

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Evolving Jurisprudence of Freedom as a Right in the Modern Era

JEEVAN JOHN¹ AND SIDHYA SASIDHARAN²

ABSTRACT

Surrogacy is a scientific medical technology that also encompasses social ethics, economics, and the law, it is nonetheless restricted by surrogacy laws. The Hon'ble Supreme Court of India recently had the opportunity to address two key reproductive rights issues relating to surrogacy and reproductive freedom. The need for surrogacy law is important because the reproductive freedom entailed by surrogacy not only falls under the area of personal freedom but also is a fundamental human right. The National People's Congress and its standing committee can write laws to offer legal direction for surrogacy, and in the meantime, the law should protect the legal rights of the surrogate mother, surrogate child, and surrogacy client. According to the Supreme Court, a woman has the right under Article 21 to make her own reproductive decisions, but the Medical Termination of Pregnancy Act places the decision to have an abortion in the hands of medical professionals. Numerous privacy issues are connected to the surrogacy procedure. The paper aims to provide and highlight the issue that 'whether surrogacy comes under the freedom of women and reproductive choice and its scope.'

Keywords: Surrogacy, Reproductive freedom, Legislation.

I. INTRODUCTION

In Latin “Surrogatus” means a substitute i.e., a person appointed to act in the place of another.³ A woman who serves as a surrogate for intended parents who are ready to become parents and who enters into a legal agreement known as surrogacy. According to the experts, one in six couples struggle with infertility. Some people use medical interventions to deal with this issue; for others, no such assistance is offered. Surrogacy can help an infertile couple in these situations where the woman has had a hysterectomy, has had multiple miscarriages, or was born without a womb. This arrangement is now considered to be typical and socially acceptable in modern era. The surrogacy process has become overly commercialized in recent years, and the rights of the surrogate mother and the child born through it have been marginalized. It is crucial

¹ Author is a student at Government Law College, Thrissur, India.

² Author is a student at Government Law College, Thrissur, India.

³ Surrogacy in Latin. [accessed on July 7, 2023]. Available from: <http://www.latindictionary.org/surrogatus>, <http://en.wiktionary.org/wiki/surrogatus>.

to have appropriate legislation on this topic because surrogacy is a godsend for parents or those who want a child but are unable to conceive one. The exploitation of women must be regulated by legislation since it is a highly delicate topic that raises a lot of moral and ethical dilemmas. Thus, the Surrogacy Regulation Act, 2021 was passed by the legislature to address the problem. Gestational surrogacy is a form of legal surrogacy in India.

II. IMPORTANCE OF DISCUSSING THE SCOPE OF SURROGACY IN THE MODERN ERA

The scope of surrogacy in the modern era is an important topic of discussion due to its increasing prevalence and the ethical and legal implications it raises. As assisted reproductive technologies continue to advance and become more accessible, the practice of surrogacy has become a viable option for many individuals and couples. However, with its growing popularity comes the need to address the various complexities and challenges that arise in the process. This includes issues such as the rights and responsibilities of all parties involved, the potential exploitation of surrogate mothers, and the impact on the child's well-being and identity. Therefore, a comprehensive understanding of the ethical, legal, and psychological implications of surrogacy is essential. It is crucial to establish clear regulations and guidelines to protect the interests and rights of both the intended parents and the surrogate mother. Additionally, providing adequate support and counseling for all parties involved can help mitigate potential emotional and psychological challenges that may arise throughout the surrogacy journey. By addressing these complexities, we can ensure that surrogacy remains a viable and ethical option for those who wish to start or expand their families.

One detailed example related to the input is the case of a same-sex couple who desires to have a biological child. They may choose to use assisted reproductive technologies, such as in vitro fertilization (IVF) and gestational surrogacy, to achieve pregnancy. In this case, a surrogate mother carries the embryo created from the couple's sperm and a donor egg, allowing them to experience parenthood biologically. This example highlights how surrogacy provides an avenue for individuals or couples who would otherwise not be able to have a biological child.

(A) What is the Legal Position on Surrogacy's Commercialization?

Depending on whether the surrogate is paid money for carrying the child, surrogacy can be either commercial or charitable. In commercial surrogacy, the surrogate is often chosen by an agency, her medical expenses are covered, and she is compensated for her gestational services. Charitable surrogacy involves using advertisements, friends, and acquaintances to find a surrogate. She may receive compensation for direct pregnancy-related medical expenses and for income lost as a result of the pregnancy.

According to the law, surrogacy must be performed for charitable purposes.⁴ As a result, commercial surrogacy is prohibited.

- Human gametes and embryos may not be purchased or sold.
- No one is permitted to purchase or sell a surrogate's services.
- Additionally, the surrogate, her dependents, or her representative cannot receive any kind of payment, incentive, benefit, fee, remuneration, or inducement.

Additionally, the export of embryos to other nations is prohibited by law. No person, group, surrogacy centre, lab, or healthcare institution of any kind is allowed to engage in commercial surrogacy activities, according to the Surrogacy (Regulation) Act, 2021. Furthermore, the Act makes it illegal for such clinics or enterprises to execute surrogacy procedures if they are not linked with a recognized surrogacy organization. This includes searching for surrogate mothers, using private brokers or middlemen to make arrangements for surrogate mothers, or searching for surrogate mothers themselves.⁵ According to the Act, each of these offences carries a sentence of up to ten years in jail and/or a fine of up to ten lakh rupees. These offences have been classified by the Act as cognizable, non-bailable, and non-compoundable.⁶

(B) Chances of Exploitation of Women

Only close relatives are permitted to serve as surrogates under the Act.⁷ On the other hand, it will make women's exploitation worse. They might be coerced by their family to serve as surrogates. This will put stress on the family and could lead to violence towards women. The physical autonomy and reproductive rights of women who want to be surrogates for friends or family but do not meet the requirements are also unfairly restricted by these rules. The authorities claim that there is no logical justification for not using unmarried, childless women as surrogates. Every physically and psychologically healthy woman should have the freedom to choose whether to pursue a surrogacy arrangement without the need for such an explanation.

III. SURROGACY (REGULATION) ACT, 2021

The Surrogacy (Regulation) Act, 2021, which is now in effect, makes commercial surrogacy illegal. The Assisted (Reproductive Technologies) Bills of 2008, 2010, and 2014, as well as the

⁴ <https://www.legacyias.com/editorials-opinions-analysis-for-upsc-09-march-2023/> (last visited 17 July 2023)

⁵ Section 38, Surrogacy Regulation Act, 2021.

⁶ Section 43, Surrogacy Regulation Act, 2021.

⁷ Prasanna Mohanty, The Surrogacy (Regulation) Bill, 2019: A Casual approach to a Serious Concern, BUSINESS TODAY (July 16, 2023), available at: <https://www.businesstoday.in/latest/policy/story/surrogacy-regulation-bill-2019-infertility-indian-council-of-medical-research-icmr-surrogate-mothers-in-vitro-fertilisation-ivf-222257-2019-08-15> (last visited 16 July., 2023).

Surrogacy (Regulation) Bills of 2016, 2019, and 2020, all came before the current Act and attempted to regulate surrogacy. After getting the president's approval on December 25, 2021, the Surrogacy (Regulation) Act, 2021 was eventually passed and went into effect on January 25, 2022.

Aspects of the Act: The Surrogacy Act grants the surrogate and the child born through surrogacy many rights and protections. The Act also establishes several regulatory and certification bodies for surrogacy and surrogacy-related procedures.

Prohibition and regulation of surrogacy clinics: According to the Act, a surrogacy clinic is not permitted to execute activities related to surrogacy and surrogacy treatments without first registering with the Act.⁸ Any individual or organization, including a surrogacy clinic, pediatrician, gynecologist, embryologist, licensed medical professional, or another, is prohibited from partaking in any kind of commercial surrogacy or encouraging a woman to participate as a surrogate mother by marketing, publishing, canvassing, propagating, or advertising anything.⁹ Without the express approval of the surrogate mother and a licensed medical professional (such as a gynecologist, pediatrician, embryologist, the intended parents, and others), an abortion cannot legally be carried out or caused during a surrogacy.¹⁰

According to the Act, the surrogate mother must get postpartum delivery problems insurance for a duration of 16 months. It must be delivered by an insurance provider that has been properly approved by the Insurance Regulatory and Development Authority, such as an insurance firm or agent.¹¹

Registration of surrogacy clinics: According to the Act, a surrogacy clinic must complete the registration process in order to offer surrogacy services.¹² Additionally, it is stated that such registration will only be valid for three years, following which the clinic will be obligated to complete a new registration.¹³

The Act allows for the establishment of surrogacy boards at both the national and state levels, with the latter being the most thorough.¹⁴

(A) Guidelines for Surrogate Eligibility

The Act stipulates that a surrogate must be a woman who has been married, has at least one

⁸ S. 3(i), Surrogacy Regulation Act, 2021, No. 47, Acts of Parliament 2021 (India).

⁹ Section 3(v), Surrogacy Regulation Act, 2021.

¹⁰ Section 3 (vi), Surrogacy Regulation Act, 2021.

¹¹ Section 4 (iii), Surrogacy Regulation Act, 2021.

¹² Section 10, Surrogacy Regulation Act, 2021.

¹³ Section 11, Surrogacy Regulation Act, 2021.

¹⁴ Section 14, Surrogacy Regulation Act, 2021.

child of her own, and who, on the day of implantation, is between the ages of twenty-five and thirty-five. She must also be a close relative of the couple getting married, according to the clause. She should also abstain from supplying her own gametes and from taking on the role of a surrogate mother more than once in her lifetime. Additionally, it specifies that before beginning the procedure, surrogates must receive a certificate from a licensed medical professional attesting to their physical and mental suitability for surrogacy and surrogacy treatments.¹⁵ The Act stipulates that a surrogate mother has the right to revoke her agreement to act as a surrogate before the embryo is placed in her womb.¹⁶ The Act also prohibits anyone from forcing a surrogate mother to abort at any stage during the surrogacy procedure, with the exception of those who are legally permitted to do so, such as individuals, organizations, surrogacy clinics, laboratories, or clinical facilities of any kind.¹⁷

(B) Guidelines for Intending Couples Eligibility

According to the Act, the intended couple must be between the ages of twenty-three and fifty in the case of a woman and twenty-six and fifty-five in the case of a man on the day of certification.¹⁸ Additionally, it states that the intended couples must be Indian citizens and have been married for at least five years. Additionally, it must be the case that the intended parents have never had any living children, whether biologically, through adoption, or via surrogacy. Before moving forward with surrogacy, the parents of children who are mentally or physically challenged, have a life-threatening disorder or have a terminal illness for which there is currently no cure can also apply for approval from the relevant authorities and get a medical certificate from the District Medical Board. The Act also provides that women who are divorced or widowed and are between the ages of thirty-five and forty-five may act as a single commissioning parents for their children.

(C) Prohibition Against Leaving a Surrogate Child Behind.

The Surrogacy Act forbids the abandonment of a child born via a surrogacy procedure for any reason, including a genetic defect, birth defect, any other medical condition, the development of defects later in life, the child's gender, or the intended parents' conception of more than one child, whether in India or elsewhere. The agreement further specifies that the child would be treated as the intending spouse's biological child and will be entitled to all the rights and

¹⁵ Section 4(b), Surrogacy Regulation Act, 2021

¹⁶ Section 6, Surrogacy Regulation Act, 2021.

¹⁷ Section 10, Surrogacy Regulation Act, 2021

¹⁸ Section 4(c), Surrogacy Regulation Act, 2021

privileges accorded to a natural child by any existing laws.¹⁹

IV. SURROGACY AND HUMAN RIGHTS JURISPRUDENCE

There has always been awareness of surrogate motherhood, but only in specific moral contexts. In other cases, it might not just be beneficial. It may also be admirable. However, with a proposed legal framework that views surrogate motherhood as a business including fees for renting out wombs, involves procedures that are extremely sophisticated and have the potential to have unheard-of repercussions.²⁰

Like any scientific advances, the technologies that are suggested for their application can be either beneficial or detrimental, depending on the goals, strategies, and outcomes. This technology, like any other technological advancement, has the potential to either advance the welfare of individuals and society as a whole or to degrade and destroy it. Technology is generally understood to be nothing more than an instrument in human hands. It can be employed for either good or bad. Common sense suggests that moral principles should regulate how technology is utilized; after all, a knife can be used to cut fruit and vegetables, but it can also be abused to cause harm or death. It must be emphasized that no technological advancement is morally neutral.

(A) Views of Indian Judiciary

The judiciary in India has also acknowledged the human right to procreate as a fundamental freedom. For instance, the Andhra Pradesh High court agreed with the ruling of the United States Supreme Court in *Jack T. Skinner Vs. State of Oklahoma*²¹ that the right to reproduce is "one of the basic civil rights of man" and upheld an individual's "reproductive autonomy" as a component of their "right to privacy" in *B.K. Parthasarathi v. Govt. of A. P.*²²

In another decision, *Javed v. State of Haryana*²³, the Supreme Court refused to say that the right to procreate is not a fundamental human right, even though it upheld the requirement of two surviving children to prevent someone from running for Panchayat Raj office. According to *Baby Manji Yamada v. Union of India and Others*,²⁴ surrogacy is a well-known method of reproduction in which a woman consents to become pregnant in order to carry and give birth to a child that she will not nurture but instead give to a third party who has been hired. In some

¹⁹ Section 7, Surrogacy Regulation Act, 2021.

²⁰ Pahuja, R., Dr (2019). *Surrogacy Law, Practices and Polity in India* (1st ed., pp. 1.6-17). Bloomsbury Publishing India Pvt. Ltd.

²¹ 316 US 535.

²² AIR 2000 A.P. 156.

²³ (2003)8 sec. 369.

²⁴ (2008) W.P.(C) no 369.

situations, parents who want to have a child that is biologically related to them have no choice but to use a surrogate. In a significant ruling in the case of *Jan Blaz v. Anand Municipality*²⁵, the Gujarat High Court granted Indian citizenship to twin children whose father was a German national through paid surrogacy in the Anand District, raising many surrogacy-related issues in the process. The bench kept watch. Much more so than the rights of the biological parents, the surrogate mother, or the ova donor, we are principally concerned with the rights of the two brand-new, innocent newborns. Another crucial factor is the newborns emotional and legal relationships with the surrogate mother and the donor oocytes.

(B) Social Acceptance and Cultural Perspectives

Balancing the social acceptance and cultural perspectives surrounding surrogacy is another significant aspect to consider. While surrogacy is becoming more widely accepted in many societies, there are still cultural norms and beliefs that may view it as controversial or morally wrong. This can create tension and stigma for intended parents, surrogate mothers, and even the children born through surrogacy. Moreover, cultural perspectives on the roles of mothers, fathers, and family structures can further complicate the acceptance and understanding of surrogacy. In some cultures, the idea of a woman carrying and giving birth to a child that is not biologically hers may challenge traditional notions of motherhood and the importance of genetic ties. Similarly, the involvement of a surrogate father or the absence of a biological father in the family structure can also raise questions and concerns. These cultural perspectives can contribute to the complexities surrounding surrogacy and make it difficult for individuals involved to navigate societal expectations and judgements. Additionally, legal frameworks and regulations surrounding surrogacy vary widely across different countries, further adding to the complexity and uncertainty surrounding this practice. Overall, the cultural and legal challenges associated with surrogacy create a challenging landscape for those seeking to use this method to start a family. The lack of a clear consensus on the ethical and moral implications of surrogacy adds to the difficulty of making informed decisions. Furthermore, the emotional and psychological impact on all parties involved, including the surrogate mother, intended parents, and the child, cannot be ignored. In order to address these complexities, it is crucial for society to have open and honest discussions about surrogacy, while also developing comprehensive legal frameworks that prioritize the well-being of all individuals involved.

²⁵ Annika Thombleson, A dissertation on, “Contracting the New Delhi Belly: Responding to the practice of International Surrogacy” University of Otago .

V. SHIFTS IN SOCIETAL VIEWS ON SURROGACY IN THE MODERN ERA

In the modern era, surrogacy has been a topic of evolving societal views and debates, and it is likely that further shifts have occurred in the intervening years. However, an overview of some trends and shifts in societal views on surrogacy up until that time.

- **Increasing Acceptance:** Surrogacy has gained acceptance in various regions of the world over time. As medical science has progressed and the practice has grown in popularity, views have changed to accept surrogacy as a viable option for couples or single people struggling with infertility.
- **Legalization and Regulation:** Surrogacy has been made legal and controlled in several nations and jurisdictions, providing all participants with defined rules and protections. Due to its perception as a legitimate and protected arrangement, this has helped the practice gain more support.
- **LGBTQ+ Rights:** Since surrogacy gives same-sex couples the chance to become parents who are genetically related to their kid, the LGBTQ+ community has been a major proponent of surrogacy rights.²⁶ Surrogacy as a method of starting a family for same-sex couples has grown in acceptance as LGBTQ+ rights have in diverse societies.
- **Ethical Concerns:** Despite growing acceptability, surrogacy has also generated ethical questions regarding surrogate mother coercion, exploitation, and commercialization. Discussions regarding the requirement for thorough regulations to safeguard the rights and welfare of all parties involved have been spurred by these worries.
- **Cultural Differences:** Cultures and religions have quite different perspectives on surrogacy. While some cultures have accepted surrogacy as a legal reproductive option, others continue to adhere to long-held customs that may be against the practice. Surrogacy continues to be seen differently in different cultures and according to diverse religious beliefs.
- **Globalization and Access:** People and couples from nations with harsh surrogacy regulations are now able to seek out surrogacy services in countries with more lenient surrogacy laws thanks to the ease of travel and the growth of medical tourism. As a result, conversations and debates concerning the ethical and legal ramifications of surrogacy have increased in areas where it was previously less prevalent.

²⁶ Kim, H. (2017, September). Family Building by Same-Sex Male Couples via Gestational Surrogacy. *Seminars in Reproductive Medicine*, 35(05), 408–414. <https://doi.org/10.1055/s-0037-1607333> (Last visited July 21, 2023).

- **Psychological and Emotional Considerations:** The emotional health and psychological support of all parties involved, including surrogate moms, intended parents, and the children born through surrogacy, are more in the spotlight as surrogacy becomes more common. Discussions about the best practices for surrogacy agreements have been shaped by this understanding of the significance of emotional well-being.

It is important to note that societal views are not monolithic, and opinions on surrogacy continue to vary widely depending on cultural, religious, and regional factors.

VI. SURROGACY AND REPRODUCTIVE TOURISM

Reproductive tourism and surrogacy are two ideas that are connected and have grown in popularity recently. Reproductive tourism is the practice of people or couples leaving their own country to acquire assisted reproductive technology or services, frequently because those therapies are unavailable, illegal, or more affordable abroad.²⁷ One of the main aspects of reproductive tourism is surrogacy, with many people looking for international surrogacy arrangements. Here are some important aspects to consider when exploring the relationship between surrogacy and reproductive tourism:

- **Reasons for Reproductive Tourism:** Legal limitations or outright bans on surrogacy in the home country, higher surrogacy service costs locally, a shortage of qualified surrogate candidates, or access to cutting-edge assisted reproductive technologies abroad may be the main drivers of reproductive tourism, including surrogacy.
- **Legal and Regulatory Variations:** Surrogacy is governed by a variety of legal systems in various nations, ranging from outright bans to full recognition. Travelers interested in becoming parents may look for nations where surrogacy is accepted and regulated, giving them more legal security and protection.
- **Ethical Concerns:** Reproductive tourism and international surrogacy pose moral questions about exploitation, the commodification of women's bodies, and the potential for surrogacy services to become a business. These ethical problems are complicated by the involvement of vulnerable groups, such as surrogates who are struggling financially.
- **International Surrogacy Contracts:** The legal repercussions of international surrogacy might be complicated. Researchers may investigate how international surrogacy

²⁷ Hyder-Rahman, N. (2021, April 29). Commercial Gestational Surrogacy: Unravelling the threads between reproductive tourism and child trafficking. *Anti-Trafficking Review*, 16, 123–143. <https://doi.org/10.14197/atr.201221168> (last visited 21 July., 2023).

contracts are made to protect the rights of all parties and guarantee adherence to both host and home country laws.²⁸

- **Medical Standards and Quality of Care:** Research can evaluate the differences in medical norms and treatment quality between the various nations that offer surrogacy services. Assessing the dangers and advantages of reproductive tourism can be made easier by being aware of the variations in healthcare infrastructure and regulatory control.
- **Psychological and Emotional Impact:** Examine how reproductive tourism affects intended parents, surrogates, and the kid on a psychological and emotional level. Consider the potential difficulties of long-distance surrogacy agreements as well as the support networks needed for all sides.
- **Cultural and Social Factors:** Investigate how attitudes in society and culture concerning surrogacy and starting families affect people's choices to participate in reproductive tourism. Consider how intended parents and surrogates' experiences may be impacted by how these beliefs vary between the home and host nations.
- **Legal and Social Challenges:** Examine the legal difficulties intended parents encounter when bringing a child delivered through international surrogacy back to their native country. Look into matters involving nationality, parental rights, and adoption procedures.
- **Impact on the Host Country:** Analyze the effects of reproductive tourism on the local population, the economy, and the healthcare system of the host nation. Think about the impact on societal attitudes and perceptions of the surge of reproductive tourists looking for surrogacy services.

VII. CONCLUSION

In conclusion, surrogacy has a wide range of applications in the present period and has seen great development. For people and couples who are having trouble conceiving, for same-sex couples, and for people with illnesses that make it impossible for them to carry a pregnancy to term, surrogacy has emerged as a realistic option. The options for surrogacy have been significantly increased by improvements in assisted reproductive technologies such in vitro fertilization (IVF) and preimplantation genetic screening. Surrogacy is subject to a wide range

²⁸ LEGAL ASPECTS OF SURROGACY CONTRACTS. (2016). *Kutafin University Law Review*. <https://doi.org/10.17803/2313-5395.2016.1.5.198-203> (last visited in 21 July 2023)

of legal and regulatory frameworks around the world. While some have opted to embrace surrogacy and have clear legal frameworks, others have chosen to outlaw or rigorously control it for moral, cultural, or religious reasons. Cross-border surrogacy has become more common as a result, where intended parents look for surrogacy services in nations with more lenient legislation.

Complex ethical issues are raised by surrogacy, including as worries about the commercialization of reproduction, the potential for surrogate abuse, and the psychological effects on all parties. It is still extremely difficult to strike a balance between the rights and best interests of the kid, the intended parents, and the surrogate. The practice of surrogacy has also been impacted by societal changes, such as the growing acceptance of varied family structures and LGBTQ+ parenting, which has made surrogacy a popular choice for many people looking to start families. The availability and cost of surrogacy services are affected differently by the coexistence of commercial and charitable surrogacy models. Reproductive tourism is an emerging trend that emphasizes the international character of surrogacy practices and creates additional legal, ethical, and cultural questions. Reproductive tourism involves individuals or couples travelling to other nations for surrogacy services.

As we continue, the scope of surrogacy is likely to continue evolving. Advancements in medical technologies, changes in legal and regulatory environments, and shifting societal attitudes will influence how surrogacy is practiced and accepted in the modern era.
