
Ban on Commercial Surrogacy in India: A Critical Analysis

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Abstract

“Any fool can have a baby; it takes a smart woman to get paid for it¹.”

The mixture of technology and law always give rise to many complex techno-legal problems, and finding solutions for the same becomes a daunting task for lawmakers. But modern situations demand advanced solutions to balance the two out. A complete ban without reasonable justification is the first step of showing the powers enjoyed in dictatorship but sometimes, restrictive reformations help in bringing peace and sanity back to society. The Surrogacy laws are enacted with a higher vision of eliminating the pain of surrogate mothers and illegal transaction in the name of surrogate child's wellbeing from the intending parents by fraudulent contractors. This paper will cover the historical as well as the reformative objective of the act. This research paper will put forth the sufferings and tortures tolerated by the surrogate mother, there being the most vulnerable of all and very easy to a make fool of themselves, by accepting the illegal methods of gaining surrogacy and make the readers question the worthiness of conducting commercial surrogacy. This paper asks a question, “Whether commercial surrogacy includes any valid contract clause.” The paper had tried to cover overall aspects of surrogacy and drew a critical analysis of a period when commercial surrogacy was allowed and that of post-ban period.

KEYWORDS:

Commercial, Surrogacy, illegal, advanced, reformative

INTRODUCTION

The Hindu religion has provided an anecdote, which included the involvement of third-party help to resolve the issue of infertility. In India, the population of Hindu is 79.8%, that is near about 96.63 crores². In Indian society the issues of reproductive is very much attached with the religious and cultural background. Thus, having to experience motherhood through any means is deeply embedded in the mindset of Indians. In-vitro fertilization brought about an innovative change in traditional surrogacy. Now, there is no need for the gestational mother to donate eggs, but genetically acclaimed children can be born outside marital family³. Soon after a judgement passed by a High Court, that granted the commercialization of Surrogacy in 2002, it almost became a means of earning for many surrogate mothers, totally disrespecting the sacred idea of motherhood. The services catering to reproductive healthcare system in the United States are expensive without an insurance coverage and the insurance companies there, rarely provide for IVF⁴. Thus, contractual agreements through private agencies became famous among couples, wanting to perform gestational surrogacy⁵. Indian market having a highly

¹ Nytimes.com, <https://www.nytimes.com/2011/10/05/world/asia/05iht-letter05.html>, (last visited on 8th March 2024)

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Pib.gov.in, <https://pib.gov.in/newsite/PrintRelease.aspx?relid=126326> (last visited on 8th March 2024)

³Paul R. Brezina & others, “Recent Advantages in Assisted Reproductive Systems”, LLC 2012, Springer Science+Buisness Media, 166, 167 2012.

⁴ Meghan Boone, “It's Only Covered if You Keep It: The Legality of Surrogate Pregnancy Exclusions in Health Insurance Policies”, 14 GEO. J. GENDER & L. 677, 682 (2013).

⁵ Ibid

advanced educational system with a low-cost facility for living made it the perfect hub for carrying out surrogacy in a mass scale and the ART industry started showing an immense growth⁶. The Indian Council for Medical Research (ICMR) came up with guidelines to this issue and the government started focusing on passing legislations for the same⁷. The Assisted Reproductive Technology (ART) Bill, though drafted in 2008 and with subsequent revisions in 2010 and 2014, was not enacted anytime in the future⁸. Both the guidelines and the bill contained provisions that allowed the grant of custody to the intending parents, which included foreigners. Thus, clearly promoting the surrogacy-culture⁹. Universally, three categories of approaches are followed regarding surrogacy performance. Firstly, those countries who had banned surrogacy in its entirety such as Germany, China, and France. Secondly, those countries who have completely legalized surrogacy to be carried out in any form, such as Russia, Israel, Georgia and Ukraine. A common practice of commercial surrogacy is done in fewer states of the U.S, and it is believed that only a developed and capitalist country can carry this out. Thirdly, lies those countries where only altruistic form of surrogacy is allowed, where surrogate mothers agree to give birth without getting paid, this is followed as a principle among them. The countries are UK, Canada, Hongkong, India, Greece, South Africa, and Iceland. The Centre for Social Research, with a title as Surrogate Motherhood: Ethical or Commercial revealed that the surrogacy hub before 2016, was worth \$500 million¹⁰. The maximum number of profitable shares used to go to the doctors, medical practitioners, the middlemen, and very negligible amount to the surrogate mothers, leaving them with nothing. There was a high rise in infertility rates in India during 2016s, around 22-23 million married couples whose reproductive health is on point but still suffer from infertility. The percentage of male's experience is around (30-40) and that of women is (40-50)¹¹. Slowly several negative incidents started showing up to the surface, in forms of egg donors and surrogate mothers' death, the troubles caused in getting visa for the child born out of surrogacy and the abandoning of surrogate children by foreign clients, many more. The Indian government in July 2012, brought about new regulations to strictly eliminate visas issued on medical purposes and restricted the access of foreign clients, heterosexual couples and those whose country had already banned surrogacy in the Indian surrogacy industry¹². Then came the prohibition of commercial surrogation and in its place the practice of only performing altruistic surrogacy was introduced by the government, to reduce the suffering and exploitation of unlettered and poverty-stricken women (here the surrogate mother). Commercial surrogacy was made a punishable offence and the new bill of 2020, completely banned commercial surrogacy and upheld the principles of altruistic surrogacy but widened the criteria for a woman, who is eligible to become a surrogate mother under the bill. But the question remains, how can any form of surrogacy protect the rights of women, in a country where laws are unequal and not implemented in a just manner and women usually find themselves in a vulnerable situation.

BUYING AND SELLING BABIES – CAN IT BE A VALID CONTRACT?

⁶ Amelia Gentleman, "India Nurtures the Business of Surrogate Motherhood", N.Y. TIMES (Mar. 10, 2008), <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html> pagewanted=all&_r=O, (last visited on 10th March 2024)

⁷ [main.icmr.nic.in, https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf](https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf) (Last visited on 11th March 2024)

⁸ [ncbi.nlm.nih.gov, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10327345/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10327345/) (last visited on 9th March 2024)

⁹ Ibid

¹⁰ [womenleadership.in, http://www.womenleadership.in/Csr/SurrogacyReport.pdf](http://www.womenleadership.in/Csr/SurrogacyReport.pdf) (last visited 11th March 2024)

¹¹ [ey.com, http://www.ey.com/Publication/vwLUAssets/EY-call-for-action-expanding-ivf-treatment-in-india/\\$FILE/EY-call-for-action-expanding-ivf-treatment-in-india.pdf](http://www.ey.com/Publication/vwLUAssets/EY-call-for-action-expanding-ivf-treatment-in-india/$FILE/EY-call-for-action-expanding-ivf-treatment-in-india.pdf) (last visited 11th March 2024)

¹² Ibid

A woman's body is not a commodity to be valued or devalued. The connection of surrogacy with buying and selling of the womb, brings into the argument, a serious risk factor associated with women losing their reproductive capacity. The consideration of a contract of commercial surrogacy flows from the side of surrogating mother as producing a child and the other party paying for it. The parents, commissioning for this, pay the amount only after the child is born healthy and finally is handed over to their custody. The intending parents can pay for the health and wellbeing of the surrogate mother but the whole amount is paid after childbirth. Thus, there lies an exchange of money in terms of a consideration for receiving the child by means of using commodified ability of the surrogate mother's reproductive capacity and hence commercial surrogacy is a sophisticated term for the sale of a child. Many scholars and feminists believe that surrogacy in its existent nature promotes buying of babies. Here lies the distinction between adoption and surrogacy in legal parlance. The contract that plays a significant role in commercial surrogacy goes against the principles of natural law of justice. On the contrary, some argue that commercial surrogacy is not necessarily a mechanism to buy and sell babies but that of services rendered by the surrogate mother with their consent. There has been a series of public interest litigations supporting both side of the claims, one such was filed before the Supreme Court, and the apex court decided to hear the issues and decide the matter on merits. The advocate from the petitioner's side, took up the argument that, the law has been passed by the central legislature and thus they cannot shy away from facing the aftermath of this legislation as they are supposed to look after the wellbeing of people in general. The major highlights of the petition rests on the issue of age restrictions, if the ART Act don't impose any restrictions other than stating women should be above the age of 21, then how can this surrogacy act, which is based on usage of artificial methods to carry on surrogacies, allow existence of such strict regulations¹³. But majority views lie in the argument that just like selling of bodily organs is considered illegal and is prohibited then open execution of rendering bodily services should be prohibited as well.

¹³ Abraham Thomas, "SC seeks Centre's reply on plea challenging blanket ban on commercial surrogacy", hindusthantimes.com, (last visited on 8th March 2024), <https://www.bbc.com/news/health-47826356>.

ADOPTION	COMMERCIAL SURROGACY
<p>Adoption, being a universal law, prohibits any form of payment to the birthparent, who might surrender their children in return for money.</p> <p>2. The fundamental law of Adoption can be violated, and it results in an offence that is punishable.</p> <p>3. The concept of Adoption was created to give a home to a child-less couple and a parent-less child vice versa.</p> <p>4. Adoption applies to existing children.</p> <p>5. If a couple with an intention of becoming parents adopts and suffers some losses, it would be necessary losses.</p>	<p>While commercial surrogacy absolutely allows giving and taking of payment in consideration for the child.</p> <p>2. Here, it is allowed systematically, and laws are made to govern the procedure of commercial surrogacy.</p> <p>3. This concept is more in support of creating and designing children to sell them in future.</p> <p>4. Commercial Surrogacy applies to children who are made to be created after the contract comes into force.</p> <p>5. If a couple choosing to perform a commercial surrogacy, have to go through some losses, then that would be a defeat in receiving the ultimate gain for which consideration has been exchanged, i.e. an opportunity to become parents¹⁴</p>

I. INTENTION AND EFFECT OF THE BLANKET BAN ON COMMERCIAL SURROGACY

The Commercial Surrogacy is described as, “*commercialisation of surrogacy services or procedures or its component services ... 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 incurred on the surrogate mother and the insurance coverage for the surrogate mother*”¹⁵. As this has been a way of earning for many uneducated and unemployed women, the question that remains is whether the complete ban is support of Article 19(1)(g)¹⁶ of the Indian Constitution¹⁷, which gives a right to every Indian citizen the freedom utilizing opportunities to carry out trade and commerce¹⁸. The ban primarily took place due to reported incidents that showed unethical carried out surrogacies which led to exploitation of surrogate mothers, surrogate children being abandoned¹⁹, formation of scandalous rackets which carried out illegal means of carrying out commercial surrogacies. The intention of the legislature to bring this bill was to remodify the sufferings of surrogate mother, who’s rights are governed largely by middlemen and intending parents. The reports of illegal activities took place due to an absence of binding legislation for surrogacy and protection given to surrogate mothers legally. The endorsement of altruistic surrogacy might put immense social and emotional pressure on close relatives, as they are bound to bear such emotional and bodily pain

¹⁴ Elizabeth Bartholet, “Intergenerational Justice for Children: Restructuring Adoption, Reproduction & Child Welfare Policy”, 8 LAW & ETHICS HUM, RTS. 103, 127, 127-128 (2014)

¹⁵ Surrogacy (Regulation) Act, 2021, sec 2(f), No. 47, Acts of Parliament, 2021(India)

¹⁶ INDIA CONST.art.19

¹⁷ Ibid

¹⁸ INDIA CONST.art.19

¹⁹ Baby M case

without expecting any monetary gain. The money gained from allowing to go through surrogacy has instead helped many underprivileged women to bring their family above the poverty lane. A test to check proportionality has been discussed recently, which says that there should be a proportionate amount of balance maintained between giving more importance towards achievement of the actual purpose and the importance of maintaining the limitations set constitutionally²⁰. The select committee report²¹, took into consideration partially the importance to counting the surrogate mothers as the most prominent stakeholders and thus the need for compensating them for their labor, by removing the compensatory model and bringing in its place a medical coverage model. Sometimes, before imposing strict restrictions, it should satisfy a test where it shows that if an alternative to it is being brought about which causes less harm, it is sufficient²². This strict ban had affected the surrogate mother's family largely, this would have been less if proper counselling on employment and surrogacy been carried out and suggesting methods of earning outside of commercial surrogacy to help the surrogate mothers create an economic stability. This ban had not only taken away the right to employment but also the agency over surrogate mother's own body and leaving them in a livelihood deprived condition. Several studies supporting the commercial surrogacy had shown, the ultimate satisfaction for the surrogate parents is to receive altruism but for others and majority can be to send their own children to good schools and maybe to clear existent family debts. The arguments put forth by the surrogate mothers were that finding alternate means of employment without any aid from government after the complete has left them with no other ways but to reach out to other exploitative measures. The intention of the ban was related to grounds governing issues on public morality and interest, and government has an absolute right to issue a blanket ban on something than is subjected to public harm²³. If the repercussion of commercial surrogacy is challenged in court of law, it would be subjected to the same number of restrictions as the sale of liquor and prostitution is subjected to, as all of them affect public morality some way or the other²⁴. To draft such restrictive legislations proves that the legislatures had intention to hold commercial surrogacy as, "*res extra commercium*"²⁵. The Surrogacy Regulating Act, 2021²⁶, imposed certain restrictions on who can be eligible to become an intending parent. The act only allows a heterosexual couple to avail the rights of altruistic surrogacy, the argument posed forward by the department of health research, has been to safeguard the vulnerability of the surrogate child and only in a healthy marital environment, a child can grow up, with both parents taking equal shares to give the child a good future. They also state that marriage binds two individuals by means of law and thus can only provide the best environment for a nurtured childhood. This argument lacks strength when the divorce rate of India and other negative aspects of marital institutions are considered. Live-in relationships have been legally recognized by the apex court of India, as being of the similar nature to a married one²⁷. Indian laws, allow adoption by single parents and the child being born out of a live-in relationship is also legally recognized, so making it restrictive for only married couple is a

²⁰ *Modern Dental College and Research Centre v. State of Madhya Pradesh*, (2016) 4 SCC 346 : AIR 2016 SC 1559.

²¹ select committee report.

²² Anuj Garg case

²³ *M.J. Sivani v. State of Karnataka*, (1995) 6 SCC 289 : AIR 1995 SC 1770.

²⁴ *State of Uttar Pradesh v. Kaushaliya*, (1964) 4 SCR 1002.

²⁵ *Res extra commercium* means a thing outside of commercial intercourse i.e., things not subject to ownership, commerce, or trade, such as the high seas or air (Oxford Reference).

²⁶ surrogacy act

²⁷ *Nandakumar v. State of Kerala*, (2018) 10 SCC 1: AIR 2018 SC 4321 [10]

bit flawed. The regressive intent with which rights have been curbed away from homosexual couples, cannot be accepted as reasonable as studies show, children grow up being happier and contentful in social, educational, and emotional aspects²⁸. A very shocking, mention worthy restriction is that the intending parents must wait for a minimum of 5 long years to start the process of altruistic surrogacy. They should avail themselves of surrogacy if only they have exhausted all the Assisted Reproductive Technology Treatments (ART)²⁹. This can affect couples who had married late, and those who have a huge age difference, these kinds of couple might never be able to get an opportunity. The effect of the act is grave as it tries to violate constitutionally recognized fundamental rights, as section 3(ii)³⁰ of the same act upholds a complete blanket ban on running of any kinds of surrogacy clinics, this in turn affects the institutions who entered the market to carry on their profession and prima facie violates Article 19³¹ of the constitution. The sections which generate a respective eligible age group for both intending parents and surrogate mothers, are not only arbitrary but can stop a couple from becoming intending parents just because they don't fit the age-criteria. The sections of the Surrogacy Act arguably violate the articles of the Golden-Triangle of the constitution, there being Art 14, 19 and 21. The conflict that has arisen between the enforceability and prevention of the fundamental rights, has placed this act in a position of dilemma. The right to procreate is a fundamental right; this act not only tries to restrict this fundamental right but places itself as a supreme authority to decide, by molding the rights of intending parents according to its restrictive sections. The fundamental right to privacy is also being infringed as the couple need to show a certificate of infertility or is supposed to state some specific medical reasons for not conceiving. The biggest consequences of this complete ban can be more development of illegal rackets organizing commercial surrogacy, resulting in an increased form of exploitation of the vulnerable stakeholders. If they are caught carrying out commercial surrogacy, the saddest part is the absence of any safeguarding reforms but only penal provisions against them. The legislature and government looked out for an easy way to curb the social problems of surrogacy and such kinds of banning gives more power to them to negate the creation of any regulatory reforms. Another argument suggests that the legislature's intent is to bring the labor of women in the domain of domestic household rather than making it an economical issue. The government should indeed focus on being a social felicitator rather than being a controller. The concerns projected in the Act could have been taken in a validating way if backing those up logically was possible. The allowance of commercial surrogacy between two separate countries can give rise to complex legal dilemmas as it can make the child go state-less, with either of the countries not willing to give citizenship rights to the surrogate child. During 2008, India became one of the busiest hubs for surrogacy industry, but internationally there was an absence of any rules under private international law. Recently, the Hague Conference³² decided to bring about new rules and regulatory bodies, specially to cater for surrogacy. The international legislature is concerned with providing security and protective rights to the surrogate child and countries willing to allow commercial surrogacy will have to comply to the respective practicing norms.

²⁸ Ken W. Knight, *The kids are okay: it is discrimination, not same-sex parents, that harms children*, 9 MJA 207, (2017)

²⁹ ART

³⁰ sec 3

³¹ article 19 of constitution

³² Claire Fenton- Glynn, *Surrogacy: Why the world needs rules for 'selling babies'*, bbc.com, (last visited on 9th March 2024), <https://www.bbc.com/news/health-47826356>.

II. EVOLUTION OF STATUTES

“Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances³³”, this had been held in the case of M. Nagaraj v. Union of India³⁴.

Year	Legislations/Rules	Changes brought about.
1. 2008	Assisted Reproductive Technology (ART) Bill	This bill was revised twice, both in 2010 and thereafter in 2014. It contained provisions that allowed foreigners involvement in making India, a commercial hub for surrogacy. It was drafted with the intention of making the surrogacy industry more famous and accessible.
2. 2012	Indian government brought a sudden policy.	This policy started restricting the easy availability of visas for medical purposes, to curb out the problems arising out of international citizens visiting India for commercially carrying out surrogacy.
3. 2015	The visas for medical reasons were called for suspension by the Ministry of Home Affairs.	Complete ban on, foreigners entering Indian solely for availing commercial surrogacy.
4. 2016	Surrogacy (Regulation) Bill 2016	Soon, after the decision of restraining foreigners from entering India for attaining surrogacy at a cheaper rate, this bill was drafted and introduced to the “Lok Sabha”.

³³ M. Nagaraj v. Union of India

³⁴ M NAGARAJAN

Year	Legislations/Rules	Changes brought about.
5. 2017	Bill of 2016, referred to the “Parliamentary Standing Committee on Health and Family Welfare”.	The standing committee did hold a range of meetings to make decisions on the possible outcomes of passing such a bill.
6. 2017	Report on 2016 bill, published in the august of 2017.	The introduction of the bill caused an upsurge of a lot of controversies, stating whether such a bill will protect the main stakeholders being the surrogate mothers. Thus, the report largely focused on getting the views of the public and surrogate mothers on the same.
7. 2019	The Surrogacy (Regulation) Bill, 2019 passed	First passed in “Lok Sabha” in 2019, “Rajya Sabha”, decided to ask for the reference of a select committee. The cabinet took into consideration the recommendations of the committee and then gave approval to the new bill of 2020.
8. 2021	The Surrogacy (Regulation) Act, 2021 finally got enacted	At the arriving end of 2021, the government gave assent to the enactment of a law on surrogacy in India, which had rules outlined in a manner to regulate and control the arrangements for surrogacy in India.

III. CONCLUSION AND WAY FORWARD

In India, surrogates keep on facing risks of multiple pregnancy and chances of fetal reduction as they are uneducated and with less information about how their body is being used and the consequences therein. They are much more interested in getting higher success rates, even though getting paid for surrogating is banned, still the desire of becoming a successful surrogate mother continues and the intense pressure of bearing someone else’s legally recognized child is huge. The doctors are mostly responsible for having the knowledge of embryo counts and mode of the delivery to be carried out and hence none of this information lies either with the surrogate mother or the intending mother. Even after banning commercial surrogacy, there still lies the issues of reproductive ethics being followed and a complete ban can lead to more illegal commercial surrogacy to be carried out. There is an urgent need for the development of laws responsible for regulating altruistic surrogacy practice, in a proper procedural mechanism format. The Surrogacy (Regulation) Act, 2021 contains sections which strictly prohibit any other forms of surrogacy procedures except for altruistic form or any other ones, if mentioned in the act. A complete ban on commercial surrogacy without trying to maintain a balance between the positive and negative side of it, this act has failed to induce the ideals of social engineering and achieve the objectives of the bill. The aim behind this act would have been justified if the government had listened to the concerns of people and looked after the benefits and problems of all stakeholders. The first logical step can be to bring in more regulatory provisions rather than such controlling ones, this would have helped the government move

forward in the correct direction. The whole idea of surrogacy is based on inclusiveness of all kinds, hence by bringing homosexuals and single parents into the scenario, such laws would have been able to put forth an example of the same.

Before the enactment of this act, there was no law to regulate such an industry that boomed so rapidly, at least there lies some regulating legislature due to which many illegal activities governing the subject matter of surrogacy will be duly reported and investigated on. The act was enacted with an intention of curbing away all sorts of socio-economic problems resulting from commercial surrogacy at one go, but the legislature should take notice of the fact that our constitutional makers focused on flexibility of laws more than rigidity. The rigid sense in laws is justified when there lie no other options but to implement strict actions to avoid greater harm. Some provisions of the act can be selected for amendment to bring more synchronization with the actual aim of this act. The enactment of this act has brought the hidden issues to the surface, resulting in debates and discussions, which will in future result in the formation of some better regulatory reformations. The law makers are creating such laws keeping in mind the stakeholders and concerned public, so their suggestions will be an invaluable asset for everyone. The legislatures should conduct more surveys and annual reports of the after-effect of this act should be submitted for analysis. This act just like a coin represents two sides of its existence, one being violative in nature and another being protective, but the gap between the two should be diminished. The effect of the act shows how the arguments in its favor turn from saving the noble image of motherhood to issues pertaining to public morality. The government indirectly tried to portray an exercise of coercive power, by introducing tough penal laws and not being bothered with the underlying technicalities of the industry governing surrogacy. There should be a call for rectification, if any infertility-certificate is rejected without any claims and powers vested upon the Surrogacy-Boards should be checked in control, absence of any appellate or reviewing body raises alarming problems that need to be heard and resolved. The government could have formulated new ideas for employing poverty-stricken women, who moved towards becoming surrogate mother just for the money. In an independent India, where people themselves have given each other the power of following one constitution, should be provided with some rights to choose what's right and wrong, the work of the government lies in warning them of the possible dangers of future.