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BAN ON COMMERCIAL SURROGACY **IN INDIA: A SYSTEMATIC REVIEW**

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A systematic review of literature has been conducted on the ban on commercial surrogacy in India. Scientific literature till the year 2021 has been reviewed. It includes research articles, book chapters and research reports. The right keywords have been employed, and the quality of each piece of literature has been determined. As systematic segregation for both literature before and after the ban on commercial surrogacy has been made. The right keywords have been employed, and the calibre of each piece of literature has been determined. Thematic synthesis has been used to integrate the findings from research evidence.

Keywords: Altruistic surrogacy, Ban, Commercial Surrogacy, Surrogacy, Systematic review

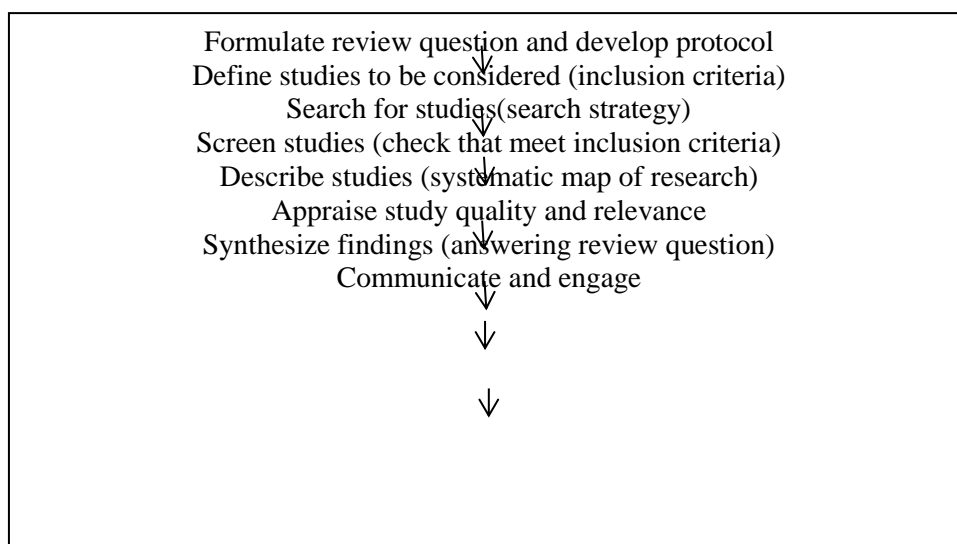
The term Surrogacy is the process of a woman giving birth or carrying a child for another person or individuals in a surrogacy arrangement, which is frequently backed by a formal contract. It is governed by the Surrogacy (Regulation) Act 2019. The Act defines the terms commercial surrogacy and altruistic surrogacy which have been used for the purpose of this paper. As per the Act, "Altruistic surrogacy" refers to a surrogacy in which the surrogate mother, her dependents, or her representative receives no charges, expenses, fees, remuneration, or financial incentive of any kind, aside from the medical costs incurred on the surrogate mother and the surrogate mother's insurance coverage.

Selling, buying, or trading the services of a surrogate mother by providing payment, reward, benefit, fees, remuneration, or financial incentive in cash or kind to the surrogate mother or her dependents or her representative, with the exception of medical expenses, is considered the commercialization of surrogacy. Commercial surrogacy was first legalised in 2002 after which it was banned in 2015. This review seeks to examine the literature before and after the ban on commercial surrogacy.

Method

Participants

A Systematic Review of the literature was conducted, and both publications published pre and post the commercial surrogacy prohibition was considered. The current review has adhered to Gough's (2007) model for the stages of a systematic review (Figure 1)



Source: Gough (2007, p.5)

Review Question and search terms

The review question is whether the literature before and after the ban on commercial surrogacy concur or differ?

Table 1: Search terms used for literature

Main Concepts	Search items/ Keywords
Commercial ban	Non- Altruistic surrogacy, commercial surrogacy,
Surrogacy	on commercial surrogacy

Search Strategy

A comprehensive search of the published national and international literature was performed using bibliographic databases from the relevant disciplines of social sciences, sociology and law. The search of literature was conducted to identify relevant published works such as thesis, reports, and research projects. The databases of literature were searched through Google, Google Scholar web search engine, thesis etc.

Study selection

The collection of references from the literature searched was carefully examined to identify if they met the inclusion criteria for the review. The titles and abstracts of the studies were evaluated in terms of the inclusion and exclusion criteria listed below in Table 2

Table 2 : Details of inclusion and exclusion criteria for quantitative and qualitative studies

Feature	Inclusion Criteria	Exclusion Criteria
Type of Publication	Journals, books, thesis, reports	Magazines, newspapers, conferences
Language of Publication	English	All other languages
Subject' of the Articles	Commercial surrogacy, Altruistic surrogacy	Transnational surrogacy
Scope	Restricted to India	All other countries

Quality Assessment

To evaluate the quality of the research evidence in this investigation, the "weight of evidence" (WoE) framework developed by Gough in 2007 was applied. Figure 2 illustrates how Gough provided "generic" and "review specific judgement," combining both to provide a "overall assessment."

Weight of Evidence A
Generic, non-review specific judgement about quality of evidence e.g. generally accepted criteria by those who generally use and produce evidence.
Weight of Evidence B
Review specific judgement about the appropriateness of a specific form of evidence for answering the current review question e.g. the relevance of research design
Weight of Evidence C
Review specific judgement about the relevance of the focus of the evidence for the review question e.g. type of sample, method of data gathering or analysis
Weight of Evidence D
Overall assessment of the extent that a study contributes evidence to answering a review question, typically a combination of A, B and C

*Figure 2 : Weight of Evidence Framework**Source: Gough (2007, p.5)*

Table 3 outlines Gough's (2007) framework, which supports the review process. All qualitative research studies have been segregated as per subject of research. Most of the articles taken are of high quality, however information from less rigorous articles are also included.

Table 3: Application of Weight of Evidence Framework

Weight of Evidence Criteria	Implications for current review
A. Quality of research	Research with high cite score
B. Research Design	Qualitative research
C. Relevance to the theme and scope	Commercial/ Non- Altruistic Surrogacy

Results

The characteristics of the reviewed research evidence have been described.

Description of studies

The following description presents a general map of the qualitative research before and after the ban on commercial surrogacy been reviewed. (Table 4)

Table 4: Characteristics of Studies- Qualitative

Sl no	Author and Year	Theoretical and Conceptual Framework	Research Questions and Hypothesis	Emerging Themes
1	Mina Chang (2009)	Nature of commercial surrogacy	Analyses regulations in commercial surrogacy	Attractive for lower socio eco levels, demographic trends, New form of business, a form of class, gender and race exploitation
2	Alison Bailey (2011)	Commercial surrogacy and social Justice	Whether commercial surrogacy is a viable option in a country with poor women	Outsourcing Surrogacy to India, Moral and Ethnographic Responses to Indian

			health	Surrogacy Work, ethnographic Narratives, Reproductive Justice as a moral indicator, Reproductive Justice and Indian Surrogacy, Reproductive Health and Indian Surrogacy Work
3	MM Tieu (2009)	Reviewing the psychological studies on the effect of relinquishing child has on surrogate mother	Whether altruistic surrogacy is the necessary objectification of surrogate mother	Fragmentation of the maternal and infant bond, contractual issues and health risks, objectification of surrogate mother
4	Amrita Pande (2010)	Analysis of the Anand Surrogacy programme	Analysis of new form of women labour	Surrogacy as labour, analysis of Anand model of surrogacy, recruitment of desperate mothers, contract and counseling, surrogacy hostel, different rates
5	Kristine Schanbacher (2014)	India's Gestational Surrogacy Market as an Exploitation	Whether commercial surrogacy upholds the principle of medical ethics	Non-maleficence and surrogacy, Health Risk of Surrogate Women Disregarded, Fueling Traditional Class and

		of Poor, Uneducated Women		Racial Hierarchies, Surrogate Women Commodified, Beneficence of Surrogacy, autonomy of surrogate women, surrogacy and justice
6.	Virginee Rozee, Syed Uniza, Elise da La, Rocherbrochard (2020)	Study of primary data obtained by interview of 33 surrogates	Social paradoxes of commercial surrogacy	Reasons to become a surrogate, a desire for social upward mobility, equal to any other physical job, preference over other jobs, social condemnation, domination with no autonomy, moral paradoxes
7.	Dalia Bhattacharjee (2016)	Assesses the problem of commercial surrogacy	Whether ban on surrogacy adequately addresses the problem of commercial surrogacy	Assessing the ART Bill, No birth no pay, Delay in payments, livelihood denial, safeguarding of the womb, hazards of moral reprehensions
8.	Dr. PM Arathi (2018)	Study to understand legal rights and Challenges of Surrogates	Regulation over ban on commercial surrogacy	Market and Labour, Reproductive Autonomy, Informed and Voluntary Consent in Surrogacy, Injustice in 'Balancing Interests, Regulatory Framework in India, Rights of

				Surrogates, Legal Ambiguities and its Implications, Legal Enforceability of Surrogacy Agreements, reasons to be a surrogate, Women as economic anchors of the family
9	Stency Mariya Mark (2021)	Analysing commercial surrogacy through the lens of capabilities approach	Ban on commercial surrogacy not a solution	Capabilities approach, Kantian notion of rational agent, Procreation as a profession, Conundrum associated with commercial surrogacy, informed consent, exploitation of surrogate, bonding theory
10	Dr. Kamaljit Kaur (2015)	Analysis of surrogacy through the lens of Human rights	Right to reproductive health and commercial surrogacy	Profile of surrogate mothers, right to reproductive health, arguments in favour, violation of art 21
11.	Manya Gupta and Shiromani Chaturvaedi (2020)	Studies the potential impact of ban of commercial surrogacy in	Structural problems with surrogacy	Commodification of body and child, current status of surrogacy, exploitation of women, underground markets, Health of women

		India through primary data		affected, Altruistic surrogacy as an option
12	B. Asvini, C. Renuga (2019)	Analysing quantitative data regarding commercial surrogacy	Analysis of the surrogacy bill post ban	Commercial nature of surrogacy, effect of new bill on commercial surrogacy

The characteristics of the ten qualitative research studies that were reviewed is outlined below.

Nature and focus: 2 studies focus on the assessment of commercial surrogacy in a country with poor women health, 1 study focusses on the exploitation of women, 2 studies were an assessment of the life of surrogate women undergoing commercial surrogacy through field study. Post the 2015 ban, one field study concerning 33 surrogates highlights the social paradoxes of commercial surrogacy, 2 studies focus on the formulation of a regulatory framework over the ban on commercial surrogacy, one study is a quantitative analysis of the effect of the Surrogacy (Regulation) Act 2022 and 2 other studies focus on the violation of article 21 as a result of the ban.

Findings

The findings can be grouped under the following categories:

Assessment: review done on the literature before and after the ban on commercial surrogacy

Factors that led to the ban: Studies before the ban showed that factors such as exploitation of surrogate women, human trafficking, abysmal working conditions and other ethical reasons led to the ban on commercial surrogacy.

Indicators that led to opposing the ban: Studies after the ban observed that the right to earn a living of waomen was being violated along with the right to procreate. The autonomy of women was being interfered with due to the ban and hence the opposition

Key observation: The literature before and after the ban on commercial surrogacy are in stark contrast with each other

Discussion

Legal Theory

The usage of Assisted Reproductive technology (ART) has grown immensely around the world. Surrogacy is the process of the surrogate mother carrying and delivering someone else's child on their behalf. Law creates, protects and recognizes the rights created. According to Hohfeldian analysis when one has a right the other has a duty to protect that right. Similarly there exists a right of women to earn a livelihood for which she has the right to practice commercial surrogacy. The state has a duty to ensure that this right is protected. The 2015 ban on commercial surrogacy curtails such a right. However according to the interest theory, what a right protects is not a will or a choice but some interest for the benefit of the person who holds that right. Whether the right to commercial surrogacy really protects the interests of women is what this article aims to deal, with the help of literature before and after the ban on commercial surrogacy. The researcher wants to elucidate the harm principle put forward by J.S. Mill. He claimed that if someone is causing harm to other people, they must be punished. If not, he is free to act however he pleases. Absolutely no "damage" is done to anybody else by a surrogate mother and hence she must be free to exercise her choice.

Brief legislative and social history

Commercial Surrogacy was first legalised in India in 2002, after which there was a booming rise in surrogacy market in India. India became the hub of surrogates for foreign couples due to cheap rates and desperate poverty stricken women. Observing all these changes the 228th law commission report in 2009 recognised the need to end this exploitation and shift from commercial to altruistic form of surrogacy. This shift was partly because of ethical reasons considering a lot of women were being forced into it. In 2015 commercial surrogacy was banned in India. There was a need to bring an act that regulated surrogacy laws which led to the introduction of the Surrogacy (Regulation) Bill 2016. This Bill got passed in the Lok Sabha but was recommended to a parliamentary standing committee by the Rajya Sabha to the select committee. After including a few changes suggested by the committee the bill was finally passed in 2021 making it the Surrogacy (Regulation) Act of 2021

Assessment of literature before ban on Commercial Surrogacy

The review shows that there have been a considerable number of articles written before the ban on commercial surrogacy that criticized the kind of impact commercial surrogacy had on

surrogate women. The first study spoke about the tempting salary of the job which attracts poor women across the country creating a new form of class, gender or race exploitation. The disparity in the rates paid to gestational surrogates makes this racial hierarchy clear. In India, the vast majority of women who use gestational surrogacy are uneducated, underprivileged, and frequently have families of their own to feed. But what the article fails to dwell upon is as to whether the women are become surrogates as a result of force or by exercising their choice. If women voluntarily chose commercial surrogacy as a viable career option it cannot be termed as exploitation.

Another study focuses on the issue of whether commercial surrogacy should be encouraged in a nation with a horrendously poor track record for women's health and a high maternal mortality rate. With the similar background another study dwells with the issue of maleficence in commercial surrogacy. It states that a medical procedure shouldn't purposefully cause the patient unnecessary pain or harm. This premise is broken by the commercial gestational surrogacy market in India. The process frequently ignores the health dangers surrogate women face, which feeds traditional economic and racial divisions, and markets surrogate mothers. This was further backed by an example that states that the US surrogate women for their safety are given no over than two embryos, whereas in India, surrogates are implanted with five or more embryos to boost the likelihood of pregnancy. It also highlights the issue of autonomy as to whether surrogates are able to act freely and voluntarily without interference from outside forces and with the capacity to do so with knowledge, intention, and understanding. However if the procedure of taking informed consent is duly being complied with the issue will not be a legal issue but more of a sociological problem.

As a part of the review a field study conducted in Anand, Gujarat a booming centre for surrogacy is included. Around 42 surrogates were interviewed as a part of this study. It elaborates on the manufacturing of a mother-worker, contract and counseling such that the surrogate is completely in control of the management during the nine months. Another study argues that surrogacy in itself disregards the vital role played by the biological and psychological relationship between the surrogate and the infant in this development, which is a critical factor in determining a child's welfare during the foetus and early infant stages. The natural and intuitive mother-child relationship is destroyed by surrogacy. Agencies and surrogates use a variety of cognitive dissonance reduction techniques to try to solve this issue. The article seeks for the law to prohibit all forms of surrogacy arrangements. All these articles

reflect the views of people before the ban on commercial surrogacy which are inclined clearly against the concept of commercial surrogacy. This will be further contrasted with views brought about post the commercial surrogacy ban in 2015.

Assessment of literature after ban on Commercial Surrogacy

The review shows that there have been a considerable number of articles written after the ban on commercial surrogacy that are in stark contrast to the views of literature before the ban. One field study of about 33 surrogates breaks the paradox of development of an intuitive maternal bond with the infant after birth. It observed that the Surrogates did not mention any particular challenges they had when having to let go of the kid they were carrying, nor did they anticipate playing a part in the child's future. Their work was denaturalized. They said that all they were doing was giving the child room to grow inside of them. Majority surrogates considered surrogacy as better than the other jobs. The article breaks the paradox of only desperate poor women being forced into surrogacy. In his findings he found the majority women not from a poverty-stricken background. Most women were also found to have informed consent and were conscious of what they were doing.

Another study writes that although commercial surrogacy in India needs to be regulated, it is being done in the incorrect way. Instead of the ban a framework that addresses the needs (economic, physical, and emotional) of all individuals involved in surrogacy services is required. The author states that he/she is worried about the necessity for surrogate moms to be shielded from any negative results (physical, emotional, or financial), as well as the vulnerable intended parents' wants to become parents and is of the view that the government's current plan appears to be moving surrogacy in India toward a more controversial area, which could be dangerous. However what is problematic in this article is its very objective that seeks to study the “impact” of commercial surrogacy which in practicality cannot be measured. It also seeks for a regulatory framework but ignores the fact that the existence of surrogacy contracts in itself are a form of regulation and thus there arises no necessity of an additional law governing the working conditions of surrogates.

One of the studies elaborates on the moral reasons that could have led to the ban on commercial surrogacy. While it recognizes the issues that might crop in if commercial surrogacy being made valid it states that the regulation of the market could have been a viable option compared to the blanket ban on commercial surrogacy as it raises a counterproductive effect. The

promotion of altruistic form of surrogacy could lead to forcing members within the family to become surrogate mothers and huge rise in underground markets. The findings of yet another study collected as a part of the researcher's review contends that the dangers of exploitation do not disappear just because the current surrogacy practise has no commercial components. The author backs this argument with empirical quantitative data on whether the Surrogacy Bill of 2019 would reduce commercial surrogacy in India as a result it got 60% of the persons not in favour of the statement. The shortcoming of this paper however is that the effectivity of an act cannot be measured by a mere survey capturing the opinions of people.

While the studies before the ban on commercial surrogacy said favoured such a ban on grounds of exploitation, the subsequent studies post the ban says that the prohibition against commercial surrogacy based on concerns about exploitation is unreasonable and an outright violation of the couple's right to procreate. A woman who chooses to become a surrogate, on the other hand, typically has urgent financial demands as a result of underemployment or unemployment. Banning commercial surrogacy is neither a solution nor an answer without addressing the reality of jobs and pay in India. Another article studies the ban on commercial surrogacy with the help of capabilities approach. According to Nussbaum, the government must fulfil the minimum requirements or minimal capacities (giving women with opportunities to engage in physical activity and bodily integrity) that promotes living a respectable life and an opportunity to exercise one's capabilities. The researcher argues that the government is imposing its ownership over a woman's bodily autonomy and right to privacy by outlawing commercial surrogacy. Women are being told "what they can do with their body and what they cannot" by the government. Only a woman has the authority to make decisions about her body.

Conclusion

A systematic review was conducted on the ban on commercial surrogacy in India. Appropriate keywords were used to find the literature and the quality was assessed using the Weight of evidence framework. After assessing, thematic synthesis was used to segregate the findings of both literature after and before the ban on commercial surrogacy. This review sought to address the question of whether the literature before and after the ban on commercial surrogacy concur or differ.

The review shows that the literature collected before the ban on commercial surrogacy listed

down various issues pertaining to commercial surrogacy on majorly two grounds social and ethical. The social grounds included exploitation, forced or uninformed consent, human trafficking etc. Apart from these women were also forced to conceive multiple times, middlemen would take commercial advantages of uneducated women and frequent abandonment of surrogate women. The ethical reasons would be that of womb considered sacred and safe thus must not be exposed to trade practices. All of these grounds indicated a weak state of affairs with respect to surrogates for which a ban on commercial surrogacy seemed a viable option.

On the other hand, articles that came after the ban on commercial surrogacy criticized the move on the grounds that there is a limited understanding of the exploitation that was taking place and thus a regulatory framework would be more effective in curtailing such exploitation rather than a blanket ban on commercial surrogacy. Some of the concerns raised were that it strips women of the autonomy over their bodies and violates their right to make reproductive choices under article 21. With the above findings and discussions it can be concluded that the review has made a successful attempt in bringing about the contrasting literature before and after the ban on commercial surrogacy.

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