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SURROGACY AND CRIMINAL LAW IN INDIA

AUTHORED BY - HISHMA SAFI

Abstract

Surrogacy has emerged as a significant reproductive option in India, raising complex legal, ethical, and criminal law concerns. The enactment of the Surrogacy (Regulation) Act, 2021 marked a shift from a largely unregulated commercial practice to a strictly controlled altruistic model. This article examines the intersection of surrogacy and criminal law, focusing on offences such as commercial exploitation, trafficking, and abandonment. It evaluates the evolving legal framework, judicial responses, and the challenges faced in balancing reproductive rights with protection against exploitation. The study also highlights comparative perspectives and suggests reforms for a more inclusive and effective regulatory regime.

Keywords: Surrogacy, Criminal Law, Exploitation, Altruistic Surrogacy, Legal Regulation

Introduction

Surrogacy is a reproductive arrangement whereby a woman, known as the surrogate mother, agrees to carry and deliver a child for another individual or couple, commonly referred to as the intending parents. This arrangement may arise due to medical incapacity, infertility, or other personal circumstances preventing conception or gestation. In contemporary times, surrogacy has evolved into a significant aspect of assisted reproductive technology (ART), raising complex legal, ethical, and social concerns.

In India, surrogacy gained widespread acceptance during the early 2000s, primarily due to the availability of advanced medical infrastructure at comparatively lower costs and the absence of a stringent regulatory framework. This led to the emergence of India as a preferred global destination for commercial surrogacy, often described as a hub for “reproductive tourism.”¹ Foreign couples frequently sought Indian surrogate mothers due to affordability and accessibility, contributing to the rapid expansion of the surrogacy industry.

However, this unregulated growth exposed serious concerns regarding the exploitation of economically vulnerable women, lack of informed consent, commodification of the female

¹ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, 35 Signs Journal (2010).

body, and instances of child abandonment. Reports of intermediaries and clinics engaging in unethical practices further intensified the need for legal oversight.² Additionally, cross-border surrogacy arrangements raised issues relating to citizenship, parentage, and legal recognition of the child.

In this context, criminal law assumes a crucial role in regulating surrogacy practices by prohibiting exploitative arrangements and penalizing illegal activities such as trafficking, coercion, and commercial dealings. It serves not only as a deterrent against abuse but also as a mechanism to safeguard the dignity, rights, and well-being of surrogate mothers and children. The development of a comprehensive legal framework reflects the State's attempt to strike a balance between reproductive autonomy and protection against exploitation.

Historical Evolution

The evolution of surrogacy regulation in India reflects a gradual transition from permissive practices to a more restrictive and regulated regime. Initially, there was no specific legislation governing surrogacy, and the practice operated largely within a legal vacuum. The first formal attempt to provide guidance came through the issuance of the Indian Council of Medical Research (ICMR) Guidelines, 2005, which recognized and permitted commercial surrogacy under certain conditions.³ These guidelines laid down standards for clinics and procedures but lacked statutory enforceability.

Following the introduction of the guidelines, India witnessed a rapid proliferation of surrogacy arrangements, attracting both domestic and international clients. Cities like Anand in Gujarat became prominent centers for surrogacy services.⁴ The industry grew into a multi-million-dollar sector, with numerous fertility clinics and agencies facilitating arrangements between intending parents and surrogate mothers.

Despite its economic benefits, the unregulated nature of commercial surrogacy led to widespread criticism. Instances of exploitation of surrogate mothers—often from economically disadvantaged backgrounds—became increasingly evident. Women were reportedly subjected to poor living conditions, inadequate medical care, and lack of post-delivery support.⁵ Moreover, legal disputes involving custody, nationality, and abandonment of children

² Law Commission of India, 228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics (2009).

³ Indian Council of Medical Research (ICMR), National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005.

⁴ Sama Resource Group for Women and Health, *Surrogacy: Ethical and Legal Issues in India* (2012).

⁵ Centre for Social Research, *Surrogate Motherhood: Ethical or Commercial?* (2014).

highlighted significant gaps in the existing framework.

A landmark moment in the evolution of surrogacy law came with the decision in *Baby Manji Yamada v. Union of India* (2008), where the Supreme Court acknowledged the legality of surrogacy but emphasized the urgent need for regulation.⁶ Similarly, the case of *Jan Balaz v. Anand Municipality* (2009) exposed complications relating to the citizenship of children born through cross-border surrogacy arrangements.⁷

In response to these challenges, the Government of India initiated legislative measures to regulate the sector. The Surrogacy (Regulation) Bill was first introduced in 2016, followed by revised versions in 2019, reflecting ongoing debates and policy considerations. These legislative efforts culminated in the enactment of the Surrogacy (Regulation) Act, 2021, which marked a paradigm shift in India's approach to surrogacy.

The 2021 Act prohibits commercial surrogacy and permits only altruistic surrogacy under strict eligibility criteria. It seeks to prevent exploitation by eliminating financial incentives and ensuring that surrogacy arrangements are based on compassion rather than profit.⁸ The Act also establishes regulatory bodies at the national and state levels to oversee implementation and compliance.

Thus, the historical evolution of surrogacy law in India demonstrates a transition from a liberal, market-driven model to a restrictive, welfare-oriented framework aimed at protecting vulnerable stakeholders while addressing the ethical and legal complexities associated with the practice.

Legal Framework

The legal regulation of surrogacy in India is primarily governed by the Surrogacy (Regulation) Act, 2021, which was enacted to promote ethical practices, prevent exploitation, and protect the rights of surrogate mothers, intending parents, and children born through surrogacy.⁹ The Act represents a significant shift from the earlier unregulated regime by introducing a structured and restrictive legal framework.

One of the central features of the Act is the prohibition of commercial surrogacy, thereby disallowing any financial consideration beyond medical expenses and insurance coverage for the surrogate mother.¹⁰ The law permits only altruistic surrogacy, which is based on compassion

⁶ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

⁷ *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21

⁸ The Surrogacy (Regulation) Act, 2021, Act No. 47 of 2021.

⁹ The Surrogacy (Regulation) Act, 2021, Act No. 47 of 2021

¹⁰ *Ibid.*, § 2(g)

and familial support rather than financial gain.¹¹ This approach aims to eliminate the commercialization of women's reproductive capacities.

The Act further prescribes strict eligibility criteria for intending couples and surrogate mothers. Intending couples must be Indian citizens, married, and fall within specified age limits, while the surrogate mother must be a close relative, married, and have previously given birth to a child.¹² Additionally, the law mandates essentiality and eligibility certificates to ensure genuine need and compliance with legal requirements.

To ensure effective implementation, the Act establishes National and State Surrogacy Boards, which are responsible for policy formulation, supervision, and monitoring of surrogacy practices.¹³ Furthermore, all surrogacy clinics are required to be registered, and non-compliance may lead to penalties, including cancellation of registration.⁶

The Act operates in conjunction with the Assisted Reproductive Technology (Regulation) Act, 2021, which regulates ART clinics and procedures, thereby creating a comprehensive framework governing reproductive technologies in India.¹⁴ Together, these statutes aim to ensure transparency, accountability, and ethical medical practices.

Nature and Consequences (Criminal Aspects)

The Surrogacy (Regulation) Act, 2021 incorporates stringent penal provisions to address the criminal dimensions of surrogacy and deter unlawful practices. The criminalization of certain acts reflects the legislature's intent to curb exploitation and protect vulnerable stakeholders.

Firstly, commercial surrogacy is strictly prohibited, and any form of monetary compensation beyond permissible limits constitutes an offence.¹⁵ This includes direct or indirect financial benefits provided to the surrogate mother or intermediaries.

Secondly, the Act penalizes the exploitation of surrogate mothers, including coercion, inducement, or forcing a woman into surrogacy arrangements.¹⁶ Such provisions aim to safeguard women, particularly those from economically weaker sections, from abuse and undue influence.

Thirdly, abandonment of a child born through surrogacy is treated as a punishable offence. The intending parents are legally obligated to accept custody of the child irrespective of any

¹¹ Ibid., § 2(b)

¹² Ibid., §§ 4–5

¹³ Ibid., §§ 14–17.

¹⁴ The Assisted Reproductive Technology (Regulation) Act, 2021.

¹⁵ Surrogacy (Regulation) Act, 2021, § 38.

¹⁶ Ibid.

abnormality or condition.¹⁷

Further, the Act criminalizes the sale, purchase, or trafficking of embryos and gametes, recognizing such acts as violations of human dignity and bodily integrity.¹⁸ The operation of unregistered clinics and advertisement of commercial surrogacy services are also prohibited, ensuring that only authorized institutions engage in such procedures.¹⁹

The penalties prescribed under the Act are severe, including imprisonment up to ten years and fines up to ₹10 lakh, thereby emphasizing the deterrent role of criminal law.²⁰ These provisions collectively aim to eliminate unethical practices and promote responsible surrogacy arrangements.

Judicial Approach

The Indian judiciary has played a pivotal role in shaping the legal discourse on surrogacy by addressing complex issues related to parentage, citizenship, and the rights of stakeholders.

In *Baby Manji Yamada v. Union of India* (2008), the Supreme Court acknowledged the legality of surrogacy in India and highlighted the absence of a comprehensive legal framework, thereby underscoring the need for legislative intervention.²¹ The case involved cross-border surrogacy and raised questions regarding the custody and welfare of the child.

Similarly, in *Jan Balaz v. Anand Municipality* (2009), the Gujarat High Court dealt with issues concerning the citizenship of twins born through surrogacy to foreign parents.²² The case exposed significant lacunae in Indian law relating to nationality and legal parentage.

In recent years, courts have also examined constitutional challenges to the Surrogacy (Regulation) Act, 2021, particularly regarding its restrictive provisions. Issues such as the exclusion of unmarried individuals, live-in partners, and LGBTQ+ persons have been contested on the grounds of equality and reproductive autonomy under Articles 14 and 21 of the Constitution.²³

The judicial approach thus reflects a continuous effort to balance individual reproductive rights with societal interests and ethical considerations, while also prompting legislative reforms.

¹⁷ Ibid., § 7.

¹⁸ Ibid., § 38(c).

¹⁹ Ibid., § 38(d).

²⁰ Ibid., § 39.

²¹ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

²² *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21.

²³ Constitution of India, Articles 14 & 21.

Critical Issues and Challenges

Despite the enactment of a comprehensive legal framework, several critical issues and challenges persist in the regulation of surrogacy in India.

One of the major concerns is the exclusionary nature of the law, which restricts access to surrogacy to married heterosexual couples, thereby excluding single individuals, live-in partners, and LGBTQ+ communities.²⁴ This raises questions about discrimination and violation of constitutional rights.

Another significant issue is the altruistic surrogacy model, which has been criticized for being unrealistic and impractical. The complete prohibition of commercial surrogacy may lead to the emergence of underground markets, thereby defeating the purpose of regulation.²⁵

The Act also raises concerns regarding the autonomy and reproductive rights of women, as it limits their ability to make independent decisions regarding their bodies and restricts compensation.²⁶ Additionally, implementation challenges such as lack of infrastructure, monitoring mechanisms, and regulatory oversight hinder effective enforcement.

Ethical dilemmas continue to persist, including issues of informed consent, exploitation, commodification of reproduction, and emotional implications for surrogate mothers.²⁷ These challenges highlight the need for a more balanced and inclusive approach.

Comparative Perspective

A comparative analysis of surrogacy laws reveals diverse approaches adopted by different jurisdictions, reflecting varying socio-legal and ethical considerations.

In the United States, surrogacy laws vary across states, with several jurisdictions permitting commercial surrogacy under legally enforceable contracts.²⁸ This model emphasizes contractual freedom and reproductive autonomy.

In contrast, the United Kingdom permits only altruistic surrogacy under the Surrogacy Arrangements Act, 1985, similar to India's approach.²⁹ However, the UK framework is more flexible in certain aspects, including eligibility criteria.

Countries such as Ukraine and Russia allow commercial surrogacy and have become international hubs for reproductive tourism due to their liberal regulatory regimes.³⁰

²⁴ Surrogacy (Regulation) Act, 2021, eligibility provisions.

²⁵ Law Commission of India, 228th Report (2009).

²⁶ Amrita Pande, Commercial Surrogacy in India (2010)

²⁷ Centre for Social Research Report (2014)

²⁸ American Bar Association, Surrogacy Law Overview.

²⁹ Surrogacy Arrangements Act, 1985 (UK).

³⁰ International Surrogacy Law Reports.

India's approach, therefore, represents a restrictive and welfare-oriented model, prioritizing protection against exploitation over market-driven practices. However, this approach must be balanced with inclusivity and practical considerations.

Recommendations

1. **Inclusive Legal Framework:** The law should be amended to include single individuals, live-in partners, and LGBTQ+ persons to ensure equality and non-discrimination.
2. **Regulated Compensation Model:** A controlled compensation mechanism should be introduced to prevent exploitation while recognizing the surrogate mother's contribution.
3. **Strengthening Enforcement Mechanisms:** Improved monitoring, digital registration systems, and stricter compliance measures should be implemented.
4. **Awareness and Counseling Programs:** Mandatory counseling and legal awareness should be provided to surrogate mothers to ensure informed consent.
5. **International Collaboration:** Cross-border surrogacy issues should be addressed through bilateral and multilateral agreements.

Conclusion

Surrogacy in India lies at the intersection of reproductive rights, ethical considerations, and criminal law. The enactment of the Surrogacy (Regulation) Act, 2021 marks a significant step towards regulating the practice and preventing exploitation. However, its restrictive nature raises concerns regarding inclusivity, autonomy, and practical implementation.

While criminal law serves as an essential tool to deter illegal practices and protect vulnerable individuals, a balanced and progressive approach is necessary to address the evolving realities of society. Future reforms must aim to harmonize legal regulation with constitutional values, human rights, and ethical considerations, ensuring a fair and effective surrogacy regime in India.