
COMMERCIAL SURROGACY IN INDIA

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ABSTRACT

The demand for support in human reproduction through surrogacy has seen a significant increase. Surrogacy refers to a form of assisted reproductive technology where intended parents engage a surrogate mother to bear and deliver a child on their behalf. While advancements in surrogacy offer new avenues for parenthood, they also introduce complex legal and ethical challenges.¹ This research paper explores the distinctions and consequences of altruistic versus commercial surrogacy. It critically examines the constitutional validity of the Surrogacy (Regulation) Act, 2021 and presents legal arguments advocating for the legalization of commercial surrogacy in India.

¹ *Surrogacy*, OHCHR, March 10, 2023, “<https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy#:~:text=Surrogacy%20as%20a%20reproductive%20practice,new%20legal%20and%20ethical%20dilemmas>”.

Introduction

The most practical choice for infertility-stricken Indian couples, for long, has been surrogacy. It came to an end when the central government enacted legislation outlawing commercial surrogacy. The Surrogacy (Regulation) Bill was passed in 2019 and its main goal was to regulate the surrogacy practice. For infertile Indian couples, it permits altruistic surrogacy but outlaws commercial surrogacy.

Difference and implications of commercial and altruistic surrogacy

“Commercial surrogacy” is a practice of commercialization of services or processes concerning surrogacy. This comprises any trade that entails the sale or purchase of human embryos or gametes, or the provision of compensation in any other form whether in the form of payment, reward, benefit, fees, remuneration or any form of incentive to the surrogate mother, family members or representatives to serve as a surrogate.² The existing law prohibits such commercial surrogacy in India by enacting the Surrogacy Regulation Act, 2021 (Act) and in case the crime is committed it can attract a maximum of 10 years of imprisonment indicting a fine up to Rs. 10 lakhs.³

“Altruistic surrogacy” is a form of surrogacy whereby no charges, expenses, fees, remuneration or monetary incentive of any nature are charged to the surrogate mother, her dependent family members (including representative acting on their behalf) and no such remuneration or monetary incentive of any nature does accrue to such individuals other than the medical expenses of the surrogate mother and other expenses required by her and her insurance coverage.⁴

In section 4 of the Surrogacy (Regulation) Act, conditions applicable to altruistic surrogacy prove to be rigorous. It requires that the prospective couple have at least five years of legal marriage and they are properly certified by appropriate authorities that one of them is infertile. The individuals who are specifically not allowed to use surrogacy include LGBTQ+ people, unmarried couples, single parents, foreign nationals, and individuals who are not within the age bracket allowed (women, between 23 and 50 years; men, between 26 and 55 years).

²“Surrogacy Regulation Act of 2021, Section 2, Acts of Parliament, India.”

³“Surrogacy Regulation Act of 2021, Section 4, Acts of Parliament, India.”

⁴“Surrogacy Regulation Act of 2021, Section 2, Acts of Parliament, India.”

Moreover, only a “close relative” of the intended parents is permitted to act as a surrogate. Surrogate mothers are restricted to undertaking the role only once in their lifetime and must fall within the 25 to 35 age bracket. The law also criminalizes any payment beyond a "reasonable" amount for insurance coverage of 16 months post-delivery, with violators facing imprisonment of up to ten years.⁵

The term “close relations” is not defined in the Act, but it is mentioned that the surrogate mother has to be genetically related to the intending couple or intending woman.⁶ Unanticipated mental and emotional hurdles are thrown in the way when the surrogate mother is in "close relations" with the intended parents. These may arise as the surrogate mother may demand certain rights (including custody or other similar rights) over the child, while the intended parents may or may not consent to the same.

Making a contrast between altruistic and commercial surrogacy is an effective way to highlight the importance of the surrogate mother's motive in determining surrogacy's moral position. As most surrogates originate from economically precarious backgrounds, legislators interpreted surrogacy as a kind of exploitation and commercialization and believe that many of them enter into the profession for financial gain. The surrogate's choice is no longer seen to be autonomous, but rather heteronomous since it is being influenced by financial considerations.

A woman who works as a surrogate may provide for her family's needs while also providing her own children with a brighter future. Several variables, in addition to the position of financial remuneration in surrogacy partnerships, are problematic. Surrogates' educational level is inadequate, which often inhibits them from comprehending the contract requirements, medical dangers, and treatments they would have to undertake. In the lack of the criteria for informed consent, there is a risk that surrogates may make their choice under less-than-ideal circumstances and agree to give birth to a child who is not theirs. Additionally, their lack of education limits their options for other occupations. As a result, surrogacy seems to be the only choice for some women.

⁵“Surrogacy Regulation Act of 2021, Section 4, Acts of Parliament, India.”

⁶“Surrogacy Regulation Act of 2021, Section 2, Acts of Parliament, India.”

Challenging the Constitutionality

It would not be out of place to examine the Constitutionality of the **Surrogacy Act of 2021**. There are specific aspects of this law, which needs a closer examination.

The Act may appear to contradict the "Golden Triangle" criterion established by the Supreme Court to determine the law's constitutionality. This test of reading equality, liberty, and freedom of rights together attempts to ensure that the State does not violate people's key fundamental rights.

To begin with, the act may contravene Article 14⁷ of the Indian Constitution, which guarantees all citizens "equality before the law and equal protection under the law." Article 13⁸ of the Indian constitution prohibits class legislation, but it does not bar the parliament from reasonably classifying objects, people, and transactions in order to attain certain goals. Such classification should not be arbitrary, or evasive, and it should be based on a substantial differentiation. It must have a reasonable and just relevance to the desired goal of the legislation.

Restricting married Indian couples to only altruistic surrogacy and excluding others based on nationality, marital status, and sexual orientation is an unreasonable categorization that breaches the right to equality. Given that the Act was enacted to protect women from exploitation and to outlaw the commercialization of the birth process, the restriction does not influence the legislation's stated goals.

Furthermore, The Legislation supports majoritarian Indian morality by denying LGBTQ and unmarried couples the opportunity to choose surrogacy. It is critical to emphasize that in the country, it is not prohibited to be a member of the LGBTQ community or live in a live-in relationship; hence, restricting these groups' access to altruistic surrogacy is unequivocally an instance of unlawful discrimination against them. As a result, this is also an inappropriate and arbitrary categorization.

Secondly, the Bill violates the "right to livelihood" and the "right to reproductive autonomy," both protected under Article 21⁹ of the Indian Constitution. The Supreme Court affirmed that

⁷"Constitution of India, Article 14."

⁸"Constitution of India, Article 13."

⁹Constitution of India, Article 21.

a woman's reproductive choices are an essential component of her right to life and personal liberty under Article 21 in the historic case of *"Suchita Srivastava v. Chandigarh Administration."* The Court underlined that a woman's fundamental rights, which include her rights to privacy, dignity, and physical integrity, include reproductive autonomy. This ruling demonstrated that reproductive rights are constitutionally protected aspects of individual liberty rather than just medical or social issues.¹⁰

In the case of *"Justice KS Puttaswamy v. Union of India"*¹¹, a nine-judge bench declared that privacy is a fundamental right and this declaration includes factors like personal information, family, and sexual orientation. In particular, the judgment stressed that the decisions in the matter of sexuality, sexual orientation, and gender identity can be discussed as a matter of private life and should be granted protection on a constitutional level. The Court cited a number of landmark decisions that guaranteed women the autonomy to their bodies and sexuality and rights to work night shifts, protect their reproductive choices, preserving bodily integrity and making free choices in regard to marriage, becoming a mother and raising a family. It acknowledged these problems to be highly individual and personal, fundamental to the dignity and liberty of an individual, essential to an individual's dignity and freedom, and central to the broader pursuit of happiness grounded in autonomy and self-respect.¹²

The proposed Act may also violate Article 19¹³, which provides "freedom of trade and profession" in India. When a woman consents to be a surrogate mother, they need a complete infrastructure in terms of medical and other facilities. When commercial surrogacy is not permitted, it leaves very few women to be eligible to provide surrogacy services within close relation. Through the continuous growth and provision of this infrastructure facility for commercial surrogacy, the entire business cycle can begin which is impacted adversely when commercial surrogacy is not allowed.

Why should commercial surrogacy be legalised?

In 2011, *"Budhadev Karmaskar vs State of West Bengal"*, the Apex Court ruling is a landmark judgment as it states that prostitution and other forms of sex work are not against the law in

¹⁰"Suchita Srivastava and Ors. v. Chandigarh Administration, AIR 2010 SC 235."

¹¹"Justice K.S. Puttaswamy (Retd.) v. Union of India, W.P. (Civil) No. 494/2012."

¹²Jayna Kothari, "The Indian Supreme Court Declares the Constitutional Right to Privacy" <https://ohrh.law.ox.ac.uk/the-indian-supreme-court-declares-the-constitutional-right-to-privacy>.

¹³ Constitution of India, Article 19.

India; nevertheless, trafficking for the purpose of sexual exploitation is illegal. Pimping, soliciting, exploiting, and renting out premises for the purpose of prostitution are all illegal activities that fall within the bounds and scope of the Indian criminal justice system.¹⁴

It is possible to draw parallels between the acts of prostitution and surrogacy. Prostitution is a kind of exploitative sexual behaviour in which a woman works for immediate financial gain by engaging in sexual encounters with varying degrees of sexual exclusivity. Whereas, in commercial surrogacy, the surrogate mother is paid to carry the baby until it is born and is responsible for all aspects of the process of giving birth. The similarity between prostitution and surrogacy is that in both cases, a woman involves her body, consensually, in return for some monetary remuneration.

In place of a complete prohibition on commercial surrogacy, the government may choose to implement limits and control the commercial surrogacy policy.

According to me, as an alternative to outlawing commercial surrogacy, the government may choose to impose limitations instead, such as:

- Setting the lower and upper age restrictions for potential surrogate mothers.
- Determining how many times a woman may become a surrogate mother throughout her lifetime.
- Placing a cap on the amount of financial remuneration that is considered to be fair for a surrogate mother to receive.
- By organising initiatives that educate women who are disadvantaged or lack education about the process of surrogacy.
- It is only possible for a couple to choose commercial surrogacy if they have been medically diagnosed as infertile and do not already have a surrogate in their immediate "close relations".

¹⁴“Budhadev Karmaskar vs. State of West Bengal (02.08.2011 - SC): MANU/SC/0881/2011.”

Conclusion

Surrogacy may be seen in one way based on socioeconomic situations as offering the incorrect financial motivation to do something one would not otherwise do, or in another way as a genuine opportunity for surrogates and their families to live a better life. Thus, by implementing the above-suggested regulations instead of imposing a blanket ban on commercial surrogacy, the government will not only be successful in preventing the exploitation of underprivileged and uneducated women in India but also not infringe on the fundamental rights of the citizens.