

AN ANALYTICAL REVIEW OF SURROGACY LAWS IN INDIA

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ABSTRACT

Surrogacy has become a widely accepted option for individuals and couples seeking parenthood. However, navigating the legal and ethical issues of the Surrogacy Act remains a challenge. The human body is a wonderful machine. The future of childbirth in the form of test tube babies, and surrogate motherhood through new reproductive and cloning technology will introduce undreamt of possibilities in the sexual arena. Surrogacy is a method of assisted reproduction whereby a woman agrees to become pregnant to gestate and give birth to a child for others to raise. The Surrogacy Act of 2021 aims to regulate various aspects of surrogacy, including eligibility criteria, rights of the surrogate mother and child, and financial implications.

This review of the act describes the legal nuances, health implications, and societal norms surrounding surrogacy. It also discusses the need for modifications to ensure fairness, inclusivity, and protection of fundamental rights. This research seeks to initiate the discussion regarding today's medical development in surrogacy and also present the essential aspects of surrogacy. This research will also try to compare various nations regarding the policy and take on surrogacy.

KEYWORDS: Surrogacy, Human rights, Legal issues, Health benefits, India

INTRODUCTION

The word 'surrogate' originates in the Latin word 'surrogatus', meaning a substitute, a person appointed to act in the place of another. Hence a surrogate mother is a woman who carries a child on behalf of other women, either from her ovum or from the implantation in her womb of a fertilized egg from another woman. A standard definition of 'surrogacy' is offered by the American law report[1] in the following manner;

“.. 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”

Indian council of medical research recognized surrogacy in 2005, which subsumes that surrogacy is a mechanism to help those who cannot naturally conceive a child. In recent years, substantial

growth in surrogacy has gained much attention and has raised several human rights concerns globally, it is estimated that 15% of couples are infertile which shows infertility is one of the most prevalent medical problems. The main causes of women choosing to be surrogate mothers are poverty and kind human being. Surrogacy is becoming a growing business nowadays to earn more money to overcome hardships. This research will present a critical analysis of the current regulation of surrogacy via domestic law in India and international law on the rights of the child in the current scenario unregulated surrogacy leads to gross violation of human rights.

OBJECTIVES:

1. To critically study the Surrogacy Act 2021.
2. To study the health-related issues due to surrogacy.

HYPOTHESES

1. There are some shortcomings in the surrogacy act 2021

RESEARCH METHODOLOGY

The present study has referred to a secondary data source to analyze surrogacy in the Indian scenario. The secondary sources of data include books, journals, articles, reports published by the government, and websites of different governmental and non-governmental agencies and organizations.

SURROGACY

- Surrogacy is an option to fulfill the desire to have a child of a couple for whom it is physically or medically impossible or undesirable to carry a baby to term on their own.
- The surrogate offers to carry a baby through pregnancy and then return the baby to the intended parent(s) once it is born.
- Opting for surrogacy is often a choice made when women are unable to carry children on their own.
- There can be several reasons, including an abnormal uterus or a complete absence of a uterus either congenitally or post-hysterectomy.
- Women may have a hysterectomy due to complications in childbirth, medical diseases such as cervical cancer or endometrial cancer, heart and renal conditions, etc.
- There are two types of surrogacy- traditional surrogacy and gestational surrogacy.
- In Traditional surrogacy, a surrogate mother is artificially inseminated either by the intended father or an anonymous donor. The surrogate mother provides the egg and is thus genetically related to the child.
- In Gestational surrogacy, an embryo is created using an egg and sperm produced by the intended couple and is transferred into the surrogate's Uterus. The surrogate has no genetic link to the child. Her eggs cannot be used to conceive the child.
- Surrogacy can be altruistic or commercial. In altruistic surrogacy, the surrogate is not paid for her services, except for medical expenses and insurance. In commercial surrogacy, the surrogate is paid over and above these expenses.

- The Surrogacy Regulation Act, 2021 seeks to ban commercial surrogacy establishing gestational surrogacy but protects the altruistic surrogate through enhanced, prescribed payments (for medical expenses, food and care, and longer-duration insurance).
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DEFINITIONS

- **Surrogacy** - Surrogacy includes an agreement where a woman (the surrogate) consents to carry and deliver a child for another person or couple (the intended parent/s). The surrogate, also known as a gestational carrier, conceives and bears a child on behalf of the intended parent/s.
- **Intended Couples** - The “intending couple” means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy.

Surrogate mothers must meet criteria such as age, marital status, and physical and mental health. Also, surrogacy requires a medical necessity certificate from the District Medical Board as mentioned under the law.

ANALYSIS OF THE SURROGACY ACT, 2021

Strengths of the surrogacy act

A. **Regulatory progress** - It constitutes an important step towards regulating surrogacy in India, providing a legal framework for the practices that were unregulated earlier relating to surrogacy.

B. **Protection of rights** - The act defines several key aspects relating to surrogacy, such as eligibility criteria and the rights of the surrogate, providing a certain degree of legal protection to parties involved.

C. **Transparency** - The act also mentions transparency in the surrogacy process, which can help prevent the exploitation and abuse of surrogate mothers.

D. **Ethical approaches** - It lays down some ethical guidelines for surrogacy, promoting responsible and ethical implementation within the industry.

Shortcomings of the surrogacy act

A. **Need for rectification** - The need for rectification arises from the vague language in the act to prevent misinterpretation or misuse of the law (One example of the need for rectification due to vague language in the act is the ambiguity surrounding the definition of "close relative" about eligibility criteria for surrogacy, which could lead to varying interpretations and potential misuse of the law).

B. Fairness and inclusivity - It requires some major modifications to straighten the principles of fairness, inclusivity, and protection of fundamental rights, ensuring that all parties involved are treated fairly and their rights are secured.

C. Implementation challenges - The implementation of the Surrogacy Act, of 2001 may face challenges such as lack of awareness, regulatory oversight, resource constraints, legal and ethical issues, enforcement challenges, and cultural and social factors. requiring transparent mechanisms and resources to ensure effective implementation of the law.

D. Accessibility - It is a very difficult task to ensure that the act is accessible to all individuals and couples, including those from backward communities.

ALTRUISTIC MODEL

The altruistic model is a form of surrogacy where the surrogate mother receives no monetary compensation apart from the coverage for medical expenses and insurance during the pregnancy.

Challenges of the altruistic model

- **Forced labor concerns:** The ban on commercial surrogacy might create a situation where women are compelled to become surrogate mothers against their will, possibly due to financial reasons. To address this, there should be fair compensation for surrogate mothers to prevent exploitation and ensure their well-being.
- **Health implications:** The act should provide clear guidelines on the health risks involved for both the surrogate mother and the fetus. This includes ensuring access to comprehensive healthcare services throughout the surrogacy process, to safeguard the health of all parties involved.
- **Discrimination based on disability:** The current guidelines are unclear and may lead to discrimination against individuals with disabilities. It is important to have inclusive regulations that protect the rights of all individuals, including those with disabilities, involved in the surrogacy process.

COMMERCIAL SURROGACY

The surrogacy or related procedures conducted for a monetary benefit or reward (whether in cash or kind) which is more than the basic medical expenses and insurance coverage is called commercial surrogacy.

Challenges of commercial surrogacy

- **Implications** - The ban on commercial surrogacy has vital implications for procreative medical tourism, as it limits opportunities for fertility tourism and economic prospects for surrogate mothers.
- **Fair compensation** - To address the issue of fair compensation, alternative solutions such as short-term disability insurance coverage and the provision of legal representation for surrogate mothers could be explored.
- **Legal recognition** - It is crucial to address the parity in the legal recognition of different methods of family-making. This includes avoiding the establishment of hierarchies based on biological relatedness, and ensuring that all individuals have equal access and recognition regardless of the method chosen to build their families.

SURROGACY IN INDIA AS PER SURROGACY REGULATION ACT , 2021

Guidelines for the intended parents :

The surrogacy law in India – 2021 has established eligibility criteria for intended parents seeking to undertake surrogacy.

- As per the law, the intended couple must be lawfully married and meet specific age pre-requisites.
- The female partner must fall between the age range of 23 to 50 years, whereas the male partner must be in the age bracket of 26 to 55 years.
- Additionally, the couple must not have any biological offspring from a prior marital union.
- The female partner should have a medical indication for surrogacy with valid medical reports to support this claim.
- The willing surrogate mother should be married with at least one child of her own.
- An unmarried woman may also qualify as an intended parent, provided she falls in the age group of 35 to 45 years and is either married, divorced, or widowed. Nonetheless, if she has a surviving child from a previous marriage, she is ineligible for surrogacy.
- Single males or same-sex couples are prohibited from surrogacy arrangements in India.
- Medical Indication in the Intended Mother is a Must.

The new surrogacy law in India allows couples to opt for surrogacy under certain medical conditions, including MRKH, unicornuate uterus, multiple IVF failure, miscarriage, or abortion.

Considerations for surrogate mothers

- Becoming a surrogate is a decision that involves meeting a complex set of requirements to ensure a successful outcome.

- Firstly, the surrogate must genuinely wish to carry a child for another couple without any financial incentive, as commercial surrogacy is strictly prohibited.
- In addition, the surrogate must meet specific demographic criteria, such as being a married woman between the ages of 25 to 35 years with at least one biological child.
- Furthermore, medical and psychological fitness certificates are also essential to confirm that the surrogate is physically and mentally capable of undergoing surrogacy, minimizing potential risks to herself and the baby.
- Lastly, surrogacy is regulated to ensure safety, with each surrogate allowed only one attempt and the intended parents restricted to trying surrogacy up to three times. Only one embryo can be transferred during each attempt, ensuring maximum safety for all involved parties.

Legal requirements of Surrogacy

The new surrogacy law in India – 2021 mandates several legal requirements that intended parents and surrogates must follow.

- They must submit several documents, including proof of marriage, certificates of age, and a certificate of essentiality for the surrogate, along with a medical indication obtained from the District board.
- The surrogate must also have a certificate of eligibility from the Board.
- Intended parents must provide compensation for the surrogate's travel, clothes, medicines, tests, and check-ups. However, they are not allowed to offer any monetary expenditure.
- The surrogate must also have insurance for three years, and the intended parents must provide an affidavit or guarantee of her health.

REGULATIONS

- Surrogacy is **prohibited for commercial purposes** such as sale, prostitution or any other forms of exploitation.
- A child born through surrogacy will be deemed to be the biological child of the couple.
- **Abortion** of such a fetus is allowed **only with the consent of the surrogate mother** and the authorities as per provisions of the **Medical Termination of Pregnancy Act 2021**.
- To avail of surrogacy, a couple should be **married for at least 5 years**, with the wife aged between 25-50 and the husband between 26-55.
- They should **not have any living child** unless the child has disabilities or a life-threatening illness.
- The **National Surrogacy Board** and **State Surrogacy Boards** are responsible for regulating surrogacy clinics and enforcing standards.

- The Act prohibits practices like **commercial surrogacy, embryo selling, and exploitation or abandonment of surrogate mothers or children.**
- Violations can lead to **imprisonment for up to 10 years and a fine of Rs. 10 lakh.**

HEALTH RISKS ASSOCIATED WITH SURROGACY

- In the US, surrogates are given no more than two embryos for their safety, whereas in India, surrogates are implanted with up to five embryos to increase the chances of pregnancy. Using such a large number of embryos increases health risks for babies and the mother. The chances of post-partum depression in surrogates are more with the child that grew in the mother's womb. Pregnancy, birth, and the post-partum period include complications such as pre-eclampsia and eclampsia, urinary tract infections, stress incontinence, hemorrhoids, gestational diabetes, life-threatening hemorrhage and pulmonary embolism. Multiple pregnancy increases the likelihood of requiring an operative delivery. A surrogate host of advanced maternal age has increased risk of perinatal mortality, perinatal death, intrauterine fetal death, neonatal death. There is a greater risk to the mother of pregnancy induced hypertension, stroke and placental abruption. When hormones or drugs the surrogate is instructed to take, all drugs have side-effects. Many women undergoing Artificial insemination also take fertility treatments, increasing the likelihood of an adverse reaction and risks involved with the procedure.^{19,20,21}
- Issues such as premature delivery, genetic malformation and infections which lead to increased hospitalization of newborn are important issues to be considered in surrogacy contract.^{20,21}
- Many surrogate mother's breastfeed the newborns during the first few hours following birth. However, parents find difficulty in initiating breastfeeding and in establishing the bonding between mother and child in the case of surrogacy.²¹
- One of the major drawbacks of induced lactation in most surrogates or adopting mothers rarely produced the same quantity of breast milk as a new mother immediately following child birth. This presents a problem in terms of infant nutrition.^{21,22}

CASE LAWS RELATED TO SURROGACY IN INDIA

- **Suchita Srivastava's vs Chandigarh administration**- In this case court said the right to make reproductive choices falls under the personal liberty guaranteed by article 21 including women's entitlement to carry a pregnancy to its full term it's her choice whether she wants to give birth to the child or not. These rights form part of women's right to privacy, dignity, and bodily integrity
- **Justice KSputt Swamy & Anr vs Union of India**- In this case, the court said to obtain a 'certificate of infertility' from the district medical board, which is a violation of the 'right to privacy and has been recognized as a 'fundamental right' to be protected
- **Baby Manji Yamada vs Union of India**- a Japanese couple surrogated their child in India but before a month of the child's birth, the Japanese couple separated. The biological father, ikufumi Yamada wanted to take his biological child to Japan but the legal framework of both countries does not permit it and the future of the child was left in dark. in the end, the supreme court interfered

in this matter and the court allowed the child to leave the country with her grandmother the case of baby manjhi Yamada spurred the government to make regulating surrogacy

• **Jan Balaz vs Anand municipality**- in this case, Gujrat high court ruled that the birth certificate of the surrogated child will carry the surrogated mother's name and in return, the biological parent of the child will be granted the passport of Indian and in return surrogated mother have to give his child to a German couple in adoption, the appeal was made in supreme court against this judgement but the supreme court is still seized of an appeal.

Recent Legislative enactment for Maternity leave of Surrogates

Recently, the Government has notified an **amendment to Central Civil Services (Leave) Rules, 1972** to grant **maternity leave** and other benefits to **government employees** in case of children born through **surrogacy**.

- This move aims to **address the existing gap in the leave policies** for government employees **who opt for surrogacy**.

Provisions of Notified Amended Rules

- **Maternity Leave for Surrogate and Commissioning Mothers:** It allows women government employees who have children through surrogacy to avail **180 days of maternity leave**.
 - This includes **both the surrogate mother and the commissioning mother** (the intended mother) with less than two surviving children.
- **Paternity Leave for Commissioning Fathers:** The new rules also grant **15 days of paternity leave** to the "**commissioning father**" (**the intended father**) who is a male government servant with less than two surviving children.
 - This leave can be availed within 6 months from the date of delivery of the child.
- **Child Care Leave for Commissioning Mothers:**
 - Additionally, the commissioning mother with less than two surviving children is eligible for childcare leave, as per the existing provisions in the **Central Civil Services (Leave) Rules**.

Laws related to Surrogacy

- Surrogacy Regulation Act, 2021
- Surrogacy Regulation Rules, 2022
- Assisted Reproductive Technology (ART) (Regulation) Act, 2021

CONCLUSION

From this research, the researcher has understood the concept of surrogacy whether it is commercial surrogacy or altruistic surrogacy and the researcher also understood what measures the government took to counter commercial surrogacy. In India, surrogacy is purely an understanding between the parties so care has to be taken while drafting agreement so that it does not violate any of the laws like, e.g., points to be taken into consideration why does the intended parents opt for surrogacy, particulars of the surrogate, type of surrogacy, mentioning about paternity in the agreement, the creation of registry for biological father of children in an adoption cases, rules set forth on how and when genetic testing can be done to determine paternity, compensation clause, unexpected mishappening to the surrogate mother, child's custody, regarding the jurisdiction for the disputes arising out of agreement. The law views surrogacy and adoption as distinct choices for family-making, emphasizing the right to a biologically related child through surrogacy as opposed to adoption

The Surrogacy Act, 2021 is a significant step towards the regulation of surrogacy in India but it needs to be fixed. Currently, the act shifts from a right-based to a need-based approach, excluding certain groups and limiting reproductive autonomy. The ban on commercial surrogacy raises concerns about exploitation and discrimination. The amendment acknowledges the legitimacy of surrogacy as a form of reproduction and adjusts eligibility to consider the medical needs of one partner within a marriage. Future changes should make the law clearer about surrogacy, making sure it's fair to everyone involved and protects their rights.

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