



Revisiting the Ban on Commercial Surrogacy in India

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Abstract

The word 'surrogate' is referred to mean 'substitute'. And surrogacy, thereby, is an arrangement wherein a female bears the child as a substitute for others. This sort of arrangement may take place within a family or community out of altruism or outside of family and community for commercial purposes. In the past couple of decades, India has seen a huge surge in cases of commercial surrogacy after it was allowed in the year 2002. It was allowed under the aegis of the guidelines issued by the Indian Council of Medical Research (ICMR). In absence of a full-fledged legislation, these guidelines along with the judicial pronouncements made by the Supreme Court of India have been the only regulatory mechanisms dealing with surrogacy in India. As the surrogacy arrangements have increased manifold in the country, so have the issues related to them. Primary among them being instances of exploitation of the surrogate mothers and the lack of legal protection available to them. In order to cater to these issues, the Parliament had been having discussions on a draft legislation in the recent years and ultimately the Surrogacy (Regulation) Act, 2021 was passed. Amongst various positive initiatives, this new law is aimed to carry out the process of regulation of surrogacy by the establishment of a National Surrogacy Board as well as various state surrogacy boards along with other appropriate authorities. Further, any kind of sex selection has been made a punishable offence. One proactive feature has been an increased insurance cover extending to a period of 36 months as against the initially proposed period of 16 months. Thus, it is amply clear that this law has taken into considerations various aspects for safeguarding the rights of surrogates as well as overall smooth functioning of the surrogacy arrangements in the country. However, one feature of this Act is that it allows only altruistic surrogacy enabling only close relatives to act as surrogates and puts a ban on commercial surrogacy throughout the country.

This paper puts forward an argument against this ban on commercial surrogacy. While it is very important to take all necessary legal measures to protect the interests of surrogates but at the same time, banning commercial surrogacy will not only deprive the various childless couples unable to opt for altruistic surrogacy but will also affect negatively the source of income of the commercial surrogates. This mar on the income will only put these women into more deplorable conditions. This ban will also hamper the chances of LGBTQ community as well as single women towards opting for

surrogacy. In light of all these points, the paper shall look into the efficacy of the new law and will strive to put forward suggestions for bringing about a more effective and holistic legislation on surrogacy.

Keywords: *Surrogacy, Commercial, Altruistic, Exploitation, Regulation*

Meaning of Surrogacy & its Origin in India

The word ‘surrogate’ means ‘substitute’.ⁱ Various agencies have attempted to give a formal definition of surrogacy. One such definition can be found under the Artificial Reproductive Technique Guidelines.

According to the Artificial Reproductive Technique (ART) Guidelines, surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a ‘surrogate mother’ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s).”ⁱⁱ

Essentially, surrogacy as an arrangement enables such people to have children who are either incapable of procreating themselves or are unwilling to do so. It has proven to be a boon for childless couples from across the globe. Surrogacy can be carried out in two forms. The first being ‘traditional’ wherein through artificial insemination, the surrogate mother gets pregnant using her own eggs and sperms from the donor male. The second form of surrogacy is ‘gestational’ wherein already fertilized egg from a donor woman is implanted in the surrogate’s womb through the help of In Vitro Fertilization (IVF).

While many countries have had arrangements for enabling surrogacy, it picked up pace commercially in India 2002 onwards. Not only were a lot of Indian people resorting to surrogacy, but simultaneously India became one of the favourite destinations for surrogacy among foreigners as well. The biggest factor for this boom was the lower costs of surrogacy arrangements as compared to the western countries and well as ample number of available surrogates. Another reason for India becoming a hub for commercial surrogacy was the lack of an effective regulatory framework. A study carried out under the aegis of United Nations reported that in the first decade i.e. from 2002-2012, the surrogacy industry was generating an income of US \$2.3 billion annually.ⁱⁱⁱ

Legal Mechanism related to Surrogacy in India

When surrogacy was introduced at a commercial level in India in the year 2002 itself, there was a lack of strict laws to regulate it. The only relevant piece of regulation available during the initial phase were a set of guidelines issued by the Indian Council of Medical Research (ICMR). These were the National Guidelines for Accreditation Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in India; however, they lacked the legislative authority that a statute would have had.

While the clinics were flourishing given the lack of a proper legal framework, one incident happened wherein Supreme Court had to intervene and make a call for an effective legislation on surrogacy. It was in the case of **Baby Manji Yamada v. Union of India**^{iv} wherein a couple from Japan entered into an arrangement for surrogacy at a clinic based in Anand, Gujarat. However, soon after, the couple got divorced and the status of the surrogate child was stuck in limbo. The Japanese woman who had commissioned the surrogacy as well as the surrogate Indian mother, both did not want to have the custody of the child. The father wanted to keep the child’s custody with him but was unable to do so as under the Guardianship & Wards Act,

a single father could not adopt the child. This entire situation brought to the forefront the lacunae around the surrogacy related rules in India. In this case, ultimately National Commission for Protection of Child Rights and the Japanese Government were involved through which the child's paternal grandmother was given custody of the child and the child herself was given a Japanese visa on humanitarian grounds to go to Japan. Finally, the baby could go to Japan with her father and grandmother but it took a long legal battle for it. Had the legal stance already been made clear from the very beginning of commercial surrogacy practices in India, such cases could have been handled in a better manner.

When this case attracted a lot of attention, it was soon realised that bringing around a legislation dealing with surrogacy is of utmost importance. As a consequence, the Assisted Reproductive Technology (Regulation) Bill, 2008 was brought around. However, ironically this Bill could never be tabled before Parliament for discussion and so it could never culminate into a law. Keeping in view the pressing need for a legislation on the issue, the Law Commission of India gave a report titled "Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy".^v This series of efforts also included another Bill called assisted Reproductive Technology (Regulation) Bill, 2010 but this too could never become a law.

Thereafter, the Surrogacy (Regulation) Bill was formulated in 2016 which saw a few changes before it could be reintroduced in the year 2019. This Bill ultimately paved the way for ultimately a legislation on surrogacy which came to be known as The Surrogacy (Regulation) Act, 2021. It was passed in December, 2021 along with the Assisted Reproductive Technology (Regulation) Act, 2021.

Commercial Surrogacy in India

As mentioned earlier, commercial surrogacy was allowed in India since 2002 and thereafter it saw a great financial success as well. However, time and again, there have been instances wherein it has been found that the surrogate mothers have been exploited at the hands of the surrogacy clinics.^{vi} The biggest reason for it was the lack of a legal framework which could ensure protection of the surrogate mothers. As a consequence, the surrogacy clinics have been found to take advantage of the needy surrogate mothers who were often either illiterate or not educated enough to understand the nuances of the surrogacy agreement they were made to sign. Often, they were found to be underpaid, not given enough nutrition, subjected to a lot of restrictions including mandatory stay in sub-standard stay facilities with no insurance cover.^{vii}

Citing these reasons, demands have been made time and again to rethink about the continuance of commercial surrogacy in India. And ultimately, commercial surrogacy has been banned by the Parliament of India through The Surrogacy (Regulation) Act, 2021. The Act now allows only altruistic surrogacy^{viii} to be carried out in India subject to the fulfilment of the conditions laid out in the Act.

The recently passed legislation defines commercial surrogacy as "commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother".^{ix}

With the advent of the new legislation, a blanket ban has been imposed upon any kind of commercial surrogacy in India.^x This Act also further prohibits any kind of promotion^{xi} and

advertisement^{xii} of commercial surrogacy by any clinic or registered medical practitioner, etc. as well.

In fact, undertaking commercial surrogacy has been made a punishable offence under this Act wherein the people involved have been made liable to undergo punishment in the form of imprisonment extending to 10 years and fine extending to 10 lakhs rupees.^{xiii} The Act also seeks to punish any person who intends to take the help of any clinic for carrying out commercial surrogacy with imprisonment extending to 5 years and fine extending to 5 lakh rupees.^{xiv}

Future of Commercial Surrogacy in India: Critical Evaluation

As mentioned in the previous section, commercial surrogacy can no longer be practiced in the country. However, it needs to be evaluated that whether this decision of imposing a blanket ban on this practice is justified or not.

The Law Commission of India, in its 228th Report had mooted a case for banning commercial surrogacy in India citing the reasons of possible exploitation of surrogate mothers in the absence of a legal framework offering them protection. Thus, the exploitation was attributed to the lack of legislation. However, it is ironical to witness that despite there being a legislation in place now, the Parliament still went ahead to ban commercial surrogacy instead of taking care of the rights of potential surrogate mothers in this very legislation.

It is important to note that women who chose to act as surrogate mothers did so in order to earn a livelihood for themselves and their families. While the Supreme Court has observed at various occasions^{xv} that right to livelihood is very much a fundamental right forming an essential part of the right to life, and thus, imposing a ban on commercial surrogacy has the potential to exclude such women of their livelihood through this means. It could be justified only once these women who were earning their livelihood from this industry are comfortably placed elsewhere professionally. As no such targeted initiatives appear to be in place, this ban on commercial surrogacy has left a large number of Indian women economically vulnerable.

The current legislation not only bans commercial surrogacy but also does not allow the surrogate mothers undergoing altruistic surrogacy to receive any monetary compensation for the same. This kind of approach is resounding of the primitive and outdated patriarchal notions under which any labour undergone by females is not attributed any monetary value. Earlier the commercial surrogates had the chance of being compensated for their services keeping in view the labour undergone by them. With the current ban on commercial surrogacy and no payment allowed for altruistic surrogacy, the women seem to have been denied their right of being compensated after undergoing the physically and mentally intensive process of surrogacy.

The new enactment provides for certain categories of intending couple^{xvi} and intending women^{xvii} who can opt for surrogacy of altruistic nature only. Further, a lot of qualifications have been attached for a woman to act as a potential surrogate. A woman willing to act as a surrogate should be a near relative of the couple willing to undergo surrogacy. She should be aged between 25 and 35 years and should have been married. She must also have at least one child of her own. Also, a limitation has been put under the Act that one woman can act as a surrogate only once in her lifetime.^{xviii} When we closely look at these conditions, it appears that the process of surrogacy has been made very tedious and difficult to carry out because finding a fit female relative may not be very easy for every willing couple. The complexity of these conditions may even prove to be discouraging for the people thinking of opting for surrogacy. Had commercial surrogacy been allowed to take place, this issue could have been avoided.

Another factor worth considering is that as only altruistic surrogacy within close relatives has been allowed, the chances of the surrogate mother exercising privacy, with regards to

undergoing surrogacy, is highly diminished. In an agreement of commercial surrogacy, since the surrogate mother was not related to the people opting for surrogacy, her right to privacy could be maintained but within a family this appears to be more or less difficult. This lack of privacy may again lead to the violation of fundamental right of privacy which has been enshrined under the right to life by the Supreme Court.^{xix}

Keeping in view the predominantly patriarchal structure of our Indian society where women in a household are not endowed with much autonomy regarding their decisions, one more downside of allowing only altruistic surrogacy by a close relative is that the female relatives may sometimes be coerced against their wishes to undergo surrogacy for a childless couple related to them. As the childless couples will not have the chance to resort to commercial surrogacy, they may engage into such coercive and imposing practices within their family. If a female relative is forced to undergo such a surrogacy, this will lead to denial of agency over her reproductive choices. This would amount to going the notion of reproductive autonomy which the Supreme Court, in the case of **Suchita Srivastava v. Chandigarh Administration**,^{xx} has categorically upheld to be the woman's prerogative.

The arguments put forward in favour of the ban of commercial surrogacy are based on saving the surrogate mothers from their potential exploitation. However, this problem would have been effectively tackled through a strongly worded legislation which would have regulated the practice of commercial surrogacy and protected the rights of surrogate mothers. Instead of bringing up such a legislation, a complete ban has been imposed on the practice itself which may be of little help as it may lead to even more unregulated surrogacy related practices in the black market. These situations would be potentially worse than what we previously witnessed as the women would be more prone to health hazards with no legal mandate of insurance covers. Further, cases of child abandonment may also increase as there would be no legal obligation on the part of the people opting for surrogacy to obtain the custody of the child. In these unfortunate circumstances, obtaining justice for the surrogate mothers would become even more difficult as they would no longer be perceived as victims but as culprits themselves. If such a situation arises, this will ultimately defeat the purpose of imposing the ban on commercial surrogacy as it is going to create even more problems for the surrogate mothers than what they initially had.

Even if we assume that the blanket ban on commercial surrogacy would be cent percent effective in our country, there is no assurance that the same would not be carried out in other countries. And in absence of a legal framework taking care of the rights of surrogate women, the chances of their exploitation will still exist there. Thus, we would just be shifting the base of the issue along with the potential livelihood for women which would have come to our country while the issue will remain as it is. In this regards, it would have been better to allow commercial surrogacy in our country itself through a legally regulated mechanism.

Suggestions & Conclusion

There is no denying the fact that the rights of women should be protected at all costs. There is also no denying the fact that the Indian women who have been working as commercial surrogates have been rendered vulnerable at various occasions in the past. However, as discussed in this paper, the vulnerability of these women arose from the lack of an effective legal mechanism safeguarding their rights. But the legislature, instead of making laws for safeguarding the interests of surrogate women, has altogether banned the entire practice of commercial surrogacy itself. So, while the intention of the legislature to safeguard the interests of women is laudable, the manner in which it has attempted to do so cannot be justified.

Through the current Surrogacy (Regulation) Act, 2021, the Parliament has attempted to prevent women from being coerced into commercial surrogacy against their will or without their

informed consent through imposing a ban on this practice. But at the same time, it has also taken away the opportunity from women who would have wanted to make an informed decision in favour of undergoing commercial surrogacy by exercising their right of choice, in a free democratic country, in order to earn their livelihood. It appears that this ban on commercial surrogacy is more of a naïve decision made without proper deliberation. It can be said that the new law has done more harm than good for the commercial surrogates in India.

Thus, this paper puts forward an argument for the re-evaluation of the Surrogacy (Regulation) Act, 2021. This Act should be amended to allow commercial surrogacy in an effectively regulated manner. The purpose of protection of potential surrogates can be achieved in a better fashion if their rights are clearly laid down in a legislation and any deviation is strictly punished. A centrally supervised system needs to be implemented in the country wherein a regulatory authority needs to be established with which surrogates and surrogacy clinics would be registered. The whole arrangement regarding a surrogacy agreement would be closely monitored by that agency so that the rights of all stakeholders can be effectively protected.

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ⁱ Malini Karkal, *Surrogacy from a feminist perspective*, 5(4) IJME (Oct.- Dec. 1997) <http://www.Issuesinmedicalethics.org/054mi15.html>. (last visited Apr. 25, 2022).

ⁱⁱ The Assisted Reproductive Technologies (Regulation) Bill, 2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare.

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^{vii} Centre for Social Research, *Surrogate Motherhood: Ethical or Commercial?* 144 (2010) <https://wcd.nic.in/sites/default/files/final%20report.pdf> (last visited Apr. 23, 2022).

^{viii} S.2(b), The Surrogacy (Regulation) Act, 2021. “altruistic surrogacy” means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.

^{ix} S.2(g), The Surrogacy (Regulation) Act, 2021.

^x S.3. The Surrogacy (Regulation) Act, 2021. **Prohibition and regulation of surrogacy clinics.** On and from the date of commencement of this Act, — (ii) no surrogacy clinic, paediatrician, gynaecologist, embryologist, registered medical practitioner or any person shall conduct, offer, undertake, promote or associate with or avail of commercial surrogacy in any form.

^{xi} S.3. The Surrogacy (Regulation) Act, 2021. **Prohibition and regulation of surrogacy clinics.** On and from the date of commencement of this Act, — (v) no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist or any other person shall promote, publish, canvass, propagate or advertise or cause to be promoted, published, canvassed, propagated or advertised which— (b) is aimed at promoting a surrogacy clinic for commercial surrogacy or promoting commercial surrogacy in general.

^{xii} S.3. The Surrogacy (Regulation) Act, 2021. **Prohibition and regulation of surrogacy clinics.** On and from the date of commencement of this Act, — (v) no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist or any other person shall promote, publish, canvass, propagate or advertise or cause to be promoted, published, canvassed, propagated or advertised which— (e) advertises commercial surrogacy in print or electronic media or in any other form.

^{xiii} S.38. The Surrogacy (Regulation) Act, 2021. **Prohibition of commercial surrogacy, exploitation of surrogate mothers and children born through surrogacy.** (1) No person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall.— (a) undertake commercial surrogacy, provide commercial surrogacy or its related component procedures or services in any form or run a racket or an organised group to empanel or select surrogate mothers or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures, at such clinics, laboratories or at any other place.

^{xiv} S.40. The Surrogacy (Regulation) Act, 2021 **Punishment for not following altruistic surrogacy.** Any intending couple or intending woman or any person who seeks the aid of any surrogacy clinic, laboratory or of a registered medical practitioner, gynaecologist, paediatrician, embryologist or any other person for not following the altruistic surrogacy or for conducting surrogacy procedures for commercial purposes shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to five lakh rupees for the first offence and for any subsequent offence with imprisonment which may extend to ten years and with fine which may extend to ten lakh rupees.

^{xv} *Olga Tellis & Ors. v. Bombay Municipal Corp.*, 1986 AIR 180; *Consumer Education and Research Center & Ors. v. Union of India*, (1995) 42 SCC 3.

^{xvi} S.2(r), The Surrogacy (Regulation) Act, 2021. “intending couple” means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy.

^{xvii} S.2(s), The Surrogacy (Regulation) Act, 2021. “intending woman” means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy.

^{xviii} S.4(iii)(b)(I), The Surrogacy (Regulation) Act, 2021.

^{xix} *K. S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

^{xx} (2009) 9 SCC 1.