



A legal perspicacity on the surrogacy with special reference to the Surrogacy (Regulation) Act, 2021

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Abstract

Reproduction is essential for the survival. Almost every couple desires to have their own child. Parenting is like a dream that practically everyone has, but it is a blessing many people do not normally receive. In a society like India, when a couple is not able to bear a child, it is considered a curse and is stigmatized. With the introduction of major scientific and technological developments in gynecology and obstetrics, various methods of Assisted Reproduction Techniques have become a viable alternative to enabling people to become parents. Surrogacy is one such method. In India, The Surrogacy (Regulation) Act 2021 has raised legal, moral and ethical questions related to surrogacy. This paper intends to study the effective application of The Surrogacy (Regulation) Act, 2021 in context of present situation in India. The new legislation has prohibited the commercialization of surrogacy as it has been causing grief and exploitation of surrogate mothers for a long time. But the recent legislation is silent as to the right to form a family for single parent, lesbian, gay, bisexual, transgender and queer communities, which have raised a debate all over India about the Act being a violation of the Right to Reproduction of an individual. The paper concludes that the current law is a progressive step, but in certain areas the act is still vague and inefficient in its nature and finally, suggestions and recommendations for better enforcement of surrogacy laws in India have been discussed.

Keywords: Human rights, legal issues, surrogacy, assisted reproduction techniques, intended parents, surrogate mother

Introduction

Procreation is a necessary process for the survival. In a society like India, the institution of marriage serves to provide legitimacy to the offspring born out of that marriage. Generally, couples desire to have their own child. This could be for many reasons like, from religious to social or even personal. A child is considered the future of the family. But unfortunately, not every couple is able to have a child. The reason for not having a child because in most cases is infertility, though there may be many other social and medical reasons as well. Medical Infertility means not being able to become parents even after a year of trying. If a woman gets pregnant but keeps having a miscarriage or still birth, that's also called infertility^[1].

This urge of having a biological child of his own has always encouraged man to find newer methods for begetting the child. With the growth of technology and medical sciences various techniques have evolved to help the infertile couple. Assisted Reproduction Techniques means achieving pregnancy through medical intervention. These intricate procedures aim to manipulate gametes, specifically eggs and sperm, to enhance the likelihood of fertilization. ART is usually considered by individuals for whom alternative infertility treatments are ineffective or those who have previously attempted treatment but have been unsuccessful in achieving parenthood.^[2]

There are various assisted reproduction techniques such as Intracytoplasmic Sperm Injection (ICSI), Gamete Intrafallopian Transfer (GIFT), IVF, surrogacy etc, but Surrogacy is the most practicable and viable option. Surrogacy procedure has given a hope to infertile couples, who are not able to conceive.

Concept and Scope

The word "Surrogacy" is derived from Latin word "Surrogare", meaning substitute^[3]. Surrogacy is an alternative procedure for attaining parental status. It is the last option available for infertile couples who want a biological child but cannot conceive one. Surrogacy is a gift for those who are unable to have children through natural process. Surrogacy, which entails raising a baby for nine months in the womb of the mother, going through pain for delivering the child, and then willingly parting with one's child for the sake of another woman, seems strange.

Surrogacy can be either commercial or altruistic. The surrogacy arrangement is deemed commercial if the surrogate receives payment in exchange, and altruistic if she receives no payment at all, other than reimbursement for her pregnancy-related and medical costs. The Surrogacy (Regulation) Act, 2021, in India, allows altruistic surrogacy but forbids commercial surrogacy. Surrogacy has become the most advanced assisted reproductive method in which a woman bears another woman's baby in her womb in consideration of money or due to love and affection. The increasing new technology and medical skills, the low cost and the easy availability of surrogate mothers have made India the center of practice of surrogacy. Many problems have arisen due to the complicated nature of surrogacy, including the legal validity of surrogacy activities and commercialization, compliance and validity of surrogacy contracts, parenthood of surrogate child, surrogate mother's rights and responsibilities. As in India, the legislature enacted the Surrogacy (Regulation) Bill 2019 on 25 December 2021 which came into effect on 25 January 2022. This study helps to analyze the efficiency of the recent law in the regulation of surrogacy in the present situation.

Law Governing Surrogacy in India

The Surrogacy (Regulations) Act, 2021 governs surrogacy in India which has been divided into eight chapters and fifty-four sections. The Surrogacy (Regulation) Rules 2022 have also been framed to supplement it. Later on, the Surrogacy (Regulation) Amendment Rules, 2023 were announced by the Ministry of Health and Family Welfare. The use of donor gametes is forbidden by this Amendment to Surrogacy (Regulation) Rules 2022, which also mandates that the intended parents to provide both the male and female gametes. The term “Surrogacy” has been defined under the Act under Section 2 (zd) “as a procedure in which a woman carries the child and gives birth to a child of an intending couple and thereafter hand overs the child to the intending couple after the child is born.”^[4] The main characteristics of the Act may be elaborated in following categories:

1. Regulation of Surrogacy Clinics

Section 3 of the Act provides for the restriction on Surrogacy clinics which are not registered^[5]. The Act further imposes restriction on the Surrogacy clinic, gynaecologist, embryologist, etc to conduct commercial surrogacy in any manner. This Section provides for certain qualifications only those shall be allowed to work in the surrogacy clinics who are qualified according to the provided qualifications. Abortion must not be performed during the surrogacy period by the intended couple, the surrogacy clinics, or any individual unless authorized by the appropriate authority and approved by the surrogate mother's written consent^[6].

2. Regulation of Surrogacy Procedures

As per Section 4(i), no surrogacy clinic can perform in any way activities related to surrogacy procedures unless registered under this Act, Section 4(ii) provides that surrogacy procedure shall be conducted only for the these purposes^[7]: When there is medical requirement. Only altruistic surrogacy purposes. It should not be for business purpose or in violation of any other condition.

3. Who can be a Surrogate Mother^[8]

In order to serve as a surrogate, the woman must herself be a mother of a child. The woman to act as Surrogate must be between the age of 25 to 35. She must be willing to go through the Surrogacy Process. Naturally informed consent will be significant and serve the letter and spirit compliance of the legislation. She ought to have a certificate of psychological and medical fitness from a medical facility.

It is prohibited for women to serve as surrogates more than once in their lifetime. Act is intended for a purposeful criterion to determine as she is not allowed to donate her own gametes.

4. Who can be an Intended Couple^[9]

The Intended Couple must be legally married and in case of man, he must be between 26 to 55 years and the woman must be between the age of 23 to 50. The Intended Couple can have child through Surrogacy only when they cannot have a child naturally or through adoption or they don't have a surviving child through Surrogacy. In case they have a child, then the child must be either mentally or physically challenged, has a life-threatening ailment, or has a deadly

illness. Intended Parents are prohibited to abandon the Surrogate Child. The Act prohibits the abandoning of child by the intended couple if the child is born with some birth defects or illness, whether within India or outside^[10].

5. Rights of a surrogate child

Section 8 of the Act states that a child born via surrogacy would be considered the biological child of the intended parents and would be entitled to all the same legal rights as a child born naturally^[11].

6. Registration of surrogacy clinics

Section 11 of ART Act 2021 states that no one shall be allowed to open a surrogacy clinic unless it is registered under the Act. Applications for surrogacy clinic registration must be submitted to the relevant authority together with the necessary fees. Surrogacy clinic shall be registered only when such clinic can provide standard facilities as required by authorities.

According to Section 12 of the Act, the competent authority must give the applicant the certificate of registration following a thorough review and determination that the applicant has met with all requirements and paid the required fees. The cancellation of registration is allowed under Section 13. The competent authorities may issue a notice to the surrogacy clinic *suo motu*, or after receiving a complaint, requesting that it explain why its registration shouldn't be canceled or suspended. Section 14 allows for the filing of an appeal within 30 days after discovering that the relevant body has decided to deny an application or to suspend or cancel a registration.

7. National Assisted Reproductive Technology and Surrogacy Board and the State Assisted Reproductive Technology and Surrogacy Boards

Section 17 of the Act makes provision for constitution of the National Board to perform such powers and functions as conferred by the act on the Board. Section 26 of the Act makes provision for Constitution of the State or Union Territory Boards to review the activities of the appropriate authorities functioning in the State or UT.

Judicial Response towards Surrogacy in India

The main elements of the Act, particularly those that prohibit commercial surrogacy and implement altruistic or gestational surrogacy, are highly impressive, but there are several practical issues that need to be resolved for the Act to be enforced effectively in the long run. Prior to conducting a critical study of this Act, it is vital to highlight how the Indian judiciary has favored surrogacy. In *Baby Manji Yamada vs. Union of India*,^[12] the Apex court of India opined that there was no comprehensive law related to Surrogacy. Conversely, the Supreme Court of India rendered a favorable decision in 2008 to establish a legal framework in the nation, shedding light on surrogacy. A PIL was filed by an NGO before the Rajasthan High Court alleging an inter-country child trafficking racket under the guise of unregulated commercial surrogacy in India. The court issued a writ of habeas corpus to produce the Japanese child born through surrogacy in India in the larger public interest. The Rajasthan High Court's interim order was then challenged in a writ petition filed under Article 32 of the Indian Constitution with the Supreme Court. The surrogate child's grandmother, Manji Yamada, filed a case contesting

the Rajasthan High Court's orders on the child's production. She also contested the NGO's locus standi to file the habeas corpus writ petition before the Rajasthan High Court. The petitioner sought an extension of her visa to obtain guardianship of the child and further requested the issuance of a passport for the child to facilitate travel to Japan to reunite with their biological parent.

The Hon'ble Supreme Court directed the petitioner to submit their grievances to the Child Commission, which was established pursuant to the Act. The Supreme Court determined that the Child Commission is accountable for any necessary actions in the ongoing case. The petitioner, the child's grandmother, who aims to secure custody of the surrogate child, has been granted a visa extension by the Supreme Court. The Supreme Court directs the Central Government to promptly process the application for the child's passport and travel permissions as per the law.

In *Jan Balaz vs Union of India* ^[13] case the issue related to Indian citizenship was addressed by the court. In this instance, the question was whether a child born within India to a foreign biological father and an Indian surrogate mother would qualify for Indian citizenship at birth. The petitioner, living in Germany, was the biological parent of two children born via an Indian surrogate. Due to biological constraints, the petitioner's spouse was unable to conceive. The Gujarat High Court followed the Supreme Court's decision in the Baby Manji case, stating that commercial surrogacy is allowed. The Gujarat High Court stated, "*Artificial insemination, egg donation, womb lending, and surrogacy agreements are not illegal in India and do not face civil or criminal penalties.*" Consequently, this court decision reinforces the legality of both commercial and international surrogacy in India. In *Union of India & Anr v Jan Balaz and others*, ^[14] the central government appealed the Gujarat High Court's decision. The Central Adoption Regulatory Authority (CARA) was directed by the court to take the German couples' request into consideration. The Children were not granted passport but were allowed exit permit by the authorities. This case resulted into the ban of commercial surrogacy which was a welcoming step towards the Prevention of exploitation against women. In *Jayashree Wad vs Union of India*, ^[15] Jayashree Wad, a lawyer, raised the issue of exploitation of Surrogate Mothers by few Medical Experts for their own monetary benefits. She fought this battle single handedly. She demanded the Comprehensive legislation to prevent the exploitation and at the same time she also cited examples of many countries where commercial surrogacy is not allowed to prove her point that commercial surrogacy not only impact the mother but also the child and thus the Hon'ble Supreme Court while the PIL was still pending ordered the centre to ban the arrival of NRIs and OCIs to India for opting for Surrogacy.

Issues Related to Surrogacy

Surrogacy is not an easy process. It involves a lot of issues which can be ethical, social, medical or legal. Some of the issues related to surrogacy have been discussed below-

1. Ethical and Psychological Issues of Surrogacy

Usually, surrogacy causes a lot of psychological problems. Surrogate mothers accept the surrogacy agreements for the monetary benefits but during the process of carrying the child she starts to develop emotional bond with the child and after the delivery it becomes emotionally difficult to

deliver the baby to the intending parents. On the other hand, the intending parents do face problems in creating the bond with the child as they have not gone through the process of pregnancy. In numerous situations, the surrogate mother refuses to give the child to the intended parents.

2. Medical Issue

Numerous medical or obstetrical problems that affect the surrogate mother or the foetus can arise during the course of the pregnancy. When the intending mother's eggs are inserted into the surrogate's body, infectious diseases might be transmitted to the surrogate. Surrogacy has not only posed health risks to surrogate mother but also to the child.

3. Religious Problem

Various religions do not allow surrogacy practices. Catholicism does not allow such practices; however, Judaism religion allows surrogacy. Hindus ancient scriptures provide evidences of surrogacy being practiced. Lord Kartikeya, revered as the deity of fertility. He is the offspring of Goddess Parvati and Lord Shiva, the creator. It is said that Shiva provided a seed to be placed in Mother Ganga, the goddess of the river, as a response to the Gods' request for a candidate to lead their army. Since the seed is placed within Mother Ganga, she could be seen as a surrogate, and the seed can be viewed as the father's genetic contribution in contemporary terms ^[16].

4. Right to Health

There have been cases where unexpected difficulties during the prenatal period caused surrogate lose their lives. Similarly teenage egg donors have occasionally passed away shortly after egg donations. Limited educational opportunities, economic hardship, marginalization from the workforce, patriarchal social and family dynamics surrounding surrogacy arrangements, and financial considerations all serve as significant motivators. The agents that work for commissioning parents abuse surrogates. So, surrogacy can be both a financial opportunity and a potential tool for exploitation. The surrogacy process brings forth numerous concerns regarding human rights, as well as matters pertaining to the health, safety, and privacy of both the surrogate mother and the child.

5. Commercialization of Surrogacy

In 2015, commercial surrogacy was banned in India. Before that, India grew as a popular surrogacy destination. On one hand, the wealthy have easy access to reproductive services than the underprivileged, giving them a wider range of options when choosing a surrogate. On the other hand, since surrogates themselves are frequently in need of money, financial factors have a significant impact on the decision to offer their bodies as surrogates which leads to their exploitations and reproductive trafficking.

Inadequacies of the Act

1. Exclusion

Same-sex couples, Unmarried Individuals and live-in partners are not allowed to have child through surrogacy; certain provisions of the Act are defiantly contradictory to the fundamental rights. According to the definition of "Couple" as provided in the Act the man and the woman should be legally married and should be of legal age.

“Intending Couple” as per section 2 (r) includes only the couples having medical indications. The Act allows “intending women” to have a child through Surrogacy but only those women are considered intending woman who age between the age of 35 to 45, who are Indian and who is either widow or divorcee

2. Tackling the issue as a breach of the Right to Privacy

Section 4 (iii) (a) (I) of Act, requires a certificate of medical indications supporting gestational surrogacy for either both the intended couple or one of them or the intended woman. The certificate must be issued by a District Medical Board. In *Justice K.S. Puttaswamy & Anr vs. Union of India*,^[17] it was determined that obtaining and presenting a certificate of infertility constitutes a violation of the right to privacy, and from a moral and ethical standpoint, it is inappropriate to mandate the acquisition of an infertility certificate from the District Board; thus, this fundamental right must be safeguarded.

3. Concern for short-term insurance

In order to cover postpartum delivery complications, the Act requires the intended parent or parents to obtain insurance coverage from an insurance provider or agent approved by the IRDA for a period of six months. This provision fails to consider the medical issues that the surrogate mother may face throughout her lifetime. Pregnancy can result in various health problems that can persist for life, potentially leading to severe illnesses over time.

4. Concern about mental health

Although the Act is comprehensive and strict regarding the psychological qualifications of a surrogate, it does not address the potential for newly developed psychiatric disorders after implantation. Additionally, any unresolved mental health concerns in the surrogate mother can risk the fetus in the womb.

5. Complete ban on commercial Surrogacy

The Act only permits altruistic surrogacy, however, finding surrogates for this kind of arrangement can often be challenging. Offering pregnancy and childbirth services to others is seen as a means of making money and has evolved into a popular practice among lower-income families in India. There is a chance that loopholes will be discovered even within strict restrictions. For instance, after the effective ban on international surrogacy in Thailand in 2015, there have been reports of transferring surrogate mothers to nearby countries^[18]. This example of Thailand highlights the risks in such nations which do not offer protections, nor do their local laws safeguard women who undertake surrogacy arrangements outside their country, making these women particularly vulnerable.

6. The matter of surrogate compensation

The legislation allows surrogates to be compensated for their services, even if it forbids commercial surrogacy. However, the statute doesn't provide clear instructions on how to calculate or define appropriate compensation. To make sure surrogates are fairly compensated for their labor, policymakers should think about creating more precise standards for surrogate compensation.

Conclusion and Suggestions

The Act has several shortcomings attached to it but still it is a much-needed legislation in the modern-day society. Following are the certain suggestive measures that could be added in the existing act to increase its efficiency and make the act more relevant in today's scenario.

1. The statute should uplift the complete prohibition on commercial surrogacy rather there should be an alternate choice where options are available. Where a childless gets an opportunity to have a child and women in need of money can earn it. Laws pertaining to the nature of the contract can also be drafted if commercial surrogacy would be legalized. Such a contract pertaining to commercial surrogacy would eliminate the possibility of corruption and would also prevent the exploitation of the mother, and would clearly specify the relation between the parties to surrogacy. The requirement that the woman should be married and have a kid of her own to be a surrogate should not be imposed by the statute. Having such a condition reveals a lot about how society views single mothers or even unmarried women who are pregnant. Furthermore, marriage and childbirth cannot be used as a criterion to assess the surrogate mother's capacity to care for the child.
2. The requirements should especially address the mother's physical and emotional health, taking into account the setting she would be living in, rather than marriage and having their own child.
3. The statute should grant LGBTQ communities the right to procreate through ART. In the recent judgment of *Navtej Singh Johar vs. Union of India (2018)*^[19], the Supreme Court de-criminalized homosexuality by partially struck down Section 377 of the Indian Penal Code. Even with the fundamental rights assured to them by the Indian Constitution, it is crucial to acknowledge the LGBTQ community to promote equality in society, a right that all Indian citizens deserve.
4. One potential change to the existing legislation could be to focus more on the sections that specifically address the rights and protections of all individuals involved in the surrogacy process, including the child. The act should emphasize the responsibilities of both the individuals performing the surrogacy procedure and the surrogacy clinics.
5. The fact that having a surrogate baby is linked to a number of immediate risks and mental health problems in long run cannot be ignored. According to a number of studies, the surrogate mother may experience postpartum psychosis or depression. It is crucial to lay emphasis on the surrogate child's wellbeing to attend to the emotional and mental aspects of health. These gaps must be effectively addressed.

Thus, these are some of the corrective measures that could lead the act in achieving the vision with which the act came into existence. India plays a major role in these practices, so the Act represents a positive step forward; however, there are several points where the surrogacy legislation appears to be inconsistent. Article 21 states that “Right to Life” is a fundamental right, which also includes “Right to Reproduction”. Womens’ rights to have child and to carry a pregnancy falls under their reproductive rights. Consequently, imposing restrictions on surrogacy means limiting reproductive choices clearly violates Articles 21 and 14.

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