



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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ARTs, Surrogacy and right to reproduce in India

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Received 28 December 2021; *Accepted* 09 January 2022; *Published* 14 January 2022

*The procreation of life is a natural process that enables a woman to go through the joy of motherhood. However, due to certain physiological difficulties, some women are not able to experience this process naturally. They seek assisted reproductive technologies such as Intra-uterine injections (IUI), In-vitro fertilization (IVF), surrogacy, etc. so that they aren't deprived of the opportunity of becoming a mother. The advancement in medical sciences and technology, particularly in the field of assisted reproductive technologies has not only transformed the reproductive environment but has also brought hope to people who are unable to procreate on their own. While discussing these techniques, one should keep in mind the right to reproduce of an individual. The 'right to life' as envisaged under Article 21¹ of the Constitution of India also incorporates the 'right to reproduce'. It was held in the case of *Devika Biswas v Union of India*.² Late marriages and single parenthood are becoming more common than ever before as society is undergoing changes. Thus, the concept of obtaining children through ARTs is gaining popularity as well. In order to curb malpractices and exploitation under the garb of providing parenthood, there is a need for specific legislations. This paper discusses two such legislations which are still under the process of becoming Acts, the extent of reproductive choices which will be available to Indians, and related case laws.*

Keywords: *reproductive technologies, surrogacy, reproductive rights.*

¹ Constitution of India, 1950, art 21

² *Devika Biswas v Union of India* (2016) 10 SCC 726

INTRODUCTION

“For Robert Brown, all love begins and ends with motherhood, by which a woman plays the God.”³The gift of motherhood is seen as sacred, but now with evolving times, it would be unfair to restrict it to a woman only. The ones who can’t procreate on their own should not be deprived of this gift of parenthood. And with various technological advancements, it is possible to bring the joy of having a child in their lives as well. The desire to be a parent and pass on one’s own traits is a strong one and cannot be neglected. Even as per varied religious beliefs, the process to propagate life on earth is seen as important. Therefore, not being able to have a child may have a devastating influence on one’s life. With advances in medical science, this can be changed with the help of Assisted Reproductive Technologies (ARTs) such as IUI, IVF, surrogacy, etc. ARTs mean “all techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman.”⁴ While ARTs include several technologies, in certain cases where the carrying of the child is physically or medically impossible, surrogacy is one such assisted reproductive technology that comes into play.

In a surrogacy arrangement, the couple intending to be parents and the woman who is willing to be the surrogate mutually agree that the surrogate mother will act as a vessel or a carrier of the child. The surrogate will be the one to go through the entire process of pregnancy which includes conceiving, gestating, and giving birth to the child of the intended parents. She will have no legal or parental right over the child born. The child will solely belong to the intended parents as if he/she was given birth by the intended mother herself. The word Surrogacy finds its origin in the Latin term "*Surrogatus*", which indicates a substitute, *i.e.*, a person serving in place of another. Thus, surrogacy means to carry or deliver a child for someone else.

³ Yadav, D. and Kasturi, P., ‘A Comprehensive Analysis on Reproductive Health and Surrogacy in India: A Study on the Law, Policy, and Practice’ (SCC Online) <<https://www-sconline-com.du.remotlog.com/blog/post/2021/09/27/reproductive-health-and-surrogacy-in-india/>> accessed 12 December 2021

⁴ Assisted Reproductive Technologies (Regulation) Bill, 2021, s 2(c)

“The Surrogacy Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.”⁵

Surrogacy is primarily of two types:

- **Traditional/Natural surrogacy-** the surrogate mother is fertilized with the sperm/male gamete of the male person of the couple seeking to be parents. As a result, the child is biologically related to the surrogate mother.
- **Gestational Surrogacy-** the surrogate mother is a mere carrier of the embryo created by the process of IVF and then later transferred into her uterus. By using the process of IVF, the fertilization of the male and the female gamete, taken from the intended mother and father, takes place in a test tube in a laboratory.

Further, two types of arrangements are practiced in surrogacy: commercial and altruistic. Commercial surrogacy involves rewards to the surrogate mother for carrying and relinquishing the child. She gets paid apart from the general medical expenses. This arrangement benefits both the couple and the surrogate. Altruistic surrogacy doesn't involve any reward for the surrogate mother, in this scenario, only her medical expenses are paid by the couple in need. She obtains no extra benefits. Since it is based on the idea of altruism, it has no place for any sort of monetary reward or compensation.

BACKGROUND

After the birth of the first scientifically well-documented test tube baby in India in 1986, IVF clinics sprang up all over the country. Some of the services provided by these IVF clinics were dubious. This was due to a lack of ART norms and regulations in the country, as well as a lack of accreditation, supervisory and regulatory bodies, and government oversight. As a result, in

⁵ 'The Surrogacy (Regulation) Bill, 2019' (PRS Legislative Research) <<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>> accessed 12 December 2021

2002, the Indian Council of Medical Research (ICMR) published draft “National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India”.

In a step toward regulating ART practices, IVF clinics, safeguarding the interests of the surrogate mothers and intended parents, Rajya Sabha has cleared the Surrogacy (Regulation) Bill, 2020 and the Assisted Reproductive Technologies (Regulation) Bill, 2021. The surrogacy bill regulates the practice of surrogacy in India by posing a ban on commercial surrogacy and by allowing only altruistic surrogacy (by the means of ARTs). While the ARTs (Regulation) Bill aims at supervising the clinics, banks dealing in these technologies along with the donation of gametes for various processes. Both the bills intend to curb several malpractices that take place when one decides to use the available technologies for surrogacy and ARTs. Despite the increasing popularity of commercial surrogacy in India, it has remained widely unregulated in the absence of proper legislation. Commercial surrogacy became legal in 2002, and ICMR released guidelines to regulate the same in 2005. Since 2008, the process to form legislation on this matter has been ongoing. The concept of commercial surrogacy was acknowledged by the Apex Court in the Manji Yamada case⁶. The court directed the attention towards the need for surrogacy laws to curb the malpractices ongoing in the various parts of India.

In 2009, Law Commission of India, in its 228th report titled, “NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY” stated that, *“The growth in the ART methods in recognition of the fact that infertility as a medical condition is a huge impediment in the overall wellbeing of couples and cannot be overlooked especially in a patriarchal society like India. A woman is respected as a wife only if she is the mother of a child so that her husband's masculinity and sexual potency are proved and the lineage continues. Some authors put it as follows: The parents construct the child biologically, while the child constructs the parents socially. The problem however arises when the parents are unable to construct the child through the conventional biological means. Infertility is seen as a major problem as kinship and family ties are dependent on progeny. Herein*

⁶ *Manji Yamada v Union of India* (2008) 13 SCC 518

surrogacy comes as a supreme savior."⁷ It suggested a complete ban on commercial surrogacy in lieu of exploitation of surrogate mothers, especially by foreigners, in absence of codified law.

Dr. Harsh Vardhan, Minister of Health and Family Welfare, introduced The Surrogacy (Regulation) Bill, 2019 in Lok Sabha on July 15, 2019, which was passed on August 5, 2019. The bill was referred to the Select Committee by Rajya Sabha. The Committee recommended replacing the word 'close relative' with 'willing woman', a complete ban on commercial surrogacy, removal of the 5-year waiting period before one goes for surrogacy, and inclusion of single women and all Indian origin couples to access surrogacy.

WHY ARE THESE LEGISLATIONS REQUIRED?

"Until a few years ago, India had an estimated 20-25 million infertile couples, thereby making Assisted Reproductive Technology (ART) such as surrogacy a solution to their problems".⁸ "Since its legalization in 2002, the rise of the commercial surrogacy industry in India has been such that a U.N.-backed study in July 2012 estimated the surrogacy business in India at new dimensions at \$400 million per year, with above 3,000 fertility clinics across India."⁹ With society undergoing changes and a decreasing fertility rate, the demand for surrogacy and the use of various assisted reproductive technologies have boomed. When commercial surrogacy was allowed in 2002, a steady increase in India's medical tourism was also noted. And along with the boom there exist malafide practices of sex selection, exploitation of poor and uneducated women to become surrogates, influencing people to donate gametes in exchange for monetary rewards, and spread of clinics and banks lacking proper infrastructure and facilities for carrying out such intense procedures. Therefore, a need for codified laws to regulate this aspect of the medical industry was felt.

⁷ 'Government of India Law Commission of India Need for Legislation to Regulate Assisted Reproductive Technology Clinic as Well as Rights and Obligations of Parties to a Surrogacy' (2009) <<https://lawcommissionofindia.nic.in/reports/report228.pdf>> accessed 12 December 2021

⁸ Nikita Doval, Vidya K., & Apoorva, 'Surrogacy industry thrives in India amid regulatory gaps' (*Mint*, 03 November 2014) <<https://www.livemint.com/Politics/1tiGqG9X9ChMt9Tb1pmNpM/Surrogacy-industry-thrives-in-India-amid-regulatory-gaps.html>> accessed 12 December 2021

⁹ Nita Bhalla & Mansi Thapliyal, 'India seeks to regulate its booming 'rent-a-womb' industry' (*Reuters*) <<https://www.reuters.com/article/us-india-surrogates/india-seeks-to-regulate-its-booming-rent-a-womb-industry-idUSBRE98T07F20130930>> accessed 12 December 2021

ARTIFICIAL REPRODUCTIVE TECHNIQUES (REGULATION) BILL, 2021

Salient Features of the Bill

- The bill calls for the creation of a national registry and registration authority to keep track of all clinics and medical professionals working in the field.
- It tries to control and regulate Assisted Reproductive Technology (ART) facilities and ART banks, forestall abuse, take on protected and moral practice, etc.
- A national board would be established, with minimum criteria for physical infrastructure, laboratory, diagnostic equipment, and professional people to be used by clinics and banks.
- It regulates the sex selection of a child to be born by means of these technologies. Determination or selection of sex of the child is strictly prohibited and the provision of the PCPNDT ACT,1994 is to be complied with.
- It also poses restrictions on the sale, etc., of human gametes, zygotes, and embryos.
- It contains the punishment for offenders who don't comply with the provisions of this bill.

DEMERIT OF THE BILL

- The Bill excludes single men, cohabiting heterosexual couples, and the LGBTQ+ community from accessing ARTs.

SURROGACY (REGULATION) BILL, 2020

Salient Features of the Bill

- The bill paves for the ethical form of altruistic surrogacy to married couples who suffer from infertility.
- The commercialization of surrogacy and the sale/purchase of human gametes and embryos is banned.
- The purpose of surrogacy must be altruistic only.

- The establishment of the National Surrogacy Board, State Surrogacy Boards, and Appropriate Authorities at the State/UT level is recommended.
- The Act establishes minimum criteria for age and medical conditions that must be met by the surrogate mother to prevent her exploitation.
- It regulates the registry of surrogate clinics and they will be required to maintain a certain standard as enforced by the appropriate authorities.
- The Bill safeguards the interests of the child from being abandoned by the intended parents.
- The bill penalizes advertisement or undertaking commercial surrogacy, exploitation of surrogate mother, exploiting or abandoning surrogate child, and selling human gametes and embryos for surrogacy,

DEMERITS OF THE BILL

- It only includes infertile married couples, and just like the ARTs (Regulation) the bill excludes the LGBTQ+ community and same-sex couples.
- Due to the ban on commercial surrogacy, several women who were willing to earn by being surrogate mothers lose their chance to their income?
- The Apex Court in the cases, *Consumer Education and Research center and Ors. v Union of India*¹⁰ and *Olga Tellis v Bombay Municipal Corporation*¹¹, have ensured that the word 'life' incorporates the right to livelihood as well. At a time when women still struggle to get to school and jobs, should women's financial possibilities be ripped away by law?

A GLANCE AT THE WORLD

- In the United States and Argentina, independent surrogacy committees make decisions on surrogacy requests.
- Only altruistic surrogacy is permitted in the following countries:
 1. The United Kingdom,

¹⁰ *Consumer Education and Research Center and Ors. v Union of India* (1995) 3 SCC 42

¹¹ *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180

2. the Netherlands,
 3. Ireland, Denmark,
 4. Belgium,
 5. South Africa,
 6. Australia,
 7. Canada, and
 8. Greece.
- Surrogacy for commercial purposes is lawful in Russia, Ukraine, and Thailand.
 - Surrogacy is prohibited in all forms in France, Germany, Spain, Sweden, Italy, and Iceland.

RIGHT TO REPRODUCTION

It is a known fact that the instinct to parent a child is natural and an integral part of life. Every individual, irrespective of their gender, relationship status, or sexual orientation, reserves a right to reproduce. Denying them the opportunity to experience parenthood is strictly unfair. "In *Suchita Srivastava v Chandigarh Administration*¹², the Supreme Court equated the right to make a choice in relation to reproduction with personal liberty under Article 21 and clarified that such right includes within it the 'privacy, dignity and bodily integrity' of the woman and further stated that 'taken to its logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. In *Devika Biswas v Union of India*¹³, the Apex Court perceived that the right to reproduction is an important component of the 'right to life under Article 21.'¹⁴

Consequently, if only heterosexual couples of a specific age group are given access to the use of surrogacy and ARTs and single persons, older couples, and the LGBTQ+ community is deprived of their right to reproduce, it is a violation of Article 21 which has been guaranteed to

¹² *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1

¹³ *Devika Biswas* (n 2)

¹⁴ Alice George & Aviral Chauhan, 'Surrogacy Bill and ART Bill: Boon or Bane?' (*Mondaq*, 11 April 2019) <<https://www.mondaq.com/india/life-sciences-biotechnology-nanotechnology/797138/surrogacy-bill-and-art-bill-boon-or-bane>> accessed 9 December 2021

all by the Indian Constitution. Such restrictions also unsettle the concept of equality as enshrined under Article 14 of the Constitution of India.

CONCLUSION

To ensure a logical and uniform approach to governing regulations, legislative proclivity and sensitization are essential. To date, the lack of industry regulation in India has had little effect on the procedure's popularity, owing to its methodological proficiency and comparatively low cost of execution. Despite this, exploitation continues to be widespread. Furthermore, because it is limited to heterosexual married couples of prescribed ages, the exclusion of others such as single persons, older couples, individuals in live-in relationships, and the LGBTQ+ community jeopardizes the idea of equality before the law and the constitutional guarantee against discrimination. The Bill not only infringes on their right to personal liberty, but it also breaches Article 14 of the Indian Constitution's equality values.

Treating infertility alone as the reason to avail these services and excluding same-sex couples and single people who wish to experience the joy of parenthood just because they are unable to procreate naturally, is harsh and unfair. No one should be deprived of experiencing parenthood in their lives, especially, on the basis of their sexuality, age, or relationship status. A single person can be as accommodating to a child as any other heteronormative family. Society is ever-evolving and so should our laws be. A better tomorrow for our nation cannot be built if we keep on giving into orthodox patterns and keep neglecting the transforming society. Though this change might be slow and steady we need to prepare for the upcoming future by being more inclusive and accepting of other people. We need not divide our society in a binary where heteronormativity is the norm of the day. Moreover, the desire to have a biologically related child can't be overlooked. Chile in a recent move has legalized same-sex marriages and adoption by same-sex couples, thus accepting the presence of non-heterosexual families. Furthermore, the Bill chooses to outright prohibit commercial surrogacy, recognizing its exploitative past. The fact that commercial surrogacy is not exploitative but rigorous regulations are required needs to be recognized.