

SURROGACY (REGULATION) ACT, 2021: EFFECTIVENESS AND CONCERNS

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ABSTRACT

In a country like India where not having a child is a social taboo, surrogacy brought hopes and happiness for many childless couples. Amid these hopes, there are also ethical concerns whether it was morally correct to use one's body to reproduce and make a living out of it. Furthermore, as India legalized surrogacy way back in 2002 and made it an important component of medical tourism, the surrogacy market grew multifold. This growth in surrogacy market also posed many challenges. Exploitation of surrogates and abandonment of children started surfacing in a big way. The government of India acknowledged these problems and enacted the Surrogacy (Regulation) Act, 2021. Through this Act, the government majorly focused on two aspects. First, it put an end to commercial surrogacy to do away with exploitation of surrogates. Secondly, in order to fulfil the need of childless couples, it allowed altruistic surrogacy where there will be no payments for surrogate except for her medical and insurance expenses. Furthermore, it also restricts the foreigners from availing this facility. How will this new act unfold is a matter of academic enquiry. Preliminary impressions through popular writings are pointing at many loopholes in the act. To begin with, it is suggestive of black marketing. As a result, while the hospitals and middlemen continue to mint money, the surrogates are at the loser's end. Additionally, altruistic surrogacy is exerting a lot of pressure on weaker women of families' giving rise to women exploitation. Furthermore, it also deprived many women of their jobs as surrogates. Through this paper, an attempt is made to understand the act of 2021 and the way it solves or give rise to new challenges in safeguarding the rights of surrogates and children and the future of surrogacy in India.

Keywords: Surrogacy, Legislation, Challenges, Exploitation, regulation, reproductive labor

INTRODUCTION

Surrogacy is an arrangement for carrying of a pregnancy by a female for other couples who are not able to reproduce children of their own. The woman who gives birth to the child is called the ‘**surrogate**’ and the couple for whom the child is produced is called –‘**intended couple**’. The surrogate only rents out her womb as the gametes does not belong to her and is imported either from the intended couple or elsewhere. The Indian Council of Medical Research (ICMR) has described surrogacy as an arrangement where women give birth to a child where neither of the gametes belong to her or her husband, and after the birth, the child is handed over to the couple for whom this process was adopted (see Government of India, 2008, 2016). There are different ways how surrogacy is performed. In terms of procedure, there are two types. First is gestational surrogacy where the pregnancy results from the transfer of an embryo created by in vitro fertilization (IVF). Here the child is genetically unrelated to the surrogate mother. Second is traditional surrogacy where the surrogate is impregnated naturally or artificially and the child is genetically related to the surrogate mother. In terms of surrogacy arrangements there are also two types. First one is the ‘altruistic surrogacy’ where a woman becomes a surrogate out of concern for the couple who are not able to have children. Second one is the ‘commercial surrogacy’ where the surrogate mother is not related to the intended parents but agrees to be a surrogate as she is paid for it.

In the entire process of surrogacy, multiple actors are involved and it is important to delineate them in order to comprehend their importance and challenges. First- a couple wanting to have a child, second- a surrogate who is physically competent enough to give birth to this child, third-a medical team of doctors in a hospital to supervise the medical process and fourth-the person donating eggs and embryos. It is very important to regulate the interplay of these actors and give it legal sanctity in order to avoid any incidences of exploitation and foul play. In understanding the need for legal sanctity, the government of India legalized surrogacy in 2002. In addition, the government also made it an important component for promoting medical tourism. In a very small span of time, surrogacy found popularity among childless couples not only in India but also in many parts of world. Gradually, India emerged as the surrogacy hub

for couples from different countries. Over a period of time, nearly three thousand surrogacy clinics came up with over thousands of Indian women working as surrogates (Jana & Hammer, 2022). One of the reasons for India to emerge as the popular surrogacy destination was its cost, which was very reasonable in comparison to other countries. On an average the price of surrogacy in India varied between 10,000 USD to 28000 USD which was much cheaper than the cost in other countries. Another reason was the ease of availability. In no time, this sector grew immensely. However, with the growth in surrogacy, news and reports of exploitation of surrogates and the abandonment of children born out of them started surfacing in. Below is an account of the problems which arouse out surrogacy.

PROBLEMATISING SURROGACY

As India legalised surrogacy way back in 2002 and made it a part of medical tourism, the Indian Council of Medical Regulation (ICMR) formulated a framework for operationalizing surrogacy. In no time, the Indian surrogacy market grew exponentially. This growth also brought many challenges. The foremost challenge was in the form of the exploitation of surrogates. The surrogates often complained of being underpaid while the middlemen and the hospitals made a fortune. It was reported that surrogates developed emotional attachments to the children and declined to hand them over to the intended couples. In addition, the news of the abandonment of children born through surrogates started surfacing. If there were any deformities in the child, the intending couples refused to take them. It all gave rise to mental issues, both for the surrogates and for the intended couples. All these challenges caught the attention of the government. The Law Commission of India took up this matter and recommended the prohibition of commercial surrogacy in India (Report 228, Law Commission of India). Additionally, there were many policy inputs suggestive of putting a ban on surrogacy.

Apart from any formal reports or studies pointing towards flaws in commercial surrogacy, it can be argued that the scope for exploitation of surrogates always existed in this unequal society and the world. As surrogates are from poor families and the intending parents are relatively wealthy, it makes the arrangements very unequal. Novelist Gena Corea mentioned it a long time ago, in 1985, in her dystopic novel **The Mother Machine**. In this novel, she mentions the exploitation of women in the poorer countries by those in the developed ones for the fertility

business. Furthermore, as surrogacy gets commercialised, there is always a very high risk of women getting attracted to it out of their desperation to make money (see Brazier et al. 1998). Another inherent problem of surrogacy comes from the ethical perspective. Many scholars found surrogacy to be ethically wrong as it treated women and children as mere commodities (see Anderson 1990; Holder 1984; Radin 1987; Sandel 2013). Furthermore, the fertility clinics exploit the surrogates as the women's labour market in India is oversupplied. They mint money at the expense of surrogates and leave surrogates underpaid. Studies have also identified the non-transparent nature of transactions in surrogacy as one of the key factors for exploitation (see Jana & Hammer, 2022). Overall, it is well accepted that there are numerous problems in surrogacy. Hence, legal interventions were a must. India responded to these problems by enacting the Provision of Surrogacy (Regulation) Act 2021. A detailed provision of this act is mentioned below:

Government's Response through Provisions of Surrogacy (Regulation) Act 2021

Indian government enacted the Provisions of Surrogacy (Regulation) Act of 2021 aiming to protect the rights of surrogate mothers and the children born out of them. The core aspect of this legislation is that it attributes flaws in surrogacy to its commercial nature. Therefore, it aims to completely ban the commercialization of surrogacy and commoditization of children. In keeping with this aim, the act differentiates between the altruistic and commercial surrogacy. It defines altruistic surrogacy as the one where no charges, expenses, fees, remuneration or monetary incentives are to be given to surrogates other than the medical expenses and insurances covers. It bans commercial surrogacy which is defined as the one where surrogacy is commercialized including buying of human embryo, payment for the surrogate mothers and all the other expenses. The act also lays down strict punishments for commercial surrogacy. Under section 40, there are provisions for strict punishments. For the first time offenders, there will be imprisonment up to 5 years coupled with fine of Rupees 5 lakh and for any subsequent offences; the imprisonment period extends to 10 years with the fine of rupees 10 lakh.

The act further restricts surrogacy only for heterosexual married Indian couples who do not have any child of their own with the condition that only a relative of theirs can be a surrogate mother. It also lays down conditions under which parents can avail this facility. First and foremost condition is that the intending couples (either the wife or the husband) must have a medical condition which does not allow them to reproduce children of their own. It will be

testified by the District medical board which will issue a certificate stating couples' inability to reproduce child of their own. Furthermore, there should be no surviving children of the intending parents. The couple will ensure insurance cover of 16 months for the surrogate mothers. For safeguarding the rights and security of children born out of surrogacy, the act notifies that these children can never be abandoned for any reason whatsoever. Section 7 of the act clearly states that there are absolutely no exceptions for rejecting the custody of child by the intending parents. It also provides that every state and union territory shall establish a Board to be known as the State Assisted Reproductive Technology and Surrogacy Board or the Union territory Assisted Reproductive Technology and Surrogacy Board. This board will review the functioning of the authorities in the field of surrogacy and suggest measures or any other matter as given by the government.

The Act of 2021 is a significant step towards regulating the surrogacy industry and also protecting the rights of children born out of surrogate mothers. How this has unfolded at the grassroots level is a debatable issue. Scholars are divided on the utility of this legislation in handling surrogacy issues in India. While some of the scholars have praised the government's efforts in banning commercial surrogacy, others are of the opinion that a blanket ban is not the correct solution to deal with such a sensitive issue as surrogacy.

Decoding the Provisions of Surrogacy (Regulation) Act 2021

The Act has defined surrogacy as an altruistic affair. It has laid down the eligibility criteria for the intending couples so that only the needy ones proceed with surrogacy. It has also taken cognizance of the exploitation which surrogates and the abandoned children suffer and attributed it to commercialization of surrogacy. In spite of all the good intentions, scholars have identified shortcoming of this Act. To begin with, a complete ban on commercial surrogacy encourages black marketing where the exploitation of surrogates is even more as she has no legal safeguards once she indulges into surrogacy. It is also argued that altruistic surrogacy has its own limitations and challenges. First and foremost is that having a relative as a surrogate mother will always be emotionally draining for the children and the intending parents. Moreover, it is wrong to assume that any surrogate would take so much of physical and emotional pain without any economical benefit. This also reinforces the patriarchal approach.

The Act also deprives women of their reproductive decisions and economical benefits. Women who made their living through surrogacy lost their jobs. Studies show that majority of these women opined that ban on international surrogacy should be lifted as it deprived them of economic benefits (see Huber, Karandiker, & Gezinski, 2017). Moreover, as surrogacy in India had become a 2.5 billion USD industry, putting a carpet ban was not economically viable as women lost opportunities to be economically independent (Nair & Kalarivayil, 2018). While the Act banned commercial surrogacy, studies pointed out difficulties in finding altruistic surrogates (see Parry & Ghoshal 2018). Moreover, it is no guarantee that altruistic surrogacy would not be exploitative (see *ibid*). Therefore, the provisions of the Act are discriminatory towards couples who fail to have any altruistic surrogates. Moreover, it is an accepted fact that very few women would voluntarily undertake surrogacy for their family members. They would only do it on account of family pressures. Therefore, even women in the family can be exploited and forced to act as surrogate. There are possibilities of richer family members to exploit the lesser ones and also provide economic benefits under table. It may destroy the very assumptions of the surrogacy act 2021. We find that though the intensions of the Act are to do away with the ills associated with surrogacy, it has many loopholes to cater to.

CONCLUSION

To conclude, this paper has examined the problems of surrogacy in terms of exploitation of surrogates and abandonment of children. It illustrated how the government of India responded to this issue by enacting the Provisions of Surrogacy (Regulations) Act, 2021. Further, how scholars have examined and identified the loopholes in this Act was also discussed. There are some of the major takeaways and suggestions for the way government has responded to surrogacy in India. First, as surrogacy is a part of assisted reproductive services, treating it under a separate legislation has raised many queries. Second, scholars are of the opinion that regulating commercial surrogacy would have been a better option than putting a complete ban on it. Third, it is argued that there is no guarantee that altruistic surrogacy would not be exploitative as it has its own set of problems. Fourth, studies point out that as Indian surrogacy market grew in size, the Act of 2021 made surrogates lose their jobs. Finally, in spite of various criticisms of the Surrogacy Act 2021, one has to understand that as India is on her way to become the spiritual leader of the world, therefore unethical components associated with

commercial surrogacy had to be scrapped. Furthermore, Indian have a tradition of compassion and sacrifice, therefore altruistic surrogacy was the only way out for surrogacy to operate in India.

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