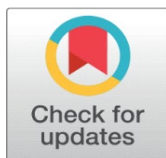


A CRITICAL LEGAL STUDY ON SURROGACY WITH SPECIAL REFERENCE TO GENDER JUSTICE

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1. INTRODUCTION

A cornerstone of the Indian Constitution has always been 'justice.' Justice as a notion has a broad scope. Social, economic, and political perspectives are the three basic and wide viewpoints that are included in the word. The term 'justice' started to encompass a variety of dynamic viewpoints over time, including gender justice. Humans are gregarious creatures. All people aspire to raise their own offspring. India is well recognized for its extremely diverse culture, and it is a natural human desire. In the lengthy history of India, there have been instances where the country's culture has stood in the way of its own progress. A culture's ultimate goal must be the well-being of its constituents and of society as a whole. The ultimate aim of law is to provide justice and bring reform to the society. A law has to be just and reasonable. Arbitrariness, ambiguity, discrepancies leads to failure of law miserably.

ABSTRACT

The ultimate goal of the Indian constitution is to uphold each person's dignity while preserving the nation's unity and integrity by guaranteeing justice, liberty, equality, as well as fraternity to all Indian citizens. One of the goals of the Constitution of India is to guarantee to the people, the citizen of India by providing justice which includes social justice, economic justice, and political justice. Law is a tool to attain justice, not an end in and of itself.

The definition of 'social justice' is all-encompassing. Gender Justice is also included. With the development of the ICT industry, the word 'gender justice' has assumed new meanings and forms. Due to the numerous social, legal, economic, cultural, and legal problems involved, the Surrogacy (Regulation) Act of 2021 and the Assisted Reproductive Technology Act, 2021 are heavily criticized and challenged. The Indian Constitution guarantees social justice as a fundamental right. Gender justice is a human right as well as a fundamental one. The goal of law is to promote justice; it is not an end in and of itself.

The researcher will be concentrating on the idea of surrogacy and the problems associated with it, particularly from the standpoint of gender justice, in this study paper and others. The researcher has chosen to use a doctrinal research approach, and their methodology will be critical research.

Keywords: Surrogacy, assisted reproductive technology, gender discrimination, gender equality gender justice

2. THE CONCEPT OF 'SURROGACY'

Before exploring the concept of Surrogacy, it is crucial to examine related terms that provide a broader understanding of the research issue from various perspectives. The WHO defines **Gender** as “the characteristics attributed to women, men, girls, and boys that are socially constructed. This includes the norms, behaviors, and roles associated with being a woman, man, girl, or boy, as well as their interrelationships. Gender varies across societies and can change over time.”¹ The **Collins Dictionary** describes **Surrogacy** as “an arrangement where a woman carries a baby for someone unable to conceive and subsequently hands the baby over to that person”² The term '**Surrogate**' is derived from the Latin word '**seurogate**,' which means 'a substitute' for another person.

The **Model United Nations International School of The Hague**, during its XXXIIIrd Annual Session, defines these terms as follows³:

- **SURROGATE:** An individual selected to act on behalf of another.
- **SURROGACY:** The act of being a surrogate or surrogate mother.
- **TRADITIONAL SURROGACY:** This occurs when the woman serves as both the egg donor and the biological mother of the child she carries.

GESTATIONAL SURROGACY involves transferring an embryo created by two other individuals into the surrogate's uterus, meaning the surrogate has no biological link to the child.⁴

COMMERCIAL SURROGACY includes financial compensation for the surrogate's services, as well as reimbursement for medical expenses and other costs associated with the pregnancy.⁵

Children born through surrogacy possess the same rights as all other children, as outlined in the United Nations Convention on the Rights of the Child (CRC).⁶ Regardless of individual state policies regarding surrogacy, all states are obligated to uphold the human rights of children born via surrogacy without discrimination. This includes the necessity for appropriate legal and regulatory frameworks at the national level to protect and promote these rights.⁷

3. ORIGIN OF 'SURROGACY' AND HISTORICAL BACKGROUND

India is not entirely unfamiliar with this word. Laws change along with society as time goes on. The younger generation is negatively impacted by human behaviour, mentality, psychological issues, and biological variables, particularly with regard to sexual and reproductive health, for a number of reasons. According to a report by the World Health Organization (WHO), “one in every four couples in developing countries is affected by infertility”⁸ and which is not only sad but also startling. The National Health Mission reports states that India's overall fertility rate is declining day by day. It has decreased from 2.2 to merely 2.0. In rural areas, the fertility rate is 2.1, but in urban areas it is 1.6. Despite the nation's great cultural diversity and plethora of social, cultural, political, and educational problems, the act was created. The Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology Act, 2021, which went into effect, are the two most progressive measures India has passed in its long history to further the growth of the nation.

The majority of Assisted Reproductive Technology Clinics operated nationwide in an unregulated manner. Harassment of not only the surrogate mother and the intended couple but also the surrogate child was not an exception to the unethical activities in commercial surrogacy. All of these facts served as important justifications for the creation of strict new laws to address this issue. “The Law Commission of India, in its 228th report also stated the need of a legislation in this regard to deal with concept of surrogacy. The commission recommended prohibiting commercial surrogacy citing

¹ https://www.who.int/health-topics/gender#tab=tab_1

² [https://www.collinsdictionary.com/dictionary/english/surrogacy#:~:text=\(s%CA%8Cr%C9%99g%C9%99si%20%2C%20US%20s,the%20baby%20to%20that%20person](https://www.collinsdictionary.com/dictionary/english/surrogacy#:~:text=(s%CA%8Cr%C9%99g%C9%99si%20%2C%20US%20s,the%20baby%20to%20that%20person)

³ <https://munish.nl/pages/downloader?code=who01&comcode=who&year=2023>

⁴ *ibid*

⁵ *ibid*

⁶ <https://www.unicef.org/media/115331/file>

⁷ *ibid*

⁸ <https://pmc.ncbi.nlm.nih.gov/articles/PMC6881900/>

concern over the prevalent use of surrogacy, by foreigners and the lack of a proper Legal frame work resulting in exploitation of the surrogate mother who may have poverty or lack of education etc.”⁹

The following are some of the key features of The Surrogacy (Regulation) Act, 2021.

1. The act provides complete ban on commercial surrogacy.
2. It gives legal recognition to altruistic surrogacy and provides a right to intending couple who shall be a legally Indian married couple between the age of 28 to 50 years for female and 26 to 55 years for male.
3. It restricts Indian married couples who have been lawfully wed for at least five years to be eligible for surrogacy.
4. Prior to deciding to use a surrogate, the couple must obtain a certificate of eligibility and a certificate of essentiality under the legislation.
5. The act also lays out requirements for the surrogate mother's eligibility.
6. It makes provisions for Constitution Surrogacy Boards to handle its technicalities or for the technical compliance with regard to the procedural component to forbid any unethical actions at the federal and state levels.
7. It offers the surrogate mother a number of protections.
8. It acknowledges the surrogate child's legal standing.
9. The severe penalties for engaging in sex selection, etc.
10. Registration of all authorities and their registration

WHAT DISTINGUISHES THE ASSISTED REPRODUCTIVE TECHNOLOGY ACT OF 2021 FROM THE SURROGACY (REGULATION) ACT OF 2021?

Both the altruistic and gestational surrogacy is permitted by The Surrogacy (Regulation) Act, 2021.¹⁰ With assistance from the Assisted Reproductive Technology Act of 2021, which addresses infertility, the Surrogacy (Regulation) Act of 2021 governs the practice of surrogacy. The most popular and successful type of assisted reproductive technology is ‘IVF’ that allows an infertile couple to become parents and enjoy having a child.

AN ANALYSIS OF THE SURROGACY (REGULATION) ACT OF 2021 AND THE ASSISTED REPRODUCTIVE TECHNOLOGY ACT OF 2021 FROM A LEGAL PERSPECTIVE:

The preamble to The Constitution of India itself specifies that Constitution “The preamble to our constitution India serves two purposes: Firstly, it indicates the source from which the constitution derives its authority; Secondly, it also states the objects which the Constitution to establish and promote”¹¹ The Surrogacy (Regulation) Act, 2021 got highly criticized because on the three important grounds as follows:

1. The act prevents same sex couples or the people from LGBT community of people from having a child by opting for surrogacy.
2. The act measurably fails to ensure, to guarantee the fundamental right to equality provided under the Article 14 of the Constitution of India
3. The act fails to guarantee the fundamental right to life and hence violates Article 21 of the Constitution of India

4. A CONCEPTUAL STUDY AND ANALYSIS OF THE TERM ‘GENDER’:

The term ‘gender’ has long been a subject of discussion and keen interest in society. Traditionally, it has referred to male and female categories. However, as societal understanding evolves, individuals identifying as third gender are increasingly recognized within the concept of ‘gender.’ In Indian history and culture, transgender individuals hold a unique significance, yet they are often regarded as marginalized members of society. This marginalization stems from their experiences of being treated as less than human despite their identities.

The **National Centre for Transgender Equality** defines the term ‘**transgender**’ people as those whose gender identity differs from the sex assigned to them at birth. This definition encompasses a broad spectrum, including trans men and trans women—regardless of whether they have undergone sex reassignment surgery, hormone therapy, or other

⁹<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081094-1.pdf>

¹⁰ S. 4 (ii) (a) and S. 4 (ii) (b) of The Surrogacy (Regulation) Act, 2021

¹¹ Dr. DD Basu, Introduction to The Constitution of India, Lexis Nexis Publication, 21st Ed., pp.21

treatments—as well as individuals with intersex variations, genderqueer identities, and socio-cultural identities such as kinner, hijra, aravani, and jogta.¹²

The definition of 'gender' is all-encompassing, integrating various perspectives—social, economic, cultural, and more. In contrast, the term 'sex' is inherently more restrictive, typically categorized into three groups: 'female,' 'male,' and 'other.' The movement for 'gender justice,' which began long ago, is still ongoing. To achieve the goal of 'Gender Justice,' it is essential to understand and study the concept of 'gender.' While 'sex' is a component of the broader definition of 'gender,' the reverse is not true. The societal patriarchal structure is a significant contributor to discrimination against individuals based on their sex. Thus, it is imperative for the three pillars of democracy to enact reforms in this area.

Significant legislative milestones include the **Sati (Prevention) Act, 1987**, the **Dowry (Prohibition) Act, 1961**, the **Protection of Women from Domestic Violence Act, 2005**, and the **Right to Education Act, 2009**. The judiciary, as the third pillar of democracy, has also played a transformative role, as seen in cases such as the **Vishakha guidelines**, the **Shah Bano case**, the **Shayara Bano case**, and the **Vineeta Sharma v/s Rakesh Sharma case**, along with the **Sabarimala case**.

In any civilized society, ensuring justice is paramount. Social justice is a fundamental right that seeks to eliminate social imbalance through legal means, harmonizing competing claims among different social groups or individuals. This legal framework is essential for establishing a welfare state. The Constitution of India promises social, economic, and political justice to its citizens, and policies must not ignore the deliberate suffering inflicted on significant segments of the population.¹³

The preamble to the Constitution asserts that the Indian state will guarantee the dignity of each individual. It aims to achieve this by ensuring equal fundamental rights for all, allowing individuals to enforce their minimum rights through the judiciary if they are violated.¹⁴

THE HINDU ADOPTION AND MAINTENANCE ACT, 1956, THE SURROGACY (REGULATION) ACT, 2021, AND THE ASSISTED REPRODUCTIVE TECHNOLOGY ACT, 2021

The Hindu Adoption and Maintenance Act of 1956 offers adoption rights to individuals without consideration of their marital status, as outlined in Sections 7 and 8. This raises significant questions regarding the disparities and contradictions between the laws governing adoption and surrogacy. Specifically, while the Hindu Adoption and Maintenance Act permits any individual to adopt a child—thereby upholding the fundamental right to parenthood protected under Article 21 of the Indian Constitution—The Surrogacy (Regulation) Act of 2021 restricts single individuals from becoming biological parents via Assisted Reproductive Technology (ART). This limitation infringes upon fundamental rights, including the right to equality under Article 14 and the right to life with dignity as guaranteed by Article 21 of the Constitution of India.

The primary objective of any legislative framework should be the welfare of society as a whole. The Preamble of the Indian Constitution envisages a democratic republic that is not only political but also socially just. It emphasizes the importance of 'justice, liberty, equality, and fraternity' as foundational principles that underpin democracy.¹⁵ A robust democracy must ensure that all individuals are granted a fundamental set of rights that empower them to fully embrace their identities. The rule of law stands as one of civilization's most significant achievements, providing a framework that ensures order and fairness within society. According to A.V. Dicey, the concept of the rule of law is built upon three essential pillars: the supremacy of law, equality before the law, and the overarching legal spirit. Any infringement of these principles could lead to the disintegration of the rule of law and, consequently, the erosion of democracy itself. A society cannot exist in peace or harmony without adhering to the principle of legal supremacy. Equality before the law is also a cornerstone of the rule of law doctrine. Frances Wright, a notable Scottish writer, articulated that "Equality is

¹² Section 2 (k) of The Transgender Persons (Protection Of Rights) Act, 2019

¹³ Dr. D.D.Basu, Introduction to The Constitution of India, Lexis Nexis Publication, 21st Ed. Pp 25

¹⁴ *ibid* pp. 28

¹⁵ *ibid* pp 23

the soul of liberty; there is, in fact, no liberty without it." This principle of equality is enshrined in Article 14 of the Indian Constitution, reinforcing the fundamental right to equal treatment under the law. Thomas Jefferson famously stated, "The most sacred of the duties of the government is to do equal and impartial justice to all citizens." This notion has been echoed in landmark judicial rulings, where it has been recognized that equality is a dynamic concept with multiple dimensions and cannot be constrained within traditional legal frameworks. Justice P.N. Bhagwati has affirmed this view, highlighting the evolving nature of equality in contemporary society.¹⁶

The discrepancies between the Hindu Adoption and Maintenance Act and the Surrogacy (Regulation) Act demonstrate a need for reform in legislative practices to ensure that the rights of all individuals, regardless of marital status, are adequately protected. A thorough examination of these laws reveals that the current legal landscape does not adequately address the rights of single individuals wishing to pursue parenthood through surrogacy. This inconsistency not only undermines the ideals of justice and equality enshrined in the Constitution but also reflects broader societal biases that need to be challenged and rectified for a more inclusive and equitable legal framework.

5. A STATUTE RULING 'SURROGACY' THROUGH A HUMAN RIGHTS PERSPECTIVE:

Following World War II, practically all developed nations accepted the idea of human rights at national level, and it was acknowledged on a worldwide scale. Regarded as the cornerstone of justice, freedom as well as peace in the world, the preamble of the 1948 Universal Declaration of Human Rights (UDHR) affirms not only the intrinsic dignity but equal and inalienable rights of every member of the humankind. The UDHR recognized the right to equality at an international level, "All human being are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards another in a spirit of brotherhood."¹⁷ A 'human being' is recognized to have rights under the notion of human rights, which are unalienable irrespective of their race, colour, sex, language, religion, political viewpoint, national or social origin, property, birth, or any other position. The fundamental intention behind that is "Human Rights are not a privilege conferred by government. They are every entitlement by virtue of his human beings humanity" as rightly said by Mother Teresa.

6. A JUDICIAL APPROACH TO SURROGACY LAW

The landmark case of National Legal Service Authority v. Union of India¹⁸ represents a significant judgment by the Hon'ble Apex Court of India, which recognized transgender individuals as a "third gender." This ruling affirmed that the fundamental rights enshrined in the Constitution of India apply equally to transgender persons, granting them the right to self-identify as male, female, or third gender. This decision, delivered by Hon'ble Justice K.S. Radhakrishnan and Hon'ble Justice A.K. Sikri on April 15, 2014, was met with celebration by human rights advocates. However, even seven years later, the aspiration for "Gender Justice" remains largely unmet. The bench emphasized that "transgenders are also citizens of India," reiterating the Constitution's spirit of providing equal opportunities for all citizens to grow and reach their potential, irrespective of caste, religion, or gender.

The judgment elaborated that equality goes beyond merely preventing discrimination; it also involves actively remedying the discrimination faced by marginalized groups. The recognition of transgender individuals as a third gender is framed as a human rights issue rather than merely a social or medical concern. Therefore, it necessitates robust protection under the law.¹⁹ The Supreme Court further highlighted that failure to recognize one's gender identity constitutes discrimination under Article 15 of the Constitution, which prohibits discrimination on the basis of sex. It concluded that discrimination based on sexual orientation or gender identity encompasses any exclusion, restriction, or preference that undermines the principle of equality and the equal protection of laws guaranteed by the Constitution. Consequently, the Court issued various directives to protect the constitutional rights of transgender individuals.²⁰

¹⁶ *E.P. Royappa v. state of Tamil Nadu and Anr.* (AIR 1974 SC)

¹⁷ The Universal Declaration of Human Rights, Article 1 and Article 7

¹⁸ (2014 (5) SCC438)

¹⁹ *Ibid*

²⁰ *Ibid*

Moreover, the Court introduced a new aspect of 'bodily integrity' to Article 21 of the Constitution, asserting that every woman possesses the right to make reproductive choices. This includes the autonomy to decide whether to carry a pregnancy to term or to terminate it. Furthermore, women have the freedom to engage in sexual activity or to refuse it.²¹

Addressing whether Section 377 of the Indian Penal Code, 1860, violates Articles 14, 15, 19, and 21 of the Indian Constitution, the Supreme Court articulated that gender identity is intrinsic to an individual's personality. Denying this identity would violate one's dignity, constituting an infringement of the fundamental right to privacy. The Court underscored that discrimination against the LGBTQ+ community, simply because they form a minority, is unacceptable. It further asserted that constitutional morality must prevail over societal norms, emphasizing that homosexuality is not a deviation but rather a legitimate variation in human sexual orientation.²²

The Supreme Court's decisions in these cases highlight the need for comprehensive legal protections for marginalized communities, particularly in the context of surrogacy and reproductive rights. By affirming the rights of transgender individuals and emphasizing bodily autonomy, the judiciary has paved the way for greater acceptance and understanding of gender diversity in India. However, the continued struggle for equality underscores the importance of ongoing advocacy and legal reform to achieve true gender justice for all.

7. CONCLUSION AND SUGGESTIONS

The core principles of the nation's supreme law and the essence of human rights will remain respected, even as this legislation evolves and adapts to emerging needs. The Assisted Reproductive Technology Act and the Surrogacy (Regulation) Act of 2021 stand among India's most forward-thinking reforms, viewed through socio-legal, cultural, political, and technological lenses. However, surrogacy arrangements in India introduce a complex legal landscape that affects all involved parties—intended parents, surrogate mothers, and children born through surrogacy—due to the intersection of surrogacy laws and family laws. Although the Surrogacy (Regulation) Act, 2021, represents a significant move toward regulating surrogacy, it reveals various contradictions and inconsistencies when compared to existing family laws.

Excluding fundamental rights to equality, protection from discrimination, and life with dignity and freedom severely violates individuals' basic rights. Denying these rights would represent a profound discrimination and mark one of the most regressive legal decisions in history.

8. SUGGESTIONS

- **Legal Reforms That Are Inclusive:**
In order to reflect the changing notions of family in contemporary society, it is important to think about amending the Surrogacy Act to include same-sex couples, unmarried partners, and single parents.
- **Law Harmonization:**
It is imperative that the Surrogacy Act and current family laws be more closely aligned. To prevent legal issues and guarantee the safety of all parties, precise rules should be set to balance variations in parental rights, custody, and inheritance.
- **Strengthening Legal Protections:**
Legal protections for surrogate mothers need to be reinforced to prevent exploitation and ensure their rights are safeguarded. This includes comprehensive healthcare, psychological support, and fair compensation for their medical expenses.
- **Educating people and creating awareness:**
Raising public knowledge and educating people about surrogacy laws and the rights of all parties involved can help reduce stigma and misconceptions and foster a more accepting and educated society.

While the current Indian surrogacy laws are an essential regulatory step, they need to be substantially improved and harmonized with current family laws in order to properly resolve the inherent conflicts and safeguard the rights of all

²¹ Suchita Skivastava vs. Chandigarh Administration (2009) 14 SCR 989

²² Navtej sing Johar and Ors. v. and union of India, WP (Cri.) 76 12016

parties involved. India can more effectively negotiate the difficulties of surrogacy and family laws by adopting more inclusive and cogent legislative reforms, guaranteeing that the changing meanings of family are adhered to and accepted within the legal frame. In addition to protecting intended parents' and surrogate mothers' interests, this will also guarantee the fundamental rights and human rights.

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.

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