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# A LEGAL ANALYSIS OF SURROGACY IN INDIAN CONTEXT

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## ABSTRACT

SURROGACY is a strategy utilized when a couple is not able to fall pregnant and relies on a foreign entity to conceive the child through assisted reproductive technology or the inclusion of an egg cell after invitro gestation, carry the child through pregnancy, and then relinquish the child's custody to the couple after birth. A couple who is not able to have babies for a range of reasons will benefit from this method since it allows for the birth of a blood-linked child. Surrogacy could be used for couples for whom artificial insemination is insufficient. IT was first utilised in the 1980s and legalised in India in 2002, but the administration of the nation eventually learned of the technology's flaws and abuse.

India was deemed the "CAPITAL OF SURROGACY" by the UN in 2012, according to their assessment.

This study uses a doctrinal method to research the legal ramifications of surrogacy in India. This research paper will examine assisted reproduction technology and surrogacy act 2021 and several rules relating to surrogacy.

*Keywords: Artificial insemination, surrogacy, and surrogate mother.*

## INTRODUCTION

Birth is necessary for all forms of life to exist because no life on our earth is eternal. Human civilization first developed relationships as a means of directing conceptions of birth. The legal and culturally acknowledged union of a man and a woman that bestows upon them the titles of wife and husband as well as legal status onto their offspring is generally referred to as marriage. People are the foundation of civilization and marriage has the potential to establish families, the definition of wedding is advantageous to society. Nearly all communities have had ideas about marriage, reproduction, and childbirth from prehistoric times. The primary physiological goal of marriage is procreation, which is also crucial for the breed's survival. In addition, everyone is naturally driven to want to have children naturally for a multitude of reasons, such as love, societal indoctrination, religious rites, upholding family traditions, etc.<sup>1</sup>

All living organisms must be able to reproduce in order to survive. Reproduction is the metabolic process by which a woman gives birth to a child. Any offspring that arises as a result of a biological mechanism is nurtured by the natural parents. Reproduction is thus turning into an essential tool for the survival of the species. The concept of marriage emerged in culture as a way to encourage continuity. Sadly, there are a lot of childless couples, which implies that a lot of people are unable to get pregnant for a variety of reasons, such as social or health issues.

The inability of a person to become pregnant owing to a variety of conditions is referred to as social infertility.<sup>2</sup> Like lesbians, gays, widowed people, single people, and divorced people, these people are capable of having children but are unable to do so for various reasons. Every society has a significant issue with infertility, which affects both men and women equally. The Abrahamic faith holds that infertility is a gift from God that the couple must accept with faith. They hold that past misdeeds are to blame for infertility. In the holy book Quran, God's sovereignty is explicitly stated as follows: "God created what he pleased; He granted to whom he pleased, and he gives to whom he pleased, men; he gives them in pairs, males and females; and he made whom he pleased barren verily." He has knowledge and power. In Buddhism and Hinduism, the "karmic cycle" is seen as a crucial element that is to blame for all significant life occurrences, circumstances, and sufferings, including infertility. Infertility is said to be a result of prior transgressions. Medical infertility, which is caused by biological factors, is the incapacity or failure to conceive a child despite many years of marriage and frequent sexual

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<sup>1</sup> V. Rajalakshmi "Reproductive Technology v. Women", SC journal 1991, p.49.

<sup>2</sup> Ibid

activity without the use of contraception. The cause of infertility could be a condition like diabetes mellitus.<sup>3</sup>

## **UNDERSTANDING OF THE TERM "SURROGACY"**

For couples who are unable to conceive for a variety of reasons, including possible medical issues, surrogacy is an alternative to have a biological child. In a surrogacy, the surrogate mother carries the child throughout the pregnancy and gives the child back to the intended parents after birth. The two varieties of surrogacy are as follows:

1. Traditional Surrogacy
2. Gestational Surrogacy

" Traditional Surrogacy: "The insemination in this scenario is artificial and is done between a surrogate mother and either by intended father or an anonymous donor

"Gestational Surrogacy": It is done by creating an embryo by fusion of an egg and sperm which is produced by intended parents and then is transferred into the womb of the surrogate mother."

## **INDIA'S HISTORY OF SURROGACY**

1. Infertile couples can benefit from "surrogacy." Surrogacy is the practise of a woman carrying another person's child in her womb through the transfer of an embryo or gametes made by the intended parents. It was formerly referred to as the Niyoga Dharma and has been practised in India for centuries.

2. Balram, Devki and Vasudev's seventh child, was implanted as an embryo in Rohini, Vasudev's first wife. It was carried out to stop Kansa from killing the infant.

3. In the Mahabharata, Gandhari gave birth to a mass after a two-year pregnancy. Rishi Agryasa discovered that the bulk had 101 cells. From these cells, 100 male children known as Kaurans and a female body known as Dushala were born outside the womb in a nutritional medium.

## **INDIA'S SURROGACY LAWS**

The legalisation of commercial surrogacy in India in 2002 relieved infertile couples who were

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<sup>3</sup> Martyn Stafford-Bell, "Social Infertility Sexual Function and Sexuality", Vol. 8, No. 3, 2006.

unable to conceive a child naturally, and the demand for the procedure rose significantly. According to a study, India became the world's largest surrogacy hub, which in turn increased demand from infertile couples who were unable to conceive a child naturally. Due to the significant growth in demand from domestic and international couples, the surrogacy market grew quickly.

In the action involving "Baby Manjhi Yamada v. Union of India,"<sup>4</sup> "obtaining travel documents for a child born through commercial surrogacy in India to prospective Japanese parents who was carried by the mother." According to the Supreme Court, commercial surrogacy was permitted in India at the time. This ruling was made in 2008, which also happened to be the year that the "Assisted Reproductive Technology Bill" was drafted. "The 'Law Commission of India to pump up the problem of surrogacy'" was encouraged because no action had been taken to draught the Bill of the year 2008 before Parliament. The Law Commission of India then presented its report on legislation for managing surrogacy and resolving related issues in 2009. Before beginning the surrogacy procedure, the ICMR changed the rules in 2010 and proposed a signed contract between the intended parents, the mother, and the ART clinic. The Ministry of Health and Family Welfare also provided revisions to the Act Bill draught."

According to a 2012 UN survey, which included more than 3000 fertility clinics nationwide, the Indian surrogacy industry has an annual economic scale of 400 million dollars." Whereas

Anand in Gujarat is referred to as the "Cradle of the Global," India has earned the moniker "world capital for surrogacy."

In 2015, the Indian government outlawed commercial surrogacy completely and forbade NRIs (non-resident Indians) from taking part. "The Surrogacy Regulation Bill was approved by the Union Cabinet in 2016 which restricts surrogacy services to married infertile Indian couples. In many ways, the Bill that was passed in 2016 differed from the Bill that was enacted in 2014." The Bill was not introduced in the Rajya Sabha, yet it still managed to avoid the surrogacy law. The Surrogacy (Regulation) Bill, 2019, an exact clone of the Bill from 2016, was subsequently reintroduced in the Lok Sabha and passed by the then-Union Cabinet to protect the women who become easy prey for the couples due to their financial situation and finally the Surrogacy Act 2021 was made.

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<sup>4</sup> <https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets>

**Regulations pertaining to legacy are required.**

The Black's Law Dictionary states that "Surrogacy is the procedure of having a child for someone else by using another woman to carry and birth the kid.

As a result, a woman who carries another person's child inside of her and gives birth to that child is referred to as a surrogate mother. She can carry the child if the intended parents' sperm and embryo are put in her womb or if she uses the fusion of her own egg and sperm to give birth. In India, the marriage is supposed to be for "The continuation of life depends on "procreation of offspring," and if a couple is unable to carry out this duty and give birth to a child, the entire family and society hold them accountable. Because only a kid can demonstrate the sexual potency of a husband and wife, using a surrogate to carry a child for a couple who is unable to do so naturally has become a viable alternative.

**Low Cost:** When compared to other wealthy countries like the USA, the cost of surrogacy in India is significantly lower. India is regarded by many foreigners as the greatest country for surrogacy because of its low surrogacy rate, lack of surrogacy rules, and ease of access to their own genetically related children. India has always been a highly popular destination for medical travellers because there are superb facilities available at very affordable prices. But in 2015, the government outlawed it. Couples were sexually and financially abusing women while treating the child like a commodity<sup>5</sup>.

**Clinic and Middlemen:** In numerous instances, the clinic and middlemen took advantage of the surrogate mother by having infants delivered for a very low price without giving her the proper post-delivery care. The marketers were also engaged in these situations, advising the couples to pursue surrogacy and providing them with a panel of women who would provide the operations at a very low cost. The surrogate mothers were always the most negatively impacted. The SURROGACY ACT 2021 addressed the issue of inadequate nutrition and high-quality food for the surrogate mothers, which is typically crucial during pregnancy and after childbirth.

**ACT 2021 RELATING TO SURROGACY****1. Surrogacy clinics are prohibited and subject to regulations**

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<sup>5</sup> <https://www.drishtias.com/daily-updates/daily-news-editorials/surrogacy-regulations-bills-2019>

a) Unless registered under this Act, no surrogacy clinic may engage in, associate with, or take part in activities relating to surrogacy and surrogacy processes; employ, cause to be employed, or use the services of, whether on an honorary basis or for compensation, anyone who does not meet the requirements that may be prescribed; or.

b) No surrogacy clinic, paediatrician, gynaecologist, embryologist, enrolled healthcare professional, or any other person shall conduct, offer, undertake, promote, or accompany with surrogacy for commercial purposes in any form; or store a person's embryo or gamete for the purpose of surrogacy, with the exception of storage for other legal purposes such as sperm banks, In vitro fertilisation, and medical research.

## **2. Surrogacy and Surrogacy Procedures Regulatory Measures<sup>6</sup>**

Except for the following, no surrogacy or surrogacy procedures may be initiated, conducted, performed, or accessed;

A couple of Indian descent or a woman planning to use surrogacy must acquire a certification of advice from the Board on an application made by the said individuals in the form and manner that may also be required when an intending pair has a medical indication that calls for gestational surrogacy.

**Observe:** "gestational surrogacy" refers to a procedure in which a woman (surrogate) carries a child for an intended partner by allowing an embryo to be implanted in her womb; the child is not genetically related to the surrogate mother;

-when it is only done for charitable surrogacy objectives;

-when it isn't done for profit or to make surrogacy or the surrogacy process more marketable;

-when it is not used for prostitution, child labour, or any other type of exploitation.

## **3. Requirement of surrogate mother's written, informed consent**

It is vital to get the mother's (surrogate mother's) written consent to undergo these therapies in a vernacular she is familiar with. The surrogate mother will be informed about all current health concerns and side effects of the surgery.

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<sup>6</sup> <https://www.scconline.com/blog/post/2021/12/27/surrogacy-regulation-act-2021/>

#### **4. Registering surrogacy centres**

Every clinic that provides or establishes surrogacy is required to get a licence under this Act. Without first being duly registered under the Act, no one is permitted to open a centre (a "surrogacy clinic") to carry out surrogacy or any other type of surrogacy procedure. Within sixty days of the day the proper authority was constituted, every clinic that offers surrogacy or surrogacy treatments, whether fully or partially, must file an application for licence.

#### **5. Creation of the National Registry for Surrogacy and Assisted Reproductive Technology<sup>7</sup>**

A National Assisted Reproductive Technology and Surrogacy Registry must be established with the purpose of registering surrogacy facilities under the Act of 2021.

#### **Importance of the changes**

In India, where surrogacy has been practised for much longer, the bulk of the time we hear tales of women who gave birth to sibling's children who were either sterile or suffered from serious chronic ailments. It was previously done within the family as a favour, thus there was no need for any official mechanism to address the issue, even though there were certain arbitrary and ambiguous constraints back then. There were various laws passed, but there were minimal rights for the children's biological mother in order to protect the interests of the women (surrogate moms) who were at risk of being exploited. Couples who travelled from abroad to seek a surrogate mother have been fully barred in order to ensure that commercial surrogacy is completely outlawed. This Act is necessary to control surrogacy and put an end to unethical behaviour motivated by greed. The outlawing of commercial surrogacy in India will shield disadvantaged women from abuse and guarantee the mother's access to medical care. Now, it will also be checked if the children were abandoned after birth.

#### **CONCLUSION**

In India, bearing children is considered the most significant event in a woman's life and is viewed as a gift from God. Motherhood is seen as a second birth due to how important the timing of delivery is to a woman. There are additional dangers associated with being a surrogate

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<sup>7</sup> <https://www.scconline.com/blog/post/2021/12/27/surrogacy-regulation-act-2021/>

mother, including as an increased chance of developing major problems despite obtaining medical treatment, as well as care that is infrequently accessible.

It is important to note that commercial surrogacy had been a significant source of income for many women in India, despite the fact that "many parties, women rights activists, and feminist groups in India have been against contractualization due to the shady practices that are prevalent in the society." The surrogacy industry is well-established in India, so outlawing it at this time, when it is at its peak, may cause issues for the women who relied on it for their financial needs and push the sector underground, where it would be safe from the inspection of those in positions of power.

A restriction on commercial surrogacy would have both positive and negative effects because it would invalidate the couple's entitlement to a child, which they had usually enjoy with the help of surrogacy. Male and female infertility cases are on the rise in India. Commercial surrogacy is illegal, but in order to relieve the concerns of business participants, adequate legislation with tight regulations and enforcement is required.