

# **SOCIO- LEGAL IMPACT OF SURROGACY IN INDIA: WITH SPECIAL REFERENCE TO REPRODUCTIVE RIGHTS**

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## **Abstract**

Motherhood is a blessing and every woman have right to choose her own option to motherhood. Now a days, the technical advancement has made the human life easier and faster. At the same time, we need to understand the legal control over the technology. In modern time the surrogacy has become one of the best contributions by science and technology for childless parents. Infertility is an emotional roller coaster, often accompanied by grief & loss. The reason could be ranging from medical conditions, lifestyle habits, age factor or due to unknown causes. In such circumstances ART treatment come to the aid of infertile couples & when all fails surrogacy is the only hope for the couple wanting to have their biological child. Surrogacy can be traced from Biblical Times: The first mention of surrogacy can be found in "The Book of Genesis" in the story of Sarah and Abraham.<sup>1</sup> Surrogacy is a kind of technology where the women agreeing to undergo the pregnancy for another person. In short there is a legal agreement between the intended parents and surrogate mother known as 'Surrogacy Agreement'. Earlier commercial surrogacy was allowed in India but later on it became a hub for foreigners. Hence, currently in India there is ban on commercial form of surrogacy and only altruistic form of surrogacy is allowed. The present legislation affects badly on reproductive rights of parents, it clearly states that single person, LGBTQ, live in couples etc. are not allowed to become the parents through surrogacy. Further it also effects on various rights such as right to compensation, right to health etc. Hence the present research includes different rights of surrogate mother, child and intended parent, legal perspective of surrogacy and impact of surrogacy on Reproductive rights.

**Keywords:** Altruistic Surrogacy, Commercial Surrogacy, Reproductive Rights, Right to Motherhood, Right to Health.

## **1. Introduction**

Nature has bestowed the beautiful capacity to procreate a life within woman and every woman cherishes the experience of motherhood. But, unfortunately some women due to certain physiological conditions could not give birth to their own off-spring.<sup>2</sup> Now a days, with the help of advanced technology things have become easier and quick. When it comes to reproductive rights, an individual will first prefer natural birth of child if not then adoption. But in case one wants his own biological child then the second option is IVF (In vitro Fertilization) treatment. When this option will not work then one has to go for surrogacy. Considering recent changes under surrogacy regulation, it is not easy to have child through surrogacy. The restrictions are put to become surrogate parents, surrogate mother etc. which ultimately hampers the reproductive rights of human being.

This paper examines various aspect related to reproductive rights of human with special reference to surrogacy. The multidisciplinary approach has been used under the paper to understand different facets of reproductive choices. The one who cannot go for natural parentage or the one who cannot afford the technical advancement for treatment has only option

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<sup>1</sup> *History of Surrogacy*, SURROGATE.COM, available at <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>, last seen on 25/10/2021.

<sup>2</sup>Ministry of Women and Child, Government of India, Final Report, 2010, Available at <https://wcd.nic.in/sites/default/files/final%20report.pdf>, last seen on 20/01/2023.

of surrogacy in case of own biological child. But if this right of motherhood or reproductive autonomy is infringed due to strict conditions stated under legal rules and regulations then there is need to rethink about the same. The reproductive rights are human rights which are recognised at international level. This paper well explains about the socio legal impact of surrogacy in India with reference to reproductive rights. Understanding the significance of this research, firstly this paper is helpful for the surrogate mothers, intended parents and the surrogate child. This research is based on rights to motherhood under surrogacy and the legal perspective of the same.

## **2. Concept of Reproductive Rights-**

The concept of reproductive right is considered at international level. Article 16 and 10 of CEDAW (Convention on Elimination of all form of discrimination against Women) talks about equality to decide the number and spacing of the children and access to information on and advice on family planning.<sup>3</sup> Article 25 of UDHR (Universal Declaration of Human Rights) states that everyone has right to a standard of living adequate for the health and well-being, further it talks about Motherhood and childhood are entitled to special care and assistance.<sup>4</sup> Further General Comment 22 talks about right to sexual and reproductive health. This is how the recognition is given to the concept of reproductive rights at global level.

In general terms the reproductive rights mean the right to have choice to reproduce. This right is considered as fundamental right. But when it comes implementation part whether equal choice of reproductive right is there or not is the question. Enjoying parentage of a child is the most important phase of life but if it is getting restricted due to certain reasons then it is nothing but infringement of right. On one side the laws are there to protect the fundamental rights and on the other side if the laws are restricting individual from enjoying his own fundamental right, then it seems contradictory.

Even the Supreme Court has recognised this right in various cases and stated that the reproductive right is fundamental right and protected under the Constitution of India. In '*Suchita Srivastava v Chandigarh Administration*' the Supreme Court held that the reproductive autonomy is a dimension of personal liberty as guaranteed under Article 21. Further it was stated that reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise children; and that these rights form part of a woman's right to privacy, dignity, and bodily integrity.<sup>5</sup>

Apart from it various Indian legislature, landmark judgments talks about the right to reproductive choices. But even after that some lacunas are there which leaves scope for discrimination of such rights. In such a case no specific provisions or legal protection is available.

## **3. Origin & Development of surrogacy-**

According to *Black Law's Dictionary*, the word 'surrogate' has its origin in the Latin word '*Surrogatus*', meaning a 'substitution or replacement' i.e.; a person appointed in place of another. The practice of surrogacy is ancient and is known to almost all countries and societies.

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<sup>3</sup>United Nations, Sexual and reproductive health and rights, Available at <https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights>, last seen on 18/01/2023.

<sup>4</sup> United Nations, Universal Declaration of Human Rights, Available at, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, last seen on 18/01/2023.

<sup>5</sup> (2009) 14 SCR 989.

The major types of surrogacies are Traditional Surrogacy, Gestational Surrogacy, Commercial Surrogacy and Altruistic Surrogacy.<sup>6</sup>

Surrogacy can be traced from Biblical Times: The first mention of surrogacy can be found in “The Book of Genesis” in the story of Sarah and Abraham. Sarah and Abraham were married but could not conceive a child of their own, so Sarah turned to her servant Hagar to be the mother of Abraham’s child. This is a case of traditional surrogacy, where the surrogate uses her own egg in the child, she’s carrying for intended parents. Even though Sarah was not biologically related to the baby, she and Abraham both claimed the child as their own.<sup>7</sup>

Earlier commercial surrogacy was legalised in India during the period of 2000. This concept was also called as ‘Rent a Womb’. The main motive behind legalizing commercial surrogacy was nothing but the medical tourism. Rather than promoting medical tourism it was used for economic purpose. India became hub for surrogacy. Many intended parents from foreign country started approaching surrogate mothers through clinics in India. The economic or financial need of surrogate mother was fulfilled and the intended couple could get surrogate child. After that the commercial surrogacy was completely banned in India.

“surrogacy” means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;<sup>8</sup>

#### **4. Impact of surrogacy laws on reproductive autonomy-**

In India, the current legal provisions with respect to the surrogacy lacks on balancing the interest and protecting the rights of stakeholders. Considering the need of law on current situation of surrogacy the rights of surrogate mother, surrogate child and the intended parents are most important aspects to understand. Further focusing on motherhood, some issues are left unaddressed which affects the rights to motherhood.

#### **5. Socio-legal impact of surrogacy in India-**

The impact of surrogacy can be traced in different rights of an individual. On one side we talk about right to equality as our fundamental right and on other side the right is getting infringed by some other legal provisions. Here the laws itself are contravened with respect to the protection of individual rights. In surrogacy basically two parties are required i.e., surrogate mother and intended parents. But there are certain restrictions to become surrogate mother and intended couple as well. To enjoy reproductive autonomy or motherhood is the human right recognised at international level but under the current Indian legal provisions of surrogacy certain criterions are given to become eligible for surrogate mother or intended parents. One does not have autonomy to decide on his own to enjoy the motherhood through surrogacy.

Following are certain rights which talks about the impact of surrogacy in India. Such rights are also recognised at international level and by other Indian laws.

##### **a) Right to Compensation & Right to Health -**

As per the recent Act passed, no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except when it is only for altruistic surrogacy purposes and when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy

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<sup>6</sup> *Surrogacy (Regulation) Bill, 2020: The Way Forward*, ipleaders, available at <https://blog.ipleaders.in/surrogacy-regulation-bill-2020-way-forward/> , last seen on 16/10/2021.

<sup>7</sup> *History of Surrogacy*, SURROGATE.COM, available at <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/> , last seen on 25/10/2021.

<sup>8</sup> S. 2(zd), The Surrogacy (Regulation) Act, 2021.

procedures<sup>9</sup>. In altruistic form of surrogacy, the surrogate mother does not get any monetary compensation for undertaking surrogacy.

According to the present laws, a surrogate mother is not given any compensation other than the medical expenses and insurance during and post partem pregnancy. Under altruistic surrogacy no remuneration is given to the surrogate mother and very few women who are close relative of intended parents will become ready to be the surrogate mother. This affects the rights of intended parent to have child. Here the law also does not consider that the surrogate mother can be a working woman and how the time which she is investing for surrogacy will be compensated that is another issue. Apart from it the health problems may arise during or after pregnancy which might have long term impact on health of surrogate mother. This issue has not been addressed by the law for compensation purpose.

#### **b) Right to Motherhood & Reproductive Rights -**

Present legislation states that, “when an intending couple has a medical indication necessitating gestational surrogacy: Provided that a couple of Indian origin or an intending woman who intends to avail surrogacy, shall obtain a certificate of recommendation from the Board on an application made by the said persons in such form and manner as may be prescribed.”<sup>10</sup>

The surrogacy laws in India talks about ‘Certificate of Eligibility’ issued by appropriate authority on fulfilment of certain conditions which includes the intended parents should be married couple or intending woman i.e., widow or divorcee between the specified age limit. It clearly states that single person, LGBTQ, live in couples etc. are not allowed to become the parents through surrogacy. It somehow affects the right of motherhood or reproductive rights. The rights of LGBTQ community have been recognised under ‘*Navtej Singh Johar & Ors v. Union of India thr. Secretary ministry of Law and Justice*’. The court overruled its previous judgement given in Suresh Kaushal case and declared Section 377 as unconstitutional as it violated Art 14,15,19 and 21 of the Constitution. It was one of the major landmark judgements of Supreme Court given in regard for the right of equality of LGBTQ community.<sup>11</sup> When the Supreme Court has given recognition then the legislative committee can also rethink about this point. Right to enjoy reproductive autonomy or motherhood should be equally given to everyone. Further talking about single person, right to adoption is available but not the surrogacy. The individual can enjoy the motherhood through adoption but not through surrogacy. This is how it contradicts. In case of live in couples, the rights are recognised under Domestic Violence Act but not under Surrogacy Act. The legislative authority should address and reconsider such issues.

#### **c) Critical Analysis of Close Relative being surrogate mother -**

One of the criteria for being surrogate mother is that, the surrogate mother should be a ‘close relative’ of commissioning parents. The definition of surrogate mother talks about the same. It means the woman who undergoes surrogacy should be genetically related to intended couple. Now a days, the family pattern has been changed. Not every Indian live in a joint family or has strong bond with family members & relatives who will volunteer for becoming surrogate mother of intended couple. On the other side there are certain chances of emotional attachment between surrogate mother and child. The surrogate mother being genetically connected to the child may refuse to handover the child to intended couple. In case of commercial surrogacy, the chances of attachment are less and chances of detachment are more. Hence under altruistic form of surrogacy the lacunae is regarding the emotional connectivity with surrogate child.

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<sup>9</sup> S. 4(b), The Surrogacy (Regulation) Act, 2021.

<sup>10</sup> S. 4(a), The Surrogacy (Regulation) Act, 2021.

<sup>11</sup> AIR 2018 SC 4321; W.P. (CrI.) No. 76 of 2018 D. No. 14961/2016.

Considering this point the restrictions given under current legal enactment regarding eligibility to become surrogate mother should be reconsidered.

**d) Lack of Provision regarding imposing Inspection -**

There is no specific provision which talks about implementation of such laws. The provision which talks about procedure of surrogacy are properly carried out or not is the most important part of this topic. Hence certain punishments are also provided but no specification is given as to the procedural implication of post surrogacy effect. One more aspect related to the same issues is about the safety and well upbringing of a child. There is no special legal committee or authority to keep a close check on upbringing of child by intended couple. There are chances that the child might not get proper upbringing from intended parents. Then what about the rights of such child. This question regarding the rights of child should be addressed by law.

**e) Surrogacy Contract and ethical issues-**

The Law Commission Report of India has addressed the issue regarding surrogacy agreement. Under Section 10 of the Contract Act, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is an enforceable contract. Thereafter, under section 9, CPC, it can be the subject of a civil suit before a civil court for adjudication of all disputes relating to the surrogacy agreement and for a declaration/injunction<sup>12</sup>. As per the Indian Contract Law the consideration should have some value in monetary terms. Consideration is one of the important essential elements of the contract. In case of commercial surrogacy agreement, the consideration i.e., money for renting womb is unethical practice. In case of altruistic surrogacy, the concept of surrogacy agreement won't be completely applicable as there is no consideration. In altruistic form of surrogacy, the compensation shall not be given to the surrogate mother as it is a voluntary act. Hence there is no application of agreement lacking its essential element. Here the legislature leaves scope for lacunae. Apart from it there are certain ideologies which think that surrogacy agreement is unethical in its nature. The surrogate child cannot be the part of consideration under such agreement hence such issue needs to be considered again to balance the social, ethical and legal aspects.

**f) Right to Privacy –**

The right to privacy is our fundamental right which is enshrined under the Article 21 of Indian Constitution. The supreme court has also recognised the right to privacy under various case laws. Such privacy in case of surrogacy needs to be maintained. Talking about the confidentiality regarding the surrogacy process there are chances regarding data theft. This might have the impact on privacy of stakeholders. One more important aspect is related to right to information. The child has right to know about his birth, parents, surrogacy etc.

**6. Conclusion**

Protecting the reproductive autonomy is the need of an hour. Surrogacy is one of the ways through which an individual or couple can enjoy the parenthood or motherhood. While protecting such autonomy there is a need to protect the rights of surrogate mother, surrogate

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<sup>12</sup> 228<sup>th</sup> Law Commission of India Report, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, 22 (2009), Available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081094-1.pdf>, last seen on 31/01/2023.

child and intended parents. Present laws do not cover certain issues which are affecting the rights of intended couple to become eligible for surrogate parents. Not every person can go for this option. Considering right to equality there is requirement to make required changes under enactment. Further talking about surrogate mother, every woman is not eligible to become surrogate mother. The woman who is close relative of intended parents can become the surrogate mother. Here the family members of woman cannot force her to become surrogate mother and it should be voluntary act of her. Further no compensation will be given so if in case the woman is facing financial issues then it cannot be resolved through the surrogacy process. Hence the laws should be amended according to the requirement of protection of different individual human rights.

### References:

#### A. Ministry Report

- Ministry of Women and Child, Government of India, Final Report, 2010, Available at <https://wcd.nic.in/sites/default/files/final%20report.pdf>.

#### B. Case Laws

- '*Suchita Srivastava v Chandigarh Administration*' (2009) 14 SCR 989.
- '*Navtej Singh Johar & Ors v. Union of India thr. Secretary ministry of Law and Justice*' AIR 2018 SC 4321; W.P. (Crl.) No. 76 of 2018 D. No. 14961/2016.

#### C. Legislative Enactments

- S. 2(zd), The Surrogacy (Regulation) Act, 2021.
- S. 4(b), The Surrogacy (Regulation) Act, 2021.
- S. 4(a), The Surrogacy (Regulation) Act, 2021.

#### D. Law Commission Report

- 228<sup>th</sup> Law Commission of India Report, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, 22 (2009), Available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081094-1.pdf>.

#### E. Website

- *History of Surrogacy*, SURROGATE.COM, available at <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>.
- United Nations, Sexual and reproductive health and rights, Available at <https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights>.
- United Nations, Universal Declaration of Human Rights, Available at, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.
- *Surrogacy (Regulation) Bill, 2020: The Way Forward*, ipleaders, available at <https://blog.ipleaders.in/surrogacy-regulation-bill-2020-way-forward/>.
- *History of Surrogacy*, SURROGATE.COM, available at <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>.