

A Medical Indication Mandate, The Act mandates a medical indication certified by the District Medical Board for surrogacy cases involving Indian origin, divorced or widowed intending

mothers, charitable purposes, and a prohibition on financial gains.

- **Ethical, Social, and Legal Concerns: A Critical Analysis**

Restrictions Galore

The Act prohibits certain groups from utilizing surrogacy services, including couples with one child, foreign nationals, those in live-in relationships, single individuals, and the LGBTQIA+ community. While the aim is to prevent exploitation, it raises ethical questions about reproductive autonomy.

- **Deprivation of Reproductive Autonomy**

The Act, in its bid to safeguard against exploitation, shifts from a right-based to a need-based approach. This sparks concerns about individuals' freedom to decide on having children, limiting choices based on governmental decisions rather than personal rights.

- **Women's Rights**

A paradox emerges as unmarried women, although legally permitted to undergo abortions, are barred from availing surrogacy services. This raises questions about reproductive autonomy, especially when considering instances where surrogacy has provided women with financial independence and a dignified life.

- **LGBTQIA+ Community Exclusion**

Homosexual couples find themselves excluded from altruistic surrogacy, despite legal strides recognizing LGBTQIA+ rights. The Act's stance, rooted in societal norms and legal gaps, raises concerns about discrimination and the denial of fundamental rights to this community.

- **Live-in Relationships** - Live-in partners, recognized and protected by Indian courts, surprisingly fall outside the Act's regulatory scope. This exclusion appears incongruent with legal precedents supporting the legitimacy of such relationships.

- The Surrogacy Regulation Act, 2021, while aiming to protect against exploitation and ensure ethical practices, faces criticism for its restrictive nature. Critics argue that it limits individual

autonomy, excludes certain demographics, and perpetuates societal norms that may not align with evolving legal perspectives.

As India continues to grapple with these complex issues, the need for a nuanced, inclusive, and rights-based approach becomes increasingly apparent. Striking a balance between protecting all parties involved and promoting inclusivity should be at the forefront of any surrogacy legislation, paving the way for a more ethically sound and socially just future.

2. Controversy related to surrogacy law in India

The debate over surrogacy legislation is intensifying in the House, with concerns rising over the potential surge in illicit surrogacy practices as commercial surrogacy faces prohibition. This article explores the multifaceted challenges and ethical considerations surrounding surrogacy, advocating for a balanced approach that safeguards human rights while addressing the complexities of the industry.⁴

1. The Dilemma of Forced Labour:

With the outlawing of commercial surrogacy, there is a fear that exploitative practices may rise, exemplified by cases of minors allegedly forced into selling their eggs. Article 19(1) is invoked, arguing that prohibiting commercial surrogacy infringes on the right to earn a livelihood, exacerbating poverty. The article proposes a compromise through "compensatory surrogacy" under stringent legislation to protect human rights and deter exploitation.

2. Health Implications for Surrogate Mothers and Fetuses:

The article sheds light on the lacunae in the current Act regarding health implications for surrogate mothers and fetuses. Concerns include teratogen and maternal drug abuse, the risk of venereal diseases, and the increased incidence of postpartum complications. The need for comprehensive screening of intending parents and addressing long-term health risks is emphasized.

⁴ Chhagani N. International surrogacy countries for parents. [Jul; 2022]. 2019 <https://www.ivfconceptions.com/international-surrogacy-countries/>

3. Unseen Mental Health Implications:

While the Act assesses the psychological eligibility of surrogate mothers, it fails to address potential post-implantation psychiatric disorders. The article advocates for a formal psychiatric assessment to ensure holistic healthcare. Studies highlighting mental health issues post-surrogacy, such as postpartum depression, underscore the importance of addressing emotional dimensions for the well-being of both surrogate mothers and children.

4. Discrimination on the Basis of "Ableism":

The Act allows surrogacy for couples with a child diagnosed with an incurable illness, yet lacks clear guidelines on defining disability limits. The article argues that this ambiguity promotes discrimination based on ableism. The potential neglect of a disabled child when a healthy sibling arrives further complicates the ethical landscape.

5. Downfall of Procreative Medical Tourism:

Banning foreigners from availing surrogacy services in India has led to a decline in procreative medical tourism. The article highlights the economic aspects overlooked by the current Act, emphasizing the altruistic model's failure to provide economic advantages to women from poor backgrounds. It suggests finding alternatives that balance economic considerations while preventing exploitation.⁵

6. Short-term Disability Insurance Coverage:

Introducing short-term disability insurance coverage is proposed as a viable solution to compensate surrogates for lost wages. The article discusses the benefits of this program and suggests additional financial funding and legal representation for surrogates to address ethical concerns.

As the House grapples with surrogacy legislation, this article calls for a nuanced approach that acknowledges the complex interplay of human rights, economic considerations, and health implications. Striking a balance between altruism and rights is essential to create a comprehensive legal framework for surrogacy that protects all stakeholders involved.

⁵ Daniyal S. As clamour to ban conversion grows, a reminder: five Indian states have already done so. [Jul; 2022]. 2014. <https://vedkabhed.com/index.php/2014/10/09/as-clamour-to-ban-conversion-grows-a-reminder-five-indian-states-have-already-done-so/>

➤ **Landmark cases related to Surrogacy in India**

Jan Balaz v. Anand Municipality⁶ is a pivotal case in Indian surrogacy law. The petitioner, a German national, entered into a surrogacy agreement with an Indian woman in 2008, resulting in the birth of a child in Gujarat, India. Despite obtaining a birth certificate, authorities prevented the petitioner from leaving India with the child. Initially, the Gujarat High Court denied the petitioner's request, expressing concerns about the child's welfare and the legality of commercial surrogacy in India. However, after deliberation, the court granted permission for the petitioner to leave with the child, subject to specific conditions. This case drew attention to the complexities of commercial surrogacy in India and underscored the necessity for more comprehensive laws and regulations governing surrogacy agreements, emphasizing the importance of safeguarding the well-being of children born through surrogacy.

In the case of Baby Manji Yamada v. Union of India⁷ a surrogate baby born to a Japanese couple through an Indian surrogate mother became the focal point. Subsequent to the couple's divorce, the mother declined custody, and the father faced challenges obtaining a visa to enter India and retrieve the child. This legal scenario prompted inquiries into the legal status and rights of surrogate children, as well as the responsibilities of surrogacy clinics and intended parents. Ultimately, the Supreme Court directed the Japanese consulate in India to issue travel documents for the child, facilitating her journey to Japan. Additionally, the court recommended that the Indian government establish regulations to govern surrogacy within the country. This case underscored the need for a legal framework addressing the intricacies of surrogacy arrangements and outlining the responsibilities of all parties involved.

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Conclusion

The surrogacy laws in India have undergone changes over time. As of my last update, commercial surrogacy was banned in India, allowing only altruistic surrogacy for Indian citizens. The law prohibited foreigners, unmarried couples, single individuals, and same-sex couples from seeking surrogacy services in India. However, laws can change, and it is essential to check the latest regulations and guidelines from official government sources or legal experts to understand the current status of surrogacy laws in India.

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