



A MULTI-DIMENSIONAL REVIEW OF SURROGACY IN INDIA BY TRACING THE LEGAL EVOLUTION THROUGH A SOCIO-ECONOMIC LENS

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I. INTRODUCTION

The term ‘Surrogacy’ evolves from the Latin term “Surrogatus” which directly translates to ‘ a substitute or a person appointed to act in place of another ’.¹ It is a method of assisted reproduction where a woman carries the child of an intending couple to term. It can be classified into two forms, traditional and gestational surrogacy. Traditional surrogacy, according to Black's Law Dictionary, is a pregnancy in which the surrogate mother provides her own egg, which is fertilised by artificial insemination, and she carries the resulting foetus. Whereas, gestational surrogacy is a pregnancy in which the genetic mother provides the egg, which is fertilised, and another woman, the surrogate mother, carries the foetus and gives birth to the child.² The Surrogacy Regulation Act, 2021,³ defines ‘surrogacy’ as “a practice whereby one woman bears and gives birth to a child for an intending couple”. It is not a phenomenon that merely requires legal intervention. In reality, it is influenced and

dictated by the interplay of ethical, technological and socio-economic factors. It has lasting implications for all the stakeholders involved.

The practice itself can be traced back to mythological texts like the Mahabharata, where, Balaram, the seventh child of Vasudeva and Devaki was transferred to the womb of another woman to protect the baby from Kansa, who had sworn to kill the child at birth. Further, following King Vichitravirja’s death, his half-brother Vyasa agreed to act as a surrogate father in an attempt to continue the Kuru lineage, leading to the birth of Dhritarashtra, Pandu and Vidhur.⁴ The Bible too, mentions Genesis, Chapters 16 and 30, which are the stories of Abraham and Sarai and Rachel and Jacob, respectively, as evidence that surrogacy has been practised since the beginning of time. According to religious texts, the first traditional surrogate arrangement started in 910 B.C., leading to the birth of the first surrogate kid, Ismail, in this world. For reasons related to family, kinship, and ancestry, surrogate motherhood is mentioned as a legal method of family formation in Babylonian society. This is supported by authoritative references in Hammurabi's Code and the Nuzi Tablets, which legally permit surrogacy due to a wife's inability to bear children, allowing traditional surrogacy. Thus, in the historical setting, surrogacy was used as a conventional and charitable endeavour to assist infertile couples in having children for them.⁵ These illustrations

¹ Szabo L. Researchers link maternal instincts, Tots’ Smiles, Virginia, USA Today, July 7. 2008

² Bryan A. Garner, Black’s Law Dictionary (2004), 8th Edn, p. 4529.

³ THE SURROGACY (REGULATION) ACT, 2021 (NO. 47 OF 2021)

⁴ Witzleb, N & Chawla, A 2015, Surrogacy in India: strong demand, weak laws. in P Gerber & K O’Byrne (eds), *Surrogacy, Law and Human Rights*. 1st edn, Ashgate Publishing Limited, UK, pp. 167-191.

⁵ Banerji, S. (2012). Emergence of the Surrogacy Industry. Economic and Political Weekly, Vol. XLVII, No. 11. pp. 27-29.



suggest that surrogacy and practices similar to surrogacy were acceptable in exceptional circumstances.

II. LEGAL EVOLUTION

After the birth of the first test tube baby in India in 1986, IVF clinics mushroomed across the country.⁶ The services gained popularity and were extensively employed. However, no laws, regulations, standards or supervisory bodies were in place to monitor the same. In 2002, commercial surrogacy was legalised and the Supreme Court reaffirmed the same in the case of *Baby Manji Yamda v. Union of India*.⁷ This contributed to a surge in medical tourism, making it “the hub” of surrogacy.⁸ The industry operated on low costs and was riddled with cases of exploitation of surrogate mothers by the middlemen, organ trade and other unethical practices. The Law Commission, in its 208th Report, thus, advocated imposing a ban on commercial surrogacy.

The guidelines issued by the Indian Council of Medical Research in 2005 for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics in India was one of the first legislative attempts to establish standards of conduct concerning surrogacy and the practices associated with it. These Guidelines and the guidelines issued by the Ministry of Home Affairs were, however, only advisory in nature. The 228th Law Commission Report, in 2009, recommended enacting laws to facilitate and govern practices related to Assisted Reproductive Technology. The Surrogacy

(Regulation) Act and The Assisted Reproductive Technology Act were both passed in 2021 in furtherance of the same recommendation. They govern the legal intricacies surrounding the practice of surrogacy, including the operation and supervision of Assisted Reproductive Technology clinics and banks and ensuring ethical use of the same.

One of the cardinal features of the Surrogacy (Regulation) Act is that it allows only altruistic surrogacies. Section 2(1)(b) of the Act defines 'altruistic surrogacy' as "the surrogacy in which no charges, expenses, fees, remuneration, or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, is given to the surrogate mother or her dependents or her representative." The Act prohibits commercial surrogacy in any and all forms. It only allows altruistic surrogacies. It imposes a fine of Rs. 50,000 and, or imprisonment for a term of 5 years on any couple engaging in commercial surrogacy. Further, it imposes a fine of up to Rs. ten lakhs and imprisonment for up to ten years on any person or clinic involved in the exploitation of surrogate mothers or the abandonment and exploitation of children born through surrogacy. The import or sale of embryos or gametes for the purposes of surrogacy and the storage of the same for any illegal purpose would be in contravention of the provisions of this Act. It provides for the establishment of the National Assisted Reproductive Technology and Surrogacy Registry to facilitate the

⁶ Anand Kumar TC, Hinduja I, Joshi S, Kelkar MD, Gaitonde S, Puri CP, et al. *In-vitro* fertilisation and embryo transfer in India. *ICMR Bull.* (1986) 16:41–3.

⁷ (2008) 13 SCC 518

⁸ Indian Journal of Forensic Medicine & Toxicology, October-December (2020), Vol. 14, No.4 Surrogacy in India: Ethical and Legal Aspect Gerard Pradeep Devnath, Senthil Kumaran



compulsory registration of all fertility clinics and facilities that undertake surrogacy treatments. The intending couple is bound to provide the surrogate with insurance coverage and cover all medical expenses. It also sets out qualifications for the intending parents as well as the surrogate mother. The couple must be legally married as per the relevant provisions in force in India, be aged between 25 and 55, and should not have another biological or adopted child or one conceived through surrogacy. The Act also prohibits a woman from acting as a surrogate more than once. A 'Certificate of Essentiality or Infertility' substantiating the medical need for surrogacy issued by the Assisted Reproductive Technology and Surrogacy Board must be produced.

The Assisted Reproductive Technology Act⁹ is broader in scope and covers treatments that the commissioning couple themselves can avail without engaging the services of any third party, like intrauterine insemination, intracytoplasmic sperm injection, in-vitro fertilisation, etc. These treatments are not restricted to married couples who hold Indian citizenship alone. They can be availed by single women intending to be mothers, as well as foreign nationals. Surrogacy can, however, be commissioned only by Indian nationals or NRI holding Indian citizenships.¹⁰ It establishes a Registration Authority and a National Registry to act as a central database holding information about all Assisted Reproductive Technology clinics and banks and the available services and facilities. The Registration Authority has

been bestowed with the power to grant, suspend or cancel registrations of these clinics, hear complaints, initiate investigations and make recommendations to the National and State Boards. This Registry collates and submits data to the National Board, which uses it to formulate policies and make recommendations to the government to ensure better implementation of the legislation. The Boards also establish the minimum standards for infrastructure, equipment, workforce, and technology to be complied with by the clinics. It also imposes certain duties on these clinics, which include ensuring the eligibility of the intending couple as well as the surrogate mother, providing counseling facilities and educating all the parties about the implications of the Act as well as the rights of the unborn child, to store data in a confidential manner and establish a grievance redressal cell. It imposes a penalty in the form of a fine of not less than Rs. 10 lakh and not exceeding Rs. 25 lakh or imprisonment for a term of 5 to 10 years or both on any clinic advertising sex-selective Assisted Reproductive Technology

These legislations aim to balance and protect the interests of surrogate mothers, the unborn child and the intended parents. In the case of *Devika Biswas v. Union of India*¹¹, the Supreme Court extended the 'Right to Life' under Article 21¹² to include the right to reproduction. The Surrogacy (Regulation) Act, 2021 violates Articles 14 and 21 of the Constitution by restricting these reproductive rights and choices to heterosexual couples and widows or divorcees, fulfilling certain

⁹ THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021 (NO. 42 OF 2021)

¹⁰ The Emerging Laws Relating Surrogacy: A Procreational Right for Single Parent, Transgenders and Foreigners, (2018) SCC OnLine Blog OpEd 10

¹¹ 2016 10 SCC 726

¹² INDIA CONST. art. 21



criteria by excluding older couples, persons who intend to be single parents and the LGBTQ+ community. There is no just, fair, and reasonable rationale to justify these heteronormative and exclusionary provisions. This exclusion is also inconsistent with the stand taken by the Apex Court in various landmark judgements. In the case of *Tulsa & Ors v. Durghatiya & Ors*¹³, the Court held that there is a presumption of marriage in cases where the couple has been living together for a long time. Further, in the case of *S.P.S. Balasubramanyam v. Suruttayan*¹⁴, it was held that the biological children of a married couple and children born to a couple in a live-in relationship would be equivalent.

Both the legislations are therefore limited in their application since the excluded sections are unable to exercise and realise their reproductive choices. Section 4(ii)(e) of the Surrogacy (Regulation) Act, allows couples to opt for surrogacy if the National Board identifies the couple to be suffering from diseases and is convinced that the same may be transferred to the unborn child. For example, human immunodeficiency virus (HIV) discordant couples or patients of hepatitis would ideally opt for assisted reproduction to prevent the transmission of the disease. The Act is, however, ambiguous about what diseases or conditions would qualify for the same.

The Surrogacy (Regulation) Act also mandates a waiting period of five years from the date of marriage before the certificate of infertility is issued to the intending couple. The definition of 'infertility' itself is narrow,

as it does not take into consideration certain medical conditions that may allow the woman to conceive but prevent her from carrying the baby to term. It directly infringes on the right of the intended parents to have a child earlier or to have a child but not carry a child to term. The procedure to be followed if only one of the partners fulfils the eligibility criteria has also not been provided for.¹⁵ The appalling feature is the perception and treatment of children with mental and physical disabilities. The Act encourages couples to opt for surrogacy if they already have a child with a life-threatening disorder and deems having children with disabilities to be equivalent to being childless.

It also imposes unfair restrictions on the woman intending to be a surrogate. It prohibits unwed and childless women from acting as surrogates, restricting the free exercise of their reproductive rights. This right is enshrined in Article 21 of the Constitution and includes the right to carry a child and give birth. In the case of *B.K. Parthasarathi v. Government of A.P.*¹⁶ The Supreme Court determined that reproductive choices are purely personal in nature and intrusion of the state in such matters requires stringent scrutiny. Further, the ban on commercial surrogacy was aimed at protecting vulnerable women from exploitation and extortion from brokers and intermediaries and invasive medical treatments, the procedures and consequences of which they were unaware about. However, it also poses a threat to women who rely on these means to attain sustenance and financial stability.¹⁷ It also limits options for

¹³ 2008 4 SCC 520

¹⁴ 1994 SCC 1 460

¹⁵ Legal Glitches Facing Surrogacy Agreement in India, (2014-15) 1.2 IJLPP 26

¹⁶ AIR 2000 AP 156

¹⁷ India's Attempt to Regulate Surrogacy - A case of Excessive State Intervention and Blinkered Law-Making, (2021) SCC OnLine Blog OpEd 152



the intending couple since finding a relative or family member to act as a surrogate is not always a viable option.

Additionally, the legislation excludes the practice of traditional surrogacy, where the surrogate's egg is fertilised through intrauterine insemination of the intended father's sperm. This process would be comparatively cost-effective and also allow LGBTQ+ couples to opt for surrogacy. The surrogate would also be exposed to fewer and less complicated medical treatments and procedures. Traditional surrogacy would also enable women who are unable to produce healthy eggs to have children. Such exclusions may engender illegal markets and unsafe practices. The reinforcement of conventional ideals and family structures is incongruent with the progressive and revolutionary stance taken by the judiciary time and again.

Moreover, the legislations impose a ban on commercial surrogacy with the intent of preventing the commodification and exploitation of the surrogate and child. Instead, control of the surrogate's bodily freedoms to harmful extents must be prevented by putting legal checks in place. Prohibiting women willing to work as surrogates could lead to women in tightly-knit families being pressured into surrogacy. Moreover, underground markets, counterfeit certificates and invasive medical procedures are likely to develop as a result of the ban. According to numerous news outlets, India's 2015 prohibition on transnational surrogacy was regularly circumvented by transferring surrogates to Kenya and Nepal while the operation was being done.¹⁸ With respect to

the value of the child itself, empirical trends do not support the claim that commercial surrogacy denigrates children. The intended parents compensate the surrogate for the services of carrying the child to term and not for the child as the product itself.

Another dimension that needs to be taken into consideration is whether a right to surrogacy exists. A right broadly consists of two components, the interests it aims to protect and the claims that accompany these interests. Whether the right to procreate and have biological children extends beyond one's own body and justifies the right to surrogacy is riddled with conflicting opinions. While the right to surrogacy may be considered a contractual right arising from the agreement between the two parties, classifying it as a procreative right cannot be effectively defined or recognized. One of the arguments imposes responsibility on the state to help members realise the right to have a family and biological children. Along the lines of this argument, Canada has recently agreed to financially cover one cycle of IVF for couples unable to conceive naturally. Gotz T, Goldstein S, Chauhan N, et al. Distribution of funded IVF in Ontario: a patient perspective. Presented at the Canadian Fertility and Andrology Society conference; 2017 Sept. 14–16; Vancouver, BC. Gay rights activists have also put forth arguments to consider surrogacy as a reproductive gay right since it is the only manner in which a homosexual couple would be able to have biological children. The argument raised in contradiction to this view claims that this right cannot be realised since its enforcement is entirely dependent on the

¹⁸ Rudrappa, Sharmila. (2017). *Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015*. Critical Sociology.



consent of a third party and is, therefore, unfeasible. On the other hand, the right to surrogacy as a contractual right aims at protecting the interests of both parties involved and not the rights of the parents alone. This right is also, however, accompanied by certain restrictions, potential and conflicting interests.¹⁹

III. ECONOMIC ANALYSIS

Commercial surrogacy has a significant impact on the family, which is the fundamental building block of society. Hence sociological factors cannot be disregarded when examining the practice. It is a commonplace for underprivileged women who act as surrogates to be exploited by surrogacy-seeking couples or society at large. Couples who are not able to conceive look at these underprivileged women as labourers who are providing them with cheap and petty services in return for their money. They show disregard for a surrogate's importance in bearing their child. A surrogate is turned into nothing more than a tool in the mechanical process.²⁰ Even if the surrogate women are not poor, it is still a source of income for them. They carefully examine and make a tradeoff between how much money they can make from the surrogate contract and how much they would have to pay to bear another woman's child. Moreover, the regret one feels for giving up a child is balanced by the empathy one possesses towards another infertile woman whose child the surrogate is bearing. Furthermore, the task gets much

easier if the surrogate already has children of her own.

However, since not everyone can afford it, surrogacy may be referred to as a "luxury good." Despite coming from a lower socioeconomic status than the intended parents, the surrogate would offer a fee based on her cost-benefit analysis covering the nine months of mental and physical labour. Every year, the international surrogacy industry in India grows to new heights. According to the Indian Council of Medical Research (ICMR), India's commercial surrogacy market is worth USD 6 billion annually, equivalent to 4,90,01,97,00,000 rupees. Since it is cheaper and more affordable compared to other countries, India has become the hub for couples from foreign countries to plan a child through a surrogate mother in India. Through a cost-benefit analysis, the procedure in the United States would cost roughly USD 70000. Whereas in India, it would cost around one-seventh of the same amount, including all facilities provided to the surrogate.²¹

Both the intended parent and the surrogate mother benefit from the arrangement. They contend that the intended parents' desire to have a child outweighs any compensation given to the surrogate mother. In contrast, the surrogate's attachment to the money received outweighs any risks associated with the process. For the surrogate, who is often from an underprivileged background, the amount of money she earns in that one year of being

¹⁹ STRAEHLE, CHRISTINE. "Is There a Right to Surrogacy?", (2016) *Journal of Applied Philosophy*, vol. 33, no. 2, pp. 146–59. JSTOR, <https://www.jstor.org/stable/26813129>. Accessed 3 Nov. 2022.

²⁰ Jenny Gunnarsson Payne, Elzbieta Korolczuk & Signe Mezinska (2020) *Surrogacy relationships: a*

critical interpretative review, *Upsala Journal of Medical Sciences*, 183-191

²¹ Sharma RS, Bhargava PM, Chandhiok N, Saxena NC. New Delhi: Indian Council of Medical Research (2002) *Draft National guidelines for accreditation, supervision & regulation of ART clinics in India*.



a surrogate is way higher than what she would earn otherwise through daily wages from labour. However, there are several dimensions to this enormous industry where women are clearly being used for the financial gain of others. First off, Indian surrogates receive half as much money for carrying a child as they would in the West. This is because women who choose to work as surrogates are typically low-income women from underserved groups in our society. Due to their precarious financial situation, they have little choice but to accept the sum offered for their labour. Additionally, the price is almost always higher than their household's average income, which gives them the impression that the compensation is commensurate with the value of their labour.

In addition, because surrogates receive ostensibly large payments, their husbands and families frequently pressure them to continue carrying children for others without taking into account the negative impact it has on the physical and mental health of the surrogate. In some cases, their husbands stop seeking employment and instead rely on the surrogate's steady supply of income. Thus, placing the added responsibility of providing for the family on the surrogate. Modern market societies have an entirely different viewpoint. They claim that these motivations are primarily personal and financial. Banning commercial surrogacy would only encourage couples to engage in illegal and evasive means or pay relatively higher costs to achieve the same. Since this is perceived to be a luxury good and is restricted to high-income families, the intending couple would

be willing to incur large expenses. It is also essential to remember that there is a great demand for surrogates and a limited supply. A rule will create balance; a prohibition will not. It is also important to note that the demand for surrogates is high, and the supply is low. Only regulations would be able to bring about equilibrium.

IV. SOCIAL ANALYSIS

Surrogacy, morally, is seen with a dark tint. In the general public's view, it is considered immoral merely because it involves the commercialisation of motherhood, which is usually considered very sacred, especially in a country like India, and is remotely associated with sex work.²² In traditional Indian households, surrogacy is not commonly practised or preferred, resulting in its stigmatisation. However, the stigma is not merely because the woman is carrying a child for a couple but is because her body is involved in the process. Families that lack awareness regarding the advances in the medical industry are under the impression that the process involves sexual intercourse with the surrogate mother.

It is also argued that it is quite natural for a woman to develop an emotional bond with the foetus, and the same is inevitable. Hence, the maternal bond would lie with the surrogate and the child and yet the biological mother would further nurture the child, which is deemed unnatural in society's eyes. The attitude of the intending couple also plays a significant role in the whole process.²³ It is often regarded as mere physical labour by some instead of perceiving it as a labour of love. They disregard the changes and the

²² Pande A.(2009) Not an 'angel', not a 'whore': surrogates as 'dirty' Workers in India. *Indian J Gend Stud.* 16(2), 141-73.

²³ Sydie, R. A. (1994), 'Natural Women and Cultured Men A feminist Perspective on Sociological Theories', pp. 118-119, Vancouver, UBC Press.



difficulties that the surrogate mother is going through. There is yet more trouble for them. It is unnatural and logically unavoidable for someone with a kid within them for nine months to experience some emotional attachment.

Women are frequently coaxed or, in rare instances, forced against their will into surrogate parenthood due to the downtrodden status of women in our culture and the Indian patriarchal system's expectations of subservience to the men of the household. It is a source of easy money for the household by merely giving up working for the said nine months. In addition, they frequently do not even have a choice on how the money they make from serving as surrogates is spent. Regardless of the surrogate's preferences, the older family members or the household's head decide how the money is spent.²⁴

Since having children or becoming a parent is one of the fundamental necessities for living a life with human dignity, every human being should have the right to do so. Even though national and international law has recognised this need as a fundamental human right, the LGBTQIA community have been left out in the cold. The Surrogacy (Regulation) Act, however, does not include such homosexual groups in society. This begs the question of how a nation whose Constitution guarantees equality to all members of human society and legalises gay sex could discriminate against homosexuals by denying them the opportunity to parent through surrogacy, especially in cases where such couples cannot conceive naturally. The present law only permits "altruistic"

surrogacy via a close relative for heterosexual, infertile couples. Commercial surrogacy is forbidden. Accordingly, most single persons, all same-sex couples, live-in couples, and more, cannot use a surrogate to deliver a kid who would at least partially be their biological child. For instance, celebrities like Karan Johar used surrogacy to give birth to his twins, but under the present law, a single parent like him will no longer be able to do so.

V. CONCLUSION

Although the cost and prerequisite requirements differ from country to country, several nations currently embrace surrogacy and welcome fertility tourism. The parent's marital status is not a prerequisite in nations including the Netherlands, South Africa, Russia, Greece, and the United Kingdom. In certain nations, a single man or woman is even permitted to become an intended parent. Only a small number of countries, like Russia and the USA, allow commercial surrogacy, which is illegal in the majority of the states. No specific law governs surrogacy in nations like Kenya, Malaysia, and Nigeria. However, some nations like Saudi Arabia, Iran, Spain, France, and Japan ban all forms of surrogacy. Achieving a balance between protecting everyone's rights, upholding ethical standards, and successfully using medical and technological breakthroughs is crucial.

The desire for motherhood compels infertile couples, single individuals and homosexual couples to seek alternate alternatives, and surrogacy emerges as the most realistic option. In certain instances, surrogacy is the only option open to parents who desire to

²⁴ Anderson, E. (1990). 'Is Women's Labor a Commodity?' *Philosophy and Public Affairs*, Vol.19, pp.71-92.



have a biologically linked kid. India is gradually becoming a popular destination for wealthy foreigners seeking surrogacy arrangements. In this aspect, India is an intriguing alternative due to its inexpensive medical facilities, excellent reproductive technology, and absence of regulatory rules. Surrogacy must be recognised as a "right" and not a "necessity" at this time. The moral justifications for making surrogacy the last option are no longer valid. In a rights-based discourse, the state is required to play a pivotal role in advancing reproductive rights and liberties in order to enhance reproductive health.

The report by the Parliamentary Standing Committee on the effectiveness of the Surrogacy Regulation Bill of 2016²⁵ highlights the counterproductive effects of banning commercial surrogacy. Instead of outright prohibition, effective laws should be implemented to prevent the exploitation, development, and spread of the illicit market and human trafficking. It is time to wake up from this slumber and develop a new path based on stringent regulation and enforcement processes. Following, the feminist movement, the legislation must be formulated in consonance with the same. In the altruistic paradigm, the surrogate mother undergoes all of the emotional and physical changes out of compassion, which seems impractical. Thus, the "compensatory surrogacy model" will be examined, in which intended parents compensate surrogate mothers for health, economic, suffering, and death losses, among others.

²⁵PRS Legislative Research, (2020). Report of the Select Committee on the Surrogacy (Regulation) Bill, 2019