

# SOCIO-LEGAL VULNERABILITY OF INFERTILE WOMEN: A SURROGACY AND ADOPTION PERSPECTIVE.

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## ABSTRACT:

Infertility is an emanating issue in the modern era. Realising the vulnerability of the sterile women and making them aware of the Socio-Legal patterns and consequences that tend to form conjectures about women as the vulnerable member in the struggle for motherhood. This piece of study tries to clarify such speculation and bring forward the elements or components that have been stated in various research works and remains unheard. Surrogacy or Adoption can be considered as a panacea for such intending couples suffering from infertility. Opting for any of these alternatives available could help in mitigating the negative impact of increased levels of stress and anxiety which might lead to depression in future. Social factors such as social ties, relationship with family & in-laws and legal factors like the cumbersome procedures and provisions in the present legislations on the alternative processes like Surrogacy and Adoption and the lacunas are need to be dealt with before taking any decision on the same. Therefore, all such factors responsible in the making of infertile vulnerable women, the hindrances in selecting an alternative, the complications faced by such women in the pathway to Surrogacy or Adoption and the related laws in India have been discussed in detail, which would be helpful for intending couples before taking any decision on parenthood. This piece of work is done, keeping in mind all the infertile women suffering, as the targeted audience and it tries to portray a clear picture of the Vulnerable Infertile women and what all they go through physically and mentally and how it can be avoided.

**KEYWORDS:** Infertile, Vulnerable women, Surrogacy, Adoption.

**INTRODUCTION:** Many researchers have published papers on depression, social and cultural stigma, and isolation experienced by depressed infertile married couples as a result of infertility, physiological or other psychological medical problems involving anxiety and stress at various levels of the procedures they used to have their own child. Infertility therapy for such couples may entail procedures that are unpleasant, costly, and put a burden on the couple's relationship, which can be difficult to manage with patience. Even after all of this, there's no guarantee that you'll be able to have your own child. The huge scientific accomplishment has revealed new dimensions of nature that have remained hidden since then. The biomedical sciences have made an unimaginable contribution to humanity. These incredible scientific breakthroughs whether legal, moral, technical, or ethical usually come with a set of problems and hazards. Advances in biomedical sciences and reproductive techniques have catered to the desire of men and women with no or limited reproductive capabilities to have children through techniques known as Assisted Reproductive Technologies (ART), which is a method of achieving pregnancy by artificial means, also known as fertility treatment. Surrogacy is another practise that has grown in popularity as a means of replacing natural conception and birth. Both Surrogacy and Adoption can act as an panacea for such depressive infertile couples only if we can detect the flaws behind not opting for these processes and providing a remedy for the issue found.

**According to “INDIAN SOCIETY OF ASSISTED REPRODUCTION”** - “Infertility currently affects about 10-14% of the Indian population which is nearly 27.5 million couples, especially in urban areas where one out of six couples are impacted”<sup>1</sup>.

## INFERTILITY IN INDIA AND ELSEWHERE:

- Approximately 15% of the couples in India have trouble conceiving.<sup>2</sup>
- 48.5 million couples experience infertility globally.<sup>3</sup>
- 9% of men and 10% of women between the age of 15-45 have infertility problems in US.<sup>4</sup>

<sup>1</sup>Assisted reproductive technology in India: A 3 year retrospective data analysis by Narendra Malhotra, Duru Shah, Rishma Pai, H.D.Pai and Manish Bankar.

<sup>2</sup> UCLA Health, 2020

<sup>3</sup>Reproductive Biological Endocrinology, 2015

<sup>4</sup> Office on Women's Health, 2019 and CDC 2013.

- Highest infertility rates are usually found in Africa and Afghanistan.<sup>5</sup>
- Lowest infertility rates are usually found in Southern Europe, Eastern Asia and Eastern Europe.<sup>6</sup>
- One out of four couples in developing countries are infertile.<sup>7</sup>

As a result, it's past time to consider the available options rather than ruminating over infertility therapy for years on end, which has a negative impact on both physical and emotional health. There are different choices available to lessen the rate of such couples suffering from infertility, but the point is that the main reason for not choosing any of them is the hereditary link in the majority of cases. Surrogacy is the only way to realise the desire of having a child with a genetic link. Adoption, on the other hand, may result in the child having nothing in common with the adopting parents.

### **SURROGACY AS A PANACEA FOR DEPRESSIVE INFERTILE COUPLES:**

Surrogate is a term that signifies "replacement." Surrogate mothers fill in for genetically biological mothers who are unable to give birth due to a variety of infertility issues. Therefore, Surrogate motherhood is considered to be the span in which a woman rents her womb for carrying the child for the intending couple, and then hands the infant over to her employer spouse. Thus, Surrogacy is an arrangement whereby a woman agrees to become pregnant through assisted reproductive technology in which none of the gametes belong to her or her husband and does the same with an intention to hand over the child after the completion of the process to the intending couple for whom she agreed to become a surrogate mother.

Previously, surrogacy was limited to family, friends, and close relatives as a charitable act (Altruistic Surrogacy). Surrogacy has, however, expanded its wings across the country in recent years, with financial arrangements leading to commercialisation. As a result, the biological functioning of a woman's body is compromised. Surrogacy advertisements are popular these days, with the entire process of commercial surrogacy involving the recruiting of surrogate mothers, the formation of contracts between the infertile couple and the surrogate, and the reaping of large revenues. Surrogacy's commercialization in India has sparked concerns about black marketing; nonetheless, giving a child to a childless couple appears to outweigh all other faults and worldly values that must be sacrificed in order to have a kid.

Surrogacy has long been a contentious matter in India, owing to the lack of a unified legal framework, despite the fact that it was practised, approved, and appreciated in ancient India. Surrogacy existed throughout those times, which is strange, yet Indian Hindu mythology frequently recounts cases of surrogacy, such as Karthikey (the God of War), the son of Lord Shiva but not born of goddesses Parvati, with Ganga as the surrogate mother. In the Mahabharat Dhritarastras, wife Gandhari conceived and gave birth to a mass after a two-year gestation period, which was then placed in a nutrient medium by Rishi Vyasa, who claimed that the mass delivered by Gandhari contained 101 cells, which surprisingly developed into a hundred male and one female.

Surrogacy is defined as "an arrangement in which a woman agrees to a pregnancy achieved through assisted reproductive technology in which neither of the gametes belong to her or her husband, with the intention of carrying the child and handing it over to the person or persons for whom she is surrogating" as per the ART (Assisted Reproductive Technologies (Regulation)) Bill, 2010, which attempted to get a specific legislation pertaining to the critical issues involved in surrogacy.

A woman's poor health, which renders her pregnancy unsafe and her uterus' inability to hold the foetus, necessitates a surrogacy arrangement.

**INDIAN SURROGACY PERSPECTIVE:** In India, however, the legal protection and regulation governing surrogacy law, the contract, and other related concerns are regarded valid. The backdrop and necessity for drafting legislation to control this highly unregulated industry in India is reflected in the 228th Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy." "It appears that wombs in India are for rent," the Commission concluded, "which translates into kids for foreigners and monies for Indian surrogate mothers." When it comes to surrogacy and related topics, the idea "The parents physiologically construct the kid, while the child socially constructs the parents" has been widely reflected in the works of numerous researchers. This undoubtedly highlights the issues surrounding the child's parentage, validity, and rights that would be associated with this report.

Now India has a law that governs the process of Surrogacy, the **Surrogacy (Regulation) Act 2021** and the **Assisted Reproductive Technology (Regulation) Act 2021** were both notified by the central government on December 25, 2021. In India these two legislations would henceforth regulate the surrogacy or ART clinics and Banks and outlaw commercial surrogacy for the benefit of people at large.

Commercial surrogacy is prohibited under the Surrogacy (Regulation) Act of 2021. It does, however, allow for altruistic surrogacy. After getting presidential approval, the bill was signed into law on December 25, 2021. This Act attempts to govern the process of Surrogacy in India by constituting a National Surrogacy Board and a State Surrogacy Board and further more competent authorities in this regard for the proper regulation of ART clinics and Banks and to prevent the misuse of this process as well.

<sup>5</sup> (Central Intelligence Agency, 2017)

<sup>6</sup> UNFPA, 2018

<sup>7</sup> WHO, 2004.

The Surrogacy Act 2021 which now regulates surrogacy in India and ensures both the child and the surrogate mothers' welfare and thus contributes to the entire surrogacy ecosystem. At the same time, it is quite restrictive, which may encourage unethical behaviour because it prohibits the commercial one and allows only altruistic surrogacy with the help of a relative of a couple. It will be difficult for couples now to find a relative who would agree to become the surrogate mother for them. It narrows the pool of people who can participate in a surrogacy programme.

According to the provisions given under Section 3(3) of the Assisted Reproductive Technology (Regulation) Act 2021 the clinics and banks will have to apply separately after the act comes into effect or else after six months from the application of such legislation they will have to cease to conduct any kind of counselling or other procedures.

"Commercial activities around surrogacy are likely to go underground and deny legal protection to women who choose to be surrogates, given the stigma associated with infertility, the pressure of producing children, and the lack of agency that women have over their bodies"<sup>8</sup>.

"The ART Bill's main benefit is that it will control the country's Assisted Reproductive Technology services." Intending couples now will have a better understanding of ARTs' ethical procedures."

### **CURRENT INTERNATIONAL SURROGACY SCENARIO:**

Risking one's life is another crucial concern in a society where, while the health-care system is undoubtedly advanced, the womb lent may not be well cared for, and contractual conditions may not be good enough to protect one's health. As a result, it has become a tourist destination for surrogacy, with numerous examples illuminating the opaque commercial surrogacy business. Surrogacy is widely practised outside of the commissioning parents' government's borders or territorial jurisdiction. Australian parents, more than any other nationality, prefer surrogacy, and India, Thailand, and other Asian countries have proven to be most cost-effective tourism destinations for them, as opposed to the United States, which offers the greatest facilities and a stable regulatory framework.

In this context, another very pertinent question arises: Isn't it a forced removal of indigenous children from the community, going overseas and asking for a womb to bring up your intended offspring for reasons that aren't so befitting, and if the question is raised, which woman would willingly, freely, rent out her womb when there are other options for earning enough money and living decently?

When looking at the global trend in various countries, it is discovered that surrogacy in the United Kingdom is heavily regulated and relatively more expensive than in other countries, whilst surrogacy is forbidden or illegal in Germany and Canada. Following a series of disputes regarding surrogacy and the question of citizenship for the infant born as a result of the practise, German authorities refused to issue passports to children born through surrogacy. In an article published in the Sydney Herald titled "Babies left in limbo as India struggles with surrogacy demand" (2008), the story of the German couple, Jan Balaz and Susan Lohle<sup>9</sup>, who have been trapped in citizenship limbo while waiting for their twin sons, Nikolas and Leonard, is highlighted due to issues with claiming German citizenship and being denied passports because German nationality is determined by the birth mother. As a result of these concerns, the slow-moving Indian judicial system has been grappling with their citizenship status. The Constitution of India grants Indian citizenship to children born through an Indian surrogate mother, but what happens if the biological mother is a foreign citizen and the child seeks for citizenship in that nation and is denied? The issue of dual citizenship for surrogate offspring, which is not allowed in India, was broached by a Bench led by Justice Ranjan Gogoi in the aforesaid case. Could it be considered under any circumstances? These children may have limited rights as a result of their dual citizenship.

In *Baby Manji v Union of India*<sup>10</sup>, Supreme court stated that "commercial surrogacy is reaching industrial proportions because of the readily availability of poor surrogates". In *Jan Balaz v. Anand Municipality*<sup>11</sup>, it was held that babies born through the process of surrogacy in India are Indians. In *K Kalaisevi v Chennai Port Trust*<sup>12</sup>, the court stated that "Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them." This was also stated in *Sadhna Agarwal v state of Chhattisgarh*<sup>13</sup> and 5 other

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<sup>8</sup> Poonam Muttreja, Executive Director at Population Foundation of India.

<sup>9</sup> <https://timesofindia.indiatimes.com/india/german-surrogate-twins-to-go-home/articleshow/5978925.cms>

<sup>10</sup> *Baby Manji Yamada v. Union of India*. SCC. 2008. 518.

<sup>11</sup> *Jan Balaz v. Anand Municipality*. AIR. 2010. 21.

<sup>12</sup> *K Kalaisevi v. Chennai Port Trust*. MLJ. 2013. 493.

<sup>13</sup> *Sadhna Agarwal v. state of Chhattisgarh*. SCC. 2017. 19.

cases which are “State of Punjab v. Sodhi Sukhdev Singh<sup>14</sup>, Association v. M.V. Sea Success & Asso. Ltd<sup>15</sup>. Senior Electric Inspector v. Laxminarayan Chopra<sup>16</sup>, Manji Yamada v. Union of India<sup>17</sup>.”

### **ADOPTION AS A PANACEA FOR DEPRESSIVE INFERTILE COUPLES:**

Infertility has been shown in numerous studies to have harmful consequences on both individual and marital health.<sup>18</sup> Infertility, in particular, disrupts sexual functioning in heterosexual couples<sup>19</sup>. Scheduled intercourse has been a continual reminder to the couple that they are infertile and thus contributes to a drop in the sexual satisfaction that lasts long even after the couple has conceived or stopped taking infertility treatments.<sup>20</sup> Several variables, however, may help to mitigate the harmful effects of infertility. The stress thus developed is highest among the heterosexual couples who go for more comprehensive infertility treatments and also in individuals who have a strong desire to have a genetically related child<sup>21</sup>.

It's also been connected to a more unfavorable reaction to infertility when the root of the problem is found.<sup>22</sup> The infertility related stress affects women more negatively, especially when they are undergoing treatment for infertility.<sup>23</sup>

We can analyze how fruitlessness is built while turning into a parent still can't seem to figure it out, since the present work focuses on intending couples rather than Daly's exploration, when couples were in different modes of selection interaction. This allows us to examine the perception of fruitlessness in relation to barrenness which is very important as Daly points out,<sup>24</sup> that the study clarifies the legal roadblocks that such couples may experience in the middle of the procedure (surrogacy or adoption), allowing them to avoid depression and smoothly become parents.

### **INDIAN ADOPTION PERSPECTIVE:**

The practice and customization of Adoption has been in India since the ancient times although the aim with which the act of adoption was carried out has changed but the process still continues. Earlier it was a sacramental act unlike now where it is more often motivated on a secular or religious basis. Under the traditional Hindus many laws relating to adoption existed and were justified only on the basis of a sacramental Act. The Hindu Adoptions and Maintenance Act 1956 from the beginning distinguished itself from any sacramental features of adoption making it a secular institution for all Indians.

The adoption process was liberalized by the implementation of a few reforms. The concept of treating a son with more importance than a daughter because he was necessary for the family's material as well as spiritual wellbeing, therefore in Hindu laws even an adopted child was treated equally like a natural one. Earlier the constraints of Gotra.

#### **THE HINDU ADOPTION AND MAINTENANCE ACT 1956:**

The Hindu Adoption and Maintenance Act 1956 was made with an intention to codify and reform the Hindu laws relating to adoption and maintenance. It not only eliminates various gender discriminatory elements but also embodies the values of social justice and equality.

It is mandatory for a married Hindu male to acquire the wife's approval under this Act. If he has more than one wife, the approval of all of them is required. Adoptions made without the agreement of the wife are null and invalid. It requires both the wives consent even if one stays with the husband and one far from him for an adoption to be called valid or else the adoption becomes null and invalid. Here even an unmarried Hindu female adopt in her own right unlike the previous laws where she wasn't allowed to adopt.

An unmarried Hindu woman, widowed or divorced has been declared eligible to adopt under this statute. In Vijaya Laxman Vs V.B.T Shankar<sup>25</sup>, it was decided that a widow since adopts in her own rights she does not require the approval of any co-widow.

#### **GUARDIANS AND WARDS ACT 1890:**

The Guardians and wards Act was enacted in response to the need for a legislation that would emphasize on the personal laws of all other religions that were not dealt with under the Hindu Adoption and Maintenance Act 1956.

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<sup>14</sup> AIR 1961 SC 493, p. 502 27 Liverpool and London SP&I

<sup>15</sup> (2004) 9 SCC 512 (para 65) 28

<sup>16</sup> AIR 1962 SC 159, p. 163 W.P.(S)No.4927/2016

<sup>17</sup> SCC. 2008. 518.

<sup>18</sup> Anderson et al., 2003; McQuillan et al., 2003; Steuber & Solomon, 2008.

<sup>19</sup> Cudmore, 2005

<sup>20</sup> Greil, Leitko, & Porter, 1988

<sup>21</sup> Schneider & Forthofer, 2005

<sup>22</sup> Daniluk, 1997

<sup>23</sup> Daniluk, 2001

<sup>24</sup> 1988.

<sup>25</sup> 2011 SC 1424.

The Guardians and Wards Act was enacted to supersede all previous legislation on the subject. It is the only non-religious international legislation governing a child's guardianship, and it applies to all of India save Jammu and Kashmir. Since the personal laws of Muslims, Christians, Parsis and Jews do not allow full adoption therefore this legislation permitted to become the legal guardians irrespective of their religion.

The table below easily lets you know the legislations to be followed if you opt for Adoption or foster care depending on your religion:

RELIGION	LEGISLATION FOR ADOPTION OR FOSTER CARE
Hindu, Buddhist, Jain and Sikh	The Hindu Adoption and Maintenance Act of 1956
Muslim, Parsi, Christian and Jews	The Guardian and Wards Act of 1890
Irrespective of religion rehabilitation and social reintegration of orphaned, abandoned or surrendered children.	The Juvenile Justice (Care and Protection) Act of 2000

**CONCLUSION:**

When it comes to expanding their families, hopeful parents have numerous options, and many couples and people exploring surrogacy also explore adoption. Surrogacy and adoption are both wonderful ways for potential parents to complete their families. When comparing adoption vs. surrogacy, there are many commonalities to consider, but there are also numerous distinctions to consider. Each has its own set of advantages and disadvantages, and it is up to each expanding family to weigh all of the aspects before deciding which path to motherhood is best for them.

Hence it is always better to opt for the available alternatives then to suffer for an unknown time span. Knowing each facet of the available alternatives is important and so is to take the decision of discontinuing a non-rewarding process.