



RIGHT DENIED TO AN INTENDING MAN IN INDIA : A CRITICAL ANALYSIS OF THE SURROGACY (REGULATION) ACT, 2021.

By:

Sharon Itagi ¹

Shubham Kumar Thakur ²

Abstract

India's emergence from a highly functioning surrogacy hub that was governed by the non - existence of legal application to the implementation of the 2021 Surrogacy (Regulation) Act of India is aimed to be scrutinized and understood in this paper. Firstly, the transition of the growth in the field of surrogacy in India is to be delved into and secondly, the 2021 Act itself.

This analysis examines the Act's provisions, specifically its ruthless decision of denying the right of a man to become a father to a child that is genetically linked to him. It also extends and merges into a critical commentary on the legislation that was much needed to finally oversee and regulate the surrogacy industry thoroughly as per the policies of India but at a certain cost. The paper argues that while the intention was to establish a legal framework by ending ages of unregulated practices in India, the 2021 laws have paved the way for new legal and ethical challenges and the shift from a permissive to a restrictive environment has drastically changed the landscape of reproductive autonomy and the very access to surrogacy.

The paper moreover dives deeper into the intricacies of rights of the individuals involved according to the act and rights of those not included in the act. Indian surrogacy industry can be a potential leading institute in the world with the right moderations in the regulation of the field. This paper further aims to extend into the possible research that will be required to go forward with the idea of making India a world class facility in the field of accessible surrogacy.

Keywords : Surrogacy, Intending man, Intending couple, Equality, Rights.

Introduction

Intending parents from all over the world used to prefer India over any other country or their own home country as we led the battle of infertility one baby at a time. India was one of the few countries that did not have a strong regulation on the commercialisation of surrogacy procedures and the women of India earned sufficiently well by becoming a surrogate mother, "womb on rent" they quoted³.

¹ Sharon Itagi (First Author), a fifth year student at CHRIST (Deemed to be University) Pune - Lavasa Off Campus.

² Shubham Thakur (Second Author), Assistant Professor at CHRIST (Deemed to be University) Pune - Lavasa Off Campus.

³ Mina Chang, *Womb for Rent: India's Commercial Surrogacy*, Vol. 31 HARVARD INTERNATIONAL REVIEW 11 (2009), <https://www.jstor.org/stable/42763262>.

Then came the regulation of the process, The Surrogacy (Regulation) Act of 2021⁴ that changed the tapestry of the surrogacy field for better or for worse. The newly implemented legislation banned commercial surrogacy, allowing only an altruistic form of surrogacy on a condition that the intending couple has a medical indication that proves the fact that the couple cannot conceive by natural modes of reproduction. The act further paved the path to one of the most needed discussions of the present generation.⁵

A lot of sections of the society have been denied the right to go forward with the method of surrogacy namely, a unmarried, divorced, widowed man, unmarried woman, people of the LGBTQI+ community and certain individuals above certain age limit that is restricted by the laws under the The Surrogacy (Regulation) Act of 2021. The right denied to a man to raise a child of his own and on his own is not a privilege that a man can possess in India. In this world of the 21st century, society still categorizes most of the duties of a parent to either a woman's task or that of a man's, raising and parenting a child must absolutely be an equally available option to all certainly as per the laws of the land. The constitution of India guarantees the right to live a life with dignity and in absolute equality. While most of the debates are surely around gender neutrality when it comes to equality, it mostly highlights the irregularities that are faced by the women of the country in gaining equal rights as a man. As important as the committee for welfare of women in India strives hard to gain perspective and break glass ceilings in professional and personal lives, a not so new theory is in the works.

“Equal men's rights” is something that is presumed to be a part of witticism while the gender actually suffers and fails to put forward their concerns. In the context of family building, it was always from time immemorial considered that the mother of the family is the person who glues the family together and without her, the family usually fell apart. The new modern family consists of parents who both work, both earn and both who give almost equal amounts of time to their kids. It is definitely no longer the way it was back in time. To be denied rights that is naturally vested upon a human being is very similar to it being against the methods of nature.

Mens rights ?

The rights of man in matters of domestic life have been denied to him. A man legally or even in terms of the rules of the society cannot be the sole responsible for a child in the country. This speaks volumes as a society of what we as a society think is doable and not doable. The fact that this very subject is up for discussion is a step back on the mentality and psychological ideologies of the country. The act in question has outright managed to dishearten a significant sector of people by denying their right to form a family. The constitution of India, under Article 21 states that every individual citizen of the country has the right to life with dignity which includes the right to form and found a family.⁶ It is very much given by the law to be able to form a family. The surrogacy act does exactly what is feared by the constitutionalists, the act prohibits the right to form a family to multiple sectors but most importantly as represented in this study, the men of the country.

For those who cannot by natural means, surrogacy was a boon to all the people who failed to sire a offspring either because of a medical condition or simply because it was a personal choice to become a parent all by themselves without relying on a partner for the same.⁷ The act allows a divorced woman or a widow between the age of 35 to 45 to opt in for surrogacy to extend her family through the means of surrogacy, the very same right is denied to a divorced man or a widower. Surely it is also denied to other groups of society such as an unmarried woman, people of LGBTQI+ community along with the men of the country. Even after fighting extensively for the right to equality to each and every individual regardless of their sex, caste, religion, colour, place of birth and other such things, there is no guarantee for people to be treated equally in the society.⁸

The preserved views (Sex Role Theory)

The promise and limits of Sex Role Theory as studied previously around the 20th century in the west proclaimed a strong prediction that would spread across the globe in the following years. For a very long time the separation of duties has been categorized into gender based tasks that better understood the expression of the very people of the society. The sex role theory highlighted the very same problem that was inhabited through non-constructive mentality of the people.⁹ This theory connected individuals to personality rather than gender and to the social structure of an individual emphasizing and fighting for the need for absolutely no sex based stereotypical activities that in this present case is (mothering a child) single parenting.¹⁰

⁴ The Surrogacy (Regulation) Act, 2021, ACT NO. 47 OF 2021 (2021).

⁵ Caitlin Pyrcce, *Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem*, 23 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 925 (2016), <https://muse.jhu.edu/article/639503> (last visited Apr 25, 2025).

⁶ The Constitution of India, (1950)

⁷ Amrita Pande, “*At Least I Am Not Sleeping with Anyone*”: *Resisting the Stigma of Commercial Surrogacy in India*, 36 FEMINIST STUDIES 292 (2010), <https://www.jstor.org/stable/27919102> (last visited Apr 05, 2025).

⁸ *ibid*

⁹ Michael A. Messner, *The Limits of “The Male Sex Role”: An Analysis of the Men’s Liberation and Men’s Rights Movements’ Discourse*, 12 GENDER AND SOCIETY 255 (1998), <https://www.jstor.org/stable/190285> (last visited Apr 04, 2025).

¹⁰ Barbara J. Risman, *Can Men “Mother”? Life as a Single Father*, 35 FAMILY RELATIONS 95 (1986), <https://www.jstor.org/stable/584288> (last visited Apr 24, 2025).

The theory is argued to be a fuel that further helps in the backlash against special provisions in favour of women¹¹. It is anything but that as this theory helps in stimulating a healthy discussion about the prevention of sex roles in the society. It has taken many decades for this theory to hit India as it is the exact opposite to the deeply rooted cultural significance where men are placed on a pedestal in India and the women are merely a subjective tool for the men¹². But in 2025, it is more than evident to what is becoming of the laws of countries that boast equality regardless of gender. In the context of the present paper, forming a family is a natural response to life itself and when the medical advancements have improved so much in the last few centuries, it would be a waste to not let the men of the country become fathers or even give the option to be considered as an intending parent. The very objective of medical innovation around the world that has taken place for centuries was to better make procedures and drugs accessible to each and every human being. While the fact remains undisputed that reproduction can be certainly artificially engineered with the help of recent medical-technological innovations under the Assisted Reproductive Techniques (ART) including In Vitro Fertilization (IVF), artificial insemination and surrogacy, the limitation for accessibility of such treatments must be met with condemnation. Equal opportunities are necessary to be implemented in affairs of child care than equal rights. Men have no prospect of fathering a child all by himself if he is not presented with the opportunity per se. It starts with the cases of custody when men are constantly treated as an unfit party to take care of the child even when the father might be economically more capable than the mother of the child. The courts have certainly a discriminative view towards men in cases of child custody as it is an age-old belief that only mothers may care for their children much more efficiently than any father.¹³

The Act (Critical analysis)

The Surrogacy (Regulation) Act, 2021 is definitely a “one step forward, three steps back” in the form of evolution of the legal system of India. As much as the regulation for surrogacy was necessary due to the cases pending in local and national courts with situations relating to uncharted territories such as the nationality of the child born through surrogacy who also has foreign intending parents, the adoption procedures, the irregularities relating to transfer of rights to the home countries of the intending couple.¹⁴ The cases also included instances where the intending parents had abandoned the child that was born through surrogacy. The courage of the medical fraternity was applauded all around the world. The only hiccup in this newly found passion project of the doctors of India was the legal aspects of surrogacy.

All in all it might have just been a little wiser for India to have banned the commercialisation of surrogacy for the time being. It is always advised to utilise the manpower that India can provide that no other country can dream of. Medical tourism is one of the few ways to strengthen the economies of the country. In the early 2000s when India was coined as the cradle capital of the world because of its effective and cheap methods where intending parents from all over the world came over to India to start their families.¹⁵ This was one of the few reasons for the boom in medical tourism for India and for the excessive generation of economy.

It is beyond logical comprehension as to why a simple right is being denied to one gender but allowed to the other. This is the very same thing that the women liberation front fought for since way back to have equal rights as men in context to voting, education, employment opportunities and very identically we are only moving backwards by restricting the men of our country to form a family of their own. In a recent change of societal trend, men are very close to being the object that women were subjected to since time immemorial. Laws including safety of men against sexual harassment and assault lack the element of power that the same law in favor of a woman has. The prevention of sexual harassment of women at the workplace¹⁶ is very much gender biased that it can be detected just from the title of the act and not so surprisingly, the act does not talk about the safety net for men at the workplace. The Bharatiya Nyaya Sanhita that was implemented in 2023 also failed to incorporate and provide reassurance to the man. For instance, section 63 of the BNS that defines rape, is also a gender biased section where rape under law can only be done by a man and to a woman and not vice versa. Similarly, section 75 talks about sexual harassment of a woman by a man.¹⁷ Previously, the Indian Penal Code did have section 377 that was profoundly categorised with the section that was charged when a man is raped, along with unnatural acts with a transgender and an animal. There is clearly no 377 equivalent in the BNS, which brings the grave question of the position of men of the country.¹⁸

Recommendations

- Aiming for the elimination of gender discrimination in such personal matters that deals with concepts of the right to form a family. Inspecting existing laws that give the freedom to each individual for this particular right.

¹¹ Connell, page 259 the sex role theory

¹² Michael A. Messner, *The Limits of “The Male Sex Role”: An Analysis of the Men’s Liberation and Men’s Rights Movements’ Discourse*, 12 GENDER AND SOCIETY 255 (1998), <https://www.jstor.org/stable/190285> (last visited Apr 24, 2025).

¹³ *Id* at 5

¹⁴ Caitlin Pyrcce, *Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem*, 23 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 925 (2016), <https://muse.jhu.edu/article/639503> (last visited Apr 25, 2025).

¹⁵ M M Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, 35 J MED ETHICS 171 (2009), <https://jme.bmj.com/lookup/doi/10.1136/jme.2008.024679> (last visited Apr 24, 2025).

¹⁶ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, (2013).

¹⁷ Bharatiya Nyaya Sanhita, 2023, ACT 45 OF 2023 (2023).

¹⁸ Indian Penal Code, ACT NO. 45 OF 1860 (1860).

- Critically examining financial capacity as one of the important criteria to be able to be qualified as an intending couple, intending parent. The simpler way to consider this key factor would be to think as a practical and logical law-maker rather than form intuitions based on emotions and personal belief.
- Limiting the accessibility of surrogacy to very few people is a socioeconomic injustice and must be prevented at all costs. Economically based selection of intending man which must also be a condition for the woman of the country as well as for the couple.
- A Multi-faceted Evaluation scheme for selection to become an intending couple/parent. The intending person/people must be economically, financially, emotionally stable to foster and care for a child. No existing criminal cases or past convictions to determine the safety net that the child is going to grow up in and similar other criterias.
- Robust legal and ethical legislation is imperative which can be further modified by adding in the rights of intending couple/ persons including the rights of the intending man as well and along with that the regulation regarding medical tourism in form of commercial surrogacy that must be open to everyone in the forthcoming years once India has regulated intra-level complications pertaining to surrogacy laws and regulation.

Conclusion

The evolution of law-making has been stagnant in India, the country has barely seen significant changes pertaining to law since colonial rule. It is no surprise that the country lacks the outlook for the growth that we need. There is a lack of a good explanation for beliefs as to why certain things are considered in a preset manner in the country, one of the factors could be the psychology behind resistance to change. India is a deeply rooted country with adamant traditions and culture that has been followed for multiple centuries and when change is inevitable, the country has always had adversity to adapt to the contemporary world. Surrogacy is part of that very same world where further changes in the regulation is the only way forward. Law is something that should be advocated for the benefit and mostly for the justice of the individuals who believe in it. Men should have the right to independently form a family of their own as a woman can already in this country.

References

1. Michael A. Messner, *The Limits of "The Male Sex Role": An Analysis of the Men's Liberation and Men's Rights Movements' Discourse*, 12 GENDER AND SOCIETY 255 (1998), <https://www.jstor.org/stable/190285> (last visited Apr 04, 2025).
2. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, (2013).
3. Indian Penal Code , ACT NO. 45 OF 1860 (1860).
4. The Surrogacy (Regulation) Act, 2021, ACT NO. 47 OF 2021 (2021).
5. The Constitution of India, (1950).
6. Jack C Straton, *The Myth of the Battered Husband Syndrome*, MASCULINITIES 2.
7. Susan L. Averett, Lisa A. Gennetian & H. Elizabeth Peters, *Paternal Child Care and Children's Development*, 18 JOURNAL OF POPULATION ECONOMICS 391 (2005), <https://www.jstor.org/stable/20007968> (last visited Apr 05, 2025).
8. Jyoti Chaudhary , *Consequences of Surrogacy on Surrogates in India* , 49 INDIAN ANTHROPOLOGICAL ASSOCIATION 91 (2019).
9. Daisy Deomampo, *Transnational Surrogacy in India: Interrogating Power and Women's Agency*, 34 FRONTIERS: A JOURNAL OF WOMEN STUDIES 167 (2013), <https://www.jstor.org/stable/10.5250/fronjwomestud.34.3.0167> (last visited Apr 24, 2025).
10. Mikaela J. Dufur et al., *Sex Differences in Parenting Behaviors in Single-Mother and Single-Father Households*, 72 J OF MARRIAGE AND FAMILY 1092 (2010), <https://onlinelibrary.wiley.com/doi/10.1111/j.1741-3737.2010.00752.x> (last visited Apr 4, 2025).
11. Diksha Munjal-Shankar, *Commercial Surrogacy in India: Vulnerability Contextualised*, 58 JOURNAL OF THE INDIAN LAW INSTITUTE 350 (2016), <https://www.jstor.org/stable/45163396> (last visited Apr 24, 2025).
12. Diksha Munjal-Shankar, *Medical Tourism, Surrogacy & the Legal Overtones - the Indian Tale*, 56 JOURNAL OF THE INDIAN LAW INSTITUTE 62 (2014), <https://www.jstor.org/stable/43953689> (last visited Apr 24, 2025).
13. Barbara J. Risman, *Can Men "Mother"? Life as a Single Father*, 35 FAMILY RELATIONS 95 (1986), <https://www.jstor.org/stable/584288> (last visited Apr 24, 2025).
14. M M Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, 35 J MED ETHICS 171 (2009), <https://jme.bmj.com/lookup/doi/10.1136/jme.2008.024679> (last visited Apr 24, 2025).
15. Mina Chang, *Womb for Rent: India's Commercial Surrogacy*, Vol. 31 HARVARD INTERNATIONAL REVIEW 11 (2009), <https://www.jstor.org/stable/42763262>.
16. Caitlin Pyrcce, *Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem*, 23 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 925 (2016), <https://muse.jhu.edu/article/639503> (last visited Apr 25, 2025).
17. Amrita Pande, *"At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India*, 36 FEMINIST STUDIES 292 (2010), <https://www.jstor.org/stable/27919102> (last visited Apr 25, 2025).