



Women's Rights in India: Special Reference to Motherhood and Surrogacy

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Abstract: Reproductive medical tourism has grown more popular, with India serving as a major destination for people from all over the world. During the past several decades, many childless couples have travelled to India in search of surrogacy. In India, the legal status of surrogacy is unmistakable. Gestational surrogacy is legal in India. One of the few nations where commercial surrogacy is still legal in India. However, there is no legal prohibition against commercial surrogacy in India. This suggests that although commercial surrogacy is not illegal in India, neither is there specific legislation regulating it. Even while women have benefited from increased access to educational and employment opportunities as a result of globalisation, the gap between the gender has only widened on a global and local scale. Consequently, gender contradictions are not unique to the surrogacy industry but characterise women's outsourced work everywhere.

Keywords: Fertility industry • Gestational Surrogacy • Commercial Surrogacy • Gender Paradoxes

Introduction

Every one of us has mental pictures of women, and the very word “woman” conjures up a wide range of feelings within our hearts, such as unconditional love, the desire to nurture, and a compassionate temperament. Every woman is blessed by nature with the miraculous capacity to bring new life into the world, and the experience of motherhood is something that all mothers deeply value.

Unfortunately, some mothers were suffering from a range of physical conditions that prevented them from giving birth to their own children. Despite living in different places, practising different religions, or being born at different times, women—who make up half of the world's population—have experienced discrimination, harassment, and exploitation. Whatever their location, their religious affiliation, or the time of their birth, this is true. Everywhere women travel, they run into a number of challenges.

In order to avoid societal shame, surrogate moms frequently ask for anonymity. Some guys take offence at this ‘encroachment’ on their rights, particularly the spouses of surrogate mothers. Surrogacy participants claim that after they start the procedure, their

spouses, who initially supported them taking on the role, frequently alter their opinions. The fundamental biological role of a woman is turned into a business agreement through surrogacy.

According to the Beijing Declaration and Platform for Action, Governments have the first and most important duty to protect and advance the rights of the people. These rights are also at the core of the UN's mandate. The Platform for Action makes a clear statement about what governments must do to fulfil their duties to achieve gender equality as a result of its robust human rights framework.

Need for the Study

When viewed from a commercial or business perspective, surrogate motherhood presents difficult ethical, philosophical, and sociological challenges. The financial side of the transaction further complicates the problem in India, where there is no legal framework to safeguard the surrogate mothers, the children, or the commissioning parents' rights. The process of contracting out pregnancy is comparable to this method of renting a womb and having a kid. Uncertainty surrounds the prevalence of this practise in



India, but research indicates that it has expanded dramatically over the past few years, with rural women frequently being selected for this type of pregnancy outsourcing.

The research technique showed a variety of signs that suggested a shift in surrogacy from more remote locations to more accessible cities such as Delhi and Mumbai, offer superior health care facilities, and give anonymity. There are several different factors attracting foreigners to India. Some people cannot afford the therapy in their home country, while others are prohibited from doing so by national legislation.

Women who opt for this operation tend to be married, to come from lower middle-class families, and to be in serious financial need at the time of the procedure. Protecting the surrogate mother's rights is an obvious and obligatory condition of the law. The rights of the child to be born are almost never taken into account when it comes to surrogacy.

If a child's mother and father enter into a contract transferring parental responsibilities to the couple, the child loses the right to sue either of them in the future. It could have a detrimental effect on the psychological wellbeing of kids born as a result of surrogate motherhood arrangements. It is intended to carry out research on surrogacy practises that happen anywhere from tiny rural villages to booming metropolises throughout India as a first step toward resolving all of these issues associated to surrogacy.

Methodology

Case studies served as the foundation for the study's approach. Preferably, secondary sources of data are gathered and examined for the study, which will emphasise the key conclusions and offer suggestions for potential future policy ramifications in this area. The government, non-governmental organisations, and other relevant institutions and organisations shall be informed of the proposals for the benefit and improved legal standing of the mothers.

Constitutional Law

In the meanwhile, the judiciary has been using constitutional law and common law to protect women from injustices and to lend a hand in a variety of other ways to improve the position of women in all spheres of their lives. The active judges and public-spirited individuals who were successful in advancing the women's status in India to the present level are to thank for the increase of women's status in our nation to its current level, which, although not ideal, is nonetheless satisfactory.

As a real guardian of justice, the impartial and independent court has always served that function. Since our country's independence, the court has routinely interpreted laws and expanded their reach in ways that benefit the traditionally marginalised side of our society, namely women.

The United Nations Charter declares that all people are entitled to the same civil freedoms and legal safeguards. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a global bill of rights for women that has been signed and ratified by nearly every country in the world. It is crucial that the protection of women's and girls' rights be incorporated in national legislation and policy, both of which should be deeply founded in international human rights standards.

A number of international accords and human rights treaties have been ratified by India, demonstrating its commitment to ensuring that women enjoy equal rights. The ratification of CEDAW in 1993 was a major step forward because it called for the eradication of all acts of discrimination against women. In addition to guaranteeing women's equality before the law, the Indian Constitution grants the state the right to engage in 'positive discrimination' in favour of young women in order to lessen the collective disadvantages that girls face in terms of socioeconomic status, educational attainment, and political power.



Surrogacy

The word ‘surrogate’ means ‘substitute’ (Malini Karkal 1992). Along with surrogacy agreements taking place within families, communities, states, and countries due to affordable medical facilities and cutting-edge reproductive technology, India is slowly but surely growing in popularity as a surrogacy destination for many foreigners, particularly wealthy westerners.

According to Warnock Report (1984) HF&E, Surrogacy is defined as “the practise wherein one woman carries a newborn for other women with the intent that the child should be given up after delivery”.

Ordinance of Surrogacy in India

The altruistic surrogacy is allowed under the Act, but the commercial surrogacy is prohibited.

Altruistic Surrogacy

In this case, the surrogate mother receives no financial compensation for bearing the child or giving birth to it; instead, the genetic parents cover all of the surrogate mother's necessary medical costs.

Commercial Surrogacy

Commercial surrogacy refers to the practise of executing surrogacy or one of its associated procedures in exchange for a monetary advantage or reward (cash or in kind) that surpasses the necessary medical expenses and the amount covered by insurance. When indigenous women in underdeveloped nations carry babies for wealthy foreigners, the practise of commercial surrogacy naturally raises eyebrows. Each of these elements contributes to the heated discussion around the practise. In India, commercial surrogacy was made legal in 2002. Surrogacy may only be legally performed in one specific way in India, though.

Gestational Surrogacy

The gestational surrogate mother, who is sometimes referred to as a gestational carrier, does not have any biological links with the kid who is delivered via the procedure of gestational surrogacy. With regard to this kind of surrogacy, the terms ‘host surrogacy’ and ‘full surrogacy’ can also be used interchangeably.

The surrogate typically will not share a genetic bond with the child, But certainly one of the biological parents will. Because of this, gestational surrogacy differs from other forms of surrogacy in that it does not include the adoption of a stepparent or additional parent. Legally speaking, this greatly simplifies the procedure.

Surrogacy's place in India's legal framework is seldom susceptible to misunderstanding. One of the kinds of surrogacy that can be legally practised in India is gestational surrogacy. As one of the few countries that still permits commercial surrogacy, India stands apart. On the other hand, despite the lack of any supporting legal precedent, commercial surrogacy is lawful in India. This shows that even while India permits surrogacy for commercial purposes, there is no explicit law in place to control the practise.

Women’s Orientation in India

In 1856, the British government enacted the Widow Remarriage Act. The British government passed the Civil Marriage Act in 1872. The British government enacted the Married Women's Property Act in 1874. 1921 saw the passage of the Child Marriage Restraint Act by the British government. The British government enacted the Prevention of Prostitution Act in 1923. The British government passed the Hindu Inheritance Act in 1929. The Sati Prohibition was the most significant piece of legislation. These legal provisions are still in effect in modern times.

Constitutional rights and legal rights are the two types of rights that women in India are entitled to. The rights guaranteed by the constitution, which is the fundamental



legislation of the nation, are those that are outlined in its numerous clauses. The legal rights, however, are those that are stipulated by the numerous laws. The Indian Constitution guarantees that men and women are entitled to the same status and opportunities. The Supreme Court, which is charged with being the guardian of the Constitution, has made several rulings in various situations in an effort to achieve constitutional goals.

Empowering Women

The process of judicial interpretation is the means through which individual clauses of the Constitution and the text of individual legislation enacted by the legislative branch are endowed with their true meanings and implications. The constitutional mandate as well as the many legislations that provide for protective discrimination in favour of women in relation to a variety of facets of their social, economic, and legal life have been brought before the courts.

Superior Courts in India have established gender jurisprudence using a range of instruments, including judicial review, judicial activism, social action lawsuits, and the obligation of basic rights enforcement. This has given meaning and vitality to the constitutional structure of women's protected discrimination.

Legal Insights- The Development of Surrogacy Laws

In 2002, India passed a law that made commercial surrogacy lawful to encourage 'medical tourism'. Because of this, the surrogacy sector in India has experienced meteoric expansion in recent years. According to reports from the United Nations in 2012, the size of the surrogacy market was believed to be about \$400 million at the time. Because of this, there are now more than three thousand additional clinics throughout India.

We can see that an enormous growth in the practise of surrogacy in our country has led in an impressive expansion of several

commercial businesses, some of which claim to specialise in surrogacy law. These companies provide guidance and assistance to foreign couples visiting India in the goal of renting an Indian woman's womb in order to have a child. Such agreements may be deemed exploitative since they promote baby selling, alter the value of children, and undermine women's reproductive autonomy. Furthermore, they encourage the sale of children who have been genetically modified.

In its 228th report, the Law Commission of India made a recommendation to allow ethical and altruistic surrogacy but to outlaw commercial surrogacy. This recommendation was made for relevant laws to be enacted. One of the primary causes for the proliferation of surrogacy services in India is the country's rampant poverty, which forces impoverished Indian women to rent their wombs in exchange for monetary compensation or other necessary goods.

Women's rights in the context of maternity benefits in the event of surrogacy and the role of the judiciary in recognising those rights:

Women in India have less access to economic possibilities, which puts them at a greater risk of living in poverty. When seen in this context, commercial surrogacy emerges as a powerful instrument for achieving financial independence. In the case of *Olga Tellis v. Bombay Municipal Corporation (1986 AIR 180)*, Article 21 of the Indian Constitution protects an individual's "right to life", which the Supreme Court of India has interpreted to include the "right to a living".

- **Baby Manji Yamada vs Union of India (AIR 2009 SC 84)**

An Indian surrogate mother gave birth to Baby Manji Yamada on behalf of a Japanese couple who had just separated, right before the child's first month of life. The kid's biological father intended to move the child to Japan, but neither the Japanese government nor the legal system had any provisions for such a situation.



In the end, the child and her grandma were permitted to leave India when the Supreme Court of India had to step in. The Baby Manji Yamada ruling's greatest influence was on the Indian government, which was prompted to pass legislation governing surrogacy as a result.

Jan Balaz Vs Anand Municipality (AIR 2010 Guj21)

The Gujarat High Court ruled that the name of the surrogate mother will appear on the birth certificate of a child born through surrogacy rather than that of the biological mother. The child will also be given an Indian passport, which confirms that he or she is an Indian citizen. The surrogate mother will then be required to give the child to the German couple who hired the Indian surrogate mother for the adoption.

An appeal against this ruling is still pending before the Supreme Court, and while the case was being heard, the Supreme Court became convinced that there was an urgent need to address the issue, which led to the proposal of the bill in Parliament. After Manji's case, in 2008, the Supreme Court of India ruled that surrogacy could be practised legally in India. This decision strengthened international confidence in surrogacy procedures that could be performed in India.

Surrogacy Bill

On November 21, 2016, the Surrogacy (regulation) Bill, 2016 was presented to the Lok Sabha. On January 12, 2017, it was forwarded to the standing committee for further review. This was followed by the committee submitting its report to Lok Sabha on the matter on August 10, 2017, and the bill was ultimately enacted by Lok Sabha on December 19, 2018, in accordance with the committee's findings and recommendations. The 2016 Surrogacy Act aims to reduce the prevalence of commercial surrogacy while stressing the positive aspects of surrogacy done for altruistic reasons. The bill also

safeguards the surrogate mother and kid from abuse. However, the surrogate will not benefit monetarily from “renting out” her womb to the prospective parents.

Instead, all of the surrogate mother's medical and insurance expenditures will fall on the shoulders of the parents-to-be. The proposed law comprises guidelines for licencing surrogacy facilities, creating national and state surrogacy boards, and creating an Appropriate Authority.

Indian Parliament's Role

The Indian Parliament has just enacted the Assisted Reproductive Technology (Regulation) Bill and the Surrogacy (Regulation) Bill, and both will have substantial effects on the reproductive rights and the well-being of Indian women. To prohibit unethical practises like sex determination and the exploitation of surrogate mothers, Minister Of health Mansukh Mandaviya stated in Parliament that the goal of the new law is to “regulate” and “monitor” ART canthers and surrogacy.

Despite a prohibition on international surrogacy in 2015, Assisted reproductive technology (ART) and domestic commercial surrogacy have flourished in India because of two well-established networks of unregulated brokers and clinics.

The new laws aim to create a National ART and Surrogacy Registry as well as new both national and state ART and Surrogacy Forums to act as advisory bodies for the government. The Registry will also keep track of all of the assisted reproductive technology procedures that are performed in the nation.

Right To Individual's Privacy, Reproductive Liberty, And Personal Dignity

In addition, the blanket prohibition on commercial surrogacy by the Indian government will have a negative influence on the widening reach of women's rights law in India. In *Suchita Srivastava v. Chandigarh*



Administration, the Supreme Court decided that the Constitution's Article 21 protects the right to make reproductive decisions, including the right to get pregnant, give birth, and raise children.

The practise of commercial surrogacy is outright prohibited in a few of North American nations. In India, the same is not acceptable due to three key factors. First off, there is really concerned that outright banning commercial surrogacy will lead to the activity moving to a secretive environment. Due to the lack of other employment options, disadvantaged women would be compelled to participate in the unlawful commercial surrogacy industry if it becomes widespread. In addition to exposing surrogates to a wide range of health risks, this might also lead to a significant issue with child desertion because the intended parents would have no legal duties.

Second, this Bill would make it impossible for potential surrogates to seek justice if they were abused while participating in unlawful commercial surrogacy, as the law would view them as facilitators of an illegal activity rather than collaborators. The severe gender inequality in India will be exacerbated by the outlawing of commercial surrogacy.

Regulation Bill of 2020

The National Surrogacy Board proposed by the Surrogacy (Regulation) Bill, 2020 is charged with formulating national policy regarding surrogacy, also, state surrogacy boards that will function as government agencies in each state and territory of the Union. The legislation's goal is to outlaw commercial surrogacy and allow only "altruistic surrogacy", in which the surrogate mother does not get any additional financial compensation.

Commercial surrogacy, defined as surrogacy performed for financial benefit in addition to reimbursement for medical expenses and insurance coverage, is illegal under this law. A bill from 2019 specifying the requirements for

both the "couple" choosing to undergo surgery and the surrogate mother is currently available, but a new legislation outlining these requirements has not yet been made public.

"Speaking on the passage of the bill in the Parliament, Health Minister Mansukh Mandaviya had described the 'long-pending' bill as 'progressive' and said that it aimed at curbing the exploitation of women".

In response to campaigning by women's rights organisations, the Surrogacy (Regulation) Bill, 2016 was introduced in the Lok Sabha with the purpose of introducing much-needed control to the existing unregulated surrogacy industry. The bill's passage was halted by the Rajya Sabha, and it has been sent to a parliamentary committee for additional consideration.

In 2017, the Rajya Sabha issued its 102nd report, in which it advised making progressive modifications to the existing legislation. These recommendations helped pave the way for the Surrogacy (Regulation) Bill, which would be introduced in 2019.

On December 25, 2021, the President gave his approval to the Surrogacy (Regulation) Act of 2021, making it a law. This act's goals included the establishment of Surrogacy Board and a National Assisted Reproductive Technology in addition to Surrogacy Boards and State Assisted Reproductive Technology, as well as the regulation of the practise of surrogacy and the procedure involved in it.

Opinion's Concerning

According to the altruistic model, a woman should undergo the psychological and physical strain of becoming a surrogate for free, and only out of compassion. Such a demand is patriarchal in outlook, impractical, and patronising. It prevents surrogates from having a legal means of support, as a result, fewer women are willing to become surrogates, and thus, fewer people are able to benefit from the process.

LGBTQ+ people, couples who live together, and single parents are nonetheless denied this



possibility under the proposed Bill. Those who qualify must also have a “certificate of essentiality” demonstrating that they have exhausted all other feasible biological parenting options. It does not take into account certain medical issues that, while they do not make women infertile, increase the danger and difficulty of conception. Additionally, it does not take into account the possibility that women may decide against becoming pregnant owing to obligations associated to their careers.

More changes are still required and using a surrogate should be acknowledged as a reproductive right; If this is not addressed, then neither the parental rights of the custodial parent nor the physical autonomy of the surrogate will be adequately protected under India's surrogacy laws.

Pragmatic Issues

The challenges that have been faced by the surrogacy industry in present context of Indian society are to be mentioned below:

- It has been termed as a ‘social stigma’ when we talk in reference to India in particular. Till date it has been seen as a hush-hush event, as the surrogacy events take place behind the curtains in India.
- It’s a need of an hour kind of situation for most of the people here. Which leads to exploitation, dealing of young unmarried girls in this profession. As, it has always been the choice of the needy people, who can’t afford the general lifestyle tends to sweep into this profession for money and comforting their basic needs.
- ‘Commercial Industry’ is the term being highlighted for this scenario. As, its seen in the most recent times that even the unmarried young girls are coming in this profession. If it’s just for money or any other advantages they want to seek in.

- ‘Emotional Mechanism’ has also come up as one of the conflicting factors in this business. As, the surrogate mother develops the emotional attachment towards the child she is carrying in her womb. The child is there for nine long months, so the attachment for the yet born undoubtedly occurs in this situation.
- Health or medical issues has always hit the tough rock in this industry. As, it’s never been the priority of the commercial heads. Still, we see that some kind of precautionary measures has been introduced in the recent past towards the surrogate mothers in India.

Conclusion

The practise of surrogacy in India is characterised by several contradictory aspects, all of which will be discussed in this article. To begin, women who resort to surrogacy do so in violation of gender norms, even though doing so may help them more effectively fulfil the expectations placed on them as wives and mothers.

In conclusion, even though surrogacy was institutionalised to defend itself against allegations of exploitative practises, surrogates remained subject to the unrelenting dominance of the medical establishment and without any say in the surrogacy process.

Surrogacy has been portrayed in feminist literature in a variety of ways, including as a strategy for thriving in an unsafe environment, as dirty work that is stigmatised by the female's peer group, as an exploitative relationship between medical professionals and parents, as a biological right, and as a means of gaining social status. Therefore, gender paradoxes are not unique to the practise of surrogacy; rather, they are typical of the activities that are outsourced by women in today's global society.

Women who are both aware of their rights and capable of asserting them is a necessity



currently. A self-sufficient woman not only looks out for her own safety, but also for the safety of those in her immediate environment. Therefore, it is the moment to speak up; women in our male-dominated society should fight for their rightful place in the world. It ought to begin within the family unit itself. If the mindset of the Indian people, which has been dominated by patriarchal views since ancient times, is not changed, women in India will never be able to benefit from the true potential of the law.

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