



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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A Critical Analysis of Surrogacy Laws in India

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Received 03 December 2022; Accepted 11 December 2022; Published 20 December 2022

Surrogacy is a contentious topic, especially when prominent celebrities have utilised it. In the past, persons who were unable to have children, particularly male offspring, were cursed by society. We consider children to be divine gifts. Although "Adoption" is a treatment offered by our government to childless parents, many members of our community are not yet prepared to adopt. The main reason is that the adopted child and the adoptive parent will not be biologically related. In addition, the adoptive parent is unlikely to be familiar with the child's caste, religion, community, or—most importantly—genetic make-up in case a future medical problem arises. It is a blessing for couples who are unable to conceive normally, but it can also be exploited for profit. According to WHO statistics, infertility affects one in every four couples in developing nations, and the incidence rate continues to be high year after year. Therefore, when the intended parents are not interested in adoption, surrogacy may be the greatest alternative for infertile couples to have a child with their biological identity. The concept of surrogacy has gained popularity among the public while also generating debate. Commercial surrogacy is outlawed in India and many other countries throughout the world. The main aim of this paper is to analyse the reasons for allowing commercial surrogacy, analyse the laws relating to surrogacy, and its impact on Society.

Keywords: *surrogacy, adoption, genetic makeup, commissioning parents.*

INTRODUCTION

Surrogacy is dealt with under the Surrogacy (regulation) act, of 2021. It is an arrangement where a woman consents to carry and give birth to a child on behalf of another. The intended parent or parents receive custody and guardianship of the child once it is born from the birth parent.

TYPES OF SURROGACY

There are two types of surrogacy:

Traditional surrogacy: in this type of surrogacy a woman is artificially inseminated with the sperm of the father. The surrogate carries the child and gives birth to it. In this, the surrogate will be the child's biological mother as the surrogate's egg is only fertilised by the father's sperm. In this type sperm from donors can also be used.

Gestational surrogacy: Using the procedure known as "in vitro fertilisation" (IVF), it is now feasible to collect the mother's (or an egg donor's) eggs, fertilise them with the father's (or a sperm donor's) sperm, and then implant the embryo into the uterus of a gestational surrogate. After that, the surrogate gives birth to the child. Since their egg wasn't used, they have no genetic connection to the child.

ESSENTIALS FOR BECOMING A SURROGATE

- The surrogate should be married and she ought to have a child of her own.
- The age of the woman must be between 25-35.
- She must have a medical and psychological fitness certificate for undergoing surrogacy.

ESSENTIALS OF THE INTENDING COUPLES

- The woman's age should be between 23 and 50 and that of the husband should be between 26 and 55.
- The couple should be married for 5 years.
- The couple should be a citizen of India.

- No prior children in any way (except- a child having a life-threatening disease or disorder with no cure with a certificate of district medical Board).

CONDITIONS UNDER WHICH SURROGACY IS ACCEPTABLE

Surrogacy is permitted when

- The intending couple is suffering from infertility;
- Altruistic;
- It is not used for commercial purposes;
- The children are not produced for prostitution, sale, or other forms of exploitation;
- The couple is suffering from any condition or disease that has been specifically listed by regulations.¹

COMMERCIAL SURROGACY AND ALTRUISTIC SURROGACY

Any surrogacy agreement that compensates the surrogate mother for her services beyond the payment of medical costs is referred to as commercial surrogacy. Altruistic surrogacy is the practice of using a surrogate without compensating the woman for her services. In the majority of the world, surrogacy is either illegal or not recognised. Only a few countries allow surrogacy. Commercial surrogacy is considered legal in countries like Ukraine, Mexico, Colombia, Russia, Georgia, and some parts of the USA. Countries like France, Finland, Japan, Italy, Spain, Sweden, Switzerland, Hungary, Ireland, etc have banned all forms of surrogacy. By prohibiting commercial surrogacy (even for foreigners) while permitting and regulating altruistic surrogacy for all people of India, India attempts to strike a balance between these two extremes.²

¹ Surrogacy (Regulation) Act 2021

² Kalyan Ray, 'Surrogacy: A liberal law on the anvil' (*Deccan Herald*, 15 February 2020)

<<https://www.deccanherald.com/specials/sunday-spotlight/surrogacy-a-liberal-law-on-the-anvil-805137.html>>

accessed 04 December 2022

CAN SURROGACY BE CONSIDERED AS A JOB AND CAN SURROGATES BE CONSIDERED AS LABOURERS

Beyond the legal profession, the notion that surrogacy may be regarded as labour is indeed not new. Labour that produces items or services with a monetary value and for which producers are paid is referred to as productive labour in a capitalist market. Contrarily, reproductive labour denotes jobs done in the home or on one's own, such as cooking, housework, and raising children. Although "work" is understood under labour law to refer to the former, the latter must also be considered work.³ What is sold in commercial surrogacy is labour power, a product that is frequently provided in exchange for payment. Some contend that since women have traditionally filled these tasks in the house, regulators find it difficult to view reproductive work as an agentic, skilled activity that women should be entitled to contract and negotiate over. The examples of reproductive labour have been undervalued and underpaid when they have been made into commodities. Despite being compensated for their services, commercial surrogates are frequently reluctant to be classified as "labour."

Technological advancements cannot accelerate or increase the "efficiency" of surrogate labour, nor can they be "programmed" to be effective.⁴ At the moment, no government in the world controls this behaviour using a model of labour law. The construction of industry narratives in well-known commercial locations like Georgia, California, and (formerly) India around ideals of altruism, which distances surrogates from their identification as labourers even when compensated, maybe even more crucial. Thinking of surrogacy as a "job" implies that it will be available to all women or a commonplace way to address unemployment. This supports the idea that a surrogacy agreement may be effectively carried out by anyone who possesses a uterus. These procedures won't work without a genuine dedication to the procedure and the

³ Sylvie Armstrong, 'Labour is labour: What surrogates can learn from the sex work is work movement' (2022) 49(1) *Journal of Law and Society* <<https://doi.org/10.1111/jols.12350>> accessed 04 December 2022

⁴ Sylvie Armstrong, 'Surrogacy: Time we recognized it as a job?' (2021) 30(7) *Journal of Gender Studies* <<https://doi.org/10.1080/09589236.2021.1915754>> accessed 04 December 2022

desire to put in the required emotional labour. Thus the idea that surrogacy is not or should not be a job supports the notion that women's reproductive work is not "real work."⁵

WHAT ARE THE MATERNITY BENEFITS THE SURROGATE AND THE COMMISSIONING PARENTS CLAIM?

Maternity benefits are provided to women for the time leading up to and following childbirth to safeguard the rights of female employees and to support the development of a healthy balance between their reproductive and productive lives. The provision of maternity pay assures both the mother's and the child's welfare. However, when considering surrogate births, the availability of such incentives becomes ambiguous. The topic of providing maternity benefits splits into two parts: benefits for the commissioning mother, and benefits for the surrogate mother. For her health throughout pregnancy, a safe recovery after giving birth, and any postpartum depression or social isolation that she may face, the surrogate mother must be eligible for maternity benefits. While taking into consideration the child's well-being, the commissioning mother needs maternity leave.⁶

The Maternity Benefit (Amendment) Act of 2017 was the first to add maternity benefits about surrogacy to the Maternity Benefit Act of 1961. The Maternity Benefit (Amendment) Act of 2017 added the idea of "commissioning moms" into the Maternity Benefit Act of 1961, and the commissioning mother was given a twelve-week maternity leave starting from the day the child was delivered to her.⁷ The Surrogacy (Regulation) Bill, 2020 was introduced by the cabinet in February 2020 following discussion and revisions to the Surrogacy (Regulation) Bill that had been suggested in 2019. These changes were made in response to key recommendations by the

⁵ April Hovav, When pregnancy is a job: Surrogacy in policy and Practice, *Gender & Society* (*Gender & Society*, 2 April 2019) <<https://gendersociety.wordpress.com/2019/04/02/when-pregnancy-is-a-job-surrogacy-in-policy-and-practice/>> accessed 04 November 2022

⁶ Shruti Khaitan, 'MATERNITY BENEFITS AND SURROGACY: A CASE FOR THE RECOGNITION OF COMMERCIAL SURROGACY' (2021) 24 SUPREMO AMICUS <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/supami24&ion=18&casa_token=g8l7AB1RyQAAAAA:c3ceoOHf6HyhpAP2dZS2T_VedcwY9GOL579ZFOSBITF-qYBUX8VdF9kFziMGWv868MucCyK8ybRB> accessed 04 November 2022

⁷ Maternity Benefit Act 1961, s 5(4)

Rajya Sabha. The surrogate mother, the commissioning parents, and the surrogate child are all included in this social law that aims to include and protect their rights.⁸

After the amendment, the government increased the period of maternity leave from the previous 12 weeks to 26 weeks. However, to be eligible for maternity leave, the employee had to have put in at least 80 days of work for the firm in the 12 months before her estimated due date. The expectant woman may elect to take up to eight weeks of leave before giving birth out of the 26 weeks of maternity leave. The woman decides how the leave will be structured and is free to decide whether to take the whole 26 weeks of leave once the baby is born.

WHY IS COMMERCIAL SURROGACY BANNED IN INDIA?

Any surrogacy agreement that compensates the surrogate mother for her services beyond the payment of medical costs is referred to as commercial surrogacy. Commercial surrogacy first appeared in India in 2002, and since then it has grown rapidly. It was formally legalised in 2002⁹. Its main purpose of it was to promote medical tourism in India, and as a result, India has been labelled the "hub of surrogacy." Complications arose when financial agreements were made to exchange the surrogate child, turning the infant into a "saleable commodity." Surrogacy is viewed as exploiting women, according to some¹⁰. Although commercial surrogates are compensated for their services, there is a general resistance to labelling these relationships as "work." Currently, no government in the world controls this activity using a labour law approach. Through surrogacy, a woman's body's typical biological role is transformed into a business agreement. Services for surrogates are promoted.

Operating agencies recruit surrogates and earn substantial revenues. The marketing of surrogacy causes some to worry about selective breeding at a cost, breeding farms, turning poor

⁸ Ranjit Malhotra, 'Highlights and brief analysis of the surrogacy (regulation) bill, 2020 and suggested potential safeguards' (*International Bar Association*) <[https://www.ibanet.org/article/B5C65969-4901-49A9-82CF-8DC4C8BEB1E2#:~:text=The%20Surrogacy%20\(Regulation\)%20Bill%2C%202020\(Surrogacy%20Bill\),the%20ban%20on%20commercial%20surrogacy](https://www.ibanet.org/article/B5C65969-4901-49A9-82CF-8DC4C8BEB1E2#:~:text=The%20Surrogacy%20(Regulation)%20Bill%2C%202020(Surrogacy%20Bill),the%20ban%20on%20commercial%20surrogacy)> accessed 04 November 2022

⁹ Himanshi Garewal, 'Legalizing commercial surrogacy in India' (*SSRN*, 10 November 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4262933> accessed 04 November 2022

¹⁰ Ronli Sifris, 'Commercial surrogacy and the human right to autonomy' (2015) 23(2) *Journal of law and medicine* <<https://pubmed.ncbi.nlm.nih.gov/26939504/>> accessed 04 November 2022

women into baby producers, the illicit market for selling babies, and infant selling. A baby becomes a product and a pregnancy becomes a service through surrogacy. Experience has taught us that, just as in any other business transaction, the "consumer" specifies his or her requirements before making a purchase. The contracting couple may require the surrogate to end the pregnancy if they so want, and she will not be permitted to do so if she disagrees. In certain cases, the contracting party has specified the baby's sex as well, refused to accept the child if it was abnormal, and initiated a lawsuit against the surrogate because she had broken the terms of the agreement. The rights of the newborn are hardly ever taken into account in surrogacy. Thus the Indian government has outlawed commercial surrogacy because it is exploiting the needy and underprivileged women.

CASE LAW

Baby Manaji Yamanda v Union of India

The word "commercial surrogacy" was elaborated by the supreme court of India in the above case and defined it as "a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb". In this case, Dr. Ikufumi Yamada and his wife did not have a child. So they entered into a contract with an Indian woman. The baby was conceived by an Indian mother and a Japanese man. However, the couple experienced marital problems, and the father wanted to have custody of the child. However, Indian law prohibited single fathers from adopting girls. The National Commission for the Protection of Child Rights was asked to address this matter in a petition that was submitted to the Supreme Court. It was held by Justice Arijit PasShriya Misras that the father has the right to custody of the child. In this instance, Baby Manaji Yamada was awarded a passport by the government, after which she was transferred to her grandmother (the mother of the father), and the Supreme Court ruled that the surrogacy deal was legal in India.¹¹

¹¹ 'Commercial surrogacy in India' (Aishwarya Sandeep)

<<https://aishwaryasandeep.com/2021/08/04/commercial-surrogacy-in-india/>> accessed 05 December 2022

CAN COMMERCIAL SURROGACY BE LEGALISED AGAIN?

In my opinion, commercial surrogacy can be legalised again. After delivering the baby to the commissioning couple, the surrogate moms are compensated and looked after. However, the sensitive problems surrounding commercial surrogacy are incredibly patriarchal and aim to violate the surrogate mothers' autonomy and physical integrity. The Bill's prohibition of commercial surrogacy ignores the overlapping dimensions in which the law will affect women's entitlement to their bodies. The altruistic surrogacy concept, which is heavily highlighted, assumes that women will undergo the physical, psychological, and emotional work of childbirth simply out of compassion, which is very different from the way things are. Such irrational assumptions support society's patriarchal mindset and limit the autonomy of those who have reproductive organs. Every individual needs to be able to maintain their autonomy and bodily integrity, thus surrogates will always have this right. The Act was created with the intention that altruistic surrogacy would lessen the exploitation of surrogates, however, this has not proven to be the case.

The likelihood of surrogate moms being compelled to go through the surrogacy procedure by family members is considerable, even in cases of altruistic surrogacy. However, a well-written agreement will lessen the use of surrogates for commercial purposes. In India, there are conservative philosophies that claim commercial surrogacy seeks to sell newborn children for financial gain, but in reality, commercial surrogacy aids a couple in starting a family because the intended parents are required to pay for the surrogate mother's medical care before and after the child is born. Indian civilization has created the idea of selling newborn children. However, in the literal sense, the baby is not sold in commercial surrogacy; rather, the services, reproductive work, discomfort, and certain other pregnancy-related items are sold by the surrogates to the intended couples.¹²

¹² Sanjana Dwivedi, 'Requisites for legalization of commercial surrogacy in India: Small reference to surrogacy laws in United States' (*iPleaders*, 10 June 2020) <<https://blog.iplayers.in/requisites-for-legalization-of-commercial-surrogacy-in-india-small-reference-to-surrogacy-laws-in-united-states/>> accessed 04 December 2022

Also, there is another complication in altruistic surrogacy where the close relatives of the intended couples can be a surrogate. In today's society, it is very hard to find such surrogates as most of them live in nuclear families. Additionally, there is no communication between the kid and the surrogate mother in commercial surrogacy. However, with altruistic surrogacy, the family may experience emotional problems if the kid remains connected to the surrogate mother. Also, the surrogate mothers' decision to improve their economic situation is the second key factor in the legalisation of commercial surrogacy.

CONCLUSION

The individual liberty and physical integrity of surrogates are contravened by the legalising of altruistic surrogacy and the prohibition of commercial surrogacy. The basis of a woman's fundamental right to equality and privacy, regarding private concerns of bodily and psychological integrity, is the ability to make autonomous decisions about her own body and reproductive processes. Therefore, the Act's prohibition on commercial surrogacy is unconstitutional due to the infringement of physical integrity and personal autonomy. The Act may exacerbate the situation for surrogates as a restriction on commercial surrogacy may create a black market where commercial surrogacy might take place underground as impoverished women may be more motivated to do so owing to their socioeconomic circumstances. Hence commercial surrogacy should be made legal.